

INEFFECTIVE ASSISTANCE OF COUNSEL

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Texas Monthly Super Lawyer - Criminal Law, 2003-2017
Best Lawyers in America in Appellate Law, White Collar Criminal Defense and Non-White Collar Criminal Defense, 2006-2017
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, 53 S.Ct. 55, 77 L.Ed. 158 (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, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (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, 101 S.Ct. 665, 667, 66 L.Ed.2d 564 (1981). Absent the effective assistance of counsel "a serious risk of injustice infects the trial itself." *Cuyler v. Sullivan*, 446 U.S. 335, 343, 100 S.Ct. 1708, 1715, 64 L.Ed.2d 333 (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, 87 S.Ct. 1396, 1399, 18 L.Ed.2d 493 (1967).

The Legal Standard

The United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (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, 104 S.Ct. at 2064.

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 (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, 100 S.Ct. at 1716. It also applies to all stages of a criminal trial. *See, Hernandez v. State*, 988 S.W.2d 770 (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, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)(prejudice prong of *Strickland* requires defendant to show that but for counsel’s errors he would not have entered a guilty plea). It also applies to an attorney’s performance in handling an appeal. *See, Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (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).

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 (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. Rasmisel*, 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 Amezquita*, 223 S.W.3d 363 (Tex. Crim. App. 2006) (failure to investigate evidence that someone else committed the crime); *Wiggins v. Smith*, 539 U.S. 510 (2003) (failure to conduct reasonable investigation is ineffective assistance); *Ex parte Briggs*, 187 S.W.3d 458 (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 [14th 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 (5th 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 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 (Tex. App. 1991); *Ex parte Raborn*, 658 S.W.2d 602 (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 (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 (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.

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, 104 S.Ct. 2039, 2046, 80 L.Ed.2d 657 (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, 104 S.Ct. at 2047 (citing in illustration *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (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). “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, 104 S.Ct. at 2047 n. 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, 122 S.Ct. 1843, 1851, 152 L.Ed.2d 914 (2002) (noting that difference between situations addressed by *Strickland* and *Cronin* 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). 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 writ of habeas corpus even if not raised first in the trial court. *Robinson v. State*, *supra* at 812-13.

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.

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); *also see, United States v. Cronin*, *supra* at 658, 104 S.Ct. at 2046 (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). 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); *also see, 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). 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. Rusmiser*, 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; 104 S.Ct. at 2064 (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, 104 S.Ct. at 2068. 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, 104 S.Ct. at 2064. 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, 104 S.Ct. at 2067. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068.

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, 121 S.Ct. 696, 700, 148 L.Ed.2d 604 (2001).

Conclusion

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, 104 S.Ct. at 2063.

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.

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.

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.

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.

Guilt-Innocence Trial Errors

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.

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 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.

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 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.

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.

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.

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

Counsel ineffective where he periodically slept during the 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.

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

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

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.

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.

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 advice 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 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.

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.

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.

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

Counsel ineffective based on failure to object that indictment barred by statute of limitations.

Punishment Phase

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.

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.

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.

Examples of "Effectiveness"

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.

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.