APPENDIX A
11TH COURT OPINION

APPENDIX A

FILE COPY

Court of Appeals
Eleventh District of Texas

100 WEST MAIN STREET, SUITE 300
P. O. BOX 271
EASTLAND, TEXAS 76448

SHERRY WILLIAMSON
CLERK
TELE: 254/629-2638
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sherry.williamson@txcourts.gov
www.txcourts.gov/11thcoa

August 30, 2019

Shane Deel, District Attorney
100 West 4th Street, Suite 202
Baird, TX 79504
* DELIVERED VIA E-MAIL *

Jeffrey A. Propst
Keith & Propst, PLLC
P. O. Box 3717
Abilene, TX 79604
* DELIVERED VIA E-MAIL *

RE: Appellate Case Number: 11-16-00338-CR
Trial Court Case Number: 7138
Style: Phillip Jay Walter, Jr. v. The State of Texas

The Court has this day **AFFIRMED** the judgment of the trial court in the above cause.

Copies of the Court's opinion and judgment are attached.

TEX. R. APP. P. 68.3 requires the Petition for Discretionary Review be filed with the Clerk, Court of Criminal Appeals. No copy is required for the Eleventh Court of Appeals.

Pursuant to TEX. R. APP. P. 48.4, the attorney representing the defendant on appeal shall, **within five days** after the opinion is handed down, send by certified mail, return receipt requested, a copy of the opinion and judgment, along with notification of the defendant's right to file a pro se petition for discretionary judgment in the Court of Criminal Appeals. A letter certifying compliance with this rule and a copy of the return receipt is due in this Court on or before **September 16, 2019**.

Respectfully yours,

Sherry Williamson

Sherry Williamson, Clerk

cc: Dean Rucker, Administrative Judge (DELIVERED VIA E-MAIL)
District Clerk - Callahan County (DELIVERED VIA E-MAIL)
James Eidson, Judge (DELIVERED VIA E-MAIL)

Opinion filed August 30, 2019

In The

Eleventh Court of Appeals

No. 11-16-00338-CR

PHILLIP JAY WALTER, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 42nd District Court
Callahan County, Texas
Trial Court Cause No. 7138

OPINION

At the conclusion of a joint trial, the jury convicted Appellant, Phillip Jay Walter, Jr., and his wife, Violet Maree Walter, of murder, robbery, and theft of a firearm.[1] *See* TEX. PENAL CODE ANN. §§ 19.02, 29.02, 31.03 (West 2019). The trial court assessed Appellant's punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for forty years for the murder conviction

[1]In this opinion, we will refer to Phillip Jay Walter, Jr., as "Appellant" and to his wife, Violet Maree Walter, as "Walter."

APP. A

and for twenty years for the robbery conviction. The trial court also assessed Appellant's punishment at confinement in the State Jail Division of the Texas Department of Criminal Justice for a term of two years for the conviction for theft of a firearm. Additionally, the trial court ordered that the sentences are to run concurrently.[2] Appellant challenges his convictions in a single issue on appeal. We affirm.

Background Facts

Don Allen, a police officer with the Abilene Police Department, was found dead at his home in Clyde on August 31, 2015. Approximately one week before his death, Allen placed an advertisement on Craigslist seeking an unconventional sexual encounter. Walter responded to Allen's post on August 29, 2015, writing: "Still looking? Sexy couple in their 20s. . . . Down for anything." For the next couple of days, Walter and Allen e-mailed each other about the prospect of a sexual encounter between Appellant, Allen, and Walter. Eventually, Allen invited Appellant and Walter to his home in Clyde on the afternoon of August 31.

That evening, Allen's fiancée found Allen dead in their bedroom, lying facedown on the floor. Allen was wearing only a T-shirt and socks; he was otherwise naked. His hands and ankles had been bound by USB cords, with his hands tied behind his back. Another USB cord, along with Allen's shorts, was loosely wrapped around Allen's face and neck. There was no evidence of forced entry or a struggle inside the home.

One of Allen's neighbors told investigators that he saw a male and a female arrive at Allen's home that afternoon. Another one of Allen's neighbors saw a vehicle near Allen's home. The neighbor provided the police with the

[2]We note that Walter received the same sentences.

APP. A

vehicle's make, color, and model. Investigators discovered that Appellant owned a vehicle similar to the vehicle seen near Allen's home.

Video surveillance from a pawn shop in Abilene showed Appellant, accompanied by Walter, pawning four video games and a woman's bracelet on the evening of August 31. The same four video games had been recently played on Allen's video game console, and Allen's fiancée identified the pawned bracelet as her bracelet. Investigators also identified Appellant's fingerprint on a water bottle at Allen's home.

Appellant and Walter were subsequently arrested. Police officers searched their apartment pursuant to a search warrant. In the apartment, the police found an Abilene Police Department badge, a taser, handcuffs, and an ASP case that had been issued to Allen as an Abilene Police Officer. Allen's firearm was returned to police by a confidential informant, and Allen's police radio was found on the side of a highway, two miles east of Clyde.

During the search of the apartment, the police also found Appellant's and Walter's cell phones. The police searched the phones pursuant to additional search warrants. Walter's text messages to Appellant revealed that they were experiencing financial difficulties at the time and were in the process of being evicted from their apartment. Walter sent Appellant several text messages on the day of Allen's death, urging Appellant to do something to remedy their dire financial situation. For example, Walter sent Appellant the following text messages on August 31: "Go f--k someone else and restore our s--t," "Hurry up and fix this," "DO SOMETHING NOW," and "You NEED to do this. Your fear of a police report versus LOSING us should be bigger. Your need to feed and house your CHILDREN should be bigger tha[n] ANYTHING."

After Walter set up the meeting with Allen at Allen's home in Clyde, Walter texted Appellant that "[w]e have that Clyde lick," "[w]e MUST do it and do it hard,"

and "[t]he lick is waiting." The State presented evidence that a "lick" refers to robbery or thievery.

Dr. Tasha Greenberg, a deputy medical examiner at the Tarrant County Medical Examiner's Office, performed an autopsy on Allen's body. Dr. Greenberg testified that she observed multiple areas of bleeding "into the muscles of the front of the neck," along with a fracture of the thyroid cartilage, specifically the right cornu. There were also lacerations of the lower lip. Dr. Greenberg determined that the cause of death was asphyxia, which she described as a lack of oxygen to the brain. The evidence of injury to the neck indicated to her that there was a "compression of the vessels in the neck." Dr. Greenberg also testified that there was a likelihood that pressure was applied to Allen's chest or back.

Dr. Greenberg did not see any evidence that the USB cord that was found around Allen's neck was used as a ligature. In this regard, this cord was somewhat loose around Allen's neck. Dr. Greenberg testified that the lack of an imprint on Allen's neck indicated that a broader or softer object was used to asphyxiate Allen.

Two pieces of a braided leather belt were found near Allen's body. Allen's fiancée testified that this belt was neither her belt nor Allen's belt. Allen's father testified that this belt was smaller than the belts found inside the home that belonged to Allen. DNA testing of both ends of the belt revealed the presence of DNA from three contributors, and Appellant and Walter could not be excluded as the contributors. Additionally, Allen could not be excluded as a contributor of DNA on one end of the belt. Appellant could not be excluded as a contributor of DNA found on swabs taken from Allen's neck, and Appellant's DNA was also not excluded from DNA recovered from the USB cords wrapped around Allen's wrists.

Dr. Greenberg determined that the manner of death was homicide. "Homicide" is generally defined as "[t]he killing of one person by another." *Homicide*, BLACK'S LAW DICTIONARY (10th ed. 2014). She testified that choking

someone to render him or her unconscious would be an act that would be clearly dangerous to human life and that choking someone to the point of unconsciousness could result in serious bodily injury. She further opined that voluntary choking is dangerous.

During closing argument, Appellant and Walter argued that Allen consented to being choked and that he died during "high-risk sex." To support this theory, the defense stressed the state in which Allen's body was found and the lack of any evidence indicating a struggle or resistance to the USB cables around his wrists or ankles.

Analysis

Appellant challenges his convictions for murder and robbery in a single issue. He asserts that the trial court erred by submitting a jury instruction on the law of parties. Specifically, he asserts that it was error to submit a jury instruction permitting him to be convicted as a party because there was no evidence that Walter "touched Don Allen so as to support a conclusion [that] she did anything to cause him death for the purposes of murder or bodily injury for the purposes of robbery." Appellant contends that "there is not sufficient evidence to charge [him] for her acts under the law of parties." We disagree.

We note at the outset that Walter also filed an appeal from her convictions for murder and robbery. The cause number of Walter's appeal is 11-17-00002-CR, styled *Violet Maree Walter v. State of Texas*. We are issuing our opinion and judgment affirming Walter's convictions at the same time we are issuing the opinion and judgment affirming Appellant's convictions. In the opinion in No. 11-17-00002-CR, we have determined that the evidence is sufficient to support Walter's convictions for murder and robbery both as a principal and as a party.

The indictment charged Appellant with murder under all three statutorily defined ways to commit the offense. *See* PENAL § 19.02(b)(1)–(3). Under these

statutory provisions, a person commits the offense of murder if he (1) "intentionally or knowingly causes the death of an individual," (2) "intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual," or (3) "commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual." *Id.* These three methods of committing murder are not separate offenses but, rather, are alternative methods of committing the same offense. *Smith v. State*, 436 S.W.3d 353, 378 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd).

Under Section 19.02(b)(1), the indictment alleged that Appellant intentionally or knowingly caused Allen's death by asphyxiation by choking, strangling, or otherwise impeding his breathing. Under Section 19.02(b)(2), the indictment alleged that Appellant committed an act clearly dangerous to human life by choking, strangling, or otherwise impeding Allen's breathing with the intent to cause serious bodily injury. Under Section 19.02(b)(3), the indictment alleged that Appellant committed or attempted to commit robbery or felony theft and that, in the course of and in furtherance of the commission or attempt, he committed an act clearly dangerous to human life by choking, strangling, or otherwise impeding Allen's breathing. *See* PENAL § 29.02 (robbery statute); PENAL § 31.03(e)(4)(C) (theft of a firearm is a state jail felony). When an indictment alleges multiple felonies in a prosecution under Section 19.02(b)(3), the specifically named felonies are not elements about which the jury must be unanimous. *White v. State*, 208 S.W.3d 467, 469 (Tex. Crim. App. 2006).

With respect to Appellant's conviction for robbery, the indictment alleged that, while in the course of committing a theft, and with the intent to obtain and

maintain control over property, to wit: a police badge, an asp baton, or a taser, Appellant intentionally, knowingly, or recklessly caused bodily injury to Allen. As relevant to this case, Section 29.02 of the Penal Code provides that a person commits the offense of robbery "if, in the course of committing theft . . . and with intent to obtain or maintain control of the property, he . . . intentionally, knowingly, or recklessly causes bodily injury to another." PENAL § 29.02(a)(1). Theft is the unlawful appropriation of property "with intent to deprive the owner of the property." *Id.* § 31.03(a). "'In the course of committing theft' means conduct that occurs in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of theft." *Id.* § 29.01(1).

The court's charge allowed the jury to convict Appellant of murder and robbery either as a primary actor or as a party with Walter. Under Section 7.01 of the Penal Code, "[a] person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both." PENAL § 7.01(a) (West 2011); *see Adames v. State*, 353 S.W.3d 854, 862 (Tex. Crim. App. 2011). The court's charge permitted the jury to find that Appellant was criminally responsible for the conduct of Walter under Section 7.02(a)(2) of the Penal Code. *See* PENAL § 7.02(a)(2). This statute provides that "[a] person is criminally responsible for an offense committed by the conduct of another if: . . . acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense." *Id.*; *see Adames*, 353 S.W.3d at 862.

We review a claim of jury charge error using the procedure set out in *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). *See State v. Ambrose*, 487 S.W.3d 587, 594 (Tex. Crim. App. 2016). Our first duty in analyzing a jury charge issue is to decide whether error exists. *Arteaga v. State*, 521 S.W.3d 329, 333 (Tex. Crim. App. 2017) (citing *Barrios v. State*, 283 S.W.3d 348, 350 (Tex.

Crim. App. 2009)). If error exists, we must determine whether the error caused sufficient harm to warrant reversal. *Id.* If a timely objection was lodged at trial, reversal is required if the error resulted in "some harm" to the defendant. *Elizondo v. State*, 487 S.W.3d 185, 204 (Tex. Crim. App. 2016). Appellant objected to the inclusion of the instruction on the law of parties in the trial court's charge based on his contention that there was no evidence to support its submission.[3] Appellant asserts that he has suffered some harm requiring reversal. Because we conclude that the trial court's charge was not erroneous in this case, we do not conduct a harm analysis. *See Cortez v. State*, 469 S.W.3d 593, 598 (Tex. Crim. App. 2015) (citing *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012)).

Generally, the trial court may instruct the jury on the law of parties if "there is sufficient evidence to support a jury verdict that the defendant is criminally responsible under the law of parties." *Ladd v. State*, 3 S.W.3d 547, 564 (Tex. Crim. App. 1999). "Regardless of whether it is pled in the charging instrument, liability as a party is an available legal theory if it is supported by the evidence." *In re State ex rel. Weeks*, 391 S.W.3d 117, 124 (Tex. Crim. App. 2013). The State does not have to prove it is correct regarding the defendant's participation as a party; instead, the State must only show that the evidence raises the issue to be entitled to its submission. *Id.* at 125. Thus, a trial court errs by submitting an instruction under the law of parties if the evidence adduced at trial would not support a jury verdict under the law of parties. *Ladd*, 3 S.W.3d at 564.

The jury is entitled to consider the events that took place before, during, and after the commission of the crime. *See Paredes v. State*, 129 S.W.3d 530, 536 (Tex. Crim. App. 2004); *Goff v. State*, 931 S.W.2d 537, 545 (Tex. Crim. App. 1996).

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[3]Appellant did not object to the particular manner in which the trial court's charge addressed his status as a party in an attempt to narrow or modify the language of the charge. *See Ferreira v. State*, 514 S.W.3d 297, 302 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (citing *Vasquez v. State*, 389 S.W.3d 361, 368 (Tex. Crim. App. 2012)).

"There must be sufficient evidence of an understanding and common design to commit the offense." *Gross v. State*, 380 S.W.3d 181, 186 (Tex. Crim. App. 2012) (citing *Guevara*, 152 S.W.3d at 49). "Each fact need not point directly to the guilt of the defendant, as long as the cumulative effect of the facts are sufficient to support the conviction under the law of parties." *Id.* (citing *Guevara*, 152 S.W.3d at 49). Mere presence of a person at the scene of a crime—either before, during, or after the offense—or even flight from the scene, without more, is insufficient to sustain a conviction as a party to the offense; however, combined with other incriminating evidence, it may be sufficient to sustain a conviction. *Thompson v. State*, 697 S.W.2d 413, 417 (Tex. Crim. App. 1985); *accord Gross*, 380 S.W.3d at 186. Additionally, allegations that a party is guilty under the law of parties need not be specifically pleaded in the indictment. *See Barrera v. State*, 321 S.W.3d 137, 144 n.1 (Tex. App.—San Antonio 2010, pet. ref'd).

Appellant acknowledges on appeal that "there is probably legally sufficient evidence to convict him under a direct culpability theory." In this regard, Appellant has not challenged the sufficiency of the evidence supporting his convictions for murder and robbery. If the evidence "clearly supports a defendant's guilt as a principal actor, any error of the trial court in charging on the law of parties is harmless." *Ladd*, 3 S.W.3d at 564–65 (quoting *Black v. State*, 723 S.W.2d 674, 675 (Tex. Crim. App. 1986)). An appellant is not harmed by the inclusion of an instruction on the law of parties if the jury "almost certainly did not rely upon the parties instruction in arriving at its verdict, but rather based the verdict on the evidence tending to show appellant's guilt as a principal actor." *Id.* at 565. If guilt as a party would be "an irrational finding under the evidence, then it is highly unlikely that a rational jury would base its verdict on a parties theory." *Cathey v. State*, 992 S.W.2d 460, 466 (Tex. Crim. App. 1999).

The evidence in this case was sufficient to establish Appellant's guilt as a primary actor. Thus, even if we assume error in the jury charge by the inclusion of the instruction on the law of parties, the error is harmless because the evidence supports Appellant's guilt as a primary actor. *See Cathey*, 992 S.W.2d at 466.

In Cause No. 11-17-00002-CR, we determined that the evidence was sufficient to support Walter's participation in the murder and robbery as a primary actor. This determination is dispositive of Appellant's contention that there was no evidence to support the inclusion of the instruction of his culpability under the law of parties. We overrule Appellant's sole issue.

This Court's Ruling

We affirm the judgment of the trial court.

JOHN M. BAILEY
CHIEF JUSTICE

August 30, 2019

Publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Bailey, C.J.,
Stretcher, J., and Wright, S.C.J.[4]

Willson, J., not participating.

[4]Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.

APP. A

APPENDIX B
CONVICTION ORDER

APPENDIX B

FILED FOR RECORD
AT 2:10 O'CLOCK A M

OCT 20 2016

By _____ District Clerk, Callahan County, TX

CAUSE NO. 7138

THE STATE OF TEXAS	§	IN THE 42ND DISTRICT COURT
	§	
VS.	§	OF
	§	
PHILLIP JAY WALTER, JR.	§	CALLAHAN COUNTY, TEXAS

JUDGMENT - PRISON SENTENCE
PLEA OF NOT GUILTY
JURY TRIAL

Judge Presiding: Honorable John Weeks	**Date:** OCTOBER 20, 2016
Attorney for State: Shane Deel	**Attorney for Defendant:** JEFF PROPST
Offense: Ct. I MURDER, Ct. II Robbery, Ct. III Theft of Firearm	
Degree: First, Second, State Jail	**Offense Date:** AUGUST 31, 2016
Charging Instrument: Indictment	**Plea: Not Guilty**
Date Sentence Imposed: OCTOBER 20, 2016	**Court Costs:$** 579
Fine:$0	**Attorney's Fees: $**
Punishment: FORTY years on Count I of Murder in the Institutional Division of the Texas Department of Criminal Justice, **TWENTY** years on Count II of Robbery in the Institutional Division of the Texas Department of Criminal Justice, and **TWO** years on Count III Theft of a Firearm in the State Jail Division of the Texas Department of Criminal Justice.	**Date Sentence to Commence:** OCTOBER 20, 2016
Time Credited: 414 DAYS	**Restitution: $**

To Run Concurrently with any other sentence unless Otherwise Specified.

ON **OCTOBER 11, 2016** the above entitled and numbered cause having been called for trial, the State appeared by her County Attorney **Shane Deel**, and the defendant **PHILLIP JAY WALTER, JR.** appeared both in person and by Counsel **JEFF PROPST**, and the defendant having been duly and legally convicted by a Jury of Count I Murder, Count II Robbery, and Count III Theft of a Firearm, herein agreed that punishment be assessed by the court in this case; and the Court, having properly received and filed in the papers hereof of the Jury's finding of guilty on each count, and with the consent and approval of the Defendant and his counsel and of the State of Texas, agreed that the defendant be permitted to so waive a Jury herein on the issue of punishment and submit all punishment matters to the Court, and the Court having likewise, also given its consent and approval thereto, and here now entered in the minutes, a Jury was in all things duly waived for matters of punishment and punishment was tried before the Court wherein evidence was submitted, and the Court found as follows:

Whereupon, the defendant having been duly arraigned before the Court, both the State and Defense in open Court having announced ready for trial, the defendant, in open Court, and in person, properly represented by Counsel, pled not guilty to the charges contained in the **Indictment** filed herein; thereupon the Defendant was found guilty on three counts by a duly selected and empaneled jury, and the defendant submitted all matters of punishment to the Court and the defendant plainly appearing to the Court to be sane; and the State having introduced evidence into the record of this cause showing the guilt of the defendant; and the said evidence being accepted by the Court as a basis for the judgment of the Jury, and the Court considering the same sufficient to support the defendant's finding of guilty to the charges of **MURDER, ROBBERY, AND THEFT OF A FIREARM** to which the defendant was so found by the Jury, the Court finds the defendant to be guilty of the chargeS as alleged in the **Indictment** filed herein, and the Court finds the defendant to be guilty of the offense of **MURDER, ROBBERY, AND THEFT OF A FIREARM,** that the said defendant committed said offense on **AUGUST 31, 2016.**

It is therefore considered, ordered and adjudged by the Court that the defendant **PHILLIP JAY WALTER, JR.** is guilty of the offenses of **MURDER, ROBBERY, AND THEFT OF A FIREARM** as found by the jury in the defendant's plea of not guilty herein made to the Jury, and that the said defendant be punished by confinement in the Institutional Division of the Texas Department of Criminal Justice for a term of **FORTY** years on Count I of Murder, for **TWENTY** years on Count II of Robbery, and in the State Jail Division of the Texas Department of Criminal Justice for a term of **TWO** years on Theft of a Firearm, and that the State of Texas do have and recover of the said defendant all costs in this prosecution expended for which execution may issue.

