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APPLICATIONS FOR WRIT OF HABEAS CORPUS

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I. General Requirements

Art. 11.07 governs writ applications on non-death penalty cases. Art. 11.071 applies to writs on death penalty cases. In order to obtain relief on an Application for Writ of Habeas Corpus, the following requirements must be met:

a. Non-Death Cases: The Application must seek relief from a felony judgment imposing a penalty other than death. 11.07, Sec. 1.

Death Cases: Entitled to competent court appointed counsel. Counsel appointed immediately after conviction. 11.071, Sec. 1. Writ application must be filed within 180 days from appointment of counsel or not later than the 45th day after the date the state's brief is filed on direct appeal, whichever date is later. May receive one 90 day extension. 11.071, Sec. 4(a) and (b).

b. The underlying case must be a final conviction (not probation and not on appeal), 11.07, Sec. 3, *Ex parte Johnson*, 12 S.W.3d 472 (Tex. Crim. App. 2000).

c. Must raise constitutional or fundamental errors. *Ex parte Graves*, 70 S.W.3d 103 (Tex. Crim. App. 2002). Relief not available by way of habeas corpus for violations of procedural statutes. *Ex parte McCain*, 67 S.W.3d 204 (Tex. Crim. App. 2002).

d. Must challenge the applicant's conviction or sentence and not conditions of confinement. *Ex parte Reyes*, 209 S.W.3d 126 (Tex. Crim. App. 2006); Cannot be used to seek relief from violations of procedural statutes. *McCain v. State*, 67 S.W.3d 204 (Tex. Crim. App. 2002).

e. Must allege some form of confinement. "Confinement means confinement for any offense or any collateral consequences resulting from the conviction that is the basis

of the instant habeas corpus." 11.07, Sec. 3(c). Parole is considered restraint that allows habeas writ. *Ex parte Elliot*, 746 S.W.2d 762 (Tex. Crim. App. 1988).

f. Application must be filed with the District Clerk of the county of conviction. Art. 11.07, Sec. 3(b); 11.071, Sec. 4(a).

g. An applicant must plead and prove facts which entitle him to relief and must prove his claim by a preponderance of the evidence. *Ex parte Rains*, 555 S.W.2d 478 (Tex. Crim. App. 1976).

h. Must use the form prepared by the Court of Criminal Appeals in an 11.07 writ. Must set out clams on the form. Attaching memorandum with claims set out is insufficient. *Ex parte Blacklock*, 191 S.W.3d 718 (Tex. Crim. App. 2006).

II. District Court's Duties

a. State has 15 days after service of Application to file answer. 11.07, Sec. 3(b). On death penalty case, the state has 120 days to file an answer. 11.071, Sec. 7(a).

b. "Within 20 days of the expiration of time for state to answer, it shall be duty of the convicting court to decide whether there are controverted, previously unresolved facts material to the legality of the applicant's confinement." 11.07, Sec. 3(c); 11.071, Sec. 8(a).

c. "If convicting court decides there are controverted, previously unresolved facts which are material to the legality of the applicant's confinement, it shall enter an order within 20 days of the expiration of the time allowed for the state to reply, designating the issues to be resolved." 11.07, Sec. 3(d). 11.071, Sec. 8(a), 9(a). Once this order is entered, the trial court should resolve the issues. *McCree v. Hampton*, 824 S.W.2d 578 (Tex. Crim. App. 1992). The designation of issues suspends the time limits set

out in 11.07. *McCree*, *supra.* There is no particular form for this order. It is sufficient if the Court simply states "The Court finds there are controverted, previously unresolved facts material to the legality of applicant's confinement, *i.e.*, whether he received ineffective assistance of counsel. These issues shall be resolved by affidavits and an evidentiary hearing." In a death penalty case, there are time limits for the court to hold a hearing and resolve the issues. 11.071, Sec. 9.

d. "To resolve those issues, the court may order affidavits, depositions, interrogatories, additional forensic testing, and hearings, as well as using personal recollection. 11.07, Sec. 3(d); 11.071, Sec. 9(a).

e. "If convicting court decides there are no such issues, the clerk shall immediately transmit to the Court of Criminal Appeals a copy of the application, any answers filed, and a certificate reciting the date upon which that finding was made. 11.07, Sec. 3(c); in death penalty case if court determines there are no controverted issues, the parties shall file proposed findings on a date not later than 30 days. District court must enter findings within 15 days of the date of filing proposed findings. 11.071, Sec. 8(b) and (c).

f. District court issues Findings of Fact and Conclusions of Law which are transmitted to the Court of Criminal Appeals. 11.07, Sec. 3(d); 11.071, Sec. 8.

III. Facts that Bar Relief

a. If issue could have been raised on direct appeal, relief will not be granted on a habeas application. *Ex parte Cruzata*, 220 S.W.3d 518 (Tex. Crim. App. 2007).

b. Normally, an application for writ of habeas corpus should not raise matters that have been decided on direct appeal. *Ex parte Schuessler*, 846 S.W.2d 850 (Tex. Crim.

App. 1993).

c. Subsequent Writs. Court cannot consider merits or grant relief if a subsequent writ is filed after final disposition of an initial application challenging the same conviction unless the application contains sufficient specific facts establishing that:

1. the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application. 11.07, Sec. 4(a)(1).

2. by a preponderance of the evidence, but for a violation of the U. S. Constitution, no rational juror could have found the applicant guilty beyond a reasonable doubt. 11.07, Sec. 4(a)(2).

d. If ineffective assistance of counsel raised and rejected on direct appeal because record is not adequately developed, it may be relitigated on habeas corpus. *Ex parte Torres*, 943 S.W.2d 469 (Tex. Crim. App. 1997).

e. Fourth Amendment violations are generally not cognizable on a writ. In *Ex parte Kirby*, 492 S.W.2d 579 (Tex. Crim. App. 1973), the court held that the failure to raise the question of sufficiency of an affidavit for a search warrant on direct appeal was tantamount to an abandonment of that claim and would not be considered for the first time on a writ. An applicant can still raise ineffective assistance of counsel based on the failure of the attorney to challenge an illegal search.

f. The Court of Criminal Appeals has ruled that a claim of insufficiency of the evidence cannot be raised on a writ of habeas corpus. *Ex parte Easter*, 615 S.W.2d 719 (Tex.

Crim. App. 1981). This is the type of claim that can be raised on direct appeal. A claim of no evidence can be raised on a writ application. *Ex parte Perales*, 215 S.W.3d 418 (Tex. Crim. App. 2007).

