# NO. 12-15-00153-CR

# IN THE COURT OF APPEALS

# TWELFTH COURT OF APPEALS DISTRICT

# TYLER, TEXAS

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| ***COBY RAY HUDGINS, APPELLANT*** | ***§*** | ***APPEAL FROM THE 124TH*** |
| ***V.*** | ***§*** | ***JUDICIAL DISTRICT COURT*** |
| ***THE STATE OF TEXAS, APPELLEE*** | ***§*** | ***GREGG COUNTY, TEXAS*** |

***MEMORANDUM OPINION***

A jury found Appellant Coby Ray Hudgins guilty of murder and assessed his punishment at imprisonment for ninety-nine years. In three issues, Appellant contends that his counsel's representation at the punishment stage of the trial was ineffective. We affirm the judgment of conviction, reverse the portion of the judgment assessing punishment, and remand the cause to the trial court for a new trial on punishment.

## BACKGROUND

On the evening of October 5, 2013, Appellant had three guests in the home he shared with his fiancé, Kastina Anderson: Leea Anderson, Kastina's sister; Kayla Williams, Leea's best friend; and Gabriele Tucker, Appellant's cousin. All were drinking alcohol, and at least two of the young women had smoked marijuana. According to the witnesses, the atmosphere was cordial and relaxed. Appellant said, "Let me show you my real old lady," went to his bedroom, and brought back a pistol. Appellant pulled the slide back, pointed the gun at Kayla Williams's forehead, and fired it. Stippling on Williams's face indicated the gun was only a few inches from her face when fired.

Leea and Tucker fled from the house. Immediately after firing the shot that killed Williams, Appellant fired the pistol three more times in quick succession. One bullet hit the

refrigerator and two hit the door jamb. He left in his automobile, returned quickly, and left again. Tucker called her aunt, Appellant's mother, and told her to come to the house "because Coby was acting crazy." Appellant's mother arrived quickly, and after calling her fiancé, called 911.

Appellant drove his automobile into a bridge railing wrecking the vehicle and activating the airbags. He escaped from the vehicle relatively unscathed. Nevertheless, he was taken to the hospital. His blood alcohol level was 0.284, more than three times the legal limit.

When interviewed by Trooper Jacob Muehlstein, who knew nothing about the homicide, Appellant kept blurting out "I'm going to prison, just take me." He also kept loudly proclaiming his love for Kastina. Appellant was arrested for driving while intoxicated.

Appellant testified at the guilt-innocence stage of the trial. He denied shooting Williams intentionally. He testified that he did not know the gun was loaded. He said he intended to hand it to her and it fired. He had pulled the slide back to make sure it was not loaded. After the shot that killed Williams, he was in shock. He said he did not recall firing the other three shots.

The trial court charged the jury on both murder and manslaughter. Appellant's counsel argued that Appellant knew his conduct was reckless and that he was guilty of manslaughter, but not murder. The jury found Appellant guilty of murder.

At the punishment phase, Appellant's great uncle, father, and maternal grandmother testified. His father testified that Appellant's cousin, Dustin Lay, had sexually assaulted Appellant when Appellant was younger. Lay had been charged and convicted of the offense. Appellant had testified against him. Lay had been released from incarceration some months before this incident and had made threats against Appellant. Betty Jean Tucker, Appellant's grandmother and primary caretaker for most of his life, testified that she was aware of the sexual assault, and that it had been very hard on the whole family. The jury returned a verdict of ninety-nine years.

At the hearing on Appellant's motion for new trial, Wade French, a forensic psychologist, testified regarding the nature of the ex parte assistance a forensic psychiatrist or psychologist could provide a defendant who had been sexually abused. He related how the stress from a traumatic event like sexual abuse typically affects the victim's life and conduct, and that it especially affects the victim's reaction to future stress or stimuli. It was Dr. French's opinion that a forensic psychiatrist or psychologist, after evaluating the sexually abused defendant, could

then explain in depth the life altering effects of such trauma to the jury. This, he believed, was especially relevant in mitigating a defendant's moral blameworthiness and in aiding the jury to more accurately assess an appropriate sentence.

Appellant also testified. He said he paid his $25,000 attorney's fee in $400 weekly payments by check or in cash. Appellant told the court that his attorney never talked to him about punishment witnesses "other than the family." His attorney asked about a pastor, but Appellant could not contact him. His attorney, he said, did not try to contact the pastor. His attorney never asked him about his employers or teachers that Appellant believed would have testified in his behalf. His attorney never contacted the Buckner Center where Appellant was counseled and treated following his sexual assault. Nor did his attorney talk to Dr. Mark Miller in Kilgore who treated him following the homicide. Appellant testified that his attorney never talked to him about speaking to his doctors, nor did he get him to sign releases for his medical records.

Appellant told the court that his attorney told him he was investigating the possibility of a "Bernie Tiede defense," and that he would try to get the State to pay for "Dr. Gripon."[1] However, after the hearing on competency and sanity, his attorney never again discussed the matter with him.

Appellant's counsel testified that he was only vaguely aware of the possibility of the court appointing a forensic expert to give ex parte assistance to indigent defendants. He remembered that he gave Dr. Gripon's telephone number to Appellant's father telling him "y'all can have it done if you want to. The judge is not going to pay for it [a forensic psychologist or psychiatrist to assist the defense]." Then counsel added, "[N]ow, I never heard any more from it." He made no further effort to seek appointment of an expert to assist the defense in producing mitigation evidence on Appellant's behalf during punishment if needed.

