

# **INEFFECTIVE ASSISTANCE OF COUNSEL**

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### **PROFESSIONAL ACTIVITIES**

Innocence Project of Texas, President; State Bar of Texas (Member, Criminal Law Section, Appellate Section); Dallas Bar Association, Chairman Criminal Section; Fellow, Dallas Bar Association; Texas Criminal Defense Lawyers Association, Board Member, Chairman, Appellate Committee, Legal Specialization Committee, Co-Chairman, Strike Force; National Association of Criminal Defense Lawyers; Dallas County Criminal Defense Lawyers Association; Dallas Inn of Courts, LVI; Board Certified, Criminal Law and Criminal Appellate Law, Texas Board of Legal Specialization; Instructor, Trial Tactics, S.M.U. School of Law, 1992, Texas Criminal Justice Integrity Unit, Member; Texas Board of Legal Specialization, Advisory Committee, Criminal Appellate Law

### **PUBLICATIONS, SEMINAR PRESENTATIONS AND HONORS:**

Features Article Editor, Voice for the Defense, 1993-2000  
Author/Speaker: Advanced Criminal Law Course, 1989, 1994, 1995, 2003, 2006, 2009, 2010, 2011, 2012, 2013, 2016, 2017; Course Director 2015

Author/Speaker: Criminal Defense Lawyers Project Seminars, Dallas Bar Association Seminars, Texas Criminal Defense Lawyers Seminars, Center for American and International Law Seminars, 1988-2017

Author: Various articles in Voice for the Defense, 1987-2005

Author: S.M.U. Law Journal, Annual Survey of Texas Law; 1991, 1993, 1994, 1995, 1998

Criminal Law Expert - Texas Lawyer Magazine Podcasts, 2006-2011

D Magazine - Best Lawyers in Dallas, 2014-2018

Texas Monthly Super Lawyer - Criminal Law, 2003-2018

Best Lawyers in America in Appellate Law, White Collar Criminal Defense and

Non-White Collar Criminal Defense, 2006-2018

Best Lawyers in America, Dallas Criminal Defense: White Collar Lawyer of the Year, 2011

Best Lawyers in America, Dallas Criminal Defense Lawyer of the Year, 2014  
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# INEFFECTIVE ASSISTANCE OF COUNSEL

## Introduction

The right to be represented by counsel is by far the most important of a defendant's constitutional rights because it affects the ability of a defendant to assert a myriad of other rights. As Justice Sutherland explained in *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932):

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

*Id.*, at 68-69, 53 S.Ct., at 63-64.

The right to the assistance of counsel is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section

10 of the Texas Constitution. This right to the assistance of counsel has long been understood to include a “right to the effective assistance of counsel.” *See McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970). The integrity of our criminal justice system and the fairness of the adversary criminal process is assured only if an accused is represented by an effective attorney. *See United States v. Morrison*, 449 U.S. 361, 364 (1981). Absent the effective assistance of counsel, “a serious risk of injustice infects the trial itself.” *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980). Thus, a defendant is constitutionally entitled to have effective counsel acting in the role of an advocate. *See Anders v. California*, 386 U.S. 738, 743 (1967).

### The Legal Standard

The United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984) established the federal standard for determining whether an attorney rendered reasonably effective assistance of counsel. The Texas Court of Criminal Appeals in *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986) adopted the *Strickland* test as the proper test under state law to gauge the effectiveness of counsel. Pursuant to that test

. . . the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the

defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*Strickland v. Washington*, 466 U.S. at 687.

The purpose of the *Strickland* two part test is to judge whether counsel's conduct so compromised the proper functioning of the adversarial process that the trial cannot be said to have produced a reliable result. *Thompson v. State*, 9 S.W.3d 808, 812-13 (Tex. Crim. App. 1999) (citing *McFarland v. State*, 845 S.W.2d 824, 843 (Tex. Crim. App. 1992)); *Ex parte Scott*, 190 S.W.3d 672, 677 n. 3 (Tex. Crim. App. 2006) (reasonable probability of a different outcome means it is sufficient to undermine confidence in the result).

The *Strickland* test applies to appointed and retained counsel alike. See *Cuyler v. Sullivan*, *supra* at 344. It also applies to all stages of a criminal trial. See *Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999) (*Strickland* applies to claim of deficient attorney performance at noncapital sentencing proceeding). It applies when evaluating an attorney's performance in connection with a guilty plea. See *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (prejudice prong of *Strickland* requires defendant to show that but for counsel's errors he would not have entered a guilty plea).

In assessing deficient performance, courts “must determine whether there is a gap between what counsel actually did and what a reasonable attorney would have done under the circumstances.” *Neal v. Puckett*, 286 F.3d 230, 236 (5th Cir. 2002) (*en banc*). Defense counsel must investigate the case or make a reasonable decision that makes particular investigations unnecessary. *Strickland*, 466 U.S. at 690-691; *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003). See *McFarland v. State*, 928 S.W.2d 482, 501 (Tex. Crim. App. 1996), *overruled on other grounds by Mosley v. State*, 983 S.W.2d 249 (Tex. Crim. App. 1998).

In *Ex parte Lilly*, 656 S.W.2d 490, 493 (Tex. Crim. App. 1983), the court stated:

It is fundamental that an attorney must have a firm command of the facts of the case as well as the law before he can render reasonably effective assistance of counsel. . . . A natural consequence of this notion is that counsel also has a responsibility to seek out and interview potential witnesses and failure to do so is to be ineffective, if not incompetent, where the result is that any viable defense available to the accused is not advanced.

