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# APPLICATIONS FOR WRIT OF HABEAS CORPUS

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## LAW RELATED PUBLICATIONS, ACADEMIC APPOINTMENTS AND HONORS:

Features Article Editor, Voice for the Defense, 1993-2000
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Author/Speaker: Criminal Defense Lawyers Project Seminars, Dallas Bar Association Seminars,
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Best Lawyers in America in Appellate Law, White Collar Criminal Defense and Non-White Collar Criminal Defense, 2006-2011

## TABLE OF CONTENTS

# APPLICATIONS FOR WRIT OF HABEAS CORPUS

## I. General Requirements

Art. 11.07 governs writ applications on non-death penalty cases. Art. 11.071 applies to writs on death penalty cases. In order to obtain relief on an Application for Writ of Habeas Corpus, the following requirements must be met:

a. Non-Death Cases: The Application must seek relief from a felony judgment imposing a penalty other than death. 11.07, Sec. 1.

Death Cases: Entitled to competent court appointed counsel. Counsel appointed immediately after conviction. 11.071, Sec. 1. Writ application must be filed within 180 days from appointment of counsel or not later than the 45th day after the date the state's brief is filed on direct appeal, whichever date is later. May receive one 90 day extension. 11.071, Sec. 4(a) and (b).

b. The underlying case must be a final conviction (not probation and not on appeal), 11.07, Sec. 3, *Ex parte Johnson*, 12 S.W.3d 472 (Tex. Crim. App. 2000).

c. Must raise constitutional or fundamental errors. *Ex parte Graves*, 70 S.W.3d 103 (Tex. Crim. App. 2002). Relief not available by way of habeas corpus for violations of procedural statutes. *Ex parte McCain*, 67 S.W.3d 204 (Tex. Crim. App. 2002).

d. Must challenge the applicant's conviction or sentence and not conditions of confinement. *Ex parte Reyes*, 209 S.W.3d 126 (Tex. Crim. App. 2006); Cannot be used to seek relief from violations of procedural statutes. *McCain v. State*, 67 S.W.3d 204 (Tex. Crim. App. 2002).

e. Must allege some form of confinement. "Confinement means confinement for any offense or any collateral consequences resulting from the conviction that is the basis

of the instant habeas corpus." 11.07, Sec. 3(c). Parole is considered restraint that allows habeas writ. *Ex parte Elliot*, 746 S.W.2d 762 (Tex. Crim. App. 1988).

f. Application must be filed with the District Clerk of the county of conviction. Art. 11.07, Sec. 3(b); 11.071, Sec. 4(a).

g. An applicant must plead and prove facts which entitle him to relief and must prove his claim by a preponderance of the evidence. *Ex parte Rains*, 555 S.W.2d 478 (Tex. Crim. App. 1976).

h. Must use the form prepared by the Court of Criminal Appeals in an 11.07 writ. Must set out clams on the form. Attaching memorandum with claims set out is insufficient. *Ex parte Blacklock*, 191 S.W.3d 718 (Tex. Crim. App. 2006).

**II. District Court's Duties**

a. State has 15 days after service of Application to file answer. 11.07, Sec. 3(b). On death penalty case, the state has 120 days to file an answer. 11.071, Sec. 7(a).

b. "Within 20 days of the expiration of time for state to answer, it shall be duty of the convicting court to decide whether there are controverted, previously unresolved facts material to the legality of the applicant's confinement." 11.07, Sec. 3(c); 11.071, Sec. 8(a).

c. "If convicting court decides there are controverted, previously unresolved facts which are material to the legality of the applicant's confinement, it shall enter an order within 20 days of the expiration of the time allowed for the state to reply, designating the issues to be resolved." 11.07, Sec. 3(d). 11.071, Sec. 8(a), 9(a). Once this order is entered, the trial court should resolve the issues. *McCree v. Hampton*, 824 S.W.2d 578 (Tex. Crim. App. 1992). The designation of issues suspends the time limits set

out in 11.07. *McCree*, *supra.* There is no particular form for this order. It is sufficient if the Court simply states "The Court finds there are controverted, previously unresolved facts material to the legality of applicant's confinement, *i.e.*, whether he received ineffective assistance of counsel. These issues shall be resolved by affidavits and an evidentiary hearing." In a death penalty case, there are time limits for the court to hold a hearing and resolve the issues. 11.071, Sec. 9.

d. "To resolve those issues, the court may order affidavits, depositions, interrogatories, additional forensic testing, and hearings, as well as using personal recollection. 11.07, Sec. 3(d); 11.071, Sec. 9(a).

e. "If convicting court decides there are no such issues, the clerk shall immediately transmit to the Court of Criminal Appeals a copy of the application, any answers filed, and a certificate reciting the date upon which that finding was made. 11.07, Sec. 3(c); in death penalty case if court determines there are no controverted issues, the parties shall file proposed findings on a date not later than 30 days. District court must enter findings within 15 days of the date of filing proposed findings. 11.071, Sec. 8(b) and (c).

f. District court issues Findings of Fact and Conclusions of Law which are transmitted to the Court of Criminal Appeals. 11.07, Sec. 3(d); 11.071, Sec. 8.

**III. Facts that Bar Relief**

a. If issue could have been raised on direct appeal, relief will not be granted on a habeas application. *Ex parte Cruzata*, 220 S.W.3d 518 (Tex. Crim. App. 2007).

b. Normally, an application for writ of habeas corpus should not raise matters that have been decided on direct appeal. *Ex parte Schuessler*, 846 S.W.2d 850 (Tex. Crim.

App. 1993).

c. Subsequent Writs. Court cannot consider merits or grant relief if a subsequent writ is filed after final disposition of an initial application challenging the same conviction unless the application contains sufficient specific facts establishing that:

1. the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application. 11.07, Sec. 4(a)(1). *See*, *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009) (Due process claim, as asserted in subsequent application for writ of habeas corpus, that murder conviction was based on a foundation of perjury by state's chief witness was not procedurally barred, where, at time of first application, neither the DNA testing that purportedly established falsity of witness's testimony nor the statute authorizing a motion by a convicted person for forensic DNA testing was available).

2. by a preponderance of the evidence, but for a violation of the U. S. Constitution, no rational juror could have found the applicant guilty beyond a reasonable doubt. 11.07, Sec. 4(a)(2). *See generally*, *Ex parte Santana*, 227 S.W.3d 700 (Tex. Crim. App. 2007).

d. If ineffective assistance of counsel raised and rejected on direct appeal because record is not adequately developed, it may be relitigated on habeas corpus. *Ex parte Torres*, 943 S.W.2d 469 (Tex. Crim. App. 1997).

e. Fourth Amendment violations are generally not cognizable on a writ. In *Ex parte*

*Kirby*, 492 S.W.2d 579 (Tex. Crim. App. 1973), the court held that the failure to raise the question of sufficiency of an affidavit for a search warrant on direct appeal was tantamount to an abandonment of that claim and would not be considered for the first time on a writ. An applicant can still raise ineffective assistance of counsel based on the failure of the attorney to challenge an illegal search.

f. The Court of Criminal Appeals has ruled that a claim of insufficiency of the evidence cannot be raised on a writ of habeas corpus. *Ex parte Easter*, 615 S.W.2d 719 (Tex. Crim. App. 1981). This is the type of claim that can be raised on direct appeal. A claim of no evidence can be raised on a writ application. *Ex parte Perales*, 215 S.W.3d 418 (Tex. Crim. App. 2007).

**IV. Decision By Court of Criminal Appeals**

a. Court of Criminal Appeals may grant or deny relief based on findings and conclusions of trial court. 11.07, Sec. 5; 11.071, Sec. 11. The trial court cannot grant or deny relief. Rather, the trial court makes factual findings and recommends to the Court of Criminal Appeals that the application be granted or denied. *Ex parte Williams*, 561 S.W.2d 1 (Tex. Crim. App. 1978). Trial judge is original factfinder but Court of Criminal Appeals is ultimate factfinder. *Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008)

b. The Court of Criminal Appeals is not bound by the findings, conclusions or recommendations of a trial court. However, because the trial court is in a better position to make determinations of credibility, the Court of Criminal Appeals should defer to those findings if they are supported by the record. *Ex parte Thompson*, 153 S.W.3d 416 (Tex. Crim. App. 2005); *Ex parte Bates*, 640 S.W.2d 894, 898 (Tex.

Crim. App. 1982); *Ex parte Turner*, 545 S.W.2d 470, 473 (Tex. Crim. App. 1977).

c. The Court of Criminal Appeals defers to the factual findings of the trial judge even when those findings are based on affidavits rather than live testimony. *Manzi v. State*, 88 S.W.3d 240 (Tex. Crim. App. 2002).

**V. Decision on Whether Live Evidentiary Hearing is Necessary**

11.07 gives the trial court leeway on how evidence is gathered on a writ application. On some issues, affidavits may be sufficient. However, on issues that involve a judgment concerning credibility, a live evidentiary hearing is preferable. On some occasions, the Court of Criminal Appeals will order the trial court to conduct a live hearing. *See*, *Ex parte Brown*, 205 S.W.3d 538 (Tex. Crim. App. 2006) (Court of Criminal Appeals remanded for a live hearing). A good example of the necessity for a hearing is *Ex parte Thompson*, 153 S.W.3d 416 (Tex. Crim. App. 2005). In *Thompson*, the trial court heard testimony from the alleged victim of a sexual assault recanting the testimony she gave as a child. The trial court heard the testimony and concluded that the recantation was credible and the Court of Criminal Appeals deferred to this fact finding.

Claims of ineffective assistance of counsel frequently require an evidentiary hearing. Where there is a dispute between the client and attorney over what occurred, the trial court is required to make a credibility determination that can best be made after a live hearing.

*Gallego v. United States*, 174 F.3d 1196 (11th Cir. 1999) is particularly instructive on the question of judging credibility when counsel and the client disagree on factual questions. The issue in *Gallego* whether the defendant's counsel rendered ineffective assistance of counsel. In *Gallego*, the Court stated:

> It is perfectly legitimate for the district court to find, based on all the evidence in the record, that a defendant's testimony about his participation in a drug scheme is not credible. The magistrate judge here, however, based the decision on the fact that the defendant's allegations were unsubstantiated and incorrectly found as a matter of law

> that defendant could not carry his burden without presenting some evidence in addition to his own word, which is contrary to that of counsel's. The magistrate says nothing about the internal consistency of the defendant's testimony, or his candor or demeanor on the stand. Indeed, the magistrate does not even state simply why the defendant's lawyer is the more credible witness in this case. There is nothing in the report to indicate the magistrate weighed defendant's credibility. Compare *United States v. Camacho*, 49 F.3d 349 (11th Cir. 1994) (court made specific findings of fact after an evidentiary hearing regarding defendant's credibility), *cert. denied*, 514 U.S. 1090, 115 S.Ct. 1810, 131 L.Ed.2d 735 (1995). The fact that defendant's testimony is uncorroborated is not enough standing alone to support a credibility finding. Counsel's testimony was also unsubstantiated by other evidence.
>
> While we appreciate the concerns enunciated in *Underwood*, we cannot adopt a per se "credit counsel in case of conflict rule," which allows that in any case where the issues comes down to the "bare bones testimony" of the defendant against the contradictory testimony of counsel, defendant is going to lose every time. We therefore remand for a new evidentiary hearing.

