INEFFECTIVE ASSISTANCE OF COUNSEL

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CHAPTER 32

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Constitutions

INEFFECTIVE ASSISTANCE OF COUNSEL

I. STANDARDS FOR DETERMINING INEFFECTIVE ASSISTANCE OF COUNSEL

A. General Principles

1. The defendant has the right to the effective assistance of counsel at trial. U.S. CONST. amends. VI and XIV; TEX. CONST. art. I, §10; Powell v. Alabama, 287 U.S. 45 (1932).

    a. A juvenile has the same right to effective representation as an adult. In re K.J.O., 27 S.W.3d 340 (Tex. App. – Dallas 2000, pet. denied).

2. The defendant was constructively denied the assistance of counsel within the meaning of United States v. Cronic, 466 U.S. 648 (1984), where counsel periodically slept during the trial. Burdine v. Johnson, 262 F.3d 336 (5th Cir. 2001), cert. denied, 535 U.S. 1120 (2002).

    a. Counsel's absence from the courtroom during the testimony of a prosecution witness requires a showing of harm. Hodges v. State, 116 S.W.3d 289 (Tex. App. – Corpus Christi 2003, pet. ref'd).

3. Counsel must act within the range of competence demanded of counsel in criminal cases. McMann v. Richardson, 397 U.S. 759 (1970).
4. The same standards apply in evaluating the representation of retained and appointed counsel. Cuyler v. Sullivan, 446 U.S. 335 (1980).
5. Counsel must be authorized to practice law; where counsel's license was suspended for professional misconduct at the time of trial, the defendant is denied effective assistance if the reasons for the suspension reflected so poorly on counsel's competence that it may reasonably be inferred that counsel was incompetent to represent the defendant. Cantu v. State, 930 S.W.2d 594 (Tex. Crim. App. 1996).
6. The effectiveness of counsel is ordinarily gauged by the totality of the representation, but a single error, if sufficiently egregious, can constitute ineffective assistance. Ex parte Felton, 815 S.W.2d 733 (Tex. Crim. App. 1991).
7. The defendant is entitled to a hearing on a motion for new trial alleging ineffective assistance of counsel where the allegations, if true, would entitle him to a new trial. Reyes v. State, 849 S.W.2d 812 (Tex. Crim. App. 1993).

    a. The defendant has the right to question counsel; the admission of counsel's affidavit, over objection, denies confrontation. Lopez v. State, 895 S.W.2d 392 (Tex. App – Corpus Christi 1994, no pet.).
    b. Counsel cannot invoke his fifth amendment privilege and refuse to testify about his representation. Porchia v. State, 904 S.W.2d 147 (Tex. App. – Dallas 1995, pet. ref'd).
    c. The granting of a motion for new trial based on ineffective assistance of counsel is reviewed for an abuse of discretion. State v. Kelley, 20 S.W.3d 147 (Tex. App. – Texarkana 2000, no pet.) (failure to obtain ruling on speedy trial motion).

8. The defendant need not object in the trial court to counsel's ineffective representation to preserve the issue for appellate review. Robinson v. State, 16 S.W.3d 808 (Tex. Crim. App. 2000).
9. The appellate court can abate the appeal to order the trial court to conduct an evidentiary hearing to determine:

    a. whether counsel advised the defendant regarding the risks of joint representation of co-defendants. Gonzales v. State, 605 S.W.2d 278 (Tex. Crim. App. 1980); Guillory v. State, 638 S.W.2d 73 (Tex. App. – Houston [1st Dist.] 1982, no pet.); Guillory v. State, 646 S.W.2d 467 (Tex. App. – Houston [1st Dist.] 1982, no pet.).
    b. whether counsel had a reasonable basis to advise the defendant to elect the jury to assess punishment at the retrial where the trial court had imposed the minimum sentence at the first trial. Jackson v. State, 640 S.W.2d 323 (Tex. App. – San Antonio 1982, pet. ref'd).
    c. whether trial counsel, who said he would not challenge his own effectiveness at trial, should have been appointed on appeal. Alvarez v. State, 79 S.W. 679 (Tex. App. – Houston [1st Dist.] 2002, pet. dism'd).

10. Where the issue of ineffective assistance of counsel has been rejected on appeal, it can be relitigated on habeas corpus if the defendant introduces evidence not contained in the appellate record. Ex parte Torres, 943 S.W.2d 469 (Tex. Crim. App. 1997).

B. Guilt-Innocence Stage

1. The standard of Strickland v. Washington, 466 U.S. 668 (1984) applies.

    a. The defendant must show that counsel's performance was deficient.

        (1) The defendant must show that counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment.
        (2) Counsel's performance must be evaluated on the basis of the caselaw extant at the time of trial. Vaughn v. State, 931 S.W.2d 564 (Tex. Crim. App. 1996).

    b. The defendant must show that the deficient performance prejudiced the defense.

        (1) The defendant must show that counsel's errors were so serious as to deprive him of a fair trial with a reliable result.

c. Standard of appellate review

(1) The defendant must identify specific acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.
(2) The appellate court must determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance.
(3) Ultimately, the defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

(a) A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

2. The Strickland standard applies to a claim of ineffective assistance of counsel arising under article I, §10 of the Texas Constitution. Hernandez v. State, 726 S.W.2d 53 (Tex. Crim. App. 1986).

C. Punishment Stage

1. The Strickland standard applies in capital and non-capital cases. Boyd v. State, 811 S.W.2d 105 (Tex. Crim. App.), cert. denied, 502 U.S. 971 (1991); Hernandez v. State, 988 S.W.2d 770 (Tex. Crim. App. 1999).
2. The 5th Circuit requires the defendant to establish a reasonable probability that, but for counsel's errors, the sentence would have been "significantly" less harsh. Spriggs v. Collins, 993 F.2d 85 (5th Cir. 1993). The Supreme Court has held that counsel's deficient performance that resulted in a higher sentence under determinate sentencing guidelines constitutes prejudice. Glover v. United States, 531 U.S. 198 (2001). The holding in Spriggs is questionable in light of Glover. See Daniel v. Cockrell, 283 F.3d 697 (5th Cir.), cert. denied, 537 U.S. 874 (2002); United States v. Reinhart, 357 F.3d 521 (5th Cir. 2004).
3. The Strickland standard, rather than the Cronic presumed – prejudice standard, applies to a claim that counsel failed to oppose the prosecution at specific points during the trial. Bell v. Cone, 535 U.S. 685 (2002).

II. GUILTY PLEA

A. Standard Of Review

1. The Strickland standard applies to a challenge to a guilty plea based on ineffective assistance of counsel. Hill v. Lockhart, 474 U.S. 52 (1985).

a. The defendant must show that counsel's advice was deficient and, but for that advice, there is a reasonable probability that he would have pled not guilty.

B. Inadequate Explanations Of The Law

1. Application To The Facts

a. Counsel must advise the defendant how the law applies to the facts of the case to ensure that the guilty plea is knowing and voluntary. Ex parte Morse, 591 S.W.2d 904 (Tex. Crim. App. 1980).

(1) Failure to advise the defendant that a temporary taking of jail keys from a jailer to escape did not constitute robbery under the former Penal Code. Ex parte Gallegos, 511 S.W.2d 510 (Tex. Crim. App. 1974); Ex parte Rogers, 519 S.W.2d 861 (Tex. Crim. App. 1975).
(2) Failure to advise the defendant, who pled guilty to murder, that the facts would support a conviction for the lesser-included offense of voluntary manslaughter. Booth v. State, 725 S.W.2d 521 (Tex. App. – Tyler 1987, pet. ref'd).
(3) Failure to advise the defendant that the venue was improper in the place of prosecution. Brown v. Butler, 811 F.2d 938 (5th Cir. 1987).
(4) Failure to advise the defendant, who pled guilty to aggravated assault, that knowledge and conscious disregard of risk that his actions would lead to a certain result were elements of the offense. Burke v. State, 80 S.W.3d 82 (Tex. App. – Fort Worth 2002, no pet.).

2. Application To Punishment Issues

a. The Range Of Punishment

(1) Erroneous advice to plead guilty to avoid the death penalty, which had been held unconstitutional. Ex parte Burns, 601 S.W.2d 370 (Tex. Crim. App. 1980).
(2) Failure to advise the trial court that the defendant was eligible for a sentence less than life under the Youth Court Act. Burley v. Cabana, 818 F.2d 414 (5th Cir. 1987).
(3) Erroneous advice to plead guilty to avoid conviction for two offenses charged in the indictment, where the defendant could only be convicted of one offense. Mitchell v. State, 762 S.W.2d 916 (Tex. App. – San Antonio 1988, pet. ref'd).

b. Eligibility For Probation

(1) Erroneous advice that the defendant, a second offender, was eligible for probation from the court for aggravated sexual assault. Ex parte Battle, 817 S.W.2d 81 (Tex. Crim. App. 1991).
(2) Erroneous advice that the defendant was eligible for shock probation for aggravated sexual assault. Ex parte Kelly, 676 S.W.2d 132 (Tex. Crim. App. 1984); Helton v. State, 909 S.W.2d 298 (Tex. App. – Beaumont 1995, pet. ref'd).

(3) Erroneous advice that the defendant was eligible for shock probation where there was an affirmative finding of a deadly weapon in the judgment. Ex parte Austin, 746 S.W.2d 226 (Tex. Crim. App. 1988).

(4) Erroneous advice that the defendant would receive deferred adjudication probation for DWI and the case would be dismissed after she successfully completed the probation. Ex parte Stamnitz, 768 S.W.2d 461 (Tex. App. – Houston [1st Dist.] 1989, no pet.).

(5) Erroneous advice that the defendant, a habitual offender, was eligible for probation for felony DWI. Freeman v. State, 94 S.W.3d 827 (Tex. App. – Texarkana 2002, no pet.).

c. Eligibility For Parole

(1) Defendant relied on erroneous advice regarding parole eligibility in accepting a plea bargain. Ex parte Young, 644 S.W.2d 3 (Tex. Crim. App. 1983).

(2) Young was modified to the extent that, to obtain relief, the defendant must show that the erroneous advice regarding parole eligibility was incorporated in the plea bargain agreement. Ex parte Pruitt, 689 S.W.2d 905 (Tex. Crim. App. 1985); Ex parte Evans, 690 S.W.2d 274 (Tex. Crim. App. 1985); Ex parte Stephenson, 722 S.W.2d 426 (Tex. Crim. App. 1987); Ex parte Hairston, 766 S.W.2d 790 (Tex. Crim. App. 1989); Ex parte Trahan, 781 S.W.2d 291 (Tex. Crim. App. 1989).

d. Deportation Consequences

(1) Failure to advise the defendant, who pled guilty to a federal felony, of the availability of a judicial recommendation against deportation, and the failure to seek same at sentencing. United States v. Castro, 26 F.3d 557 (5th Cir. 1994).

(2) Failure to advise the defendant, who pled guilty to a state felony, of the deportation consequences. Morales v. State, 910 S.W.2d 642 (Tex. App. – Beaumont 1995, pet. ref'd).

e. Right To Withdraw Guilty Plea

(1) Erroneous advice that the defendant had an absolute right to withdraw the plea before sentencing. Rivera v. State, 952 S.W.2d 34 (Tex. App. – San Antonio 1997, no pet.).

3. Application To Motion For New Trial

a. Erroneous advice to the defendant as to the consequences of moving for a new trial. Rivera v. State, 716 S.W.2d 68 (Tex. App. – Dallas 1986, pet. ref'd).