IV. Decision By Court of Criminal Appeals

a. Court of Criminal Appeals may grant or deny relief based on findings and conclusions of trial court. 11.07, Sec. 5; 11.071, Sec. 11. The trial court cannot grant or deny relief. Rather, the trial court makes factual findings and recommends to the Court of Criminal Appeals that the application be granted or denied. *Ex parte Williams*, 561 S.W.2d 1 (Tex. Crim. App. 1978). Trial judge is original factfinder but Court of Criminal Appeals is ultimate factfinder. *Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008)

b. The Court of Criminal Appeals is not bound by the findings, conclusions or recommendations of a trial court. However, because the trial court is in a better position to make determinations of credibility, the Court of Criminal Appeals should defer to those findings if they are supported by the record. *Ex parte Thompson*, 153 S.W.3d 416 (Tex. Crim. App. 2005); *Ex parte Bates*, 640 S.W.2d 894, 898 (Tex. Crim. App. 1982); *Ex parte Turner*, 545 S.W.2d 470, 473 (Tex. Crim. App. 1977).

c. The Court of Criminal Appeals defers to the factual findings of the trial judge even when those findings are based on affidavits rather than live testimony. *Manzi v. State*, 88 S.W.3d 240 (Tex. Crim. App. 2002).

V. Decision on Whether Live Evidentiary Hearing is Necessary

11.07 gives the trial court leeway on how evidence is gathered on a writ application. On some issues, affidavits may be sufficient. However, on issues that involve a judgment concerning

credibility, a live evidentiary hearing is preferable. On some occasions, the Court of Criminal Appeals will order the trial court to conduct a live hearing. *See*, *Ex parte Brown*, 205 S.W.3d 538 (Tex. Crim. App. 2006) (Court of Criminal Appeals remanded for a live hearing). A good example of the necessity for a hearing is *Ex parte Thompson*, 153 S.W.3d 416 (Tex. Crim. App. 2005). In *Thompson*, the trial court heard testimony from the alleged victim of a sexual assault recanting the testimony she gave as a child. The trial court heard the testimony and concluded that the recantation was credible and the Court of Criminal Appeals deferred to this fact finding.

Claims of ineffective assistance of counsel frequently require an evidentiary hearing. Where there is a dispute between the client and attorney over what occurred, the trial court is required to make a credibility determination that can best be made after a live hearing.

Gallego v. United States, 174 F.3d 1196 (11th Cir. 1999) is particularly instructive on the question of judging credibility when counsel and the client disagree on factual questions. The issue in *Gallego* whether the defendant's counsel rendered ineffective assistance of counsel. In *Gallego*, the Court stated:

> It is perfectly legitimate for the district court to find, based on all the evidence in the record, that a defendant's testimony about his participation in a drug scheme is not credible. The magistrate judge here, however, based the decision on the fact that the defendant's allegations were unsubstantiated and incorrectly found as a matter of law that defendant could not carry his burden without presenting some evidence in addition to his own word, which is contrary to that of counsel's. The magistrate says nothing about the internal consistency of the defendant's testimony, or his candor or demeanor on the stand. Indeed, the magistrate does not even state simply why the defendant's lawyer is the more credible witness in this case. There is nothing in the report to indicate the magistrate weighed defendant's credibility. Compare *United States v. Camacho*, 49 F.3d 349 (11th Cir. 1994) (court made specific findings of fact after an evidentiary hearing regarding defendant's credibility), *cert. denied*, 514 U.S. 1090, 115 S.Ct. 1810, 131 L.Ed.2d 735 (1995). The fact that defendant's testimony is uncorroborated is not enough standing alone to support a credibility finding. Counsel's testimony was also unsubstantiated by other evidence.
>
> While we appreciate the concerns enunciated in *Underwood*, we cannot adopt a per se "credit counsel in case of conflict rule," which allows that in any case where the

> issues comes down to the "bare bones testimony" of the defendant against the contradictory testimony of counsel, defendant is going to lose every time. We therefore remand for a new evidentiary hearing.

Id. at 1198-99.

VI. Typical Issues Raised in Writ Applications

The three most common issues raised in writ applications are ineffective assistance of counsel, suppression of exculpatory evidence and new evidence establishing actual innocence. The vast majority of meritorious writs will fall within one of these categories.

a. 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)).

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 even 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).

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. Cronic,* 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. Cronic, supra* at 659 n. 26, 104 S.Ct. at 2047 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) en banc; 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 *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). 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. 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. Cronic, 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. Rusmisel,* 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

Ex parte Ard, 2009 WL 618982 (Tex. Crim. App. 2009)
Attorney's failure to adequately present expert testimony to jury.

Ex parte Gonzales, 204 S.W.3d 391 (Tex. Crim. App. 2006)
Attorney's failure of trial counsel to investigate and present mitigating evidence in capital murder case of defendant being abused as a child.

Ex parte Amezquita, 223 S.W.3d 363 (Tex. Crim. App. 2006)
Attorney's failure of trial counsel to investigate information that someone else committed

the crime.

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 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.

Woods v. State, 59 S.W.3d 833 (Tex. App. - Texarkana 2001, pet. granted)

When record contains a substantial amount of evidence about defendant's mental health history it was ineffective for defense counsel to fail to request the court appointed assistance of a mental health expert.

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

Failure of defense counsel to inform defendant of plea offer made by the State is an omission that falls below an objective standard of professional reasonableness. Defendant is prejudiced by missed opportunity of accepting offer and presenting it to the trial judge for consideration.

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.

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

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

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

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

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.

Ex parte Graves, 70 S.W.3d 103 (Tex. Crim. App. 2002)

There is no right to effective assistance of counsel in a habeas proceeding because there is no constitutional right to counsel in such a proceeding.

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.

b. Suppression of Exculpatory Evidence

The failure of prosecutors to reveal exculpatory evidence to defendants and their attorneys is an appropriate ground for an application for writ of habeas corpus. *Ex parte Lewis*, 587 S.W.2d 697, 701 (Tex. Crim. App. 1979).

Review of Law

The seminal case concerning exculpatory evidence is *Brady v. Maryland*, 373 U.S. 83, 83

S.Ct. 1194, 10 L.Ed.2d 215 (1963). *Brady* was charged with murder and tried separately from his codefendant. At Brady's trial, he admitted participation in the crime but contended that his codefendant had done the actual killing. Prior to trial, Brady's counsel requested access to the statements made by the codefendant. He was shown some statements but the prosecution withheld a statement where the codefendant admitted the killing. After Brady's direct appeal, he gained access to this exculpatory statement and brought a post conviction challenge to his conviction alleging a violation of due process based on the prosecutor withholding this favorable evidence. In *Brady*, the Supreme Court stated the following:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

