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INEFFECTIVE ASSISTANCE OF COUNSEL AND STATE MISCONDUCT

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TABLE OF CONTENTS

PAGE

I.

The two most common grounds raised in Applications for Writs of Habeas Corpus are ineffective assistance of counsel and prosecutorial misconduct by suppression of exculpatory evidence. This paper discusses these two grounds.

II.

INEFFECTIVE ASSISTANCE OF COUNSEL

Introduction

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

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

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

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

The Legal Standard

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

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

whose result is reliable.

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

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

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

In assessing deficient performance, courts "must determine whether there is a gap between what counsel actually did and what a reasonable attorney would have done under the circumstances." *Neal v. Puckett*, 286 F.3d 230, 236 (5th Cir. 2002) (*en banc*). Defense counsel must investigate the case or make a reasonable decision that makes particular investigations unnecessary. *Strickland*, 466 U.S. at 690-691; *Wiggins*

v. Smith, 539 U.S. 510, 521-22 (2003). *See McFarland v. State*, 928 S.W.2d 482, 501 (Tex. Crim. App. 1996), *overruled on other grounds by Mosley v. State*, 983 S.W.2d 249 (Tex. Crim. App. 1998).

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

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

It has been held that, even if an attorney's manner of conducting a trial was trial strategy, it can be so ill-chosen as to render a trial fundamentally unfair. *United States v. Rusmisel*, 716 F.2d 301, 310 (5th Cir. 1983). Any trial "strategy" that flows "from lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel." *Kenley v. Armontrout*, 937 F.2d 1198, 1304 (8th Cir.), *cert. denied*, 502 U.S. 964 (1991); *Ex parte Amezquita*, 223 S.W.3d 363, 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.

Ineffective Assistance on Appeal

Strickland also applies to an attorney's performance in handling an appeal. *See*

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

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

In *Stallings v. United States*, 536 F.3d 624, 627 (7th Cir. 2008), the court stated that where a petitioner alleges ineffective assistance of appellate counsel the appellate court first examines the record to see whether counsel omitted significant and obvious

issues and, if so, the court then compares the neglected issues to those actually raised. If the ignored issues are clearly stronger than those raised, appellate counsel was deficient. *See also Passmore v. Estelle*, 594 F.2d 115, 118 (5th Cir. 1979) (finding appellate counsel ineffective).

Ineffective Assistance on Motion for New Trial

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

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

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

> Further, the State has cited no authority for the argument that we should

> consider record evidence in determining whether a claim is "facially plausible." To the contrary, courts seem to resolve this issue by looking to the allegations alone without considering any contradictory record evidence.

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

Exceptions to *Strickland*

These are some errors that "are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified" thus making it unnecessary to establish the prejudice prong of *Strickland*. *United States v. Cronic*, 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. Cronic, supra* at 659 n. 26. In other words, in order for the presumption of prejudice to apply, the attorney must completely fail to challenge the prosecution's entire case, not just elements of it. *Haynes v. Cain*, 298 F.3d 375, 380-382 (5th Cir. 2002); also see *Bell v. Cone*, 535 U.S. 685, 697 (2002) (noting that difference between situations addressed by *Strickland* and *Cronic* is "not of degree but of kind").

Raising Ineffective Assistance

Rule 33.1(a) of the Texas Rules of Appellate Procedure generally requires that a complaint be presented to the trial court "by a timely request, objection, or motion" as a prerequisite to raising the complaint on direct appeal. TEX. R. APP. P. 33.1(a). There are, however, many practical difficulties with requiring a defendant to raise the issue of ineffective assistance of counsel at the time of trial or even in a motion for new trial. *See Robinson v. State,* 16 S.W.3d 808, 810 (Tex. Crim. App. 2000). The biggest difficulty is that there is generally no real opportunity to adequately develop the record