Thereupon the said defendant was asked by the Court whether she had anything to say why said sentence should not be pronounced against him/her, and he/she answered nothing in bar thereof, and it appearing to the Court that the defendant is mentally competent and understanding

of the English Language, the Court proceeded in the presence of said defendant, his/her counsel also being present, to pronounce sentence against him/her as follows:

It is the Order of the Court that said defendant **PHILLIP JAY WALTER, JR.** who has been adjudged to be guilty of **MURDER, ROBBERY, AND THEFT OF A FIREARM** and whose punishment has been assessed by the Court at confinement in the Institutional Division of the Texas Department of Criminal Justice for **FORTY** years on murder, **TWENTY** years on robbery, and to the State Jail Division of the Texas Department of Criminal Justice for **TWO** years for theft of a firearm, be delivered by the Sheriff of Callahan County, Texas, immediately, to the Director of the Institutional Division of the Texas Department of Criminal Justice or other persons legally authorized to receive such convicts and said defendant shall be confined in said Institutional Division Texas Department of Criminal Justice for **FORTY** years for murder, **TWENTY** years for Robbery and to the State Jail Division of the Texas Department of Criminal Justice for **TWO** years for Theft of a Firearm, in accordance with the provisions of the law governing the Texas Department of Criminal Justice, and the defendant is remanded to Jail until the Sheriff can obey the directions of this sentence. It is the Order of the Court that all appellate rights shall been advised to the defendant.

It is further adjudged and decreed by this Court that the sentence pronounced herein shall begin this date **OCTOBER 20, 2016** and the defendant is granted credit for Jail time **414 DAYS on each Count** and the said defendant is hereby remanded to jail until the directions of this sentence can be obeyed.

Court Costs:$ **579**
Court Appointed Attorney's Fee: $
Fine: $
Restitution: $

JOHN WEEKS, PRESIDING JUDGE
42ND DISTRICT COURT
CALLAHAN COUNTY, TEXAS

****

APPENDIX C
P.D.R. DENIAL

APPENDIX C

RECV'D 5.13.2020

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

STATE OF TEXAS
PENALTY FOR
PRIVATE USE

COURT OF CRIMINAL APPEALS OF TEXAS

PRESORTED FIRST CLASS

U.S. POSTAGE >> PITNEY BOWES

ZIP 78702 $ 000.27⁰
02 4W
0000372116 MAY 07 2020

5/6/2020

WALTER, PHILLIP JAY JR. Tr. Ct. No. 7138

COA No. 11-16-00338-CR
PD-0130-20

On this day, the Appellant's Pro Se petition for discretionary review has been refused.

Deana Williamson, Clerk

PHILLIP JAY WALTER JR.
CONNALLY UNIT - TDC # 2099080
899 FM 632
KENEDY, TX 78119

194-39

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78119 DMAGNAB

APPENDIX D

P. D. R. REHEARING DENIAL

APPENDIX D

RECV'D 8-25-20

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

OFFICIAL BUSINESS
STATE OF TEXAS
PENALTY FOR
PRIVATE USE

PRESORTED FIRST CLASS
COURT OF CRIMINAL APPEALS OF TEXAS

U.S. POSTAGE PITNEY BOWES
ZIP 78701 $ 000.27⁰
02 4W
0000372116 AUG. 21 2020

8/19/2020 **11-16-00338-CR**
WALTER, PHILLIP JAY JR. **Tr. Ct. No. 7138** **PD-0130-20**

On this day, the Appellant's Pro Se motion for rehearing has been denied.

Deana Williamson, Clerk

PHILLIP JAY WALTER JR.
CONNALLY UNIT - TDC # 2099080
899 FM 632
KENEDY, TX 78119

19439

EBNAB 78119

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APPENDIX E
CERTIORARI EXTENSIONS

APPENDIX E

(ORDER LIST: 589 U.S.)

THURSDAY, MARCH 19, 2020

ORDER

In light of the ongoing public health concerns relating to COVID-19, the following shall apply to cases prior to a ruling on a petition for a writ of certiorari:

IT IS ORDERED that the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. See Rules 13.1 and 13.3.

IT IS FURTHER ORDERED that motions for extensions of time pursuant to Rule 30.4 will ordinarily be granted by the Clerk as a matter of course if the grounds for the application are difficulties relating to COVID-19 and if the length of the extension requested is reasonable under the circumstances. Such motions should indicate whether the opposing party has an objection.

IT IS FURTHER ORDERED that, notwithstanding Rules 15.5 and 15.6, the Clerk will entertain motions to delay distribution of a petition for writ of certiorari where the grounds for the motion are that the petitioner needs additional time to file a reply due to difficulties relating to COVID-19. Such motions will ordinarily be granted by the Clerk as a matter of course if the length of the extension requested is reasonable under the circumstances and if the motion is actually received by the Clerk at least two days prior to the relevant distribution date. Such motions should indicate whether the opposing party has an objection.

IT IS FURTHER ORDERED that these modifications to the Court's Rules and practices do not apply to cases in which certiorari has been granted or a direct appeal or original action has been set for argument.

These modifications will remain in effect until further order of the Court.

APPENDIX F
C.C.P. ART. 31.01

APPENDIX F

TEXAS STATUTES

Code of Criminal Procedure

Title 1 Code of Criminal Procedure of 1965

After Commitment or Bail and Before the Trial

Chapter 31 Change of Venue

Art. 31.01. On Court's Own Motion.

Whenever in any case of felony or misdemeanor punishable by confinement, the judge presiding shall be satisfied that a trial, alike fair and impartial to the accused and to the State, cannot, from any cause, be had in the county in which the case is pending, he may, upon his own motion, after due notice to accused and the State, and after hearing evidence thereon, order a change of venue to any county in the judicial district in which such county is located or in an adjoining district, stating in his order the grounds for such change of venue. The judge, upon his own motion, after ten days notice to the parties or their counsel, may order a change of venue to any county beyond an adjoining district; provided, however, an order changing venue to a county beyond an adjoining district shall be grounds for reversal if, upon timely contest by the defendant, the record of the contest affirmatively shows that any county in his own and the adjoining district is not subject to the same conditions which required the transfer.

HISTORY:

Enacted by Acts 1965, 59th Leg., ch. 722 (S.B. 107), § 1, effective January 1, 1966.

Notes to Decisions

Constitutional Law

Criminal Law & Procedure: Criminal Offenses: Property Crimes: Larceny & Theft: Elements

Criminal Law & Procedure: Jurisdiction & Venue: Venue

Criminal Law & Procedure: Scienter: Specific Intent

Constitutional Law

1. Tex. Code Crim. P. Ann art. 31.01, under which the venue of defendant's murder trial was conducted in one county following a change in venue from another county within the same judicial district upon the court's own motion, was constitutional. Allen v. State, 488 S.W.2d 460, 1972 Tex. Crim. App. LEXIS 2490 (Tex. Crim. App. Nov. 22, 1972, no writ).

Criminal Law & Procedure: Criminal Offenses: Property Crimes: Larceny & Theft: Elements

2. Defendant's argument in his appeal from a theft conviction that the evidence was insufficient to show that he intended to deprive the truck's owner of the truck as required under Tex. Penal Code § 31.03(a) was refuted by overwhelming evidence that defendant broke into the truck, drove off with it, sped away from police, crashed it into another car (killing the driver) and then a pole, and fled on foot. Hernandez v. State, No. 03-13-00268-CR, 2014 Tex. App. LEXIS 8921 (Tex. App. Austin Aug. 14, 2014).

Criminal Law & Procedure: Jurisdiction & Venue: Venue

3. In a child sexual abuse case, a trial court did not err by failing to sua sponte transfer venue of the case due to the airing of a commercial that referenced appellant's case because the commercial was aired 10 months prior to trial, and only two members of the jury venire recalled the commercial. Neither remembered any details of the commercial, and they both stated that they could be fair and impartial. Graves v. State, No. 13-11-00617-CR, No. 13-11-00618-CR, 2013 Tex. App. LEXIS 7834 (Tex. App. Corpus Christi June 27, 2013).

4. Under Tex. R. App. P. 33.1, although defendant objected to a change of venue under Tex. Code Crim. Proc. Ann. art. 31.01 on substantive grounds, defendant never raised the issue of notice or lack of a hearing, and thus that portion of the argument was waived. Rodarte v. State, No. 08-04-00176-CR, 2006 Tex. App. LEXIS 6938 (Tex. App. El Paso Aug. 4, 2006).

5. Trial court did not err in transferring venue of defendant's trial to another county on its own motion, pursuant to Tex. Code Crim. Proc. Ann. art. 31.01; the trial court reviewed the evidence presented at an earlier hearing on the State's first motion to change venue under Tex. Code Crim. Proc. Ann. art. 31.02 and the trial court found that defendant was not going to receive a fair trial in the current county. Rodarte v. State, No. 08-04-00176-CR, 2006 Tex. App. LEXIS 6938 (Tex. App. El Paso Aug. 4, 2006).

6. Given the extensive pre-trial publicity a case had received, a trial court did not abuse its discretion in changing the venue of a trial. Garcia v. State, 75 S.W.3d 493, 2002 Tex. App. LEXIS 612 (Tex. App. San Antonio Jan. 30, 2002, pet. ref'd), cert. denied, 537 U.S. 1237, 123 S. Ct. 1362, 155 L. Ed. 2d 203, 2003 U.S. LEXIS 1820 (U.S. 2003).

7. Tex. Code Crim. Proc. Ann. art. 31.01 permits a trial judge to change venue on its own motion, after notice and a hearing, if the trial judge is satisfied that a fair and impartial trial cannot be had in the county in which the case is pending; appellate courts review a trial court's decision to transfer venue under an abuse of discretion standard. Garcia v. State, 75 S.W.3d 493, 2002 Tex. App. LEXIS 612 (Tex. App. San Antonio Jan. 30, 2002, pet. ref'd), cert. denied, 537 U.S. 1237, 123 S. Ct. 1362, 155 L. Ed. 2d 203, 2003 U.S. LEXIS 1820 (U.S. 2003).

8. Trial court did not violate Tex. Code Crim. Proc. Ann. art. 31.01 by failing to afford defendant notice and a hearing before granting State's motion to change venue because the notice and hearing requirement only apply when venue is changed on the court's own motion. Garza v. State, 974 S.W.2d 251, 1998 Tex. App. LEXIS 2762 (Tex. App. San Antonio May 6, 1998, pet. ref'd).

9. Order to show cause sufficiently alerts both parties to a jural determination, and the hearing presents the parties an opportunity to rebut it; Tex. Code Crim. Proc. Ann. art. 31.01 does not violate either the due process clause of U.S. Const. amend. XIV or the due course of law provision of Tex. Const. art. III, § 45. Bath v. State, 951 S.W.2d 11, 1997 Tex. App. LEXIS 2704 (Tex. App. Corpus Christi May 22, 1997, pet. ref'd), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 62, 1998 U.S. LEXIS 5014 (U.S. 1998).

10. Tex. Code Crim. Proc. Ann. art. 31.01 permitted the trial court to order a hearing on a change of venue on its on motion, but did not require the trial court to actually file a motion or to present evidence in support thereof. Aranda v. State, 736 S.W.2d 702, 1987 Tex. Crim. App. LEXIS 645 (Tex. Crim. App. Sept. 23, 1987), cert. denied, 487 U.S. 1241, 108 S. Ct. 2916, 101 L. Ed. 2d 947, 1988 U.S. LEXIS 3193 (U.S. 1988).

11. Under Tex. Code Crim. Proc. Ann. art. 31.01, where ninety-two prospective jurors were interviewed and only two were excused for cause, appellant's counsel conducted a competent examination of the prospective jurors and was granted all his challenges for cause, and the remaining jurors all repeatedly indicated that they could be fair and impartial to appellant, a change of venue was not required for appellant to receive a fair and impartial trial. Mills v. State, 736 S.W.2d 944, 1987 Tex. App. LEXIS 8466 (Tex. App. San Antonio Sept. 9, 1987, no writ).

12. In a criminal action, Tex. Code Crim. Proc. Ann. art. 31.01 did not require the trial court to offer evidence in support of its own motion to change venue and the trial court was only required in its order to state the grounds for its decision to change venue. Cook v. State, 667 S.W.2d 520, 1984 Tex. Crim. App. LEXIS 587 (Tex. Crim. App. Feb. 1, 1984, no writ).

13. Tex. Code Crim. P. Ann art. 31.01, under which the venue of defendant's murder trial was conducted in one county following a change in venue from another county within the same judicial district upon the court's own motion, was constitutional. Allen v. State, 488 S.W.2d 460, 1972 Tex. Crim. App. LEXIS 2490 (Tex. Crim. App. Nov. 22, 1972, no writ).

Criminal Law & Procedure: Scienter: Specific Intent

14. Defendant's argument in his appeal from a theft conviction that the evidence was insufficient to show that he intended to deprive the truck's owner of the truck as required under Tex. Penal Code § 31.03(a) was refuted by overwhelming evidence that defendant broke into the truck, drove off with it, sped away from police, crashed it into another car (killing the driver) and then a pole, and fled on foot. Hernandez v. State, No. 03-13-00268-CR, 2014 Tex. App. LEXIS 8921 (Tex. App. Austin Aug. 14, 2014).

Research References and Practice Aids

TREATISES & ANALYTICAL MATERIALS

2-52 Texas Criminal Practice Guide § 52.02, PRETRIAL PROCEEDINGS, VENUE, Change of Venue, Texas Criminal Practice Guide.

2-52 Texas Criminal Practice Guide § 52.201, PRETRIAL PROCEEDINGS, VENUE, Statutes, Texas Criminal Practice Guide.

APPENDIX G

REHEARING DENIAL

APPENDIX G

Court of Appeals

Eleventh District of Texas

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P. O. BOX 271
EASTLAND, TEXAS 76448

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December 19, 2019

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* DELIVERED VIA E-MAIL *

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RE: Appellate Case Number: 11-16-00338-CR
Trial Court Case Number: 7138
Style: Phillip Jay Walter, Jr.
v. The State of Texas

In the above cause, the Court has this day:

1) **GRANTED** Appellant's Pro Se "Motion for Leave"; and
2) **DENIED** Appellant's Pro Se "Amended Motion for Rehearing."

If either party wishes to file a Petition for Discretionary Review, please note:

1) Pursuant to TEX. R. APP. P. 68.3(a), the petition and all copies of the petition must be filed with the Clerk of the Court of Criminal Appeals; and

2) Pursuant to TEX. R. APP. P. 68.4(j), a copy of this Court's opinion must be attached to each copy of the Petition for Discretionary Review.

Respectfully yours,

Sherry Williamson

Sherry Williamson, Clerk

APPENDIX H

COURT RECORDS

In fact, I think what the -- what the Jury Charge will tell you is something like, you're not to discuss the fact that he didn't testify. You're not even to consider it. You're not allowed to say, well, he didn't testify, and if I had been accused of this, I would have testified, so therefore guilty. That's exactly what you can't do.

And does everybody -- does everybody understand that first? And second, does everybody -- can everybody follow the law on that and do what the Charge says if that's where we are at the end of this trial? Anybody feel like they can't? Once again, it's okay if you can't, I just need to know.

Okay. I don't see any hands.

You've already heard from Mr. Deel that the deceased in this case, a guy named Don Allen, was employed as an Abilene police officer. Okay? How many of you -- for how many of you is that potentially a sore spot for you in this case, for a -- the police officer part, does it weigh particularly heavy on you?

Mr. Poole?

PROSPECTIVE JUROR: Yes, sir.

MR. PROPST: What do you -- what are your honest feelings about that? I mean, you already know that he is -- he was employed as an Abilene police officer.

PROSPECTIVE JUROR: Living in a small town, you're always friends with the local police and the sheriff's department. If it would have been a small town, you know, it would probably be hard to hear this, but just because I like the Callahan County or Cross Plains, I really couldn't make a -- say, he's -- since he's a police officer, and I'm partial to him this way.

MR. PROPST: Okay. Ms. Carouth?

PROSPECTIVE JUROR: Yes, sir.

MR. PROPST: Does that make this case harder, the fact that Mr. Allen was employed as a police officer in Abilene?

PROSPECTIVE JUROR: No, sir. Not to me. A life is a life. It doesn't --

MR. PROPST: Okay. Does it make it harder for anyone? Yes, ma'am, you worked for the sheriff's office.

PROSPECTIVE JUROR: I worked for Taylor County. I had seen -- I didn't know him personally, and I live in Clyde also. I didn't know him personally, but I've seen him a lot, and he was just always real nice.

MR. PROPST: Okay. For anyone else, does it make this case harder? Any other hands? Mr. Sorge.

PROSPECTIVE JUROR: I think it does. To me, you know, like the lady said, a life is a life. That's

true. But here's somebody that's trying to protect everybody and something happens. He no longer can do what he was sworn to do.

MR. PROPST: Okay. Does anybody feel like -- and look, there's a lot of stuff going on in the world right now. A lot of stuff going on in this country that -- you know, I'm 40 -- I'll be 41 here in a couple of months, and I don't remember ever seeing anything like the way things are now in the country. It's in the news a lot. There's been a lot of issues with police one way or the other. And it is -- emotions are a little raw, it seems to me, on both sides. Emotions seem to be a little raw.

So my question, what I'm trying to get at here is, the fact that that was Mr. Allen's employment, does anybody feel like that is just something -- you know, because what you're going to be asked to do is with dispassionately, you're going to be asked to, in a calculated way, weigh the evidence and decide guilty or not guilty. That he intentionally or knowingly caused the death of Don Allen.

And the fact that we have a deceased person who was employed as a police officer in Abilene, does that just -- maybe it hits too much of a nerve. I guess that's what I'm trying to say. Does anybody feel that way? This

just hits a nerve. I'm going to be irr -- I'm already irritated, and I don't -- I don't think I can sit here and carefully in a calculated way weigh the evidence. Anybody feel that way?

Yes, ma'am.

Anyone else?

Can y'all hear me these days?

(Laughter.)

MR. PROPST: All right. Let's talk about -- Mr. Deel talked about wrestling. Does anybody -- and this may be something else you don't want to admit to, I don't know. What about UFC? It's funny stuff.

And Ms. Carouth, isn't that what they do in that? I mean, don't they put them in choke holds?

PROSPECTIVE JUROR: Yes.

MR. PROPST: And what happens if some guy gets into a choke hold and loses the fight? What happens at the end of that?

PROSPECTIVE JUROR: I watch it a little bit with my grandson, so I'm not real sure.

(Laughter.)

MR. PROPST: Anybody else know?

PROSPECTIVE JUROR: That's the only reason I watch it.

PROSPECTIVE JUROR: They pass out and tap

out --

PROSPECTIVE JUROR: Tap out.

PROSPECTIVE JUROR: -- they keep them on the floor and make sure they're all right until I move.

MR. PROPST: Ever seen somebody go to sleep like that?

PROSPECTIVE JUROR: No. Or it's portrayed that they go to sleep. We don't really know.

(Laughter.)

MR. PROPST: I guess you've got to take them on their word at that.

PROSPECTIVE JUROR: I don't think anything like that would put me to sleep.

(Laughter.)

MR. PROPST: All right. Let's -- we've dredged over this lightly, but I think that in this case, we're going to have to talk about it a little bit more. Publicity, media. We've got media in the courtroom today. And, you know, this case, it's just had a lot of media attention. And that's okay. You're not going to be in trouble if you've seen it on the news.

But I would like to know, and I think everybody raised their hand, is there anybody in this courtroom who hadn't heard about this case in the media before today?

I think we got one. It's okay. It just means you're a busy person.

PROSPECTIVE JUROR: I am busy.

MR. PROPST: And the real question is -- and, you know, I'm not allowed to ask you, well, what have you heard? We can't really -- I can't really do that. We can't get into those kind of specifics. But the real question is: Has anything that you've heard of this case given you an impression one way or the other of whether Mr. Walter is guilty or not guilty?

PROSPECTIVE JUROR: The way you're talking about choke holds and things of that accord, it does seem like you're trying to imply that maybe somebody might have passed out, but in real facts somebody died, but -- in terms of manslaughter. Is that what you're trying to push towards?