In *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), the Court further explored the question of suppression of exculpatory evidence and stated that "when the prosecutor receives a specific and relevant request (for exculpatory evidence) the failure to make any response is seldom, if ever, excusable." The *Agurs* court also noted that, "if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made." Specifically, the Court in *Agurs* distinguished three situations in which a *Brady* claim might arise: first, where previously undisclosed evidence revealed that the prosecution introduced trial testimony that it knew or should have known was perjured, 427 U.S. at 103-104, 96 S.Ct. at 2397-2398. In this situation, the Court said that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have

affected the judgment of the jury."[1] *Agurs*, 427 U.S. at 103 (see also, *United States v. San Filippo*, 564 F.2d 176, 178 (5th Cir. 1977) ("due process is violated when the prosecutor although not soliciting false evidence from a government witness, allows it to stand uncorrected when it appears"); second, where the Government failed to accede to a defense request for disclosure of

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[1]In *Ramirez v. State*, 2002 WL 1723751 (Tex. App. - Austin), the Court reversed a case based on the prosecution's failure to correct false testimony from a State's witness that she was not looking for money based on being a victim of the crime alleged even though she had hired a lawyer to pursue a lawsuit. The Court in *Ramirez* summarized the law as follows:

> "In *Giglio v. United States*, 405 U.S. 150, 153, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the Court acknowledged that since *Mooney*, it has been clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'the rudimentary demands of justice.' *See Pyle v. Kansas*, 317 U.S. 213, 216, 63 S.Ct. 177, 87 L.Ed. 214 (1942). And in *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), the Court concluded that the same result obtains when the prosecution, 'although not soliciting false evidence, allows it to go uncorrected when it appears.' *Id*. at 269, 79 S.Ct. 763. When the reliability of a given witness may well be determinative of the guilt or innocence of an accused, nondisclosure of evidence affecting credibility falls within the general rule discussed. *Giglio*, 405 U.S. at 154, 92 S.Ct. 763. This line of cases has sometimes been referred to as the *Mooney-Pyle-Napue* line of decisions. See 42 George E. Dix & Robert O. Dawson *Texas Practice: Criminal Practice and Procedure* §22.51 (2d ed.2002) (hereinafter Dix); *see also generally Giles v. Maryland*, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967); *Miller v. Pate*, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967); *Alcorta v. Texas*, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957); *Ex parte Castellano*, 863 S.W.2d 476 (Tex. Crim. App. 1993); *Ex parte Adams*, 768 S.W.2d 281 (Tex. Crim. App. 1989); *Davis v. State*, 831 S.W.2d 426 (Tex. App. - Austin 1992, no pet.).
>
> Although *Brady* relied upon *Mooney*, *see Kyles v. Whitley*, 514 U.S. 419, 432, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), and there have been suggestions that the *Mooney* line of cases were incorporated in the later *Brady* rule, the two lines of decision are distinctive. *See United States v. Agurs*, 427 U.S. 97, 104, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). It has been stated: Although *Brady v. Maryland* and its progeny suggest the due process to disclose may have superseded and replaced the prohibition against the use of perjured testimony, this is not the case. The prohibition against the use of perjured testimony remains available to defendants as an alternative to *Brady* arguments. *Mooney* contentions are sometimes more attractive to defendants because the criterion for determining the materiality of improperly used perjured testimony is more lenient than that for determining the materiality of improperly suppressed exculpatory evidence under *Brady*. The difference between the two due process rules is not entirely clear. Some situations will present viable arguments that both were violated. If a defendant is able to establish both that the State knowingly used perjured testimony and that it failed to disclose evidence showing the falsity of the testimony, the defendant is entitled to relief if he or she can show the testimony used is material under the perjured testimony line of decisions and its more relaxed materiality standard. Dix §22.5 (citations omitted)
>
> While appellant relies upon both due process rules, we conclude it is necessary to examine only the *Mooney-Pyle-Napue* line of decisions to reach the proper disposition of appellant's contention. We review the record to determine if the State 'used' the testimony, whether the testimony was 'false,' whether the testimony was 'knowingly used,' and if these questions are affirmatively answered, whether there is a reasonable likelihood that the false testimony could have affected the judgment of the jury."

some specific kind of exculpatory evidence, *id*. at 104-107, 96 S.Ct. at 2398-2399; and third, where the Government failed to volunteer exculpatory evidence never requested, or requested only in a general way. The Court found a duty on the part of the Government even in this last situation, though only when suppression of the evidence would be "of sufficient significance to result in the denial of the defendant's right to a fair trial." *Id*. at 108, 96 S.Ct. at 2400.

United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), clarified the standard of review when exculpatory evidence is suppressed. First, the *Bagley* court rejected a distinction between cases when there was a specific request for exculpatory evidence and no request. *Bagley* set out a three part test for obtaining relief based on suppression of exculpatory evidence. (1) The prosecution withheld or suppressed evidence. (2) The evidence was favorable to the defense. (3) The evidence was material to either guilt or punishment. See also, *Ex parte Kimes*, 872 S.W.2d 700, 702-03 (Tex. Crim. App. 1993). Under *Bagley* the materiality test is met and a new trial required if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. This reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome". 473 U.S. at 682, 105 S.Ct. at 3383; see also, *Ex parte Adams*, 768 S.W.2d 281 (Tex. Crim. App. 1989) (Texas has adopted the *Bagley* test for materiality determinations when exculpatory evidence is suppressed). The *Bagley* court also held that the prosecution has a duty to disclose evidence that could be used to impeach the prosecution's witnesses. In *Bagley*, the prosecution had not disclosed incentives which had been offered witnesses contingent on the government's satisfaction with their testimony.

In *Bagley*, the Court expressed concern with "any adverse effect that the prosecutor's failure to respond (with exculpatory evidence) might have had on the preparation of the defendant's case." 473 U.S. at 683, 105 S.Ct. at 3384. See also, *Derden v. McNeel*, 938 F.2d 605, 617 (5th Cir. 1991)

(a reviewing court may consider any adverse effects the prosecutor's failure to release information might have had on the defendant's preparation and presentation of the case).

In *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), the Court discussed the showing necessary to obtain a new trial when the prosecution withholds exculpatory evidence. Under *Kyles,* this showing does not require a demonstration that the disclosure of this evidence would have resulted in an acquittal. Rather, as the Court stated, the question is "not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence, he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." 514 U.S. at 434, 115 S.Ct. at 1566. The *Kyles* court restated the materiality test as a determination as to whether there is a "reasonable probability" that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." The Court emphasized that this was not a sufficiency of the evidence test and did not require a showing that disclosure of the suppressed evidence would have resulted in the defendant's acquittal.

The Court in *Kyles* found reversible error in the prosecutions suppression of the following evidence in a Louisiana murder case: 1) contemporaneous eyewitness statement taken by the police following the murder that were favorable to Kyles; 2) various inconsistent statements by a police informant who had implicated Kyles and 3) a computer printout of license numbers of car parked at the crime scene on the night of the murder, which did not list Kyles' car.