for appeal at this time. *Id*. This creates a usually insurmountable hurdle to raising an ineffective assistance claim on direct appeal. "Rarely will a reviewing court be provided with the opportunity to make its determination on direct appeal with a record capable of providing a fair evaluation of the merits of the [ineffective assistance] claim . . ." *Thompson v. State,* 9 S.W.3d 808, 813 (Tex. Crim. App. 1999); *Rylander v. State,* 101 S.W.3d 107, 109 (Tex. Crim. App. 2003) (issue not decided on direct appeal because defense counsel should explain actions). Thus, for most ineffective assistance claims, a writ of habeas corpus is the preferred method for raising the issue. *Ex parte Torres,* 943 S.W.2d 469, 475 (Tex. Crim. App. 1997). For a multitude of reasons, ineffective assistance claims are excepted from the general rule of error preservation set forth in Rule 33.1(a) and may be raised in an application for a writ of habeas corpus even if not raised first in the trial court. *Robinson v. State, supra* at 812-13; *Massaro v. United States*, 538 U.S. 500 (2003) (ineffective assistance of counsel should be raised in collateral proceeding).

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

discussed the problems with indigent *pro se* defendants pursuing ineffective assistance claims. Judge Alcala has suggested counsel be appointed in these cases, but the court has not followed her suggestion.

Burden of Proof

The burden of proving ineffective assistance of counsel rests on the convicted defendant by a preponderance of the evidence. *Haynes v. State*, 790 S.W.2d 824, 827 (Tex. Crim. App. 1990). In order to determine whether the defendant has met this burden, the reviewing court looks to the totality of the representation and the particular circumstances of the case in evaluating the reasonableness of an attorney's conduct. *See Ex parte Felton*, 815 S.W.2d 733, 735 (Tex. Crim. App. 1991). The review conducted of defense counsel's representation is "highly deferential and presumes that counsel's actions fell within a wide range of reasonable assistance." *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001) (citing *Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000)). It is the defendant's burden to overcome this presumption by proving his ineffective assistance of counsel claim by a preponderance of the evidence. *McFarland v. State*, 845 S.W.2d 824, 843 (Tex. Crim. App. 1992); *Moore v. State*, 694 S.W.2d 528, 531 (Tex. Crim. App. 1985); *see also, United States v. 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. Rusmisel,* 716 F.2d 301, 310 (5th Cir. 1983). As the Supreme Court explained in *Strickland,* strategy decisions should be judged by an *objective* standard of reasonableness. *Strickland v. Washington*, *supra*, 466 U.S. 687-88 (emphasis added).

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

in the outcome." *Id*. at 694; *Smith v. State,* 286 S.W.3d 333, 340 (Tex. Crim. App. 2009).

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

Additional Thoughts

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

But these ineffective assistance claims are easy to make, and it may be a natural reaction for a criminal defendant to blame his lawyer when he is found guilty of a crime. As the Supreme Court pointedly noted in *Strickland*, 'the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality

of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.' 466 U.S. at 689."

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

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

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

Examples of Ineffectiveness

Expert Witnesses

Ex parte Overton, 444 S.W.3d 632 (Tex. Crim. App. 2014)
Ineffective assistance of counsel established by failure to present testimony of expert physician that refuted state's case.

Ex parte Briggs, 187 S.W.3d 458 (Tex. Crim. App. 2005)
Attorney ineffective for failure to thoroughly investigate medical evidence before advising client to plead guilty to injury to a child.

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

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

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

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

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

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

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

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

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

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

Failure to Investigate

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

Butler v. State, 716 S.W.2d 48, 54 (Tex. Crim. App. 1986)
Attorney's failure to investigate evidence that someone other than defendant was the robber was ineffective.

State v. Thomas, 768 S.W.2d 335, 336 (Tex. App. - Houston [14th Dist.] 1989, *no pet.*)
Counsel's failure to interview and call witnesses was ineffective.

Ex parte Welborn, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990)
Defense counsel's failure to interview witnesses constitutes ineffective assistance.

Melton v. State, 987 S.W.2d 72 (Tex. App. - Dallas 1998, no pet.)
Attorney found ineffective for failing to investigate facts of robbery case, telling his client that a videotape existed of him committing the offense when no such tape existed, thereby causing defendant to plead guilty to robbery even though he had no memory of committing the offense because he suffered from alcoholic blackouts.

Wiggins v. Smith, 539 U.S. 510 (2003)
Failure to fully investigate petitioner's life for mitigating evidence is ineffective assistance.

