

STATE APPLICATIONS FOR WRITS OF HABEAS CORPUS

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APPLICATIONS FOR WRIT OF HABEAS CORPUS

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 claims 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). *See, Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009) (Due process claim, as asserted in subsequent application for writ of habeas corpus, that murder conviction was based on a foundation of perjury by state's chief witness was not procedurally barred, where, at time of first application, neither the DNA testing that purportedly established falsity of witness's testimony nor the statute authorizing a motion by a convicted person for forensic DNA testing was available).
 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). *See generally, Ex parte Santana*, 227 S.W.3d 700 (Tex. Crim. App. 2007).

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

Some of the common issues raised in writ applications are ineffective assistance of counsel, suppression of exculpatory evidence, false evidence from state's witnesses, and new evidence establishing actual innocence. The vast majority of meritorious writs will fall within one of these categories.

a. Ineffective Assistance Of Counsel

I. Introduction

The right to be represented by counsel is by far the most important of a defendant's constitutional rights because it affects the ability of a defendant to assert a myriad of other rights.

As Justice Sutherland explained in *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932):

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

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

The right to the assistance of counsel is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 10 of the Texas Constitution. This right to the assistance of counsel has long been understood to include a “right to the effective assistance of counsel.” See *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970). The integrity of our criminal justice system and the fairness of the adversary criminal process is assured only if an accused is represented by an effective attorney. See *United States v. Morrison*, 449 U.S. 361, 364 (1981). Absent the effective assistance of counsel, “a serious risk of injustice infects the trial itself.” *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980). Thus, a defendant is constitutionally entitled to have effective counsel acting in the role of an advocate. See *Anders v. California*, 386 U.S. 738, 743 (1967).

II. The Legal Standard

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

. . . the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

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

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

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

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

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

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

It has been held that, even if an attorney’s manner of conducting a trial was trial strategy, it can be so ill-chosen as to render a trial fundamentally unfair. *United States v. Rusmisl*, 716 F.2d 301, 310 (5th Cir. 1983). Any trial “strategy” that flows “from lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel.” *Kenley v. Armontrout*, 937 F.2d 1198, 1304 (8th Cir.), *cert. denied*, 502 U.S. 964 (1991); *Ex parte Amezcuita*, 223 S.W.3d 363, 367-68 (Tex. Crim. App. 2006) (failure to investigate evidence that someone else committed the crime); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (failure to conduct reasonable investigation is ineffective assistance); *Ex parte Briggs*, 187 S.W.3d 458, 467-69 (Tex. Crim. App. 2005) (attorney ineffective for failure to investigate medical evidence). Moreover, the courts have repeatedly found that the failure to make proper evidentiary objections because of a misunderstanding or ignorance of the rules satisfies the first prong of the *Strickland* test. *United States v. Williams*, 358 F.3d 956, 964-65 (D.C. Cir. 2004); *Gochicoa v. Johnson*, 118 F.3d 440, 447 (5th Cir. 1997); *Westley v. Johnson*, 83 F.3d 714, 723 (5th Cir. 1996); *Crockett v. McCotter*,

796 F.2d 787, 792 (5th Cir. 1986). No professional norms justify an inadequately researched objection. *See Wiggins v. Smith*, 539 U.S. 510, 526 (2003) (finding counsel's conduct unreasonable when it "resulted from inattention, not reasoned strategic judgment"). In *Baldwin v. State*, 668 S.W.2d 762, 764 (Tex. App. - Houston [14th Dist.] 1984, no pet.), the court found ineffective assistance of counsel when the attorney permitted the eliciting of inadmissible and incriminating hearsay. The court in *Lyons v. McCotter*, 770 F.2d 529 (5th Cir. 1985), held that passing over admission of prejudicial and arguably inadmissible evidence may be a strategic decision by trial counsel, while passing over admission of prejudicial and clearly inadmissible evidence has no strategic value and may constitute ineffective assistance. Also, in *Strickland v. State*, 747 S.W.2d 59, 60-61 (Tex. App. - Texarkana 1988, no pet.), the court found ineffective assistance for counsel's failure to object to four inadmissible extraneous offenses. *See also Mares v. State*, 52 S.W.3d 886 (Tex. App. - San Antonio 2001, pet. ref'd) (holding failure to make objection in this case cannot be considered reasonable trial strategy); *Moore v. Johnson*, 194 F.3d 586, 604 (5th Cir. 1999); *Proffitt v. Waldron*, 831 F.2d 1245, 1248 (5th Cir. 1987) (holding tactical decisions that give no advantage to a defendant are not reasonable and the court will not engage in presumption of reasonableness under these circumstances); *Welborn v. State*, 785 S.W.2d 391, 396 (Tex. Crim. App. 1990) (failure to object to inadmissible evidence).

Although counsel's effectiveness is normally judged by the totality of the representation, a single egregious error can constitute ineffective assistance of counsel. *Ex parte Felton*, 815 S.W.2d 733, 736 (Tex. Crim. App. 1991); *Ex parte Raborn*, 658 S.W.2d 602, 605 (Tex. Crim. App. 1983). A single error of counsel may support a claim of ineffective assistance if the error was of such magnitude that it rendered the trial fundamentally unfair. *See Ex parte Varelas*, 45 S.W.3d 627, 630 (Tex. Crim. App. 2001) (failure to request limiting instruction and an instruction that extraneous offense must be proven beyond a reasonable doubt is ineffective); *Nelson v. Estelle*, 642

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

III. Ineffective Assistance on Appeal

Strickland also applies to an attorney's performance in handling an appeal. *See Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (due process requires that defendant have effective assistance of counsel on his first appeal); *Ex parte Flores*, 387 S.W.3d 626, 639 (Tex. Crim. App. 2012) (to obtain new appeal based on ineffective assistance applicant must show that 1) counsel's decision not to raise a particular issue was objectively unreasonable and 2) there is a reasonable probability that, but for counsel's failure to raise that issue, he would have prevailed on appeal).

Although appellate counsel is not required to raise every non-frivolous claim and may be selective in inclusion of issues in order to maximize success, counsel has an obligation to raise determinative issues. *See Smith v. Robbins*, 528 U.S. 259, 287-88 (2000). In this regard, several federal circuits have held that appellate counsel is ineffective if counsel fails to raise a claim that qualifies as a "dead bang" winner. *See Upchurch v. Bruce*, 333 F.3d 1158, 1163-64 (10th Cir. 2003); *Cargle v. Mullin*, 317 F.3d 1196, 1202 (10th Cir. 2003); *Fagan v. Washington*, 942 F.2d 1155, 1157 (7th Cir. 1991). These note that the failure to raise a substantial claim can be indicative

only of oversight or ineptitude. *See Fagan*, 942 F.2d at 1157. *See also Evans v. Clarke*, 680 F. Supp. 1351, 1359-60 (D. Neb. 1985) (denial of effective assistance of appellate counsel warranted habeas relief where claims not presented on direct appeal had at least arguable merit and counsel affirmatively argued against client's case).