[1] Tiede was granted postconviction habeas relief and a new punishment hearing after being convicted of murder and sentenced to life imprisonment. Psychiatrist "Dr. Gripon" was the State's expert at trial, and "Dr. Mears" was Tiede's expert. Dr. Mears's testimony suggested that Tiede had experienced dissociation when he shot his victim and made a reference to Tiede's "child history of trauma." Dr. Gripon testified that Tiede had an unremarkable mental health history that would not support Dr. Mears's determination. The habeas evidence included Tiede's recent revelation that he was sexually abused as a child for an extended period of time. After interviewing Tiede for habeas purposes, Dr. Gripon changed his opinion, concluding that Tiede did, in fact, suffer from a dissociate episode at the time he shot his victim. ***Ex parte Tiede***, 448 S.W.3d 456, 458-60 (Tex. Crim. App. 2014) (per curiam) (Alcala, J., concurring).

Counsel testified that he asked Appellant many times for witnesses related to the punishment stage of the case. Counsel said that "he was going to get ahold of the church people" to testify for Appellant. But all at once Appellant told him he did not want anyone from the church to testify. Counsel did not know what the problem was.

Buck Files, an attorney who is board certified in criminal law, testified regarding the "Performance Guidelines for Non-Capital Criminal Defense Representation" promulgated by the Texas Court of Criminal Appeals and adopted by the State Bar of Texas. Files traced the development of the case law recognizing the right of indigents to state-paid expert assistance when necessary for a fair trial. He identified those elements of Appellant's trial counsel's performance that, in his opinion, were deficient when measured against the State Bar Performance Guidelines.

Files believed that counsel's most serious failure was in not requesting ex parte forensic psychological or psychiatric assistance to assist in the development of mitigating evidence at the punishment stage. Instead, counsel asked the court to appoint its own expert to conduct a competency and sanity examination although there was no real question of Appellant's competence or sanity. According to Files, this demonstrated counsel's ignorance of well-established, relevant case law. Given counsel's knowledge of Appellant's sexual abuse, counsel's failure to procure ex parte assistance was, Files believed, performance below that of constitutionally effective counsel. A forensic psychologist could have explained to the jury in depth how the prior sexual abuse affected Appellant's life and actions.

Although the Guidelines pointedly warn counsel against delay in the punishment stage investigation, Files's review of counsel's file discovered nothing related to the punishment phase except for the names of two probation witnesses. It was Files's conclusion that counsel's preparation for the punishment phase did not "go beyond just a cursory conversation with the defendant or with his family."

Files testified that it did not appear from counsel's file that counsel had obtained relevant information concerning Appellant's background and personal history, employment history and skills, education, or medical history and condition in preparation for sentencing. Nor did counsel attempt to obtain releases in order to obtain Appellant's medical records. Files considered counsel's almost total failure to investigate and pursue every avenue that could lead to mitigating

evidence to be ineffective representation at the punishment stage of the trial. The trial court denied Appellant's motion for new trial. This appeal followed.

## INEFFECTIVE ASSISTANCE OF COUNSEL

In his first issue, Appellant claims his counsel was ineffective at the punishment stage by failing to adequately investigate mitigating evidence, although counsel knew that Appellant had been the victim of traumatic sexual abuse as a child. In his second issue, Appellant maintains his counsel was ineffective in failing to acquire independent expert assistance to assist the defense in preparing and presenting mitigating evidence related to the sexual abuse of Appellant as a child. In his third issue, he claims his counsel was ineffective by failing to present any contextual evidence of how the proven prior sexual abuse might have affected him. These issues are, in effect, a challenge to the trial court's denial of his motion for new trial. *See* ***Bates***, 88 S.W.3d at 727. Therefore, we address them together.

### Standard of Review and Applicable Law

We review a trial court's ruling on a motion for new trial under an abuse of discretion standard. ***Charles v. State***, 146 S.W.3d 204, 208 (Tex. Crim. App. 2004) (superseded in part on other grounds by TEX. R. APP. P. 21.8(b), *as recognized in* ***State v. Herndon***, 215 S.W.3d 901, 905 n.5 (Tex. Crim. App. 2007)); ***Bates v. State***, 88 S.W.3d 724, 727-28 (Tex. App.—Tyler 2002, pet. ref'd).

To prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate that (1) his counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different, i.e. that the defense was prejudiced. ***Strickland v. Washington***, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064-65, 80 L. Ed. 2d 674 (1984); ***Tong v. State***, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000). A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Strickland***, 466 U.S. at 694, 104 S. Ct. at 2068; ***Tong***, 25 S.W.3d at 712.

In determining whether a defendant has shown prejudice during the punishment phase of a noncapital case, the relevant factors include the following: (1) whether the defendant received a maximum sentence, (2) the disparity, if any, between the sentence imposed and the sentence(s) requested by the respective parties, (3) the nature of the offense charged and the strength of the

evidence presented at the guilt-innocence phase of trial, (4) the egregiousness of counsel's error (meaning the relationship between the amount of effort and resources necessary to have prevented the error as compared to the potential harm from that error), and (5) the defendant's criminal history. ***Lampkin v. State***, 470 S.W.3d 876, 922 (Tex. App.–Texarkana 2015, pet. ref'd).