It has been held that, even if an attorney’s manner of conducting a trial was trial strategy, it can be so ill-chosen as to render a trial fundamentally unfair. *United States v. Rusmiser*, 716 F.2d 301, 310 (5th Cir. 1983). Any trial “strategy” that flows “from lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel.” *Kenley v. Armontrout*,

937 F.2d 1198, 1304 (8th Cir.), *cert. denied*, 502 U.S. 964 (1991); *Ex parte Amezcuita*, 223 S.W.3d 363, 367-68 (Tex. Crim. App. 2006) (failure to investigate evidence that someone else committed the crime); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (failure to conduct reasonable investigation is ineffective assistance); *Ex parte Briggs*, 187 S.W.3d 458, 467-69 (Tex. Crim. App. 2005) (attorney ineffective for failure to investigate medical evidence). Moreover, the courts have repeatedly found that the failure to make proper evidentiary objections because of a misunderstanding or ignorance of the rules satisfies the first prong of the *Strickland* test. *United States v. Williams*, 358 F.3d 956, 964-65 (D.C. Cir. 2004); *Gochicoa v. Johnson*, 118 F.3d 440, 447 (5th Cir. 1997); *Westley v. Johnson*, 83 F.3d 714, 723 (5th Cir. 1996); *Crockett v. McCotter*, 796 F.2d 787, 792 (5th Cir. 1986). No professional norms justify an inadequately researched objection. *See Wiggins v. Smith*, 539 U.S. 510, 526 (2003) (finding counsel's conduct unreasonable when it "resulted from inattention, not reasoned strategic judgment"). In *Baldwin v. State*, 668 S.W.2d 762, 764 (Tex. App. - Houston [14<sup>th</sup> Dist.] 1984, no pet.), the court found ineffective assistance of counsel when the attorney permitted the eliciting of inadmissible and incriminating hearsay. The court in *Lyons v. McCotter*, 770 F.2d 529 (5<sup>th</sup> Cir. 1985), held that passing over admission of prejudicial and

arguably inadmissible evidence may be a strategic decision by trial counsel, while passing over admission of prejudicial and clearly inadmissible evidence has no strategic value and may constitute ineffective assistance. Also, in *Strickland v. State*, 747 S.W.2d 59, 60-61 (Tex. App. - Texarkana 1988, no pet.), the court found ineffective assistance for counsel's failure to object to four inadmissible extraneous offenses. *See also Mares v. State*, 52 S.W.3d 886 (Tex. App. - San Antonio 2001, pet. ref'd) (holding failure to make objection in this case cannot be considered reasonable trial strategy); *Moore v. Johnson*, 194 F.3d 586, 604 (5th Cir. 1999); *Proffitt v. Waldron*, 831 F.2d 1245, 1248 (5th Cir. 1987) (holding tactical decisions that give no advantage to a defendant are not reasonable and the court will not engage in presumption of reasonableness under these circumstances); *Welborn v. State*, 785 S.W.2d 391, 396 (Tex. Crim. App. 1990) (failure to object to inadmissible evidence).

Although counsel's effectiveness is normally judged by the totality of the representation, a single egregious error can constitute ineffective assistance of counsel. *Ex parte Felton*, 815 S.W.2d 733, 736 (Tex. Crim. App. 1991); *Ex parte Raborn*, 658 S.W.2d 602, 605 (Tex. Crim. App. 1983). A single error of counsel may support a claim of ineffective assistance if the error was of such magnitude that it rendered the trial fundamentally unfair. *See Ex parte Varelas*,

45 S.W.3d 627, 630 (Tex. Crim. App. 2001) (failure to request limiting instruction and an instruction that extraneous offense must be proven beyond a reasonable doubt is ineffective); *Nelson v. Estelle*, 642 F.2d 903, 907 (5th Cir. 1981); *Tress v. Maggio*, 731 F.2d 288, 292-94 (5th Cir. 1984) (failure to seek severance); *Summit v. Blackburn*, 795 F.2d 1237, 1244-45 (5th Cir. 1986) (failure to object to proving corpus delicti solely by defendant's confession); *Ex parte Zepeda*, 819 S.W.2d 874, 886-87 (Tex. Crim. App. 1991) (failure to request accomplice witness instruction); *Cooke v. State*, 735 S.W.2d 928, 930 (Tex. App. - Houston [14th Dist.] 1987, pet. ref'd) (failure to object to tainted identification after illegal arrest and to proffer of bolstering testimony when entire strategy was mistaken identity); *Sanders v. State*, 715 S.W.2d 771, 776 (Tex. App. - Tyler 1986, no pet.) (failure to raise involuntariness of confession). Therefore, if counsel intended to object, but simply failed to do so because of the lack of awareness of the legal requirements for a proper objection or proffer, his deficiency prejudiced the defense and requires relief.

### Ineffective Assistance on Appeal

*Strickland* also applies to an attorney's performance in handling an appeal. See *Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (due process requires that defendant have effective assistance of counsel on his first appeal); *Ex parte*

*Flores*, 387 S.W.3d 626, 639 (Tex. Crim. App. 2012) (to obtain new appeal based on ineffective assistance applicant must show that 1) counsel's decision not to raise a particular issue was objectively unreasonable and 2) there is a reasonable probability that, but for counsel's failure to raise that issue, he would have prevailed on appeal).

Although appellate counsel is not required to raise every non-frivolous claim and may be selective in inclusion of issues in order to maximize success, counsel has an obligation to raise determinative issues. *See Smith v. Robbins*, 528 U.S. 259, 287-88 (2000). In this regard, several federal circuits have held that appellate counsel is ineffective if counsel fails to raise a claim that qualifies as a “dead bang” winner. *See Upchurch v. Bruce*, 333 F.3d 1158, 1163-64 (10th Cir. 2003); *Cargle v. Mullin*, 317 F.3d 1196, 1202 (10th Cir. 2003); *Fagan v. Washington*, 942 F.2d 1155, 1157 (7th Cir. 1991). These note that the failure to raise a substantial claim can be indicative only of oversight or ineptitude. *See Fagan*, 942 F.2d at 1157. *See also Evans v. Clarke*, 680 F. Supp. 1351, 1359-60 (D. Neb. 1985) (denial of effective assistance of appellate counsel warranted habeas relief where claims not presented on direct appeal had at least arguable merit and counsel affirmatively argued against client’s case).

In *Stallings v. United States*, 536 F.3d 624, 627 (7th Cir. 2008), the court

stated that where a petitioner alleges ineffective assistance of appellate counsel the appellate court first examines the record to see whether counsel omitted significant and obvious issues and, if so, the court then compares the neglected issues to those actually raised. If the ignored issues are clearly stronger than those raised, appellate counsel was deficient. *See also Passmore v. Estelle*, 594 F.2d 115, 118 (5th Cir. 1979) (finding appellate counsel ineffective).