*Id*. at 1198-99.

## VI. Typical Issues Raised in Writ Applications

The three most common issues raised in writ applications are ineffective assistance of counsel, suppression of exculpatory evidence and new evidence establishing actual innocence. The vast majority of meritorious writs will fall within one of these categories.

### a. Ineffective Assistance of Counsel

Introduction

The right to be represented by counsel is by far the most important of a defendant's constitutional rights because it affects the ability of a defendant to assert a myriad of other rights. As Justice Sutherland explained in *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932):

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent

> evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

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

The right to the assistance of counsel is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 10 of the Texas Constitution. This right to the assistance of counsel has long been understood to include a "right to the effective assistance of counsel." *See, McMann v. Richardson,* 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970). The integrity of our criminal justice system and the fairness of the adversary criminal process is assured only if an accused is represented by an effective attorney. *See, United States v. Morrison,* 449 U.S. 361, 364, 101 S.Ct. 665, 667, 66 L.Ed.2d 564 (1981). Absent the effective assistance of counsel "a serious risk of injustice infects the trial itself." *Cuyler v. Sullivan,* 446 U.S. 335, 343, 100 S.Ct. 1708, 1715, 64 L.Ed.2d 333 (1980). Thus, a defendant is constitutionally entitled to have effective counsel acting in the role of an advocate. *See*, *Anders v. California,* 386 U.S. 738, 743, 87 S.Ct. 1396, 1399, 18 L.Ed.2d 493 (1967).

The Legal Standard

The United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) established the federal standard for determining whether an attorney rendered reasonably effective assistance of counsel. The Texas Court of Criminal Appeals in *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986) adopted the *Strickland* test as the proper test under state law to gauge the effectiveness of counsel. Pursuant to that test

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

*Strickland v. Washington*, 466 U.S. at 687, 104 S.Ct. at 2064.

The purpose of the *Strickland* two part test is to judge whether counsel's conduct so compromised the proper functioning of the adversarial process that the trial cannot be said to have produced a reliable result. *Thompson v. State*, 9 S.W.3d 808, 812-13 (Tex. Crim. App. 1999) (citing *McFarland v. State*, 845 S.W.2d 824, 843 (Tex. Crim. App. 1992)).

The *Strickland* test applies to appointed and retained counsel alike. *See, Cuyler v. Sullivan, supra* at 344, 100 S.Ct. at 1716. It also applies to all stages of a criminal trial. *See, Hernandez v. State,* 988 S.W.2d 770 (Tex. Crim. App. 1999)(*Strickland* applies to claim of deficient attorney performance at noncapital sentencing proceeding). It applies when evaluating an attorney's performance in connection with a guilty plea. *See, Hill v. Lockhart,* 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)(prejudice prong of *Strickland* requires defendant to show that but for counsel's errors he would not have entered a guilty plea). It even applies to an attorney's performance in handling an appeal. *See, Evitts v. Lucey,* 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985)(due process requires that defendant have effective assistance of counsel on his first appeal).

Exceptions to Strickland

These are some errors that "are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified" thus making it unnecessary to establish the prejudice prong of *Strickland. United States v. Cronic,* 466 U.S. 648, 658, 104 S.Ct. 2039, 2046, 80 L.Ed.2d 657 (1984). Prejudice is presumed in situations where the likelihood of counsel having provided effective assistance is extremely small such as where counsel failed completely to subject the

prosecution's case to "meaningful adversarial testing." *Id.* at 660, 104 S.Ct. at 2047 (citing in illustration *Powell v. Alabama,* 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932)). According to the Court of Criminal Appeals, it is unnecessary for a defendant to meet the prejudice requirement of *Strickland* if he was actually or constructively denied the assistance of counsel altogether, if counsel was prevented from assisting the accused at a critical stage of the proceedings because of some type of state interference, or if counsel was burdened by an actual conflict of interest which adversely affected counsel's performance. *Mitchell v. State,* 989 S.W.2d 747, 748 (Tex. Crim. App. 1999). "Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." *United States v. Cronic, supra* at 659 n. 26, 104 S.Ct. at 2047 n. 26. In other words, in order for the presumption of prejudice to apply the attorney must completely fail to challenge the prosecution's entire case, not just elements of it. *Haynes v. Cain*, 298 F.3d 375, 380, 382 (5th Cir. 2002) en banc; also see *Bell v. Cone*, 535 U.S. 685, 122 S.Ct. 1843, 1851, 152 L.Ed.2d 914 (2002) (noting that difference between situations addressed by *Strickland* and *Cronic* is "not of degree but of kind.").

Raising Ineffective Assistance

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

raising an ineffective assistance claim on direct appeal. "Rarely will a reviewing court be provided with the opportunity to make its determination on direct appeal with a record capable of providing a fair evaluation of the merits of the [ineffective assistance] claim...". *Thompson v. State,* 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). Thus, for most ineffective assistance claims, a writ of habeas corpus is the preferred method for raising the issue. *Ex parte Torres,* 943 S.W.2d 469, 475 (Tex. Crim. App. 1997). For a multitude of reasons, ineffective assistance claims are excepted from the general rule of error preservation set forth in Rule 33.1(a) and may be raised in an application for writ of habeas corpus even if not raised first in the trial court. *Robinson v. State, supra* at 812-13.

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

Burden of Proof

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

assistance of counsel claim by a preponderance of the evidence. *McFarland v. State,* 845 S.W.2d 824, 843 (Tex. Crim. App. 1992); *Moore v. State,* 694 S.W.2d 528, 531 (Tex. Crim. App. 1985); *also see, United States v. Cronic, supra* at 658, 104 S.Ct. at 2046 (the burden rests on the accused to demonstrate a constitutional violation).

The Court of Criminal Appeals emphasized in *Thompson v. State, supra* that a claim of ineffective assistance of counsel must be supported by a record containing direct evidence as to why counsel took the actions or made the omissions relied upon as the basis for the claim. *Id. at* 813-14.; *accord, Busby v. State,* 990 S.W.2d 263, 268-69 (Tex. Crim. App. 1999)(ordinarily the strong presumption that an attorney's decisions were acceptable trial strategy cannot be overcome without evidence in the record as to the attorney's reasons for the decisions). While there may be some actions that unquestionably fall outside the spectrum of objectively reasonable trial strategy, generally, the Court of Criminal Appeals requires a defendant to offer evidence from his attorney explaining his actions in order to overcome the presumption that counsel acted pursuant to a reasonable trial strategy. *See, Garcia v. State,* 57 S.W.3d 436, 440 (Tex. Crim. App. 2001)(court will not conclude challenged conduct constituted deficient performance unless conduct was so outrageous that no competent attorney would have engaged in it); *also see, Thompson v. State, supra* at 816 (Meyers, J., dissenting)(inconceivable that defense counsel could have had a reason for failing to object to certain hearsay that would fall within the range of objectively reasonable trial strategy). It should be kept in mind, however, that simply labeling an attorney's actions "trial strategy" does not insulate the attorney from a finding of ineffective assistance of counsel. An attorney's strategy can be so ill-chosen as to render a trial fundamentally unfair. *See, United States v. Rusmisel,* 716 F.2d 301, 310 (5th Cir. 1983). As the Supreme Court explained in *Strickland*, strategy decisions should be judged by an *objective* standard of reasonableness. *Strickland v. Washington*, *supra*, 466

U.S. 687-88; 104 S.Ct. at 2064 (emphasis added).

Once a convicted defendant establishes that his attorney's actions were objectively unreasonable, he must still prove that he was prejudiced by his attorney's actions. To establish prejudice, he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. at 694, 104 S.Ct. at 2068. The focus of the prejudice component is whether counsel's deficient performance renders the result of the trial unreliable or fundamentally unfair. *Id*. at 687, 104 S.Ct. at 2064. It is not enough to argue that the attorney's errors had some conceivable effect on the outcome of the proceeding, rather the convicted defendant must establish a "reasonable probability" of actual prejudice. *Id*. at 693, 104 S.Ct. at 2067. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694, 104 S.Ct. at 2068.

While a convicted defendant must establish actual prejudice from his attorney's conduct, the State cannot avoid the consequences of a finding of ineffective assistance by arguing that the prejudice is de minimus. For example, any amount of additional time in prison constitutes prejudice. *Glover v. United States*, 531 U.S. 198, 203, 121 S.Ct. 696, 700, 148 L.Ed.2d 604 (2001).

Conclusion

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

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

*Strickland v. Washington*, *supra*, 466 U.S. at 685, 104 S.Ct. at 2063.

Examples of Ineffectiveness

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

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

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

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

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

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

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

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

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

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

*Woods v. State*, 59 S.W.3d 833 (Tex. App. - Texarkana 2001, pet. granted)

When record contains a substantial amount of evidence about defendant's mental health history it was ineffective for defense counsel to fail to request the court appointed assistance of a mental health expert.

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

Failure of defense counsel to inform defendant of plea offer made by the State is an omission that falls below an objective standard of professional reasonableness. Defendant is prejudiced by missed opportunity of accepting offer and presenting it to the trial judge for consideration.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Ex parte Crow*, 180 S.W.3d 135 (Tex. Crim. App. 2005)

Counsel must inform client of right to file a petition for discretionary review.

Examples of "Effectiveness"

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

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

*Ex parte Graves,* 70 S.W.3d 103 (Tex. Crim. App. 2002)

There is no right to effective assistance of counsel in a habeas proceeding because there is no constitutional right to counsel in such a proceeding.

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

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

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

Even if defendant's attorney did not adequately prepare for trial by failing to interview

defendant, complaining witness, and defendant's original attorney, defendant failed to show how lack of preparation had any negative impact on outcome of trial and thus failed to prove counsel was ineffective.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**b. Suppression of Exculpatory Evidence**

The failure of prosecutors to reveal exculpatory evidence to defendants and their attorneys is an appropriate ground for an application for writ of habeas corpus. *Ex parte Lewis*, 587 S.W.2d 697, 701 (Tex. Crim. App. 1979).