When the deficient performance arises from a failure to investigate and introduce mitigating evidence, the following additional factors are also relevant: (1) whether mitigating evidence was available, and if so, whether the available mitigating evidence was admissible, (2) the nature and degree of other mitigating evidence actually presented to the jury at punishment, (3) the nature and degree of aggravating evidence actually presented to the jury by the State at punishment, (4) whether and to what extent the jury might have been influenced by the mitigating evidence, (5) whether and to what extent the proposed mitigating evidence serves to explain the defendant's actions in the charged offense, and (6) whether and to what extent the proposed mitigating evidence serves to assist the jury in determining the defendant's blameworthiness. ***Id***.

For an appellant to prevail on an effective assistance of counsel argument resulting from professional errors applicable to the sentencing phase where the jury determined the sentence, the record must demonstrate ***Strickland*** prejudice beyond mere conjecture and speculation. ***Id***. at 918-19. Even a small increase in a defendant's sentence is prejudicial. ***Id***. at 917 (citing ***Glover v. United States***, 531 U. S. 198, 200, 202, 121 S. Ct. 696, 698-99, 148 L. Ed. 2d 604 (2001)).

Our review of counsel's representation is highly deferential; we indulge a strong presumption that counsel's conduct falls within a wide range of reasonable representation. ***Strickland***, 466 U.S. at 689, 104 S. Ct. at 2065. An appellant making an ineffective assistance of counsel claim must identify the acts or omissions of counsel alleged not to have been the result of reasonable professional judgment. ***Id***., 466 U. S. at 690, 104 S. Ct. at 2066. "The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." ***Id***. "[T]he defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" ***Id***., 466 U. S. at 689, 104 S. Ct. at 2065. The heavy measure

of deference accorded defense counsel's judgments, however, "must not be watered down into a disguised form of acquiescence." ***Profitt v. Waldon***, 831 F.2d 1245, 1248 (5th Cir. 1987).

A criminal defense lawyer must have a firm command of the facts of the case and the governing law in order to render reasonably effective assistance of counsel. ***Ex parte Welborn***, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990). A corollary of this requirement is that counsel has the responsibility to seek out and interview potential witnesses. ***Id***.

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

***Wiggins v. Smith***, 539 U.S. 510, 521-22, 123 S. Ct. 2527, 2535, 156 L. Ed. 2d 471 (2003) (quoting ***Strickland***, 466 U.S. at 690-91, 104 S. Ct. at 2066). Counsel is charged with making an independent investigation of the facts, taking care to avoid indiscriminate reliance on the client's version. ***Welborn***, 785 S.W.2d at 395. Defense counsel is obligated to conduct a thorough investigation of the defendant's background. ***Wiggins***, 539 U.S. at 522, 123 S. Ct. at 2535.

The sentencing stage of any case is, for many defendants, the time when the most important services of the entire proceeding can be performed. ***Vela v. Estelle***, 708 F.2d 954, 964 (5th Cir. 1983), *cert. denied sub nom.*, ***McKaskle v. Vela***, 464 U.S. 1053, 104 S. Ct. 736, 79 L. Ed. 2d 195 (1984); ***Milburn v. State***, 15 S.W.3d 267, 269 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). A strategic decision cannot be reasonable when counsel has failed to investigate the options and make a reasonable choice between them. ***Glenn v. Tate***, 71 F.3d 1204, 1207 n.1 (6th Cir. 1995), *cert. denied*, 519 U. S. 910, 117 S. Ct. 273, 136 L. Ed. 2d 196 (1996).

The Texas Court of Criminal Appeals has held that once it is shown that insanity will be a significant factor at trial, due process requires that the accused be given the means to advance that claim at trial. ***De Freece v. State***, 848 S.W.2d 150, 159 (Tex. Crim. App. 1993). "[T]he trial court abuses its discretion in failing to appoint, or to give 'prior . . . approval' to 'reasonable expenses incurred' by counsel for the accused to obtain, a competent psychiatrist to assist in the evaluation, preparation[,] and presentation of his insanity defense." ***Id***. In reaching its

conclusion, the court relied on the holding in ***Ake v. Oklahoma***, 470 U. S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). *See* ***id***. at 159-61.

In ***Ake***, a capital case, the United States Supreme Court concluded that, "without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high." ***Id***., 470 U. S. at 82, 105 S. Ct. at 1096. The Court held due process requires that "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." ***Id***., 470 U. S. at 83, 105 S. Ct. at 1096.

According to the court of criminal appeals, most courts considering ***Ake*** have held that it also applies to non-psychiatric experts. *See* ***Rey v. State***, 897 S.W.2d 333, 338 (Tex. Crim. App. 1995). The rule is that if an indigent defendant establishes a substantial need for an expert, without which the fundamental fairness of the trial will be called into question, ***Ake*** requires the appointment of an expert, regardless of the field of expertise. ***Id***.

