

mounted the prejudice Applicant was now facing since he not only being tried for the murder, but for being a horrible person generally.

CLAIM FOR RELIEF NUMBER EIGHTEEN

APPLICANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY U.S. CONST. AMEND. VI AND THE RIGHT TO DUE PROCESS AS GUARANTEED BY U.S. CONST. AMEND. V & XIV BY THE CONFLICT CAUSED BETWEEN COUNSEL'S CONTINUED LIVELIHOOD VERSUS THE INTERESTS OF APPLICANT.

Sometime after writ counsel read the record of this cause a set of questions were prepared and distributed to trial counsel inquiring into their reasons for certain trial actions and inactions during the trial of this case. Those questions are presented here as exhibit "H" to attorney Mack Arnold, and exhibit "I" to attorney Bob Loper. Counsel subsequently spoke to both attorneys, and they acknowledged receipt of the same. Both attorney's told writ counsel that they were reviewing the questions and would get back with writ counsel. See affidavit of writ counsel attached hereto as exhibit "J". Finally, writ counsel met in the Harris County Courthouse with attorney Bob Loper, who is a personal friend, and was informed by Mr. Loper that both he and Mack Arnold had decided not to answer the questions. See exhibit ""J".

This response that they would not answer the questions came shortly after writ counsel received the attached letter marked as exhibit "K" from the administrative office of the District Courts of Harris County, Texas. Such letter informed counsel that he must swear that he was never found ineffective in a case before he could be recertified to handle capital cases as lead counsel. Both Mr. Arnold and Mr. Loper are and were at the time certified to handle capital cases as lead counsel. It is a common fact that attorneys who practice criminal law believe that the ability and competence to handle capital cases only comes after many years of practice in this area. That once that competence and certification has been achieved it is a coveted thing. It is like being at the top of one's profession. Likewise, if one chooses to exercise that competence and actually practice in the capital case arena, it is extremely time consuming and financially advantageous, especially for a person who practices mainly appointed work. To practice capital cases requires one to handle less criminal cases of the non-capital type. To all of a sudden have your certification pulled would cause embarrassment and financial harm to any such attorney. To place the attorney in the situation where if he answers questions about why he made such trial actions or inactions as requested by exhibits "H & I", he might be walking himself into a situation where his livelihood is damaged, and it creates a conflict of interests between the attorney and his client.

It is also fundamentally unfair in violation of U.S. CONST. AMEND. XIV to indigent defendants to have their attorneys put under scrutiny that neither the courts or the State are subjected to. If a trial judge makes an error or errors that cause a case to be reversed, are

there any ramifications which would take away the judge's ability to be a judge? Is there any ramifications that would decertify that judge from handling certain types of cases, such as capital cases? Of course there are no such rules. Are there any rules that would require that if a prosecutor makes an error, even an error of intentional misconduct, that would decertify that prosecutor from practicing in that area of the criminal law in the future? Of course no such rule exists. By singling out the defense attorney as the only participant in the entire criminal justice system who would have his/her livelihood taken from them if they would admit a mistake places such an extreme burden on the defense attorney that no longer are the best interests of the client paramount. Every attorney is human, and every human makes mistakes. To place the burden on the attorney that if he/she makes a mistake it just cannot be admitted without fear of losing your capital certification, places a conflict on the attorney to choose between client and ones livelihood.

The practice of criminal law is an evolving thing. The practice of capital representation is an evolving thing. There was a time when the best of capital counsel did not use mitigation specialists. Now is the time where counsel is almost per se ineffective if they choose not to employ a mitigation specialist. An attorney can engage in certain conduct at one time which would be considered within the normal range of competence for attorneys in that area, and months or years later as that area of law evolves the same conduct would amount to ineffective assistance. Therefore, what is paramount is why the attorney did what he/she did. Whether the questioned conduct was an act completed or an act of omission.

In the case of **Thompson v. State**, 9 S.W.3d 808 (Tex. Crim. App. 1999) this court stated:

"...Rarely 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 involving such a serious allegation. In the majority of instances, the record on direct appeal is simply undeveloped and cannot adequately reflect the failing of trial counsel. **Jackson v. State**, 973 S.W. 2d 954, 957 (Tex. Crim. App. 1998). To defeat the presumption of reasonable professional assistance, "any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." **McFarland v. State**, 928 S.W.2d at 500. "Indeed in a case such as this, where the alleged derelictions primarily are errors of omission de hors the record rather than commission revealed in the trial record, collateral attack may be the vehicle by which a thorough and detailed examination of alleged ineffectiveness may be developed and spread upon a record." **Jackson v. State**, 973 S.W.2d at 957.

The record in the case at bar is silent as to why appellant's trial counsel failed to object to the State's persistent attempts to elicit inadmissible hearsay. Therefore, appellant has failed to rebut the presumption this was a reasonable decision. "Failure to make the required showing of . . . deficient performance

... defeats the ineffectiveness claim." **Strickland v. Washington**, 104 S.Ct. at 2071. An appellate court should be especially hesitant to declare counsel ineffective based upon a single alleged miscalculation during what amounts to otherwise satisfactory representation, especially when the record provides no discernible explanation of the motivation behind counsel's actions—whether those actions were of strategic design or the result of negligent conduct. In the instant case, the record provides no reference to explain why counsel chose not to object, or failed to object, when the prosecutor doggedly pursued the introduction of inadmissible hearsay."

Therefore, if the attorney just refuses to answer the question of "why?", the ineffectiveness claim will most always fail. The request of writ counsel for trial counsel to answer the question of "why", should not be too much to ask. But, if the answer might be the personal destruction of ones livelihood, it can easily be seen why the conflict of interest raises its ugly head, and counsel would take the safe position of just refusing to answer the questions. This action by the District Courts of Harris County, even though it may be in compliance with recent law, creates an irreconcilable conflict between trial counsel and their clients. Such that the end result is ineffective assistance by counsel's refusal to answer the questions presented in exhibits "H & I".

On this issue the trial court should ORDER supplementation of this writ by counsel being forced to answer the questions raised within exhibits "H & I". Otherwise, it should