C. Incorrect Sentencing Information

1. Misrepresentations Regarding The Punishment To Be Assessed

a. Erroneous advice that the court had informally agreed not to assess more than a specific term of years despite the full range of punishment being theoretically available. Ex parte Harris, 596 S.W.2d 893 (Tex. Crim. App. 1980); Murphy v. State, 663 S.W.2d 604 (Tex. App. – Houston [1st Dist.] 1983, no pet.); Morales v. State, 910 S.W.2d 642 (Tex. App. – Beaumont 1995, pet. ref'd).

b. Erroneous advice that the court would follow the State's recommendation of leniency in exchange for the defendant's guilty plea and testimony against a co-defendant, but the defendant should not acknowledge same when questioned during the plea proceeding. Huffman v. State, 676 S.W.2d 677 (Tex. App. – Houston [1st Dist.] 1984, pet. ref'd).

c. Erroneous advice that the defendant would receive no jail time if she accepted a plea bargain for probation, where the trial court retained the authority to impose jail time as a condition of probation. Fielder v. State, 834 S.W.2d 509 (Tex. App. – Fort Worth 1992, pet. ref'd); Flowers v. State, 951 S.W.2d 883 (Tex. App. – San Antonio 1997, no pet.).

d. Erroneous advice that the juvenile defendant could withdraw his plea if the trial court did not follow the State's recommendation on punishment. Matter of E.Q., 839 S.W.2d 144 (Tex. App. – Austin 1992, no writ).

e. Erroneous advice that the defendant would get probation. Diaz v. State, 905 S.W.2d 302 (Tex. App. – Corpus Christi 1995, no pet.).

2. Misrepresentations Regarding Other Charges

a. Erroneous advice that a pending charge in another county would be dismissed if the defendant pled guilty to the present offense. Ex parte Bratchett, 513 S.W.2d 851 (Tex. Crim. App. 1974).

3. Misrepresentations Regarding Concurrent Sentences

a. Erroneous advice that the sentence would be served concurrently with a federal sentence. Ex parte Burton, 623 S.W.2d 418 (Tex. Crim. App. 1981); Ex parte Chandler, 684 S.W.2d 700 (Tex. Crim. App. 1985); Ex parte Slaughter, 689 S.W.2d 464 (Tex. Crim. App. 1985); Ex parte Huerta, 692 S.W.2d 681 (Tex. Crim. App. 1985); Ex parte Moody, 991 S.W.2d 856 (Tex. Crim. App. 1999).

b. Erroneous advice that the sentence would be served concurrently with a sentence from another state. Ex parte Griffin, 679 S.W.2d 15 (Tex. Crim. App. 1984); Ex parte Young, 684 S.W.2d 704 (Tex. Crim. App. 1985); Ex parte Reyna, 707 S.W.2d 110 (Tex. Crim. App. 1986).

D. Failure To Investigate

1. Counsel erroneously told the defendant that a videotape showed him committing the crime. Melton v. State, 987 S.W.2d 72 (Tex. App. – Dallas 1998, no pet.).

III. PLEA BARGAINING

A. Failure to make a meaningful effort to negotiate a plea bargain in an appropriate case. Mitchell v. State, 762 S.W.2d 916 (Tex. App. – San Antonio 1988, pet. ref'd).

B. Failure to inform the defendant of a plea bargain offer. Hanzelka v. State, 682 S.W.2d 385 (Tex. App. – Austin 1984, no pet.); Ex parte Wilson, 724 S.W.2d 72 (Tex. Crim. App. 1987); Pennington v. State, 768 S.W.2d 740 (Tex. App. – Tyler 1988, no pet.); State v. Pilkinton, 7 S.W.3d 291 (Tex. App. – Beaumont 1999, pet. ref'd); Atkins v. State, 26 S.W.3d 580 (Tex. App. – Beaumont 2000, pet. ref'd); Paz v. State, 28 S.W.3d 674 (Tex. App. – Corpus Christi 2000, no pet.).

   1. The defendant must show that he would have accepted the offer had he been informed of it.
   2. The remedy is reinstatement of the offer. Ex parte Lemke, 13 S.W.3d 791 (Tex. Crim. App. 2000) .

C. Failure to inform the defendant of the deadline for accepting a plea bargain offer. Turner v. State, 49 S.W.3d 461 (Tex. App. – Forth Worth 2001, pet. dism'd).

D. Failure to inform the prosecutor that the defendant accepted a plea bargain offer before expiration of the deadline. Flores v. State, 784 S.W.2d 579 (Tex. App. – Forth Worth 1990, pet. ref'd); Randle v. State, 847 S.W.2d 576 (Tex. Crim. App. 1993).

E. Failure to advise the defendant accurately concerning whether to accept a plea bargain offer. Ex parte Raborn, 658 S.W.2d 602 (Tex. Crim. App. 1983); Sanders v. State, 715 S.W.2d 771 (Tex. App. – Tyler 1986, no pet.) (counsel advised defendant, who had signed a confession, to reject plea bargain offer because State had "no evidence").

F. Failure to fully explain the plea bargain offer. State v. Williams, 83 S.W.3d 371 (Tex. App. – Corpus Christi 2002, no pet.) (counsel failed to explain meaning of deferred adjudication).

IV. PUNISHMENT ELECTION

A. Failure to file a timely election that the jury assess punishment. Ex parte Walker, 794 S.W.2d 36 (Tex. Crim. App. 1990).

B. Failure to advise the defendant that the trial court cannot grant probation following conviction by a jury for an aggravated offense. Medeiros v. State, 733 S.W.2d 605 (Tex. App. – San Antonio 1987, no pet.); Turner v. State, 755 S.W.2d 207 (Tex. App. – Houston [14th Dist.] 1988, no pet.); Gallegos v. State, 756 S.W.2d 45 (Tex. App. – San Antonio 1988, pet. ref'd); Ex parte Canedo, 818 S.W.2d 814 (Tex. Crim. App. 1991); Cardenas v. State, 960 S.W.2d 941 (Tex. App. – Texarkana 1998, pet. ref'd).

C. Failure to advise the defendant that the trial court cannot grant probation following conviction by a jury where there is an affirmative finding of a deadly weapon in the judgment. Stone v. State, 751 S.W.2d 579 (Tex. App. – Houston [1st Dist.] 1988, pet. ref'd).

D. Failure to advise the defendant that the jury cannot grant probation because of his prior felony conviction. Trinh v. State, 974 S.W.2d 872 (Tex. App. – Houston [14th Dist.] 1998, no pet.).

V. PROBATION APPLICATION

A. Failure to file a sworn application for probation. May v. State, 722 S.W.2d 699 (Tex. Crim. App. 1984); Trevino v. State, 752 S.W.2d 735 (Tex. App. – Eastland 1988, pet. dism'd); Ex parte Welch, 981 S.W.2d 183 (Tex. Crim. App. 1998).

B. Failure to offer evidence to prove eligibility for probation. San Roman v. State, 681 S.W.2d 872 (Tex. App. – El Paso 1984, pet. ref'd) (counsel erroneously believed defendant did not have burden to prove eligibility); Ware v. State, 875 S.W.2d 432 (Tex. App. – Waco 1994, pet. ref'd) (inadvertence).

C. Failure to request a jury charge on probation where the defendant was eligible, an application was timely filed, and evidence was offered in support. Snow v. State, 697 S.W.2d 663 (Tex. App. – Houston [1st Dist.] 1985, pet. dism'd); Burnworth v. State, 698 S.W.2d 686 (Tex. App. – Tyler 1985, pet. ref'd).

VI. CONFLICT OF INTEREST

A. Obligations Of The Trial Court

1. The trial court has a duty to appoint separate counsel to represent co-defendants charged with the same offense or, at the very least, to evaluate the risks of a conflict of interest. Reversal is automatic where the trial court forces joint representation over timely objection. Holloway v. Arkansas, 435 U.S. 475 (1978); Hernandez v. State, 862 S.W.2d 193 (Tex. App. – Beaumont 1993, pet. ref'd).
2. The trial court must permit counsel to withdraw where he asserts that he cannot provide conflict-free representation.

   a. The trial court should have allowed a TDCJ staff attorney to withdraw as appointed counsel for a TDCJ inmate in a criminal case where TDCJ employees were witnesses against the inmate. Forced representation would strain the relationship between counsel and other TDCJ employees. White v. Reiter, 640 S.W.2d 586 (Tex. Crim. App. 1982).
   b. The trial court should have allowed counsel to withdraw as appointed counsel for the defendant where counsel also prosecuted for the municipal court. Forced representation would damage counsel's relationship with the city. Kelly v. State, 640 S.W.2d 605 (Tex. Crim. App. 1982).

3. The trial court may have a duty to inquire into the propriety of joint representation of co-defendants.

    a. The trial court has no duty to inquire, in the absence of an objection, unless it knows or reasonably should know of a conflict. Cuyler v. Sullivan, 446 U.S. 335 (1980).
    b. The trial court has a duty to inquire if a conflict is apparent of record. Wood v. Georgia, 450 U.S. 261 (1981) (counsel was hired and paid by employer to represent employees, and outcome most beneficial to employer was least beneficial to employees); Ramirez v. State, 13 S.W.3d 482 (Tex. App. – Corpus Christi 2000, pet. dism'd) (counsel represented defendant and prosecution witness).

4. The trial court may deny the defendant his counsel of choice, even if the defendant waives the right to conflict-free representation, if there is a potential conflict that may develop into an actual conflict at trial. Wheat v. United States, 486 U.S. 153 (1988).

    a. However, prior to Wheat, the Court of Criminal Appeals held that it was error to disqualify counsel due to a conflict of interest where the defendant waived the right to conflict-free representation. Ex parte Prejean, 625 S.W.2d 731 (Tex. Crim. App. 1981).

B. Obligations Of Counsel

1. Counsel must advise the defendant of the dangers of multiple representation if there is an actual conflict of interest, such as where evidence exists that would benefit one defendant to the detriment of another. Ex parte Alaniz, 583 S.W.2d 380 (Tex. Crim. App. 1979); Gonzales v. State, 605 S.W.2d 278 (Tex. Crim. App. 1980); Ex parte Parham, 611 S.W.2d 103 (Tex. Crim. App. 1981); Ex parte McCormick, 645 S.W.2d 801 (Tex. Crim. App. 1983); Ex parte Acosta, 672 S.W.2d 470 (Tex. Crim. App. 1984); Amaya v. State, 677 S.W.2d 159 (Tex. App. – Houston [1st Dist.] 1984, pet. ref'd); Maya v. State, 932 S.W.2d 633 (Tex. App. – Houston [14th Dist.] 1996, no pet.); Garcia v. State, 979 S.W.2d 809 (Tex. App. – Houston [14th Dist.] 1998, pet. ref'd).
2. Counsel must withdraw where the evidence implicates him in the offense or reflects adversely on his character. Brewer v. State, 649 S.W.2d 628 (Tex. Crim. App. 1983) (counsel made disparaging comments during secretly recorded conversations with confidential informant and defendants).
3. Counsel cannot act in a dual capacity, such as by representing the defendant and serving as the court reporter. Ex parte Parker, 704 S.W.2d 40 (Tex. Crim. App. 1986).
4. Counsel cannot simultaneously represent the defendant and a prosecution witness. Ramirez v. State, 13 S.W.3d 482 (Tex. App. – Corpus Christi 2000, pet. dism'd); Perillo v. Johnson, 205 F.3d 775 (5th Cir. 2000); Nethery v. State, 29 S.W.3d 178 (Tex. App. – Dallas 2000, pet. ref'd); Pina v. State, 29 S.W.3d 315 (Tex. App. – El Paso 2000, pet. ref'd).
    a. Appellate counsel, who had been elected County Attorney, took no action after the State's PDR was granted. Blankenship v. Johnson, 118 F.3d 312 (5th Cir. 1997).