Review of Law

The seminal case concerning exculpatory evidence is *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). *Brady* was charged with murder and tried separately from his codefendant. At Brady's trial, he admitted participation in the crime but contended that his codefendant had done the actual killing. Prior to trial, Brady's counsel requested access to the statements made by the codefendant. He was shown some statements but the prosecution withheld a statement where the codefendant admitted the killing. After Brady's direct appeal, he gained access to this exculpatory statement and brought a post conviction challenge to his conviction alleging a violation of due process based on the prosecutor withholding this favorable evidence. In *Brady*, the Supreme Court stated the following:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

In *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), the Court further explored the question of suppression of exculpatory evidence and stated that "when the prosecutor receives a specific and relevant request (for exculpatory evidence) the failure to make any response is seldom, if ever, excusable." The *Agurs* court also noted that, "if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made." Specifically, the Court in *Agurs* distinguished three situations in which a *Brady* claim might arise: first, where previously

undisclosed evidence revealed that the prosecution introduced trial testimony that it knew or should have known was perjured, 427 U.S. at 103-104, 96 S.Ct. at 2397-2398. In this situation, the Court said that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."[1] *Agurs*, 427 U.S. at 103 (see also, *United States v. San Filippo*,

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

> "In *Giglio v. United States*, 405 U.S. 150, 153, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the Court acknowledged that since *Mooney*, it has been clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'the rudimentary demands of justice.' *See Pyle v. Kansas*, 317 U.S. 213, 216, 63 S.Ct. 177, 87 L.Ed. 214 (1942). And in *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), the Court concluded that the same result obtains when the prosecution, 'although not soliciting false evidence, allows it to go uncorrected when it appears.' *Id*. at 269, 79 S.Ct. 763. When the reliability of a given witness may well be determinative of the guilt or innocence of an accused, nondisclosure of evidence affecting credibility falls within the general rule discussed. *Giglio*, 405 U.S. at 154, 92 S.Ct. 763. This line of cases has sometimes been referred to as the *Mooney-Pyle-Napue* line of decisions. See 42 George E. Dix & Robert O. Dawson *Texas Practice: Criminal Practice and Procedure* §22.51 (2d ed.2002) (hereinafter Dix); *see also generally Giles v. Maryland*, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967); *Miller v. Pate*, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967); *Alcorta v. Texas*, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957); *Ex parte Castellano*, 863 S.W.2d 476 (Tex. Crim. App. 1993); *Ex parte Adams*, 768 S.W.2d 281 (Tex. Crim. App. 1989); *Davis v. State*, 831 S.W.2d 426 (Tex. App. - Austin 1992, no pet.).
>
> Although *Brady* relied upon *Mooney*, *see Kyles v. Whitley*, 514 U.S. 419, 432, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), and there have been suggestions that the *Mooney* line of cases were incorporated in the later *Brady* rule, the two lines of decision are distinctive. *See United States v. Agurs*, 427 U.S. 97, 104, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). It has been stated: Although *Brady v. Maryland* and its progeny suggest the due process to disclose may have superseded and replaced the prohibition against the use of perjured testimony, this is not the case. The prohibition against the use of perjured testimony remains available to defendants as an alternative to *Brady* arguments. *Mooney* contentions are sometimes more attractive to defendants because the criterion for determining the materiality of improperly used perjured testimony is more lenient than that for determining the materiality of improperly suppressed exculpatory evidence under *Brady*. The difference between the two due process rules is not entirely clear. Some situations will present viable arguments that both were violated. If a defendant is able to establish both that the State knowingly used perjured testimony and that it failed to disclose evidence showing the falsity of the testimony, the defendant is entitled to relief if he or she can show the testimony used is material under the perjured testimony line of decisions and its more relaxed materiality standard. Dix §22.5 (citations omitted)
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> While appellant relies upon both due process rules, we conclude it is necessary to examine only the *Mooney-Pyle-Napue* line of decisions to reach the proper disposition of appellant's contention. We review the record to determine if the State 'used' the testimony, whether the testimony was 'false,' whether the testimony was 'knowingly used,' and if these questions are affirmatively

564 F.2d 176, 178 (5th Cir. 1977) ("due process is violated when the prosecutor although not soliciting false evidence from a government witness, allows it to stand uncorrected when it appears"); second, where the Government failed to accede to a defense request for disclosure of some specific kind of exculpatory evidence, *id*. at 104-107, 96 S.Ct. at 2398-2399; and third, where the Government failed to volunteer exculpatory evidence never requested, or requested only in a general way. The Court found a duty on the part of the Government even in this last situation, though only when suppression of the evidence would be "of sufficient significance to result in the denial of the defendant's right to a fair trial." *Id*. at 108, 96 S.Ct. at 2400.

*United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), clarified the standard of review when exculpatory evidence is suppressed. First, the *Bagley* court rejected a distinction between cases when there was a specific request for exculpatory evidence and no request. *Bagley* set out a three part test for obtaining relief based on suppression of exculpatory evidence. (1) The prosecution withheld or suppressed evidence. (2) The evidence was favorable to the defense. (3) The evidence was material to either guilt or punishment. See also, *Ex parte Kimes*, 872 S.W.2d 700, 702-03 (Tex. Crim. App. 1993). Under *Bagley* the materiality test is met and a new trial required if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. This reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome". 473 U.S. at 682, 105 S.Ct. at 3383; see also, *Ex parte Adams*, 768 S.W.2d 281 (Tex. Crim. App. 1989) (Texas has adopted the *Bagley* test for materiality determinations when exculpatory evidence is suppressed). The *Bagley* court also held that the prosecution has a duty to disclose evidence that could be used to impeach the prosecution's witnesses. In *Bagley*, the prosecution had not disclosed incentives which had been

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> answered, whether there is a reasonable likelihood that the false testimony could have affected the judgment of the jury."

offered witnesses contingent on the government's satisfaction with their testimony.

In *Bagley*, the Court expressed concern with "any adverse effect that the prosecutor's failure to respond (with exculpatory evidence) might have had on the preparation of the defendant's case." 473 U.S. at 683, 105 S.Ct. at 3384. See also, *Derden v. McNeel*, 938 F.2d 605, 617 (5th Cir. 1991) (a reviewing court may consider any adverse effects the prosecutor's failure to release information might have had on the defendant's preparation and presentation of the case).

In *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), the Court discussed the showing necessary to obtain a new trial when the prosecution withholds exculpatory evidence. Under *Kyles,* this showing does not require a demonstration that the disclosure of this evidence would have resulted in an acquittal. Rather, as the Court stated, the question is "not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence, he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." 514 U.S. at 434, 115 S.Ct. at 1566. The *Kyles* court restated the materiality test as a determination as to whether there is a "reasonable probability" that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." The Court emphasized that this was not a sufficiency of the evidence test and did not require a showing that disclosure of the suppressed evidence would have resulted in the defendant's acquittal.

The Court in *Kyles* found reversible error in the prosecutions suppression of the following evidence in a Louisiana murder case: 1) contemporaneous eyewitness statement taken by the police following the murder that were favorable to Kyles; 2) various inconsistent statements by a police informant who had implicated Kyles and 3) a computer printout of license numbers of car parked at the crime scene on the night of the murder, which did not list Kyles' car.

Knowledge of government agents, such as police officers, of exculpatory evidence is imputed

to the prosecution. *Williams v. Whitley*, 940 F.2d 132 (5th Cir. 1991); *U. S. v. Auten*, 632 F.2d 478 (5th Cir. 1980). Therefore, if a police officer has exculpatory evidence, this is the same as a prosecutor having it, and it must be turned over to the defense. See *Kyles,* 115 S.Ct. at 1566, ("the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."); *United States v. Brooks*, 966 F.2d 1500 (D.C. Cir. 1992) (discussing duty of prosecutor to search files of other agencies); *O'Rarden v. State*, 777 S.W.2d 455 (Tex. App. - Dallas 1989, pet. ref'd) (prosecution team includes investigators); *Carey v. Duckworth*, 738 F.2d 875 (7th Cir. 1984) (prosecution cannot evade *Brady* requirements by keeping itself ignorant of information). See also, *Jones v. Chicago*, 856 F.2d 985 (7th Cir. 1988) (criticizing police for withholding information from prosecutor in order to circumvent *Brady* rule). In *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991), the court held that when the government is confronted with a request by a defendant for the personnel files of testifying officers the government has a duty to examine those files and must disclose information favorable to the defense that meets the materiality standard. The court held that if the government is uncertain about its materiality the evidence should be submitted to the court.

Additionally, the duty to disclose exculpatory evidence is ongoing and the State must disclose it whenever it is discovered. *Flores v. State*, 940 S.W.2d 189, 191 (Tex. App. - San Antonio, 1996, no pet.).

In *Strickler v. Greene*, 527 U.S. 263 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999), the Supreme Court reiterated the standard of review for determining *Brady* claims. However, *Strickler* demonstrated the heavy burden the Courts place on defendants to demonstrate prejudice when the prosecution withholds exculpatory evidence. In *Strickler*, the court found that the prosecution withheld exculpatory evidence but concluded that the defendant did not show prejudice because

there was strong evidence in the record that the defendant in that capital murder case would have been convicted and sentenced to death even if the prosecution had revealed the suppressed exculpatory evidence. Specifically in *Strickler* the prosecutor failed to disclose exculpatory materials in the police files, consisting of notes taken by a detective during interviews with an eyewitness and letters written to the detective by the eyewitness, that cast serious doubt on significant portions of her testimony. However, there was additional strong physical evidence and witness testimony that the court found to provide sufficient support for the conclusion that the defendant would have been convicted and sentenced to death even if the witness had been severely impeached or her testimony excluded entirely.

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

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

downstairs and saw the defendant in the front of the apartments. He said that the defendant could not have gotten from the back of the apartments when the shooting occurred to the front that fast because Walker ran down the stairs in a few seconds, and therefore the defendant did not do the shooting.

After trial, the defense learned of this evidence and Walker's testimony was presented at a motion for new trial. Both the trial court and Court of Appeals refused to order a new trial. However, the Court of Criminal Appeals reversed and held that there was a reasonable probability that the result of the proceeding would have been different with Walker's testimony.

Several years ago, the Texas Court of Criminal Appeals reversed a capital murder conviction based on the suppression of exculpatory evidence. In *Ex parte Richardson*, 70 S.W.3d 865 (Tex. Crim. App. 2002), the prosecution failed to disclose the existence of a diary kept by a police officer with the Lubbock Police Department that contained substantial information that could have been used to impeach the State's star witness. This diary was written while the officer was guarding the witness during a period of protective custody. The officer who maintained the diary testified at the post-conviction writ hearing that she kept the diary to protect herself and other officers from false accusations by the witness. The diary contained information about false accusations and statements made by the witness about the officers. At the writ hearing, the officer who wrote the diary as well as five other officers testified the witness was not a truthful person. None of this information had been revealed to the defense. Based on this evidence, the Court of Criminal Appeals found that the three part test for obtaining relief under *Brady* was met. The Court specifically found that the State failed to disclose the existence of this exculpatory evidence, that the withheld evidence was favorable to the accused and that the evidence was material, that is, that there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different.

In *United States v. Ruiz*, 122 S.Ct. 2450 (2002), the Supreme Court held that the Constitution does not require the government to disclose material impeachment evidence prior to entering into a plea agreement.

