INEFFECTIVE ASSISTANCE OF COUNSEL/ATTORNEY ETHICS

Prepared and presented by:
Wm. Reagan Wynn
Kearney & Westfall
120 W. 3rd St., Suite 300
Fort Worth, TX 76102
817/336-5600
FAX: 817/336-5610

I. Standard for Reviewing Ineffective Assistance

A. Guilt/Innocence Phase

1. Two-prong test set out in *Strickland v. Washington*, 466 U.S. 668 (1984) and adopted by the Court of Criminal Appeals in *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986).

a. First, defendant must demonstrate that attorney's performance was deficient. *See Strickland*, 466 U.S. at 687. To satisfy this requirement, defendant must show that, under all of the circumstances and prevailing professional norms, attorney's performance fell below the objective standard of reasonableness. *See id.* at 687-89.

b. Second, defendant must demonstrate that attorney's deficient performance prejudiced him or her. *See id.* at 687. To satisfy this requirement, defendant must show that there is a reasonable probability that, but for attorney's unprofessional errors, the result of the trial would have been different. *See id.* at 694. The probability is "reasonable" if it is sufficient to undermine confidence in the outcome of the trial. *See id.*

B. Punishment Phase

1. "Reasonably effective assistance of counsel" standard set forth by the Court of Criminal Appeals in *Ex parte Duffy*. *See Craig v. State*, 825 S.W.2d 128, 129-30 (Tex. Crim. App. 1992); *Ex parte Duffy*, 607 S.W.2d 507, 516 (Tex. Crim. App. 1980).

2. In applying this standard, court must determine whether attorney was reasonably likely to render effective assistance and whether he/she did, in fact, render effective

assistance, i.e. whether defendant received reasonably effective assistance of counsel. *See Vaughn v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996).

3. Under this standard, unlike the standard of review for ineffective assistance claims pertaining to the guilt/innocence stage under *Strickland*, defendant is not required to show prejudice. *See Vaughn*, 931 S.W.2d at 566.

NOTE: Review under these standards is essentially *de novo*, i.e., the reviewing court must review the record and determine if one of the standards has been met. *See Vaughn*, 931 S.W.2d at 566; *see also, United States v. Faubion*, 19 F.3d 226, 228 (5th Cir. 1994) (ineffective assistance is mixed question of law and fact subject to *de novo* review).

C. Burden of Proof -- defendant has the burden of proving that attorney's performance constituted ineffective assistance of counsel by a preponderance of the evidence. *See Patrick v. State*, 906 S.W.2d 481, 495 (Tex. Crim. App. 1995), *cert. denied*, 116 S. Ct. 1323 (1996).

II. Venues in Which to Raise Ineffective Assistance

A. Motion for New Trial — TEX. R. APP. P.21.

! Ineffective assistance of counsel may be properly raised in a motion for new trial even though it is not one of the specifically enumerated grounds listed in Rule 21.3 of the Texas Rules of Appellate Procedure. *See Reyes v. State*, 849 S.W.2d 812, 815 (Tex. Crim. App. 1993).

B. State Habeas — TEX. CODE CRIM. PROC. ANN. art. 11.07 (Vernon Supp. 1998).

C. Federal Habeas — 28 U.S.C. § 2254.

III. Duty of Counsel to Investigate the Facts

"[A] thorough factual investigation is the foundation upon which effective assistance of counsel is built . . . ." *Duffy*, 607 S.W.2d at 516; *see also Powell v. Alabama*, 287 U.S. 45, 58 (1932) ("It is not enough to assume that [defense] counsel . . . thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thorough-going investigation might disclose as to the facts. No attempt was made to investigate."); *Brescia v. New Jersey*, 417 U.S. 921, __, (1974) (Marshall, J. dissenting to denial of writ of certiorari) ("'Adequate preparation for trial often may be a more important element in the effective assistance of counsel to which a defendant is entitled than the forensic skill exhibited in the courtroom.'" (quoting *Moore v. United States*, 432 F.2d 730, 735 (3rd Cir. 1970) (en banc)).

ETHICS: Disciplinary Rule 1.1, Comment Six provides that an attorney should control his/her practice so that "each matter may be handled with diligence and competence."