Knowledge of government agents, such as police officers, of exculpatory evidence is imputed to the prosecution. *Williams v. Whitley*, 940 F.2d 132 (5th Cir. 1991); *U. S. v. Auten*, 632 F.2d 478 (5th Cir. 1980). Therefore, if a police officer has exculpatory evidence, this is the same as a prosecutor having it, and it must be turned over to the defense. See *Kyles,* 115 S.Ct. at 1566, ("the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the

government's behalf in the case, including the police."); *United States v. Brooks*, 966 F.2d 1500 (D.C. Cir. 1992) (discussing duty of prosecutor to search files of other agencies); *O'Rarden v. State*, 777 S.W.2d 455 (Tex. App. - Dallas 1989, pet. ref'd) (prosecution team includes investigators); *Carey v. Duckworth*, 738 F.2d 875 (7th Cir. 1984) (prosecution cannot evade *Brady* requirements by keeping itself ignorant of information). See also, *Jones v. Chicago*, 856 F.2d 985 (7th Cir. 1988) (criticizing police for withholding information from prosecutor in order to circumvent *Brady* rule). In *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991), the court held that when the government is confronted with a request by a defendant for the personnel files of testifying officers the government has a duty to examine those files and must disclose information favorable to the defense that meets the materiality standard. The court held that if the government is uncertain about its materiality the evidence should be submitted to the court.

Additionally, the duty to disclose exculpatory evidence is ongoing and the State must disclose it whenever it is discovered. *Flores v. State*, 940 S.W.2d 189, 191 (Tex. App. - San Antonio, 1996, no pet.).

In *Strickler v. Greene*, 527 U.S. 263 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999), the Supreme Court reiterated the standard of review for determining *Brady* claims. However, *Strickler* demonstrated the heavy burden the Courts place on defendants to demonstrate prejudice when the prosecution withholds exculpatory evidence. In *Strickler*, the court found that the prosecution withheld exculpatory evidence but concluded that the defendant did not show prejudice because there was strong evidence in the record that the defendant in that capital murder case would have been convicted and sentenced to death even if the prosecution had revealed the suppressed exculpatory evidence. Specifically in *Strickler* the prosecutor failed to disclose exculpatory materials in the police files, consisting of notes taken by a detective during interviews with an eyewitness and

letters written to the detective by the eyewitness, that cast serious doubt on significant portions of her testimony. However, there was additional strong physical evidence and witness testimony that the court found to provide sufficient support for the conclusion that the defendant would have been convicted and sentenced to death even if the witness had been severely impeached or her testimony excluded entirely.

Texas courts have reversed a few cases based on the suppression of exculpatory evidence by the prosecution. The Texas courts essentially follow the same reasoning as the Supreme Court in analyzing these cases.

In *Thomas v. State*, 841 S.W.2d 399 (Tex. Crim. App. 1992), the defense filed a motion requesting exculpatory evidence. The prosecutor responded in the usual way and said the state had no exculpatory evidence. At the trial, the State's witnesses testified that they saw the defendant drag the deceased behind an apartment building and shoot him. The State suppressed the following exculpatory evidence: A different witness named Walker was interviewed by the police several days after the shooting and the prosecutor personally interviewed Walker about one month after the shooting. The prosecutor and the prosecutor's investigator also interviewed Walker in the courtroom the first day of trial. After that interview, Walker disappeared and was not available to testify at trial. In all of his interviews, Walker told the State officials that he arrived at the apartment and went upstairs to watch a movie. When he arrived, he saw the defendant in front of the apartments. While Walker was upstairs, he heard arguing and gunshots in the back of the apartments. He ran downstairs and saw the defendant in the front of the apartments. He said that the defendant could not have gotten from the back of the apartments when the shooting occurred to the front that fast because Walker ran down the stairs in a few seconds, and therefore the defendant did not do the shooting.

After trial, the defense learned of this evidence and Walker's testimony was presented at a motion for new trial. Both the trial court and Court of Appeals refused to order a new trial. However, the Court of Criminal Appeals reversed and held that there was a reasonable probability that the result of the proceeding would have been different with Walker's testimony.

Several years ago, the Texas Court of Criminal Appeals reversed a capital murder conviction based on the suppression of exculpatory evidence. In *Ex parte Richardson*, 70 S.W.3d 865 (Tex. Crim. App. 2002), the prosecution failed to disclose the existence of a diary kept by a police officer with the Lubbock Police Department that contained substantial information that could have been used to impeach the State's star witness. This diary was written while the officer was guarding the witness during a period of protective custody. The officer who maintained the diary testified at the post-conviction writ hearing that she kept the diary to protect herself and other officers from false accusations by the witness. The diary contained information about false accusations and statements made by the witness about the officers. At the writ hearing, the officer who wrote the diary as well as five other officers testified the witness was not a truthful person. None of this information had been revealed to the defense. Based on this evidence, the Court of Criminal Appeals found that the three part test for obtaining relief under *Brady* was met. The Court specifically found that the State failed to disclose the existence of this exculpatory evidence, that the withheld evidence was favorable to the accused and that the evidence was material, that is, that there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different.

In *United States v. Ruiz*, 122 S.Ct. 2450 (2002), the Supreme Court held that the Constitution does not require the government to disclose material impeachment evidence prior to entering into a plea agreement.

The Court of Criminal Appeals has also held that the *Brady* rule did not apply when the

accused was already aware of the information. *Hayes v. State*, 85 S.W.3d 809 (Tex. Crim. App. 2002); *Harvard v. State*, 800 S.W.2d 195, 204 (Tex. Crim. App. 1989).

If the defendant discovers previously withheld evidence during trial, or close to trial, it is necessary to request a continuance in order to preserve error for appeal. *Lindley v. State*, 635 S.W.2d 541, 544 (Tex. Crim. App. 1982); *Williams v. State*, 995 S.W.2d 754, 762 (Tex. App. - San Antonio 1999, no pet.); *Gutierrez v. State*, 85 S.W.2d 446 (Tex. App. - Austin 2002).

Specific Cases

Reversals of convictions for suppression of exculpatory evidence arise in a variety of circumstances. A sampling of such cases follows:

Supreme Court Cases

Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972): Government failed to disclose impeachment evidence of a promise of immunity in exchange for testimony.

Kyles v. Whitley, *supra*: State suppressed the following evidence in murder case: contemporaneous eyewitness statements taken by the police which would have undermined the state's eyewitness testimony, various inconsistent statements made to the police by an informant and a list of cars at the crime scene.

Miller v. Pate, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967): Habeas granted where prosecution knowingly misrepresented paint-stained shorts as blood-stained, and failed to disclose the true nature of the stains.

Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959): "When reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of immunity deal with witness violates Due Process.

Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987): Defendant

entitled to any exculpatory evidence in child welfare agencies files.

