INEFFECTIVE
ASSISTANCE OF
COUNSEL

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WE ALL MAKE MISTAKES

What is the Secret of SUCCESS?
“RIGHT DECISIONS”,
How do you make Right Decisions?
“EXPERIENCE”,
How do you get Experience?
“WRONG DECISIONS!”.....!

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INEFFECTIVE ASSISTANCE OF COUNSEL

- Strickland v. Washington, 466 U.S. 668 (1984), test requires Applicant to show:

1. Counsel’s performance was deficient. Requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment.

2. The deficient performance prejudiced the defendant.
An appellate court “must indulge a strong presumption that counsel’s conduct [fell] within the wide range of reasonable professional assistance; that is, the [appellant] must overcome the presumption that under the circumstances, the challenged action might be considered sound trial strategy.”

*Strickland*, 466 U.S. at 689
“In the absence of evidence of counsel’s reasons for challenged conduct, an appellate court ‘commonly will assume a strategic motivation if any can possibly be imagined and will not conclude the challenged conduct constituted deficient performance unless the conduct was so outrageous that no competent attorney would have engaged in it.”

TRIAL COUNSEL’S REASONS


- Trial counsel must provide affidavit or testimony.
“Under our system of justice, the criminal defendant is entitled to an opportunity to explain himself and present evidence on his behalf. His counsel should ordinarily be accorded an opportunity to explain her actions before being condemned as unprofessional and incompetent.”

Purpose of Strickland 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.

Appellate court looks to the totality of the representation and the particular circumstances of each case in evaluating the effectiveness of counsel.

*Thompson, 9 S.W.3d at 813*

It is possible that a single egregious error of omission or commission by counsel constitutes ineffective assistance.

*Thompson, 9 S.W.3d 813*
Ineffective Assistance of Counsel may (should) be raised for first time on a writ. *Ex Parte Torres*, 943 S.W.2d 469 (Tex. Crim. App. 1997).

Trial record is rarely sufficient to show ineffective assistance.
Must show that but for counsel’s errors defendant would not have entered a guilty plea. *Hill v. Lockhart*, 474 U.S. 52 (1985)
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.

_Lafler v. Cooper_, 566 U. S. 156 (2012)
_Ex parte Argent_, 393 S.W.3d 781 (Tex. Crim. App. 2013)
Counsel ineffective for failure to properly advise defendant who was entering guilty plea whether state sentence would run concurrent with his federal sentence.

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

_State v. Diaz-Bonilla_, 495 S.W.3d 45 (Tex. App. – Houston [14th Dist.] 2016, _pet.ref’d_)
Counsel’s misinformation to defendant as to his parole eligibility constituted deficient performance.

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


Prejudice shown from counsel’s erroneous advice that guilty plea would not result in deportation when applicant shows he would not have pled guilty had he known he would be deported.

STRATEGIC DECISIONS ARE BASED ON INVESTIGATION

The Supreme Court has made clear that “strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.”  
*Strickland*, 466 U.S. at 690-91

But when choices are made after less than complete investigation, they are reasonable only “to the extent that reasonable professional judgments support the limitations on investigation.”  *Strickland*, 466 U.S. at 691.

And decisions made out of inattention are not strategic and afforded no deference at all.  
Failure of trial counsel to investigate information that someone else committed the crime is ineffective.

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.

Melton v. State, 987 S.W.2d 72
(Tex. App. – Dallas 1998, no. pet.)
Counsel ineffective for lack of awareness of case holding that, on charge for possession of or attempt to possess controlled substance through use of fraudulent prescription form, State had to prove that defendant presented “fraudulent” form, not just that defendant committed “fraud” by interlineating upon otherwise legitimate form.

INEFFECTIVE ASSISTANCE DURING TRIAL

Attorneys rendered ineffective assistance by failing to investigate and present mitigating evidence of defendant being abused as a child in capital murder case.


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.

INEFFECTIVE ASSISTANCE DURING TRIAL

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

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

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

*Cannon v. State*, 252 S.W.3d 342
INEFFECTIVE ASSISTANCE DURING TRIAL

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


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

INEFFECTIVE ASSISTANCE DURING TRIAL


- Failure to request accomplice witness instruction when case based entirely on accomplice testimony. *Ex parte Zepeda*, 819 S.W.2d 874 (Tex. Crim. App. 1991)
A defendant has the right under Sixth Amendment to insist that counsel refrain from admitting guilt during the guilt-phase of a capital murder trial, even when counsel’s view is that confessing guilt offers the defendant the best chance to avoid the death penalty.