MR. PROPST: Well, you're very clever.

(Laughter.)

MR. PROPST: I am prohibited at this point from going into the specifics, all I can do is imply.

PROSPECTIVE JUROR: Well, you talk about the media, the media was just going crazy about the story. So I think you talked about -- when you talked about a choke hold right there and started going on about how you might pass out. So I was just thinking that that might be what

you're trying to make sure we don't see. I figured you were wanting one or the other without us not having any evidence just quite yet, so making sure we're not going off the beaten path.

MR. PROPST: You feel pretty -- are you pretty passionate about this case?

PROSPECTIVE JUROR: No, I was just trying to figure out what and where and where I need to keep my eyes towards.

MR. PROPST: Okay. Well, I tell you what, here's what I want from you and what I want from everybody. What I want from you is to be fair and impartial. What I want from you is to promise me and promise the Court and promise Mr. Walter that you're going to follow the law in this case. I want you to promise Mr. Walter and me and the Court that you will not make a decision until you have seen all of the evidence, which is not going to happen right now while I'm standing here. Okay? Can you do that?

PROSPECTIVE JUROR: Of course.

MR. PROPST: Does everybody feel like they can do that?

The question is: Based on the publicity, the media coverage that you've seen, has anybody formed an opinion one way or the other about whether Mr. Walter is

guilty or not guilty? You don't have to tell me what the opinion is. And you certainly don't have to tell me what it is you've heard or saw, but I would just like to know if you have formed an opinion about it.

PROSPECTIVE JUROR: It's kind of hard not to.

MR. PROPST: That's right, Ms. Bowen. I mean, it's impossible not to, right? You have some opinion, right?

PROSPECTIVE JUROR: (Moving head up and down.)

MR. PROPST: Ms. Bowen broke the ice. I mean, that -- isn't that how it is? I mean, you've heard facts, you know. And based on the facts you heard, you formed an opinion on it; isn't that right?

PROSPECTIVE JUROR: Well, if you've heard what they say --

PROSPECTIVE JUROR: Yeah. But, how do we know it's the facts?

PROSPECTIVE JUROR: There is a lot we don't know about, in my opinion, and what you hear from the media.

MR. PROPST: Okay.

PROSPECTIVE JUROR: I don't believe any of it. Just because it was an APD, that's irrelevant. I mean, are they better than us? I mean --

MR. PROPST: Okay.

PROSPECTIVE JUROR: -- who's to say just because he was APD, he didn't have a life of his own that he wasn't APD.

MR. PROPST: Okay. Ms. Miller.

PROSPECTIVE JUROR: I think the media has portrayed it being an officer. My dad's a 32-year veteran. And my opinion on this case is he has a personal life that had nothing to do with being a police officer. And if the roles were reversed, would they be treated the same as the officer?

MR. PROPST: If the roles were reversed in what way?

PROSPECTIVE JUROR: If one of them was the deceased.

MR. PROPST: Okay. I think I follow you, but I'm not sure.

(Laughter.)

PROSPECTIVE JUROR: What I'm saying is, if the media has portrayed a biased opinion or a biased -- I'm a police officer's daughter and it has not.

MR. PROPST: Okay. Okay.

PROSPECTIVE JUROR: Just because the media has portrayed this being a police officer murdered, you really can't go off on that.

MR. PROPST: Okay. Do you think -- no offense to the media, but do you think the media always gets all the facts straight?

PROSPECTIVE JURORS: No.

PROSPECTIVE JUROR: There's two sides to every story.

MR. PROPST: But sometimes they do, sometimes they don't.

PROSPECTIVE JUROR: They just shut down FM 18, would they do it for me?

PROSPECTIVE JUROR: That's right.

PROSPECTIVE JUROR: No. So, you know, based on that, yeah, he's getting -- he's getting publicity that I wouldn't probably get if I were to die, you know, what I was accused of doing.

PROSPECTIVE JUROR: Because he was a cop.

PROSPECTIVE JUROR: Because he was a Clyde cop.

MR. PROPST: Okay.

PROSPECTIVE JUROR: He's from Clyde.

MR. PROPST: Okay.

PROSPECTIVE JUROR: But he's from Clyde. From Cisco.

MR. PROPST: Okay. I'm losing -- I'm losing track here.

the answer by now, but if you voted, if you had to vote right now, Mr. English, how would you vote?

PROSPECTIVE JUROR: Not guilty.

MR. LEGGETT: Not guilty. Because in that long list of rights that Americans have, Violet and Phillip at this moment with no evidence whatsoever are presumed to be innocent. And I'm really sure that of all the things that the Judge tells you, he'll tell you that in his Charge, that they are presumed to be innocent. The indictment is no proof of guilt. They are presumed to be innocent. And that's a very powerful right, and it's supposed to be that way because we value freedom.

Can you -- given what you may have heard about this case in the news media, on radio, TV, paper, wherever you might have heard about it, can you afford Violet Walter the presumption of innocence? Can you do that? Is there anyone here who cannot? I just can't do that. I know too much, I've heard too much, I've read too much, I can't do that. Is there anyone?

I take it by your silence that you can.

Has anybody here on this panel talked about this case at school, work, church? Discussed the facts with anybody? Mr. Dawson?

PROSPECTIVE JUROR: Oh, I didn't discuss any facts, but I like going to AIGR, Abilene Indoor Gun

Range --

MR. LEGGETT: Right.

PROSPECTIVE JUROR: -- and when we heard that about a copy, of course, that's what we would talk about.

MR. LEGGETT: Okay. Other people? Yes, Ms. Lee.

PROSPECTIVE JUROR: Had a conversation with our S -- our S -- SRO, our resource officer --

MR. LEGGETT: Right, right.

PROSPECTIVE JUROR: -- on campus after it had happened.

MR. LEGGETT: Recent conversations?

PROSPECTIVE JUROR: It was last school year. It would have been right after it happened.

MR. LEGGETT: A lot of people have talked about this matter, what they think are the facts in this case. Mr. Prew, I can imagine.

Yes, sir. Your name is?

PROSPECTIVE JUROR: Toby Germann. Not about the facts, but talking with a sister about the fact that I was selected on the jury.

MR. LEGGETT: Anyone else?

PROSPECTIVE JUROR: And not knowing that this was the case, but it being Tuesday, she knew.

MR. LEGGETT: Not -- you hadn't talked about it since Judge Weeks gave you the instructions not to talk about it, right?

PROSPECTIVE JUROR: No.

MR. LEGGETT: That's good because he's pretty serious business about that. You know, he'll -- he's a pretty easygoing guy until you don't do what he tells you to do, then he's not so easygoing. So don't talk about this, at least don't talk about this stuff unless you're -- that kind of thing. He'll give you instructions about that. So I was hoping that you didn't -- you didn't violate this Court's orders about that.

Anyone else talk about it?

THE COURT: You had another hand.

MR. LEGGETT: Yes. Yes, ma'am. Yes, yes. Yes, ma'am.

PROSPECTIVE JUROR: I did just right after it happened.

MR. LEGGETT: Okay.

PROSPECTIVE JUROR: And it just kind of raised a couple more questions than what there was answers in the paper. But that was really the only time I discussed it with anyone.

MR. LEGGETT: And your name is?

PROSPECTIVE JUROR: Kathye Pennington.

MR. LEGGETT: It's hard not to discuss these things, isn't it? Yes, ma'am.

PROSPECTIVE JUROR: I'm Connie Kirkham, and I discussed it with my husband right after it happened. He's a commissioner for Callahan County.

MR. LEGGETT: Your what?

PROSPECTIVE JUROR: My husband is a county commissioner --

MR. LEGGETT: Okay.

PROSPECTIVE JUROR: -- of Callahan County.

MR. LEGGETT: Everybody talks about --

Yes, sir. Anybody else over there?

PROSPECTIVE JUROR: Yes. Someone I believe it was in a conversation rather than just me, that told me something about the -- their -- what they had heard about the nature of the advertisement that the deceased had allegedly run.

MR. LEGGETT: Okay. All right. And I think that was in the news, too.

PROSPECTIVE JUROR: Yes, sir.

MR. LEGGETT: It's hard not to talk about these things. I mean, you see stuff, and you talk about it in groups and those kind of things. And that's not the real problem or the reason why I asked the question.

The real question that I want to make sure one more time is that we want to make sure that you haven't formed an opinion about the case that you -- that would affect your judgment or your verdict.

Mr. English, have you formed an opinion about what you've heard that might affect your verdict?

PROSPECTIVE JUROR: No, I'd have to see the evidence.

MR. LEGGETT: Okay. Ms. Garlett?

PROSPECTIVE JUROR: I would have to see the evidence.

MR. PROPST: Ms. Thompson?

PROSPECTIVE JUROR: Same.

MR. LEGGETT: Ms. Earp?

PROSPECTIVE JUROR: Same.

MR. LEGGETT: Okay. What about you, Ms. Lee?

PROSPECTIVE JUROR: The same.

MR. LEGGETT: And Ms. Miller?

PROSPECTIVE JUROR: Same.

MR. LEGGETT: Good. Mr. Shelly, what about you --

PROSPECTIVE JUROR: About the same.

MR. LEGGETT: -- you want to -- you haven't formed an opinion?

PROSPECTIVE JUROR: I haven't seen any

evidence, so...

MR. LEGGETT: I'll put a star by your name. What about you, Mr. Pruet, what about you?

PROSPECTIVE JUROR: I haven't seen any evidence.

MR. LEGGETT: You haven't seen any evidence and you haven't formed an opinion that's going to affect your judgment or your verdict?

PROSPECTIVE JUROR: Yes, sir.

MR. LEGGETT: Anybody have an opinion that they think might affect their verdict?

Is there anyone on the panel that watched Don Allen's funeral on television or went to his funeral?

PROSPECTIVE JUROR: I saw it on TV.

MR. LEGGETT: Is that --

PROSPECTIVE JUROR: Watched it on TV.

MR. LEGGETT: -- it was on TV? It's hard not --

PROSPECTIVE JUROR: After all that goes on.

MR. LEGGETT: Right.

PROSPECTIVE JUROR: Every channel had it.

MR. LEGGETT: Has -- and I think Mr. Propst may have talked about it briefly. I think he used the example of the --

THE COURT: Did you get -- did you get the

hand in the middle on that last question?

MR. LEGGETT: No, I didn't.

Yes, sir.

PROSPECTIVE JUROR: Yeah.

MR. LEGGETT: No, I didn't.

PROSPECTIVE JUROR: Oh. I watched it on TV.

MR. LEGGETT: Right. And your name is?

PROSPECTIVE JUROR: Aaron Laughlin.

MR. LEGGETT: Yes, sir.

PROSPECTIVE JUROR: I watched it on TV.

MR. LEGGETT: Okay. How many people have used craigslist? And was that to sell things? Has anybody used it for other purposes? Yes, sir, Mr. Dawson?

PROSPECTIVE JUROR: It's helped how bands of different things group together.

MR. LEGGETT: Who else over here use craigslist? Yes, sir.

PROSPECTIVE JUROR: I used it to sell hay.

MR. LEGGETT: Okay. Other than for buying and selling stuff? Has anybody ever used or viewed the personal section of craigslist, where they can meet people? Has anyone ever used or viewed that? Looked at the casual connection or the relationship section of craigslist? Mr. Dawson.

Who else? Anyone else? Raise your hands

And the alternate is the most thankless job in the world because you may not get to do anything. Okay? But we have you here in case something happens to one of these other people. Okay? If we put you on the jury, then you act in their place. But you're going to get to sit here and listen to everything, and you'll be able to mingle with the jury. You just won't go into the jury room and do any deliberations unless something happens to one of those people. Okay?

So on the jury is, Jamie Miller. Jamie Miller, come on up and have a seat.

Now Jared Loper, Melynda Buchanan, Matt McCloy, Douglas Akers, Netha Carouth, William Poole, Richard Austin.

Mandy Rocco. Is it Rocco (pronouncing)?

PROSPECTIVE JUROR: Rocco.

THE COURT: All right. Sorry.

Judy Hadley.

Janie Aldridge -- Arledge, excuse me. Arledge.

PROSPECTIVE JUROR: It's okay. It is Arledge.

THE COURT: And the last juror is Johnny Kirby.

And the alternate juror is Rebecca Garvin.

JUROR NO. 16: Yeah -- I mean, it -- it -- it makes me feel awkward, to be honest with you. I mean, this is -- I've never been in a situation like this.

THE COURT: Yeah. I mean, awkward because what?

JUROR NO. 16: Because of -- I mean, he's related to -- I -- I don't know him that well. It's just a weird situation knowing he's in the courtroom. It could be a relative.

THE COURT: I don't know if he is or not.

MR. LEGGETT: Do you think it will affect your verdict?

JUROR NO. 16: I don't think it will, no, sir, I do not. But I want to be up front and forward about it.

THE COURT: Okay. Anything else from this man?

MR. LEGGETT: No.

MR. DEEL: No.

THE COURT: All right. Thank you. You can go back and have a seat.

(Juror No. 10 exits chambers.)

THE COURT: Anything else you guys want to talk about about this? Okay.

MR. DEEL: No.

There's one difference. It's very simple. Theft is taking something that's not yours. Robbery is using force against a person to take something that's not yours. So in order to rob somebody, you have to want to take their stuff, and you have to say, And now I'm going to use force against you of some kind. That's what robbery is.

The State, they're purporting to be able to prove that to you beyond a reasonable doubt that Mr. Walter and Ms. Walter committed robbery and that they committed murder.

Let's talk about what was going on in those days because you're going to -- this happened over a year ago. There's going to be a lot of law enforcement officers take the stand right over here and testify. And I think you're going to see and I bet you can even remember that whenever we got news that there was a police officer that had been killed in Clyde, Texas, everybody thought the worst. Everybody thought the worst, that he was being targeted because he was a police officer or he had somehow been killed because that's what he was.

And there was a lot of jumping to conclusions right there at the beginning. And then thank God, that's not what it was. And that's what you're going to see from this evidence because this isn't -- you know what? The fact that Don Allen worked for APD, worked for Abilene

Just be back in the room at about 10 or 15 minutes, okay?

(Recess taken.)

(Open court, defendants present, no jury.)

THE COURT: I'm sorry, I can't remember --

JUROR LOPER: Jared Loper.

THE COURT: What is the deal now?

JUROR: I know him. I do not know him, but I went to school with a family --

THE REPORTER: Is this on the record?

THE COURT: Can you hear him?

THE REPORTER: Speak up a hair.

JUROR LOPER: I did not know him. I went to school with one of the family members of the victim.

THE COURT: Which you told me yesterday.

JUROR LOPER: Yes, sir. And I feel it is my responsibility to let you know, and I still feel like I did that like I should have, so I do not believe I can continue and be fair.

THE COURT: Why can't you be fair?

JUROR LOPER: I can be fair. I just feel like that information should have been understood before we started this process.

THE COURT: We discussed that yesterday, and you said you could continue yesterday.

JUROR LOPER: I understand that, sir. I

don't believe I can do -- be fair. I'm just being honest with you.

THE COURT: You can't do what?

JUROR LOPER: I just feel like it is my responsibility to let you know that information. I did not know that at the time.

THE COURT: Did anybody ask that question on voir dire, whether they knew any members of the family?

MR. DEEL: Not about the family, I don't believe, Judge.

THE COURT: Do you remember that question being asked?

MR. PROPST: Not that specific question, Your Honor.

THE COURT: Nobody asked it. So you're not under any duty to disclose it. You haven't done anything wrong.

JUROR LOPER: I feel like I have.

THE COURT: Well, you haven't. If I thought you done something --

JUROR LOPER: With the whole situation --

THE COURT: If I thought you had done something wrong --

JUROR LOPER: Because I want this fair --

THE COURT: We would have talked about it

yesterday, and I might have considered taking you off the jury. Just because you know someone who is a member of his family, that doesn't keep you from being on a jury. That is not a disqualification whatsoever unless your relationship with him means that you will have a bias or a prejudice for or against one or the other -- the party you're talking about.

JUROR LOPER: I understand.

THE COURT: The party you're talking about was Mr. Walter; is that right? I mean, Mr. Allen.

JUROR LOPER: Yes.

THE COURT: You knew Mr. Allen's brother 15 years ago --

JUROR LOPER: Correct.

THE COURT: But you indicated to me it was a very casual relationship.

JUROR LOPER: It is a very casual relationship. I haven't known him since then.

THE COURT: I mean, are you just trying to get out of this?

JUROR LOPER: No, sir, I'm just trying to be honest with you, how I feel.

THE COURT: That you can't be fair to who?

JUROR LOPER: I believe I can be fair. I just feel like I should have released that information

sooner.

THE COURT: Okay. Well, I already told you you are under no obligation to tell me.

JUROR LOPER: I understand.

THE COURT: So are you going to continue to be on this jury? Why should I take you off -- if you haven't done anything wrong and you say you won't hold it against anybody, why should I take you off?

JUROR LOPER: I'm just trying to be fair and honest, is all I'm trying to do here.

THE COURT: Well, I believe you're being honest, but I don't understand why when you told us yesterday that you had no problem with continuing, that it was a -- you went to high school with the deceased's brother 15 years ago, nobody asked about it in the jury selection, and we asked you yesterday on the record whether you thought you could continue to be fair and impartial, and you said yes.

JUROR LOPER: That is true.

THE COURT: What has changed?

JUROR LOPER: I just had time to think about it is all that has changed.

THE COURT: Who are you going to punish? One of these --

JUROR LOPER: No, sir, I'm not going to

punish anybody. I just want to be as fair as I can in this process.

THE COURT: All right. Anything else from this guy?

MR. PROPST: Can we ask him a few questions?

THE COURT: Yeah. I mean --

MR. PROPST: Mr. Loper, I appreciate your honesty. You know, whenever we talk about bias and prejudice --

THE REPORTER: Jeff, can you speak up?

THE COURT: She can't hear you.

MR. PROPST: Sorry.

Whenever we talk about bias and prejudice, those words kind of have a bad connotation, like it's a bad thing or it makes you a bad person, okay? Do you understand whenever the Judge asks you bias and prejudice in a legal sense, that's not what it means? It doesn't mean something bad. It doesn't mean you're a bad person.

The question is if you feel like your relationship with the member of Mr. Allen's family is going to cause you to render a decision in this case that's based on something other than just merely the evidence that's presented to you. For instance, if you felt sympathy with the family or anything like that. Does that make sense?

JUROR LOPER: Yes, sir.

MR. PROPST: Do you think that that relationship that you've got or the fact that you know some of the members or one of the members of his family would do that for you?

JUROR LOPER: No, sir. I just feel like this information should have been released to y'all sooner, and I wouldn't have probably been chosen. So I felt like that was my error and my mistake, and I'm trying to correct it.

MR. PROPST: Do you know any other members of his family?

JUROR LOPER: No, sir. I don't even know that one very well. I just know of him.

MR. PROPST: Will you make a decision in this case that's just like -- just as though you didn't know any members --

MR. LOPER: Absolutely. But I just -- like I said before, I just want to make sure that I am on the record and clear about my feelings on this because it is important to me to make sure we get it corrected if it needs to be corrected.

THE COURT: It doesn't need to be corrected based on what you've said.

MR. LOPER: Okay. Well, I'm just trying to be --

THE COURT: Everything you've said --
MR. LOPER: I apologize for taking the Court's time --
THE COURT: It's okay.
MR. LOPER: -- but I was just trying to be honest.
THE COURT: It's okay. It's okay. But everything you've said still qualifies you to be on this jury. If I felt anything you said did not qualify you from being on this jury, I could remove you from the jury and put the alternate in. But you haven't said anything that would keep you from continuing to sit. And that was the conversation that we had yesterday. That's why I'm surprised to hear it again today.
MR. LOPER: Yes. And I apologize --
THE COURT: And it's okay. You have made your position clear --
MR. LOPER: Okay.
THE COURT: -- how important it is, but I have told you already that you didn't do anything wrong.
MR. LOPER: Yes, sir.
THE COURT: Nobody asked you about it. You are under no obligation to reveal it, okay? You weren't under any obligation to reveal it, but you had, and you did, and you said that it wouldn't affect your decision.

And so that's really kind of the end of the story.

MR. LOPER: I don't won't take any more of your time. I apologize.

THE COURT: It's okay.

MR. LOPER: Thank you.

(Open court, defendants and jury present.)

THE COURT: Y'all have a seat.

If you will continue with the witness, please.

Q. (BY MR. DEEL) Officer Wood, when we started a moment ago, I may have skipped ahead of some preliminary information I want to get from you. How long again have you worked for Clyde PD?