### Ineffective Assistance on Motion for New Trial

The right to effective assistance of counsel applies at the motion for new trial. *Cooks v. State*, 240 S.W.3d 906, 908 (Tex. Crim. App. 2007). In *Griffith v. State*, 507 S.W.3d 720, 721-22 (Tex. Crim. App. 2016), Judge Hervey concurring, the following was stated concerning ineffectiveness on a motion for new trial:

To prove harm, the defendant must present at least one "facially plausible" claim to the court of appeals that could have been argued in a motion for new trial but was not due to ineffective assistance of counsel. *Cooks*, 240 S.W.3d at 912; *Bearman v. State*, 425 S.W.3d 328 (Tex. App. - Houston [1st Dist.] 2010, no pet.) (abating the appeal for the appellant to file an out-of-time motion for new trial because he presented a "facially plausible" claim that trial counsel was ineffective). To make a "facially plausible" claim, a defendant is not required to marshal all evidence germane to potential ineffective-assistance-of-counsel claims, but he has to do more than just listing things trial counsel may have possibly done (or not done) that could possibly constitute ineffective assistance of counsel. *See Cooks*, 240 S.W.3d at 911-12.

In *Rogers v. State*, No. 14-09-00665-CR, 2011 WL 7290492, at \*4 (Tex. App. - Houston [14th Dist.] 2011, no pet.) (not designated for publication), the court discussed the meaning of a facially plausible claim. The state had argued that the record demonstrated that the defendant would not prevail at a hearing on the motion for new trial. The *Rogers* court responded as follows:

Further, the State has cited no authority for the argument that we should consider record evidence in determining whether a claim is "facially plausible." To the contrary, courts seem to resolve this issue by looking to the allegations alone without considering any contradictory record evidence.

*See State v. Webb*, 244 S.W.3d 543, 549 (Tex. App. - Houston [1st Dist.] 2007, no pet.) (defense counsel was deficient in failing to assert as a ground for new trial the illegality of defendant's plea agreement); *Barnett v. State*, 338 S.W.3d 680, 685 (Tex. App. - Texarkana 2011) (motion for new trial was facially sufficient to warrant a hearing to determine if failure to subpoena witness or offer mitigating evidence constituted ineffective assistance); *Monakino v. State*, 535 S.W.3d 559, 566-67 (Tex. App. - Houston [1st Dist.] 2016, no pet.) (defendant entitled to file out of time motion for new trial since he specifically listed several issues he would raise in a motion for new trial).

### Exceptions to *Strickland*

These are some errors that "are so likely to prejudice the accused that the

cost of litigating their effect in a particular case is unjustified” thus making it unnecessary to establish the prejudice prong of *Strickland*. *United States v. Cronin*, 466 U.S. 648, 658 (1984). Prejudice is presumed in situations where the likelihood of counsel having provided effective assistance is extremely small such as where counsel failed completely to subject the prosecution’s case to “meaningful adversarial testing.” *Id.* at 660 (citing in illustration *Powell v. Alabama*, 287 U.S. 45 (1932)). According to the Court of Criminal Appeals, it is unnecessary for a defendant to meet the prejudice requirement of *Strickland* if he was actually or constructively denied the assistance of counsel altogether, if counsel was prevented from assisting the accused at a critical stage of the proceedings because of some type of state interference, or if counsel was burdened by an actual conflict of interest which adversely affected counsel’s performance. *Mitchell v. State*, 989 S.W.2d 747, 748 (Tex. Crim. App. 1999); *Cannon v. State*, 252 S.W.3d 342, 349 (Tex Crim. App. 2008) (reversal for ineffective assistance where counsel declined to perform basic defense functions). “Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt.” *United States v. Cronin*, *supra* at 659 n. 26. In other words, in order

for the presumption of prejudice to apply, the attorney must completely fail to challenge the prosecution's entire case, not just elements of it. *Haynes v. Cain*, 298 F.3d 375, 380-382 (5th Cir. 2002); also see *Bell v. Cone*, 535 U.S. 685, 697 (2002) (noting that difference between situations addressed by *Strickland* and *Cronic* is "not of degree but of kind").

### Raising Ineffective Assistance

Rule 33.1(a) of the Texas Rules of Appellate Procedure generally requires that a complaint be presented to the trial court "by a timely request, objection, or motion" as a prerequisite to raising the complaint on direct appeal. TEX. R. APP. P. 33.1(a). There are, however, many practical difficulties with requiring a defendant to raise the issue of ineffective assistance of counsel at the time of trial or even in a motion for new trial. *See Robinson v. State*, 16 S.W.3d 808, 810 (Tex. Crim. App. 2000). The biggest difficulty is that there is generally no real opportunity to adequately develop the record for appeal at this time. *Id.* This creates a usually insurmountable hurdle to raising an ineffective assistance claim on direct appeal. "Rarely will a reviewing court be provided with the opportunity to make its determination on direct appeal with a record capable of providing a fair evaluation of the merits of the [ineffective assistance] claim . . ." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999); *Rylander v. State*, 101

S.W.3d 107, 109 (Tex. Crim. App. 2003) (issue not decided on direct appeal because defense counsel should explain actions). Thus, for most ineffective assistance claims, a writ of habeas corpus is the preferred method for raising the issue. *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997). For a multitude of reasons, ineffective assistance claims are excepted from the general rule of error preservation set forth in Rule 33.1(a) and may be raised in an application for a writ of habeas corpus even if not raised first in the trial court. *Robinson v. State*, *supra* at 812-13; *Massaro v. United States*, 538 U.S. 500 (2003) (ineffective assistance of counsel should be raised in collateral proceeding).

This is not to say that an ineffective assistance claim may not be raised in the trial court or on direct appeal. It can in some circumstances. For example, such a claim may be raised in a motion for new trial. *Reyes v. State*, 849 S.W.2d 812, 815 (Tex. Crim. App. 1993). The difficulty in attempting this, however, is the short time frame in which evidence must be gathered to support the claim and the fact that the trial transcript is usually not available within the time period for filing a motion for new trial. In *Ex parte Garcia*, 486 S.W.3d 565 (Tex. Crim. App. 2016), various members of the court discussed the problems with indigent *pro se* defendants pursuing ineffective assistance claims. Judge Alcala

has suggested counsel be appointed in these cases, but the court has not followed her suggestion.