C. Standard Of Review

1. Prejudice is presumed where counsel had a conflict due to the representation of multiple defendants. Cuyler v. Sullivan, supra.
2. The defendant must prove prejudice under the Strickland standard where counsel had a conflict based on self-interest. Monreal v. State, 947 S.W.2d 559 (Tex. Crim. App. 1997); Beets v. Johnson, 65 F.3d 1258 (5th Cir. 1995), cert. denied, 517 U.S. 1157 (1996).

VII. FAILURE TO FILE PRE-TRIAL MOTIONS

A. Suppress Illegally Obtained Evidence

1. The defendant's confession. Sanders v. State, 715 S.W.2d 771 (Tex. App. – Tyler 1986, no pet.) (involuntary); Boyington v. State, 738 S.W.2d 704 (Tex. App. – Houston [1st Dist.]1985, no pet.) (fruit of unlawful arrest); Mitchell v. State, 762 S.W.2d 916 (Tex. App. – San Antonio 1988, pet. ref'd).
2. The complainant's out-of-court identification of the defendant. Cooke v. State, 735 S.W.2d 928 (Tex. App. – Houston [14th Dist.] 1987, pet. ref'd) (fruit of unlawful arrest).
3. An airport police officer's observations of a DWI defendant after the officer, outside of his jurisdiction, unlawfully arrested the defendant for traffic violations. Perkins v. State, 812 S.W.2d 326 (Tex. Crim. App. 1991).

B. Severance

1. The co-defendant had a prior felony conviction. Miles v. State, 644 S.W.2d 23 (Tex. App. – El Paso 1982, no pet.).
2. The co-defendant made a confession implicating the defendant. Ex parte McCormick, 645 S.W.2d 801 (Tex. Crim. App. 1983).

C. Double Jeopardy

1. Armed robbery was the underlying felony in the defendant's prior capital murder conviction. Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990).

VIII. INADEQUATE TRIAL PREPARATION

A. Failure To Confer Adequately With The Defendant, Investigate The Facts, Or Prepare For Trial

1. Counsel must confer with the defendant sufficiently to prepare a defense and must conduct an independent investigation of the facts. Ex parte Marez, 505 S.W.2d 930 (Tex. Crim. App. 1974); Ex parte Bratchett, 513 S.W.2d 851 (Tex. Crim. App. 1974); Ex parte Cavett, 521 S.W.2d 619 (Tex. Crim. App. 1975); Ex parte Howard, 591 S.W.2d 906 (Tex. Crim. App. 1980); Ex parte Harris, 596 S.W.2d 893 (Tex. Crim. App. 1980); Ex parte Ybarra, 629 S.W.2d 943 (Tex. Crim. App. 1982);

Ex parte Lilly, 656 S.W.2d 490 (Tex. Crim. App. 1983); Ex parte Raborn, 658 S.W.2d 602 (Tex. Crim. App. 1983); Murphy v. State, 663 S.W.2d 604 (Tex. App. – Houston [1st Dist.] 1983, no pet.); Hutchinson v. State, 663 S.W.2d 610 (Tex. App. – Houston [1st Dist.] 1983, pet. ref'd); Sanders v. State, 715 S.W.2d 771 (Tex. App. – Tyler 1986, no pet.); Strickland v. State, 747 S.W.2d 59 (Tex. App. – Texarkana 1988, no pet.); Mitchell v. State, 762 S.W.2d 916 (Tex. App. – San Antonio 1988, pet. ref'd); Haynes v. State, 790 S.W.2d 824 (Tex. App. – Austin 1990, no pet.); Jackson v. State, 857 S.W.2d 678 (Tex. App. – Houston [14th Dist.] 1993, pet. ref'd); Catalan v. Cockrell, 315 F.3d 491 (5th Cir. 2002).

a. Failure to obtain a free transcript of testimony from prior trial that resulted in a hung jury. Lawson v. State, 896 S.W.2d 828 (Tex. App. – Corpus Christi 1995, pet. ref'd) (no prejudice where only minor discrepancies).
b. Failure to know the defendant had prior convictions before calling him to testify. Green v. State, 899 S.W.2d 245 (Tex. App. – San Antonio 1995, no pet.).
c. Calling the defendant to testify at a bond hearing, at which he judicially confessed, without knowing that the complainant could not identify him. Mendoza v. State, 959 S.W.2d 321 (Tex. App. – Waco 1997, pet. ref'd).
d. Failure to move to weigh the controlled substance without the packaging. Diaz v. State, 905 S.W.2d 302 (Tex. App. – Corpus Christi 1995, no pet.).
e. Failure to prepare the defendant adequately to testify so he would not open the door to impeachment evidence. Perrero v. State, 990 S.W.2d 896 (Tex. App. – El Paso 1999, pet. ref'd).

2. Counsel cannot withdraw during the trial and leave the representation to another lawyer who was present only to observe. Brown v. State, 630 S.W.2d 876 (Tex. App. – Fort Worth 1982, no pet.).
3. Counsel cannot refuse to cross-examine witnesses or to present evidence or argument after the court refused to allow him to withdraw. Wenzy v. State, 855 S.W.2d 47 (Tex. App. – Houston [14th Dist.] 1993, pet. ref'd).

B. Failure To Interview Witnesses

1. Counsel has a duty to interview both prosecution and defense witnesses. Flores v. State, 576 S.W.2d 632 (Tex. Crim. App. 1978); Ex parte Duffy, 607 S.W.2d 507 (Tex. Crim. App. 1980); Butler v. State, 716 S.W.2d 48 (Tex. Crim. App. 1986); Doherty v. State, 781 S.W.2d 439 (Tex. App. – Houston [1st Dist.] 1989, no pet.); Ex parte Welborn, 785 S.W.2d 391 (Tex. Crim. App. 1990); Haynes v. State, 790 S.W.2d 824 (Tex. App. – Austin 1990, no pet.); Bryant v. Scott, 28 F.3d 1411 (5th Cir. 1994); Smith v. State, 894 S.W.2d 876 (Tex. App. – Amarillo 1995, pet. ref'd); Diaz v. State, 905 S.W.2d 302 (Tex. App. – Corpus Christi 1995, no pet.); In re K.J.O., 27 S.W.3d 340 (Tex. App. – Dallas 2000, pet. denied).

a. Counsel cannot make a sound strategic decision not to call a witness that he failed to interview. Milburn v. State, 15 S.W.3d 267 (Tex. App. – Houston [14th Dist.] 2000, pet. ref'd).

2. Counsel must adequately prepare the witnesses to testify at trial. Ex parte Guzmon, 730 S.W.2d 724 (Tex. Crim. App. 1987).
3. Counsel failed to investigate the extraneous offenses and advise the defendant that they would become admissible if he presented an alibi defense. Moore v. Johnson, 194 F.3d 586 (5th Cir. 1999).

C. Failure To Present Exculpatory Evidence

1. Alibi. Ex parte Cavett, 521 S.W.2d 619 (Tex. Crim. App. 1975); Nealy v. Cabana, 764 F.2d 1173 (5th Cir. 1985); Butler v. State, 716 S.W.2d 48 (Tex. Crim. App. 1986); Shelton v. State, 841 S.W.2d 526 (Tex. App. – Forth Worth 1992, no pet.); In re I.R., 124 S.W.3d 294 (Tex. App. – El Paso 2003, no pet. reported), Bryant v. Scott, 28 F.3d 1411 (5th Cir. 1994); In re K.J.O., 27 S.W.3d 340 (Tex. App. – Dallas 2000, pet. denied).
2. Lack of mental capacity.

a. Insanity. Ex parte Duffy, 607 S.W.2d 507 (Tex. Crim. App. 1980); Profitt v. Waldron, 831 F.2d 1245 (5th Cir. 1987); Bouchillon v. Collins, 907 F.2d 589 (5th Cir. 1990); In re R.D.B., 20 S.W.3d 255 (Tex. App. – Texarkana 2000, no pet.).
b. Incompetency. Callaway v. State, 594 S.W.2d 440 (Tex. Crim. App. 1980); Jackson v. State, 857 S.W.2d 678 (Tex. App. – Houston [14th Dist.] 1993, pet. ref'd).
c. Mental disease in mitigation of punishment in a death penalty case. Loyd v. Whitley, 977 F.2d 149 (5th Cir. 1992).

3. Consent. State v. Thomas, 768 S.W.2d 335 (Tex. App. – Houston [14th Dist.] 1989, no pet.).
4. Suicide. Winn v. State, 811 S.W.2d 756 (Tex. App. – Corpus Christi 1993, no pet.).
5. State's lack of diligence in executing capias before expiration of probation. Torres v. State, 29 S.W.3d 631 (Tex. App. – Corpus Christi 2000, pet. ref'd).
6. Testimony of the defendant.

a. Refusing to allow the defendant to testify. Doherty v. State, 781 S.W.2d 439 (Tex. App. – Houston [1st Dist.] 1989, no pet.).
b. Allowing the defendant to testify while heavily tranquilized. Ex parte Duffy, 607 S.W.2d 507 (Tex. Crim. App. 1980).
c. Making poor use of an interpreter to elicit the defendant's testimony. Ex parte Guzmon, 730 S.W.2d 724 (Tex. Crim. App. 1987) (rambling narrative).

7. Defendant's lesser role in the offense. Everage v. State, 893 S.W.2d 219 (Tex. App. – Houston [1st Dist.] 1995, pet. ref'd).
8. Failure to offer the exculpatory portions of the defendant's confession after the inculpatory portions were admitted. Moore v. Johnson, 194 F.3d 586 (5th Cir. 1999).
9. Mitigating evidence at the punishment stage. Milburn v. State, 15 S.W.3d 267 (Tex. App. – Houston [14th Dist.] 2000, pet. ref'd); Moore v. State, 983 S.W.2d 15 (Tex. App. – Houston [14th Dist.] 1998, no pet.); Moore v. Johnson, 194 F.3d 586 (5th Cir. 1999); Lockett v. Anderson, 230 F.3d 695 (5th Cir. 2000).

D. Failure To Investigate The Validity Of Prior Convictions Alleged For Enhancement

1. Failure to determine that the first conviction was not final when the defendant committed the offense that resulted in the second conviction used to enhance him to habitual offender status. Ex parte Scott, 581 S.W.2d 181 (Tex. Crim. App. 1979).
2. Failure to determine that the defendant, charged as an habitual offender, could only be enhanced to second offender status because both prior convictions became final on the same date. Ex parte Pool, 738 S.W.2d 285 (Tex. Crim. App. 1987).
3. Failure to determine that the defendant was not represented by counsel on the prior conviction. Cook v. Lynaugh, 821 F.2d 1072 (5th Cir. 1987); Ex parte Jordan, 879 S.W.2d 61 (Tex. Crim. App. 1994); Childress v. Johnson, 103 F.3d 1221 (5th Cir. 1997) (counsel appointed only for plea proceeding).
4. Failure to determine that the prior conviction was void. Ex parte Felton, 815 S.W.2d 733 (Tex. Crim. App. 1991).
5. Failure to determine that the prior conviction was not final because the defendant received shock probation. Ex parte Langley, 833 S.W.2d 141 (Tex. Crim. App. 1992).
6. Failure to file timely notice of appeal on a prior conviction, as promised, enabling it to become admissible at the trial for the primary offense. Ex parte Walker, 777 S.W.2d 427 (Tex. Crim. App. 1989).
7. Failure to object to improper enhancement under federal sentencing guidelines. Glover v. United States, 531 U.S. 198 (2000); United States v. Phillips, 210 F.3d 345 (5th Cir. 2000); United States v. Franks, 230 F.3d 811 (5th Cir. 2000).