The Court of Criminal Appeals has also held that the *Brady* rule did not apply when the accused was already aware of the information. *Hayes v. State*, 85 S.W.3d 809 (Tex. Crim. App. 2002); *Harvard v. State*, 800 S.W.2d 195, 204 (Tex. Crim. App. 1989).

If the defendant discovers previously withheld evidence during trial, or close to trial, it is necessary to request a continuance in order to preserve error for appeal. *Lindley v. State*, 635 S.W.2d 541, 544 (Tex. Crim. App. 1982); *Williams v. State*, 995 S.W.2d 754, 762 (Tex. App. - San Antonio 1999, no pet.); *Gutierrez v. State*, 85 S.W.2d 446 (Tex. App. - Austin 2002).

Specific Cases

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

Supreme Court Cases

*Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972): Government failed to disclose impeachment evidence of a promise of immunity in exchange for testimony.

*Kyles v. Whitley*, *supra*: State suppressed the following evidence in murder case: contemporaneous eyewitness statements taken by the police which would have undermined the state's eyewitness testimony, various inconsistent statements made to the police by an informant and a list of cars at the crime scene.

*Miller v. Pate*, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967): Habeas granted where prosecution knowingly misrepresented paint-stained shorts as blood-stained, and failed to disclose the true nature of the stains.

*Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959): "When reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of immunity deal with witness violates Due Process.

*Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987): Defendant entitled to any exculpatory evidence in child welfare agencies files.

*Banks v. Dretke*, 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004). The failure of the state to disclose that it had rehearsed the testimony of two witnesses used in both the guilt and penalty stage of a capital prosecution, especially when the witnesses denied any prior conversations with the prosecution, together with a false denial that one of the witnesses was an informant who received both money and accommodations from the state, constituted a violation of due process under *Brady v. Maryland*. In remanding the case for further consideration by a federal court considering *habeas* relief, the Court emphasized that "materiality" for the purpose of the *Brady* doctrine does not require a demonstration that, with the undisclosed evidence the defendant would have prevailed, but only a showing of reasonable probability that, with the evidence the outcome would have been different.

*Youngblood v. West Virginia*, 547 U.S. 867, 126 S.Ct. 2188, 165 L.Ed.2d 269 (2006). *Brady* requires the government to disclose evidence which relates to impeachment as well as exculpatory evidence. It also applies to evidence known only to the police and not the prosecutors. In *Youngblood*, the police evidently knew of a handwritten statement of two alleged victims of a sexual assault which substantially impeached their testimony that their conduct with the petitioner was not consensual.

*United States v. Vonn*, 535 U.S. 55, 122 S.Ct. 1043, 152 L.Ed.2d 90 (2002). In offering a defendant a "fast track plea bargain," the government was not obligated, under either the Fifth or

Sixth Amendments, to disclose impeachment information relating to informants and witnesses. "Exculpatory evidence includes evidence affecting witness credibility, where the witness' reliability is likely determinative of guilt or innocence." However, a unanimous Court found this principle which requires disclosure prior to trial is inapplicable at the plea stage, at least with regard to information which might be useful for impeachment purposes: "It is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may or may not help a particular defendant."

Texas Cases

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

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

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

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

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

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

*Ex parte Lewis*, 587 S.W.2d 697 (Tex. Crim. App. 1979): Existence of doctors letter stating

defendant was insane.

*Ex parte Turner*, 545 S.W.2d 470 (Tex. Crim. App. 1977): Fact that police officer aided in obtaining release of main witness.

*Flores v. State*, 940 S.W.2d 189, 191 (Tex. App. - San Antonio 1996, no pet.): Witness statement that was material in corroborating defendant's argument that victim shot herself.

*Granger v. State*, 653 S.W.2d 868 (Tex. App. 13 Dist. 1983), aff'd, 683 S.W.2d 387 (Tex. 1984), *cert. denied*, 472 U.S. 1012 (1985): Failure to disclose existence of a deal that changed witness's sentence from death to lie.

*Ham v. State*, 760 S.W.2d 55 (Tex. App. - Amarillo 1988, no pet.): Prosecution withheld doctors report which supported defense position and refuted prosecution.

*Jones v. State*, 850 S.W.2d 223 (Tex. App. - Fort Worth 1993): Prosecution failed to disclose in a timely manner exculpatory information in a victim impact statement which negated the evidence of defendant's intent to shoot the victim.

*O'Rarden v. State*, 777 S.W.2d 455 (Tex. App. - Dallas 1989, pet. ref'd): Failure to provide defense copy of Dept. of Human Resources report which indicated no sexual abuse occurred.

*Thomas v. State*, 841 S.W.2d 399 (Tex. Crim. App. 1992): Witness statement to police that defendant was not in a physical position to have been able to commit the offense.

*Ex parte Masonheimer*, 220 S.W.3d 494 (Tex. Crim. App. 2007) (double jeopardy barred a third trial of a defendant whose mistrial motions were necessitated primarily by state's intentional failure to disclose exculpatory evidence under *Brady* with the specific intent to avoid the possibility of an acquittal).

*Harm v. State*, 183 S.W.3d 403 (Tex. Crim. App. 2006). Child Protective Services was not acting as a State agent, and thus knowledge of records from CPS that allegedly indicated that, in the

past, victim had made unfounded allegations of sexual abuse and had engaged in inappropriate sexual behavior, could not be imputed to State as a basis for asserting that failure to disclose such information constituted a *Brady* violation in prosecution for indecency with a child; records were created in the course of an non-criminal investigation that was unrelated to defendant, but within the duties of CPS to protect the welfare and safety of the children, and the records significantly predated the allegations against defendant.

*Keeter v. State*, 175 S.W.3d 756 (Tex. Crim. App. 2005). Defendant did not preserve *Brady* claim for review when he moved for new trial on ground that evidence establishing innocence was withheld by material prosecution witness; the evidence allegedly showing preservation was relevant to claim of actual innocence, the defendant did not mention *Brady* in his motion or during the hearing on the motion and did not include any *Brady*-related cases in his post-hearing submission, and neither the state nor the trial court understood that the defendant was raising a *Brady* claim.

Federal Cases

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

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

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

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

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

*Carter v. Rafferty*, 826 F.2d 1299 (3rd Cir. 1987): Reports of polygraph test given to

important prosecution witness, but see *Wood v. Bartholomew*, 516 U.S. 1, 116 S.Ct. 7, 133 L.Ed.2d 1 (1995) (because polygraphs are inadmissable even for impeachment they are not subject to *Brady*).

*Chaney v. Brown*, 730 F.2d 1334 (10th Cir. 1984): Conviction affirmed but death sentence reversed where withheld evidence contradicted prosecution's theory of the murder and placed defendant 110 miles from the scene.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*United States v. Fisher*, 106 F.3d 622 (5th Cir. 1991): Government report reflecting on

credibility of key government witness.

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

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

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

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

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

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

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

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

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

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

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

*Tassin v. Cain*, 517 F.3d 770 (5th Cir. 2008). State's failure to disclose in murder trial the understanding or agreement between witness and state, under which witness expected to gain beneficial treatment in sentencing for related crimes provided that she testified at trial consistently with her prior statements inculpating defendant, constituted Fourteenth Amendment violation under *Giglio*, even though witness had not received a firm promise of leniency from the judge or prosecutor.

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

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

Timing of Disclosure

The ability to effectively utilize exculpatory evidence is largely dependent on the defendant's obtaining timely disclosure. In *United States v. Hart*, 760 F.Supp. 653 (E.D. Mich. 1991), the Court held that it was the court's responsibility to fix the timing for disclosure of exculpatory evidence. Other courts have issued opinions stating that disclosure must be made in time for effective use at

trial. *United States v. Higgs*, 713 F.2d 39, 44 (3rd Cir. 1983); *United States v. Starusko,* 729 F.2d 256, 261 (3rd Cir. 1984).

Requesting Exculpatory Evidence

The prosecution has a duty to reveal exculpatory evidence even without a specific request from the defense and regardless of the good faith or bad faith of the prosecution. *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *Thomas v. State*, 841 S.W.2d 399 (Tex. Crim. App. 1992).

**c. New Evidence Establishing Actual Innocence**

Reasonable minds may disagree on many issues that arise in the criminal justice system. However, the one principle on which everybody would be expected to agree is that prisons are for the guilty and the courts should ensure that the innocent are freed. In fact, this elemental idea is far from universally accepted. See *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996), Judge Womack dissent.

> *At the threshold, we must decide whether the Due Process Clause of the United States Constitution forbids, not just the execution, but the incarceration as well of an innocent person. We need not pause long to answer this question. . . . We think it clear . . . that the incarceration of an innocent person is as much a violation of the Due process Clause as is the execution of such a person. It follows that claims of actual innocence are cognizable by this Court in a postconviction habeas corpus proceeding whether the punishment assessed is death or confinement. In either case, such claims raise issues of federal constitutional magnitude.*
>
> *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996).

In a democratic society, two propositions are clear. Truth is the province of the judiciary, and courts, staffed by fallible humans, inevitably err. As a consequence, some means must exist to exonerate those legally guilty but actually innocent, balancing the State's interests in finality and efficiency with its interest in fair play. As the Court of Criminal Appeals has recognized, that means is the writ of habeas corpus.

The "Great Writ" of habeas corpus, "the most celebrated writ in the English Law," 3 William Blackstone, *Commentaries* at 129, offers protection against "illegal restraint or confinement." *Fay v. Noia*, 372 U.S. 391, 400 (1962). Habeas corpus relief is based on the principle "that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release." *Id.* at 402. The Texas Constitution vests in the Courts the power to issue writs of habeas corpus, TEX. CONST. art. 5, § 5, construed to encompass claims raising jurisdictional or fundamental defects or constitutional issues. *Ex parte Tuley*, 109 S.W.3d 388 (Tex.Crim.App. 2002); *Ex parte Graves*, 70 S.W.3d 103, 109 (Tex.Crim.App. 2002). Claims of actual innocence raise issues of constitutional magnitude.

**Federal Due Process**

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

Assertions of actual innocence are categorized either as *Herrera*-type claims or *Schlup*-type claims. *Herrera v. Collins,* 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993); *Schlup v. Delo,* 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). *See Elizondo,* 947 S.W.2d at 208; *Ex Parte Franklin*, 72 S.W.3d 671 (Tex.Crim.App. 2002). A *Herrera*-type claim involves a substantive claim in which the applicant asserts a bare claim of innocence based solely on newly discovered evidence. *Schlup,* 513 U.S. at 314, 115 S.Ct. 851. *See also Elizondo,* 947 S.W.2d at 208. A *Schlup*-type claim, on the other hand, is a procedural claim in which the applicant's claim of innocence does not alone provide a basis for relief but is tied to a showing of constitutional error at trial. *Schlup,* 513 U.S. at 314, 115 S.Ct. 851.