In ***Ex parte Briggs***, 187 S.W.3d 458 (Tex. Crim. App. 2005), the appellant was charged with "first-degree injury to a child" after the death of her two month old son. ***Id***. at 460, 463. Her son, Daniel, was born with a congenital defect and numerous health problems. ***Id***. at 460. The sole issue was how Daniel died. ***Id***. at 468. Briggs's retained counsel decided not to fully investigate Daniel's medical records or consult with experts until he had been paid an additional $2,500 to $7,500 in expert fees. ***Id***. at 463. Briggs could never raise the money for the expert fees or the balance due on the attorney's fees. ***Id***. at 466. She pleaded guilty and received a seventeen year sentence. ***Id***. at 463.

Evidence adduced at the hearing on her writ application indicated Daniel's death was not a homicide. ***Id***. at 462. The court concluded that her counsel was ineffective and granted relief vacating her conviction. ***Id***. at 469-70. The court explained that when it became clear the applicant could not "come up with" the remainder of the fee or additional money for medical experts, a reasonably competent attorney would have several options:

1. Subpoena all of the doctors who had treated Daniel during the two months of his life to testify at trial. Introduce the medical records through the treating doctors and elicit their expert opinions;

2. If counsel was convinced that applicant could not pay for experts to assist him in preparation for trial or to provide expert testimony, withdraw from the case, explaining to the court that applicant was now indigent, prove that indigency (as was done in the writ proceeding), and request appointment of new counsel;

3. Remain as counsel with the payment of a reduced fee, but request investigatory and expert witness fees from the trial court for a now-indigent client pursuant to ***Ake v. Oklahoma***.

***Id***. at 468.

"'Prevailing norms of practice as reflected in the American Bar Association standards and the like . . . are guides to determining what is reasonable [assistance].'" ***Wiggins***, 539 U.S. at 522, 123 S. Ct. at 2536 (quoting ***Strickland***, 466 U.S. at 688-89, 104 S. Ct. at 2065). The State Bar of Texas has adopted "Performance Guidelines for Non-Capital Criminal Defense Representation."' *See generally* Jeff Blackburn and Andrea Marsh, *The New Performance Guidelines in Criminal Cases: A Step Forward for Texas Criminal Justice*, 74 TEX. BAR J. 616 (July 2011) *available at* https://www.texasbar.com/AM/Template.cfm?Section=Texas_Bar_Journal&Template=/CM/ContentDisplay.cfm&ContentID=14703.

While not black and white standards, the Guidelines may be persuasive authority in the judicial evaluation of claims of ineffective assistance. ***Id.*** at 617-18. Several of the Guidelines are particularly relevant in the instant case.

According to the Guidelines, the "primary and most fundamental obligation of defense counsel is to provide zealous and effective representation for the client at all stages of the criminal process." ***Id***. at 620 (Guideline 1.1 A.). At the initial interview, "[c]ounsel should obtain from the client all release forms necessary to obtain the client's medical, psychological, education, military, prison, and other records as may be pertinent." ***Id***. at 621-22 (Guideline 2.2 C.2.). Information that should be acquired includes "[a]ny necessary information waivers or releases that will assist in the client's defense, including preparation for sentencing; the written releases obtained should include a HIPAA . . . compliant release in case medical records are required . . . ." ***Id***. at 622 (Guideline 2.2 C.5g.).

During the investigation, "[c]ounsel should explore all avenues leading to facts relevant both to the merits and to the penalty in the event of conviction. In no case should counsel delay

a punishment phase investigation based on the belief that the client will be found not guilty or that the charges against the client will otherwise be dismissed." ***Id***. at 624 (Guideline 4.1 A.). In addition,

> [c]ounsel should consider whether expert or investigative assistance, including consultation and testimony, is necessary or appropriate. Counsel should utilize ex parte and in camera procedures to secure the assistance of experts when it is necessary or appropriate to:
>
> a. The preparation of the defense;
> b. Adequate understanding of the prosecution's case;
> c. Rebut the prosecution's case or provide evidence to establish any available defense;
> d. Investigate the client's competence to proceed, mental state at the time of the offense, or capacity to make a knowing and intelligent waiver of constitutional rights; and
> e. Mitigate any punishment that may be assessed after a verdict or plea of guilty to the alleged offense.

***Id***. (Guideline 4.1 B.9.). During both investigation and trial preparation, "counsel should develop and continually reassess a theory of the case and develop strategies for advancing appropriate defenses and mitigating factors, including those related to mental health, on behalf of the client." ***Id***. at 625 (Guideline 4.3).

During the sentencing process, counsel is obligated "[t]o seek and present to the court all reasonably available mitigating and favorable information that is likely to benefit the client[.]" ***Id***. at 633 (Guideline 8.1 C.). In preparing for sentencing, counsel should consider the need to "[o]btain from the client and other sources relevant information concerning such subjects as the client's background and personal history, prior criminal record, employment history and skills, education, medical history and condition, and financial status, and obtain from the client sources through which the information provided can be corroborated[.]" ***Id***. at 634 (Guideline 8.3 C.).

**Counsel's Representation**

The search for mitigating evidence should commence with the initial interview and continue throughout counsel's representation. In this case, it was clear from the outset that the appropriate defense strategy was to negotiate an agreement with the State to plead guilty to the lesser charge of manslaughter or, failing that, to obtain a conviction of manslaughter rather than

murder at trial.[2] Mitigating evidence would be of crucial importance in plea negotiations or as evidence at the punishment stage.