In *Stallings v. United States*, 536 F.3d 624, 627 (7th Cir. 2008), the court stated that where a petitioner alleges ineffective assistance of appellate counsel the appellate court first examines the record to see whether counsel omitted significant and obvious issues and, if so, the court then compares the neglected issues to those actually raised. If the ignored issues are clearly stronger than those raised, appellate counsel was deficient. *See also Passmore v. Estelle*, 594 F.2d 115, 118 (5th Cir. 1979) (finding appellate counsel ineffective).

IV. Ineffective Assistance on Motion for New Trial

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

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

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

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

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

V. Exceptions to *Strickland*

These are some errors that "are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified" thus making it unnecessary to establish the prejudice prong of *Strickland*. *United States v. Cronin*, 466 U.S. 648, 658 (1984). Prejudice is presumed in situations where the likelihood of counsel having provided effective assistance is extremely small such as where counsel failed completely to subject the prosecution's case to "meaningful adversarial testing." *Id.* at 660 (citing in illustration *Powell v. Alabama*, 287 U.S. 45 (1932)). According to the Court of Criminal Appeals, it is unnecessary for a defendant to meet the prejudice requirement of *Strickland* if he was actually or constructively denied the assistance of counsel altogether, if counsel was prevented from assisting the accused at a critical stage of the proceedings because of some type of state interference, or if counsel was burdened by an actual conflict of interest which adversely affected counsel's performance. *Mitchell v. State*, 989 S.W.2d 747, 748 (Tex. Crim. App. 1999); *Cannon v. State*, 252 S.W.3d 342, 349 (Tex Crim. App. 2008) (reversal

for ineffective assistance where counsel declined to perform basic defense functions). “Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt.” *United States v. Cronin*, *supra* at 659 n. 26. In other words, in order for the presumption of prejudice to apply, the attorney must completely fail to challenge the prosecution’s entire case, not just elements of it. *Haynes v. Cain*, 298 F.3d 375, 380-382 (5th Cir. 2002); also see *Bell v. Cone*, 535 U.S. 685, 697 (2002) (noting that difference between situations addressed by *Strickland* and *Cronin* is “not of degree but of kind”).

VI. Raising Ineffective Assistance

Rule 33.1(a) of the Texas Rules of Appellate Procedure generally requires that a complaint be presented to the trial court “by a timely request, objection, or motion” as a prerequisite to raising the complaint on direct appeal. TEX. R. APP. P. 33.1(a). There are, however, many practical difficulties with requiring a defendant to raise the issue of ineffective assistance of counsel at the time of trial or even in a motion for new trial. See *Robinson v. State*, 16 S.W.3d 808, 810 (Tex. Crim. App. 2000). The biggest difficulty is that there is generally no real opportunity to adequately develop the record for appeal at this time. *Id.* This creates a usually insurmountable hurdle to raising an ineffective assistance claim on direct appeal. “Rarely will a reviewing court be provided with the opportunity to make its determination on direct appeal with a record capable of providing a fair evaluation of the merits of the [ineffective assistance] claim . . .” *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999); *Rylander v. State*, 101 S.W.3d 107, 109 (Tex. Crim. App. 2003) (issue not decided on direct appeal because defense counsel should explain actions). Thus, for most ineffective assistance claims, a writ of habeas corpus is the preferred method for raising the issue. *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997). For a multitude of reasons, ineffective assistance claims are excepted from the general rule of error preservation set

forth in Rule 33.1(a) and may be raised in an application for a writ of habeas corpus even if not raised first in the trial court. *Robinson v. State*, *supra* at 812-13; *Massaro v. United States*, 538 U.S. 500 (2003) (ineffective assistance of counsel should be raised in collateral proceeding).

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

VII. Burden of Proof

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

see also, United States v. Cronic, supra at 658 (the burden rests on the accused to demonstrate a constitutional violation).

The Court of Criminal Appeals emphasized in *Thompson v. State, supra* that a claim of ineffective assistance of counsel must be supported by a record containing direct evidence as to why counsel took the actions or made the omissions relied upon as the basis for the claim. *Id.* at 813-14.; *accord, Busby v. State*, 990 S.W.2d 263, 268-69 (Tex. Crim. App. 1999) (ordinarily the strong presumption that an attorney's decisions were acceptable trial strategy cannot be overcome without evidence in the record as to the attorney's reasons for the decisions). However, in *Ex parte Bowman*, 533 S.W.3d 337, 350-351 (Tex. Crim. App. 2017), even though the applicant obtained testimony from the defense lawyer, the court held that ineffective assistance was not proven based on failure of trial counsel to remember whether he had obtained and reviewed relevant records. While there may be some actions that unquestionably fall outside the spectrum of objectively reasonable trial strategy, generally, the Court of Criminal Appeals requires a defendant to offer evidence from his attorney explaining his actions in order to overcome the presumption that counsel acted pursuant to a reasonable trial strategy. *See Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001) (court will not conclude challenged conduct constituted deficient performance unless conduct was so outrageous that no competent attorney would have engaged in it), but *see Menefee v. State*, 175 S.W.3d 500 (Tex. App. - Beaumont 2005, no pet.) (ineffectiveness found on direct appeal because no possible trial strategy in allowing defendant to plead true to invalid enhancement paragraph). In *Bone v. State*, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002), the court stated, "Under our system of justice, the criminal defendant is entitled to an opportunity to explain himself and present evidence on his behalf. His counsel should ordinarily be accorded an opportunity to explain her actions before being condemned as unprofessional and incompetent." *See also Thompson v. State, supra* at 816 (Meyers, J., dissenting) (inconceivable that defense

counsel could have had a reason for failing to object to certain hearsay that would fall within the range of objectively reasonable trial strategy).

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

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

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

VIII. Additional Thoughts

In *Ex parte Chandler*, 182 S.W.3d 350 (Tex. Crim. App. 2005), the court stated, “To the uninitiated, the sheer number of allegations of ineffective assistance of counsel made against this nation’s criminal defense lawyers might well lead one to the conclusion that our law schools are entirely incapable of producing competent defense lawyers. A March 18, 2005, Westlaw search of federal and state decisions addressing ineffective assistance of counsel claims during the past fifteen months alone totals 9,467 cases (<http://web2.westlaw.com/search/all> cases & query “ineffective assistance of counsel” & date after 12/31/2003). According to Westlaw, 734 criminal cases in Texas appellate courts discussed claims of ineffective assistance of counsel during that same period. That number, however, does not include the hundreds, perhaps thousands, of ineffective assistance claims filed in post-conviction habeas applications with this court every year for which we do not write a published opinion.

But these ineffective assistance claims are easy to make, and it may be a natural reaction for a criminal defendant to blame his lawyer when he is found guilty of a crime. As the Supreme Court pointedly noted in *Strickland*, ‘the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.’ 466 U.S. at 689.”