The *Herrera* decision serves as sound precedent for recognition of habeas relief when an actual innocence claim alone is raised. In *Herrera*, six members of the Court suggested execution

of the innocent was antithetical to our constitutional system. Justice O'Connor, joined by Justice Kennedy, stated that "the execution of a legally and factually innocent person would be a constitutionally intolerable event." 506 U.S. at 420. Justice O'Connor then concluded that the existence of federal relief for such a person need not be addressed in the case before the Court. *Id.* Justice White stated that "a persuasive showing of actual innocence made after trial . . . would render unconstitutional the execution of the petitioner in this case." *Id.* at 429. He also declined to finally decide the issue on the record before the Court. Justice Blackmun, joined in dissent by Justices Souter and Stevens, stated that executing an innocent person is the "ultimate arbitrary imposition" and unquestionably violates both the Eighth and Fourteenth Amendments.[2] *Id.* at 437.

The Court of Criminal Appeals agreed with the "sound and fundamental principle of jurisprudence" that the execution of an innocent person "would surely constitute a violation of a constitutional or fundamental right." *Holmes v. Honorable Court of Appeals for the Third Dist,* 885 S.W.2d 389, 397 (Tex.Crim.App. 1994). In *Elizondo,* this Court extended its holding, verifying that the Due Process Clause of the Fourteenth Amendment forbids the incarceration of an innocent person. 947 S.W.2d at 204.

This principle is essential in a constitutional system. "After all, the central purpose of any system of criminal justice is to convict the guilty and free the innocent." *Herrera*, 506 U.S. at 399. *See United States v. Nobles*, 422 U.S. 225, 230, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975). Further, in this context, no legally cognizable distinction exists between a prisoner sentenced to death and one sentenced to a term of imprisonment. "It would be a rather strange jurisprudence . . . which held that under our Constitution [the actually innocent] could not be executed, but that he could spend the rest

[2] Justices Scalia and Thomas, concurring in the judgment of the Court, indicated execution of the innocent would not transgress the Constitution. 506 U.S. at 427-430. The majority of the Court simply assumed violation, without deciding the issue.

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

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

**B. Due Process, Generally**

The Due Process Clause of the Fifth Amendment provides that "No person shall ... be deprived of life, liberty, or property, without due process of law" The Due Process Clause of the Fourteenth Amendment states the same as to the action of a State. The Clause protects individuals against two types of government action. "Substantive due process" prevents the government from engaging in conduct that "shocks the conscience," *Rochin v. California,* 342 U.S. 165, 172, 72 S.Ct. 205, 96 L.Ed. 183 (1952), or interferes with rights "implicit in the concept of ordered liberty." *Palko v. Connecticut,* 302 U.S. 319, 325-326, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). Additionally, even when government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it still must be implemented in a fair manner. *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). This requirement traditionally is denominated "procedural due process." *United States v. Salerno,* 481 U.S. 739, 746, 107 S.Ct. 2095, 2101, 95 L.Ed.2d 697 (1987). Both procedural and substantive due process provide bases for constitutional exoneration of a prisoner with a clear and convincing claim of actual innocence.

**C. Procedural Due Process**

Criminal process is deficient when it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina v. California*, 505 U.S. 437, 445-446, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992) (quoting *Patterson v. New York*, 432 U.S. 197, 202, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977)). The province and duty of the judiciary is to

correct its own errors. Barring a prisoner with a genuine claim of actual innocence without offering a procedure for vindication of that claim by judicial review offends fundamental principles of justice.

A balancing of relevant interests reveals the necessity of recognizing a claim to procedural due process. Certainly, the State's interest in finality is important, but a society that knowingly imprisons the innocent cannot call itself just. The interest to the prisoner is paramount: No price can be placed on freedom. Further, the State has an interest in liberating the innocent: Any democratic society by definition cherishes freedom and abhors imprisoning the innocent. Finally, the cost to the State is slight. The judiciary will confront litigation of only a very few claims that satisfy an extraordinarily high standard.

As the Court noted in *Holmes*, a balance of interests compels the conclusion that due process requires provision of a judicial forum in which to litigate these claims. 885 S.W.2d at 400. This high standard of proof minimizes any burden on the State. In fact, because the presumption of innocence dissolves upon a finding of guilt, the burden of proof can be placed upon the applicant. Consistently adhering to this high standard, the Court holds the habeas court must be "convinced that [the] new facts unquestionably establish [the applicant's innocence." *Elizondo*, 947 S.W.2d at 209 (quoting *Schlup*, 513 U.S. at 317). Specifically, the Court adheres to the views of the Supreme Court, expressed in *Schlup*, that when asserting a *Herrera*-type claim, the applicant must "demonstrate by clear and convincing evidence that no reasonable juror would convict him in light of the new evidence." *Elizondo*, 947 S.W.2d at 209. The Court amplified in *Franklin*, holding the evidence presented must constitute affirmative evidence of the applicant's innocence. 72 S.W.3d at 678.

Simply stated, the procedural component of the Due Process Clause mandates habeas relief for the actually innocent. A society cannot call itself free if it knowingly imprisons the innocent

without providing a judicial venue in which to raise solid claims of innocence.

**D. Substantive Due Process**

Principles of substantive due process compel a like conclusion. "'[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points. . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints. . . .'" *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 848, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (quoting *Poe v. Ullman,* 367 U.S. 497, 543, 81 S.Ct. 1752, 1777, 6 L.Ed.2d 989 (1961) (opinion dissenting from dismissal on jurisdictional grounds)). Knowingly to imprison the innocent is an arbitrary imposition and purposeless restraint. As the Court recognized in *Elizondo*, a constitutional society founded on due process simply cannot tolerate punishing the innocent. *See Elizondo*, 947 S.W.2d at 209.

Concededly, Justice Rehnquist, writing for the Court in *Herrera*, included some language tending to indicate substantive due process did not apply to analysis of the issue of whether federal habeas relief extended to claims of actual innocence. *See* 506 U.S. at 400-01. However, the comments begged the essential question – does imprisonment of the actually innocent violate the Constitution – and were predicated on concerns of federalism and the starkly limited nature of federal habeas corpus, neither of which is extant in state writs under Art. 11.07 or 11.071, Tex. Code Crim. Proc. Thus, Justice Rehnquist's exposition does not preclude recognition on the State level of a substantive due process claim.

Further, the Justice Rhenquist's reasoning is not sound. The Court disclaimed substantive due process as a source of recognition of freestanding innocence claims because a person convicted in a constitutionally fair trial is legally guilty. In other words, the actual innocence construct

presupposes legal guilt. Thus, the Court reasoned, no question could arise regarding punishment of an innocent person. *Id.* at 407 n. 6. The very issue was whether the applicant was in fact innocent.

As the *Herrera* dissent underscored, however, and the Court of Criminal Appeals affirmed in *Elizondo*, the habeas applicant does not attack the jury verdict. "Nowhere does [the] applicant claim that the verdict is invalid or should be invalidated. What he wants is a new trial based on newly discovered evidence which he claims proves his innocence." *Elizondo*, 947 S.W.2d at 209. However, the question is not whether the Constitution forbids punishment of a person who is legally guilty but factually innocent but whether it denounces punishing one who would be found legally innocent if tried today. *See* Charles R. Morse, *Habeas Corpus and "Actual Innocence":* Herrera v. Collins, 113 S.Ct. 853 (1993), 16 Harv. J. L. and Pub. Pol'y 848 (1993). The focus is on the present, not on the prior trial. This issue is amenable to substantive due process analysis.

In any event, the Court conceded that "a truly persuasive demonstration of 'actual innocence' would make a conviction unconstitutional. *Herrera*, 506 U.S. at 417. A "truly persuasive demonstration of innocence" undermines the construct of legal guilt to the extent that, at some point, it disappears. Application of principles of substantive due process is then invited. *See People v. Washington*, 171 Ill.2d 475, 488-489, 665 N.E.2d 1330 (1996). In the face of extraordinary evidence of actual innocence, denial of a judicial forum eviscerates due process.

This holding does not extend the Due Process Clause to "require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person." *See Patterson v. New York*, 432 U.S. 197, 208, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). This Court carefully balances the interests of the prisoner in access to a forum to test the most basic justice of a sentence[3] and the interest of the State in finality and efficiency by granting relief in only the most

[3] *See Kuhlmann v. Wilson*, 477 U.S. 477 U.S. 436, 452, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986).

extraordinary cases. Adherence to this standard assures the courts will not be overburdened with frivolous claims.

When the burden is so "exceedingly heavy" that the applicant must "unquestionably establish his innocence," *Ex parte Tuley*, 109 S.W.3d 388, 390 (Tex.Crim.App. 2002), the justice system will not experience any sort of cataclysmic tumult. In fact, experience demonstrates it hardly experiences a whimper. "Claims of actual innocence are rare and the cases in which relief is granted are even more rare." *Id.* at 394. The *Tuley* court empirically noted that, since the *Elizondo* decision, applicants had six years to file claims. No flood materialized. Nor, the court noted, did *Elizondo* encourage inmates or their friends and family to harass victims of crimes to encourage them to recant. *Id.* at 395. The only tangible effect of the ruling was to free the innocent. "The criminal justice system has done justice." *Id.*

Habeas is the essential and the only viable means of vindicating actual innocence claims. "The principal purpose of the writ of habeas corpus is to serve as a bulwark against convictions that violate fundamental fairness." *Engle v. Isaac*, 456 U.S. 107, 126, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 97, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (Stevens, J., concurring). Habeas corpus is the last judicial inquiry into the validity of a criminal conviction, the final opportunity of the courts to correct their inevitable errors.

The system of executive clemency cannot accomplish this function. While the Court in *Herrera* called executive clemency the "fail safe" in our criminal justice system, 506 U.S. at 391, the Court did not hold that this device satisfies the commands of the Fourteenth Amendment, and the dissent persuasively argued it does not. As the majority concedes, "'A pardon is an act of grace.'" 506 U.S. at 413. The vindication of the actually innocent that is constitutionally commanded cannot be made to turn on the unreviewable discretion of an executive official or administrative tribunal.

In *Ford v. Wainwright,* the Court recognized this, explicitly rejecting the argument that executive clemency was adequate to vindicate the Eighth Amendment right not to be executed if one is insane. 477 U.S., at 416, 106 S.Ct. at 2605. The possibility of executive clemency "exists in every case in which a defendant challenges his sentence under the Eighth Amendment. Recognition of such a bare possibility would make judicial review under the Eighth Amendment meaningless." *Solem v. Helm,* 463 U.S. 277, 303, 103 S.Ct. 3001, 3016, 77 L.Ed.2d 637 (1983).

A like result obtains in due process analysis. "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803). As the *Herrera* dissent recognized, we no longer live under a government of laws if the exercise of a legal right turns on "an act of grace." 506 U.S. at 440. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 638, 63 S.Ct. 1178, 1185, 87 L.Ed. 1628 (1943).