Appellant retained counsel seventeen months before trial. At some point during that interval, counsel became aware that Appellant had been sexually abused when he was eleven, and that he had testified in Gregg County against his abuser. This knowledge should have provoked further inquiry into the facts of the abuse and its impact on the victim. A reasonable investigation would have disclosed that Appellant, as a result of the abuse, had been treated by mental health professionals. Investigation would also have revealed that Dr. Mark Miller of Kilgore treated Appellant following the shooting and prescribed psychotropic medications for him. Counsel never obtained releases to secure the records of these treatments, nor did he attempt to interview the medical professionals involved. Instead, throughout the course of his representation, counsel ignored this obvious avenue to mitigating evidence that Appellant would need at trial.

Counsel, however, was at least aware that Appellant's history of sexual assault could bear on the case's outcome. He discussed the possibility of a "Bernie Tiede" defense with Appellant, and told him he would try to get the State to pay for it. To achieve this, counsel did not ask the court to appoint Dr. Gripon or another forensic psychiatrist to provide ex parte technical assistance to the defense to evaluate the effect of the sexual abuse on Appellant and Appellant's conduct, and, if appropriate, to testify for the defense. Counsel instead requested the appointment of Dr. Gripon to determine Appellant's competence and sanity.

In presenting the motion to the court, Appellant's counsel all but conceded that he did not believe Appellant was incompetent or had been insane at the time of the shooting. At the hearing on the motion, counsel struggled to explain what relief he actually sought by his motion.

> THE COURT: All right. We're here on the defendant's motion for competency examination and/or pleading insanity.
>
> Mr. Bennett, it's your motion. You may present it.
>
> MR. BENNETT: Yeah, Judge. This is more – and I'm not – **I don't think the boy is insane or maybe not incompetent, it has more to do with the reason this happened; the reason being that he was molested as a child by his own cousin – who was in the courtroom**

[2] As pertinent here, murder is intentionally or knowingly causing the death of an individual. TEX. PENAL CODE ANN. § 19.02(b)(1) (West 2011). Manslaughter is recklessly causing the death of an individual. ***Id***. § 19.04 (West 2011).

**the other day with him, matter of fact – and the new theories out there about what cause – what motivates people to, number one, get guns; number two, to be scared. That's going to be a factor in this case when it goes to court.**

And to my understanding and research, there's – the person who is pushing this is the one I requested from Beaumont, Texas; a very successful doctor of psychiatry. And it's a new field that I don't know that much about, Judge, and I'm not sure too many people do.

And I would just – and I'm not saying Dr. – the doctors you use; I know them, I know them well. And I – and I respect them and all. **But it would be good to have a – new ideas put into our system and new things to work with, Judge. And – and I would like to learn it. I would like to learn what these theories are and how they approach it, personally. So that's the reason I'm asking for this – this guy, Judge.**

**And if my client had the money and the resources – he don't even have a job now – I'm sure I could get him and his family to do it, if they had the money. But they don't have the money.** His aunt and grandmother just had a wreck, and his aunt died last Saturday, a week ago, in a car wreck. And grandmother is still in the hospital, I believe –

THE DEFENDANT: She's out.

MR. BENNETT: No, she's out. So they've been through a bad time. I – I'd just like to try new blood, Judge, is what I'm talking about.

THE COURT: Well, it sounds – but what you said – first of all, does your – do you believe your client has the sufficient present ability to consult with you with a reasonable degree of rational understanding?

MR. BENNETT: I – I would – **I would usually have said yes until I found out what these theories are and all on – on children that are – are sexually molested and what their problems are. Judge, I – I'm just not sure of that anymore.**

As far as being able to talk to him, sure, I can talk to him. As far as what happened, that's kind of bleaky, too, because of the conditions that were in effect that night. **I'm more wanting to be one who can testify as to why someone would be scared of somebody who had sexually molested him when he was a child and how that affects him. –**

THE COURT: That's different from competency.

MR. BENNETT: It is – well –

THE COURT: **You're ask – you have asked for a motion for incompetency or sanity evaluation, and – but what you're telling me, the reasons for it is really more defensive issues.**

. . . .

THE COURT: Well, for purposes of a sanity or competency evaluation, I believe the issue has been raised. I am not going to appoint this doctor. First of all, the Court has no knowledge of this doctor. Secondly, this is a court-appointed physician and, reading the doctor's fee schedule, would probably cost the county over 5,000 or $6,000. I will appoint Dr. Tom Allen to examine him for purposes of incompetency and/or sanity.

**If the defense wishes a different expert for purposes of trial, when they can petition the Court for that or hire their own expert. That's the ruling of the Court.**

MR. BENNETT: Thank you, Judge.

(emphasis added).

In attempting to explain to the court what he was seeking by his competency motion, Appellant's counsel inadvertently described what ex parte psychological or psychiatric assistance could best provide the defense—technical help in evaluating the effect of sexual abuse on Appellant and in explaining how sexual abuse might have influenced his life and conduct. The court recognized that counsel's explanation pertained to "really more defensive issues." And at the close of the hearing, the judge pointedly stated that "[i]f the defense wishes a different expert for purposes of trial, then they can petition the court for that or hire their own expert." It is evident from these comments that the court was open to appointing an expert to assist in developing mitigation evidence if a proper request was made and supported.