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

That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the

ability of the adversary system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

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

IX. Examples of Ineffectiveness

Expert Witnesses

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

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

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

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

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

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

Rylander v. State, 75 S.W.3d 119 (Tex. App. - San Antonio 2002, pet. granted)

Attorney's failure to present qualified medical testimony in support of defendant's only viable defense when combined with other trial errors undermines confidence in outcome of the trial and amounts to ineffective assistance.

Ex parte Clement-Cook, 2017 WL 3379960 (Tex. Crim. App. 2017)

Ineffective assistance for failure to consult with medical expert on aggravated assault case.

Hinton v. Alabama, 134 S.Ct. 1081 (2014)

Defense counsel's failure to request funds for additional experts was ineffective.

Ex parte Napper, 322 S.W.3d 202 (Tex. Crim. App. 2010)

Counsel's failure to consult DNA expert is deficient conduct but harm not shown.

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

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

Wright v. State, 223 S.W.3d 36 (Tex. App. - Houston [14th Dist.] 2016), *pet. ref'd*

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

Sessums v. State, 129 S.W.3d 242 (Tex. App. - Texarkana 2004), *pet. ref'd*

Failure of counsel to object to expert testimony regarding the factors for determining the alleged victim's truthfulness.

Draughon v. Dretke, 427 F.3d 286 (5th Cir. 2005)

Failure to obtain forensic examination of path of bullet was ineffective.

Failure to Investigate

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ignorance of the Law

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

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

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

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

Failure to Present Evidence

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

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

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

Failure to interview and present alibi witnesses is ineffective assistance.

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

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

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

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

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

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

McCoy v. Louisiana, 138 S.Ct. 1500 (2018)

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

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

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

Failure to Object to Inadmissible Evidence

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

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

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

Failure to object to inadmissible hearsay is ineffective.

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

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

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

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

Presenting Evidence Harmful to Defense

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

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

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

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

Impeachment of Witnesses

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

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

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

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

Misstatement of Law

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

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

Jury Instructions

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

Defense counsel's failure to request limiting instructions with respect to extraneous acts evidence offered during guilt phase of capital murder prosecution, and to request that jury be required to find defendant committed the extraneous acts beyond a reasonable doubt before using them in assessing guilt amounted to ineffective assistance of counsel, where counsel stated by affidavit that his failure to request such instructions was an oversight and was not product of trial strategy; where defendant's pattern of abusing victim was essential to state's case, and trial court would have been required to give instructions if requested.

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

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

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

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

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

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

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

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

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

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

Failure to File Application for Probation

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

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

Evidence and Witness Issues

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

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

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

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

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

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

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

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

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

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

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

Ineffective assistance for failure to object to inadmissible extraneous offense.

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

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

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

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

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

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

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

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

Sleeping Lawyer

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

Counsel ineffective where he periodically slept during the trial.

Lawyer Not Participating in Trial

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

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

Statute of Limitations

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

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

Jury Selection

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

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

Venue

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

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

Prior Convictions

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

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

Requesting Interpreter

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

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

Failure of State's Proof

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

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

Identification Evidence

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

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

Confessions

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

Ineffectiveness for failure to challenge voluntariness of confession.

Guilty Pleas and Plea Bargaining

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

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

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

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

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

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

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

Failure to inform client of plea offer is ineffective assistance.

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

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

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

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

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

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

Ex parte Nacoste, WR-86,964-01 and WR,86-964-02, 2017 WL 3166462 (Tex. Crim. App. 2018)
Ineffective assistance based on defense counsel failing to advise applicant that the evidence did not support his guilt before advising him to plead guilty. Laboratory report refuted state's case in drug case.

Miller v. State, No. PD-0891-15, 2018 WL 2327371 (Tex. Crim. App. 2018)
Prejudice established on ineffective assistance of counsel by demonstrating that applicant would have opted for a jury if his attorney had correctly advised him that he was ineligible for probation from the trial court. Applicant does not need to show that the likely outcome of the jury trial would have been more favorable.

United States v. Shepherd, 880 F.3d 734 (5th Cir. 2018)
Ineffective assistance based on counsel's failure to fully investigate the means of complying with sex offender registration law before advising client to plead guilty.

State v. Diaz-Bonilla, 495 S.W.3d 45 (Tex. App. - Houston [14th Dist.] 2016, *pet. ref'd*)
Failure to advise defendant prior to defendant's entry of guilty plea that he had a viable legal defense that he did not perform an overt act needed to support his conviction constitutes ineffective assistance.

Ex parte Argent, 393 S.W.3d 781 (Tex. Crim. App. 2013)
To establish prejudice on a claim of ineffective assistance in which the defendant is not made aware of a plea bargain offer, or rejects an offer because of bad advice, defendant must show a reasonable probability that he would have accepted earlier offer if he had not been given ineffective assistance, prosecution would not have withdrawn his offer and trial court would not have refused to accept plea bargain.

Turner v. State, 49 S.W.3d 461 (Tex. App. - Fort Worth 2001)
Failure to inform defendant of deadline for accepting plea offer is ineffective.

Randle v. State, 847 S.W.2d 576, 579-580 (Tex. Crim. App. 1993)
Failure to communicate defendant's acceptance of plea offer in a timely manner was ineffective.

Hart v. State, 314 S.W.3d 37 (Tex. App. - Texarkana 2010, *no pet.*)
Advising defendant to plead guilty in the hope of receiving probation when the charge to which the defendant pled made him ineligible for probation.

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

Ex parte Crow, 180 S.W.3d 135 (Tex. Crim. App. 2005)
Counsel must inform client of right to file a petition for discretionary review.

Ex parte Axel, 757 S.W.3d 369 (Tex. Crim. App. 1988)
Failure to file timely notice of appeal is ineffective assistance.

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

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

Punishment Phase

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Incorrect Advise on Parole Eligibility

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

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

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

Ineffective assistance based on erroneous advice regarding parole eligibility.

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

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

Insanity Defense

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

Failure to investigate possibility of an insanity defense.

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

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

Immigration Consequences

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

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

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

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

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

Ineffective assistance based on counsel giving applicant incorrect immigration advice.

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

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

Conflict of Interest

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

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

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

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

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

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

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

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

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

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

Egregious Conduct By Counsel

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

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

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

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

X. Ineffective Assistance Not Proven

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

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

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

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

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

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

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

Counsel not ineffective for allowing defendant to wear at start of voir dire a shirt like the one worn by robber. No reasonable probability that the result of the trial would have been different if jury panel had not seen defendant in that shirt.

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

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

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

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

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

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

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

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

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

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

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

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

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

Counsel provided effective assistance by preventing defendant from committing perjury.

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

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

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

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

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

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

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

Failure to object to inadmissible hearsay was strategic decision.

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

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

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

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

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

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

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

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

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

Limited use of character witnesses upheld as reasonable tactical choice.

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).

I. Supreme Court 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.” *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 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.

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.