Richards v. Quarterman, 566 F.3d 553 (5th Cir. 2009)
Ineffective assistance based on failure to conduct adequate pre-trial investigation. Decision by counsel cannot be said to be reasonable or strategic absent a thorough investigation.

Ignorance of the Law

Ex parte Welch, 981 S.W.2d 183, 185 (Tex. Crim. App. 1998)
Defense counsel's misunderstanding of the law on probation constituted ineffective assistance.

Ex parte Lewis, 537 S.W.3d 917 (Tex. Crim. App. 2017)
Ineffective assistance based on lack of knowledge of law on controlled substance charge.

Ex parte Kolhoff, 2020 WL 241620 (Tex. Crim. App. 2020)
Trial counsel ineffective based on failure to realize that client was not required to register as a sex offender and advising him to plead guilty to failure to register.

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 F.3d 598 (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 misdemenaor 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 Kolhoff, 2020 WL 241620 (Tex. Crim. App. 2020)
Trial counsel ineffective based on failure to realize that client was not required to register as a sex offender and advising him to plead guilty to failure to register.

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. 548 S.W.3d 497 (Tex. Crim. App. 2018)

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

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

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

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

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

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

To establish prejudice on a claim of ineffective assistance in which the defendant is not made aware of a plea bargain offer, or rejects an offer

because of bad advice, defendant must show a reasonable probability that he would have accepted earlier offer if he had not been given ineffective assistance, prosecution would not have withdrawn his offer and trial court would not have refused to accept plea bargain.

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

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

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

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

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

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

Roe v. Flores-Ortega, 528 U.S. 47 (2000)
Counsel's failure to file notice of appeal depriving defendant of appellate proceeding altogether was presumably prejudicial.

Punishment Phase

Rompilla v. Beard, 545 U.S. 374 (2005)
Failure to obtain and review prosecutor's punishment phase evidence and failure to develop mitigating evidence on capital case is ineffective.

Ex parte Medina, 540 S.W.3d 593 (Tex. Crim. App. 2017)
New punishment hearing ordered in death penalty case based on counsel's deficient performance in failing to present any punishment phase case.

Ex parte Armstrong, No. WR-78,106-01, 2017 WL 5483404 (Tex. Crim. App. 2017)
Ineffective assistance at punishment phase of capital murder case based on failure to present adequate evidence regarding applicant's mental health at time of offense.

Milburn v. State, 15 S.W.3d 267 (Tex. App. - Houston [14th Dist.] 2000, *pet. ref'd*)
Ineffective assistance established for punishment phase when counsel failed to contact 20 potentially favorable character witnesses.

Lampkin v. State, 470 S.W.3d 876 (Tex. App. - Texarkana 2015, *pet. ref'd*)
Trial counsel's failure to investigate defendant's mental health history to uncover mitigating evidence at penalty phase of trial constituted ineffective assistance.

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

Ex parte Lane, 303 S.W.3d 702 (Tex. Crim. App. 2009)
Failure to object during punishment phase to testimony by DEA agent on dangers and societal costs caused by methamphetamine was ineffective assistance.

Ex parte Rogers, 369 S.W.3d 858 (Tex. Crim. App. 2012)
Failure of counsel to discover evidence showing that the defendant was not at the scene of a crime that was used at punishment phase as extraneous offense constitutes ineffective assistance of counsel.

Ex parte Austin, 746 S.W.2d 228 (Tex. Crim. App. 1988)
Counsel ineffective for advising client he was eligible for shock probation when he was not.

Ex parte Walker, 794 S.W.2d 36 (Tex. Crim. App. 1998)
Not timely filing election for jury to set punishment is ineffective assistance.

Miller v. Dretke, 420 F.3d 356 (5th Cir. 2005)
Defense counsel was ineffective for failure to present treating physician's testimony regarding defendant's mental and psychological problems during trial.

Incorrect Advise on Parole Eligibility

Ex parte Moussazadeh, 361 S.W.3d 684 (Tex. Crim. App. 2012)
Counsel's misinformation to defendant as to his parole eligibility constituted deficient performance.