Banks v. Dretke, 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004). The failure of the state to disclose that it had rehearsed the testimony of two witnesses used in both the guilt and penalty stage of a capital prosecution, especially when the witnesses denied any prior conversations with the prosecution, together with a false denial that one of the witnesses was an informant who received both money and accommodations from the state, constituted a violation of due process under *Brady v. Maryland*. In remanding the case for further consideration by a federal court considering *habeas* relief, the Court emphasized that "materiality" for the purpose of the *Brady* doctrine does not require a demonstration that, with the undisclosed evidence the defendant would have prevailed, but only a showing of reasonable probability that, with the evidence the outcome would have been different.

Youngblood v. West Virginia, 547 U.S. 867, 126 S.Ct. 2188, 165 L.Ed.2d 269 (2006). *Brady* requires the government to disclose evidence which relates to impeachment as well as exculpatory evidence. It also applies to evidence known only to the police and not the prosecutors. In *Youngblood*, the police evidently knew of a handwritten statement of two alleged victims of a sexual assault which substantially impeached their testimony that their conduct with the petitioner was not consensual.

United States v. Vonn, 535 U.S. 55, 122 S.Ct. 1043, 152 L.Ed.2d 90 (2002). In offering a defendant a "fast track plea bargain," the government was not obligated, under either the Fifth or Sixth Amendments, to disclose impeachment information relating to informants and witnesses. "Exculpatory evidence includes evidence affecting witness credibility, where the witness' reliability is likely determinative of guilt or innocence." However, a unanimous Court found this principle which requires disclosure prior to trial is inapplicable at the plea stage, at least with regard to

information which might be useful for impeachment purposes: "It is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may or may not help a particular defendant."

Texas Cases

Ball v. State, 631 S.W.2d 809 (Tex. App. - Eastland 1982, pet ref'd): Error not to disclose picture of defendant with black eye at time of arrest when self defense claimed.

Collins v. State, 642 S.W.2d 80 (Tex. App. - Fort Worth 1982): State did not tell defense material witnesses name or location.

Cook v. State, 940 S.W.2d 623 (Tex. Crim. App. 1996): Withheld evidence that the defendant knew victim and had been to her apartment and failed to disclose material inconsistent statements of a key witness to the Grand Jury.

Crutcher v. State, 481 S.W.2d 113 (Tex. Crim. App. 1972): Witnesses inconsistent statements.

Ex parte Adams, 768 S.W.2d 281 (Tex. Crim. App. 1989): Crime victims prior inconsistent statement.

Ex parte Brandley, 781 S.W.2d 886 (Tex. Crim. App. 1989): Inconsistent statement by witnesses.

Ex parte Lewis, 587 S.W.2d 697 (Tex. Crim. App. 1979): Existence of doctors letter stating defendant was insane.

Ex parte Turner, 545 S.W.2d 470 (Tex. Crim. App. 1977): Fact that police officer aided in obtaining release of main witness.

Flores v. State, 940 S.W.2d 189, 191 (Tex. App. - San Antonio 1996, no pet.): Witness

statement that was material in corroborating defendant's argument that victim shot herself.

Granger v. State, 653 S.W.2d 868 (Tex. App. 13 Dist. 1983), aff'd, 683 S.W.2d 387 (Tex. 1984), *cert. denied*, 472 U.S. 1012 (1985): Failure to disclose existence of a deal that changed witness's sentence from death to lie.

Ham v. State, 760 S.W.2d 55 (Tex. App. - Amarillo 1988, no pet.): Prosecution withheld doctors report which supported defense position and refuted prosecution.

Jones v. State, 850 S.W.2d 223 (Tex. App. - Fort Worth 1993): Prosecution failed to disclose in a timely manner exculpatory information in a victim impact statement which negated the evidence of defendant's intent to shoot the victim.

O'Rarden v. State, 777 S.W.2d 455 (Tex. App. - Dallas 1989, pet. ref'd): Failure to provide defense copy of Dept. of Human Resources report which indicated no sexual abuse occurred.

Thomas v. State, 841 S.W.2d 399 (Tex. Crim. App. 1992): Witness statement to police that defendant was not in a physical position to have been able to commit the offense.

Ex parte Masonheimer, 220 S.W.3d 494 (Tex. Crim. App. 2007) (double jeopardy barred a third trial of a defendant whose mistrial motions were necessitated primarily by state's intentional failure to disclose exculpatory evidence under *Brady* with the specific intent to avoid the possibility of an acquittal).

Harm v. State, 183 S.W.3d 403 (Tex. Crim. App. 2006). Child Protective Services was not acting as a State agent, and thus knowledge of records from CPS that allegedly indicated that, in the past, victim had made unfounded allegations of sexual abuse and had engaged in inappropriate sexual behavior, could not be imputed to State as a basis for asserting that failure to disclose such information constituted a *Brady* violation in prosecution for indecency with a child; records were created in the course of an non-criminal investigation that was unrelated to defendant, but within the

duties of CPS to protect the welfare and safety of the children, and the records significantly predated the allegations against defendant.

Keeter v. State, 175 S.W.3d 756 (Tex. Crim. App. 2005). Defendant did not preserve *Brady* claim for review when he moved for new trial on ground that evidence establishing innocence was withheld by material prosecution witness; the evidence allegedly showing preservation was relevant to claim of actual innocence, the defendant did not mention *Brady* in his motion or during the hearing on the motion and did not include any *Brady*-related cases in his post-hearing submission, and neither the state nor the trial court understood that the defendant was raising a *Brady* claim.

Federal Cases

Ballinger v. Kirby, 3 F.3d 1371 (10th Cir. 1993): Exculpatory photograph.

Banks v. Reynolds, 54 F.3d 1508 (10th Cir. 1995): Fact that another person had been arrested for the same crime.

Boone v. Paderick, 541 F.2d 447 (4th Cir. 1976): Prosecutor did not disclose deal with accomplice/witness for leniency.

Bowen v. Maynard, 799 F.2d 593 (8th Cir. 1986): Evidence that former police officer was initial suspect in the murder for which defendant was convicted.

Brown v. Borg, 951 F.2d 1011 (9th Cir. 1991): Knowledge by prosecutor that her theory of the case was wrong.

Carter v. Rafferty, 826 F.2d 1299 (3rd Cir. 1987): Reports of polygraph test given to important prosecution witness, but see *Wood v. Bartholomew*, 516 U.S. 1, 116 S.Ct. 7, 133 L.Ed.2d 1 (1995) (because polygraphs are inadmissable even for impeachment they are not subject to *Brady*).

Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984): Conviction affirmed but death sentence reversed where withheld evidence contradicted prosecution's theory of the murder and placed

defendant 110 miles from the scene.

Derden v. McNeel, 932 F.2d 605 (5th Cir. 1991): Radio log that would have impeached State's witnesses.

DuBose v. Lefevre, 619 F.2d 973 (2nd Cir. 1980): State's encouragement to witness to believe that favorable testimony would result in leniency toward the witness.