In *Wearry v. Cain*, 136 S.Ct. 1002 (2016), the court stated that evidence qualifies as material when there is “any reasonable reasonable likelihood” it could have “affected the judgment of the jury.” To prevail on a *Brady* claim, the applicant need not show that he “more likely than not” would have been acquitted had the new evidence been admitted. He must show only that the new evidence is sufficient to “undermine confidence” in the verdict.

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.

II. Knowledge of Officers Imputed to Prosecution

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.

III. Ongoing Duty to Disclose Exculpatory Evidence

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.); *Pena v. State*, 353 S.W.3d 798 (Tex. Crim. App. 2011); Art. 39.14, Tex. Code Crim. Proc. (Michael Morton Act) (requiring state to disclose exculpatory evidence found after trial).

IV. Application in Texas

The Texas courts essentially follow the same reasoning as the Supreme Court in analyzing cases alleging suppression of exculpatory evidence.

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.

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.

V. Jailhouse Snitches

Deals with jailhouse informants are also *Brady* material. In *Napue v. Illinois*, 360 U.S. 264 (1959), the court held that when reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of immunity deal violates due process; *Giglio v. United States*, 405 U.S. 150 (1972) held an agreement between the state and informant for consideration of leniency is *Brady* material; *Lacaze v. Warden*, 645 F.3d 728 (5th Cir. 2010) stated "Supreme Court has never limited a *Brady* violation to cases where the facts demonstrate that the state and the witness have reached a bona fide, enforceable deal."; *see also, Wearry v. Cain*, 136 S.Ct. 1002 (2016)(State failed to disclose that, contrary to the prosecution's assertions at trial, Brown

had twice sought a deal to reduce his existing sentence in exchange for testifying against Weary. The police had told Brown that they would “talk to the D.A. if he told the truth.”); *Duggan v. State*, 778 S.W.2d 465 (Tex. Crim. App. 1989) held that, *Brady* applies to agreement “which are merely implied, suggested, insinuated or inferred.” The *Duggan* court stated: Question is whether there exists “some understanding for leniency.” The court further stated that, “It makes no difference whether the understanding is consummated by a wink, a nod and a handshake, or by a signed and notarized formal document ceremoniously impressed with a wax seal. A deal is a deal.”

A recent jailhouse informant case is Stanley Mozee and Dennis Allen from Dallas County. Writ relief was granted January 10, 2018 (WR-82,467-01, WR-56,666-03). Mozee and Allen were convicted largely on the basis of jailhouse informants. The informants testified at trial that they had no deal with the state, had not asked for a deal and did not expect a deal. Many years after trial, letters to the prosecutors were found in the District Attorney's file from informants, written prior to trial, asking when the prosecutor was going to follow through with the deals he had promised them.

VI. Defendant Aware of Information

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).

VII. Preserving Error

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).

VIII. Work Product Privilege

In *Ex parte Miles*, 359 S.W.3d 647 (Tex. Crim. App. 2012), the court stated that the privilege derived from the work-product doctrine is not absolute, and the duty to reveal material exculpatory evidence as dictated by *Brady* overrides the work-product privilege.

IX. Specific Cases

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

X. Supreme Court Cases

Smith v. Cain, 132 S.Ct. 627 (2012). Previous statement from eyewitness that he could not identify the perpetrator is exculpatory evidence when eyewitness identifies defendant in court.

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.”

XI. 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 Brandle, 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 life.

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.

XII. 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 inadmissible 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 coindictor 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 (1st 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 (1st 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 inculcating 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*.

XIII. 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).

XIV. 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**

Federal Due Process

I. Introduction: *Herrera* and *Schlup* Claims

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 sound 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 its 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

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 violation, without deciding the issue.

of his life in prison.” *Herrera*, 506 U.S. at 405.

Conceptually, relief for the actually innocent arises under the Due Process Clause of the Fourteenth Amendment. In fact, both procedural and substantive due process demand habeas relief under these circumstances.

II. Texas Cases

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 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). *Ex Parte Chatman*, 2008 WL 217860 (Tex. Crim. App. 2008) (Court of Criminal Appeals held that judgment of conviction would be set aside, where no rational jury would have convicted applicant in light of new DNA evidence indicating that he was excluded from being the perpetrator.)

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. In *Thompson*, Judge Cochran, concurring, stated that courts:

“fail in [their] primary duty of protecting the innocent and punishing the guilty if [the courts] intentionally slam the courthouse door against one who is, in fact, innocent of wrongdoing. I believe that if the criminal justice system—even when its procedures were fairly followed—reaches a patently inaccurate result which has caused an innocent person to be wrongly imprisoned for a crime he did not commit, the judicial system has an obligation to set things straight.” *See Id.* (concurring opinion) at 421-23.

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); *Ex Parte Patrick Logan Montgomery*, 2009 WL 1165499 (Tex. Crim. App. 2009) (recantation by alleged victims found credible).

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 *Ex parte Navarajo*, 433 S.W.3d 558 (Tex. Crim. App. 2014), the court rejected an actual innocence claim on a recantation case even though the trial court found the recantation credible.

In *Ex parte Calderon*, 309 S.W.3d 64 (Tex. Crim. App. 2010), the court stated that the evidence of innocence must be either newly discovered or newly available. Evidence can be newly available if it was previously known, but was not available for the defendant to use for some reason outside his control.

An example of a non-recantation actual innocence case is *Ex Parte Harbin*, 297 S.W.3d 283 (Tex. Crim. App. 2009) where the defendant was found actually innocent of duty to register as a sex offender, but see *Ex Parte Wahlgren*, 2017 WL 1496966 (Tex. Crim. App. 2017), where the defendant was not actually innocent of duty to register as a sex offender.

A prosecution under an unconstitutional statute does not constitute actual innocence. For instance, a portion of the online solicitation of a minor statute was declared unconstitutional in *Ex Parte Lo*, 424 S.W.3d 10 (Tex. Crim. App. 2013). The Court of Criminal Appeals held that writs granted under *Lo* are not "actual innocence" findings. See, *Ex Parte Fournier*, 473 S.W.3d 789 (Tex. Crim. App. 2015). The court said that *Fournier* actually engaged in the conduct, so there was no new evidence of innocence.

A similar approach was taken in *Ex Parte Mable*, 443 S.W.3d 129 (Tex. Crim. App. 2014) on fake drug case. The court held that the term "actual innocence" only applies in circumstances where the accused did not actually commit the charged offense or any possible lesser include offense. The court held that subsequent lab testing on a drug case showing no drugs does not prove actual innocence.

The two most recent actual innocence findings are Sonia Cacy and the San Antonio Four. In *Ex Parte Sonia Cacy*, No. WR-85,420-10 (Nov. 2, 2016), the following occurred: Cacy was convicted of an arson murder based on a false lab report that claimed there was gasoline on her uncle's clothing. The trial court made findings that Cacy was actually innocent and the Court of Criminal Appeals agreed. Judge Yeary concurred in the judgment. He agreed that Cacy met the *Elizondo* standard and that no reasonable jury would convict in light of the new evidence. However, Judge Yeary questioned whether the use of the terminology "actual innocence" is appropriate because, "In many cases, it overstates the criteria under which we are amenable to granting post-conviction habeas corpus relief as a matter of due process."