Ex parte Hutton, No. WR-87,094-01, 2017 WL 4021197 (Tex. Crim. App. 2017)
Ineffective assistance based on erroneous advice regarding parole eligibility.

Ex parte Boyken, No. WR-87,091-01, 2017 WL 8573682 (Tex. Crim. App. 2017)
Trial counsel deficient by failure to advise applicant that she would not be eligible for parole until she served one half of her sentence.

Insanity Defense

Ex parte Imoudu, 284 S.W.3d 866 (Tex. Crim. App. 2009)
Failure to investigate possibility of an insanity defense.

Ex parte Howard, 425 S.W.3d 323 (Tex. Crim. App. 2014)
Counsel ineffective for failing to present evidence at punishment phase of insanity caused by voluntary intoxication.

Immigration Consequences

Padilla v. Kentucky, 559 U.S. 356 (2010)
Failure to advise defendant of deportation consequences of conviction is ineffective assistance.

Lee v. United States, 137 S.Ct. 1958 (2017)
Defendant demonstrates reasonable probability that he would not have pled guilty if he had known that it would lead to mandatory deportation, thus ineffective assistance shown.

Ex parte Aguilar, 537 S.W.3d 122 (Tex. Crim. App. 2017)
Ineffective assistance based on counsel giving applicant incorrect immigration advice.

Ex parte Torres, 483 S.W.3d 35 (Tex. Crim. App. 2016)
Deficient performance from counsel in failing to adequately warn defendant that his guilty plea made him subject to automatic deportation. However, defendant failed to establish prejudice because he did not show that he would have rejected the plea bargain and

pursued a trial or would otherwise have received a more favorable outcome.

Conflict of Interest

Ex parte Knelsen, 2017 WL 2462329 (Tex. Crim. App. 2017)
On conflict of interest claim must show a viable defensive strategy was not pursued as a result of the alleged conflict of interest.

Cuyler v. Sullivan, 446 U.S. 335 (1980)
Defendant can demonstrate conflict of interest by showing (1) counsel was actively representing conflicting interests and (2) the conflict had an adverse effect on specific aspects of counsel's performance.

Mickens v. Taylor, 535 U.S. 162, 172-74 (2002)
Trial court's failure to inquire into known potential conflict of interest did not merit reversal because defendant did not show that conflict adversely affected counsel's performance.

Acosta v. State, 233 S.W.3d 349 (Tex. Crim. App. 2007)
To show ineffective assistance based on a conflict of interest defendant must show counsel had actual conflict of interest and that the conflict colored his actions during trial.

Ex parte McFarland, 163 S.W.3d 743 (Tex. Crim. App. 2005)
No actual conflict existed due to defense counsel's alleged prior representation of defendant's alleged accomplice.

Egregious Conduct By Counsel

Ex parte Sanchez, No. WR-84,238-01, 2017 WL 3380147 (Tex. Crim. App. 2017)
Ineffective assistance found when defense counsel carried on a coercive sexual relationship with the defendant.

Aldrich v. State, 296 S.W.3d 225 (Tex. App. - Fort Worth 2009, pet. ref'd)
Defense counsel's conduct resulted in counsel being held in contempt and was ineffective assistance.

Ineffective Assistance Not Proven

Ex parte Scott, 541 S.W.3d 104 (Tex. Crim. App. 2017)
No ineffective assistance based on not calling an expert to testify that applicant was candidate for rehabilitation program in child pornography

case.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Counsel provided effective assistance by preventing defendant from committing perjury.

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

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

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

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

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

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

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

Failure to object to inadmissible hearsay was strategic decision.

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

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

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

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

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

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

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

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

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

Limited use of character witnesses upheld as reasonable tactical choice.

III.

PROSECUTORIAL MISCONDUCT

Prosecutorial misconduct claims are almost always based on suppression of exculpatory evidence. However, there are cases that recognize that prosecutorial misconduct can also reach a level of egregiousness that constitutes a violation of due process. *See Ukwuachu v. State*, 613 S.W.3d 14 (Tex. Crim. App. 2021):

> ". . . improper prosecutorial questioning of witnesses may rise to the level of a due process violation in some instances. *Greer v. Miller*, 483 U.S. 756, 765 (1987)."