### Burden of Proof

The burden of proving ineffective assistance of counsel rests on the convicted defendant by a preponderance of the evidence. *Haynes v. State*, 790 S.W.2d 824, 827 (Tex. Crim. App. 1990). In order to determine whether the defendant has met this burden, the reviewing court looks to the totality of the representation and the particular circumstances of the case in evaluating the reasonableness of an attorney's conduct. *See Ex parte Felton*, 815 S.W.2d 733, 735 (Tex. Crim. App. 1991). The review conducted of defense counsel's representation is "highly deferential and presumes that counsel's actions fell within a wide range of reasonable assistance." *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001) (citing *Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000)). It is the defendant's burden to overcome this presumption by proving his ineffective assistance of counsel claim by a preponderance of the evidence. *McFarland v. State*, 845 S.W.2d 824, 843 (Tex. Crim. App. 1992); *Moore v. State*, 694 S.W.2d 528, 531 (Tex. Crim. App. 1985); *see also, United States v. Cronin, supra* at 658 (the burden rests on the accused to demonstrate a constitutional violation).

The Court of Criminal Appeals emphasized in *Thompson v. State, supra* that a claim of ineffective assistance of counsel must be supported by a record containing direct evidence as to why counsel took the actions or made the omissions relied upon as the basis for the claim. *Id.* at 813-14.; *accord, Busby v. State*, 990 S.W.2d 263, 268-69 (Tex. Crim. App. 1999) (ordinarily the strong presumption that an attorney's decisions were acceptable trial strategy cannot be overcome without evidence in the record as to the attorney's reasons for the decisions). However, in *Ex parte Bowman*, 533 S.W.3d 337, 350-351 (Tex. Crim. App. 2017), even though the applicant obtained testimony from the defense lawyer, the court held that ineffective assistance was not proven based on failure of trial counsel to remember whether he had obtained and reviewed relevant records. While there may be some actions that unquestionably fall outside the spectrum of objectively reasonable trial strategy, generally, the Court of Criminal Appeals requires a defendant to offer evidence from his attorney explaining his actions in order to overcome the presumption that counsel acted pursuant to a reasonable trial strategy. *See Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001) (court will not conclude challenged conduct constituted deficient performance unless conduct was so outrageous that no competent attorney would have engaged in it), but *see Menefee v. State*, 175 S.W.3d 500

(Tex. App. - Beaumont 2005, no pet.) (ineffectiveness found on direct appeal because no possible trial strategy in allowing defendant to plead true to invalid enhancement paragraph). In *Bone v. State*, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002), the court stated, “Under our system of justice, the criminal defendant is entitled to an opportunity to explain himself and present evidence on his behalf. His counsel should ordinarily be accorded an opportunity to explain her actions before being condemned as unprofessional and incompetent.” *See also Thompson v. State, supra* at 816 (Meyers, J., dissenting) (inconceivable that defense counsel could have had a reason for failing to object to certain hearsay that would fall within the range of objectively reasonable trial strategy).

The most common reason counsel’s conduct is found insufficient to obtain relief is a finding that counsel had a trial strategy reason for his actions. It should be kept in mind, however, that simply labeling an attorney’s actions “trial strategy” does not insulate the attorney from a finding of ineffective assistance of counsel. An attorney’s strategy can be so ill-chosen as to render a trial fundamentally unfair. *See United States v. Rusmisl, 716 F.2d 301, 310 (5th Cir. 1983)*. As the Supreme Court explained in *Strickland*, strategy decisions should be judged by an *objective* standard of reasonableness. *Strickland v. Washington, supra*, 466 U.S. 687-88 (emphasis added).

Once a convicted defendant establishes that his attorney's actions were objectively unreasonable, he must still prove that he was prejudiced by his attorney's actions. To establish prejudice, he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. at 694. The focus of the prejudice component is whether counsel's deficient performance renders the result of the trial unreliable or fundamentally unfair. *Id.* at 687. It is not enough to argue that the attorney's errors had some conceivable effect on the outcome of the proceeding, rather the convicted defendant must establish a "reasonable probability" of actual prejudice. *Id.* at 693. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694; *Smith v. State*, 286 S.W.3d 333, 340 (Tex. Crim. App. 2009).

While a convicted defendant must establish actual prejudice from his attorney's conduct, the State cannot avoid the consequences of a finding of ineffective assistance by arguing that the prejudice is de minimus. For example, any amount of additional time in prison constitutes prejudice. *Glover v. United States*, 531 U.S. 198, 203 (2001).

### Additional Thoughts

In *Ex parte Chandler*, 182 S.W.3d 350 (Tex. Crim. App. 2005), the court

stated, “To the uninitiated, the sheer number of allegations of ineffective assistance of counsel made against this nation’s criminal defense lawyers might well lead one to the conclusion that our law schools are entirely incapable of producing competent defense lawyers. A March 18, 2005, Westlaw search of federal and state decisions addressing ineffective assistance of counsel claims during the past fifteen months alone totals 9,467 cases (<http://web2.westlaw.com/search/all> cases & query “ineffective assistance of counsel” & date after 12/31/2003). According to Westlaw, 734 criminal cases in Texas appellate courts discussed claims of ineffective assistance of counsel during that same period. That number, however, does not include the hundreds, perhaps thousands, of ineffective assistance claims filed in post-conviction habeas applications with this court every year for which we do not write a published opinion.

But these ineffective assistance claims are easy to make, and it may be a natural reaction for a criminal defendant to blame his lawyer when he is found guilty of a crime. As the Supreme Court pointedly noted in *Strickland*, ‘the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure

that criminal defendants receive a fair trial.’ 466 U.S. at 689.”

Nevertheless, the State often argues in response to ineffective assistance of counsel claims that the attorney was effective because, in effect, he was there. The presence of an attorney, however, even one who asks a few questions and makes some sort of argument on the defendant’s behalf, is not what the Supreme Court had in mind in *Strickland*. There the Court said:

That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversary system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

*Strickland v. Washington, supra*, 466 U.S. at 685.

### **Examples of Ineffectiveness**

#### **Expert Witnesses**

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

Ineffective assistance of counsel established by failure to present testimony of expert physician that refuted state’s case.

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

Attorney ineffective for failure to thoroughly investigate medical evidence before advising client to plead guilty to injury to a child.