The San Antonio Four are Kristie Mayhugh, Elizabeth Ramirez, Cassandra Rivera and Anna Vasquez. Their case is *Ex Parte Mayhugh*, 512 S.W.3d 285 (Tex. Crim. App. 2016). All four were found actually innocent by the Court of Criminal Appeals on November 23, 2016. The facts of their case were that two young girls testified that the four women sexually assaulted them. One of the girls, now an adult, recanted the accusations. The other girl did not recant. The recantation was supported by expert testimony. Additionally, the state's medical evidence, that one of the girls had physical signs of abuse, was recanted by the doctor based on new science. The Court of Criminal Appeals said "We conclude that now, with this clear and convincing evidence establishing innocence combined with the lack of reliable forensic opinion testimony corroborating the fantastical allegations in this case, no rational juror could find any of the four Applicants guilty of any of the charges beyond a reasonable doubt." The Court of Criminal Appeals further stated that "It has been suggested that the term 'actual innocence' is inappropriate because applicants who are successful when raising a claim of actual innocence never truly prove that they did not commit the offense. But when the presumptions are reversed,

the state does not have to prove that a defendant is definitively guilty. . . . Those defendants have won the right to proclaim to the citizens of Texas that they did not commit a crime. That they are innocent. That they deserve to be exonerated. These women have carried that burden. They are innocent. And they are exonerated. This Court grants them the relief they seek."

A recent rejection of actual innocence is *Ex Parte Kussmaul, et al*, 548 S.W.3d 606 (Tex. Crim. App. 2018). In *Kussmaul*, the court held that insufficient evidence supported a finding that the petitioners, one of whom was convicted of capital murder and three of whom who had pled guilty to sexual assault and had testified against the one who was convicted of capital murder, were entitled to relief under the actual-innocence standard, despite new DNA evidence favorable to petitioners. Court held that the petitioners who had pled guilty, and who claimed that they had been bullied and coerced to confess, had failed to withdraw their pleas when the promises of leniency and threats of the death penalty were no longer on the table, counsel for one of the petitioners could not recall petitioner making any claim that the authorities had forced his confession, and the prosecutor testified that he had had no complaints that the pleas had been coerced.

An example of a *Schlup* actual innocence claim, where the actual innocence is used as a gateway to raise another constitutional violation in a subsequent writ, is *Ex Parte Billy Frederick Allen*, 2009 WL 282739 (Tex. Crim. App. 2009). In *Allen*, the defendant, who was convicted of murder, was entitled to a new trial on application for writ of habeas corpus, though he made previous applications for habeas relief that were denied, as defendant asserted *Schlup*-type actual innocence claim based on newly discovered evidence intertwined with ineffective assistance claim; trial counsel failed to ask for continuance when he was surprised by officer's testimony that officer heard victim identify defendant as his attacker, counsel failed to raise in motion for new trial

newly discovered evidence that ambulance paramedic heard victim tell officer five or six times that attacker had a different middle name than defendant, counsel failed to conduct an investigation that would have revealed that such other person had an actual motive to kill victim, and it was more likely than not that no reasonable juror would have convicted defendant in the light of new evidence.

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.

d. New Scientific Evidence

I. New Statute Concerning Writs Based on New Scientific Evidence

Art. 11.073. Procedure Related to Certain Scientific Evidence.

(a) This article applies to relevant scientific evidence that:

(1) was not available to be offered by a convicted person at the convicted person's trial; or

(2) contradicts scientific evidence relied on by the state at trial.

(b) A court may grant a convicted person relief on an application for a writ of habeas corpus if:

(1) the convicted person files an application, in the manner provided by Article 11.07, 11.071, or 11.072, containing specific facts indicating that:

(A) relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable

through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial; and

(B) the scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the application; and

(2) the court makes the findings described by Subdivisions (1)(A) and (B) and also finds that, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.

(c) For purposes of Section 4(a)(1), Article 11.07, Section 5(a)(1), Article 11.071, and Section 9(a), Article 11.072, a claim or issue could not have been presented previously in an original application or in a previously considered application if the claim or issue is based on relevant scientific evidence that was not ascertainable through the exercise of reasonable diligence by the convicted person on or before the date on which the original application or a previously considered application, as applicable, was filed.

(d) In making a finding as to whether relevant scientific evidence was not ascertainable through the exercise of reasonable diligence on or before a specific date, the court shall consider whether the field of scientific knowledge, a testifying expert's scientific knowledge, or a scientific method on which the relevant scientific evidence is based has changed since:

(1) the applicable trial date or dates, for a determination made with respect to an original application; or

(2) the date on which the original application or a previously considered application, as applicable, was filed, for a determination made with respect to a subsequent application.

SECTION 2. The change in law made by this Act applies only to an application for a writ of habeas corpus filed on or after the effective date of this Act. An application for a writ of habeas

corpus filed before the effective date of this Act is governed by the law in effect at the time the application was filed, and the former law is continued in effect for that purpose.

SECTION 3. This Act takes effect September 1, 2013.

II. *Ex parte Robbins*, 360 S.W.3d 446 (Tex. Crim. App. 2011, cert. denied May 14, 2012)

Facts: Tristen Rivet and her mother, Barbara Ann Hope, lived with Robbins at the home of his mother. On the day of Tristen's death, Ms. Hope left Tristen in Robbins's care. *Id.* At 2:00 p.m., an independent witness observed Tristen playing and eating a snack while in Robbins's care. Ms. Hope returned and relieved Robbins around 4:00 p.m.

Ms. Hope went to wake Tristen around 6:00 p.m. She found Tristen unconscious in her crib with her face, including her nose and mouth, partially covered by her bedding. Ms. Hope rushed Tristen to the living room and began breathing into Tristen's mouth. She then took Tristen outside where Robbins's mother and a neighbor began performing vigorous, adult CPR on Tristen on the ground. Another neighbor came outside to investigate and, drawing on her experience as a medical technician, told the others to stop performing adult CPR because they were compressing Tristen's chest too forcefully and warned that these efforts could actually kill Tristen.

Moments later, the paramedics arrived. Tristen was pronounced dead at 6:53 p.m. shortly after arriving at the hospital.

Robbins was subsequently indicted for capital murder for allegedly causing Tristen's death. The medical examiner, Dr. Patricia Moore, testified that Tristen died from asphyxia due to compression of the chest and abdomen and ruled Tristen's death a homicide. Dr. Moore's testimony was the only direct evidence at trial that a crime had occurred.

Dr. Robert Bux, the deputy chief medical examiner of Bexar County, Texas, gave contrary testimony. However, the jury found Robbins guilty of capital murder, and the trial court sentenced him to life in prison.