The Courts turn the Constitution on its head if it vests in the unreviewable discretion of executive officials the province of correcting the errors of the judiciary. The very concept of constitutional government is undermined. If the judicial system erred in convicting the innocent, the judicial system must correct its error. Habeas corpus stands as the only viable basis for achieving due process relief.

**E. Texas Cases**

The actual innocence jurisprudence of the State of Texas has developed primarily in the area of recantations on sexual assault and indecency with a child cases. DNA exonerations are an

additional area where new evidence establishing actual innocence has resulted in relief being granted based on actual innocence. *See*, *Ex parte Waller*, 2008 WL 4356811 (Tex. Crim. App. 2008). *Ex Parte Chatman*, 2008 WL 217860 (Tex. Crim. App. 2008) (Court of Criminal Appeals held that judgment of conviction would be set aside, where no rational jury would have convicted applicant in light of new DNA evidence indicating that he was excluded from being the perpetrator.)

In *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996), the court held that bare claims of actual innocence are cognizable in a habeas hearing. To merit relief, the applicant bears the burden of showing that the newly discovered evidence unquestionably establishes his innocence. The court reviewing the habeas claim must examine the new evidence in light of the evidence presented at trial. In order to grant relief, the reviewing court must believe that no rational juror would have convicted the applicant in light of the newly discovered evidence. In *Elizondo*, the trial evidence was perfunctory testimony by a 10 year old child that his mother and applicant made him and his younger brother watch sexually explicit videotapes and that both adults sexually molested the boys. Both children recanted 13 years after the trial when they were full-grown adults, saying their natural father "relentlessly manipulated and threatened them into making such allegations against the applicant in order to retaliate against the natural mother." They denied that any abuse occurred. The trial court found the recantation credible and the Court of Criminal Appeals granted relief.

In *Ex parte Thompson*, 153 S.W.3d 416 (Tex. Crim. App. 2005), the court granted relief based on the recantation by the applicant's 20 year old daughter of the allegation of sexual assault that was alleged to have occurred when she was 5 years old. In *Thompson*, Judge Cochran, concurring, stated that courts:

> "fail in [their] primary duty of protecting the innocent and punishing the guilty if [the courts] intentionally slam the courthouse door against one who is, in fact, innocent

> of wrongdoing. I believe that if the criminal justice system-even when its procedures were fairly followed-reaches a patently inaccurate result which has caused an innocent person to be wrongly imprisoned for a crime he did not commit, the judicial system has an obligation to set things straight." *See Id*. (concurring opinion) at 421-23.

Other cases where relief was granted have had similar fact patterns. *Ex parte Tuley*, 109 S.W.3d 388 (Tex. Crim. App. 2002) (defendant's guilty plea did not bar relief); *Ex parte Harmon*, 116 S.W.3d 778 (Tex. Crim. App. 2003); *Ex Parte Patrick Logan Montgomery*, 2009 WL 1165499 (Tex. Crim. App. 2009) (recantation by alleged victims found credible).

In *Ex parte Brown*, 205 S.W.3d 538 (Tex. Crim. App. 2006), the court stated that establishing a bare claim of actual innocence in a post-conviction application for writ of habeas corpus is a "Herculean" task. In *Brown*, the court stated that to succeed on a habeas claim of actual innocence based on newly discovered evidence the applicant must show by clear and convincing evidence that, despite the evidence of guilt that supports the conviction, no reasonable juror could have found him guilty in light of the new evidence. This showing must overcome the presumption that the conviction is valid and must unquestionably establish applicant's innocence. The evidence relied upon must be newly discovered or newly available. In *Brown*, the court denied relief because the evidence was not newly discovered. The evidence was the same as that attached to the applicant's motion for new trial two years earlier.

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

An example of a *Schlup* actual innocence claim, where the actual innocence is used as a gateway to raise another constitutional violation in a subsequent writ, is *Ex Parte Billy Frederick*

*Allen*, 2009 WL 282739 (Tex. Crim. App. 2009). In *Allen*, the defendant, who was convicted of murder, was entitled to a new trial on application for writ of habeas corpus, though he made previous applications for habeas relief that were denied, as defendant asserted *Schlup*-type actual innocence claim based on newly discovered evidence intertwined with ineffective assistance claim; trial counsel failed to ask for continuance when he was surprised by officer's testimony that officer heard victim identify defendant as his attacker, counsel failed to raise in motion for new trial newly discovered evidence that ambulance paramedic heard victim tell officer five or six times that attacker had a different middle name than defendant, counsel failed to conduct an investigation that would have revealed that such other person had an actual motive to kill victim, and it was more likely than not that no reasonable juror would have convicted defendant in the light of new evidence.

In reviewing a claim of actual innocence based on a recantation, the most important job of the trial court is to assess the credibility of the recantation. If the trial judge hears testimony from the alleged victim who recants her prior testimony and finds it credible, the Court of Criminal Appeals will likely accept that fact finding. Likewise, if the trial court finds the recantation not credible, the Court of Criminal Appeals will almost certainly deny relief.

**F. Supreme Court Activity**

The United States Supreme Court appears ready to re-enter into the debate concerning actual innocence as a constitutional claim. The following is a summary from the SCOTUS BLOG:

> "On August 17, 2009, the Supreme Court, over two Justices' dissents, on Monday ordered a federal judge in Georgia to consider and rule on the claim of innocence in the murder case against Troy Anthony Davis (*In re Davis*, 08-1443). The Court told the District Court to 'receive testimony and make findings of fact as to whether evidence that could have been obtained at the time of trial clearly establishes [Davis'] innocence.'
>
> . . .
>
> The Court did not disclose how each of the Justices had voted, other than the dissents of Justices Scalia and Thomas. Presumably, however, an order of this kind would have required the approval of at least five votes. Justices Breyer, Ginsburg and

Stevens presumably voted for the order; their opinion said the case was the type that was exceptional enough to qualify for the action. It is unclear how Chief Justice John G. Roberts, Jr., or Justices Anthony M. Kennedy and Samuel A. Alito, Jr., voted, if they did, but it appears that at least two of them would have had to agree to the step taken.

Davis was convicted in 1991 of murdering an off-duty Savannah police officer, Mark Allen MacPhail, in 1989. Since his trial, Davis has claimed, seven of the state of Georgia's key witnesses have recanted the testimony they gave at the trial. Several other individuals have implicated another man - the prosecution's key witness against Davis - as the shooter.

The Court's action set off a sharply-worded exchange - Justice Stevens on one side, Justice Scalia on the other - over the strength of Davis' claim to be innocent, and over whether the Georgia federal judge who will be conducting the new review has any power to rule for Davis.

The Court has never ruled on whether a credible claim of 'actual innocence' justifies extraordinary remedies in federal court, when a state conviction is involved. Davis' case may well test that issue, as it moves through the federal courts again. Justice Scalia, in fact, said in his opinion Monday that, if there is a genuine issue on that point, the Court itself should decide the issue.

On the merits of Davis' claim, Justice Scalia dismissed it as 'a sure loser.' He said that the Georgia Supreme Court, the federal Eleventh Circuit, and the Georgia pardon board have all considered the very evidence that Davis now cites, and 'found it lacking.'

Justice Stevens did not judge finally the merits of the claim, but hinted that he had found it at least partly supported, saying that 'the substantial risk of putting an innocent man to death' justified the Court in taking the unusual action it did on Monday.

On the power of a federal judge to rule in Davis' favor at this stage, Scalia argued that the 1996 federal law limiting federal habeas review of state criminal convictions - the Anti-Terrorism and Effective Death Penalty Act (AEDPA) - barred any federal court from hearing Davis' claim because there was no error at his trial that violated any prior Supreme Court decision.

Scalia wrote: 'This Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent.' He conceded, though, that the Court has left the issue open.

Stevens said that the District judge may have authority to act, perhaps finding that AEDPA's limits do not apply to 'original' habeas writs of the kind the Justices acted on on Monday, or do not apply to a habeas claim of 'actual innocence.' In addition, Stevens said, there may be an argument that AEDPA's habeas limits are unconstitutional if they barred court review of such a claim. Finally, Stevens said, it can be argued that it would be a federal constitutional violation to execute an innocent person.

All of those issues, presumably, will be canvassed initially by the federal District judge, with further review likely in both the Eleventh Circuit and, potentially, the Supreme Court."

## G. Summaries of Texas Cases

**Relief Granted on Writ of Habeas Corpus, Conviction Overturned on Actual Innocence Grounds**

*Ex Parte Blair*, 2008 Tex. Crim. App. Unpub. LEXIS 469

Michael Nawee Blair was convicted of capital murder of a four-year-old girl in 1994 based on eyewitness misidentification and invalid forensic science. Eyewitnesses told police they had seen Blair at the park where the victim disappeared, though no one said they saw Blair and the victim together. Microscopic hair and fiber comparisons were central to the case. Post conviction DNA results from skin cells found under the victim's fingernails as well as other DNA evidence discovered on the victim's clothes excluded Blair. No reasonable juror would have convicted, relief was granted in 2008 and the judgment was set aside.

*Ex Parte Byars*, 176 S.W.3d 841 (Tex. Crim. App. 2005)

Barry Sheen Byars was convicted of first degree felony offense of injury to a child. Following conviction and sentencing the complainant recanted and trial court found recantation credible and that by clear and convincing evidence that no reasonable jury would convict in light of newly discovered evidence. Actual innocence claim established and the judgment vacated.

*Ex Parte Calderon*, 2010 Tex. Crim. App. Unpub. LEXIS 531

Domingo Calderon pled no contest to indecency with a child (his sister) at the request of his mother and was sentenced to ten years in prison. His sister later recanted saying that she lied out of fear of her step-father and the court found her recantation credible. In light of newly discovered evidence, habeas corpus was granted on actual innocence and verdict set aside.

*Ex Parte Cantu*, 2005 Tex. Crim. App. Unpub. LEXIS 319

Raul Alfred Cantu plead guilty to possession of cocaine and was sentenced. At the time of the plea, the substance had not been tested and Cantu took the plea deal to avoid a second-degree

felony charge. The substance was tested and it was found to contain no controlled substance and Cantu raised a claim of actual innocence in his writ of habeas corpus. The Court of Criminal Appeals granted relief, no jury would have convicted based on new evidence.

*Ex Parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996)

Joe Rene Elizondo was convicted of aggravated sexual assault, based on the main witness's testimony. The witness later recanted, saying that he gave the false testimony because of manipulation and threats of their natural father and Elizondo filed a writ alleging that newly available evidence shows him to be innocent. There is clear and convincing evidence that no rational jury would convict in light of the new evidence, habeas corpus granted.