*Ex parte Ard*, 2009 WL 618982 (Tex. Crim. App. 2009)

Attorney’s failure to adequately present expert testimony to jury.

*Rylander v. State*, 75 S.W.3d 119 (Tex. App. - San Antonio 2002, pet. granted)  
Attorney's failure to present qualified medical testimony in support of defendant's only viable defense when combined with other trial errors undermines confidence in outcome of the trial and amounts to ineffective assistance.

*Ex parte Clement-Cook*, 2017 WL 3379960 (Tex. Crim. App. 2017)  
Ineffective assistance for failure to consult with medical expert on aggravated assault case.

*Hinton v. Alabama*, 134 S.Ct. 1081 (2014)  
Defense counsel's failure to request funds for additional experts was ineffective.

*Ex parte Napper*, 322 S.W.3d 202 (Tex. Crim. App. 2010)  
Counsel's failure to consult DNA expert is deficient conduct but harm not shown.

*Buck v. Davis*, 137 S.Ct. 759 (2017)  
Counsel ineffective for calling expert witness at sentencing phase of capital murder trial who testified that being black created an increased probability of future dangerousness.

*Wright v. State*, 223 S.W.3d 36 (Tex. App. - Houston [14th Dist.] 2016), *pet. ref'd*  
Ineffective assistance based on counsel's failure to consult with an expert concerning sexual abuse and proper methods for interviewing children.

*Sessums v. State*, 129 S.W.3d 242 (Tex. App. - Texarkana 2004), *pet. ref'd*  
Failure of counsel to object to expert testimony regarding the factors for determining the alleged victim's truthfulness.

*Draughon v. Dretke*, 427 F.3d 286 (5th Cir. 2005)  
Failure to obtain forensic examination of path of bullet was ineffective.

## Failure to Investigate

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

Attorney's failure to investigate information that someone else committed the crime.

*Butler v. State*, 716 S.W.2d 48, 54 (Tex. Crim. App. 1986)

Attorney's failure to investigate evidence that someone other than defendant was the robber was ineffective.

*State v. Thomas*, 768 S.W.2d 335, 336 (Tex. App. - Houston [14th Dist.] 1989, *no pet.*)

Counsel's failure to interview and call witnesses was ineffective.

*Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990)

Defense counsel's failure to interview witnesses constitutes ineffective assistance.

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

Attorney found ineffective for failing to investigate facts of robbery case, telling his client that a videotape existed of him committing the offense when no such tape existed, thereby causing defendant to plead guilty to robbery even though he had no memory of committing the offense because he suffered from alcoholic blackouts.

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

Failure to fully investigate petitioner's life for mitigating evidence is ineffective assistance.

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

Ineffective assistance based on failure to conduct adequate pre-trial investigation. Decision by counsel cannot be said to be reasonable or strategic absent a thorough investigation.

## Ignorance of the Law

*Ex parte Welch*, 981 S.W.2d 183, 185 (Tex. Crim. App. 1998)

Defense counsel's misunderstanding of the law on probation constituted ineffective assistance.

*Ex parte Lewis*, 537 S.W.3d 917 (Tex. Crim. App. 2017)

Ineffective assistance based on lack of knowledge of law on controlled substance charge.

## Failure to Present Evidence

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

Attorney's failure to investigate and present mitigating evidence in capital murder case of defendant being abused as a child.

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

Failure to interview and present alibi witnesses is ineffective assistance.

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

Defense counsel deficient for not calling witnesses to testify as to alleged victim's character for violence.

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

Ineffective assistance for failure to adequately investigate and present evidence of self defense.

*Davis v. State*, 413 S.W.3d 816 (Tex. App. - Austin 2013, *pet. ref'd*)

Trial counsel's failure to present evidence of alternative perpetrator was ineffective assistance in murder case.

*McCoy v. Louisiana*, \_\_\_ U.S. \_\_\_, 2018 WL 2186174 (2018)

Supreme Court holding that it was ineffective assistance for counsel to admit defendant's guilt as part of strategy to mitigate punishment. Structural error with no requirement to show prejudice.

*Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986)

Counsel's failure to conduct any pretrial discovery and file timely suppression motion was prejudicial because counsel was ignorant of the law and acting below professional norms.

#### Failure to Object to Inadmissible Evidence

*Perkins v. State*, 812 S.W.2d 326, 329 (Tex. Crim. App. 1991)

Failure to object to arrest outside officer's jurisdiction is ineffective.

*Alvarado v. State*, 775 S.W.2d 851, 857 (Tex. App. - San Antonio 1989, pet. ref'd)

Failure to object to inadmissible hearsay is ineffective.

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

Defense counsel's failure to object to opinion testimony that victim was credible and a truthful person is ineffective.

*Davis v. State*, 413 S.W.3d 816 (Tex. App. - Austin 2013, pet. ref'd.)

Trial counsel's failure to object to defendant's former girlfriend's testimony about her abusive relationship with defendant was ineffective.

#### Presenting Evidence Harmful to Defense

*Ex parte Walker*, 777 S.W.2d 427, 431 (Tex. Crim. App. 1989)

Eliciting testimony about extraneous offenses during cross-examination of police officer.

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

Opening door to cross examination of defendant regarding his post-arrest silence is ineffective.

#### Impeachment of Witnesses

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

Trial counsel's failure to impeach witness with his inconsistent statements, made when he told police that he saw shooter's face but could not make it out, constituted deficient performance.

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

Ineffective assistance based on failure of defense counsel to impeach eyewitness testimony that defendant was only person whom they had picked from photo lineup with their prior, tentative identification of someone else.

#### Misstatement of Law

*Andrews v. State*, 159 S.W.3d 98, 103 (Tex. Crim. App. 2005)

Failure to correct prosecutor's misstatement of law regarding whether defendant's sentences could be cumulated, leaving jury with false impression that defendant could serve no more than 20 years when, in fact, the defendant could have received a sentence as long as 80 years was ineffective.

#### Jury Instructions

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

Defense counsel's failure to request limiting instructions with respect to extraneous acts evidence offered during guilt phase of capital murder prosecution, and to request that jury be required to find defendant committed the extraneous acts beyond a reasonable doubt before using them in assessing

guilt amounted to ineffective assistance of counsel, where counsel stated by affidavit that his failure to request such instructions was an oversight and was not product of trial strategy; where defendant's pattern of abusing victim was essential to state's case, and trial court would have been required to give instructions if requested.