Although there were apparently no grounds to doubt Appellant's competence or sanity, counsel asked the court to appoint a disinterested expert to make just such an evaluation. Any report generated by the disinterested expert must be provided to the court and to the State and the defense. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.025(d) (West Supp. 2016). But the expert's evaluation of competence and sanity was not going to produce what counsel sought to learn—the influence of sexual abuse on the victim's life and behavior. If counsel had requested the appointment of a forensic psychologist or psychiatrist to assist the defense in the investigation, preparation, and trial of the case, the expert's opinions and reports would have been available only to Appellant's lawyer to be shared with Appellant. *See* ***Ballew v. State***, 640 S.W.2d 237, 239-40 (Tex. Crim. App. [Panel Op.] 1980) (attorney-client privilege encompasses agents whose services are required by attorney to properly prepare client's case, including psychiatrists and their notes and reports); *see also* TEX. R. EVID. 503(a)(4)(A), (b)(1)(A).

Counsel's testimony during the motion for new trial hearing shows that Appellant had difficulty communicating with him about what happened the night in question. Counsel related that he even sought to have Appellant come out to his property to shoot a gun hoping that activity would help Appellant show counsel how he handled the gun that night, what happened or help him regain forgotten memories. Appellant refused to even hold a gun nor would he look at any photographs taken at the crime scene. Counsel stated that Appellant was the "worse client about telling what happened" and that he [counsel] learned more from his client on the stand at trial than [he'd] learned in a year and a half trying to prod him on what happened that night.

This, at the very least, should have prompted counsel to pursue professional assistance to determine or explain why Appellant was unable to remember or express his memories of the events of the shooting as well as his actions and demeanor afterwards.

Counsel's testimony at the motion for new trial hearing indicates that he was unaware of the availability of ex parte assistance for indigent defendants. The opinions developing this right had been delivered more than a decade before Appellant's trial. Most dealt with ex parte assistance as an avenue to mitigating evidence—evidence that might reduce the defendant's blameworthiness in the eyes of the jurors. Defense counsel is charged with knowledge of the applicable law. ***Ex parte Welch***, 981 S.W.2d 183, 185 (Tex. Crim. App. 1998) (citing ***Ex parte Davis***, 866 S.W.2d 234 (Tex. Crim. App. 1993)). Appellant's counsel was essentially unaware of the governing law. If not, he was doubly derelict in not applying it.

At the hearing on Appellant's motion for a competency examination, Appellant's counsel had told the court that Appellant was indigent, and that neither Appellant nor his family could pay an expert. If counsel was convinced of Appellant's indigence, he should have requested state-funded expert assistance under ***Ake***. *See* ***Briggs***, 187 S.W.3d at 469. Yet despite Appellant's absolute need for mitigating evidence and the court's expressed willingness to entertain a defense motion for an ex parte expert, counsel never requested such assistance.

There is little reason to question Appellant's indigence. He lost his job when he was arrested. The woman who raised him made her living "cleaning ladies' houses." But at the motion for new trial hearing, and contrary to his statements at the hearing on his motion for a competency exam, counsel testified that "they," presumably Appellant's family, said they could pay for expert assistance. However, counsel's efforts went no further than giving Appellant's father Dr. Gripon's telephone number "in case they wanted to do it." In the months that remained before trial, counsel did not hear from Appellant's father, nor did counsel try to contact him. Counsel made no attempt to contact other forensic psychologists or psychiatrists nor did he discuss the need for such help with Appellant.

It was counsel's duty to "explore all avenues leading to facts relevant both to the merits and to the penalty in the event of conviction." Blackburn & Marsh, *supra* at 624 (Guideline 4.1 A.). It was counsel's responsibility to utilize ex parte procedures to secure the assistance of experts when necessary or appropriate to mitigate any punishment that may be assessed after a verdict of guilty. ***Id***. at 624 (Guideline 4.1 B.9.). A necessary corollary to that responsibility is

the duty to search out potential expert witnesses. It was counsel's task to find an appropriate expert. Despite the pressing necessity for expert help, counsel abdicated that responsibility to Appellant's father if "they" wanted to pursue it. Counsel made it clear in his testimony during the motion for new trial hearing that he [counsel] was not going to use any of the funds Appellant paid him to secure expert assistance.[3]

Appellant's counsel testified that Appellant told him he had suffered no lasting ill effects from the sexual abuse. He had a steady job as a fork lift operator. He was in a serious romantic relationship with a woman he intended to marry. Thus assured that his client was "normal," he saw no need to pursue an in-depth inquiry into Appellant's history of sexual abuse. Moreover, counsel maintains Appellant never told him that he had been treated at the Buckner Center after the abuse. Nor did Appellant tell him that he was being treated by Dr. Miller in Kilgore after his arrest. However, "counsel is charged with making an independent investigation of the facts of the case, eschewing wholesale reliance in the veracity of his client's version of the facts." ***Welborn***, 785 S.W.2d at 395 (quoting ***Ex parte Duffy***, 607 S.W.2d 507, 517 (Tex. Crim. App. 1980)). It is almost impossible to believe that a diligent investigation directed at Appellant and his friends, family, and coworkers would not have discovered Appellant's medical and psychological history related to his sexual abuse and the homicide.