A. A little over three years.

Q. And prior to coming to work for Clyde PD, where all had you worked?

A. I started out with the Hearne Police Department in 1992. I was a patrol officer with the Brady Police Department. I worked for the Howard County Sheriff's Office as a patrol deputy and a felony investigator, Slaton PD as a detective, and here.

Q. And in those previous positions, did you have occasions to investigate felony cases?

A. Yes, sir.

Q. And were some of those cases homicides?

APPENDIX I

GRIFFITH V. STATE

APPENDIX I

MICHAEL WAYNE GRIFFITH, Appellant v. THE STATE OF TEXAS
COURT OF CRIMINAL APPEALS OF TEXAS
507 S.W.3d 720; 2016 Tex. Crim. App. LEXIS 1514
NO. PD-0568-16
December 14, 2016, Filed

Notice:

Publish

Editorial Information: Prior History

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE EIGHTH COURT OF APPEALS TARRANT COUNTY.Griffith v. State, 2016 Tex. App. LEXIS 4238 (Tex. App. El Paso, Apr. 22, 2016)

Counsel ATTORNEYS FOR APPELLANT: Wm. Reagan Wynn, Kearney | Wynn, One Museum Place, Fort Worth, TX.

ATTORNEYS FOR THE STATE: District Attorney Tarrant County, Sharen Wilson, Fort Worth, TX.

Judges: HERVEY, J., filed a concurring opinion in which KELLER, P.J., and KEASLER, J., joined. ALCALA, J., filed a dissenting opinion.

Opinion

{507 S.W.3d 720} On this day, the Appellant's petition for discretionary review has been refused.

Concur

Concur by: HERVEY

Hervey, J., filed a concurring opinion in which Keller, P.J., and Keasler, J., joined.

I concur in the judgment of the Court, but I write separately to address the issues raised by Griffith, to explain why I agree with the decision of the court of appeals, and to respond to the dissent.

On July 26, 2013, Griffith was sentenced and filed a pro se notice of appeal. He also requested a free copy of the record. That same day, the trial court issued an order granting Griffith's request for a free record and appointing appellate counsel.

On August 13, 2013, appointed appellate counsel filed a timely motion for new trial alleging that Griffith's Eighth Amendment right to be free from cruel and unusual punishment was violated by his disproportionate sentence. (The motion was later overruled by operation of law.).

On August 15, 2013, a new attorney hired by Griffith filed a motion to substitute as appellate counsel. The next day, the trial court granted the motion.

On November 22, 2013, the clerk's record was filed in the court of appeals.

On January 22, 2014, the reporter's record was filed in the court of appeals.

On April 9, 2014, substitute appellate counsel filed a motion to abate the appeal for an opportunity to file an out-of-time motion for new trial.

On April 22, 2014, Griffith filed his brief on the merits.

On April 23, 2014, the motion to abate was denied.

Griffith argues that the period during which a defendant can file a motion for new trial in criminal cases is unconstitutional because it does not allow appellate counsel a meaningful opportunity to present ineffective-assistance-of-counsel claims. However, because there are a number of such claims that can be raised in a motion for new trial, and because Griffith did not {507 S.W.3d 721} take every step available to him to raise a meaningful ineffective claim in his case, I agree with the decision of the Court to refuse his petition for discretionary review.

Many claims can and should be litigated at the motion-for-new-trial stage. For example, if new evidence is discovered after the jury retires to deliberate, the defendant must allege that the newly discovered evidence entitles him to relief or the claim is waived. *Pena v. State*, 353 S.W.3d 797, 807-08 (Tex. Crim. App. 2011); *see Carlisle v. State*, 549 S.W.2d 698, 704 (Tex. Crim. App. 1977) (reversing and remanding because trial court erroneously overruled motion for new trial based on newly discovered evidence); *see also* Tex. R. App. P. 21.3 (setting out grounds for granting a new trial, many of which refer to newly discovered evidence). In addition, if trial counsel is aware of exculpatory evidence that is not effectively used at trial, the defendant can make an ineffective claim in his motion for new trial. Tex. R. App. P. 21.7 (the court "may receive evidence by affidavit or otherwise"). Finally, counsel can be deficient when he fails to object to erroneous language in a jury charge. *Willis v. State*, No. 06-02-00108-CR, 2003 Tex. App. LEXIS 5789, 2003 WL 21524704 (Tex. App.-Texarkana July 8, 2003, no pet.) (mem. op.) (not designated for publication) (holding that the failure of defense counsel to object to erroneous punishment charge authorizing an illegal sentence is ineffective assistance of counsel); *McDade v. State*, No. 06-01-00134-CR, 2002 Tex. App. LEXIS 8560, 2002 WL 31719501, at *4 (Tex. App.-Texarkana 2002, no pet.) (not designated for publication) (holding that counsel was deficient when he failed to object to error in jury charge referring to aggravated assault when the charge was assault on a public servant).

Although Griffith argues that the entire motion-for-new-trial procedural framework is unconstitutional because no meaningful ineffective-assistance-of-counsel claims can be raised using that procedure, I do not believe that we should address his claim because he has not availed himself of every opportunity in his own case to raise a meaningful ineffective claim.

The period for filing a motion for new trial is a critical stage of the proceedings such that a defendant has a right to the effective assistance of counsel under the Sixth Amendment. *Cooks v. State*, 240 S.W.3d 906, 911 (Tex. Crim. App. 2007). If a defendant is denied effective representation at that stage, and the defendant is harmed by that violation, he is entitled to relief. *Id.* The proper remedy is to "reset the appellate deadlines and abate the appeal," allowing an out-of-time motion for new trial to be filed. *Griffith v. State*, No. 08-13-00242-CR, 2016 Tex. App. LEXIS 4238, 2016 WL 1639496, at *3 (Tex. App.-El Paso Apr. 22, 2016); *see Harris v. State*, 827 S.W.2d 442, 443 (Tex. App.-San Antonio 1992, no pet.). To prove harm, the defendant must present at least one "facially plausible" claim to the court of appeals that could have been argued in a motion for new trial but was not due to ineffective assistance of counsel.1 *Cooks*, {507 S.W.3d 722} 240 S.W.3d at 912; *Bearman v. State*, 425 S.W.3d 328 (Tex. App.-Houston [1st Dist.] 2010, no pet.) (abating the appeal for the appellant to file an out-of-time motion for new trial because he presented a "facially plausible" claim that trial counsel was ineffective). To make a "facially plausible" claim, a defendant is not required to marshal all evidence

germane to potential ineffective-assistance-of-counsel claims, but he has to do more than just listing things trial counsel may have possibly done (or not done) that could possibly constitute ineffective assistance of counsel. *See Cooks*, 240 S.W.3d at 911-12.

Here, Griffith was represented by counsel during the entire window in which he could file a motion for new trial, and a timely motion for new trial was filed. In addition, there is no record evidence that Griffith's appointed appellate counsel wanted to present an ineffective-assistance-of-counsel claim but was unable to do so due to insufficient time. In other words, Griffith does not even allege that his appointed appellate counsel was unable to present a meaningful ineffective-assistance-of-counsel claim, nor does he claim that he was deprived of effective representation during the motion-for-new-trial period. Instead, Griffith claims that no meaningful ineffective-assistance-of-counsel claim could have been presented because the reporter's record was not filed until almost five months after the deadline. However, he neglects to mention other pertinent facts. For example, Griffith's retained appellate counsel represented him for about eight months before filing the motion to abate in the court of appeals, and for about two-and-one-half of those months, appellate counsel had access to the clerk's record and the reporter's record. Yet, after all of that time, Griffith only generically alleged that the appeal should be abated because "there are certain issues which require investigation and development." In his brief filed 13 days later, he made another general allegation that "certain issues" require more investigation, but this time he included a laundry list of potential areas in which trial counsel could have been ineffective:

> the failure to conduct necessary investigation and to interview witnesses; the failure to file discovery motions; the failure to adequately review medical records; the failure to adequately prepare; the failure to object to the introduction of extraneous offenses/bad acts; the failure to object to speculative testimony from unproved, unqualified witnesses; the failure to test witnesses regarding their purported expertise, and/or the scientific basis for their 'expert' testimony, the failure to consult with and/or obtain expert assistance for purposes of trial; the failure to adequately present evidence to support the motion to suppress; the failure to object to improper voir dire by the State; and the failure to object to improper closing arguments by the State.Although these contentions may appear more specific than the initial allegation that "certain issues" require more investigation, they still fall woefully short of even a "facially plausible" claim. *Id.* For instance, Griffith makes two record-based claims that his trial counsel failed to object to improper voir dire and closing arguments by the State. But, after almost 80 days with the reporter's record, Griffith **{507 S.W.3d 723}** failed to give even one record cite to support his bald assertions. *Id.*

It seems to me that, instead of attacking the motion-for-new-trial procedural framework, counsel's time would have been better spent trying to present a "facially plausible" claim so that Griffith could have the opportunity he claims he never had-a chance to present a meaningful ineffective-assistance-of-counsel claim in a motion for new trial. After all, according to counsel there were plenty of "facially plausible" claims that could have been made.

Beyond the motion for new trial, if in fact a defendant has a plausible ineffective-assistance-of-counsel claim, many of them can be addressed on direct appeal with the support of both the clerk's and reporter's records. Finally, these claims can also be addressed on habeas.

The dissent once again insinuates that this Court unfairly ignores the needs of the poor by denying them sufficient and/or effective assistance of counsel. And, while this is not a post-conviction writ case, much time is spent dwelling on the perceived ill of our habeas system, and the part this Court plays in effectuating that system. As succinctly stated by the dissent,

> in *Ex parte Garcia*, I highlighted what I view as an ongoing and widespread problem regarding the absence of appointed habeas counsel to assist indigent applicants in pursuing their colorable ineffective-assistance claims.Dissenting Op. at 7 (citing *Ex parte Garcia*, 486 S.W.3d 565 (Tex. Crim. App. 2016) (Alcala, J., dissenting, in which Johnson, J., joined)). However, in reality we have no idea how widespread the problem is. Further the dissent adds that,
>
> In *Garcia*, I urged this Court to take steps towards remedying this problem through the appointment of counsel for indigent habeas applicants who have colorable ineffective-assistance claims, but this Court has refused to require the appointment of counsel under those circumstances, which would largely rectify this problem. As I observed in *Garcia*, the statutory basis for appointing counsel under those circumstances already exists in Texas. In particular, I noted that Article 1.051 of the Texas Code of Criminal Procedure entitles an indigent habeas applicant to appointed post-conviction counsel whenever the habeas court determines that "the interests of justice of justice require representation." Based on that statutory authority, I suggested that this Court should remand any *pro se* habeas application to the habeas court for appointment of counsel in the interest of justice when "either the pleadings or the face of the record gives rise to a colorable, nonfrivolous [ineffective-assistance] claim."*Id.* at 8 (internal citations omitted). The dissent seems to ignore the fact that it is not up to the judiciary to amend the manner in which attorneys are appointed. That is for the legislature to decide. And while the dissent appears to suggest that merely appointing a lawyer will "fix the system," a few considerations are missing.
>
> When a writ is granted by this Court, the trial court can appoint an attorney to represent an indigent defendant. Further, many trial courts are already appointing counsel for purposes of representation on writ, and it will do the system and everyone in it absolutely no good, if the attorney is not sufficiently skilled to handle a writ. This point applies whether the attorney handling the writ is appointed or retained. Thus, even the "affluent" who can afford habeas counsel are not served if the attorney is unskilled.
>
> **{507 S.W.3d 724}** Despite proclamations that the system "is broken" and the problem of ineffective assistance of counsel is "widespread" (Dissenting Op. at 11) we have no numbers, no statistics, no real hard facts supporting the notion that thousands of indigent defendants are being unfairly treated. We cannot even predict how many ineffective assistance of counsel claims have had or will have merit.
>
> And if the problem is so widespread, are we suggesting that almost the entire defense bar (as the list of those attorneys who presently handle habeas is quite small) is inept? This court and "legal scholars" know that concept is ridiculous.
>
> Some proposals such as amending the Fair Defense Act to supply guidelines and requirements for attorneys who wish to handle more writs could be useful. Educating attorneys specifically in the realm of writ law would also be useful.2 But most importantly, this Court already fairly and fully reviews all writs as required by the Texas Constitution and laws of this State.
>
> Relying on lyrical analysis to defend our practice against grievances over the manner in which this Court performs its duties, I cite the following
>
> You say you want a revolution
>
> Well, you know
>
> We all want to change the world
>
> You tell me that it's evolution
>
> Well, you know
>
> We all want to change the world
>
> But when you talk about destruction
>
> Don't you know that you can count me out
>
> Don't you know it's gonna be

All right, all right, all right. . . .The Beatles, Revolution (Apple Records 1968).
Filed: December 14, 2016
Publish

Dissent

Dissent by: ALCALA

Alcala, J., filed a dissenting opinion.DISSENTING OPINION

For poor people, the Texas scheme for addressing claims of ineffective assistance of counsel is broken. Legal scholars know this, and the Supreme Court has essentially acknowledged this.1 Instead of addressing this problem, some people will pivot and rationalize that Texas is doing better than we used to do at providing counsel for indigent defendants. Other people will continue to pivot and rationalize, arguing that Texas spends a lot of money providing counsel for indigent defendants. And others will pivot by proclaiming that many {507 S.W.3d 725} claims should be litigated during the motion for new trial stage and that habeas attorneys must be educated and qualified to represent indigent applicants. Of course, all of those rationalizations are true, but they miss the point. The point is that indigent defendants in Texas ordinarily do not have a viable procedural avenue for challenging the ineffectiveness of their trial attorneys. This is a problem that is unique to the poor in Texas because affluent people, who can afford to hire habeas counsel, have an adequate procedural avenue for challenging the ineffectiveness of trial counsel through post-conviction habeas applications.2 A poor person, of course, like a rich person, can file his habeas application challenging his trial attorney's ineffectiveness, but he will almost certainly fail because, as a pro se litigant, he is likely unversed in the pleading and proof requirements for obtaining habeas relief. *See Ex parte Garcia*, 486 S.W.3d 565 (Tex. Crim. App. 2016) (mem. op.) (Alcala, J., dissenting); *see also Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 1317-18, 182 L. Ed. 2d 272 (2012) (observing that, "[w]ithout the help of an adequate attorney, a prisoner will have [ ] difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim" on post-conviction review; thus, a post-conviction proceeding, "if undertaken without counsel . . . may not have been sufficient to ensure that proper consideration was given to a substantial claim"). In contrast, a person who can afford a post-conviction habeas attorney to navigate that procedural scheme will have a reasonable forum to challenge the effectiveness of his trial attorney. The present system works for rich people and fails for poor people. Yet, this Court continues to do nothing to fix this broken process. This Court happily sings that everything is alright, which, of course, it is, for non-indigent habeas applicants who can afford to hire counsel.

1

See, e.g., Eve Brensike Primus, *Effective Trial Counsel After Martinez v. Ryan: Focusing on the Adequacy of State Procedures*, 122 YALE L.J. 2604 (2013); Ty Alper, *Toward a Right to Litigate Ineffective Assistance of Counsel*, 70 WASH. & LEE L. REV. 839 (2013); Eve Brensike Primus, *Procedural Obstacles to Reviewing Ineffective Assistance of Trial Counsel Claims in State and Federal Postconviction Proceedings*, American Bar Association, Criminal Justice, Vol. 24, Number 3 (2009), Emily Garcia Uhrig, *A Case For Constitutional Right to Counsel in Habeas Corpus*, 60 HASTINGS L.J. 541 (2009); Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679 (2007); *see also Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 1318, 182 L. Ed. 2d 272 (2012); *Trevino v. Thaler*, 133 S. Ct. 1911, 1918-21, 185 L. Ed. 2d 1044 (2013). In addition to these resources, law review articles have discussed this problem. *See, e.g.*, Eric M. Freedman, *Enforcing the ABA Guidelines in Capital State Post-Conviction Proceedings after Martinez and Pinholster*, 41 HOFSTRA L. REV. 591 (2012-2013); Sarah L. Thomas, Comment: *A Legislative Challenge: A Proposed Model Statute to Provide for the*

App. 1

Appointment of Counsel in State Habeas Corpus Proceedings for Indigent Petitioners, 54 EMORY L.J. 1139 (2005).

2

Aside from affluent people, some indigent defendants are fortunate enough to be aided by pro bono counsel provided by a law school or private organization.

The instant pending petition for discretionary review filed by Michael Wayne Griffith is similar to the habeas application filed by Jose Sandoval. Each of these litigants asks this Court to address the problem faced by indigent defendants who seek a meaningful opportunity to challenge the ineffectiveness of trial counsel at a stage of the proceedings when they are guaranteed the assistance of counsel. *See Griffith v. State*, No. 08-13-00242-CR, 2016 Tex. App. LEXIS 4238, 2016 WL 1639496 at *2 (Tex. App.-El Paso Apr. 22, 2016) (not designated for publication) (pet. granted). The *Griffith* petition for discretionary review, like the Sandoval habeas application, gives this Court the opportunity to address these problems. I would grant appellant's petition for discretionary review that challenges whether the Texas procedural scheme governing motions for new trial in criminal cases violates a criminal defendant's Sixth Amendment right to effective assistance of counsel on motion for new trial and his right to due process of law because, under this scheme, appellate counsel are not given a meaningful opportunity to present claims that trial counsel rendered ineffective assistance of counsel. Because this Court declines to address the merits of appellant's arguments, by refusing to hear this petition for discretionary review, I respectfully dissent.**I. Background**

Appellant was convicted by a jury of aggravated assault with a deadly weapon and sentenced to twenty years' imprisonment. At trial, appellant admitted that he shot the injured party during a dispute over an unpaid bill, but he claimed that he {507 S.W.3d 726} acted in self defense. After he was sentenced, appellant filed a motion for new trial asserting that his sentence was cruel and unusual. That motion was overruled by operation of law. In the court of appeals, while appellant's case was on appeal, counsel filed a motion to abate the appeal to allow appellant to investigate an ineffective trial counsel claim and file a motion for new trial. The court of appeals denied that motion without written order. The court explained that appellant's motion to abate the appeal was filed eight months after appellate counsel began representing appellant and that appellant's pleading fell short of the showing that must be made in a motion to abate because it included only a general allegation that there are "certain issues which require investigation and development through a motion for new trial."

In his brief filed in the court of appeals, appellant asserted that a number of potential issues "appear to exist" and warrant further investigation, including "the failure to conduct necessary investigation and to interview witnesses; the failure to file discovery motions; the failure to adequately review medical records; the failure to adequately prepare; the failure to object to the introduction of extraneous offenses/bad acts; the failure to object to speculative testimony from unproved, unqualified witnesses; the failure to test witnesses regarding their purported expertise, and/or the scientific basis for the 'expert' testimony, the failure to consult with and/or obtain expert assistance for purposes of trial; the failure to adequately present evidence to support the motion to suppress; the failure to object to improper voir dire by the State; and the failure to object to improper closing arguments by the State." The court of appeals characterized appellant's pleadings as conclusory, and it faulted appellant for failing to show that the allegations were at least facially plausible. The court of appeals held that, in appellant's case, the current Texas procedural framework regarding motions for new trial did not deprive him of a meaningful opportunity to present a claim of ineffective assistance of his trial counsel in derogation of his due-process rights and his right to effective assistance of counsel on appeal. The court of appeals explained that appellant had also failed to prove that he was harmed or prejudiced by the rules of appellate procedure.

In his first ground in his petition, appellant asks,

Does the Texas procedural scheme governing motions for new trial in criminal cases violate a criminal

defendant's Sixth Amendment right to effective assistance of counsel on motion for new trial and appeal and his right to due process of law because, under the scheme appellate counsel are not given a meaningful opportunity to present claims that trial counsel rendered ineffective assistance of counsel?Appellant asserts that this issue is of paramount importance and has been recently addressed by the Supreme Court and this Court. He observes that the Supreme Court and this Court have recognized that, under the current procedural scheme, it is "virtually impossible" for appellate counsel to adequately present a claim of ineffective assistance of trial counsel on direct review. He explains that it is virtually impossible for a defendant to prevail on a claim of ineffectiveness in a motion for new trial and direct appeal, yet those are the only times when an indigent defendant has the right to appointed counsel under the Sixth Amendment. Accordingly, appellant contends that this case involves significant constitutional rights with serious consequences for appellants and their ability to receive effective assistance of counsel during the appellate process.