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

Counsel ineffective in failing to object to indictment and charge both of which were based on invalid felony murder theory.

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

Defense counsel ineffective for failure to object to erroneous jury instruction that defendant was guilty of injury to a child if he intentionally and knowingly engaged in conduct, which law clearly established that injury to a child required proof that defendant intended result.

*Waddell v. State*, 918 S.W.2d 91 (Tex. App. - Austin 1996)

Defense counsel's failure to request lesser included offense instruction on criminal trespass in a prosecution for burglary of a building constituted ineffective assistance of counsel.

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

Finding defense counsel ineffective because failure to request instruction on necessity.

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

Counsel ineffective in failing to request accomplice witness instruction in case based entirely on accomplice witness testimony.

#### Failure to File Application for Probation

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

Counsel ineffective for failing to file application for probation for defendant who was eligible for probation.

#### Evidence and Witness Issues

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

Ineffective assistance found where defense counsel called alibi witnesses who had pleaded guilty to same offense two days earlier and thus "los[t] the case for his client."

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

Failure to object to evidence of polygraph test administered to witness found to be ineffective.

*Ex parte Bible*, 2017 WL 4675536 (Tex. Crim. App. 2017)

Ineffective assistance based on failure to object to introduction of written statement of accomplice witness.

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

Ineffective assistance established when counsel did not call witnesses who could have refuted confession.

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

Ineffectiveness based on failure to object during punishment phase to testimony by DEA agent of societal costs of methamphetamine and prosecutors closing argument about "people" bringing in the drugs to "poison" the country's children.

*Walker v. State*, 195 S.W.3d 250 (Tex. App. - San Antonio 2006, *no pet.*)

Ineffective assistance for failure to object to inadmissible extraneous offense.

*Garcia v. State*, 308 S.W.3d 62 (Tex. App. - San Antonio 2009, *no pet.*)

Ineffective assistance when counsel opened the door to defendant's prior sex assault by asking him if he had ever sexually assaulted any one or been accused of it.

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

Trial counsel's eliciting of testimony from defendant at the guilt phase of trial that he was already incarcerated on two convictions was ineffective.

*Ex parte Rogers*, 369 S.W.3d 858, 863 (Tex. Crim. App. 2012)

Failure to object to witness testimony at punishment accusing defendant of uncharged brutal rape even though attorney knew that DNA testing and defendant's electronic monitoring showed that he could not have committed the crime.

*Frangias v. State*, 392 S.W.3d 642, 655-56 (Tex. Crim. App. 2013)

Failure to secure testimony of critical witness. Where key witness was unable to appear at trial due to medical condition, the attorney's choice to attempt to introduce witness's testimony over the phone (rather than by deposition) rendered him ineffective.

### Sleeping Lawyer

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

Counsel ineffective where he periodically slept during the trial.

### Lawyer Not Participating in Trial

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

Counsel ineffective where he failed to participate in trial after motion for continuance was denied.

### Statute of Limitations

*Compton v. State*, 202 S.W.3d 414 (Tex. App. - Tyler 2006)

Counsel ineffective for not objecting that the indictment was barred by statute of limitations.

### Jury Selection

*Virgil v. Dretke*, 446 S.3d 598, 613-14 (5th Cir. 2006)

Counsel's failure to use challenge to remove biased jurors during voir dire was ineffective assistance because counsel had no rational reason for such action.

### Venue

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

Failure to advise defendant that he had a venue defense is ineffective.

### Prior Convictions

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

Failure of counsel to determine that a prior conviction alleged to enhance misdemeanor DWI to felony did not belong to the defendant.

### Requesting Interpreter

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

Counsel ineffective for failing to request an interpreter for the defendant who was deaf.

### Failure of State's Proof

*Summit v. Blackburn*, 795 F.2d 1237, 1244-45 (5th Cir. 1986)

Ineffective assistance by failure to object to proving *corpus delecti* solely by defendant's confession.

### Identification Evidence

*Cooke v. State*, 735 S.W.2d 928, 930 (Tex. App. - Houston [14th Dist.] 1987, *pet. ref'd*)

Ineffective assistance by failure to object to tainted identification after illegal arrest and to proffer of bolstering testimony where entire strategy was mistaken identity.

### Confessions

*Sanders v. State*, 715 S.W.2d 771, 776 (Tex. App. - Tyler 1986, *no pet.*)

Ineffectiveness for failure to challenge voluntariness of confession.

### Guilty Pleas and Plea Bargaining

*Lafler v. Cooper*, 132 S.Ct. 1376 (2012); *Missouri v. Frye*, 132 S.Ct. 1399 (2012)

*Strickland* test applies to plea bargaining stage of trial. Deficient advise concerning plea bargain constitutes ineffective assistance. Defendant must show that he would have accepted the offer, the state would not have withdrawn it and the trial court would have accepted it.

*Ex parte Knelsen*, 2017 WL 2462329 (Tex. Crim. App. 2017)

Failure of applicant to allege that, but for the ineffective assistance of counsel, she would have pled not guilty and insisted on a trial, insufficient pleading for ineffective assistance claim.

*Ex parte Lewis*, 537 S.W.3d 917 (Tex. Crim. App. 2017)

Trial counsel ineffective for failure to advise Applicant of what the state was required to prove on a fraudulent prescription case when the evidence did not show that the state could prove the case, and had applicant received correct information, he would not have pled guilty.

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

Failure to inform client of plea offer is ineffective assistance.

*Melton v. State*, 987 S.W.2d 72 (Tex. App. - Dallas, *no pet.*)

Attorney found ineffective for failing to investigate facts of robbery case, telling client videotape existed showing him committing robbery when no such tape existed, thereby causing him to plead guilty even though he had no memory of committing the offense because of alcohol blackout.

*Rodriguez v. State*, 470 S.W.3d 823 (Tex. Crim. App. 2015)

Ineffective assistance of counsel found based on counsel's advice that defendant decline favorable plea offer.

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

Counsel ineffective for failure to properly advise defendant who was entering guilty plea whether state sentence would run concurrent with his federal sentence.

