INEFFECTIVE ASSISTANCE OF COUNSEL

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Carmen Roe is an appellate and trial attorney with her own law firm in downtown Houston. She received her undergraduate degree from the University of Houston and later, her Doctorate, from St. Mary's University School of Law with a specialization in criminal law.

Immediately after graduation, Ms. Roe began working exclusively in criminal defense. Before opening her own law practice, Ms. Roe interned at the Texas Court of Criminal Appeals and clerked for Schneider and McKinney where she concentrated on appellate and post-conviction relief.

For the last 13 years of practice, Ms. Roe has owned her own firm where she specializes in criminal defense, including criminal trials, appeals, and post-conviction writs, in both state and federal court. Ms. Roe is board certified in criminal appeals by the Texas Board of Legal Specifications.

Among her numerous honors and areas of service, Ms. Roe was recently named a 2019 Texas Super Lawyer and in 2018 she was elected as District 4, Place 5, State Bar Board of Directors for the State Bar of Texas. She is also a continuing member who serves on the Board of Directors for the Texas Criminal Defense Lawyers Association (TCDLA).

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Overview

Ineffective assistance of counsel is one of the number one issues any post-conviction writ of habeas corpus, and sometimes a potential issue on direct appeal. On habeas, when filed the Court of Criminal Appeals is required to review the claim so it should always be raised. Significantly, prior to filing any claim of ineffective assistance, writ counsel must engage in a thorough and complete investigation. Counsel should never rely on the statements of a client, family or anyone else to establish a claim. This paper will cover the trials, tribulations and cautionary information you need to consider before filing an ineffective claim, as both appellate and habeas counsel in Texas. In addition, we will explore areas that are pitfalls for defense counsel and areas to focus for prosecutors.

I. Standard of Review for IAC Claims

Ineffective assistance of counsel stems from the fundamental tenet that every citizen accused of any crime has a right to the effective assistance of counsel provided by the Sixth Amendment to the United States Constitution.[1] So, too, Article I, Section 10 of the Texas Constitution also recognizes a defendant's right to the effective assistance of counsel. In addition, the right to counsel is required at every stage of a criminal proceeding where the substantial rights of the accused may be affected.[2] This right applies at both the guilt-innocence and the punishment phase of a trial.[3] Although claims of ineffective assistance can be cognizable on direct appeal, it is rare that they will be successful without a motion for new trial to develop a record on appeal. This is discussed more thoroughly below. Ineffective claims are also cognizable, and often most successfully presented on state habeas. Filed either as a direct appeal or on habeas, a court's determination to grant relief is based on the two-part test set out by *Strickland v. Washington*. Although a United States Supreme Court case from 1984, *Strickland* is still the standard applied in every ineffective assistance claim filed today.

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[1] U.S. Const.amend.VI; see also *Strickland v. Washington*, 466 U.S. 668 (1984).
[2] *Mempa v. Rhay*, 389 US 128 (1967); see also *Ex parte Richardson*, 496 S.W.2d 611 (Tex.Crim.App.1973) (right to counsel includes revocation hearings).
[3] *Ex parte Hernandez*, 988 S.W.2d 770 (Tex. Crim. App. 1999).

Strickland and its progeny provide the standard for determining when a criminal defendant's Sixth Amendment right to counsel is violated by counsel's inadequate performance. First, keep in mind that in any habeas proceedings it is the defendant's burden to present and prove facts that establish relief by a preponderance of the evidence.[4] To do so under *Strickland* requires a defendant prove that counsel was deficient in his performance and that his deficiency resulted in prejudice, such that it undermines confidence in the outcome of any trial or plea.[5]

A. Deficient Conduct

As previously stated, in Texas a criminal defendant is entitled to the reasonably effective assistance of counsel.[6] In order to prevail on a claim of ineffective assistance of counsel a defendant must plead and prove facts that satisfy the standards in *Strickland*.[7] Significantly, there is a presumption in favor of trial counsel's reasonable professional judgement and a defendant must overcome that presumption to prevail on any claim.[8] Finally, whether counsel was deficient is reviewed under a "totality of the representation," and should not be based on isolated acts or omissions.[9] That said, while the adequacy of counsel's performance is gauged by the totality of the representation afforded the accused, "sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard."[10] As the First Court of Appeals in Houston observed:

> To ignore a grievous error simply because it is single, while granting relief where multiple errors cumulatively reach the same magnitude, would be contrary to the reasons that caused the creation of the doctrine of ineffective assistance of counsel.[11]

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[4] *Ex parte Rains*, 555 S.W.2d 478 (Tex. Crim. App.1976).
[5] *Strickland*, 466 U.S. at 687.
[6] TEX.CONST. ART I, SEC.10; *Ex parte Duffy*, 607 S.W.2d 507 (Tex. Crim. App. 1980).
[7] *Ex parte Scott*, 190 S.W.3d 672 (Tex. Crim. App. 2006).
[8] *Delrio v. State*, 840 S.W.2d443 (Tex. Crim. App. 1992).
[9] *Ex parte Raborn*, 658 S.W.2d 602 (Tex. Crim. App. 1983).
[10] *Nero v. Blackburn*, 597 F.2d 991, 994 (5th Cir. 1979).
[11] *Cooper v. State*, 769 S.W.2d 301, 305 (Tex. App. – Houston [1st Dist.] 1989); *see also Ex parte Felton*, 815 S.W.2d 733, 736 (Tex. Crim. App. 1991) (single error was of sufficient magnitude to render trial counsel's performance ineffective).

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