*Ex Parte Gossett*, 2007 Tex. Crim. App. Unpub. LEXIS 885

Andrew Gossett was convicted of aggravated sexual assault in 2001; rape examination after incident was consistent with forced entry, but forensic DNA analyst could not make determination as to the identity of assailant. In 2007 DNA testing excluded Gossett as a possible contributor to the male DNA and Gossett raised claims of actual innocence. Habeas corpus granted, applicant entitled to relief on actual innocence claim based on newly discovered DNA.

*Ex Parte Harbin*, 297 S.W.3d 283 (Tex. Crim. App. 2009)

Phillip Harbin was convicted of child sexual offenses and incarcerated in California. Upon release he moved to Texas and attempted to, but failed to register as a sex offender and was then arrested for failing to report as a sex offender. Relief was granted, Harbin was not required to register for his offenses, failure to register as a sex offender vacated since applicant was actually innocent.

*Ex Parte Harmon*, 116 S.W.3d 778 (Tex. Crim. App. 2003)

Ricky Dale Harmon was convicted of aggravated sexual assault based on complainants

testimony. Complainant recanted testimony in an affidavit saying that the false testimony was prompted by her natural father's sister and saying that Harmon never sexually assaulted her. Trial court conducted a hearing and found recantation credible. Writ filed, relief was granted and judgment set aside.

*Ex Parte Henton*, 2006 Tex. Crim. App. Unpub. LEXIS 2532

Eugene Ivory Henton pled guilty and was convicted of a felony offense of sexual assault. Subsequent DNA testing excluded Henton as a possible contributor and he filed a writ claiming actual innocence based on new evidence not available at the time of the trial. Relief was granted, no jury would convict in light of new evidence.

*Ex Parte Knipp*, 236 S.W.3d 214 (Tex. Crim. App. 2007)

Kenneth Everett Knipp was convicted twice for the same delivery of a controlled substance. State erroneously asserted that applicant made two deliveries and he was subsequently convicted twice and sentenced for two deliveries. Knipp in fact made one delivery and due to a clerical error it was thought he made two. He subsequently filed a writ of habeas corpus claiming actual innocence and relief was granted. Evidence of actual innocence met requirements since applicant could not be guilty and the judgment was set aside.

*Ex Parte Mack*, 2006 Tex. Crim. App. Unpub. LEXIS 568

Norman Ervin Mack plead guilty of possession of a controlled substance thought to be cocaine and was convicted. Lab results later showed that the substance was chlorpromazine and Mack filed a writ of habeas corpus claiming actual innocence. No reasonable juror would convict, relief was granted and the judgment was set aside upon actual innocence.

*Ex Parte McGowan*, 2008 Tex. Crim. App. Unpub. LEXIS 437

Thomas Clifford McGowan was convicted of aggravated sexual assault and burglary of a

habitation in 1987 largely because of eyewitness misidentification. Post-conviction DNA testing and investigation exclude McGowan from being the perpetrator and he contends that he is actually innocent and entitled to relief. Habeas corpus granted based on DNA evidence and actual innocence.

*Ex Parte Montgomery*, 2009 Tex. Crim. App. Unpub. LEXIS 318

Patrick Logan Montgomery was convicted of two offenses of indecency with a child based upon complainant's testimony. Complainants in the cases later provided him with affidavits recanting their trial testimony saying that they were encouraged by their mother and other authoritative persons to falsely testify about abuse which never occurred. The trial judge found no rational jury would have convicted and recantations were credible; relief granted on actual innocence, judgment set aside.

*Ex Parte Rivera*, 2005 Tex. Crim. App. Unpub. LEXIS 21

Simon Angel Rivera entered a guilty plea to failure to report as a sex offender, involuntarily because of ineffective counsel and alleges actual innocence. At the time of the alleged failure he was no longer required to report. The judgment was vacated.

*Ex Parte Smith*, 2006 Tex. Crim. App. Unpub. LEXIS 385

Billy James Smith was convicted of aggravated rape, during trial motion for forensic DNA testing was filed accompanied by affidavit by Smith stating actual innocence. Court denied motion which was confirmed by court of appeals. Later DNA testing would exclude Smith as a contributor and by clear and convincing evidence no reasonable juror would have convicted. Previous judgment set aside, relief granted in light of favorable DNA results.

*Ex Parte Thompson*, 153 S.W.3d 416 (Tex. Crim. App. 2005)

Stephen Craig Thompson was charged and convicted of aggravated sexual assault of a child (his daughter), evidence at trial was a torn dress, testimony of wife and child and testimony of

examining physician who found no evidence of an assault. At habeas hearing, witnesses described a custody dispute, the daughter testified that she had not been assaulted and her mother had coached her to lie and that dress had been torn when she fell off a school bus, and bus driver witnessed girl fall while getting off bus where she tore her dress. Complainant provided an affidavit recanting her testimony and stating that sexual abuse never happened and that her mother had pressured her into making allegations. Habeas corpus granted and conviction set aside; court weighed the newly discovered evidence against the evidence adduced at trial.

*Ex Parte Tuley*, 109 S.W.3d 388 (Tex. Crim. App. 2002)

Facts: Defendant charged with aggravated sexual assault, jury was deadlocked and defendant plead guilty since he could not afford to retain counsel, was unable to make bail and had already spent ten months in jail and was addicted to drugs. Complainant recanted her allegations before the trial and applicant submitted affidavits and filed a writ under actual innocence. Trial court found recantation credible and habeas corpus was granted; actual innocence claims are not barred because the conviction was the result of a guilty plea.

*Ex Parte Waller*, 2008 Tex. Crim. App. Unpub. LEXIS 656

Patrick Leondos Waller was convicted of aggravated robbery and pled guilty to aggravated kidnapping. DNA testing showing that another man committed the sexual assault in addition to a confession by another man allowed defendant to raise actual innocence in a writ of habeas, which the court granted.

**Relief Granted and Remanded for a New Trial**

*Ex Parte Zapata,* 235 S.W.3d 794 (Tex. Crim. App. 2007)

Mark Anthony Zapata was charged and convicted of aggravated sexual assault of a child (his daughters), pled guilty and offered testimony of committing various offenses against his daughters.

His daughters recanted after the plea but before sentencing and defendant testified that he had fabricated the admission and entered a guilty plea to get a more lenient sentencing. The court found the recantations credible and habeas corpus was granted; applicant's plea was not knowingly and voluntarily entered. Writ asserts involuntary guilty plea and an actual innocence claim based on recantations from daughters; court granted based on involuntary guilty plea, innocence discussed in dissent.

*Ex Parte Allen*, 2009 Tex. Crim. App. Unpub. LEXIS 90

Billy Frederick Allen was convicted of two charges of murder, filed numerous writs (1984-actual innocence, 1993-ineffective trial counsel, 1995-another application challenging conviction as a subsequent application, 2005- ) Relief granted based on ineffective assistance; actual innocence discussed, remanded for a new trial.

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

Brandy Del Briggs was convicted of injury to a child for causing her child's death. Two month old was brought into hospital after lack of oxygen to the brain, emergency room personnel mistakenly inserted an oxygen tube into his stomach instead of lungs. Counsel did not fully investigate medical records or consult experts until fees were paid. Relief granted and judgment vacated based on ineffective counsel and actual innocence, there is sufficient probability that but for the counsel's errors, the defendant would not have plead guilty and to undermine the confidence that the death was the result of a criminal act. Previous judgment vacated and remanded for a new trial.

*Ex Parte Mowbray*, 943 S.W.2d 461 (Tex. Crim. App. 1996)

Freda S. Mowbray was convicted of murder and contended that State knowingly used false testimony and State's expert witness knowingly gave false and misleading testimony. Relief granted; applicant's due process rights were violated, actual innocence discussed, remanded for new trial.

*Ex Parte Rich*, 194 S.W.3d 508 (Tex. Crim. App. 2006)

David Allen Rich plead guilty to driving while intoxicated and pleaded true to two enhancements alleging prior convictions for two felony offenses. Sentenced as a habitual offender, he later discovered that one of the priors had been reduced to a misdemeanor. The court found that the sentence was illegal because the prior conviction was reduced and vacated the judgment, allowing Rich to withdraw his plea of guilty and ordered a new trial.

## DNA

**Exonerated by the Texas Court of Criminal Appeals on Writ of Habeas Corpus**

Gilbert Alejandro, 1994 (Opinion Unavailable)

Convicted of aggravated assault based on false DNA testing performed by Fred Zain. Reexamination of the DNA report showed the test had not been completed and new test excluded Alejandro as the depositor. The conviction was overturned and Alejandro was released to stand trial again. The DA declined to prosecute the case, all charges were dismissed and Alejandro was exonerated by the Texas Court of Criminal Appeals in 1994.

*Ex Parte Blair*, 2008 Tex. Crim. App. Unpub. LEXIS 469

Michael Blair was convicted of capital murder based on misidentification of witness and invalid forensic science. DNA testing of hair and fingernail scrapings from the victim's body excluded Blair as a contributor and analysis used to convict was contradicted by DNA testing. Judgment of guilt and sentence of death are set aside.

*Ex Parte Chatman*, 2008 Tex. Crim. App. Unpub. LEXIS 46

Charles Chatman was convicted in Dallas of a 1981 rape after he was misidentified in a photo lineup. He served nearly 27 years before DNA testing proved his innocence in 2007, leading to his release on January 3, 2008. Original testing showed that seminal fluid and sperm cells came from

a type O secretor. Upon later Y-STR testing, Chatman was proven not to be a contributor. No rational jury would have convicted, judgment is set aside.

Richard Danziger and Christopher Ochoa, 2002 (Opinion Unavailable)

Danziger was convicted of aggravated sexual assault based on the coerced testimony of his friend Christopher Ochoa who was convicted of murder and sexual assault. Evidence from a lab analysis at trial detected similar blood types of Danziger and the victim. Years later, the true perpetrator confessed to the crime and new tests were performed which excluded Danziger and Ochoa, both of whom were exonerated in 2002.

*Ex Parte Evans*, 2009 Tex. Crim. App. Unpub. LEXIS 696

Jerry Evans was convicted of sexual assault in 1987 when police encouraged the victim to pick Evans out of a photo line-up. Jerry contended that post-conviction DNA testing, which was not available at the time of trial, reflects that he is actually innocent. DNA testing would later prove his innocence and he was exonerated in 2009.

*Ex Parte Giles*, 2007 Tex. Crim. App. Unpub. LEXIS 1246

James Giles was convicted in 1983 for allegedly raping a victim with two other men. He was released on parole in 1993 but continued to pursue legal action to prove his innocence. The Innocence Project began investigating his case in 2000 and DNA evidence proved that Giles was innocent. He was finally exonerated in 2007.

*Ex Parte Good*, Court of Criminal Appeals Case No. AP-75,042 Unpub. Locate at:

http://www.cca.courts.state.tx.us/opinions/HTMLOpinionInfo.asp?OpinionID=12780

Donald Wayne Good was convicted in 1984 of committing a 1983 rape and burglary. He was sentenced to life in prison. He was paroled in 1993, but his parole was revoked in 2002 (for a minor property crime); he is still serving a five-year sentence for the property crime. In 2004, DNA testing

proved that Good could not have been the man who committed the 1983 crimes, and the Texas Court of Criminal Appeals exonerated him in 2004.