In *Bautista v. State*, 363 S.W.3d 259 (Tex. App. - San Antonio 2012), the court stated:

> "However, '[w]here there is serious and continuing prosecutorial misconduct that undermines the reliability of the factfinding process ...

> resulting in deprivation of fundamental fairness and due process of law, the defendant is entitled to a new trial even though few objections have been perfected.'" *Jimenez v. State*, 298 S.W.3d 203, 214 (Tex. App. - San Antonio 2009, *pet. ref'd*) (quoting *Rogers v. State*, 725 S.W.2d 350, 359-60 (Tex. App. - Houston [1st Dist.] 1987, *no. pet.*)); *see Berger v. United States*, 295 U.S. 78, 84, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935)."

Since the overwhelming majority of prosecutorial misconduct cases involve suppression of exculpatory evidence, the remainder of this section will focus on that issue.

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).

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."[1] *Agurs*, 427 U.S. at

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

> "In *Giglio v. United States*, 405 U.S. 150, 153, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the Court acknowledged that since *Mooney*, it has been clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'the rudimentary demands of justice.' *See Pyle v. Kansas*, 317 U.S. 213, 216, 63 S.Ct. 177, 87 L.Ed. 214 (1942). And in *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), the Court concluded that the same result obtains when the prosecution, 'although not

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,

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soliciting false evidence, allows it to go uncorrected when it appears.' *Id*. at 269, 79 S.Ct. 763. When the reliability of a given witness may well be determinative of the guilt or innocence of an accused, nondisclosure of evidence affecting credibility falls within the general rule discussed. *Giglio*, 405 U.S. at 154, 92 S.Ct. 763. This line of cases has sometimes been referred to as the *Mooney-Pyle-Napue* line of decisions.
See 42 George E. Dix & Robert O. Dawson *Texas Practice: Criminal Practice and Procedure* §22.51 (2d ed.2002) (hereinafter Dix); *see also generally Giles v. Maryland*, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967); *Miller v. Pate*, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967);
Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957); *Ex parte Castellano*, 863 S.W.2d 476 (Tex. Crim. App. 1993); *Ex parte Adams*, 768 S.W.2d 281 (Tex. Crim. App. 1989); *Davis v. State*, 831 S.W.2d 426 (Tex. App. - Austin 1992, no pet.).

Although *Brady* relied upon *Mooney*, *see Kyles v. Whitley*, 514 U.S. 419, 432, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), and there have been suggestions that the *Mooney* line of cases were incorporated in the later *Brady* rule, the two lines of decision are distinctive. *See United States v. Agurs*, 427 U.S. 97, 104, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). It has been stated: Although *Brady v. Maryland* and its progeny suggest the due process to disclose may have superseded and replaced the prohibition against the use of perjured testimony, this is not the case. The prohibition against the use of perjured testimony remains available to defendants as an alternative to *Brady* arguments. *Mooney* contentions are sometimes more attractive to defendants because the criterion for determining the materiality of improperly used perjured testimony is more lenient than that for determining the materiality of improperly suppressed exculpatory evidence under *Brady*. The difference between the two due process rules is not entirely clear. Some situations will present viable arguments that both were violated. If a defendant is able to establish both that the State knowingly used perjured testimony and that it failed to disclose evidence showing the falsity of the testimony, the defendant is entitled to relief if he or she can show the testimony used is material under the perjured testimony line of decisions and its more relaxed materiality standard. Dix §22.5 (citations omitted)

While appellant relies upon both due process rules, we conclude it is necessary to examine only the *Mooney-Pyle-Napue* line of decisions to reach the proper disposition of appellant's contention. We review the record to determine if the State 'used' the testimony, whether the testimony was 'false,' whether the testimony was 'knowingly used,' and if these questions are affirmatively answered, whether there is a reasonable likelihood that the false testimony could have affected the judgment of the jury."

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 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.

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.

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).

Court of Criminal Appeals

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

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

After trial, the defense learned of this evidence and Walker's testimony was presented at a motion for new trial. Both the trial court and Court of Appeals refused to order a new trial. However, the Court of Criminal Appeals reversed and held that

there was a reasonable probability that the result of the proceeding would have been different with Walker's testimony.