Robbins's Habeas Proceedings

Following Robbins's conviction, four additional experts were contacted to re-evaluate Dr. Moore's autopsy findings and trial testimony. Each expert, as well as Dr. Moore herself, concluded that Dr. Moore's original findings and testimony had been incorrect.

Dr. Dwayne Wolf, the deputy chief medical examiner for Harris County, re-evaluated the autopsy findings in March 2007 and concluded that the evidence did not support a finding that the death resulted from asphyxiation by compression or from any other specific cause. Dr. Joye Carter, the former Harris County Medical Examiner and Dr. Moore's supervisor at the time of Mr. Robbins's trial, agreed that the autopsy findings and facts of the case did not show that a homicide occurred, or indicate Tristen's particular cause of death.

Dr. Moore also admitted that her own original findings and testimony were erroneous. In a May 2007 letter sent to the Montgomery County District Attorney, Dr. Moore stated that given her "review of all the material from the case file and having had more experience in the field of forensic pathology," she felt that "an opinion for a cause and manner of death of . . . undetermined is best for this case."

Robbins filed an application for a writ of habeas corpus in June 2007 with the 410th Judicial District Court in Montgomery County, Texas, asserting that in light of this newly discovered evidence, "no rational juror would find [Mr. Robbins] guilty beyond a reasonable doubt of the offense." Robbins also explained that his "right to a fair trial by a fair and impartial jury . . . was violated because his conviction was based on testimony material to the State's case that has now been determined to be false."

In its initial response, the State recommended that Robbins be granted a new trial because "the jury was led to believe and credit facts that were not true." Rather than accept the State's recommendations, the trial court appointed Dr. Thomas Wheeler, the Chairman of the Department

of Pathology at Baylor College of Medicine in Houston, to determine, if possible, the means and manner of Tristen's death. After conducting an independent examination, Dr. Wheeler also concluded that Dr. Moore's trial testimony was "not justified by the objective facts and pathological findings" and that there were no physical findings to support the conclusion that a homicide had occurred.

In August 2008, Robbins and the State, again, recommended to the trial court that Robbins be granted a new trial. Yet again, rather than agree to the joint recommendations from the parties, the trial court ordered that the parties engage in discovery. Dr. Wheeler and Dr. Wolf were subsequently deposed and each reaffirmed their findings that the evidence did not support a finding that a homicide had occurred. In Dr. Moore's deposition, she confirmed that her trial testimony was not justified by the objective facts and pathological findings.

Around this same time, Justice of the Peace Edith Connelly reopened the inquest into Tristen's death and appointed Dr. Linda Norton to examine the evidence. Dr. Norton also disagreed with Dr. Moore's trial testimony. Dr. Norton stated that the cause of death was asphyxia by suffocation and placed the estimated time of death between 2:30 p.m. and 5:00 p.m. Dr. Norton ultimately concluded that she believed Tristen had been killed, but determined that she could not conclude beyond a reasonable doubt that Robbins was in any way responsible.

Dr. Norton was the only expert of the six pathologists consulted by the habeas court to conclude that Tristen died from a homicide.

On January 15, 2010, the State, for the first time, urged that relief be denied to Robbins. The trial court, however, found that Robbins was entitled to a new trial because the verdict against him was "not obtained by fair and competent evidence, but by admittedly false testimony that was unsupported by objective facts and pathological findings and not based on sufficient expertise or scientific validity."

Court's Holding: The Texas Court of Criminal Appeals in a 5-4 decision, rejected the trial court's recommendations and denied relief. The five-judge majority concluded that because Robbins "failed to prove that the new evidence unquestionably establishes his innocence," he was not entitled to relief on his claim of actual innocence of the crime for which he was convicted.

The majority then departed from the trial court's findings and held that false testimony had not been used to convict Mr. Robbins. Notwithstanding the agreement, among the consulted experts that Dr. Moore's findings and testimony were incorrect, the majority refused relief because none of the experts affirmatively proved the negative proposition that "Tristen could not have been intentionally asphyxiated." Thus, the majority concluded Robbins did not "have a due process right to have a jury hear Moore's re-evaluation."

In a dissent joined by two other judges, Judge Cochran identified her "extremely serious concern" about the increased "disconnect between the worlds of science and of law" that allows a conviction to remain in force when the scientific basis for that conviction has since been rejected by the scientific community. Adding to this concern was the dissent's observation that this disconnect "has grown in recent years as the speed with which new science and revised scientific methodologies debunk what had formerly been thought of as reliable forensic science has increased." As a result, the dissent argued that "[f]inality of judgment is essential in criminal cases, but so is accuracy of the result - an accurate result that will stand the test of time and changes in scientific knowledge."

Looking at the facts of Robbins's conviction, the dissent believed this case created an appropriate opportunity to address this growing concern. Because Dr. Moore's findings and trial testimony have been uniformly rejected, including by Dr. Moore herself, the dissent urged that Robbins "did not receive a fundamentally fair trial based upon reliable scientific evidence."

Indeed, Judge Cochran explained that she “suspect[ed] that the [United States] Supreme Court will one day hold that a conviction later found to be based upon unreliable scientific evidence deprives the defendant of a fundamentally fair trial and violates the Due Process Clause of the Fourteenth Amendment because it raises an intolerable risk of an inaccurate verdict and undermines the integrity of our criminal justice system.”

Judge Alcala dissented separately, concluding that Robbins “is entitled to relief on his application for a writ of habeas corpus on the ground that he was denied due process of law by the State’s use of false testimony to obtain his conviction.”

On November 26, 2014, the Court of Criminal Appeals reconsidered the *Robbins* case, this time under the recently enacted Art. 11.073. *Ex Parte Robbins*, 2014 WL 6751684 (Tex. Crim. App. 2014). Applying 11.073, the majority concluded that the medical examiner’s post-trial reconsideration of her initial conclusion from the autopsy that the cause of child victim’s death was asphyxia by strangulation and that manner of death was homicide, following which she concluded that cause and manner of death were “undetermined,” was new scientific evidence that contradicted scientific evidence relied upon by State at trial which was not available at time of original application.

The majority opinion further explained that since the revised opinion was based on a review of medical evidence and more experience in the field, it was new scientific evidence based on change of scientific knowledge that was not available at time of original habeas application.

Judge Cochran, in her concurring opinion, traced the history of Art. 11.073, noting that,

"By 2009, the Texas Legislature, at the urging of the Innocence Project of Texas, began reacting to the problems of prior convictions based on bad scientific evidence."

As noted by Judge Cochran, these efforts ultimately resulted in the enactment of Art. 11.073.

Finally, in finding relief appropriate in the *Robbins* case, Judge Cochran stated,

"Regardless of whether a conviction is based on an unreliable field of science or unreliable scientific testimony, the result is the same: an unreliable verdict that cannot stand the test of time. It is built upon the shifting sands of "junk" science or a "junk" scientist, and it is the purpose of Article 11.073 to provide a statutory mechanism for relief and a retrial based upon 'good' science and 'good' scientific testimony."