Guerra v. Johnson, 90 F.3d 1075 (5th Cir. 1996): Information showing police intimidation of witness and failure to disclose evidence regarding who was seen carrying the murder weapon shortly after the shooting.

Hudson v. Whitley, 979 F.2d 1058 (5th Cir. 1992): Evidence that the State's only eyewitness had initially identified someone else, and that person had been arrested.

Hughes v. Bowers, 711 F.Supp. 1574 (N. D. Ga. 1989), *aff'd*, 896 F.2d 558 (11th Cir. 1990): Evidence that the State's eyewitness to the murder stood to benefit from the life insurance policy of the victim if the defendant was convicted.

Jackson v. Wainwright, 390 F.2d 288 (5th Cir. 1968): Racial misidentification case, where prosecutor failed to reveal prior identification problem.

Jacobs v. Singletary, 952 F.2d 1282 (11th Cir. 1992): Failure to disclose statements of witness to polygraph examiner which contradicted trial testimony.

Jean v. Rice, 945 F.2d 82 (4th Cir. 1991): State under duty to disclose information concerning hypnosis session that enabled witness to identify the defendant.

Jones v. Jago, 575 F.2d 1164 (6th Cir. 1978): State withheld, despite defense request, a statement from coindictee who, prior to trial, had been declared material witness for prosecution, and against whom all charges were then dropped.

Lindsey v. King, 769 F.2d 1034 (5th Cir. 1985). Suppression of initial statement of

eyewitness to police in which he said he could not identify the murderer because he never saw the murderer's face.

McDowell v. Dixon, 858 F.2d 945 (4th Cir. 1988): Witness's initial statement that attacker was white when the defendant was black.

Miller v. Angliker, 848 F.2d 1312 (2nd Cir. 1988): Evidence which showed that another person committed the crimes with which defendant was charged.

Norris v. Slayton, 540 F.2d 1241 (4th Cir. 1976): Failure to furnish to rape defendant's counsel copy of lab report showing no hair or fiber evidence in defendant's undershorts or in victim's bed.

Orndorff v. Lockhart, 707 F.Supp. 1062 (E.D. Ark. 1988), *aff'd in part, vacated in part*, 906 F.2d 1230 (8th Cir. 1990): Failure to disclose that witness's memory was hypnotically refreshed during pretrial investigation.

Ouimette v. Moran, 942 F.2d 1 (lst Cir. 1991): Information about extensive criminal record of State's witness and the existence of a deal with state's witness.

Reutter v. Solem, 888 F.2d 578 (8th Cir. 1989): Withholding of fact that key witness had applied for commutation and been scheduled to appear before parole board a few days after his testimony.

Sellers v. Estelle, 651 F.2d 1074 (5th Cir. 1981): Police reports containing admissions by other persons of involvement in the offense.

Simms v. Cupp, 354 F.Supp. 698 (D. Ore. 1972): Suppression of original description by witness which differed from her trial testimony.

Spicer v. Roxbury Correctional Institution, 194 F.3d 547 (4th Cir. 1999): Inconsistent statement by government witness as to whether he was really an eyewitness to the crime.

Troedel v. Wainwright, 667 F.Supp. 1456 (S.D. Fla. 1986): State failed to disclose instances of codefendant's propensity for violence when this supported defense theory.

United States v. Beasley, 576 F.2d 626 (5th Cir. 1978): Failure of government to timely produce statement of prosecution witness when the statement at issue differed from witness' trial testimony.

United States v. Boyd, 55 F.3d 239 (7th Cir. 1995): Prosecutor failed to reveal to defense drug use by prisoner witnesses during trial and "continuous stream of unlawful" favors prosecution gave those witnesses.

United States v. Brumel-Alvarez, 976 F.2d 1235 (9th Cir. 1992): Memorandum by government agent containing information about credibility of informant.

United States v. Butler, 567 F.2d 885 (9th Cir. 1978): Government failed to disclose that the witness had been promised a dismissal of the charges against him.

United States v. Cadet, 727 F.2d 1453 (9th Cir. 1984): Names and addresses of eyewitnesses to offense that State does not intend to call to testify.

United States v. Cuffie, 80 F.3d 514 (D.C. Cir. 1996): Evidence that prosecution witness had previously lied under oath in proceeding involving same conspiracy.

United States ex. rel. Smith v. Fairman, 769 F.2d 386 (7th Cir. 1985): Police ballistics report showing gun defendant allegedly used to fire at police was inoperable.

United States v. Fisher, 106 F.3d 622 (5th Cir. 1991): Government report reflecting on credibility of key government witness.

United States v. Foster, 874 F.2d 491 (8th Cir. 1988): Failure by prosecutor to correct false testimony.

United States v. Gerard, 491 F.2d 1300 (9th Cir. 1974): Defendants deprived of evidence

of promise of leniency by prosecutor, and failure to disclose that witness was in other trouble, thereby giving him even greater incentive to lie.

United States v. Herberman, 583 F.2d 222 (5th Cir. 1978): Testimony presented to grand jury that contradicted testimony of government witnesses.

United States v. Minsky, 963 F.2d 870 (6th Cir. 1992): Withholding from defense fact that witness lied to Grand Jury.

United States v. Pope, 529 F.2d 112 (9th Cir. 1976): Prosecution failed to disclose plea bargain with witness in exchange for testimony and argued to the jury that the witness had no reason to lie.

United States v. Sheehan, 442 F.Supp. 1003 (D. Mass. 1977): Only eyewitness to see the robber's faces unmasked during a bank robbery was not called to testify because he hesitated in his identification of the defendant.

United States v. Spagnoulo, 960 F.2d 990 (11th Cir. 1992): Government failed to turn over a psychiatric report which indicated that the defendant may have been able to assert an insanity defense.

United States v. Sutton, 542 F.2d 1239 (4th Cir. 1976): Prosecutor withheld evidence that witness was coerced into testifying against defendant.

United States v. Udechukwu, 11 F.3d 1101 (lst Cir. 1993): Evidence to support defendant's theory that she had been coerced into being a drug courier.

United States v. Weintraub, 871 F.2d 1257 (5th Cir. 1989): Government withheld statement from a presentence report from witness indicating that the defendant was responsible for much smaller amount of drugs than claimed.

Walter v. Lockhart, 763 F.2d 942 (8th Cir. 1985): For over twenty years, the State withheld

a transcript of a conversation supporting the defendant's claim that the officer shot at him first.

Tassin v. Cain, 517 F.3d 770 (5th Cir. 2008). State's failure to disclose in murder trial the understanding or agreement between witness and state, under which witness expected to gain beneficial treatment in sentencing for related crimes provided that she testified at trial consistently with her prior statements inculpating defendant, constituted Fourteenth Amendment violation under *Giglio*, even though witness had not received a firm promise of leniency from the judge or prosecutor.