A. A defense attorney has a duty to make an *independent* investigation of the facts of his client's case. *See, e.g., Welborn,* 785 S.W.2d at 395; *Butler v. State,* 716 S.W.2d 48, 54 (Tex. Crim. App. 1986); *Ex parte Raborn*, 658 S.W.2d 602, 605 (Tex. Crim. App. 1983); *Ex parte Ybarra*, 629 S.W.2d 943, 946 (Tex. Crim. App. 1982); *Duffy,* 607 S.W.2d at 517.

B. Because there is a duty to investigate, defense counsel has a related duty to seek out and interview potential witnesses. *See, e.g., Duffy*, 607 S.W.2d at 517 (citing *Davis v. Alabama*, 596 F.2d 1214, 1217 (5th Cir.), *reh'g denied*, 601 F.2d 586 (5th Cir. 1979), *vacated on other grounds*, 446 U.S. 903 (1980)).

C. The duty to investigate cannot be pushed off to an associate, i.e., investigator, paralegal, or secretary. *See, e.g., Butler*, 716 S.W.2d at 55. Moreover, a defense attorney may not rely solely on his client's version of the facts. *See, e.g., Welborn*, 785 S.W.2d at 395. Nor may a defense attorney rely solely on information provided to him by the prosecution. *See, e.g., Butler*, 716 S.W.2d at 56; *Raborn*, 658 S.W.2d at 605.

D. Failure to adequately investigate a case "is . . . ineffective, if not incompetent, where the result is that any viable defense available to the accused is not advanced." *Ybarra,* 629 S.W.2d at 946.

E. A defense attorney may make a *reasonable* decision which makes particular investigations unnecessary. *See Strickland*, 462 U.S. at ____. However, "[i]t may not be argued that a given course of conduct was within the realm of trial strategy unless and until the trial attorney has conducted the necessary legal and factual investigation which would enable him to make an informed rational decision." *Welborn*, 785 S.W.2d at 393. A criminal defense lawyer must have a firm command of the facts in order to render effective assistance of counsel. *See id.*; *Ybarra,* 629 S.W.2d at 946; *Duffy,* 607 S.W.2d at 516.

F. Trouble Areas

1. Expert Witnesses — in *Duffy,* the Court of Criminal Appeals held that an attorney was ineffective for failing to ask for appointment of psychiatrist to evaluate a potential insanity defense.

2. Prior Convictions — watch out for void/voidable convictions used as enhancements or as punishment evidence under 37.07.

3. Jail Runs/Attorney for the Day

! An attorney is charged with making an *independent* investigation of the facts, eschewing reliance on the prosecutor and even the client. *See, e.g., Welborn*, 785 S.W.2d at 395; *Butler*, 716 S.W.2d at 55; *Raborn*, 658 S.W.2d at 605. Thus, situations in which attorneys are expected to represent a client in a plea bargain without being given the opportunity to investigate can create problems. This is especially true in the felony context where a conviction (or even a deferred) can have severe collateral consequences in the future.

IV. Duty of Counsel to Have Firm Command of Applicable Law

A. A criminal defense attorney must have a firm command of the governing law before he/she can provide reasonably effective assistance of counsel. *See Ex parte Drinkert*, 821 S.W.2d 953, 956 (Tex. Crim. App. 1991); *Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990).

B. "It may not be argued that a given course of conduct was within the realm of trial strategy unless and until the trial attorney has conducted the necessary legal . . . investigation which would enable him to make an informed rational decision." *Welborn*, 785 S.W.2d at 393 (citing *Duffy*, 607 S.W.2d at 526).

C. Trouble Areas

1. Prior Convictions — watch out for void/voidable convictions used as enhancements or as punishment evidence under 37.07

2. Probation Eligibility

a. Watch out for 3g offenses — the judge CANNOT give a probated sentence. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3g(a) (Vernon Supp. 1998); *Ex parte Battle*, 817 S.W.2d 81, 83-84 (Tex. Crim. App. 1991) (attorney ineffective for failing to advise client that trial court could not give probation for 3g offense).

b. Make sure the Application for Probation is verified and timely.

3. Extraneous Offenses

4. Custodial Statements — remember that a *Jackson v. Denno* hearing is *required* once voluntariness is raised as an issue.

5. Preservation of Error

V. Duty of Counsel to Keep Client Informed

A. Disciplinary Rule 1.03 provides:

> (a) A lawyer *shall* keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

B. Failure to communicate a plea offer is ineffective assistance *per se* if the client ultimately receives a higher sentence. *See Ex parte Wilson*, 724 S.W.2d 72 (Tex. Crim. App. 1987).