Judge Johnson's concurring opinion noted the following:

"The various positions on statutory interpretation seem to agree that the legislative history indicates that the intent of this statute is to provide relief to those who were convicted on science or scientific methodology that is now known to be unsound."

Judge Johnson also recognized that Art. 11.073 would apply to various other scientific fields by stating:

"As has been noted, some examples of 'contradicted scientific evidence relied on by the state at trial' include arson, infant trauma, bullet-lead analysis, bite marks, some ballistics tests, blood-spatter patterns, and scent line-ups. Some such evidence has involved misinterpretation based on out-dated knowledge, some are simply junk science that has never been subjected to any kind of scientific investigation. Whether 'debunked' or 'refined' for increased accuracy, changes in scientific knowledge in general, and therefore changes in scientific testimony by individuals, must be acknowledge and addressed."

Dissenting opinions by Presiding Judge Keller, joined by Judge Hervey, and by Judge Keasler, disputed whether 11.073 applied to the *Robbins* case, but recognized its broad applicability in other situations. For instance, in analyzing the legislative history, Judge Keasler stated,

"The Senate Research Center's Bill Analysis summarized the bill's intent as 'amend[ing] the Code of Criminal Procedure relating to applications for writs of habeas corpus relief based on relevant scientific evidence of false and discredited forensic testimony. . . . Recent examples of such evidence include dog-scent lineups, misinterpreted indicators of arson, and infant trauma."

Judge Keasler further stated:

"In support of H.B. 967, an identical companion bill to S.B. 344, Representative Turner was more detailed in his explanation of the bill's intended purpose. He began by stating that when an individual is 'convicted based on junk science or

critical forensic testimony that is disproved by later scientific advancements, the courts cannot presently agree whether or not the existing law provides a basis for relief. As examples of disproved science, he specifically identified discredited dog scent line-ups, misinterpreted indicators of arson, and mistaken assumptions about infant trauma. . . . From Representative Turner's express intent and the comments and questions from the committee members and witnesses alike, it is clear that, while this particular bill was left pending in committee, the proposed legislation targeted past scientific evidence undermined by subsequent advances in the particular field."

The state's rehearing motion was subsequently granted and on January 7, 2016, the court denied the rehearing motion. *Ex parte Robbins*, ____ S.W.3d ____ (Tex. Crim. App. 2016), 2016 WL 370157.

III. Other new science cases included:

a. ***Ex Parte Kussmaul*, 548 S.W.3d 606 (Tex. Crim. App. 2018).** *Kussmaul* rejected the actual innocence claim but granted relief under 11.073. In *Kussmaul*, the Y-STR DNA testing results were exculpatory to all four defendants and constituted new scientific evidence. The court said a showing by a mere preponderance of the evidence that an applicant would not have been convicted if exculpatory DNA results are obtained is not sufficient to warrant relief on the basis of actual innocence, but statute governing the procedure on new science evidence (Art. 11.073) affords an avenue for relief under the preponderance standard.

b. ***Ex Parte Henderson*, 246 S.W.3d 690 (Tex. Crim. App. 2007), 384 S.W.3d 833 (Tex. Crim. App. 2012).** Henderson was convicted of capital murder and sentenced to death. The allegation was that she caused the death of a child, Brandon Baugh. Henderson's defense was that Brandon's death was the result of an accidental fall.

At the time of trial, Dr. Roberto Bayardo, the medical examiner for Travis County, testified that it was impossible for Brandon's extensive brain injuries to have occurred in the way Henderson stated. In his opinion, Brandon's injuries had to have resulted from a blow intentionally

struck by Henderson. He testified that, “I would say the baby was caught up with the hands by the arms along the body and then swung and slammed very hard against a flat surface.”

In a subsequent writ, Henderson submitted affidavits and reports that indicated that recent advances in the area of biomechanics and physics suggest that it is possible that Brandon’s head injuries could have been caused by an accidental short-distance fall. Additionally, Dr. Bayardo submitted an affidavit which recanted his trial testimony. His affidavit stated:

“Since 1995, when I testified at Cathy Henderson’s trial, the medical profession has gained a greater understanding of pediatric head trauma and the extent of injuries that can occur in infants as a result of relatively short distance falls, based in part on the application of principles of physics and biomechanics. Specifically, and as shown in the reports that I have read, even a fall of a relatively short distance onto a hard surface can cause the degree of injury that Brandon Baugh experienced. If this new scientific information had been available to me in 1995, I would have taken it into account before attempting to formulate an opinion about the circumstances leading to the injury.”

The Court of Criminal Appeals majority held that Dr. Bayardo’s re-evaluation of his 1995 opinion is a material exculpatory fact and ordered the trial court to further develop the evidence.

Judge Price concurred, and stated that,

“Under these circumstances, it is at least arguable that the evidence is not even legally sufficient to sustain a conviction; that is, a rational jury could not convict the applicant of capital murder. In any event, it is evident that the applicant has presented a plausible claim that no reasonable juror *would* have found her guilty of a *capital* homicide - at least not to a level of confidence beyond a reasonable doubt.”

The dissenting Judges argued that the new scientific evidence did not establish any recognized claim for relief under Chapter 11 of the Code of Criminal Procedure.

On December 5, 2012, the Court of Criminal Appeals issued a decision granting habeas relief and ordering a new trial in the *Henderson* case. *Ex Parte Henderson*, 384 S.W.3d 833 (Tex. Crim. App. 2012), 2012 WL 6027455. In the Court’s per curiam opinion, the Court accepted the trial court’s findings of fact that new scientific evidence that a short distance fall could have caused the head injury in this case proves that no reasonable juror would have convicted her in light of this

new evidence. The Court of Criminal Appeals found that this new scientific evidence did not establish that *Henderson* was actually innocent but that it did establish a due process violation.

Judge Price filed a concurring opinion and stated that relief was being granted on the basis of the inadvertent use of false evidence to convict Henderson. Judge Price stated that Henderson had proven that her conviction was based, in critical part, upon an opinion from the medical examiner that he has now disavowed because it has been shown by subsequent scientific developments to be highly questionable. The distinction between *Henderson* and *Ex Parte Robbins* that Judge Price drew is that *Henderson* is based on new scientific developments that show the head injury can be caused by a short distance fall and, in *Robbins*, the medical examiner simply changed her mind.

Judge Cochran also filed concurring opinion, joined by Judges Womack, Johnson and Alcala. Judge Cochran reviewed the evidence from the writ hearing and stated,

“In sum, all but one of these ten medical and scientific experts agreed that Dr. Bayardo’s trial testimony was now known to be scientifically inaccurate: Brandon’s autopsy results did not establish that his death was the product of an intentional homicide. Indeed, all but one of these experts basically admitted that science cannot answer the question of whether Brandon’s death was the result of an intentional homicide. It could have been an intentional homicide; it could have been an accident.”

Judge Cochran agreed that Henderson did not receive a fundamentally fair trial based upon reliable scientific evidence.