Mahler v. Kylo, 537 F.3d 494 (5th Cir. 2008). *Brady* violation based on witness statements not disclosed by prosecution to defendant consisting of pretrial statements contradicting witnesses' testimony at trial that altercation had ceased and that victim was in process of moving away from defendant's relative at time that he fired the fatal shot.

Graves v. Dretke, 442 F.3d 334 (5th Cir. 2006). Witness's out-of-court statement that witness's wife was active participant in charged murders was exculpatory, for purpose of defendant's claim that state's suppression of statement violated *Brady*.

Timing of Disclosure

The ability to effectively utilize exculpatory evidence is largely dependent on the defendant's obtaining timely disclosure. In *United States v. Hart*, 760 F.Supp. 653 (E.D. Mich. 1991), the Court held that it was the court's responsibility to fix the timing for disclosure of exculpatory evidence. Other courts have issued opinions stating that disclosure must be made in time for effective use at trial. *United States v. Higgs*, 713 F.2d 39, 44 (3rd Cir. 1983); *United States v. Starusko,* 729 F.2d 256, 261 (3rd Cir. 1984).

Requesting Exculpatory Evidence

The prosecution has a duty to reveal exculpatory evidence even without a specific request

from the defense and regardless of the good faith or bad faith of the prosecution. *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *Thomas v. State*, 841 S.W.2d 399 (Tex. Crim. App. 1992).

c. New Evidence Establishing Actual Innocence

In *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996), the Court stated:

> *At the threshold, we must decide whether the Due Process Clause of the United States Constitution forbids, not just the execution, but the incarceration as well of an innocent person. We need not pause long to answer this question. . . . We think it clear . . . that the incarceration of an innocent person is as much a violation of the Due Process Clause as is the execution of such a person. It follows that claims of actual innocence are cognizable by this Court in a postconviction habeas corpus proceeding whether the punishment assessed is death or confinement. In either case, such claims raise issues of federal constitutional magnitude.*

Assertions of actual innocence are categorized either as *Herrera*-type claims or *Schlup*-type claims. *Herrera v. Collins,* 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993); *Schlup v. Delo,* 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). *See Elizondo,* 947 S.W.2d at 208; *Ex Parte Franklin*, 72 S.W.3d 671 (Tex. Crim. App. 2002). A *Herrera*-type claim involves a substantive claim in which the applicant asserts a bare claim of innocence based solely on newly discovered evidence. *Schlup,* 513 U.S. at 314, 115 S.Ct. 851. *See also Elizondo,* 947 S.W.2d at 208. A *Schlup*-type claim, on the other hand, is a procedural claim in which the applicant's claim of innocence does not alone provide a basis for relief but is tied to a showing of constitutional error at trial. *Schlup,* 513 U.S. at 314, 115 S.Ct. 851.

The *Herrera* decision serves as precedent for recognition of habeas relief when an actual innocence claim alone is raised. In *Herrera*, six members of the Court suggested execution of the innocent was antithetical to our constitutional system. Justice O'Connor, joined by Justice Kennedy, stated that "the execution of a legally and factually innocent person would be a constitutionally intolerable event." 506 U.S. at 420. Justice O'Connor then concluded that the existence of federal

relief for such a person need not be addressed in the case before the Court. *Id.* Justice White stated that "a persuasive showing of actual innocence made after trial . . . would render unconstitutional the execution of the petitioner in this case." *Id.* at 429. He also declined to finally decide the issue on the record before the Court. Justice Blackmun, joined in dissent by Justices Souter and Stevens, stated that executing an innocent person is the "ultimate arbitrary imposition" and unquestionably violates both the Eighth and Fourteenth Amendments.[2] *Id.* at 437.

The Court of Criminal Appeals agreed with the "sound and fundamental principle of jurisprudence" that the execution of an innocent person "would surely constitute a violation of a constitutional or fundamental right." *Holmes v. Honorable Court of Appeals for the Third Dist,* 885 S.W.2d 389, 397 (Tex. Crim. App. 1994). In *Elizondo,* this Court extended this holding, verifying that the Due Process Clause of the Fourteenth Amendment forbids the incarceration of an innocent person. 947 S.W.2d at 204.

This principle is essential in a constitutional system. "After all, the central purpose of any system of criminal justice is to convict the guilty and free the innocent." *Herrera*, 506 U.S. at 399. *See United States v. Nobles*, 422 U.S. 225, 230, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975). Further, in this context, no legally cognizable distinction exists between a prisoner sentenced to death and one sentenced to a term of imprisonment. "It would be a rather strange jurisprudence . . . which held that under our Constitution [the actually innocent] could not be executed, but that he could spend the rest of his life in prison." *Herrera*, 506 U.S. at 405.

The actual innocence jurisprudence of the State of Texas has developed primarily in the area of recantations on sexual assault and indecency with a child cases. DNA exonerations are an

[2] Justices Scalia and Thomas, concurring in the judgment of the Court, indicated execution of the innocent would not transgress the Constitution. 506 U.S. at 427-430. The majority of the Court simply assumed a violation, without deciding the issue.

additional area where new evidence establishing actual innocence has resulted in relief being granted based on actual innocence. *See*, *Ex parte Waller*, 2008 WL 4356811 (Tex. Crim. App. 2008).

In *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996), the court held that bare claims of actual innocence are cognizable in a habeas hearing. To merit relief, the applicant bears the burden of showing that the newly discovered evidence unquestionably establishes his innocence. The court reviewing the habeas claim must examine the new evidence in light of the evidence presented at trial. In order to grant relief, the reviewing court must believe that no rational juror would have convicted the applicant in light of the newly discovered evidence. In *Elizondo*, the trial evidence was perfunctory testimony by a 10 year old child that his mother and applicant made him and his younger brother watch sexually explicit videotapes and that both adults sexually molested the boys. Both children recanted 13 years after the trial when they were full-grown adults, saying their natural father "relentlessly manipulated and threatened them into making such allegations against the applicant in order to retaliate against the natural mother." They denied that any abuse occurred. The trial court found the recantation credible and the Court of Criminal Appeals granted relief.

In *Ex parte Thompson*, 153 S.W.3d 416 (Tex. Crim. App. 2005), the court granted relief based on the recantation by the applicant's 20 year old daughter of the allegation of sexual assault that was alleged to have occurred when she was 5 years old. Other cases where relief was granted have had similar fact patterns. *Ex parte Tuley*, 109 S.W.3d 388 (Tex. Crim. App. 2002) (defendant's guilty plea did not bar relief); *Ex parte Harmon*, 116 S.W.3d 778 (Tex. Crim. App. 2003).

