

## **MOTIONS FOR NEW TRIAL**

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## MOTIONS FOR NEW TRIAL: COMMON MISTAKES ON APPEAL

### INTRODUCTION

Motions for new trial are the most underutilized tool criminal defense lawyers have at their disposal. A motion for new trial gives the lawyer the proverbial “second bite at the apple” after an adverse verdict at trial or on punishment. One of the most important functions of a motion for new trial is to develop legal issues on appeal that are not otherwise part of the trial court record and unless properly preserved in a motion for new trial, cannot be effectively raised on appeal. So too, a properly filed motion can be used as a vehicle to develop facts outside of the record that can then be argued on appeal, such as ineffective assistance of counsel and newly discovered evidence.

A motion for new trial is not, however, a prerequisite to appeal. The filing of a notice of appeal also does not alter the trial court’s ability to rule on a proper motion for new trial, even if filed prior to the filing of the motion. **TEX.R.APP.P. 27.1(b).**

A properly filed motion does extend the time to file a notice of appeal from 30 days to 90 days after imposition of sentence. It also extends the time for the record to be filed on appeal, thus extending appellate deadlines to file a brief on the merits. Therefore, after a timely motion for new trial is filed, the Reporter’s Record is prepared no later than 120 days after sentencing is imposed (if the motion is denied) or 60 days after the order granting a motion for new trial. If no motion for new trial is filed, the Reporter’s Record must be filed no later than 60 days after sentence is imposed. *See* **TEX.R.APP.P. 35.2**. If your client is on bond, these extensions can be both strategic in nature and advantageous for your client.

### DEFENDANT’S RIGHT TO COUNSEL

A hearing on a motion for new trial is a critical stage of the trial process and a defendant has a Sixth Amendment right to counsel. *See* *Conner v. State*, 877 S.W.2d 325, 326 (Tex. Crim. App. 1994). The Court of Criminal Appeals has held that “as a matter of federal

constitutional law, that the time for filing a motion for new trial is a critical stage of the proceedings, and that a defendant has a constitutional right to counsel during that period.” *Cook v. State*, 240 S.W.3d 906, 911-12 (Tex. Crim. App. 2007). If the trial court appoints appellate counsel after the time for filing a motion for new trial expires, the defendant is deprived of counsel during a critical period. *See* *Salazar v. State*, 222 S.W.3d 7, 9 (Tex. App. – Amarillo 2005, no pet.).

### DENIAL OF RIGHT TO COUNSEL ON APPEAL

When a defendant is denied counsel or the effective assistance of counsel during the 30-day period to file a motion for new trial, an out of time hearing on the motion should be requested. *Trevino v. State*, 565 S.W.2d 938, 941-42 (Tex. Crim. App. 1978). To prevail on a claim of ineffective assistance of counsel during this critical stage, while counsel is not required to marshal all evidence, she must do more than just listing claims trial counsel may have possibly done (or not done) that may constitute deficient conduct. So, too, in order to show harm, counsel must present at least one “facially plausible” claim that could have been argued in a motion for new trial but was not due to ineffective assistance of counsel. *Griffith v. State*, 507 S.W.3d 720 (Tex. Crim. App. 2016).

Courts of appeals have recognized the practice of providing different counsel for trial, and on appeal create a significant risk that the right to a new trial will be ignored. *Burnett v. State*, 959 S.W.2d 652 (Tex. App. – Houston [1st Dist.], 1997, pet. ref’d). The delayed appointment of appellate counsel has made claims of lack of representation during this critical stage “common and persistent.” *Jack v State*, 42 S.W.3d 291, 293 (Tex. App. – Houston [1st Dist.], 2001), *after remand* 64 S.W.3d 694 (Tex. App. – Houston [1st Dist.], 2002), pet. dismissed, 149 S.W.3d 119 (Tex. Crim. App. 2004)(per curiam).