Judge Alcala also filed a separate concurrence. Judges Keller, Keasler and Hervey dissented.

c. *Ex Parte Overton*, 2012 WL 1521978 (Tex. Crim. App. 2012)

Overton was convicted of capital murder based on allegedly intentionally causing a child to ingest acute levels of sodium or by failing to seek medical care. A writ was filed alleging actual innocence, suppression of exculpatory evidence and ineffective assistance of counsel. The Court

of Criminal Appeals remanded the case to the trial court to resolve the contested issues. Notably, Judge Cochran, joined by Judges Price and Johnson, filed a statement concurring in the remand order stating:

“I agree that this application for a writ of habeas corpus should be remanded to the trial court for further development on the claims set out in the remand order. I think that we should give more explicit guidance to the trial court, however, as this appears to be a capital-murder conviction that depends, in many respects, upon the scientific validity and accuracy of the medical testimony offered into evidence at the original trial.

The judiciary must be ever vigilant to ensure that verdicts in criminal cases are based solely upon reliable, relevant scientific evidence—scientific evidence that will hold up under later scrutiny. I have previously expressed my concern about ‘the fundamental disconnect between the worlds of science and of law.’ *Ex Parte Robbins*, No. AP-76464, ___ S.W.3d ___, 2011 WL 2555665 at *19 (Tex. Crim. App. June 29, 2011) (Cochran, J., dissenting)

This disconnect between changing science and reliable verdicts that can stand the test of time has grown in recent years as the speed with which new science and revised scientific methodologies debunk what had formerly been thought of as reliable forensic science has increased. The potential problem of relying on today’s science in a criminal trial (especially to determine an essential element such as criminal causation or the identity of the perpetrator) is that tomorrow’s science sometimes changes and, based upon that changed science, the former verdict may look inaccurate, if not downright ludicrous. But the convicted person is still imprisoned. Given the facts viewed in the fullness of time, today’s public may reasonably perceive that the criminal justice system is sometimes unjust and inaccurate. Finality of judgment is essential in criminal cases, but so is accuracy of the result - an accurate result that will stand the test of time and changes in scientific knowledge.

Id. The problem in this case, as in *Robbins*, is not that the science itself has evolved, but that it is alleged that the scientific testimony at the original trial was not fully informed and did not take into account all of the scientific evidence now available.

Following the evidentiary hearing, the *Overton* case made its way back to the Court of Criminal Appeals. In *Ex Parte Overton*, 444 S.W.3d 632 (Tex. Crim. App. 2014), the court granted relief based on ineffective assistance of counsel because of the defense team's failure to present physician's expert testimony regarding sodium intoxication.

d. *Ex Parte Spencer*, 337 S.W.3d 869 (Tex. Crim. App. 2011)

Facts: Spencer convicted of aggravated robbery based on eyewitness testimony. On his Application for Writ of Habeas Corpus, the defense called Dr. Michel, a forensic visual science expert, to testify at the writ hearing. Dr. Michel's expert testimony was that the eyewitnesses could not have seen the face of the person exiting the BMW because of darkness, distance, and movement. Specifically, Dr. Michel testified that Cotton would not have been able to make a facial identification of a person jumping a fence 113 feet away from him. He also stated that Stewart was so far from the BMW that he would not be able to make a facial identification even in daylight, and Oliver could not have made a facial identification of a person exiting the passenger side of the BMW because her window was 123 feet away from the car. Applicant says that the State's expert agreed that with the distance and lighting conditions and Oliver would not have been able to identify facial features of the individuals exiting the car. Applicant's argument is that it was physically impossible for the eyewitnesses to make a facial identification.

The Court of Criminal Appeals denied relief. The Court stated:

"First, while the science of forensic visual testing may be new, the evidence Applicant relies on is not newly discovered or newly available. Shortly after the 1987 offense, investigators were able to observe the scene from the vantage point of the eyewitnesses while the conditions were similar to the way they were the night of the offense. The evidence gathered by investigators for both the State and the defense was presented to the jury. The issues of lighting, distance, and the witnesses' ability to identify Applicant were raised at trial. The jury heard the evidence regarding the streetlight in the alley, the light in the back of one of the houses, and the light in the car, as well as the defendant's evidence about how far away each witness was from the car. Three separate juries chose to believe the witnesses. Applicant's expert observed the scene many years later, in 2003, when

the conditions from the night of the offense were unable to be replicated. For example, Gladys Oliver's house had been torn down, there were new windows and a new fence at Cotton's house, a new shed had been built, the lighting was different, tree growth had changed after 16 years, and there was no way to ascertain exactly where in the alley the car had been on the night of the offense. Based on this, the expert determined that it was physically impossible for the witnesses to see the face of the person exiting the car.

We agree with the State that not all scientific advances can be treated equally. While we have considered advances in science when determining whether certain evidence, such as DNA, is newly discovered or newly available, the evidence presented by Applicant is not the sort of evidence that is capable of being preserved and tested at a later date. Forensic visual science may be new, but there is no way for the forensic visual expert to test the conditions as they existed at the time of the offense because there is no way to replicate the lighting conditions.

We will consider advances in science and technology when determining whether evidence is newly discovered or newly available, but only if the evidence being tested is the same as it was at the time of the offense. Thus, the science or the method of testing can be new, but the evidence must be able to be tested in the same state as it was at the time of the offense.

Applicant says that 'scientific evidence establishes the wrongfulness' of his conviction. However, an expert report saying that it was too dark and the car was too far away for the eyewitnesses to have seen Applicant does not affirmatively establish his innocence. All it does is attempt to discredit the witnesses who stated that they saw Applicant get out of the victim's car."

e. 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).

A defendant's due process rights are violated by the state's unknowing presentation of perjured testimony. *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009) (Defendant's due process rights were violated by state's unknowing presentation of perjured testimony in murder

prosecution, where postconviction DNA testing conclusively showed that accomplice witness perjured himself by denying that he had sexually assaulted victim, his testimony provided the only direct evidence that defendant sexually assaulted and killed victim, state acknowledged that it predicated its trial theory on accomplice witness's testimony, and DNA evidence refuted not only his testimony but also that of another witness who characterized accomplice witness as a nonviolent person who would never hurt a woman.); *Estrada v. State*, 313 S.W.3d 274 (Tex. Crim. App. 2010) (new punishment hearing for capital murder was required where state's expert witness unintentionally presented false testimony concerning inmates eligibility for less restrictive prison classification).

In *Ex parte Ghahremani*, 2011 WL 798640 (Tex. Crim. App. 2011), the court held that the state's knowing use of false testimony violates due process when there is a reasonable likelihood that the false testimony affected the outcome. The court also stated that the standard that state's knowing use of false testimony violates due process when there is a "reasonable likelihood" that the false testimony affected the outcome is more stringent, *i.e.*, more likely to result in a finding of error, than the standard applied to *Brady* claims of suppressed evidence, which requires the defendant to show a "reasonable probability" that the suppression of evidence affected the outcome.

f. Additional Grounds for Relief

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

Double Jeopardy: 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).