In *Ex parte Brown*, 205 S.W.3d 538 (Tex. Crim. App. 2006), the court stated that establishing a bare claim of actual innocence in a post-conviction application for writ of habeas corpus is a "Herculean" task. In *Brown*, the court stated that to succeed on a habeas claim of actual innocence

based on newly discovered evidence the applicant must show by clear and convincing evidence that, despite the evidence of guilt that supports the conviction, no reasonable juror could have found him guilty in light of the new evidence. This showing must overcome the presumption that the conviction is valid and must unquestionably establish applicant's innocence. The evidence relied upon must be newly discovered or newly available. In *Brown*, the court denied relief because the evidence was not newly discovered. The evidence was the same as that attached to the applicant's motion for new trial two years earlier.

In reviewing a claim of actual innocence based on a recantation, the most important job of the trial court is to assess the credibility of the recantation. If the trial judge hears testimony from the alleged victim who recants her prior testimony and finds it credible, the Court of Criminal Appeals will likely accept that fact finding. Likewise, if the trial court finds the recantation not credible, the Court of Criminal Appeals will almost certainly deny relief.

The United States Supreme Court appears ready to re-enter into the debate concerning actual innocence as a constitutional claim. The following is a summary from the SCOTUS BLOG:

> "On August 17, 2009, the Supreme Court, over two Justices' dissents, on Monday ordered a federal judge in Georgia to consider and rule on the claim of innocence in the murder case against Troy Anthony Davis (*In re Davis*, 08-1443). The Court told the District Court to 'receive testimony and make findings of fact as to whether evidence that could have been obtained at the time of trial clearly establishes [Davis'] innocence.'
> . . .
> The Court did not disclose how each of the Justices had voted, other than the dissents of Justices Scalia and Thomas. Presumably, however, an order of this kind would have required the approval of at least five votes. Justices Breyer, Ginsburg and Stevens presumably voted for the order; their opinion said the case was the type that was exceptional enough to qualify for the action. It is unclear how Chief Justice John G. Roberts, Jr., or Justices Anthony M. Kennedy and Samuel A. Alito, Jr., voted, if they did, but it appears that at least two of them would have had to agree to the step taken.
> Davis was convicted in 1991 of murdering an off-duty Savannah police officer, Mark Allen MacPhail, in 1989. Since his trial, Davis has claimed, seven of the state of Georgia's key witnesses have recanted the testimony they gave at the trial. Several

other individuals have implicated another man - the prosecution's key witness against Davis - as the shooter.

The Court's action set off a sharply-worded exchange - Justice Stevens on one side, Justice Scalia on the other - over the strength of Davis' claim to be innocent, and over whether the Georgia federal judge who will be conducting the new review has any power to rule for Davis.

The Court has never ruled on whether a credible claim of 'actual innocence' justifies extraordinary remedies in federal court, when a state conviction is involved. Davis' case may well test that issue, as it moves through the federal courts again. Justice Scalia, in fact, said in his opinion Monday that, if there is a genuine issue on that point, the Court itself should decide the issue.

On the merits of Davis' claim, Justice Scalia dismissed it as 'a sure loser.' He said that the Georgia Supreme Court, the federal Eleventh Circuit, and the Georgia pardon board have all considered the very evidence that Davis now cites, and 'found it lacking.'

Justice Stevens did not judge finally the merits of the claim, but hinted that he had found it at least partly supported, saying that 'the substantial risk of putting an innocent man to death' justified the Court in taking the unusual action it did on Monday.

On the power of a federal judge to rule in Davis' favor at this stage, Scalia argued that the 1996 federal law limiting federal habeas review of state criminal convictions - the Anti-Terrorism and Effective Death Penalty Act (AEDPA) - barred any federal court from hearing Davis' claim because there was no error at his trial that violated any prior Supreme Court decision.

Scalia wrote: 'This Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent.' He conceded, though, that the Court has left the issue open.

Stevens said that the District judge may have authority to act, perhaps finding that AEDPA's limits do not apply to 'original' habeas writs of the kind the Justices acted on on Monday, or do not apply to a habeas claim of 'actual innocence.' In addition, Stevens said, there may be an argument that AEDPA's habeas limits are unconstitutional if they barred court review of such a claim. Finally, Stevens said, it can be argued that it would be a federal constitutional violation to execute an innocent person.

All of those issues, presumably, will be canvassed initially by the federal District judge, with further review likely in both the Eleventh Circuit and, potentially, the Supreme Court."

d. <u>Additional Grounds for Relief</u>

Other, less common grounds for relief on a writ include:

<u>Double Jeopardy</u>: Under some circumstances, a double jeopardy claim can be raised on a writ, even if the applicant failed to raise the issue in the trial court. When the undisputed facts show

the double jeopardy violation is clearly apparent on the face of the record and when enforcement of the usual rules of procedural default would serve no legitimate state interest, this claim can be considered on a writ. *Gonzalez v. State*, 8 S.W.3d 640, 643 (Tex. Crim. App. 2002); *Ex parte Cavazos*, 203 S.W.3d 333 (Tex. Crim. App. 2006); *Ex parte Diaz,* 959 S.W.2d 213 (Tex. Crim. App. 1998); *Ex parte Knipps*, 236 S.W.3d 214 (Tex. Crim. App. 2007).

Guilty Pleas: If the plea was entered involuntarily and unknowingly, it may be attacked on a writ application. *Rodriguez v. State*, 899 S.W.2d 658 (Tex. Crim. App. 1995).

Denial of Counsel: Relief by way of habeas corpus is available if a defendant was denied the right to counsel at any critical stage of the proceedings. *Ex parte Sanders*, 588 S.W.2d 383, 385 (Tex. Crim. App. 1979).

Right to Appeal and Discretionary Review: A convicted defendant is entitled to effective assistance of counsel on direct appeal as of right. *Evitts v. Lucey*, 469 U.S. 387, 402-03 (1985). A defendant who is denied this right is entitled to an out of time appeal. *Ex parte Axel*, 757 S.W.2d 369, 374 (Tex. Crim. App. 1988). The failure of an attorney to notify client of the right to file a Petition for Discretionary Review with the Court of Criminal Appeals entitles him to file an out of time Petition. *Ex parte Wilson*, 956 S.W.2d 25 (Tex. Crim. App. 1997).

Illegal Sentence: A claim of an illegal sentence can be raised on an application for writ of habeas corpus. *Ex parte Rich*, 194 S.W.3d 508, 512 (Tex. Crim. App. 2006).

Denial of Interpreter: If the applicant did not understand English and was denied an interpreter, habeas relief is appropriate. *Ex parte Nanes*, 558 S.W.2d 893, 894 (Tex. Crim. App. 1977).

Presentation of Perjured Testimony: If the state knowingly presented perjured testimony, a writ application can be granted. *Ex parte Adams*, 768 S.W.2d 281, 293 (Tex. Crim. App. 1989).

If a defendant is convicted and imprisoned solely on the basis of perjured testimony, due process is violated and a writ can be granted. *Ex parte Carmona*, 185 S.W.3d 492 (Tex. Crim. App. 2006).