Counsel's efforts to obtain lay witnesses to testify at the punishment phase were hardly less languid. As we noted earlier, counsel was retained seventeen months before trial. It was evident from the beginning that Appellant would be found guilty of murder or manslaughter. Mitigating evidence would be crucial to the outcome. Only three witnesses testified for Appellant at the punishment phase–his great uncle, his father, and his grandmother; no coworkers, employers, or pastor. When counsel was asked why there were no more, he responded, "[T]hat's all *they* could find." (Emphasis added). It was counsel's duty to search for and interview potential witnesses and to prepare them to testify. ***Duffy***, 507 S.W.2d at 517.

The State points out that Appellant's grandmother and father, two of the three witnesses called by the defense at punishment, told the jury that Appellant had been sexually abused. Therefore, the State argues, the jury knew of Appellant's difficulties resulting from the abuse. But in their brief testimony, Appellant's grandmother and father could not provide what a

[3] The record reflects there was no contract between Appellant and counsel which addressed the party responsible for paying for experts, if needed.

forensic psychologist or psychiatrist could have given the jury. A forensic specialist could relate how the past abuse affected his present condition; the continuing effect of post-traumatic stress, and whether that would cause a heightened response to stimulus. Unlike the two family members who could only describe the sexual abuse as "difficult" or "hard for him," a psychologist or psychiatrist could explain how the abuse might have affected his behavior at the time in question. '"Testimony emanating from the depth and scope of specialized knowledge is very impressive to a jury. The same testimony from another source can have less effect."' ***Ake***, 470 U.S. at 81 n.7, 105 S. Ct. at 1095 n.7 (quoting F. Bailey & H. Rothblatt, *Investigation and Preparation of Criminal Cases* § 175 (1970)).

In this case, the sentencing stage was critical. Conviction of either murder or manslaughter was inevitable. And the maximum term of imprisonment for murder is ninety-nine years. *See* TEX. PENAL CODE ANN. §§ 12.32(a), 19.02(d) (West 2011). "Where the potential punishment is 99 years imprisonment, the sentencing proceeding takes on added importance." ***Vela***, 708 F.2d at 964. Counsel's indifference to the certain need to investigate every avenue that could lead to mitigating evidence was, in the words of one witness, absolutely "remarkable." The most plausible explanation for counsel's failure is that counsel clung to the hope until the eve of trial that the case would be resolved through a plea bargain. The Guidelines specifically warn against just such a course. Blackburn & Marsh, *supra* at 624 (Guideline 4.1 A.). Counsel's failure to pursue the investigations that would lead to mitigating evidence cannot be ascribed to trial strategy or reasoned choice. Counsel's performance was constitutionally deficient in failing to secure ex parte psychological or psychiatric assistance. In failing to investigate Appellant's medical and psychological history and in failing to zealously search for witnesses to testify for Appellant, counsel did not provide constitutionally effective representation at the punishment stage of Appellant's trial. Appellant has satisfied the first requirement of ***Strickland***. *See* ***Strickland***, 466 U. S. at 687, 104 S. Ct. at 2064 ("First, the defendant must show that counsel's performance was deficient.").

**Prejudice**

Appellant was charged with murder, a crime punishable by imprisonment for life or for any term of not more than ninety-nine years or less than five years. The evidence of his guilt was such that a conviction of either murder or manslaughter was certain. He was twenty-three at

the time of trial. He had graduated from high school and worked steadily since. He had no prior convictions. Yet the jury assessed a punishment of imprisonment for ninety-nine years.

"[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to . . . emotional and mental problems, may be less culpable than defendants who have no such excuse." ***California v. Brown***, 479 U. S. 538, 545, 107 S. Ct. 837, 841, 93 L. Ed. 2d 934 (1987) (O'Connor, J., concurring) (quoted with approval in ***Penry v. Lynaugh***, 492 U. S. 302, 319, 109 S. Ct. 2934, 2947, 106 L. Ed. 2d 256 (1989), *abrogated on other grounds by* ***Atkins v. Virginia***, 536 U. S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)). Appellant's counsel knew that Appellant had been sexually assaulted as a child. But he failed to conduct an independent investigation that would have revealed the records of Appellant's treatment at the Buckner Center and by Dr. Miller in Kilgore. Those records could have been obtained with a subpoena or a medical authorization from Appellant. Nor did counsel diligently seek out and question potential lay witnesses to testify at the punishment stage. Instead, he put on the three family members—"all they gave me." And in failing to request or procure ex parte psychological or psychiatric assistance, he abandoned the best avenue to evidence that would have served to reduce Appellant's blameworthiness in the eyes of at least some of the jurors. As a result, Appellant was left virtually defenseless at, what was for him, the most important part of the proceeding.

The State did not introduce any aggravating evidence at the punishment hearing. But during closing arguments, the effect of counsel's deficiencies became apparent. In final argument, counsel told the jury, "[Y]ou heard about his sexual assault. And that's not a reason for what happened. That's just to show you part of his life, what he is; what's made him what he is and what he was scared of. . . . He had [the gun] for protection against somebody who had hurt him and he knew was out of jail and sending threats [to Appellant] through other people."

Far from diminishing Appellant's blameworthiness, counsel's argument implicitly abandons the potentially mitigating effect of Appellant's history of sexual abuse, and invited the devastating response by the prosecutor.