Courts have held there is a rebuttable presumption that counsel considered and rejected the possibility of filing a motion for new trial when one is not filed inside the 30-day deadline. *Reyes v. State*, No. 08-15-00311-CR, 2017 WL 1164592 (Tex. App. – El Paso [8<sup>th</sup> Dist.] March 29, 2017)(defendant failed to overcome

presumption); *Carnell v. State*, No. 01-15-00519-CR, 2017 WL 1352129 (Tex. App. – Houston [1st Dist.] April 13, 2017)(presumption rebutted where counsel withdrew and nine months later counsel was appointed on appeal); *Oldham v. State*, 977 S.W.2d 354, 363 (Tex. Crim. App. 1998); *Smith v. State*, 17 S.W.3d 660, 663 (Tex. Crim. App. 2000). For this reason, the defendant must overcome the presumption to establish he was denied the right to counsel. *See Kane v. State*, 80 S.W.3d 693, 695 (Tex. App. – Fort Worth 2002, pet. ref’d)(presumption not rebutted where counsel appointed two days after the expiration for timing to file motion for new trial and pro se filing of notices of appeal). The most important issue to consider is whether counsel understood his or her role to include the investigation and filing of a motion for new trial. If a violation of the right to counsel is shown, it is reviewed under a harmless-error analysis. *Hanson v. State*, 11 S.W.3d 285, 289 (Tex. App. – Houston [14th Dist.] 1999, pet. ref’d). This means that the defendant must show that a gap in representation resulted in harm because it denied him the right to file a motion for new trial. *Mashburn v. State*, 272 S.W.3d 1, 5 (Tex. App. – Fort Worth, 2008, pet. ref’d)(defendant failed to show what matters would have been raised on a motion for new trial had he been represented during the entire period for filing).

A defendant must do more than simply show he was not represented by counsel during the critical period to file a motion; he must show actual prejudice by showing that a failure to provide representation resulted in a denial of the right to file a motion for new trial. *Monakino v. State*, No. 01-14-00361-CR, 2016 WL 6087683 (Tex. App. – Houston [1<sup>st</sup> Dist.] Oct. 18, 2016)(presumption rebutted and harm shown where counsel incorrectly believed defendant did not have the right to appeal; he was effectively unrepresented by counsel during the time period for filing a motion for new trial); *Blumenstetter v. State*, 117 S.W.3d 541, 546 (Tex. App. – Texarkana, 2003, no pet.)(presumption of continued representation rebutted by showing that 15 days after sentencing defense counsel moved to withdraw and requested appointed appellate counsel and counsel was not appointed until after period for filing motion for new trial ended); *Massingill v. State*, 8 S.W.3d 733 (Tex.

App. – Austin 1999), aff’d, 2000 WL 564168 (Tex. App. – Fort worth 2002, pet. ref’d)(although defendant did not have counsel during the first 12 days of the period to file a motion for new trial, the court stressed that he was without counsel for more than half of the period and nevertheless found denial of right to counsel); *Garcia v. State*, 97 S.W.3d 343, 348 (Tex. App. – Austin 2003, pet. ref’d)(presumption rebutted where counsel withdrew at sentencing and appointment of another attorney during the period, but defendant prepared a *pro se* motion for new trial before expiration of period for filing and the motion was not filed until two days after deadline); *but see Green v. State*, 264 S.W.3d 63, 70-71 (Tex. App. – Houston [1st Dist.] 2007, pet. ref’d)(rejecting position that *pro se* filings alone were sufficient to rebut presumption).

#### **NEW TRIALS IN CRIMINAL CASES - DEFINITIONS**

**Motion for New Trial:** “*New trial* means the rehearing of a criminal action after the trial court has, on the defendant’s motion, set aside a finding or verdict of guilt.” **TEX.R.APP.P. 21.1(a).**

**Motion for New Trial on Punishment:** “*New punishment* means a new hearing of the punishment stage of a criminal action after the trial court has, on the defendant’s motion, set aside an assessment of punishment without setting aside a finding or verdict of guilt.” **TEX.R.APP.P. 21.1(b).**

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