The evidence presented at Good's trials included the eyewitness testimony from the victim and her daughter. The rape kit was examined by the Southwestern Institute of Forensic Sciences (SWIFS). The laboratory found spermatozoa in the rape kit, on the victim's jumpsuit, and on a blanket. An analyst testified that blood group markers on the blanket must have come from a Type O secretor, which matched Good's blood type. In 2002, Good filed a handwritten motion requesting DNA testing of the evidence, test results excluded Good as a contributor to the spermatozoa on the vaginal swab. The Texas Court of Criminal Appeals vacated the conviction.

*Ex Parte Gossett*, 2007 Tex. Crim. App. Unpub. LEXIS 885

In February 2000, Andrew Gossett was convicted of aggravated sexual assault and sentenced to 50 years. Gossett was finally released on January 4, 2007, after DNA test results proved his innocence.

The victim then identified Gossett from a photo array, no physical evidence linked Gossett to the crime. Initial DNA testing in his case was inconclusive, hair samples retrieved from the victim's vehicle did not match Gossett. The victim testified that her assailant had a state of Texas map ring on his finger, but detectives who searched Gossett's residence did not find a ring. Also, a videotape recovered from a convenience store showed Gossett shortly after the attack, wearing clothing that was inconsistent with the victim's description. However, Gossett was found guilty and spent seven years in prison before DNA testing exonerated him.

*Ex Parte Henton*, 2006 Tex. Crim. App. Unpub. LEXIS 2532

Eugene Ivory Henton was convicted of sexual assault in 1984 and sentenced to four years. He served 18 months in prison on that charge. DNA testing exculpated Henton in 2005, and he was

exonerated the following year.

Carlos Lavernia, 2000 (Opinion Unavailable)

Carlos Lavernia was convicted in 1985 of aggravated rape based on eyewitness misidentification and improper forensic science. In 2000, via DNA testing, Carlos was proven innocent and exonerated.

*Ex Parte McGowan*, 2008 Tex. Crim. App. Unpub. LEXIS 437

Thomas McGowan was convicted of aggravated sexual assault and burglary of a habitation in 1987 largely because of eyewitness misidentification. After the Innocence Project accepted the case, DNA testing would prove that another man committed the crime and the Texas Court of Criminal Appeals exonerated McGowan in 2008.

*Ex Parte Phillips*, 2008 Tex. Crim. App. Unpub. LEXIS 714

In two separate trials, Steven Phillips was convicted of burglary in 1982 and rape in 1983. Phillips began to seek post-conviction DNA testing in 2002, but his requests were initially denied. With the help of the Innocence Project, DNA testing was finally conducted in 2006 and proved that Phillips was actually innocent of the rape. In 2008 Phillips was officially exonerated through a writ of habeas corpus from the Texas Court of Criminal Appeals.

*Ex Parte Rachell*, 2009 Tex. Crim. App. Unpub. LEXIS 24

Ricardo Rachell was convicted of aggravated sexual assault of a minor based on the victim's testimony and his friend who were both eight years old. Rachell offered and provided DNA evidence for testing to prove his innocence prior to trial, but it was never tested because the defense did not ask for it. After conviction, DNA testing provided newly discovered evidence and indicated that Rachell did not commit the crime and was entitled to relief. The Texas Court of Criminal Appeals exonerated him in 2009.

*Ex Parte Rodriguez*, Court of Criminal Appeals Case Nos. AP-75,225 & AP-75,226, Unpub. Locate at: http://www.cca.courts.state.tx.us/opinions/HTMLOpinionInfo.asp?OpinionID=13172

George Rodriguez was convicted of aggravated sexual assault of a child and aggravated kidnapping in 1987 based on eyewitness misidentification and improper forensic science. Despite the confession of one of the perpetrators and his identifying an accomplice, the police put Rodriguez in a line-up where he was identified by the fourteen-year-old victim. A hair found in the victim's underwear was said to be microscopically similar to Rodriguez and the testing of semen could not exclude Rodriguez. Mitochondrial testing of the hair would later indicate that Rodriguez could not have been the perpetrator. In 2005 his conviction was vacated and in September 2005 the DA moved to dismiss all charges.

*Ex Parte Smith*, 2006 Tex. Crim. App. Unpub. LEXIS 385

Billy James Smith was convicted of aggravated sexual assault while using and exhibiting a deadly weapon in 1986. He was sentenced to life in prison. Smith was released in July 2006 and officially exonerated in December 2006.

The police who searched Smith's belongings did not find clothing that the victim said the perpetrator wore. The clothes that police confiscated from Smith contained no DNA evidence whatsoever. Also, Smith's sister testified at trial, corroborating his alibi. There was no evidence in the record that the victim had engaged in sex with anyone besides her attacker in the 24 hours prior to her rape. The prosecution used the presence of semen to prove that a rape had occurred, and Smith was convicted. After attempting to secure DNA testing for four years, Billy James Smith was finally granted DNA testing in 2005 which excluded him as the donor, following which he was exonerated.

*Ex Parte Waller*, 2008 Tex. Crim. App. Unpub. LEXIS 656

Patrick Waller was convicted of robbery and kidnapping in 1992. He spent nearly 16 years

in Texas prisons before DNA testing proved his innocence. He was officially exonerated on September 24, 2008.

Despite alibi testimony at trial, the eyewitness testimony of the four victims, as well as forensic testing of semen from the crime scene which did not exclude Waller, led to him being convicted of all charges and sentenced to life in prison. In late 2007, DNA testing paid for by the Innocence Project of Texas excluded Waller and implicated the real perpetrator. Waller was freed on July 3, 2008 and exonerated a few months later.

*Ex Parte Wallis*, 2007 Tex. Crim. App. Unpub. LEXIS 1208

Gregory Wallis was convicted in 1989 of burglary of a habitation with intent to commit sexual assault in 1988. He was sentenced to 50 years in prison and served 18 years. He was released in March 2006 and officially exonerated in 2007. At trial, the victim testified that she knew for a fact Wallis was the man who raped her. He was convicted and sentenced to 50 years. In December 2005, results of a first round of DNA testing could not entirely exclude Wallis. He was offered his freedom if he would agree to be a life-time registered sex offender. He declined. In 2006, another (more advanced) DNA test was conducted and the results proved that Wallis was not the perpetrator. He was released from prison in March 2006, and in January 2007, the Texas Court of Criminal Appeals granted his writ of habeas corpus, officially exonerating him.

**Pardoned Based on DNA Exoneration**

A.B. Butler, 2000

Kevin Byrd, 1997

Timothy Cole, 2009

Roy Criner, 2000

Wiley Fountain, 2003

Larry Fuller, 2007

Entre Nax Karage, 2005

Johnnie Lindsey, 2009

Billy Miller, 2006

Brandon Moon, 2005

Arthur Mumphrey, 2006

David Shawn Pope, 2001

Anthony Robinson, 2000

Ben Salazar, 1997

Josiah Sutton, 2004

Ronald Taylor, 2008

Victor Thomas, 2002

Keith E. Turner, 2005

James Waller, 2007

Calvin Washington, 2001

Mark Webb, 2001

James Woodard, 2009

The author was assisted in preparation of this portion of the paper by Tona Trollinger, Mike Sturgill, and Natalie Roetzel.

**d. Additional Grounds for Relief**

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

Double Jeopardy: Under some circumstances, a double jeopardy claim can be raised on a writ, even if the applicant failed to raise the issue in the trial court. When the undisputed facts show

the double jeopardy violation is clearly apparent on the face of the record and when enforcement of the usual rules of procedural default would serve no legitimate state interest, this claim can be considered on a writ. *Gonzalez v. State*, 8 S.W.3d 640, 643 (Tex. Crim. App. 2002); *Ex parte Cavazos*, 203 S.W.3d 333 (Tex. Crim. App. 2006); *Ex parte Diaz,* 959 S.W.2d 213 (Tex. Crim. App. 1998); *Ex parte Knipps*, 236 S.W.3d 214 (Tex. Crim. App. 2007).

Guilty Pleas: If the plea was entered involuntarily and unknowingly, it may be attacked on a writ application. *Rodriguez v. State*, 899 S.W.2d 658 (Tex. Crim. App. 1995).

Denial of Counsel: Relief by way of habeas corpus is available if a defendant was denied the right to counsel at any critical stage of the proceedings. *Ex parte Sanders*, 588 S.W.2d 383, 385 (Tex. Crim. App. 1979).

Right to Appeal and Discretionary Review: A convicted defendant is entitled to effective assistance of counsel on direct appeal as of right. *Evitts v. Lucey*, 469 U.S. 387, 402-03 (1985). A defendant who is denied this right is entitled to an out of time appeal. *Ex parte Axel*, 757 S.W.2d 369, 374 (Tex. Crim. App. 1988). The failure of an attorney to notify client of the right to file a Petition for Discretionary Review with the Court of Criminal Appeals entitles him to file an out of time Petition. *Ex parte Wilson*, 956 S.W.2d 25 (Tex. Crim. App. 1997).

Illegal Sentence: A claim of an illegal sentence can be raised on an application for writ of habeas corpus. *Ex parte Rich*, 194 S.W.3d 508, 512 (Tex. Crim. App. 2006).

Denial of Interpreter: If the applicant did not understand English and was denied an interpreter, habeas relief is appropriate. *Ex parte Nanes*, 558 S.W.2d 893, 894 (Tex. Crim. App. 1977).

Presentation of Perjured Testimony: If the state knowingly presented perjured testimony, a writ application can be granted. *Ex parte Adams*, 768 S.W.2d 281, 293 (Tex. Crim. App. 1989).

If a defendant is convicted and imprisoned solely on the basis of perjured testimony, due process is violated and a writ can be granted. *Ex parte Carmona*, 185 S.W.3d 492 (Tex. Crim. App. 2006).

A defendant's due process rights are violated by the state's unknowing presentation of perjured testimony. *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009) (Defendant's due process rights were violated by state's unknowing presentation of perjured testimony in murder prosecution, where postconviction DNA testing conclusively showed that accomplice witness perjured himself by denying that he had sexually assaulted victim, his testimony provided the only direct evidence that defendant sexually assaulted and killed victim, state acknowledged that it predicated its trial theory on accomplice witness's testimony, and DNA evidence refuted not only his testimony but also that of another witness who characterized accomplice witness as a nonviolent person who would never hurt a woman.); *Estrada v. State*, 313 S.W.3d 274 (Tex. Crim. App. 2010) (new punishment hearing for capital murder was required where state's expert witness unintentionally presented false testimony concerning inmates eligibility for less restrictive prison classification)..