{507 S.W.3d 727} Appellant's petition shows that, under the current construction of the Texas Rules of Appellate Procedure, the thirty-day deadline found in Rule 21.4 is a strict deadline, and a trial court lacks jurisdiction to consider any motion-for-new-trial claim not raised prior to that deadline. *See* Tex. R. App. P. 21.4. Appellant also notes that a person convicted of a crime has a Sixth Amendment right to effective assistance of counsel during the motion for new trial and appellate process. *Cooks v. State*, 240 S.W.3d 906, 911 (Tex. Crim. App. 2007); *Evitts v. Lucey*, 469 U.S. 387, 396-97, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). But there is no guaranteed right to appointed counsel at the post-conviction habeas stage for non-death-penalty cases. Thus, under the current interpretation of the Sixth Amendment, the only time that a criminal defendant is guaranteed effective counsel and has an opportunity to litigate a claim of ineffective assistance of trial counsel is during the motion for new trial and appellate process. He contends, however, that the Texas motion-for-new-trial and appellate procedural scheme makes it virtually impossible for appellate counsel to adequately present an ineffective assistance of trial counsel claim on direct review.

Appellant gives specific arguments about the ineffective-assistance claims that he would have pursued had he had an adequate amount of time in which to present them in a motion for new trial. He discusses whether counsel was ineffective by failing to discover certain letters that should have been introduced into evidence, by failing to object to irrelevant and extraneous evidence, by failing to object to the deputy's personal opinion about the appellant's storage of guns, and he asserts a number of other complaints. Appellant explains that, without the appellate record to review, there was no meaningful opportunity for appellate counsel to litigate his complaints within the procedural framework currently in place.

Appellant is complaining that the procedural structure of the appellate scheme has deprived him of any meaningful opportunity to present possible claims of ineffective assistance of his trial counsel on motion for new trial or direct appeal. Appellant summarizes that a motion for new trial and direct appeal are the only procedural avenues in which a criminal defendant is guaranteed the effective assistance of counsel to raise a claim of ineffective assistance of trial counsel. He argues that the Texas scheme that makes it virtually impossible to raise such a claim violates the Sixth Amendment and his due-process rights. He continues by arguing that this Court could order that, in situations like the present one, the court of appeals should abate the appeal and allow counsel on direct appeal to fully develop and litigate ineffective-assistance-of-trial-counsel claims. This would eliminate many of the issues this Court has struggled with concerning the appointment of post-conviction counsel and consideration of subsequent writ claims.

The arguments presented in the instant petition for discretionary review mirror those in Sandoval's habeas application. In his habeas application, Sandoval alleges that he was constructively denied counsel on direct appeal because of external constraints placed on appellate counsel by the procedural scheme for criminal appeals and habeas review in Texas. Sandoval contends that he was prevented from raising potentially meritorious claims due to the structure of the Texas system that

makes it virtually impossible to challenge the ineffectiveness of trial counsel on direct appeal. Sandoval requests relief in the form of an out-of-time appeal so that his appointed appellate attorney could have a meaningful opportunity to research and {507 S.W.3d 728} raise a meritorious claim of ineffective assistance of counsel during the direct appeal of his case. That is the same relief requested by Griffith in his pending petition for discretionary review. Today, this Court denies the habeas application filed by Sandoval.**II. Analysis**

Oddly, the court of appeals faulted appellant for failing to develop extra-record evidence to establish the error and harm in this case, yet the inability to develop extra-record evidence is precisely what appellant is complaining about in this appeal. The court of appeals's analysis erroneously faults appellant for failing to do what the rules of appellate procedure expressly disallow: An appellant may not go outside the appellate record in making his arguments for relief on appeal. *See* Tex. R. App. P. 38.1(i). The court of appeals's analysis, therefore, places appellant in a Catch-22 where he is denied a meaningful appeal for complying with the rules of appellate procedure.

On a broader level, this case and Sandoval's habeas application highlight the Catch-22 that most indigent defendants face. Regardless of whether a litigant challenges ineffective assistance of counsel on direct appeal, on the one hand, or on habeas, on the other hand, the procedural scheme he faces is designed for him to fail, unless, of course, he can afford to hire counsel to represent him at the post-conviction stage.**A. It is Theoretically Possible to Challenge Ineffective Assistance of Counsel on Direct Appeal, But That Is Not a Reasonable Avenue for Most Cases**

An indigent defendant with appointed appellate counsel can challenge the ineffectiveness of his trial attorney through a motion for new trial and/or on direct appeal. But at the motion-for-new-trial stage, when he has the right to appointed counsel, a defendant is unlikely to have access to the trial record or the necessary evidence to plead and prove that his trial attorney was ineffective. The thirty-day window of time for filing a motion for new trial, which is almost always needed to develop and present evidence of ineffective assistance of counsel, is rarely a reasonable option because the trial record has not been prepared. Thus, abatement of the appeal would be necessary in order to obtain the trial record to enable appellants to produce and present the evidence and arguments required to establish an ineffectiveness claim on direct appeal. And at the direct-appeal stage, in the absence of a motion-for-new-trial hearing, this Court will presume that counsel performed adequately. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). As a general rule, therefore, direct-appeal litigation of ineffective assistance of counsel has too many likely pitfalls to be an adequate procedural vehicle for challenging the ineffectiveness of a trial attorney. *See, e.g., Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997) (observing that "the inherent nature of most ineffective assistance claims" means that the trial record will often fail to "contai[n] the information necessary to substantiate" the claim).

The concurring opinion unfairly criticizes appellant's counsel. The concurring opinion suggests that "counsel's time would have been better spent trying to present a 'facially plausible' claim." This criticism misunderstands the procedural scheme in Texas that permits only a thirty-day window of time for filing a motion for new trial. By the time that counsel spent time complaining about the unfairness of Texas's appellate structure, the permissible window of time for filing a motion for new trial had long ago passed. {507 S.W.3d 729} The problem is not that, in theory, an appellate attorney could file a motion for new trial to assert these complaints; the problem is that ordinarily an attorney cannot effectively present a complaint at that juncture given that there is an inadequate amount of time to obtain the record, investigate matters outside the record, and plead legal claims within the thirty-day window of time in which all of these things must be done.**B. It is Possible to Challenge Ineffective Assistance of Counsel on Habeas, But Most Pro Se Litigants Are Too Unskilled to Plead and Prove Their Claims**

An indigent defendant may challenge the ineffectiveness of his trial attorney through post-conviction habeas litigation, but that is also an inadequate procedural vehicle in almost all cases because, as

explained below, this Court has refused to enforce statutory provisions that would require the appointment of habeas counsel in appropriate cases. In my dissenting opinion in *Ex parte Garcia*, I highlighted what I view as an ongoing and widespread problem regarding the absence of appointed habeas counsel to assist indigent applicants in pursuing their colorable ineffective-assistance claims. *See, e.g., Garcia*, 486 S.W.3d at 574-75. I explained that, in many cases, the first opportunity for a defendant to challenge the ineffectiveness of his attorney arises in a post-conviction habeas proceeding, but, at that procedural juncture, an indigent applicant has no established constitutional right to appointed counsel. *See id.* at 567-68. Given that many indigent applicants must proceed *pro se* on habeas, as here, I observed that claims of ineffectiveness, even those that have merit, "will almost always fail because the *pro se* applicant is unaware of the legal standard and evidentiary requirements necessary to establish his claim." *Id.* at 567.

My dissenting opinion in *Garcia* merely recognized the problem that had already been highlighted by the Supreme Court in *Martinez v. Ryan*, in which it stated,

> Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy. When the issue cannot be raised on direct review, moreover, a prisoner asserting [such a] claim in an initial-review collateral proceeding cannot rely on a court opinion or the prior work of an attorney addressing that claim.*Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 1317, 182 L. Ed. 2d 272 (2012). In addition, the Supreme Court in *Martinez* noted that prisoners "unlearned in the law" may have difficulty complying "with the State's procedural rules or may misapprehend the substantive details of federal constitutional law." *Id.* Moreover, it observed that prisoners, while confined to prison, are "in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record." *Id.* In light of all these considerations, the Supreme Court concluded that, in order to present an ineffective-assistance claim in accordance with the State's procedures, "a prisoner likely needs an effective attorney." *Id.* The absence of appointed counsel to facilitate the litigation of ineffectiveness issues, it explained, was of particular concern, given that the right at stake, the right to the effective assistance of counsel, is a "bedrock principle in our justice system," without which the very fairness and accuracy of the underlying criminal proceeding cannot be guaranteed. *Id.*

In *Garcia*, I urged this Court to take steps towards remedying this problem by enforcing the state statutory provision that, in my view, requires a habeas court to appoint counsel for indigent habeas applicants who have colorable ineffective-assistance {507 S.W.3d 730} claims. *Garcia*, 486 S.W.3d at 570. In particular, I noted that Article 1.051 of the Texas Code of Criminal Procedure entitles an indigent habeas applicant to appointed post-conviction counsel whenever the habeas court determines that "the interests of justice require representation." *Id.* at 577-78 (quoting Tex. Code Crim. Proc. art. 1.051(d)(3)). Based on that statutory authority, I suggested that this Court should remand any *pro se* habeas application to the habeas court for appointment of counsel in the interests of justice when "either the pleadings or the face of the record gives rise to a colorable, nonfrivolous [ineffective-assistance] claim." *See id.* After all, our role, as the State's highest criminal court, is not to give lower courts unfettered discretion to ignore statutory language, but it is instead to review whether they have misapplied the law to the facts, and to enforce the law as it is written. I have explained that expanding the availability of appointed counsel under these circumstances would further the interests of justice by ensuring that substantial claims of ineffectiveness were given full and fair consideration by this Court on post-conviction review, thereby reducing the likelihood that violations of defendants' bedrock Sixth Amendment rights would go unremedied. *Id.* at 567-68, 582. My suggestion was quite simple and in accordance with the statutory language and with what this Court already requires in its remand orders that instruct a habeas court to appoint counsel for an indigent defendant when an evidentiary habeas hearing is held. Thus far, however, this Court has refused to enforce the plain language in the statute that requires the appointment of habeas counsel when the interests of justice require counsel.

Because of this Court's refusal in *Garcia* and subsequent cases to compel habeas courts to appoint attorneys for indigent defendants at the post-conviction stage, even when the interests of justice obviously require representation, this Court has created a situation in which indigent defendants functionally have no recourse to challenge the ineffectiveness of their trial attorneys through the post-conviction writ process. *See id.* at 574-75. As a general rule, therefore, habeas litigation pursued by a pro se defendant has too many likely pitfalls to be an adequate procedural vehicle for challenging the ineffectiveness of a trial attorney.**C. The Catch-22 is Real and Unaddressed by this Court**

This Court has before it the instant petition for discretionary review and the Sandoval habeas application, each of which highlights this Catch-22 faced by almost all poor defendants in Texas. The instant petition is at the direct-appeal stage, and he is complaining about the court of appeals's refusal to abate his case so that he could investigate, plead, and prove his claim of ineffective trial counsel. *See Griffith*, 2016 Tex. App. LEXIS 4238, 2016 WL 1639496, at *2. Sandoval's habeas application discusses a similar request for a remedy that would allow resetting the appellate timetable to permit him to pursue an ineffective-assistance-of-counsel claim at the motion-for-new-trial stage. Alternatively, Sandoval requests habeas counsel, which, as I explained in *Garcia*, should be appointed by the habeas court in the interests of justice when an applicant has demonstrated that he has a colorable claim. I would grant the instant petition for discretionary review and hold that appellant is entitled to have this Court reset the appellate timetable for him to pursue a motion for new trial because he was deprived of a fair opportunity to litigate ineffectiveness issues at that stage due to the Texas appellate procedural scheme.**III. Conclusion**

It's time to make a change in Texas to remedy the system created by this Court {507 S.W.3d 731} through its repeated refusal to require habeas courts to appoint habeas counsel when the interests of justice are at stake, which has resulted in indigent, non-death-penalty defendants being unable to adequately challenge the effectiveness of their trial counsel. Given that this Court has refused to require the appointment of counsel for indigent habeas applicants who have colorable claims of ineffective assistance of counsel, this Court's only remaining option is to permit appellants like this appellant to reset the appellate timetable for the investigation and proof of their claim. The bottom line is this: Rich people in Texas have opportunities to challenge the ineffectiveness of their trial attorneys, but poor people do not. This is not a procedural scheme that society should find tolerable. For these reasons, I respectfully dissent from this Court's refusal to grant this petition for discretionary review that presents these important constitutional issues.

Filed: December 14, 2016

Publish

Footnotes

1

A similar standard is applied when a trial court fails to hold a hearing on a motion for new trial. The Amarillo Court of appeals has explained that,

> Failure to hold a hearing on appellant's motion for new trial is an abuse of discretion when the motion raises matters not determinable from the record, as long as the defendant provides a supporting affidavit showing reasonable grounds for holding that relief should be granted. The affidavits need not establish a prima facie case, or even reflect every component legally required to establish relief. It is sufficient if a fair reading of the affidavit gives rise to reasonable grounds in support of the allegations.*Obella v. State*, No. 07-15-00271-CR, 2016 Tex. App. LEXIS 7037, 2016 WL 3660018, at *2 (Tex. App.-Amarillo 2016, pet. filed) (per curiam) (internal citations omitted).

APP-I

2
The Court of Criminal Appeals and the State Bar of Texas has "rolled out" the first Writ Academy, which is specifically designed to train attorneys to properly litigate post-conviction habeas corpus claims.

1
See, e.g., Eve Brensike Primus, *Effective Trial Counsel After Martinez v. Ryan: Focusing on the Adequacy of State Procedures*, 122 YALE L.J. 2604 (2013); Ty Alper, *Toward a Right to Litigate Ineffective Assistance of Counsel*, 70 WASH. & LEE L. REV. 839 (2013); Eve Brensike Primus, *Procedural Obstacles to Reviewing Ineffective Assistance of Trial Counsel Claims in State and Federal Postconviction Proceedings*, American Bar Association, Criminal Justice, Vol. 24, Number 3 (2009), Emily Garcia Uhrig, *A Case For Constitutional Right to Counsel in Habeas Corpus*, 60 HASTINGS L.J. 541 (2009); Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679 (2007); *see also Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 1318, 182 L. Ed. 2d 272 (2012); *Trevino v. Thaler*, 133 S. Ct. 1911, 1918-21, 185 L. Ed. 2d 1044 (2013). In addition to these resources, law review articles have discussed this problem. *See, e.g.*, Eric M. Freedman, *Enforcing the ABA Guidelines in Capital State Post-Conviction Proceedings after Martinez and Pinholster*, 41 HOFSTRA L. REV. 591 (2012-2013); Sarah L. Thomas, Comment: *A Legislative Challenge: A Proposed Model Statute to Provide for the Appointment of Counsel in State Habeas Corpus Proceedings for Indigent Petitioners*, 54 EMORY L.J. 1139 (2005).

2
Aside from affluent people, some indigent defendants are fortunate enough to be aided by pro bono counsel provided by a law school or private organization.

APPENDIX J
EX PARTE GARCIA

APPENDIX J

IRVING MAGANA GARCIA
COURT OF CRIMINAL APPEALS OF TEXAS
486 S.W.3d 565; 2016 Tex. Crim. App. LEXIS 71
WR-83,681-01
April 6, 2016, Decided

Notice:

DECISION WITHOUT PUBLISHED OPINION

Editorial Information: Prior History

Tr. Ct. No. CR-2739-10-C (1).Garcia v. State, 429 S.W.3d 604, 2014 Tex. Crim. App. LEXIS 540 (Tex. Crim. App., Apr. 9, 2014)

Counsel For State: Luis A. Gonzalez, Office of Criminal District Attorney, Edinburg, Texas.

Judges: KELLER, P.J., filed a concurring opinion in which KEASLER and HERVEY, JJ., joined. ALCALA, J., filed a dissenting opinion in which JOHNSON, J., joined.

Opinion

{486 S.W.3d 565} This is to advise that the Court has denied without written order the application for writ of habeas corpus on the findings of the trial court without a hearing.

PUBLISHED

Concur

Concur by: KELLER

Keller, P.J., filed a concurring opinion in which Keasler and Hervey, JJ., joined.

Texas seems to be firmly in the mainstream in its procedures for appointment of counsel in post-conviction habeas cases. Our statutes, like the provision in the federal system, require appointment of counsel on habeas when the trial judge determines that the interests of justice require it.1 The initial decision is left up to the {486 S.W.3d 566} trial court-which appears to be the most common practice among states-but this Court may also require that counsel be appointed. We do so on remand if there is to be a hearing and counsel is requested.

A concern has been raised that on habeas review, a *pro* se ineffective-assistance claim will almost always fail because a *pro se* applicant is unaware of the legal standard and evidentiary requirements necessary to establish his claim. I disagree with this assessment. Except when there are jurisdictional deficiencies, we construe *pro se* habeas applications liberally. We do not reject a claim just because it is inartfully worded or imperfectly pled. Moreover, in fiscal year 2015, we remanded 388 habeas cases to the trial court for hearings or affidavits addressing the claims. Most remanded applications are remanded on ineffective assistance claims and most, by far, are filed *pro se*. We granted relief in 184

cases in FY 2015.2 Although this is a small percentage of cases filed, we should not expect most post-conviction habeas cases to result in relief. After all, they are challenges to final convictions, and most convictions result from guilty pleas.3 Most habeas claims fail, but not because of pleading deficiencies. They fail because they have no merit.

Moreover, any consideration of whether our habeas procedures protect a defendant's Sixth Amendment right to trial counsel should take into account the bigger picture regarding ineffectiveness of counsel at trial and on appeal. Advances over the past fifteen years in the manner in which trial and appellate counsel are appointed in Texas have resulted in better-qualified attorneys for indigents. Starting with the Fair Defense Act in 2001, Texas has transformed the way in which counsel is appointed in criminal cases. Counties must have objective standards for appointing counsel, attorneys must obtain continuing legal education in criminal law each year, and attorneys must be on a list approved by a majority of the judges in order to receive appointments.4 When a defendant requests counsel, an attorney must be appointed promptly.5 Counsel must be appointed in a fair, neutral, and nondiscriminatory manner.6

Texas has expanded the number of public defender offices, instituted private defender offices, established mental-health public defender offices and appellate public-defender offices, created regional public defender offices for rural areas, instituted an innovative "client choice" project that includes a mentoring program for young lawyers, and published attorney caseload guidelines.7 Spending on indigent defense statewide has risen from $91 million in 2001 to $238 million in 2015.8 No system is perfect, but because Texas is addressing {486 S.W.3d 567} effective assistance of counsel at the front end of the process, the fundamental right to counsel at trial is not left unprotected.9

The applicant in this case was represented by counsel at trial, on the motion for new trial, on appeal, and on his petition for discretionary review. He lost at trial, lost at the motion for new trial, lost on appeal, and lost again in this Court, but that does not mean that he received ineffective assistance of counsel. It suggests the opposite, in fact, because he raised an ineffective-assistance claim in his motion for new trial, obtained a hearing on the motion, and lost, and he raised an ineffective-assistance claim on appeal and lost. The system is not perfect, and improvements can and should be made, but the system did not fail the applicant in this case.

I join the opinion of the Court.

Filed: April 6, 2016

Publish

Dissent

Dissent by: ALCALADISSENTING OPINION"**In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.**"

This text in the Sixth Amendment of the United States Constitution ensures to all criminal defendants the right to the effective assistance of counsel at trial. *See* U.S. Const. amends. VI, XIV. The Sixth Amendment "stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'" *Gideon v. Wainwright*, 372 U.S. 335, 343, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 462, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)). But how can the right to the effective assistance of counsel at trial be ensured if a state has no adequate vehicle for a defendant to assert that the right was violated? As the Supreme Court has suggested recently, Texas's system for addressing claims of ineffective assistance of trial counsel has serious flaws.1 Under the current scheme, in many cases, neither direct appeal nor a writ of habeas corpus provides a meaningful opportunity for litigants to present ineffectiveness claims. On direct appeal, which is a point in time at which an indigent appellant has the right to appointed counsel, an ineffectiveness claim usually fails due to the need for evidence outside the record, which usually

cannot be presented during the narrow window of time permitted for filing a motion for new trial. Similarly, on habeas review, which is a point in time at which an indigent applicant has no right to appointed counsel, an ineffectiveness claim will almost always fail because the *pro se* applicant is unaware of the legal standard and evidentiary requirements necessary to establish his claim. Because neither direct appeal nor habeas review currently provides an adequate vehicle for raising an ineffectiveness challenge, Texas's scheme fails to ensure that the "bedrock principle" of effective assistance of counsel is fulfilled for all criminal defendants. *See Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 1317, 182 L. Ed. 2d 272 (2012). This failure is apparent in the present application for a post-conviction writ of habeas corpus, in which Irving Magana Garcia, applicant, alleges that his trial counsel was ineffective, but his application is problematic because his *pro se* pleadings are inadequate to raise any colorable ineffective-assistance claim. Here, I conclude that the appropriate {486 S.W.3d 568} remedy for this systemic failure is for this Court to remand this case to the habeas court with instructions to appoint counsel for the purpose of amending the instant habeas application to pursue an ineffective-assistance claim that would not be limited by the current *pro se* pleadings.2 Because this Court instead summarily denies this application, I respectfully dissent. I explain my reasoning by (1) showing that the current Texas system fails to provide a meaningful opportunity for most indigent defendants to raise ineffective-assistance-of-trial-counsel claims, and (2) explaining that the instant record reveals a colorable ineffective-assistance claim against trial counsel, and, therefore, the *pro se* applicant requires appointed counsel in order to amend his instant pleadings, which are inadequate to present even an arguable claim.