*Ex parte Nacoste*, WR-86,964-01 and WR,86-964-02, 2017 WL 3166462 (Tex. Crim. App. 2018)

Ineffective assistance based on defense counsel failing to advise applicant that the evidence did not support his guilt before advising him to plead guilty. Laboratory report refuted state's case in drug case.

*Miller v. State*, No. PD-0891-15, 2018 WL 2327371 (Tex. Crim. App. 2018)

Prejudice established on ineffective assistance of counsel by demonstrating that applicant would have opted for a jury if his attorney had correctly advised him that he was ineligible for probation from the trial court. Applicant does not need to show that the likely outcome of the jury trial would have been

more favorable.

*United States v. Shepherd*, 880 F.3d 734 (5th Cir. 2018)

Ineffective assistance based on counsel's failure to fully investigate the means of complying with sex offender registration law before advising client to plead guilty.

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

Failure to advise defendant prior to defendant's entry of guilty plea that he had a viable legal defense that he did not perform an overt act needed to support his conviction constitutes ineffective assistance.

*Ex parte Argent*, 393 S.W.3d 781 (Tex. Crim. App. 2013)

To establish prejudice on a claim of ineffective assistance in which the defendant is not made aware of a plea bargain offer, or rejects an offer because of bad advice, defendant must show a reasonable probability that he would have accepted earlier offer if he had not been given ineffective assistance, prosecution would not have withdrawn his offer and trial court would not have refused to accept plea bargain.

*Turner v. State*, 49 S.W.3d 461 (Tex. App. - Fort Worth 2001)

Failure to inform defendant of deadline for accepting plea offer is ineffective.

*Randle v. State*, 847 S.W.2d 576, 579-580 (Tex. Crim. App. 1993)

Failure to communicate defendant's acceptance of plea offer in a timely manner was ineffective.

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

Advising defendant to plead guilty in the hope of receiving probation when the charge to which the defendant pled made him ineligible for probation.

#### Filing Notice of Appeal and Notifying Defendant of Right to File Petition for Discretionary Review

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

Counsel must inform client of right to file a petition for discretionary review.

*Ex parte Axel*, 757 S.W.3d 369 (Tex. Crim. App. 1988)

Failure to file timely notice of appeal is ineffective assistance.

*Roe v. Flores-Ortega*, 528 U.S. 47 (2000)

Counsel's failure to file notice of appeal depriving defendant of appellate proceeding altogether was presumably prejudicial.

#### Punishment Phase

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

Failure to obtain and review prosecutor's punishment phase evidence and failure to develop mitigating evidence on capital case is ineffective.

*Ex parte Medina*, 540 S.W.3d 593 (Tex. Crim. App. 2017)

New punishment hearing ordered in death penalty case based on counsel's deficient performance in failing to present any punishment phase case.

*Ex parte Armstrong*, No. WR-78,106-01, 2017 WL 5483404 (Tex. Crim. App. 2017)

Ineffective assistance at punishment phase of capital murder case based on failure to present adequate evidence regarding applicant's mental health at time of offense.

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

Ineffective assistance established for punishment phase when counsel failed to contact 20 potentially favorable character witnesses.

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

Trial counsel's failure to investigate defendant's mental health history to uncover mitigating evidence at penalty phase of trial constituted ineffective assistance.

*Buck v. Davis*, 137 S.Ct. 759 (2017)

Counsel ineffective for calling expert witness at sentencing phase of capital murder trial who testified that being black created an increased probability of future dangerousness.

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

Failure to object during punishment phase to testimony by DEA agent on dangers and societal costs caused by methamphetamine was ineffective assistance.

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

Failure of counsel to discover evidence showing that the defendant was not at the scene of a crime that was used at punishment phase as extraneous offense constitutes ineffective assistance of counsel.

*Ex parte Austin*, 746 S.W.2d 228 (Tex. Crim. App. 1988)

Counsel ineffective for advising client he was eligible for shock probation when he was not.

*Ex parte Walker*, 794 S.W.2d 36 (Tex. Crim. App. 1998)

Not timely filing election for jury to set punishment is ineffective assistance.

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

Defense counsel was ineffective for failure to present treating physician's testimony regarding defendant's mental and psychological problems during trial.

#### Incorrect Advise on Parole Eligibility

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

Counsel's misinformation to defendant as to his parole eligibility constituted deficient performance.

*Ex parte Hutton*, No. WR-87,094-01, 2017 WL 4021197 (Tex. Crim. App. 2017)

Ineffective assistance based on erroneous advice regarding parole eligibility.

*Ex parte Boyken*, No. WR-87,091-01, 2017 WL 8573682 (Tex. Crim. App. 2017)

Trial counsel deficient by failure to advise applicant that she would not be eligible for parole until she served one half of her sentence.

#### Insanity Defense

*Ex parte Imoudu*, 284 S.W.3d 866 (Tex. Crim. App. 2009)

Failure to investigate possibility of an insanity defense.

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

Counsel ineffective for failing to present evidence at punishment phase of insanity caused by voluntary intoxication.

#### Immigration Consequences

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

Failure to advise defendant of deportation consequences of conviction is ineffective assistance.

*Lee v. United States*, 137 S.Ct. 1958 (2017)

Defendant demonstrates reasonable probability that he would not have pled guilty if he had known that it would lead to mandatory deportation, thus ineffective assistance shown.

*Ex parte Aguilar*, 537 S.W.3d 122 (Tex. Crim. App. 2017)

Ineffective assistance based on counsel giving applicant incorrect immigration advice.

*Ex parte Torres*, 483 S.W.3d 35 (Tex. Crim. App. 2016)

Deficient performance from counsel in failing to adequately warn defendant that his guilty plea made him subject to automatic deportation. However, defendant failed to establish prejudice because he did not show that he would have rejected the plea bargain and pursued a trial or would otherwise have received a more favorable outcome.

### Conflict of Interest

*Ex parte Knelsen*, 2017 WL 2462329 (Tex. Crim. App. 2017)

On conflict of interest claim must show a viable defensive strategy was not pursued as a result of the alleged conflict of interest.

*Cuyler v. Sullivan*, 446 U.S. 335 (1980)

Defendant can demonstrate conflict of interest by showing (1) counsel was actively representing conflicting interests and (2) the conflict had an adverse effect on specific aspects of counsel's performance.