> I also don't know what Coby Hudgins' triggers are. I don't know what makes Coby Hudgins want to grab a gun and put it in front of a 17 year old girl's head and pull the trigger. And you don't know either. And that is very, very scary.

. . . .

> What is justice when a man walks up to a young girl, points a gun at her heard, racks it, pulls the trigger, fires three more times tracking the other two individuals in this house as they run out, and then runs away, *and then never talks about for a year and a half*.
>
> …
>
> I think the answer is you have to go as safe as you can go.

(emphasis added.)

The prosecutor's argument points to what ex parte psychiatric assistance could have supplied the defense. Such assistance could have explained Appellant's reluctance to talk about the tragedy. A defense psychologist or psychiatrist could have helped craft a defense that explained the relationship between Appellant's sexual abuse and the homicide in a manner mitigating Appellant's blameworthiness while providing a scientific basis for discounting his future dangerousness.

Appellant's mental health history and history of sexual abuse were never presented or explained as mitigating considerations. Instead, the prosecutor used Appellant's history of sexual abuse and unexplained treatment by mental health professionals as a weapon against him. The very considerations that could have argued for Appellant's diminished blameworthiness were seized by the prosecutor to argue for the longest sentence possible, "to go as safe as you can go."

The trial court in denying Appellant's motion for new trial pointed out many of the aggravating facts heard by the jury in finding Appellant did not meet the second prong of the ***Strickland*** criteria of showing prejudice from any deficient performance. We do not disagree that based on the evidence presented to the jury during both the guilt and punishment phases of the trial, the jury returned an appropriate punishment sentence. We are further mindful that the jury did not hear evidence regarding the Myspace account that Appellant was allegedly associated with and that the conclusion of a forensic psychological expert could be that Appellant did not exhibit symptomology consistent with PTSD such that the sexual abuse he previously experienced would not be viable mitigation evidence in Appellant's favor.

However, we disagree with the trial court's assessment that the aggravating evidence presented by the State would clearly outweigh any potential mitigating evidence which a forensic psychiatrist or psychologist could have produced. The question before us is whether, given the facts and circumstances known to trial counsel in this case, should the assistance of a forensic

psychiatrist or psychologist been sought to fully investigate the availability of mitigation evidence attributable to Appellant's prior sexual abuse and was the failure to do so deficient conduct on counsel's part. We believe the answer to both questions is yes.

The mitigating evidence potentially available to Appellant which was not adequately explored, taken as a whole, might have had an influence on the jury's assessment of Appellant's moral culpability. Therefore, there is at least a reasonable probability that had this mitigation evidence been explored by counsel though assistance of a forensic psychological expert, a different result would have occurred such that it undermines our confidence in the outcome. See ***Ex Parte Gonzales***, 204 S.W.3d 391, 399-400 (Tex. Crim. App. 2006). Given all the factors to examine in determining whether a defendant has shown prejudice during the punishment phase, we cannot dismiss trial counsel's deficiency and its prejudicial effect in this case. *See* ***Lampkin***, 470 S.W.3d at 921.

In summary, defense counsel did not attempt to obtain the strongest and possibly only mitigating evidence that could have persuaded the jury to impose something less than a ninety-nine year sentence. Therefore, the jury had no mitigating evidence to balance against the State's argument, the family's loss, and the nature of the crime. Accordingly, we conclude beyond conjecture or speculation that there is a reasonable probability that a constitutionally effective defense at the punishment stage would have resulted in a somewhat different sentence. *See* ***id.*** Appellant has satisfied the second requirement of ***Strickland***. *See* ***Strickland***, 466 U. S. at 687, 104 S. Ct. at 2064 ("Second, the defendant must show that the deficient performance prejudiced the defense.").

Because Appellant has met his burden under ***Strickland***, we hold that he was denied his right to effective assistance of counsel at the punishment phase of his trial. Therefore, the trial court abused its discretion in overruling Appellant's motion for new trial as to punishment. Appellant's three issues are sustained.

## DISPOSITION

Having sustained Appellant's three issues, we ***affirm*** the trial court's judgment of conviction, but ***reverse*** the judgment as to punishment, and ***remand*** the cause to the trial court for a new punishment hearing.

**BILL BASS**
Justice

Opinion delivered January 25, 2017.
*Panel consisted of Hoyle, J., Neeley, J., and Bass, Retired J., Twelfth Court of Appeals, sitting by assignment.*

(DO NOT PUBLISH)

# COURT OF APPEALS

# TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

# JUDGMENT

**JANUARY 25, 2016**

**NO. 12-15-00153-CR**

**COBY RAY HUDGINS,**
Appellant
V.
**THE STATE OF TEXAS,**
Appellee

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Appeal from the 124th District Court
of Gregg County, Texas (Tr.Ct.No. 43,645-B)

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THIS CAUSE came to be heard on the appellate record and the briefs filed herein, and the same being considered, because it is the opinion of this court that there was error in the judgment of the court below as to punishment only, it is ORDERED, ADJUDGED and DECREED by this court that the judgment as to punishment only be **reversed** and the cause **remanded** to the trial court **for a new punishment hearing;** the trial court's judgment of conviction is **affirmed;** and that this decision be certified to the court below for observance.

Bill Bass, Justice.
*Panel consisted of Hoyle, J., Neeley, J. and Bass, Retired J., Twelfth Court of Appeals, sitting by assignment.*