1

See Trevino v. Thaler, 569 U.S. 413, 133 S. Ct. 1911, 1919, 185 L. Ed. 2d 1044 (2013).

2

There may be other ways to fix Texas's inadequate system for ensuring the right to effective counsel that are not pertinent here, such as changing the Texas Rules of Appellate Procedure to extend the period of time permitted for motions for new trial so that defendants could have the benefit of the trial record and time to investigate ineffectiveness claims. *See* Tex. R. App. P. 21.4(a) (providing thirty-day window after imposition or suspension of sentence in open court for filing motion for new trial); *see also Robinson v. State*, 16 S.W.3d 808, 810-11 (Tex. Crim. App. 2000) (observing that "there is generally not a realistic opportunity to adequately develop the record for appeal in post-trial motions" for the purpose of raising an ineffective-assistance claim; "in most cases, the pursuit of such a claim on direct appeal may be fruitless"). Because any such measures would be purely prospective in their application to future cases, I do not consider them at length here.**I. Texas's Systemic Failure to Provide An Adequate Vehicle for Raising Ineffective-Assistance-of-Counsel Claims**

The Texas criminal justice system fails to provide an adequate vehicle by which an indigent defendant can raise a claim challenging the effectiveness of his trial attorney. Given that a habeas proceeding is generally recognized as the preferred vehicle for raising ineffectiveness claims in Texas,3 and given that indigent defendants are not afforded the assistance of appointed counsel at that procedural juncture, it is apparent that most indigent *pro se* habeas litigants will be unable to properly litigate their ineffective-assistance claims, based on their lack of the legal expertise necessary to properly raise such claims. To explain this problem in more detail, (A) I review the applicable legal standard for ineffective-assistance-of-counsel claims to show that it is a high bar that cannot likely be met by most *pro se* litigants, even those with likely meritorious claims, and (B) I show that, without the assistance of counsel on habeas for raising ineffectiveness claims, such claims will largely go unaddressed, thereby leaving unprotected the fundamental Sixth Amendment right to the effective assistance of trial counsel.

3

See Andrews v. State, 159 S.W.3d 98, 102 (Tex. Crim. App. 2005) ("[W]e have said that the record on direct appeal is in almost all cases inadequate to show that counsel's conduct fell below an objectively

reasonable standard of performance and that the better course is to pursue the claim in habeas proceedings.").**A. The Standard for Ineffective-Assistance-of-Counsel Claims is Demanding**

The relevant legal standard for establishing a claim of ineffective assistance of trial counsel is rigorous, and it is in no way conducive to *pro se* litigation. To prevail on a claim of ineffectiveness, an applicant must meet the two-prong test set out in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

First, an applicant must demonstrate deficient performance by showing that his {486 S.W.3d 569} attorney's representation fell below an objective standard of reasonableness, as judged by prevailing professional norms. *Id.* at 690. In order to do so, an applicant must overcome the strong presumption that counsel's conduct was reasonable. *See Burt v. Titlow*, 571 U.S. 12, 134 S. Ct. 10, 17, 187 L. Ed. 2d 348 (2013) ("We have said that counsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable judgment,' and that the burden to 'show that counsel's performance was deficient' rests squarely on the defendant.") (quoting *Strickland*, 466 U.S. at 687, 690); *Ex parte Overton*, 444 S.W.3d 632, 640 (Tex. Crim. App. 2014) ("There is a strong presumption that counsel's conduct was reasonable and judicial scrutiny of it will be highly deferential.").4 A claimant must generally prove deficiency using affirmative evidence in the record sufficient to overcome the presumption that the challenged action was sound trial strategy. *Ex parte Bryant*, 448 S.W.3d 29, 39 (Tex. Crim. App. 2014).

4

See also Ex parte Bryant, 448 S.W.3d 29, 39 (Tex. Crim. App. 2014) ("[A]ppellate scrutiny of the performance of counsel is highly deferential, and trial counsel's performance is assessed by the totality of the circumstances as they existed at the time of trial, not with the benefit of hindsight or by relying on only isolated circumstances at trial."); *Andrews*, 159 S.W.3d at 101 (explaining that, in evaluating deficient performance, "we commonly assume a strategic motive if any can be imagined and find counsel's performance deficient only if the conduct was so outrageous that no competent attorney would have engaged in it").

Second, an applicant must demonstrate prejudice by establishing that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the proceeding. *Id.*; *see also id.* at 686 (explaining that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result").

As the Supreme Court has recognized, "[s]urmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). In light of the demanding requirements for satisfying the *Strickland* standard, it is difficult to imagine that most *pro se* litigants untrained in the law could prevail in meeting this high standard.**B. The Issue is Effective Assistance of Counsel at Trial**

I conclude that habeas counsel should be appointed in this case to pursue ineffective-assistance-of-counsel claims against counsel at trial, in accordance with the established legal principle that a defendant has a constitutional right to the effective assistance of counsel at that stage of his criminal proceedings. My conclusion is not premised on the existence of a general right to habeas counsel, but is instead rooted in the constitutional right to the effective assistance of counsel at trial.**1. There is Currently No General Constitutional Right to Habeas Counsel**

Here, this case reaches this Court by a *pro se* habeas application, and it would be tempting to disregard the absence of counsel at this juncture with the simple proposition that there is no general constitutional right to the assistance of counsel on {486 S.W.3d 570} collateral review of a criminal conviction. *See Pennsylvania v. Finley*, 481 U.S. 551, 554-55, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987) (explaining that the Supreme Court has "never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions," and concluding that a state habeas

petitioner has "no such right [to appointed counsel] when attacking a conviction that has long since become final upon exhaustion of the appellate process").5 Because the Supreme Court has already determined in *Finley* that a habeas applicant does not have a general constitutional right to appointed counsel in a post-conviction proceeding, I do not attempt to revisit that determination here. *See id.*6

5

See also Ex parte Graves, 70 S.W.3d 103, 110 (Tex. Crim. App. 2002) ("It is a well established principle of federal and state law that no constitutional right to effective assistance of counsel exists on a writ of habeas corpus. . . . [A] convicted person has no constitutional right to *any* counsel, much less 'constitutionally effective' counsel, in either discretionary appeals or on writs of habeas corpus[.]").

6

I note here that, in *Martinez v. Ryan*, the Supreme Court clarified that it remains an open question of constitutional law "whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." *See* 566 U.S. 1, 132 S. Ct. 1309, 1315, 182 L. Ed. 2d 272 (2012). As the Supreme Court noted in *Martinez*, "the Constitution may require States to provide counsel in initial-review collateral proceedings because 'in [these] cases . . . state collateral review is the first place a prisoner can present a challenge to his conviction.'" *Id.* (quoting *Coleman v. Thompson*, 501 U.S. 722, 755, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)). The Court in *Martinez* observed that such a procedure "makes the initial-review collateral proceeding a prisoner's 'one and only appeal' as to an ineffective-assistance claim, and this may justify an exception to the constitutional rule that there is no right to counsel in collateral proceedings." *Id.* (quoting *Coleman*, 501 U.S. at 755). Although the Supreme Court expressly declined to reach that constitutional question in *Martinez*, the Court has never foreclosed the possibility of such a limited constitutional right to the effective assistance of counsel in a post-conviction proceeding for the purpose of raising a Sixth Amendment ineffectiveness challenge.

I, therefore, am not suggesting at this juncture that all habeas applicants be appointed counsel to pursue their claims. Rather, I am suggesting that, when a habeas applicant has complained of ineffective assistance of trial counsel, and when it appears to a habeas court that a colorable claim exists, based either on the substance of the *pro se* pleadings or in light of the record, the habeas court should appoint counsel for such an applicant to pursue that claim in order to ensure that he has been afforded his constitutional right to the effective assistance of counsel.**2. There is a Right to Effective Counsel at Trial**

The issue at stake here is the right to the effective assistance of counsel at trial and the need for Texas to provide a meaningful avenue for litigants to vindicate that constitutional right. *See Gideon*, 372 U.S. at 344. The question, therefore, is whether Texas currently has an adequate procedural scheme by which an indigent defendant may raise a challenge to the effectiveness of counsel. I conclude that it does not. More importantly, the Supreme Court has determined (a) that Texas's current scheme constitutes an inadequate vehicle by which an indigent defendant may raise an ineffective-assistance claim and, therefore, presents an unacceptable risk that meritorious claims will go unremedied, and (b) that the problem is significant enough that it was necessary to alter the federal approach to resolving these claims left unaddressed due to the inadequacies of Texas's system. After examining {486 S.W.3d 571} in (c) the approach for resolving this type of problem in federal and other state courts, I conclude in (d) that this Court may employ the current statutes for appointing habeas counsel in order to ensure that defendants' substantial claims of ineffective assistance of trial counsel are afforded meaningful consideration on post-conviction review.**a. Texas's Scheme is Inadequate to Protect Defendants' Sixth Amendment Rights**

The Supreme Court has recently addressed the inadequacies in Texas's system for litigating claims of ineffectiveness of trial counsel. *See Trevino v. Thaler*, 569 U.S. 413, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013). With respect to the inadequacy of a direct appeal for raising such a claim, the Supreme Court observed in *Trevino* that the "structure and design of the Texas system in actual operation"

makes it "'virtually impossible' for an ineffective assistance claim to be presented on direct review." *Id.* at 1915 (quoting *Robinson v. State*, 16 S.W.3d 808, 810 (Tex. Crim. App. 2000)). It explained that the reason that a direct appeal is generally inadequate is because "'the inherent nature of most ineffective assistance' of trial counsel 'claims' means that the trial court record will often fail to 'contai[n] the information necessary to substantiate' the claim." *Id.* at 1918 (quoting *Ex parte Torres*, 943 S.W.2d 469, 475 (1997)). Additionally, it observed that, although a motion for new trial may in some cases provide a means to develop the record on appeal, that vehicle "is often inadequate because of time constraints and because the trial record has generally not been transcribed at this point.'" *Id.* (quoting *Torres*, 943 S.W.2d at 475).7 In light of the need for evidence outside the trial record and the relevant time constraints, the Supreme Court determined that "the Texas procedural system-as a matter of its structure, design, and operation-does not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal." *Id.* at 1921. Thus, although Texas law "appears at first glance to permit . . . the defendant initially to raise a claim of ineffective assistance of trial counsel on direct appeal," the system, {486 S.W.3d 572} in actual operation, makes it "virtually impossible" to adequately present that type of claim at that procedural juncture. *See id.* at 1915.

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In addition to the authorities cited above, the Supreme Court cited several provisions in the Texas Rules of Appellate Procedure in support of the proposition that direct appeal is an inadequate vehicle for bringing an ineffective-assistance-of-trial-counsel claim. *See Trevino*, 133 S. Ct. at 1918-19 (citing Tex. R. App. Proc. 21.4 (2013) (motion for a new trial must be made within 30 days of sentencing); Rules 21.8(a), (c) (trial court must dispose of motion within 75 days of sentencing); Rules 35.2(b), 35.3(c) (transcript must be prepared within 120 days of sentencing where a motion for a new trial is filed and this deadline may be extended)). It also cited several of this Court's opinions, as well as a treatise from professors Dix and Schmolesky. *See id.* at 1919 (citing *Thompson* v. *State*, 9 S.W.3d 808, 813-814, and n. 6 (Tex. Crim. App. 1999) ("[I]n the vast majority of cases, the undeveloped record on direct appeal will be insufficient for an appellant to satisfy the dual prongs of *Strickland*"; only "[r]arely will a reviewing court be provided the opportunity to make its determination on direct appeal with a record capable of providing a fair evaluation of the merits of the claim . . ."); *Goodspeed* v. *State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) (similar); *Andrews*, 159 S.W.3d at 102-103 (similar); *Ex parte Brown*, 158 S.W.3d 449, 453 (Tex. Crim. App. 2005) (*per curiam*) (similar); *Jackson* v. *State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998) (*per curiam*) (similar); 42 G. Dix & J. Schmolesky, Texas Practice Series § 29:76, pp. 844-845 (3d ed. 2011) (hereinafter Texas Practice) (explaining that "[o]ften" the requirement that a claim of ineffective assistance of trial counsel be supported by a record containing direct evidence of why counsel acted as he did "will require that the claim . . . be raised in postconviction habeas proceedings where a full record on the matter can be raised")).

The Supreme Court has also suggested that a Texas post-conviction writ application, if undertaken without the effective assistance of counsel, is an inadequate vehicle for litigating ineffective-assistance claims. *See id.* at 1919-20; *see also Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 1317, 182 L. Ed. 2d 272 (2012). In *Trevino*, the Court indicated that the lack of representation, or ineffective representation, in a Texas post-conviction proceeding could "deprive a defendant of any review of [an ineffective-assistance-of-trial-counsel] claim at all." *Trevino*, 133 S. Ct. at 1918. The Court stated, "[A]s the Court of Criminal Appeals has concluded, in Texas 'a writ of habeas corpus' issued in state collateral proceedings ordinarily 'is essential to gathering the facts necessary to . . . evaluate . . . [ineffective-assistance-of-trial-counsel] claims,'" and, therefore, "collateral review normally constitutes the preferred-and indeed as a practical matter, the only-method for raising an ineffective-assistance-of-trial-counsel claim." *Id.* at 1918, 1920 (quoting *Torres*, 943 S.W.2d at 475). Although Texas has provided a vehicle-an application for a writ of habeas corpus under Article 11.07 of the Code of Criminal Procedure-for presenting complaints about the effectiveness of trial counsel,

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the problem is that indigent defendants have no right to counsel at that juncture. Moreover, ineffectiveness claims require factual and legal development in order to meet *Strickland*'s rigid standard of proof. The Supreme Court discussed this problem in *Martinez*, in which it stated,

> Without the help of an adequate attorney, a prisoner will have [ ] difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim [on habeas review]. Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy. When the issue cannot be raised on direct review, moreover, a prisoner asserting an ineffective-assistance-of-trial-counsel claim in an initial-review collateral proceeding cannot rely on a court opinion or the prior work of an attorney addressing that claim. To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney.*Martinez*, 132 S. Ct. at 1317. The Court further reasoned that prisoners are generally "unlearned in the law" and "may not comply with the State's procedural rules or may misapprehend the substantive details of federal constitutional law." *Id.* And it observed that, "[w]hile confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record." *Id.* Thus, the Court concluded that, when a state's system for litigating ineffectiveness claims has the effect of "mov[ing] trial ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, the State significantly diminishes prisoners' ability to file such claims." *Id.* at 1318.
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> The problem can be quickly summarized like this: "Texas courts in effect have directed defendants to raise claims of ineffective assistance of trial counsel on collateral, rather than direct, review," which is a point of the proceedings at which defendants have no right to counsel. *Trevino*, 133 S. Ct. at 1919. Because "the Texas procedural system would create significant unfairness" in light of its failure to allow litigants to adequately pursue their complaints in state court, the Supreme Court {486 S.W.3d 573} changed its approach so that federal courts would be permitted to address state ineffective-assistance-of-counsel claims as if those claims were presented for the first time in a federal habeas proceeding. *Id.*

b. The Federal Approach Has Changed Due to Texas's Deficiencies

Texas's problem in failing to provide an adequate mechanism for indigent defendants to complain about the ineffectiveness of trial counsel was significant enough that the Supreme Court decided to craft an equitable remedy in federal court to address this situation. This is important because, even though the Supreme Court identified this problem as being so significant as to require a federal equitable remedy, this Court has, as yet, declined to even consider whether any problem exists. Furthermore, as a result of this Court's inaction in this area, federal courts are now resolving state ineffectiveness claims in the first instance without any deference to state-court decisions about state-court cases. Thus, in many cases, state appellate courts have become inconsequential to ineffective-assistance-of-counsel claims that are later reviewed for the first time on the merits in federal court. Here, therefore, this applicant will likely be able to obtain merits review of his substantial ineffective-assistance claim in the first instance in federal court because this Court has refused to ensure that he is appointed counsel for purposes of asserting his claim in state court. This Court's inaction thus makes this Court irrelevant for purposes of this type of litigation.

Given its recognition that an initial state habeas proceeding undertaken without the effective assistance of counsel would effectively deprive Texas defendants of any meaningful review of their ineffective-assistance claims, the Supreme Court crafted a federal equitable remedy that would permit such claims to be raised and adjudicated for the first time on federal habeas review. *See id.* at 1921. The Supreme Court held that, where a state procedural framework makes it highly unlikely that a defendant will have a meaningful opportunity to raise an ineffective-assistance claim on direct appeal, a procedural default "'will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that

proceeding was ineffective.'" *Id.* (quoting *Martinez*, 132 S. Ct. at 1320). The Court reasoned that such an equitable remedy was necessary in order to protect the "critically important" right to the "adequate assistance of counsel at trial," given that claims pertaining to that right would involve the "need for a new lawyer, the need to expand the trial court record, and the need for sufficient time to develop the claim." *Id.*

In reaching its conclusion in *Trevino*, the Supreme Court relied upon the reasoning in its former opinion in *Martinez*, in which it had similarly held that Arizona's scheme for litigating ineffective-assistance-of-trial-counsel claims, which required that such claims be raised on collateral review, was inadequate to ensure that valid Sixth Amendment claims were afforded meaningful consideration. *Martinez*, 132 S. Ct. at 1315, 1319. In *Martinez*, the Court observed that, although federal habeas courts are generally barred from considering any claim that has not first been properly presented and adjudicated in state court, an exception to that general rule was required under these circumstances in order to "protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel." *Id.* at 1315.

It was within the context of this recognition-that a convicted person cannot reasonably {486 S.W.3d 574} be expected to raise a viable *pro se* challenge to the effectiveness of his trial attorney without the assistance of counsel-that the Supreme Court crafted the equitable remedy in *Martinez* and *Trevino* that would permit such litigants to raise their substantial claims for the first time in a federal habeas proceeding. *See id.* The Supreme Court held that the creation of an equitable exception to its normal procedural-default rules was appropriate in light of fact that "the initial collateral review proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim." *Id.*; *Trevino*, 133 S. Ct. at 1919. Given that the right at issue-the right to the effective assistance of counsel at trial-is a "bedrock principle in our justice system," the Court reasoned that such an equitable exception was necessary to ensure that substantial ineffective-assistance claims were given meaningful consideration. *Martinez*, 132 S. Ct. at 1317.

It is true that the holdings of *Martinez* and *Trevino* do not establish a broad constitutional right to the effective assistance of post-conviction counsel. *See In re Sepulvado*, 707 F.3d 550, 556 (5th Cir. 2013); *Chunestudy v. State*, 2014 Ark. 345, 438 S.W.3d 923, 930 (Ark. 2014) ("*Trevino* clarified aspects of *Martinez* but it did not require states to provide counsel to every petitioner in a collateral attack on a judgment."). And it is also true that the equitable rule created by those cases does not apply directly in state court. *See Banks v. State*, 150 So.3d 797, 799-800 (Fla. 2014) ("We have held that *Martinez* applies only to federal habeas proceedings and does not provide an independent basis for relief in state court proceedings. . . . Nor does *Trevino*."); *Evans v. State*, 868 N.W.2d 227, 229 n.3 (Id. 2015) (observing that holdings of *Martinez* and *Trevino* "pertain to the doctrine of procedural default in federal habeas cases and are inapplicable in state-court proceedings"). Nevertheless, the reasoning underlying *Martinez* and *Trevino* applies with equal force in state courts as it does in federal courts, and the wisdom of those cases should serve as a starting point for "an important dialogue . . . about what procedures states need to have to give defendants an opportunity to vindicate their Sixth Amendment rights to effective trial counsel."8 *See Commonwealth v. Holmes*, 621 Pa. 595, 79 A.3d 562, 583 (Pa. 2013) (observing that *Martinez* and *Trevino* reaffirmed "the centrality of claims of ineffective assistance of trial counsel," the "bedrock importance of effective counsel at trial," and the "derivative importance of opportunities to litigate claims of trial counsel ineffectiveness"). The reasoning of those cases strongly suggests that, by channeling ineffective-assistance claims to post-conviction review, which is a stage at which most defendants are unrepresented by counsel, the current Texas scheme presents an unacceptable {486 S.W.3d 575} risk that defendants' valid Sixth Amendment claims will go unremedied. One legal commentator has recognized this problem by asking, "[H]ow does a criminal defendant remedy the deprivation of a right that he cannot raise procedurally until he is no longer constitutionally entitled to an attorney?"9 In answer to this problem, I

propose that, in order to give full effect to the dictates in the federal Constitution that guarantee the effective assistance of trial counsel to all criminal defendants, Texas must either, on the one hand, alter its procedural scheme to afford indigent defendants a meaningful opportunity to raise ineffectiveness claims on direct appeal, or on the other hand, remand colorable ineffective-assistance claims to the habeas court for it to appoint counsel.10 Because the instant case reaches this Court at the habeas stage, only the latter of these two options is applicable here.