*Mickens v. Taylor*, 535 U.S. 162, 172-74 (2002)

Trial court's failure to inquire into known potential conflict of interest did not merit reversal because defendant did not show that conflict adversely affected counsel's performance.

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

To show ineffective assistance based on a conflict of interest defendant must show counsel had actual conflict of interest and that the conflict colored his actions during trial.

*Ex parte McFarland*, 163 S.W.3d 743 (Tex. Crim. App. 2005)

No actual conflict existed due to defense counsel's alleged prior representation of defendant's alleged accomplice.

### Egregious Conduct By Counsel

*Ex parte Sanchez*, No. WR-84,238-01, 2017 WL 3380147 (Tex. Crim. App. 2017)

Ineffective assistance found when defense counsel carried on a coercive sexual relationship with the defendant.

*Aldrich v. State*, 296 S.W.3d 225 (Tex. App. - Fort Worth 2009, pet. ref'd)

Defense counsel's conduct resulted in counsel being held in contempt and was ineffective assistance.

### **Ineffective Assistance Not Proven**

*Ex parte Scott*, 541 S.W.3d 104 (Tex. Crim. App. 2017)

No ineffective assistance based on not calling an expert to testify that applicant was candidate for rehabilitation program in child pornography case.

*State v. Gutierrez*, 541 S.W.3d 91 (Tex. Crim. App. 2017)

No ineffective assistance based on failure to move for a mistrial rather than be tried by 11 jurors.

*Knowles v. Mirzayance*, 129 S.Ct. 1411, 1421 (2009)

Counsel reasonably concluded that proposed defense was almost certain to fail so not ineffective in not presenting the defense.

*Mitchell v. State*, 68 S.W.3d 640 (Tex. Crim. App. 2002)

Counsel not ineffective for allowing defendant to wear at start of voir dire a shirt like the one worn by

robber. No reasonable probability that the result of the trial would have been different if jury panel had not seen defendant in that shirt.

*Mathis v. State*, 67 S.W.3d 918 (Tex. Crim. App. 2002)

Defense counsel's failure to object to prosecutor's comments during final argument concerning capital murder defendant's non-testimonial courtroom demeanor was not ineffective assistance of counsel absent proof defendant was prejudiced by counsel's conduct.

*Craig v. State*, 82 S.W.3d 541 (Tex. App. - Austin 2002, no pet.)

Even if defendant's attorney did not adequately prepare for trial by failing to interview defendant, complaining witness, and defendant's original attorney, defendant failed to show how lack of preparation had any negative impact on outcome of trial and thus failed to prove counsel was ineffective.

*Ramirez v. State*, 76 S.W.3d 121 (Tex. App. - Houston [14th Dist.] 2002, pet. ref'd)

Trial counsel's failure to request an instruction on legality of murder defendant's confession did not constitute ineffective assistance of counsel where record contained no evidence of reasoning behind trial counsel's actions in failing to request a jury instruction on issue of whether to disregard confession on ground it was obtained in violation of law.

*Mallett v. State*, 65 S.W.3d 59 (Tex. Crim. App. 2001)

Defendant failed to establish that his counsel's failure to move to withdraw his guilty plea after he testified at plea hearing that some of his actions were not intentional fell below an objective standard of reasonableness where record was silent as to counsel's motivation for failing to move to withdraw plea.

*Ex parte Lozada-Mendoza*, 45 S.W.3d 107 (Tex. Crim. App. 2001)

Counsel not ineffective for failing to inform defendant of right to file a petition for discretionary review after his case was affirmed on direct appeal when he had informed defendant of such right in his initial appointment letter.

*Smith v. State*, 40 S.W.3d 147 (Tex. App. - Texarkana 2001, no pet.)

Counsel not ineffective for failing to object to outcry testimony in child abuse case even though state conceded notice was deficient and untimely when record did not reflect reasons for counsel's failure to object or show that counsel was surprised by testimony.

*Nix v. Whiteside*, 475 U.S. 157 (1986)

Counsel provided effective assistance by preventing defendant from committing perjury.

*Blount v. State*, 64 S.W.3d 451 (Tex. App. - Texarkana 2001, no pet.)

Counsel not ineffective in aggravated sexual assault of child case for eliciting from child's mother a comment she made before child's outcry to the effect that "there was a molester in the neighborhood" referring to defendant and in which she said she heard defendant had "did something to somebody else's kid." There was a plausible strategic basis for eliciting comment to discredit mother by showing her poor supervision of child by allowing child to have contact with defendant.

*Ex parte Okere*, 56 S.W.3d 846 (Tex. App. - Fort Worth 2001, pet. ref'd)

Defendant testified at hearing an application for writ of habeas corpus that he gave attorney names of witnesses and important facts that attorney did not investigate. Defendant did not subpoena attorney to testify at hearing and offered no explanation from attorney about his conduct. Defendant did not overcome presumption that attorney exercised reasonable professional judgment.

*Jackson v. State*, 973 S.W.2d 954 (Tex. Crim. App. 1998)

Counsel not ineffective for failing to file motion to suppress absent evidence that motion would have been granted had it been filed.

*Rodriguez v. State*, 446 S.W.3d 520 (Tex. App. - San Antonio 2014, *no pet.*)

Failure to object to inadmissible hearsay was strategic decision.

*McNeil v. State*, 452 S.W.3d 408 (Tex. App - Houston [1st Dist.] 2014, *pet. ref'd.*)

Trial counsel's decision to not request burden of proof instruction and limiting instruction concerning extraneous offenses found to be reasonable trial strategy.

*Ex parte Torres*, 483 S.W.3d 35 (Tex. Crim. App. 2016)

Defendant failed to demonstrate that but for counsel's errors in failing to advise him of mandatory deportation consequences of pleading guilty he would have rejected the plea bargain and gone to trial.

*Ex parte Hudgins*, No. PD-0163-17, 2018 WL 525716 (Tex. Crim. App. 2018)

Ineffective assistance not proven when expert testified as to how an assault might cause PTSD but failed to testify as to how this affected applicant.

*Weaver v. Massachusetts*, 137 S.Ct. 1899 (2017)

Defendant not prejudiced by counsel's failure to object to courtroom closure.

*Rosales v. State*, 841 S.W.2d 368, 376-78 (Tex. Crim. App. 1992)

Limited use of character witnesses upheld as reasonable tactical choice.