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.

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; *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."; s*ee 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 Wearry. 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."

In recent years, the Texas Court of Criminal Appeals has granted writ relief on several cases based on false testimony from jailhouse informants. *See Ex Parte Dennis Lee Allen*, No. WR-56,666-03, 2018 WL 344332 (Tex. Crim. App. 2018); *Ex Parte Stanley Orson Mozee*, No. WR-57,958-01, 2018 WL 345057 (Tex. Crim. App. 2018); *Ex Parte John Nolley*, No. WR-46,177-30, 2018 WL 2126318 (Tex. Crim. App. 2018); *Ex Parte George Powell*, No. WR-80,713-02, 2019 WL 2607170 (Tex. Crim. App. 2019). In these cases, the court recognized the materiality of evidence from jailhouse informants

and granted writ relief when it was shown that there informants presented false evidence. It is also noteworthy that, according to the Innocence Project, jailhouse informant testimony is one of the leading contributing factors of wrongful convictions, nationally playing a role in nearly one of five of the 367 DNA-based exoneration cases. *See,* innocenceproject.org, The Causes of Wrongful Convictions.

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).

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).

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.

Specific Cases

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

Supreme Court Cases

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."

Texas Cases

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

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

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

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

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

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

Ex parte Casey, 2021 WL 266312 (Tex. Crim. App. 2021): Failure of state to reveal that police officers did not verbally identify themselves as police officers before defendant shot at them in aggravated assault on a police officer case was *Brady* violation.

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.

Federal Cases

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

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

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

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

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

Carter v. Rafferty, 826 F.2d 1299 (3rd Cir. 1987): Reports of polygraph test given to important prosecution witness, but see *Wood v. Bartholomew*, 516 U.S. 1, 116 S.Ct. 7, 133 L.Ed.2d 1 (1995) (because polygraphs are inadmissable even for impeachment they are not subject to *Brady*). *Chaney v. Brown*, 730 F.2d 1334 (10th Cir. 1984): Conviction affirmed but death sentence reversed where withheld evidence

contradicted prosecution's theory of the murder and placed defendant 110 miles from the scene.

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

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

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

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

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

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

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

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

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

Lindsey v. King, 769 F.2d 1034 (5th Cir. 1985). Suppression of initial statement of eyewitness to police in which he said he could not identify the murderer because he never saw the murderer's face.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

United States v. Gerard, 491 F.2d 1300 (9th Cir. 1974): Defendants deprived of evidence of promise of leniency by prosecutor, and failure to disclose that witness was in other trouble, thereby giving him even greater incentive to lie.

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

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

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

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

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

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

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

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

Walter v. Lockhart, 763 F.2d 942 (8th Cir. 1985): For over twenty years, the State withheld a transcript of a conversation supporting the defendant's claim that the officer shot at him first.

Tassin v. Cain, 517 F.3d 770 (5th Cir. 2008). State's failure to disclose in murder trial the understanding or agreement between witness and state, under which witness expected to gain beneficial treatment in sentencing for related crimes provided that she testified at trial consistently with her prior statements inculpating defendant,

constituted Fourteenth Amendment violation under *Giglio,* even though witness had not received a firm promise of leniency from the judge or prosecutor.

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

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

Timing of Disclosure

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

Requesting Exculpatory Evidence

The prosecution has a duty to reveal exculpatory evidence even without a specific request from the defense and regardless of the good faith or bad faith of the

prosecution. *United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *Thomas v. State,* 841 S.W.2d 399 (Tex. Crim. App. 1992).

Statutory Codification

In the Michael Morton Act, art. 39.14, Tex. Code Crim. Proc., the legislature codified a requirement that the state turn over *Brady* information. The following provision of 39.14 address this issue:

> "(h) Notwithstanding any other provision of this article, the state shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.
> . . .
> (k) If at any time before, during, or after trial the state discovers any additional document, item, or information required to be disclosed under subsection (h), the state shall promptly disclose the existence of the document, item, or information to the defendant or the court."