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See Eve Brensike Primus, *Effective Trial Counsel After Martinez v. Ryan: Focusing on the Adequacy of State Procedures*, 122 Yale L.J. 2604, 2624-25 (2013) (arguing that, although it has "long been the case that a majority of states routinely underenforce defendants' Sixth Amendment rights to counsel by erecting procedural regimes that effectively prevent them from ever challenging their trial attorneys' performance," *Martinez* "demonstrates that the [Supreme] Court has noticed this problem and is willing to use its equitable habeas power to begin addressing it"). Primus additionally notes that, "[i]f *Martinez*'s expanded grounds for cause [for excusing procedural default in federal court] do not send a strong enough message to the majority of states about the need to reform their procedures, the federal courts can use other, broader equitable doctrines . . . to catalyze change," including a possible federal "recognition of a constitutional right to counsel on initial collateral review." *Id.* at 2625.

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See Ty Alper, *Toward a Right to Litigate Ineffective Assistance of Counsel*, 70 Wash. & Lee L. Rev. 839, 840, 845-46 (2013) (observing that, as a practical matter, "the current state of the law ensures that the vast majority of convicted noncapital defendants have no recourse to raise ineffective assistance of counsel claims, and thus no mechanism for vindicating the requirement that the counsel *Gideon* provides be effective"; "so long as noncapital defendants are not provided postconviction counsel, [ ] most violations of the fundamental right to counsel at trial are likely to go unremedied"). In response to this quandary, Professor Alper suggests that courts should recognize "a narrow[ ] yet critical right to raise a claim of ineffective assistance of trial counsel in at least one forum" at a stage when the litigant is represented by counsel. *Id.* at 846.

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See Alper, supra note 9, at 852 ("[F]or the bedrock principle of *Gideon* to provide meaningful protection to the indigent-accused, counsel must be afforded to allow for the presentation of ineffective assistance of trial counsel claims.").**c. Federal Courts and Other State Procedures for Appointing Habeas Counsel**

Other jurisdictions employ a multitude of approaches to appointing counsel for *pro se* habeas petitioners, and, although most of these approaches are based on the particular statutes in each jurisdiction, they are nevertheless instructive in providing general guidelines for when counsel should be appointed. In a federal habeas proceeding, the magistrate or federal district court judge has the discretion to appoint counsel to a "financially eligible person" whenever the judge "determines that the interests of justice so require." U.S.C. § 3006A(a)(2)(B). The United States Third Circuit Court of Appeals has explained that, in determining whether counsel should be appointed under this provision, a court "must first decide if [the] petitioner has presented a nonfrivolous claim and if the appointment of counsel will benefit the petitioner and the court. Factors influencing a court's decision include the complexity of the factual and legal issues in the case, as well as the *pro se* petitioner's ability to investigate facts and present claims." *Reese v. Fulcomer*, 946 F.2d 247, 263 (3d Cir. 1991).11 This provision leaves to the "sound discretion of the district court" whether to appoint counsel. *See Engberg v. Wyoming*, 265 F.3d 1109, 1122 n. 10 (10th Cir. 2001). In addition to the statutory provision permitting {486 S.W.3d 576} discretionary appointment of counsel in the interests of justice, the federal rules governing habeas proceedings require the appointment of counsel if it is necessary for the effective utilization of discovery procedures, or whenever an evidentiary hearing is required. *See* Rules Governing § 2255 Proceedings, Rules 6(a), 8(c).

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See also Hoggard v. Purkett, 29 F.3d 469, 471 (8th Cir. 1994) (in deciding whether it is suitable to appoint counsel in a federal habeas proceeding, a court considers the legal and factual complexity of the petition and the petitioner's ability to present the claims, among other factors); *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983) ("In deciding whether to appoint counsel in a habeas proceeding, the district court must evaluate the likelihood of success on the merits as well as the ability of the petitioner to articulate his claims . . . in light of the complexity of the legal issues involved.").

With respect to the approaches taken by state courts, in *Martinez*, the Supreme Court noted that "[m]ost jurisdictions have in place procedures to ensure counsel is appointed for substantial ineffective-assistance claims." *Martinez*, 132 S. Ct. at 1319. The Court observed that some states "appoint counsel in every first collateral proceeding," and it identified eight states that routinely appoint counsel to every indigent habeas applicant. *Id.*12 Other states, it explained, appoint counsel "if the claims require an evidentiary hearing, as claims of ineffective assistance often do." *Id.*13 And, it further observed that other states "appoint counsel if the claims have some merit to them or the state habeas trial court deems the record worthy of further development."14

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The Court cited statutes from Alaska (Alaska Stat. 18.85.100(c)); Arizona (Ariz. Rule Crim. Proc. 32.4(c)(2)); Connecticut (Conn. Gen. Stat. § 51-296(a)); Maine (Me. Rules Crim. Proc. 69, 70(c)); North Carolina (N.C. Gen. Stat. Ann. § 7A-451(a)(2)); New Jersey (N.J. Ct. Rule 3:22-6(b)); Rhode Island (R.I. Gen Laws § 10-9.1-5); and Tennessee (Tenn. Code Ann. § 8-14-205). In addition to these states, I note that Pennsylvania routinely appoints counsel in the initial round of habeas proceedings as a matter of right, upon the defendant's filing of such a petition. *See* Pa. R. Crim. Proc. 904(c).

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Here, the court cited provisions from Kentucky (Ky. Rule Crim. Proc. 11.42(5) (if an application raises a "material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing and, if the movant is without counsel of record and if financially unable to employ counsel, shall upon specific written request by the movant appoint counsel to represent the movant in the proceeding, including appeal"); Louisiana (La. Code Crim. Proc. art. 930.7) ("If the petitioner is indigent and alleges a claim which, if established, would entitle him to relief, the court may appoint counsel."; court "shall appoint counsel" if an evidentiary hearing is held on the merits of the claim); Michigan (Mich. Rule Crim. Proc. 6.505(A) ("If the defendant has requested appointment of counsel, and the court has determined that the defendant is indigent, the court may appoint counsel for the defendant at any time during the proceedings under this subchapter."; counsel "must be appointed" if a hearing is ordered); and South Carolina (S.C. Rule Civ. Proc. 71.1(d) ("If, after the State has filed its return, the application presents questions of law or fact which will require a hearing, the court shall promptly appoint counsel to assist the applicant if he is indigent. Counsel shall be given a reasonable time to confer with the applicant. Counsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary.").

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In support of this proposition, the Court cited statutes and case law from Arkansas (Ark. Rule Crim. Proc. 37.3(b); *Hardin v. Arkansas*, 350 Ark. 299, 86 S.W.3d 384, 385 (Ark. 2002) (courts have "discretion" to appoint counsel for post-conviction proceedings; exercise of discretion depends on whether appellant makes a substantial showing that his claim has merit and that he cannot proceed without counsel); Colorado (Colo. Rule Crim. Proc. 35; *Kostal v. People*, 167 Colo. 317, 447 P.2d 536 (Colo. 1968) (if application contains "no allegations of facts" on which relief can be granted, then appointment of counsel is unnecessary); Delaware (Del. Super. Ct. Rule Crim. Proc. 61(e)(1) (permitting appointment of counsel in the exercise of discretion and good cause shown); Indiana (Indiana Rule Post-Conviction Remedies Proc. 1, § 9(a) (public defender may represent indigent habeas petitioner if public defender determines that proceedings are meritorious and in the interests

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of justice); Kansas (Kan. Stat. Ann. § 22-4506) (court shall appoint counsel if it determines that habeas petition presents substantial questions of law or triable issues of fact); New Mexico (N.M. Dist. Ct. Rule Crim. Proc. 5-802) (if the court does not order summary dismissal, counsel shall be appointed); Idaho (*Hust v. State*, 147 Idaho 682, 214 P.3d 668, 669 (2009) (where *pro se* pleadings fail to demonstrate the "possibility of a non-frivolous claim," appointment of counsel unnecessary); North Dakota (*Jensen v. State*, 2004 ND 200, 688 N.W.2d 374, 378 (N.D. 2004) (appointment of counsel in habeas proceedings is within trial court's sound discretion; "a trial court should read applications for post-conviction relief in the light most favorable to the applicant, and when a substantial issue of law or fact may exist, the trial court should appoint counsel"); and the District of Columbia (*Wu v. United States*, 798 A.2d 1083, 1089 (D.C. 2002) (prisoner's request for counsel in post-conviction proceeding is within sound discretion of trial court; where the prisoner's motion is "palpably incredible . . . fails to state a claim . . . is vague and conclusory, the appointment of counsel is not required").

{486 S.W.3d 577} The approaches taken by other jurisdictions are informative in highlighting the types of considerations that may give rise to a finding that appointment of counsel is necessary in a post-conviction proceeding. These approaches are consistent in suggesting that, in determining whether to appoint counsel, courts should consider whether the face of the record indicates the presence of disputed or unresolved factual issues that are in need of development, whether the legal issues presented are so complex as to make it unlikely that a *pro se* litigant could adequately address them, whether the pleadings or other information in the record reveals the existence of a plausible basis for relief or the possible existence of a non-frivolous claim, whether the legal questions presented are substantial, and whether the interests of justice require appointment of counsel.

I would employ these types of considerations in determining whether, under the existing Texas statutes, which I discuss in more detail next, counsel should be appointed to *pro se* habeas litigants seeking to challenge the effectiveness of their trial attorneys. *See* Tex. Code Crim. Proc. art. 11.07, § 3(d).15

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I note here that the Texas Legislature recently enacted a statute that provides for the mandatory appointment of counsel in habeas proceedings under certain circumstances. *See* Tex. Code Crim. Proc. art. 11.074. That statute provides that, upon a representation by the State that an indigent applicant is entitled to relief on the basis that he is not guilty, that he is guilty only of a lesser offense, or that he was convicted under a law that has been declared unconstitutional by this Court or the Supreme Court, then the court shall appoint counsel to represent him in a post-conviction habeas proceeding. *Id.* Although this statute is limited in scope, it evinces a willingness by the Legislature to expand upon the availability of appointed counsel in habeas proceedings under some circumstances, and it further evinces a recognition that habeas proceedings undertaken without the assistance of counsel may not be effective in vindicating an applicant's constitutional rights.**d. Current Texas Statutes Permit Appointment of Habeas Counsel**

The problem in Texas is not that existing statutes fail to permit this Court to ensure that counsel is appointed to assist applicant in pursuit of his ineffective-assistance-of-counsel claim, but rather is that this Court generally does not utilize those statutes in such a way as to ensure that counsel is appointed for indigent habeas applicants who have colorable ineffective-assistance claims, based either on the substance of the *pro se* pleadings or in light of the record. Code of Criminal Procedure Article 11.07 provides that "[t]he convicting court may appoint an attorney or magistrate to hold a hearing and make findings of fact." Tex. Code Crim. Proc. art. 11.07, § 3(d). Thus, anytime a hearing is deemed necessary, Article 11.07 expressly authorizes appointment of counsel. In addition, the Code of Criminal Procedure more generally permits a court to appoint counsel in any criminal proceeding "if the {486 S.W.3d 578} court concludes that the interests of justice require representation." *Id.* art. 1.051(c). And, more particularly, the Code mandates that an "eligible indigent

defendant is entitled to have the trial court appoint an attorney to represent him" in "a habeas corpus proceeding if the court concludes that the interests of justice require representation." *Id.* art. 1.051(d)(3). The existing statutes, therefore, provide an adequate basis upon which to conclude that appointment of counsel is required in any case in which either the pleadings or the face of the record gives rise to a colorable, nonfrivolous claim for which legal expertise is required in order to ensure that the claim is afforded meaningful consideration.

It has been suggested that Texas already spends enough money on the representation of indigent defendants and essentially that enough is enough. Although I agree that Texas has improved its procedures for appointing qualified attorneys in criminal cases, the narrower problem that the Supreme Court identified with Texas's system for resolving ineffective-assistance-of-counsel claims is one that has only recently drawn close scrutiny. The Supreme Court acknowledged that, because of the lack of appointed counsel for the purpose of raising ineffectiveness claims on habeas, litigants with meritorious claims may be deprived of any meaningful opportunity to present their claims. And the problem was significant enough that the Supreme Court had to modify its federal procedural-default law in order to now permit federal courts to review these state claims in the first instance without deference to state courts. The Supreme Court's reasoning in *Martinez* and *Trevino* refutes any suggestion that the existing safeguards for providing quality appointed counsel at trial and on direct appeal are adequate to prevent valid claims of ineffectiveness from arising in the first place.

It is true that some indigent defendants are capable of adequately raising ineffective-assistance claims on their own, and it is further true that this Court occasionally remands cases to the habeas court for appointment of counsel. But such cases are the exception to the rule. I note that, although this Court remanded a total of 388 habeas cases to the habeas court for hearings or affidavits in fiscal year 2015, and it granted relief in 184 cases, those numbers do not particularly address ineffective-assistance claims, *pro se* habeas applications, or the number of applicants who received appointed counsel. In any event, these cases constitute a very small percentage of the 4,698 habeas applications that were filed in that year. *See* Annual Statistical Report for the Texas Judiciary, Fiscal Year 2015, Court of Criminal Appeals Activity Report, Detail 4. As such, I am unpersuaded that the occasional success of *pro se* habeas litigants in raising ineffectiveness challenges renders this problem unworthy of our attention. And, regardless of my personal view that this issue is substantially important and deserving of this Court's attention, I note that the issue was deemed significant enough by the Supreme Court for it to recognize the problem and craft an equitable remedy in order to address it. That should be enough for this Court to decide that the problem is worthy of our attention.

Applying the foregoing considerations to the present case, I would accordingly hold that this indigent habeas applicant is entitled to appointed counsel for the purpose of presenting his claim that trial counsel was ineffective, given that, as explained further below, the face of the record reveals the existence of a non-frivolous claim. I would, therefore, remand this case to the habeas court for it to appoint habeas counsel, who would then be permitted to amend the instant habeas application.{486 S.W.3d 579} **II. The Instant Record Shows that Trial Counsel May Have Been Ineffective**

Although applicant's *pro se* pleadings are inadequate to give rise to any colorable ineffective-assistance claims, this record, on its face, reveals the existence of facts that suggest that applicant's trial counsel may have been constitutionally ineffective. In section A, I show that applicant has a colorable ineffective-assistance claim based on the record in this case, which reveals that applicant was deprived of a language interpreter at his trial due to counsel's erroneous advice that an interpreter would interfere with his ability to represent applicant at trial. Then, in section B, I examine applicant's present application for a writ of habeas corpus to demonstrate that it is inadequate to present any colorable ineffective-assistance claim, and, therefore, that appointment of habeas counsel is necessary to investigate and pursue any viable claims.**A. Applicant Has a Colorable Claim Alleging Ineffective Assistance of Counsel**

At his trial for murder, applicant, who speaks only Spanish, was deprived of his constitutional right to

have the assistance of an interpreter who would translate the testimony and the proceedings into a language that applicant could understand.16 This occurred because applicant's attorney told him that having an interpreter would interfere with counsel's ability to concentrate.17 In my statement dissenting to this Court's denial of applicant's motion for rehearing as to this Court's opinion on discretionary review, I explained the absurdity of that advice, stating,

By doing nothing apart from asking trial counsel if appellant wanted an interpreter, the trial court judge was either uninformed of his absolute duty to obtain an effective waiver from appellant or unwilling to do so. This problem was compounded by the conduct of trial counsel, who apparently believed himself to be so inept that he would be unable to concentrate on witness testimony merely because of the presence of an interpreter. In light of the fact that the interpreter translated the testimony of many of the Spanish-speaking witnesses into English for the jury, trial counsel's reasoning {486 S.W.3d 580} that he would be unable to concentrate if the interpreter also translated the testimony of English-speaking witnesses into Spanish for appellant lacked any logical foundation and was misguided. Based on the absence of information from the trial court judge and the misguided representations by trial counsel, appellant cannot rationally be characterized as having been adequately informed of his rights so as to have been able to make an intelligent, knowing, and voluntary waiver of his federal constitutional right to an interpreter.*Garcia v. State*, 429 S.W.3d 604, 621 (Tex. Crim. App. 2014) (Alcala, J., dissenting from denial of rehearing). Based on my earlier statements in this case, it appears that applicant has a colorable claim of ineffective assistance of trial counsel due to counsel's failure to request a language interpreter for applicant.

16
The failure to appoint an interpreter can implicate the federal constitutional right to confront the witnesses. *See Baltierra v. State*, 586 S.W.2d 553, 556-57 (Tex. Crim. App. 1979) (discussing right to interpreter under Confrontation Clause); *United States v. Lim*, 794 F.2d 469, 470 (9th Cir. 1986) (noting that "a defendant whose fluency in English is so impaired that it interferes with his right to confrontation or his capacity, as a witness, to understand or respond to questions has a constitutional right to an interpreter").

17
The court of appeals determined that the direct-appeal record failed to show that trial counsel was ineffective, but it did so on the limited record before it that failed to elaborate on counsel's reasons for declining an interpreter. *Garcia v. State*, No. 13-11-00547-CR, 2013 Tex. App. LEXIS 2328, 2013 WL 865411, at *6 (Tex. App.-Corpus Christi Mar. 7, 2013) (mem. op., not designated for publication). It stated,

At the hearing on [applicant's] motion for new trial, counsel, himself, clearly articulated his reasons for his decision not to request an English-to-Spanish interpreter. He explained that he did not want an interpreter because the interpreter would distract both him and the jury. The prosecutor did testify that counsel informed her that he did not want an interpreter for [applicant] because [counsel] did not "really want him to know what's going on." However, except for this testimony, the record is silent regarding counsel's tactical decision, if for this reason. . . . No one elicited specific testimony from counsel or further testimony from the prosecutor regarding this alleged motivation for counsel's strategic decision.*Id.*

When applicant had appellate counsel on direct appeal, that counsel did raise a colorable claim of ineffective assistance of trial counsel, but the court of appeals determined that, based on the limited record before it at that time, counsel's decision to reject the assistance of an interpreter was reasonable trial strategy. *See Garcia v. State*, No. 13-11-00547-CR, 2013 Tex. App. LEXIS 2328, 2013 WL 865411 (Tex. App.-Corpus Christi Mar. 7, 2013) (not designated for publication) (concluding that "Garcia failed to demonstrate, on this record, deficient performance by his trial counsel"). I strongly disagree with that assessment by the appellate court. But, even though the court of appeals

already decided that issue, that would not preclude applicant from presenting new evidence in support of his ineffectiveness claim and pursuing a similar claim on post-conviction review after more fully developing the record in the case.18

18
Even though applicant's ineffective-assistance complaint was addressed on direct appeal, this Court would still consider that same challenge in an application for a writ of habeas corpus if the applicant were to present new facts in support of it. *See Ex parte Nailor*, 149 S.W.3d 125, 131 (Tex. Crim. App. 2004).

On appellant's petition for discretionary review, this Court's majority opinion upheld a separate determination by the court of appeals that applicant had knowingly, intelligently, and voluntarily waived his right to an interpreter. *See Garcia*, 429 S.W.3d at 609. But this Court did not grant review as to the question before us in this habeas application with respect to whether applicant was deprived of the effective assistance of trial counsel. Thus, this Court has never considered whether counsel's actions in declining the services of an interpreter could constitute valid trial strategy.