E. Failure To Investigate Jury Misconduct

1. Failure to investigate information that jurors discussed the parole law during deliberations. Ex parte Welborn, 785 S.W.2d 391 (Tex. Crim. App. 1990).

IX. FAILURE TO OBJECT

A. Indictment

1. Indictment improperly predicated felony murder on an aggravated assault, thereby allowing the defendant to be convicted of murder on facts that only constituted aggravated assault. Ex parte Drinkert, 821 S.W.2d 953 (Tex. Crim. App. 1991).

B. Voir Dire

1. Failure to challenge biased veniremen.

   a. Veniremen presumed that the defendant was guilty. Nelson v. State, 832 S.W.2d 762 (Tex. App. – Houston [1st Dist.] 1992, no pet.).

      (1) The prejudice prong of Strickland is satisfied by the presence of one biased juror.

   b. Veniremen presumed that the defendant was guilty, would consider his failure to testify, or would automatically assess the maximum punishment upon conviction. Knight v. State, 839 S.W.2d 505 (Tex. App. – Beaumont 1992, no pet.).

      (1) Prejudice is presumed without any inquiry into the actual conduct of the trial.

2. Failure to notify the court that the wrong veniremen was excused, leaving a biased juror who had been struck for cause. Alaniz v. State, 937 S.W.2d 593 (Tex. App. – San Antonio 1996, no pet.).
3. Failure to preserve error.

   a. The trial court improperly denied a challenge for cause to a venireman who admitted that she was biased against the defendant. Montez v. State, 824 S.W.2d 308 (Tex. App. – San Antonio 1992, no pet.).
   b. The trial court terminated the voir dire examination before defense counsel could question all the veniremen. Montez v. State, supra.

C. Opening Statement

1. Counsel misstated the burden of proof by stating that the defense, to a certain extent, had to prove the defendant's innocence, and made promises regarding the evidence that were not kept. Montez v. State, supra.

D. Evidence

1. Standard Of Review

   a. "To pass over the admission of prejudicial and arguably inadmissible evidence may be strategic; to pass over the admission of prejudicial and clearly inadmissible evidence ... has no strategic value." Lyons v. McCotter, 770 F.2d 529, 534 (5th Cir. 1985), cert. denied, 474 U.S. 1073 (1986).

2. Oral Statement

   a. The defendant's oral statements did not meet the statutory or constitutional requirements for admissibility. Williamson v. State, 771 S.W.2d 601 (Tex. App – Dallas 1989, pet.

ref'd); Wenzy v. State, 855 S.W.2d 52 (Tex. App. – Houston [14th Dist.] 1993, pet. ref'd) (oral statements concerned extraneous offenses rather than primary offense).

3. Invocation Of Constitutional Rights

a. Post-arrest silence. Brown v. State, 974 S.W.2d 289 (Tex. App – San Antonio 1998, pet. ref'd).
b. Cross-examination of the defendant that he never told his exculpatory story to the police. Thomas v. State, 812 S.W.2d 346 (Tex. App. – Dallas 1991, pet. ref'd).
c. Defendant's refusal to consent to a search. Winn v. State, 871 S.W.2d 756 (Tex. App. – Corpus Christi 1993, no pet.).

4. Hearsay

a. Testimony of police officers as to statements of third persons.

(1) An officer testified that an informant told him that the defendant was in charge of the motel room where the drugs were found. Baldwin v. State, 668 S.W.2d 762 (Tex. App. – Houston [14th Dist.] 1984, no pet.).
(2) An officer testified that the defendant's wife implicated him in the offense. Fernandez v. State, 830 S.W.2d 693 (Tex. App. – Houston [1st Dist.] 1992, no pet.).
(3) Failure to move for a mistrial after an officer testified that the co-defendant said that the defendant committed the offense. Wenzy v. State, 855 S.W.2d 52 (Tex. App. – Houston [14th Dist.] 1993, pet. ref'd).

b. Mother, doctor, and counselor of a child sexual assault victim testified to statements made by the child and the defendant's relatives. Alvarado v. State, 775 S.W.2d 851 (Tex. App. – San Antonio 1989, pet. ref'd).
c. Contents of the offense report and references in the pen packet to the defendant being a parole violator. Ex parte Welborn, 785 S.W.2d 391 (Tex. Crim. App. 1990).
d. Admission of the complainant's written statement to the police implicating the defendant after she testified that he did not assault her. Owens v. State, 916 S.W.2d 713 (Tex. App. – Waco 1996, no pet.).

(1) State called the defendant's wife for the improper purpose of impeaching her with her otherwise inadmissible written statement to the police. Ramirez v. State, 987 S.W.2d 938 (Tex. App. – Austin 1999, no pet.).

5. Opinion

a. Testimony of a detective that he believed from an examination of the file that the defendant was guilty. Weathersby v. State, 627 S.W.2d 729 (Tex. Crim. App. 1982).
b. Testimony of a parent, doctor, counselor, or police officer who believed that a child sexual assault victim was telling the truth. Garcia v. State, 712 S.W.2d 249 (Tex. App. – El Paso 1986, pet. ref'd); Miller v. State, 757 S.W.2d 880 (Tex. App – Dallas 1988, pet. ref'd).
c. Testimony of a social worker that parents do not try to get their children to lie about sexual abuse. Garcia v. State, supra.
d. Expert testimony regarding factors for determining child's truthfulness. Sessums v. State, 129 S.W.3d 242 (Tex. App. – Texarkana 2004, no pet. reported).
e. Testimony of a probation officer that the defendant was not a good candidate for probation. Mares v. State, 52 S.W.3d 886 (Tex. App. – San Antonio 2001, pet. ref'd.)

6. Prior Misconduct

a. Prior convictions

(1) Details of a prior conviction. Lyons v. McCotter, 770 F.2d 529 (5th Cir. 1985), cert. denied, 474 U.S. 1073 (1986); Greene v. State, 928 S.W.2d 119 (Tex. App. – San Antonio 1996, no pet.).
(2) Impeachment of the defendant with a prior felony conviction for which he had completed probation. Ex parte Menchaca, 854 S.W.2d 128 (Tex. Crim. App. 1993).
(3) Remote prior conviction. Ramirez v. State, 873 S.W.2d 757 (Tex. App. – El Paso 1994, pet. ref'd).

b. Unadjudicated extraneous offenses

(1) Pending charge. Ruth v. State, 522 S.W.2d 517 (Tex. Crim. App. 1975) (concurring opinion).
(2) Other crimes. Cude v. State, 588 S.W.2d 895 (Tex. Crim. App. 1979); Callaway v. State, 594 S.W.2d 440 (Tex. Crim. App. 1980) (testimony of psychiatrist at competency hearing); Strickland v. State, 747 S.W.2d 59 (Tex. App. – Texarkana 1988, no pet.); Alvarado v. State, 775 S.W.2d 851 (Tex. App. – San Antonio 1989, pet. ref'd), and Doles v. State, 786 S.W.2d 741 (Tex. App. – Tyler 1989, no pet.) (sexual abuse of other children); Ex parte Welborn, 785 S.W.2d 391 (Tex. Crim. App. 1990) (under influence of controlled substance when arrested); Wenzy v. State, 855 S.W.2d 52 (Tex. App. – Houston [14th Dist.] 1993, pet. ref'd) (police cleared 14 robberies with defendant's arrest); Jackson v. State, 857 S.W.2d 678 (Tex. App. – Houston [14th Dist.] 1993, pet. ref'd); Glivens v. State, 918 S.W.2d 30 (Tex. App. – Houston [1st Dist.] 1996, pet. ref'd) (extraneous offense mentioned in PSI was inadmissible under law then in effect even though it had been admitted for limited purpose at guilt stage); Thomas v. State, 923 S.W.2d 611 (Tex. App. – Houston [1st Dist.] 1995, no pet.) (unadjudicated

extraneous offenses mentioned in PSI); Greene v. State, 928 S.W.2d 119 (Tex. App. – San Antonio 1996, no pet.) (threat to witness). Brown v. State, 974 S.W.2d 289 (Tex. App. – San Antonio 1998, pet. ref'd) (prior drug use).

(3) Defendant had been charged with an offense greater than the offense of conviction. Damian v. State, 881 S.W.2d 102 (Tex. App. – Houston [1st Dist.] 1994, pet. ref'd).

(4) Prior "mugshots." Green v. State, 899 S.W.2d 245 (Tex. App. – San Antonio 1995, no pet.).

c. Using extraneous offenses to create a scenario not supported by the evidence

(1) Allowing the State to create the scenario of a drug related murder by Colombian illegal aliens where the evidence showed only that the murder occurred as a result of an effort to collect a debt. Riascos v. State, 792 S.W.2d 754 (Tex. App. – Houston [14th Dist.] 1990, pet. ref'd).

d. Pen packets

(1) Extraneous offenses. Boyington v. State, 738 S.W.2d 704 (Tex. App. – Houston [1st Dist.] 1985, no pet.).

(2) Misconduct that formed the basis to revoke the defendant's probation. Sanders v. State, 715 S.W.2d 771 (Tex. App. – Tyler 1986, no pet.).

(3) That the enhancement paragraph on a prior conviction was dismissed. Cooper v. State, 769 S.W.2d 301 (Tex. App. – Houston [1st Dist.] 1989, pet. ref'd).

(4) That the defendant, convicted of disorderly conduct, had been charged with enticing a child. Damian v. State, 881 S.W.2d 102 (Tex. App. – Houston [1st Dist.] 1994, pet. ref'd).

e. Character of the defendant's associates

(1) Testimony of an officer regarding the criminal character of the defendant's friends. Weathersby v. State, 627 S.W.2d 729 (Tex. Crim. App. 1982).

f. Defendant's lifestyle and living conditions

(1) Irrelevant evidence of the instability of the defendant's family and the sordid condition of their home. Doles v. State, 786 S.W.2d 741 (Tex. App. – Tyler 1989, no pet.).

(2) Promiscuity. Brown v. State, 974 S.W.2d 289 (Tex App. – San Antonio 1998, pet. ref'd).

(3) Consumption of large amounts of alcohol. Ramirez v. State, 65 S.W.3d 156 (Tex. App. – Amarillo 2001, pet. ref'd).

(4) Drug use. Ex parte Nailor, 105 S.W.3d 272 (Tex. App. – Houston [14th Dist.] 2003), aff'd, ___ S.W.3d ___ (2004).

7. Miscellaneous

a. Polygraph examination report contained in PSI. Cardenas v. State, 960 S.W.2d 941 (Tex. App. – Texarkana 1998, pet. ref'd).

E. Prejudicial References To The Defendant

1. "Colombian illegal alien." Riascos v. State, 792 S.W.2d 754 (Tex. App. – Houston [14th Dist.] 1990, pet. ref'd); Ramirez v. State, supra.