Counsel ineffective by failing to object to instruction that defendant was guilty of injury to child if he intentionally and knowingly engaged in conduct causing injury; law was clearly established that injury to child required proof that defendant intended result of offense.

*Banks v. State*,
819 S.W.2d 676
WE DON’T NEED NO STINKING EXPERTS
Failure to hire DNA expert in sexual assault and kidnapping prosecution amounted to deficient performance, although counsel consulted other attorneys, doing so was insufficient investigation in this case given the fact that counsel still lacked much understanding of DNA science, and expert testimony likely would have given a boost to the defense beyond what could have been accomplished through cross-examination. (no prejudice found)

*Ex parte Napper*, 322 S.W.3d 202
Defense team’s failure to present physician’s expert testimony regarding sodium intoxication constituted ineffective assistance of counsel.

Ex parte Overton,
444 S.W.3d 632
(Tex. Crim. App. 2014)
Defense counsel ineffective for failure to request additional funds to replace an inadequate expert in firearms and toolmark analysis.

Ineffective assistance based on counsel’s failure to consult with an expert concerning sexual abuse and proper methods of interviewing children

*Wright v. State,* 223 S.W.3d 36 (Tex. App. – Houston [14th Dist.] 2016, pet. ref’d)
TEXANS HATE THE IVY LEAGUE

- Capital murder case
- Issue of causation over death of fetuses
- Defense expert available to contradict prosecution theory
- Calling the doctor could have presented potential pitfalls for the defense. For instance, the Angelina County jurors might not have been especially receptive to an expert traveling halfway across the country- from Yale-to testify in their small-town, East-Texas courthouse.
- No ineffective assistance

The sentencing process consists of weighing mitigating and aggravating factors, and making adjustments in the severity of the sentence consistent with this calculus.

Failure to contact or call to testify twenty character witnesses is ineffective assistance.

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.

*Buck v. Davis*, 137 S.Ct. 759 (2017)
Failure to object during punishment phase to testimony by DEA agent on dangers and societal costs of methamphetamine and prosecutor’s closing argument about “people” bringing in the drug to “poison” the county’s children constituted deficient performance.

_Ex parte Lane_, 303 S.W.3d 702 (Tex. Crim. App. 2009)
Failure of counsel to discover evidence showing that the defendant was not at the scene of a crime used as an extraneous offense at punishment phase constitutes ineffective assistance of counsel.

PUNISHMENT PHASE INEFFECTIVENESS

Trial counsel’s failure to investigate and discover defendant’s mental health history prejudiced defendant at penalty phase of trial; there was reasonable probability of less severe sentence; substantial mitigating evidence was available.

*Lampkin v. State, 470 S.W.3d 876 (Tex. App. – Texarkana 2015, pet. ref’d)*
INEFFECTIVENESS ON MOTION FOR NEW TRIAL

Rights to effective assistance applies at Motion for New Trial.


To prove harm, must present a “facially plausible” claim that could have been argued in Motion for New Trial but was not.

Cooks, 240 S.W.3d at 912
To obtain relief in the form of a new direct appeal on a claim of ineffective assistance of appellate counsel, a habeas applicant must show that (1) counsel’s decision not to raise a particular point of error was objectively unreasonable, and (2) there is a reasonable probability that, but for counsel’s failure to raise that particular issue, he would have prevailed on appeal.

An attorney need not advance every argument, regardless of merit, urged by appellant, but if appellate counsel fails to raise a claim that has indisputable merit under well-settled law and would necessarily result in reversible error, appellate counsel is ineffective for failing to raise it.

_Ex parte Flores_, 387 S.W.3d 626 (Tex. Crim. App. 2012)
Counsel had actual conflict of interest. Trial counsel was engaged in a coercive sexual relationship with Applicant; trial counsel had access to and control over Applicant’s case; trial counsel had a political, financial, and personal interest which colored his representation of Applicant. The Court finds that this actual conflict of interest violated Applicant’s Sixth Amendment rights.

“I'll work on the appeal. You try to escape.”