In his instant application, applicant contends that trial counsel was ineffective but, because he is proceeding *pro se* at this juncture, the claims he has presented are not viable. In spite of applicant's failure to present this Court with a viable claim on habeas, even on the face of the existing record, it is apparent that a plausible basis exists for asserting that applicant's trial counsel lacked any sound trial strategy in suggesting that applicant should waive his right to a language interpreter. I note here that at least two other state supreme courts have held that a criminal-defense attorney lacked any reasonable trial strategy in declining the services of an interpreter for a non-English-speaking defendant. *See Ling v. State*, 288 Ga. 299, 702 S.E.2d 881, 883 n.1 (Ga. 2010); *In re Khan*, 184 Wn.2d 679, 363 P.3d 577, 582 (Wash. 2015). In *Ling*, the Georgia Supreme Court rejected trial counsel's claim that it was a matter of sound trial strategy to waive the services of an interpreter based on his {486 S.W.3d 581} concern that "using an interpreter might cause the jury to grow impatient and [he] did not want to draw too much attention to the fact that [the defendant] was not a native English speaker." *Ling*, 702 S.E.2d at 883 n.1. In that case, the Court stated that counsel's strategy was "not professionally reasonable" because it was based on "speculative fears." *Id.* In *Khan*, the Washington Supreme Court also held that defense counsel's decision not to obtain an interpreter for a defendant who lacked fluency in English was not reasonable trial strategy. *See Khan*, 363 P.3d at 582 (holding that counsel's failure "deprived [the defendant] of the ability to understand many of the questions he was asked on the stand and likely deprived him of the ability to understand many other aspects of the trial," and concluding that "[t]his is not a meaningful strategy worthy of deference").

I also note that, in an analogous case, this Court has held that trial counsel's failure to secure the services of an interpreter for a hearing-impaired defendant constituted ineffective assistance, thereby warranting a new trial. *See Ex parte Cockrell*, 424 S.W.3d 543 (Tex. Crim. App. 2014). In *Cockrell*, this Court held that a reasonably competent attorney "would have realized" that Cockrell was deaf and "should have requested the assistance" mandated by the Code of Criminal Procedure. *Id.* at 547. It further observed that any measures taken by counsel to accommodate Cockrell's disability were "inadequate and ineffectual." *Id.* at 549. In concluding that Cockrell was entitled to post-conviction habeas relief, the Court reasoned that, as a result of counsel's error, Cockrell was "deprived . . . of his right to understand the nature of the trial proceedings, to assist in his own defense, and to confront the witnesses against him." *Id.* at 545. This Court further determined that Cockrell had satisfied the *Strickland* prejudice standard, observing that, because counsel had "fail[ed] to assert applicant's rights to an interpreter to ensure that he could understand the testifying witnesses and participate in his own defense during a substantial portion of the trial, the result of this proceeding is unreliable because of 'a breakdown in the adversarial process that our system counts on to produce just results.'" *Id.* at 557 (quoting *Strickland*, 466 U.S. at 696). *Cockrell*, in addition to the authorities cited above, constitutes a persuasive legal basis upon which applicant could have sought post-conviction relief in this case. But,

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as described further below, in spite of the existence of factual and legal bases upon which applicant could have raised a viable ineffective-assistance claim in this case, applicant's *pro se* pleadings are inadequate to raise any colorable claim for this Court to consider. Under these circumstances, the appointment of counsel is necessary in order to give applicant a meaningful opportunity to litigate his ineffective-assistance claim.**B. Applicant's Instant *Pro Se* Application Is Inadequate**

Applicant's *pro se* habeas application is nonsensical. Applicant argues that appellate counsel was ineffective for failing to bring certain complaints that would show that trial counsel was ineffective, even though he simultaneously acknowledges in his pleadings that a "direct appeal [is] the wrong means for reviewing an ineffective assistant [sic] claim," which is more properly addressed on habeas.19 Applicant also filed a supplementary memorandum of law {486 S.W.3d 582} that is equally nonsensical.20 Applicant's pleadings reflect a fundamental misunderstanding of the nature of habeas corpus as a vehicle for raising claims pertaining to the ineffective assistance of trial counsel, in light of his persistent incorrect suggestion that he was unable to raise such claims due to appellate counsel's failure to properly raise them on direct appeal.

19
Ground one in the application states, "Appellate attorney was ineffective on appeal due to his lack of knowledge and failure to properly brief" the ineffective-assistance claims. It further states that applicant's appellate attorney "failed to properly brief all the errors of trial counsel on appeal, thus relinquishing the right to argue those errors on habeas corpus." In that same ground, applicant also challenges the effectiveness of his trial attorney on the basis of counsel's "failure to investigate alternative person in murder case, interview witnesses, [and to properly] investigate [the] victim's dying declaration," among other complaints.

20
For example, in his memorandum of law, applicant states, "By appellate counsel's action's, [sic] appellant was denied the right to complain of the multiple errors by the trial attorney." Applicant then goes on to list those alleged errors, including (1) the trial attorney's failure to conduct an investigation regarding the identity of the perpetrator, (2) the "police department's failure to notify the Mexican Consular [sic] in violation of the 1963 Vienna Convention," (3) "not requiring the prosecution's case to survive the crucible of meaningful adversarial testing," and (4) "failure to inform appellant that he could file an 11.07 with the Court of Criminal Appeals." Applicant does not explain how appellate counsel's performance fell below an objective standard of reasonableness for failing to raise those claims, nor does he attempt to show prejudice as a result of appellate counsel's failure to raise those claims. The substance of what applicant is attempting to assert for the first time is apparent, even despite the lack of clarity in his *pro se* pleadings. He asserts that trial counsel did not investigate an alternative person, did not interview witnesses, did not investigate the victim's dying declaration of who killed him, did not investigate the victim's mother-in-law's statement about applicant's father as being the actual killer, and did not complain about the lack of notification to the Mexican Consulate of applicant's arrest. In light of these allegations, and, more importantly, in light of the existence of a colorable claim that applicant's trial counsel was ineffective for failing to secure the services of a language interpreter, I conclude that this case should be remanded to the habeas court for appointment of counsel to pursue factual and legal development of these claims.**III. Conclusion**

It is readily apparent to the Supreme Court, as it is to me, that Texas's procedural scheme for addressing ineffective-assistance-of-trial-counsel claims fails to ensure that substantial claims are afforded meaningful consideration. Until there is action either by the Legislature through statutory enactments, or by this Court through judicial decisions that would expand the availability of appointed counsel on collateral review in order to effectuate the constitutional right to the effective assistance of counsel at trial, defendants' ineffective-assistance claims will go largely unaddressed. Consequently, the bedrock principle that a defendant is entitled to an effective trial attorney will remain a theoretical concept in Texas rather than a constitutional guarantee. In light of this recognition, and in light of the

fact that this record, on its face, gives rise to a colorable ineffective-assistance claim, I would remand this application for appointment of counsel. Because I conclude that Texas's system for litigating ineffectiveness claims fails to adequately safeguard defendants' Sixth Amendment rights, and because this failure likely results in the loss of a viable ineffective-assistance claim in the present case, I respectfully dissent.

Filed: April 6, 2016

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Footnotes

1
Tex. Code Crim. Proc. art. 1.051(c), art. 26.04(c).

2
We granted relief in 170 cases in 2014; 180 in 2013; and 221 in 2012.

3
A plea of guilty is not a bar to habeas relief, but relief is less likely to be warranted when a defendant admits guilt and waives various constitutional protections.

4
Tex. Code Crim. Proc. art. 26.04.

5
In counties with a population of greater than 250,000, counsel must be appointed within one working day of the request. In counties of less than 250,000, counsel must be appointed within three working days. Tex. Code Crim. Proc. art. 1.051(c).

6
Tex. Code Crim. Proc. art 26.04(b)(6).

7
Texas Indigent Defense Commission, / (last visited Apr. 4, 2016).

8
Furthermore, last year, the Indigent Defense Commission requested an additional $196.8 million for the biennium in state funding for indigent defense. Sharon Keller, 84th Leg., Senate Committee on Finance (Part I), S.B. 2 (February 2, 2015).

9
The record is not entirely clear, but it appears that the attorneys who represented applicant during the entire trial/new trial/appeal process were sometimes appointed and sometimes retained.

1
See Trevino v. Thaler, 569 U.S. 413, 133 S. Ct. 1911, 1919, 185 L. Ed. 2d 1044 (2013).

2
There may be other ways to fix Texas's inadequate system for ensuring the right to effective counsel that are not pertinent here, such as changing the Texas Rules of Appellate Procedure to extend the period of time permitted for motions for new trial so that defendants could have the benefit of the trial record and time to investigate ineffectiveness claims. *See* Tex. R. App. P. 21.4(a) (providing thirty-day window after imposition or suspension of sentence in open court for filing motion for new trial); *see also Robinson v. State*, 16 S.W.3d 808, 810-11 (Tex. Crim. App. 2000) (observing that "there is generally not a realistic opportunity to adequately develop the record for appeal in post-trial motions" for the purpose of raising an ineffective-assistance claim; "in most cases, the pursuit of such a claim on direct appeal may be fruitless"). Because any such measures would be purely prospective in their application to future cases, I do not consider them at length here.

3

See Andrews v. State, 159 S.W.3d 98, 102 (Tex. Crim. App. 2005) ("[W]e have said that the record on direct appeal is in almost all cases inadequate to show that counsel's conduct fell below an objectively reasonable standard of performance and that the better course is to pursue the claim in habeas proceedings.").

4

See also Ex parte Bryant, 448 S.W.3d 29, 39 (Tex. Crim. App. 2014) ("[A]ppellate scrutiny of the performance of counsel is highly deferential, and trial counsel's performance is assessed by the totality of the circumstances as they existed at the time of trial, not with the benefit of hindsight or by relying on only isolated circumstances at trial."); *Andrews*, 159 S.W.3d at 101 (explaining that, in evaluating deficient performance, "we commonly assume a strategic motive if any can be imagined and find counsel's performance deficient only if the conduct was so outrageous that no competent attorney would have engaged in it").

5

See also Ex parte Graves, 70 S.W.3d 103, 110 (Tex. Crim. App. 2002) ("It is a well established principle of federal and state law that no constitutional right to effective assistance of counsel exists on a writ of habeas corpus. . . . [A] convicted person has no constitutional right to *any* counsel, much less 'constitutionally effective' counsel, in either discretionary appeals or on writs of habeas corpus[.]").

6

I note here that, in *Martinez v. Ryan*, the Supreme Court clarified that it remains an open question of constitutional law "whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." *See* 566 U.S. 1, 132 S. Ct. 1309, 1315, 182 L. Ed. 2d 272 (2012). As the Supreme Court noted in *Martinez*, "the Constitution may require States to provide counsel in initial-review collateral proceedings because 'in [these] cases . . . state collateral review is the first place a prisoner can present a challenge to his conviction.'" *Id.* (quoting *Coleman v. Thompson*, 501 U.S. 722, 755, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)). The Court in *Martinez* observed that such a procedure "makes the initial-review collateral proceeding a prisoner's 'one and only appeal' as to an ineffective-assistance claim, and this may justify an exception to the constitutional rule that there is no right to counsel in collateral proceedings." *Id.* (quoting *Coleman*, 501 U.S. at 755). Although the Supreme Court expressly declined to reach that constitutional question in *Martinez*, the Court has never foreclosed the possibility of such a limited constitutional right to the effective assistance of counsel in a post-conviction proceeding for the purpose of raising a Sixth Amendment ineffectiveness challenge.

7

In addition to the authorities cited above, the Supreme Court cited several provisions in the Texas Rules of Appellate Procedure in support of the proposition that direct appeal is an inadequate vehicle for bringing an ineffective-assistance-of-trial-counsel claim. *See Trevino*, 133 S. Ct. at 1918-19 (citing Tex. R. App. Proc. 21.4 (2013) (motion for a new trial must be made within 30 days of sentencing); Rules 21.8(a), (c) (trial court must dispose of motion within 75 days of sentencing); Rules 35.2(b), 35.3(c) (transcript must be prepared within 120 days of sentencing where a motion for a new trial is filed and this deadline may be extended)). It also cited several of this Court's opinions, as well as a treatise from professors Dix and Schmolesky. *See id.* at 1919 (citing *Thompson* v. *State*, 9 S.W.3d 808, 813-814, and n. 6 (Tex. Crim. App. 1999) ("[I]n the vast majority of cases, the undeveloped record on direct appeal will be insufficient for an appellant to satisfy the dual prongs of *Strickland*"; only "[r]arely will a reviewing court be provided the opportunity to make its determination on direct appeal with a record capable of providing a fair evaluation of the merits of the claim . . ."); *Goodspeed* v. *State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) (similar); *Andrews*, 159 S.W.3d at 102-103 (similar); *Ex parte Brown*, 158 S.W.3d 449, 453 (Tex. Crim. App. 2005) (*per curiam*) (similar); *Jackson* v. *State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998) (*per curiam*) (similar); 42 G. Dix & J. Schmolesky, Texas Practice Series § 29:76, pp. 844-845 (3d ed. 2011) (hereinafter Texas Practice)

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(explaining that "[o]ften" the requirement that a claim of ineffective assistance of trial counsel be supported by a record containing direct evidence of why counsel acted as he did "will require that the claim . . . be raised in postconviction habeas proceedings where a full record on the matter can be raised")).

8

See Eve Brensike Primus, *Effective Trial Counsel After Martinez v. Ryan: Focusing on the Adequacy of State Procedures*, 122 Yale L.J. 2604, 2624-25 (2013) (arguing that, although it has "long been the case that a majority of states routinely underenforce defendants' Sixth Amendment rights to counsel by erecting procedural regimes that effectively prevent them from ever challenging their trial attorneys' performance," *Martinez* "demonstrates that the [Supreme] Court has noticed this problem and is willing to use its equitable habeas power to begin addressing it"). Primus additionally notes that, "[i]f *Martinez*'s expanded grounds for cause [for excusing procedural default in federal court] do not send a strong enough message to the majority of states about the need to reform their procedures, the federal courts can use other, broader equitable doctrines . . . to catalyze change," including a possible federal "recognition of a constitutional right to counsel on initial collateral review." *Id.* at 2625.

9

See Ty Alper, *Toward a Right to Litigate Ineffective Assistance of Counsel*, 70 Wash. & Lee L. Rev. 839, 840, 845-46 (2013) (observing that, as a practical matter, "the current state of the law ensures that the vast majority of convicted noncapital defendants have no recourse to raise ineffective assistance of counsel claims, and thus no mechanism for vindicating the requirement that the counsel *Gideon* provides be effective"; "so long as noncapital defendants are not provided postconviction counsel, [ ] most violations of the fundamental right to counsel at trial are likely to go unremedied"). In response to this quandary, Professor Alper suggests that courts should recognize "a narrow[ ] yet critical right to raise a claim of ineffective assistance of trial counsel in at least one forum" at a stage when the litigant is represented by counsel. *Id.* at 846.

10

See Alper, supra note 9, at 852 ("[F]or the bedrock principle of *Gideon* to provide meaningful protection to the indigent-accused, counsel must be afforded to allow for the presentation of ineffective assistance of trial counsel claims.").

11

See also Hoggard v. Purkett, 29 F.3d 469, 471 (8th Cir. 1994) (in deciding whether it is suitable to appoint counsel in a federal habeas proceeding, a court considers the legal and factual complexity of the petition and the petitioner's ability to present the claims, among other factors); *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983) ("In deciding whether to appoint counsel in a habeas proceeding, the district court must evaluate the likelihood of success on the merits as well as the ability of the petitioner to articulate his claims . . . in light of the complexity of the legal issues involved.").

12

The Court cited statutes from Alaska (Alaska Stat. 18.85.100(c)); Arizona (Ariz. Rule Crim. Proc. 32.4(c)(2)); Connecticut (Conn. Gen. Stat. § 51-296(a)); Maine (Me. Rules Crim. Proc. 69, 70(c)); North Carolina (N.C. Gen. Stat. Ann. § 7A-451(a)(2)); New Jersey (N.J. Ct. Rule 3:22-6(b)); Rhode Island (R.I. Gen Laws § 10-9.1-5); and Tennessee (Tenn. Code Ann. § 8-14-205). In addition to these states, I note that Pennsylvania routinely appoints counsel in the initial round of habeas proceedings as a matter of right, upon the defendant's filing of such a petition. *See* Pa. R. Crim. Proc. 904(c).

13

Here, the court cited provisions from Kentucky (Ky. Rule Crim. Proc. 11.42(5) (if an application raises a "material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing and, if the movant is without counsel of record and if financially unable to employ counsel, shall upon specific written request by the movant appoint counsel to represent the movant in the proceeding, including appeal"); Louisiana (La. Code Crim. Proc. art. 930.7) ("If the petitioner is

indigent and alleges a claim which, if established, would entitle him to relief, the court may appoint counsel."; court "shall appoint counsel" if an evidentiary hearing is held on the merits of the claim); Michigan (Mich. Rule Crim. Proc. 6.505(A) ("If the defendant has requested appointment of counsel, and the court has determined that the defendant is indigent, the court may appoint counsel for the defendant at any time during the proceedings under this subchapter."; counsel "must be appointed" if a hearing is ordered); and South Carolina (S.C. Rule Civ. Proc. 71.1(d) ("If, after the State has filed its return, the application presents questions of law or fact which will require a hearing, the court shall promptly appoint counsel to assist the applicant if he is indigent. Counsel shall be given a reasonable time to confer with the applicant. Counsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary.").

14

In support of this proposition, the Court cited statutes and case law from Arkansas (Ark. Rule Crim. Proc. 37.3(b); *Hardin v. Arkansas*, 350 Ark. 299, 86 S.W.3d 384, 385 (Ark. 2002) (courts have "discretion" to appoint counsel for post-conviction proceedings; exercise of discretion depends on whether appellant makes a substantial showing that his claim has merit and that he cannot proceed without counsel); Colorado (Colo. Rule Crim. Proc. 35; *Kostal v. People*, 167 Colo. 317, 447 P.2d 536 (Colo. 1968) (if application contains "no allegations of facts" on which relief can be granted, then appointment of counsel is unnecessary); Delaware (Del. Super. Ct. Rule Crim. Proc. 61(e)(1) (permitting appointment of counsel in the exercise of discretion and good cause shown); Indiana (Indiana Rule Post-Conviction Remedies Proc. 1, § 9(a) (public defender may represent indigent habeas petitioner if public defender determines that proceedings are meritorious and in the interests of justice); Kansas (Kan. Stat. Ann. § 22-4506) (court shall appoint counsel if it determines that habeas petition presents substantial questions of law or triable issues of fact); New Mexico (N.M. Dist. Ct. Rule Crim. Proc. 5-802) (if the court does not order summary dismissal, counsel shall be appointed); Idaho (*Hust v. State*, 147 Idaho 682, 214 P.3d 668, 669 (2009) (where *pro se* pleadings fail to demonstrate the "possibility of a non-frivolous claim," appointment of counsel unnecessary); North Dakota (*Jensen v. State*, 2004 ND 200, 688 N.W.2d 374, 378 (N.D. 2004) (appointment of counsel in habeas proceedings is within trial court's sound discretion; "a trial court should read applications for post-conviction relief in the light most favorable to the applicant, and when a substantial issue of law or fact may exist, the trial court should appoint counsel"); and the District of Columbia (*Wu v. United States*, 798 A.2d 1083, 1089 (D.C. 2002) (prisoner's request for counsel in post-conviction proceeding is within sound discretion of trial court; where the prisoner's motion is "palpably incredible . . . fails to state a claim . . . is vague and conclusory, the appointment of counsel is not required").

15

I note here that the Texas Legislature recently enacted a statute that provides for the mandatory appointment of counsel in habeas proceedings under certain circumstances. *See* Tex. Code Crim. Proc. art. 11.074. That statute provides that, upon a representation by the State that an indigent applicant is entitled to relief on the basis that he is not guilty, that he is guilty only of a lesser offense, or that he was convicted under a law that has been declared unconstitutional by this Court or the Supreme Court, then the court shall appoint counsel to represent him in a post-conviction habeas proceeding. *Id.* Although this statute is limited in scope, it evinces a willingness by the Legislature to expand upon the availability of appointed counsel in habeas proceedings under some circumstances, and it further evinces a recognition that habeas proceedings undertaken without the assistance of counsel may not be effective in vindicating an applicant's constitutional rights.

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The failure to appoint an interpreter can implicate the federal constitutional right to confront the witnesses. *See Baltierra v. State*, 586 S.W.2d 553, 556-57 (Tex. Crim. App. 1979) (discussing right to interpreter under Confrontation Clause); *United States v. Lim*, 794 F.2d 469, 470 (9th Cir. 1986)

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