F. Jury Charge

1. Failure to object to instruction not supported by the evidence

a. The charge permitted a conviction for capital murder in the absence of sufficient evidence under state law to corroborate the attempted armed robbery that elevated the murder to a capital offense. Summitt v. Blackburn, 795 F.2d 1237 (5th Cir. 1986).

2. Failure to object to erroneous instruction

a. Defendant was guilty of a "specific result" offense if he intentionally or knowingly engaged in the conduct that caused the injury. Banks v. State, 819 S.W.2d 676 (Tex. App. – San Antonio 1991, pet. ref'd) (injury to a child); Greene v. State, 928 S.W.2d 119 (Tex. App. – San Antonio 1996, no pet.) (attempted murder).

b. Defendant was guilty of felony murder based on the underlying felony of aggravated assault. Ex parte Drinkert, 821 S.W.2d 953 (Tex. Crim. App. 1991).

c. Defendant could be convicted of attempted murder if he had the intent to inflict great bodily harm. Gray v. Lynn, 6 F.3d 265 (5th Cir. 1993).

d. Defendant would be eligible for parole after serving less time than is actually required. Kucel v. State, 907 S.W.2d 890 (Tex. App. – Houston [1st Dist.] 1995, pet. ref'd).

e. The instruction on the law of parties was too general. Greene v. State, supra.

3. Failure to request instruction on defensive theory raised by the evidence

a. Accomplice testimony. Ex parte Zepeda, 819 S.W.2d 874 (Tex. Crim. App. 1991); Howard v. State, 972 S.W.2d 121 (Tex. App. – Austin 1998, no pet.).

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

c. Statutory defense of medical care. Watrous v. State, 842 S.W.2d 792 (Tex. App. – El Paso 1992, no pet.).

d. Mistake of fact and definition of "knowingly." Green v. State, 899 S.W.2d 245 (Tex. App. – San Antonio 1995, no pet.).

e. Trespass. Waddell v. State, 918 S.W.2d 91 (Tex. App. – Austin 1996, no pet.).

f. Exclusion of illegally seized evidence pursuant to article 38.23 of the Code of Criminal Procedure. Sanchez v. State, 931 S.W.2d 331 (Tex. App. – San Antonio 1996, pet. ref'd).
g. Right to resist an unlawful citizen's arrest. Young v. State, 10 S.W.3d 705 (Tex. App. – Texarkana, pet. ref'd), cert. denied,528 U.S. 1063 (1999).
h. Voluntary release of kidnap victim in safe place. Storr v. State, 126 S.W.3d 647 (Tex. App. – Houston [14th Dist.] 2004, no pet. reported).

4. Failure to request limiting instruction

a. That the defendant's prior conviction could be considered only for impeachment. Ramirez v. State, 873 S.W.2d 757 (Tex. App. – El Paso 1994, pet. ref'd).
b. That the complainant's written statement to the police implicating the defendant could be considered only for impeachment and not as substantive evidence of guilt. Owens v. State, 916 S.W.2d 713 (Tex. App. – Waco 1996, no pet.).
c. That extraneous offenses had to be proven beyond a reasonable doubt and could be considered only for limited purposes. Ex parte Varelas, 45 S.W.3d 627 (Tex. Crim. App. 2001).

G. Jury Argument

1. Refusal to allow argument

a. The refusal to allow counsel to present closing argument at a probation revocation hearing denied the defendant the effective assistance of counsel. Ruedas v. State, 586 S.W.2d 520 (Tex. Crim. App. 1979).

2. Failure to object to improper argument

a. That the defendant should be found competent due to the seriousness of the offense, that he would go free if found incompetent, and that he could escape if sent to a mental hospital. Callaway v. State, 594 S.W.2d 440 (Tex. Crim. App. 1980).
b. Comment on the defendant's post-arrest silence. San Roman v. State, 681 S.W.2d 872 (Tex. App. – El Paso 1984, pet. ref'd).
c. That the jury should consider the application of the parole law, Boyington v. State, 738 S.W.2d 704 (Tex. App. – Houston [1st Dist.] 1985, no pet.), or an erroneous formula for calculating parole eligibility. Valencia v. State, 966 S.W.2d 188 (Tex. App. – Houston [1st Dist.] 1998, pet. ref'd).
d. That the jurors should put themselves in the place of the victim in assessing punishment. Boyington v. State, supra.
e. That the prosecutor believed the police officers were telling the truth. Williamson v. State, 771 S.W.2d 601 (Tex. App. – Dallas 1989, pet. ref'd).
f. The prosecutor misstated the applicable law, contrary to the court's charge. Ex parte Drinkert, 821 S.W.2d 953 (Tex. Crim. App. 1991) (defendant had no right to defend property because complainant, shot upon entering defendant's house, had not committed a burglary since he reasonably believed that he had right to enter house).
g. That the jury should understand that the police and the prosecution asked for substantial verdicts in certain drug cases to avoid murders like this. Craig v. State, 847 S.W.2d 434 (Tex. App. – El Paso 1993, no pet.).
h. That the defendant's prior murder conviction showed his propensity to kill. Ramirez v. State, 873 S.W.2d 757 (Tex. App. – El Paso 1994, pet. ref'd).
i. That the defendant had failed to show remorse. Oliva v. State, 942 S.W.2d 727 (Tex. App. – Houston [14th Dist.] 1997, pet. dism'd).
j. That the defendant (a police officer) had ruined the prosecution of two drug suspects by tampering with the evidence. Raney v. State, 958 S.W.2d 867 (Tex. App. – Waco 1997, pet. dism'd).
k. That defense counsel had referred to the defendant as a "drunk Mexican" (a mischaracterization of counsel's argument). Ramirez v. State, 65 S.W.3d 156 (Tex. App. – Amarillo 2001, pet. ref'd).
l. That the complainant did not testify because defendant threatened to hurt her if she did, which misstated the testimony. Ex parte Nailor, 105 S.W.3d 272 (Tex. App. – Houston [14th Dist.] 2003), aff'd, ___ S.W.3d ___ (2004).

H. Jury Note

1. Failure to preserve error where the trial court failed to follow the statutory procedure in responding to a note from the jury during deliberations. Williamson v. State, 771 S.W.2d 601 (Tex. App. – Dallas 1989, pet. ref'd).

I. Victim Impact Statement

1. Failure to object to a victim impact statement made before sentencing. Gifford v. State, 980 S.W.2d 791 (Tex. App. – Houston [1st Dist.] 1998, pet. ref'd).

X. INEPT TRIAL PERFORMANCE

A. Decision To Waive A Jury

1. Counsel persuaded an habitual offender, facing an automatic life sentence upon conviction, to waive a jury because counsel was too exhausted to prepare for and participate in a jury trial. Ex parte Dunham, 650 S.W.2d 825 (Tex. Crim. App. 1983).

B. Voir Dire

1. General lack of knowledge and skill. Hutchinson v. State, 663 S.W.2d 610 (Tex. App. – Houston [1st Dist.] 1983, pet. ref'd).

2. Failure to ask any questions. Miles v. State, 644 S.W.2d 23 (Tex. App. – El Paso 1982, no pet.); Goodspeed v. State, 120 S.W.3d 408 (Tex. App. – Texarkana 2003, pet. granted).
3. Failure to ask sufficient questions

    a. No questions regarding the burden of proof, reasonable doubt, victim of crime, connection to law enforcement, range of punishment, or probation. San Roman v. State, 681 S.W.2d 872 (Tex. App. – El Paso 1984, pet. ref'd); Winn v. State, 871 S.W.2d 756 (Tex. App. – Corpus Christi 1993, no pet.).
    b. No questions regarding the law of parties, which was the State's theory of the defendant's culpability. Ex parte Welborn, 785 S.W.2d 391 (Tex. Crim. App. 1990).
    c. Failure to question venireman about her relationship with a prosecution witness whom she knew. Montez v. State, 824 S.W.2d 308 (Tex. App. – San Antonio 1992, no pet.).

4. Misstatement of the law. Brown v. State, 974 S.W.2d 289 (Tex. App. – San Antonio 1998, pet. ref'd) (defendant had burden to prove self-defense).
5. No sound strategy for challenge

    a. Counsel challenged a venireman who was obviously favorable to the defendant after the State was unable to disqualify her for cause. Hutchinson v. State, supra.
    b. Counsel exercised peremptory challenges on veniremen who had already been excluded for cause. Goodspeed v. State, supra.

6. Offensive conduct

    a. Counsel elicited hostile responses in a rape case by engaging in "peculiar soliloquies" with regard to sex and love and making inappropriate jokes. San Roman v. State, 681 S.W.2d 872 (Tex. App. – El Paso 1984, pet. ref'd).
    b. Counsel elicited hostile responses by being rude and repeatedly asking whether he was making anyone mad. Miller v. State, 728 S.W.2d 133 (Tex. App. – Houston [14th Dist.] 1987, pet. ref'd).

7. Failure to preserve error after the improper denial of a challenge for cause. Winn v. State, 871 S.W.2d 756 (Tex. App. – Corpus Christi 1993, no pet.).

C. Ineffective Cross-Examination

1. Waiving cross-examination

    a. Counsel waived cross-examination of the complainant in a rape case where the defense was consent. San Roman v. State, 681 S.W.2d 872 (Tex. App. – El Paso 1984, pet. ref'd).

2. Accepting the State's theory of the case

    a. Counsel's questions accepted the State's position that the defendant committed the murder. Craig v. State, 847 S.W.2d 434 (Tex. App. – El Paso 1993, no pet.).

3. Bolstering the prosecution witnesses

    a. The cross-examination bolstered, rather than challenged, the prosecution witnesses by emphasizing harmful evidence. Hutchinson v. State, 663 S.W.2d 610 (Tex. App. – Houston [1st Dist.] 1983, pet. ref'd); Ex parte Walker, 777 S.W.2d 427 (Tex. Crim. App. 1989).
    b. Counsel elicited that the officer vouched for the credibility of a prosecution witness. Greene v. State, 928 S.W.2d 119 (Tex. App. – San Antonio 1996, no pet.).
    c. Counsel elicited evidence linking the defendant to the crime, destroyed the alibi defense, and supported the accuracy and credibility of the police investigation. Moore v. Johnson, 194 F.3d 586 (5th Cir. 1999).

4. Failure to impeach

    a. Counsel failed to cross-examine the State's key witness about his prior conviction and consideration received for his testimony. Ex parte Ybarra, 629 S.W.2d 943 (Tex. Crim. App. 1982).
    b. Counsel failed to impeach a witness' prior inconsistent testimony. Everage v. State, 893 S.W.2d 219 (Tex. App. – Houston [1st Dist.] 1995, pet. ref'd); Catalan v. Cockrell, 315 F.3d 491 (5th Cir. 2002).
    c. Counsel failed to impeach eyewitnesses with their prior tentative identifications of another person as the murderer. Beltran v. Cockrell, 294 F.3d 730 (5th Cir. 2002).

5. Eliciting hearsay

    a. Counsel elicited what other persons told police officers about the defendant. Baldwin v. State, 668 S.W.2d 762 (Tex. App. – Houston [14th Dist.] 1984, no pet.); Ex parte Walker, 777 S.W.2d 427 (Tex. Crim. App. 1989); Montez v. State, 824 S.W.2d 308 (Tex. App – San Antonio 1992, no pet.).

6. Eliciting the defendant's oral statement

    a. Counsel elicited from a police officer that the defendant made a damaging oral statement that would have been inadmissible. Montez v. State, supra.

7. Eliciting extraneous offenses

    a. Counsel elicited extraneous offenses in questioning police officers. Hutchinson v. State, supra; Ex parte Walker, supra; Montez v. State, supra.
    b. Counsel elicited from a witness that the defendant drew a weapon on someone who refused to pay him for cocaine; the witness, on direct examination, had denied hearing the

conversation. Craig v. State, 847 S.W.2d 434 (Tex. App. – El Paso 1993, no pet.).

c. Counsel offered the defendant's bank records that showed numerous overdrafts after the court had refused to allow the State to introduce them. Green v. State, 899 S.W.2d 245 (Tex. App. – San Antonio 1995, no pet.).

d. Counsel elicited that the defendant had previously used cocaine. Brown v. State, 974 S.W.2d 289 (Tex. App. – San Antonio 1998, pet. ref'd).

e. Counsel elicited the defendant's testimony at the punishment stage regarding unadjudicated extraneous offenses that would have been inadmissible. Durst v. State, 900 S.W.2d 134 (Tex. App. – Beaumont 1995, pet. ref'd).

f. Counsel impeached a defense witness with a non-final conviction. Greene v. State, supra.

8. Opening the door

a. Counsel asked the defendant if he had ever been in trouble, opening the door to evidence of four prior felony arrests. Miles v. State, 644 S.W.2d 23 (Tex. App. – El Paso 1982, no pet.).

b. Counsel introduced part of a witness's written statement, enabling the State to introduce the remainder, which referred to the defendant committing other sexual assaults. Doles v. State, 786 S.W.2d 741 (Tex. App. – Tyler 1989, no pet.).

c. Counsel asked the defendant's girlfriend, an alibi witness in a murder case, whether the defendant carried a gun and sold drugs, opening the door to evidence that the girlfriend, on probation for possession of cocaine, had told her probation officer that she had a romantic relationship with a man with the same first name as the defendant, who was a Colombian illegal alien who sold drugs. Riascos v. State, 792 S.W.2d 754 (Tex. App. – Houston [14th Dist.] 1990, pet. ref'd).

d. Counsel elicited that although the defendant had previously used cocaine, she never had a drug problem, opening the door to evidence that the defendant had been a drug addict. Brown v. State, 974 S.W.2d 289 (Tex. App. – San Antonio 1998, pet. ref'd).

D. Introducing Evidence For No Valid Purpose

1. Counsel called the defendant's wife, whose testimony was harmful, after the State had failed to establish by competent evidence that the defendant had committed the offense. Fernandez v. State, 830 S.W.2d 693 (Tex. App. – Houston [1st Dist.] 1992, no pet.).
2. Counsel called a CPS caseworker in an attempt to prove that children "tell stories," but instead only raised questions of child abuse. Jackson v. State, 857 S.W.2d 678 (Tex. App. – Houston [14th Dist.] 1993, pet. ref'd).
3. Counsel called the co-defendant, who had pled guilty to the offense, as an alibi witness. Ex parte Hill, 863 S.W.2d 488 (Tex. Crim. App. 1993).
4. Counsel called the defendant to testify before the jury at the punishment stage to establish the invalidity of a prior conviction, rather than doing so outside the presence of the jury, enabling the prosecutor to cross-examine him about 14 convictions from other jurisdictions that the State otherwise could not have proven. Cooper v. State, 769 S.W.2d 301 (Tex. App. – Houston [1st Dist.] 1989, pet. ref'd).
5. Counsel introduced a videotape of the defendant invoking his right to counsel and to remain silent. Winn v. State, 871 S.W.2d 756 (Tex. App. – Corpus Christi 1993, no pet.).
6. Counsel introduced the defendant's remote murder conviction on direct examination. Stone v. State, 17 S.W.3d 348 (Tex. App. – Corpus Christi 2000, pet. ref'd).

E. Prejudicial References To The Defendant

1. Counsel referred to the defendant as a "wetback." Ex parte Guzmon, 730 S.W.2d 724 (Tex. Crim. App. 1987).
2. Counsel referred to the defendant, on trial for robbery, as the "robber." Ex parte Walker, 777 S.W.2d 427 (Tex. Crim. App. 1990).
3. Counsel argued that he did not want the jury to perceive his client as a "drunk Mexican." Ramirez v. State, 65 S.W.3d 156 (Tex. App. – Amarillo 2001, pet. ref'd).

F. Conceding The Defendant's Guilt

1. By comment

a. Counsel asked the defendant at counsel table, with the jury nearby, "You didn't take all the money?" and "What did you do, hit him over the head first?" Doherty v. State, 781 S.W.2d 439 (Tex. App. – Houston [1st Dist.] 1989, no pet.).

2. By stipulation

a. Counsel stipulated that the defendant was voluntarily intoxicated, destroying his insanity defense. Long v. State, 764 S.W.2d 30 (Tex. App. – San Antonio 1989, pet. ref'd).

3. By question

a. Counsel asked whether the defendant or her companion had a chance to leave the immediate area before the police detained them, which presupposed that they were together and committed the offense. In re K.J.O., 27 S.W.3d 340 (Tex. App. – Dallas 2000, pet. denied).

G. Argument

1. Waiver of argument

a. Counsel made no argument at the punishment stage. Miles v. State, 644 S.W.2d 23 (Tex. App. – El Paso 1982, no pet.).

b. Counsel made no argument at a resentencing on remand from the court of appeals. Tucker v. Day, 969 F.2d 155 (5th Cir. 1992).

2. Offensive conduct

a. Counsel used profanity and made inflammatory racial comments. Miller v. State, 728 S.W.2d 133 (Tex. App. – Houston [14th Dist.] 1987, pet. ref'd) (complainant, who was from Nigeria, was "swinging from limb to limb with a banana or coconut in one hand ... [and] tribal marks on [his] face").

3. Inadequate argument

a. Counsel failed to emphasize the defendant's good character traits. Moore v. State, 983 S.W.2d 15 (Tex. App. – Houston [14th Dist.] 1998, no pet.).

4. Affirmatively prejudicial argument

a. That the defendant had "bandito friends" in the absence of any evidence of same. Craig v. State, 847 S.W.2d 434 (Tex. App. – El Paso 1993, no pet.).
b. Misquoting the testimony by characterizing the defendant as saying that he had killed the complainant, when he really said that the complainant was dead. Craig v. State, supra.
c. Summarizing the evidence in a manner favorable to the State. Craig v. State, supra.
d. That the sentence would not affect the lifestyle of the defendant or his associates. Craig v. State, supra.
e. That counsel did not try to put the victim on trial as he had no evidence to do so. Craig v. State, supra.

XI. INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL

A. Duty To Perfect The Appeal

1. Trial counsel must help the defendant perfect the appeal unless the trial court permits counsel to withdraw or the defendant decides not to appeal. Ex parte Axel, 757 S.W.2d 369 (Tex. Crim. App. 1988).

a. Counsel must advise the defendant of the time limit to file notice of appeal. White v. Johnson, 180 F.3d 648 (5th Cir. 1999).

2. Counsel must timely comply with the procedural rules necessary to perfect the appeal. Evitts v. Lucey, 469 U.S. 387 (1985).

a. Failure to obtain ruling on motion for new trial. Belcher v. State, 93 S.W.3d 593 (Tex. App. – Houston [14th Dist.] 2002, pet. dism'd).
b. Failure to timely file a statement of appeal. Evitts v. Lucey, supra.
c. Failure to properly designate the record.

(1) Statement of facts. Shead v. State, 711 S.W.2d 345 (Tex. App. – Dallas 1986, pet. ref'd); Nelson v. State, 725 S.W.2d 784 (Tex. App. – San Antonio 1987, no pet.); Vicknair v. State, 702 S.W.2d 304 (Tex. App. – Houston [1st Dist.] 1985, no pet.) (statement of facts from pre-trial suppression hearing).
(2) Other proceedings considered by the court. Ex parte Dietzman, 790 S.W.2d 305 (Tex. Crim. App. 1990) (testimony of witness in related bond hearing that court considered in denying motion to suppress confession).
(3) Exhibits. Ex parte Coy, 909 S.W.2d 927 (Tex. Crim. App. 1995) (court of appeals could not determine sufficiency of evidence where videotape not designated as part of appellate record).

d. Failure to timely file a brief. Ex parte Raley, 528 S.W.2d 257 (Tex. Crim. App. 1975); Ex parte Shields, 550 S.W.2d 670 (Tex. Crim. App. 1977); Ex parte Banks, 580 S.W.2d 348 (Tex. Crim. App. 1979); Ex parte Thacker, 731 S.W.2d 99 (Tex. App. – Houston [1st Dist.] 1987, no pet.).

(1) Counsel must ensure that the brief complies with all procedural requirements. Ex parte Dietzman, 790 S.W.2d 305 (Tex. Crim. App. 1990) (appellate court did not consider 23 of 27 points of error because counsel did not cite pertinent pages of record, perfect bills of exceptions, and comport appellate complaints with trial objections).

e. Counsel has a duty to notify the defendant that the court of appeals affirmed the conviction and he has a right to file a petition for discretionary review. Ex parte Jarrett, 891 S.W.2d 935 (Tex. Crim. App. 1994); Ex parte Wilson, 956 S.W.2d 25 (Tex. Crim. App. 1997).

(1) The defendant is entitled to counsel in responding to the State's PDR. Blankenship v. Johnson, 118 F.3d 312 (5th Cir. 1997).

B. Duty To Raise Issues

1. An indigent defendant has no constitutional right to require counsel to raise all nonfrivolous issues that counsel decides not to raise. Jones v. Barnes, 463 U.S. 745 (1983).
2. Counsel has a duty to raise an issue that would require reversal of the conviction. Ex parte Daigle, 848 S.W.2d 691 (Tex. Crim. App. 1993) (denial of a jury shuffle); United States v. Williamson, 183 F.3d 458 (5th Cir. 1999) (whether career offender enhancement warranted); Smith v. Robbins, 528 U.S. 259 (2000).

a. The defendant must show a reasonable probability that the conviction would have been reversed had the issued been raised.

3. Counsel cannot file a frivolous appeal brief where there are nonfrivolous issues. Randle v. State, 760 S.W.2d 30 (Tex. App. – Houston [1st Dist.] 1988, no pet.); Lombard v. Lynaugh, 868 F.2d 1475 (5th Cir. 1989); Ortiz v. State, 849 S.W.2d 921 (Tex. App. – Corpus Christi 1993, no pet.).

   a. The defendant need not satisfy the prejudice prong of Strickland where there is an actual or constructive denial of the assistance of appellate counsel. Lombard v. Lynaugh, supra.
   b. The court of appeals must abate the appeal for the trial court to appoint another lawyer to brief the issues. Stafford v. State, 813 S.W.2d 503 (Tex. Crim. App. 1991); Ortiz v. State, supra.

XII. SUGGESTIONS FOR LITIGATING A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

A. Evaluating The Appellate Record

1. The issue of ineffective assistance of counsel is usually not adequately developed in the record.

   a. If trial counsel represented the defendant on the motion for new trial, he will not have raised this issue.
   b. If a different counsel represented the defendant on the motion for new trial, he usually will not be sufficiently familiar with the record to develop the issue.
   c. The record usually does not reflect whether trial counsel had sound strategic reasons for the questionable acts or omissions.

2. Post-conviction counsel should outline the record.

   a. Summarize the testimony of each witness.
   b. List each act or omission that might indicate deficient performance.
   c. List all appellate issues that should have been, but were not, raised on appeal.

      (1) A meritorious issue that was not raised on appeal will provide a basis to allege ineffective assistance of appellate counsel.

3. Deciding to raise the issue

   a. Appellate counsel should not raise the issue of ineffective assistance unless no sound trial strategy could justify the acts or omissions of trial counsel. Thompson v. State, 9 S.W.3d 808 (Tex. Crim. App. 1999).

      (1) The primary difficulty with raising the issue on appeal is that, in the absence of an evidentiary hearing, trial counsel has not had the opportunity to articulate his strategy, if any.
      (2) Courts will not consider this issue on appeal unless it was raised and developed in the trial court. United States v. Higdon, 832 F.2d 312 (5th Cir. 1987), cert. denied, 484 U.S. 1075 (1988).

B. Briefing The Issue On Appeal

1. Counsel should raise a single point of error contending that the conduct of trial counsel denied the defendant the effective assistance of counsel and a fair trial.

   a. If counsel raises separate points of error for each act or omission, the appellate court is more likely to scrutinize the claims separately rather than together.
   b. Ultimately, ineffective assistance can only be determined by considering the totality of the representation, rather than by isolating each challenged act or omission.

2. The point of error should be divided into three sections.

   a. The standard of review.
   b. The acts or omissions that constitute deficient performance.

      (1) The absence of any sound trial strategy.

   c. How the deficiencies in performance resulted in prejudice.

C. Developing The Standard Of Competent Representation In A Habeas Corpus Proceeding

1. Interviewing trial counsel

   a. Determine trial counsel's position before preparing the application.

      (1) If the defendant files a habeas corpus application alleging ineffective assistance of counsel, the prosecutor will usually contact trial counsel to obtain an affidavit.

         (a) Some prosecutors will tell trial counsel that if he is found to be ineffective, he may be sued for legal malpractice and/or disciplined in a grievance proceeding, but if he can justify his conduct as a matter of "trial strategy," he can avoid civil liability, disciplinary sanctions, and damage to his reputation.
         (b) Some prosecutors will assist trial counsel by suggesting what his "strategy" probably was and will draft an affidavit for him to sign.
         (c) Habeas counsel must contact trial counsel first.

   b. Review trial counsel's file and discuss the case.

      (1) Bring the record for trial counsel to review.
      (2) Discuss the questionable acts or omissions.
      (3) Request an affidavit addressing each act or omission.

c. If trial counsel will not agree to an interview, send a letter setting forth the issues and request a response.

(1) If trial counsel responds, habeas counsel can evaluate his position before filing the application.
(2) If trial counsel refuses to respond, habeas counsel should explain that he will request an evidentiary hearing.

(a) Most lawyers prefer to give an affidavit rather than be cross-examined in court.

(3) A defendant convicted of a crime cannot prevail in a legal malpractice lawsuit unless he can prove that he was actually innocent and was convicted only because of the negligence of trial counsel.

2. Obtaining expert opinions

a. If trial counsel signs an affidavit asserting that the conduct in question was strategic, habeas counsel should try to obtain controverting affidavits from an experienced criminal defense lawyer.
b. Send the application, exhibits, and trial counsel's affidavit to an experienced criminal defense lawyer.

(1) Request an affidavit on whether the claimed strategy was sound under the circumstances.
(2) The purpose of obtaining an expert's affidavit is to establish the standard of reasonably competent representation, that trial counsel's conduct fell below that standard, and what a reasonably competent lawyer should have done.

(a) A criminal defense lawyer qualified as an expert can give an opinion on the soundness of trial counsel's strategy on the basis of reading the application, excerpts from the record, and the affidavit of trial counsel.
(b) Do not request an opinion regarding prejudice, as that requires a legal conclusion.

D. Preparing The Application For A Writ Of Habeas Corpus And The Brief

1. Counsel must file the form application required by the Court of Criminal Appeals, but should also file a brief and exhibits (affidavits, court records, etc.).
2. After the State files an answer, counsel must decide whether to request an evidentiary hearing.

a. If the affidavits of trial counsel, the witnesses, and any expert are adequate, there is usually no need for an evidentiary hearing.
b. Submit proposed findings of fact and conclusions of law.
c. Request a hearing to present argument.
d. If the trial court makes adverse findings of fact and conclusions of law, file specific objections before the habeas record is sent to the Court of Criminal Appeals.

XIII. KEY SUPREME COURT OPINIONS ADDRESSING IAC

(Reverse Chronological Order)

Wright v. Van Patten, 128 S.Ct. 743 (2008): The Court held that a state court's decision that defense counsel's appearance by via speaker phone when the defendant pleaded no contest to a reckless homicide was not contrary to nor a reasonable interpretation of clearly established law -- i.e., Strickland or Cronic -- as it was not ineffective and it was not a complete denial of counsel or on par with his total absence.

Arave v. Hoffman, 128 S.Ct. 532 (2008): Certiorari was granted to address the issue of "[w]hat, if any, remedy should be provided for ineffective assistance of counsel during plea bargaining negotiations if the defendant was later convicted and sentenced pursuant to a fair trial?" Although this case was dismissed when the petitioner essentially abandoned his claim (after certiorari was granted), 128 S.Ct. 749 (2008) it is worth noting that the Ninth Circuit had granted relief and directed the district court to offer him a plea bargain agreement with the same material terms offered in the original plea agreement. 455 F.3d 926, 943 (9th Cir. 2006).

Shriro v. Landrigan, 127 S.Ct. 1933 (2007): The Arizona state court's determination that trial counsel's failure to present mitigating evidence at the sentencing stage of a death penalty case was not ineffective assistance of counsel was not an unreasonable application of clearly established federal law because the defendant actively interfered with and refused to allow the presentation of mitigating evidence. In this case, counsel explained the importance of mitigating evidence, the defendant adamantly refused to allow presentation of mitigating evidence, and told the trial judge to bring on the death penalty. Additionally, the mitigating evidence was weak: it included: (1) exposure to drug and alcohol in utero, abandonment by his mother and his own drug and alcohol abuse, creating no reasonable probability of a different outcome of the sentencing phase.

Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006): The Court held that the failure of defense counsel to belatedly inform his client, a foreign citizen, of his right to consult with his own consulate under Article 36 of the Vienna Convention on Consular Relations does not constitute ineffective assistance of counsel.

Bradshaw v. Richey, 546 U.S. 74 (2005): The Supreme Court reversed and remanded the case to the Sixth Circuit for re-examination because the Sixth Circuit had reversed the district court's denial of habeas of the IAC claim: (1) without examining whether the facts upon which it granted relief had not properly been submitted to the state

court in the first instance; (2) whether the state court's determination that the defendant's forensic expert was properly qualified; (3) whether defense counsel had adequately cross-examined the state's experts; (3) whether defense counsel had erred by prematurely placing his retained forensic expert on the witness stand; and (4) whether defense counsel's failure to present complete forensic evidence, deemed IAC by the Sixth Circuit, could withstand procedural default analysis under either the cause and prejudice and/or miscarriage of justice exceptions.

Halbert v. Michigan, 545 U.S. 605 (2005): The Supreme Court held that due process and equal protection require the appointment of counsel to a defendant who seeks to appeal to a "first tier" appellate court even where the defendant pleaded nolo contendere.

Rompilla v. Beard, 545 U.S. 374 (2005): The Supreme Court held that it was IAC (punishment stage) for defense counsel to fail to examine the files of the defendant's conviction prior rape and assault, and that given the nature of the mitigating evidence which would have been discovered had defense counsel inspected the file of the prior conviction, prejudice was established. This was in the face of evidence that the defendant and his family had suggested to defense counsel that there was no meaningful mitigation evidence, because defense counsel was aware of the file and could reasonably anticipate that the state would rely upon evidence of the conviction as aggravating evidence, and the file contained significant potential mitigating evidence. The evidence in the prior case file included records of the defendant's earlier incarceration which pictured defendant's childhood and mental health in a light previously unsuggested to defense counsel (including a statement by a correctional counselor outlining defendant's upbringing in a slum environment, test results that the defendant's mental health experts would have viewed as indicative of schizophrenia and other disorders, and test results showing a third grade level of cognition after nine years of schooling.

Florida v. Nixon, 543 U.S. 175 (2004): The Supreme Court held that defense counsel's failure to obtain the defendant's express consent to a strategy of conceding guilt at the guilt stage of a capital case did not *automatically* constitute deficient performance.

Yarborough v. Gentry, 540 U.S. 1 (2003): The Supreme Court held that although the right to effective assistance extends to closing arguments, Bell v. Cone, 535 U.S. 685, 701-02 (2002); Herring v. New York, 422 U.S. 853, 865 (1975), counsel has a wide latitude in deciding how best to represent a defendant and deference to tactical decisions in closing argument is particularly important because of the broad range of legitimate defense strategy at that stage of a trial. Review is highly deferential and doubly deferential when conducted though the lens of federal habeas corpus. Here, counsel's failure to highlight during closing argument all of the potentially exculpatory pieces of evidence was not deficient, as some of them were ambiguous, some may have backfired, and even as to those which would unquestionably have supported the defense, the number of points to make was a tactical decision. Thus, although Gentry's lawyer "was no Aristotle or even Clarence Darrow," there was no deficient performance.

Wiggins v. Smith, 539 U.S. 510 (2003): The Supreme Court held that trial counsel's failure to investigate and present mitigating evidence of the defendant's dysfunctional background was deficient performance that prejudiced the capital sentencing stage of the trial. In so doing, the Court focused upon whether counsel's tactical decision to limit the investigation into the defendant's background was itself objectively reasonable. The Court noted that counsel's decision to not expand the background investigation beyond a presentence investigation (PSI) report and the Baltimore City Department of Social Services records fell short of professional standards prevailing in Maryland at the time of their investigation (1989), as it was standard as of that time to have a social history report prepared. Additionally, the investigation fell short of the American Bar Association's capital defense work standards. Contrary to prior cases, there was nothing encountered by defense counsel that would have indicated that a further investigation would have been counterproductive or fruitless. Finally, only a halfhearted mitigation case was presented, whereas habeas counsel developed an extremely powerful mitigation case from conducting the investigation that trial counsel failed to conduct (i.e., extreme severe privation and abuse while in the custody of his alcoholic, absentee mother and physical torment, sexual molestation, and repeated rape while in foster care; and his homelessness and diminished mental capacities reflect the kind of troubled history relevant to assessing a defendant's moral culpability). Counsel's failures were also prejudicial, as exposed by reweighing the aggravating evidence against the totality of the mitigating evidence adduced both at trial and in the habeas proceeding, as the Court determined there was a reasonable probability that at least one juror would have struck a different balance.

Massaro v. United States, 538 U.S. 500 (2003): The Supreme Court held that even though the defendant could have raised IAC on direct appeal and did not, IAC could nevertheless be raised on federal habeas corpus, as even where the trial record reflects enough, appellate counsel may wish to wait until a habeas proceeding to fully develop the facts and thus avoid any potential conclusiveness of determination problems made on the claims raised in the direct appeal.

Bell v. Cone, 535 U.S. 685 (2002): The Supreme Court reversed the Sixth Circuit's decision which had held that defense counsel's representation at the punishment stage of a capital case to be Cronic error (United States v. Cronic, 466 U.S. 648 (1984)) governed by a presumption of prejudice. The Sixth Circuit had found defense counsel's failure to ask for mercy a failure to subject the state's call for the death penalty to meaningful adversarial testing. In reversing the Sixth Circuit, the Supreme Court found that Cronic involves a total deprivation of counsel, whereas here, counsel's fail to adduce mitigating evidence and make a closing argument did not constitute a total deprivation of counsel at the punishment stage of the trial. Thus, Strickland, not Cronic applied and the state court's determination that Strickland had not been

satisfied was not an objectively unreasonable application of Strickland.

Mickens v. Taylor, 535 U.S. 162 (2002): The Supreme Court addressed the standard to show a Sixth Amendment violation where the trial court fails to inquire into a potential conflict of interest about which it knew or reasonably should have known. Here, one of the defendant's counsel was representing the deceased at the time he was appointed by the judge (who had dismissed the charges against the deceased) to represent the defendant for the murder of deceased. This defense attorney did not disclose to the trial court, his co-counsel or the defendant that he had previously represented the deceased, although the trial court knew or should have been aware of the potential conflict. That potential conflict was discovered after trial by habeas counsel. The Fourth Circuit denied relief, relying on Cuyler v. Sullivan, 446 U.S. 335 (1980) to require a showing of "both an actual conflict of interest and an adverse effect even if the trial court failed to inquire into a potential conflict about which it reasonably should have known" (concluding that there had been no showing of an adverse effect).

Glover v. United States, 531 U.S. 198 (2001): The Supreme Court held that counsel's failure to argue for "grouping" under the federal sentencing guidelines as deficient performance and an increase in the sentence of between 6 to 21 months constituted prejudice, contrary to the Fifth Circuit's rule (Spriggs. v. Collins, 993 F.2d 85, 88 (5th Cir. 1993)) requiring a showing that a sentence would have been "significantly less harsh" under Texas' discretionary sentencing scheme before IAC at the punishment stage of a trial constitutes prejudice.

Williams v. Taylor, 529 U.S. 362 (2000): The Supreme Court held that the defendant was denied his right to effective assistance by virtue of his trial counsel's failure to investigate and present substantially mitigating evidence at the punishment stage of his capital murder case. In so doing, the Court reaffirmed that Strickland's two prong test was well established federal law, that defense counsel's failure to discover and/or failure to present significant mitigating evidence (where that investigation began a week before trial) was not an objectively reasonable trial tactic. The lower court's opinion denying relief was both an unreasonable application of and contrary to clearly established federal law.

Roe v. Flores-Ortega, 528 U.S. 470 (2000): The Supreme Court held that counsel's failure to file a notice of appeal when the defendant has not clearly conveyed his wishes one way or the other is not per se deficient performance. In this situation, the proper inquiry is whether counsel has in fact consulted with the defendant about an appeal. If so, there is deficient performance only by failing to follow the defendant's express instructions. If counsel has not consulted with the defendant, the question becomes whether that failure to consult itself constitutes deficient performance. While it is always better practice for counsel to consult with the defendant about an appeal, the Supreme Court refuses to say that it is always deficient for counsel to failure to consult with a client about an appeal; the test is whether under the facts and circumstances, it is objectively unreasonable, and the Court imposes a constitution duty to consult regarding an appeal when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that the particular defendant reasonably demonstrated to counsel that he was interested in appealing.

Smith v. Robbins, 528 U.S. 259 (2000): The Supreme Court reviewed California's requirements for court appointed counsel who file the equivalent of an Anders (no arguably meritorious grounds on appeal) brief and concludes that this procedure does not deny an indigent his right to counsel. If, for instance, court appointed counsel fails to locate an arguably meritorious issue on appeal, appellate counsel's performance will be viewed under Strickland's two prongs: was there deficient performance and is there a reasonable probability that the confidence in the outcome of the appeal is undermined (i.e., prejudice must be shown).

XIV. KEY COURT OF CRIMINAL APPEALS OPINIONS ADDRESSING IAC

(Reverse Chronological Order)

State v. Morales, ___S.W.3d ___ (2008 WL 2081617)(No. Pd-0462-07; May 14, 2008): The CCA held that trial counsel's decision not to preserve for appellate review the denial of a challenge for cause by exercising a peremptory strike against a prospective juror who was an assistant district attorney in the same office that was prosecuting the defendant was a reasonable, if difficult, trial strategy that did not support a claim of ineffective assistance of counsel (note: the testimony had been developed on a motion for new trial where both trial counsel testified). According to the CCA, the testimony supported the conclusion that the peremptories had been exercised against other, more objectionable prospective jurors.

Ex parte Ramirez, ___S.W.3d___ 2007 WL 4322007 (Tex. Crim. App. 2007): Here, the CCA, contrary to the recommendations of the trial court, held that counsel was not deficient for failing to call witnesses at trial and for failing to review a surveillance video from a convenience store (which allegedly showed the victim's credit card being used shortly after the burglaries). The CCA reviewed the affidavit of defense counsel regarding these three alleged deficiencies and disagreed with the trial court that there was no objectively reasonable reason not to call the witnesses and that counsel was ineffective for failing to review the videotape (because the videotape did not reflect what the defendant asserted it actually reflected).

> Note: The CCA routinely grants writs of habeas corpus in published opinions when the trial court has made findings of fact and recommended that relief be granted. *See e.g.*, Ex parte Rodriguez, 2008 WL 748657 (March 19, 2008)(finding ineffective assistance because counsel failed to inform the defendant that the co-defendant had confessed to the crime and had he known, he would not have pleaded guilty, and because counsel had an

actual conflict of interest because he also represented the confessing co-defendant); Ex parte Ramirez, 2008 WL 151128 (January 16, 2008)(failure to investigate known alibi witnesses and known alternative suspects constituted deficient, prejudicial performance).

Ex parte Ellis, 233 S.W.3d 324 (Tex. Crim. App. 2007): The CCA held that defense counsel's introduction of a police report which reflected the defendant's prior conviction was not objectively unreasonable, as there were potential benefits for the defendant (i.e., attempting to convince the jury that another person possessed the cocaine cookies found in the vehicle by demonstrating that the defendant's only prior involved marijuana and that the third person's prior involved cocaine). According to the CCA, "although the defensive course chosen by counsel was risky, and perhaps highly undesirable to most criminal defense attorneys, we cannot say that no reasonable trial attorney would pursue such a strategy under the facts of this case."

Acosta v. State, 233 S.W.3d 349 (Tex. Crim. App. 2007): The CCA held that the proper standard by which to analyze claims of ineffective assistance of counsel due to a conflict of interest is that established by Cuyler v. Sullivan, 446 U.S. 335 (1980), to wit: (1) trial counsel "actively represented conflicting interests" and (2) counsel's performance at trial was "adversely affected" by the conflict of interest. The CCA further noted that "[a]n actual conflict of interest exists if counsel is required to make a choice between advancing his client's own interest in a fair trial or advancing another interests (perhaps counsel's own) to the detriment of his client's interest." The CCA thus reversed and remanded because the Fourth Court of Appeals had utilized an incorrect standard in reviewing whether defense counsel's action in playing a tape recording at trial was not for the benefit of the defendant, but for the benefit of another client.

Cooks v. State, 240 S.W.3d 906 (Tex. Crim. App. 2007): The CCA held that the thirty day period of time for filing a motion for new trial is a critical stage during which a defendant is entitled to effective assistance of counsel, but noted that despite the denial of counsel during this stage, the denial of counsel was harmless beyond a reasonable doubt because no "facially plausible claims" were included in appellate counsel's motion to abate the appeal (for a remand for filing a motion for new trial). The CCA also noted that there is a rebuttable presumption that trial counsel continued to represent the defendant during the thirty day period of time, and a further rebuttable presumption of competent representation even if the defendant is represented for only a portion of that thirty day critical period.

Ex parte Amezquita, 223 S.W.3d 363 (Tex. Crim. App. 2006): The CCA held that defense counsel's failure to investigate evidence involving the victim's cellular telephone was deficient performance where there was strong evidence that the phone was taken by the perpetrator at the time the victim was assaulted, and there was evidence that a third party had given the phone to a fourth party who had used it late on the same day as the assault. Prejudice was also found by the CCA as the absence of an adequate investigation undermined confidence in the result of the trial and so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.

Ex parte Gonzales, 204 S.W.3d 391 (Tex. Crim. App. 2006): This case contains a laundry list of things counsel should do in a capital murder case (courtesy of Judge Cochran, concurring). In this case, the CCA held that counsel's failure to investigate the defendant's sexual and physical abuse as a child was unreasonable and prejudicial, particularly given the psychiatric evaluation of the defendant post-trial, which reflected that he was suffering from post-traumatic stress disorder and other mental disorders. The mitigating evidence presented during the habeas was "substantially greater and more compelling" than the trial evidence and with the additional evidence, there was a reasonable probability that a different result at trial would have occurred.

Robertson v. State, 187 S.W.3d 475 (Tex. Crim. App. 2006): On direct appeal, the CCA held that the record was sufficient to demonstrate that trial counsel's decision to elicit from the defendant, during his direct examination, his two prior convictions which were both on appeal (and hence inadmissible to impeach the defendant) was not the result of a reasonable strategic decision. The CCA also found prejudice because the direct examination opened the door to damaging cross-examination on the topic of the prior convictions and was utilized during closing argument.

Ex parte Briggs, 187 S.W.3d 458 (Tex. Crim. App. 2005): Where defense counsel failed to fully investigate the medical records of the child who had died or consult with experts until he had been paid an additional $2,500 to $7,500, the decision not to investigate was not "strategic," but economic. Because counsel had an absolute duty to "conduct a prompt investigation of the circumstances of the case and to explore all avenues likely to lead to facts relevant to the merits of the case," (ABA Standards for Criminal Justice: The Defense Function, Standard 4-4.1 (2d ed. 1986), counsel's performance was deficient within the meaning of Strickland and Wiggins. Although counsel was retained, he had three options, according to the CCA: (1) subpoena the treating doctors who had treated the deceased and introduce the medical records through those doctors and elicit their expert opinions; (2) withdraw from the case, explaining to the court that the defendant was not indigent, and requesting the appointment of counsel; or (3) remain as counsel with a reduced fee, but request investigatory and expert witness fees from the trial court for the now-indigent defendant under Ake v. Oklahoma, 470 U.S. 68 (1985) and Rey v. State, 897 S.W.2d 333, 338 (Tex. Crim. App. 1995).

Ex parte Cash, 178 S.W.3d 816 (Tex. Crim. App. 2005): The defendant was on trial for murder and was probation eligible, but counsel failed to get the application for probation sworn. The trial court refused to give a jury charge on probation to the jury. Without addressing deficient performance, the CCA said that there could not have been any prejudice under Strickland's second prong because the jury assessed forty years TDC.

Ex parte Woods, 176 S.W.3d 224 (Tex. Crim. App. 2005): The CCA rejected a claim of IAC based on a failure to investigate and present mitigating evidence. Here, the defendant's counsel did investigate and retained three separate mitigation specialists, but found much of it unhelpful. Counsel chose not to interview all of the possible mitigation witnesses, declined to call some of the mitigation witnesses, and presented most of the mitigation evidence through one of his experts. The CCA concluded that counsel had conducted a reasonable investigation noting that "when an attorney opens Pandora's box, he is not constitutionally required to examine each and every disease, sorrow, vice, and crime contained therein before quietly and firmly closing the cover."