THE COURT OF CRIMINAL APPEALS OF TEXAS

ERIK WHITE,	§	
APPELLANT	§	
	§	
v.	§	**No. _____**
	§	
THE STATE OF TEXAS,	§	
APPELLEE	§	

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW OF THE DECISION OF THE COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS IN CAUSE NUMBERS 02-14-00320-CR, 02-14-00321-CR, 02-14-00322-CR AND 02-14-00323-CR AFFIRMING THE DECISION IN CAUSE NUMBERS 1316391D, 1330277D, 1330414D AND 1331423D IN THE 371ST JUDICIAL DISTRICT COURT OF TARRANT COUNTY, TEXAS THE HONORABLE MOLLEE WESTFALL, PRESIDING.

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

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August 17, 2015

ABEL ACOSTA, CLERK

IDENTITY OF PARTIES AND COUNSEL

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2. Hon. Mollee Westfall, presiding Judge in the trial court, 371st Judicial District Court of Tarrant County, Texas, 401 West Belknap Street, Fort Worth, Texas 76196.

3. Hon. Christy Jack, Hon. Kelly Loftus and Hon. Katie A. Woods, Assistant Criminal District Attorneys, Counsel for the State in the trial court, 401 West Belknap Street, Fort Worth, Texas 76196.

4. Hon. David L. Richards, Counsel for Appellant at trial, 3001 W. 5th Street, Suite 800, Fort Worth, Texas 76107.

5. Hon. Barry Alford, Counsel for the Appellant on appeal, 1319 Ballinger Street, Fort Worth, Texas 76102.

6. Hon. Debra Windsor, Assistant Criminal District Attorney, Counsel for the State on appeal, 401 West Belknap Street, Fort Worth, Texas 76196.

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STATEMENT REGARDING ORAL ARGUMENT

This case addresses important issues regarding whether the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Tex. R. App. P., Rule 66.3(f). Appellant argues that the Court of Appeals erred by holding that they cannot infer ineffective assistance of counsel and that counsel's failure to object or request a severance was not so outrageous that no competent attorney would have engaged in it. Further, because the record does not offer an explanation for failing to seek a severance, the Court presumes that trial counsel made all significant decisions in the exercise of reasonable judgment. Also, they concluded that competent counsel could have reasonably credited and relied on the trial judge's representations that her association with the complaining witness was limited and that her sentencing decision would not be impacted by that association. Therefore, trial counsel's unexplained decision to not inquire further about the association was not so outrageous that no competent attorney would have made the same decision.

Because of these important issues, oral argument will greatly aid the Court and should be granted.

THE COURT OF CRIMINAL APPEALS OF TEXAS

ERIK WHITE,	§	
APPELLANT	§	
	§	No. _____
v.	§	
	§	
THE STATE OF TEXAS,	§	
APPELLEE	§	

APPELLANT'S PETITION FOR DISCRETIONAR REVIEW

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Appellant, through counsel, files this Petition for Discretionary Review pursuant to Tex. R. App. P., Rules 66 and 68 on behalf of Appellant urging that this Court grant his relief on appeal from the judgment of the Court of Appeals in the Second District of Texas in cause numbers 02-14-00320-CR, 02-14-00321-CR, 02-14-00322-CR and 02-14-00323-CR from convictions obtained in the 371st Judicial District Court of Tarrant County, Texas.

STATEMENT OF THE CASE

This case addresses whether Appellant is entitled to relief from his two convictions for Aggravated Robbery with a Deadly Weapon (Texas Penal Code § 29.03) and his two convictions for Burglary of a Habitation (Texas Penal Code § 30.02 (c) (2)). Specifically, Appellant contends that the Court of Appeals erred in finding that trial counsel was not ineffective in not seeking a severance in Appellant's trial from that of his co-defendant and, further, that trial counsel was not ineffective in not seeking to have the trial court judge recused based on her

relationship with one of the complaining witnesses against Appellant. It is for these reasons that Appellant seeks relief.

STATEMENT OF PROCEDURAL HISTORY

Appellant was charged with two Burglary of a Habitation charges, alleged to have been committed on or about February 25, 2013 and two charges of Aggravated Robbery with a Deadly Weapon, alleged to have been committed on or about June 9, 2013 and June 11, 2013. Through counsel, Appellant entered a plea of guilty to all four charges and had the Court assess punishment. After hearing the punishment evidence, the Court found him guilty and sentenced him to twenty (20) years in the Institutional Division of the Texas Department of Criminal Justice on the two Burglary of a Habitation charges and life in the Institutional Division of the Texas Department of Criminal Justice on the two Aggravated Robbery with a Deadly Weapon charges.

Appellant filed timely notice of appeal on all four charges on or about August 14, 2014 and the cases were sent to the Court of Appeals for the Second District of Texas. These cases were submitted without oral argument on or about June 2, 2015. On or about July 30, 2015, the Court of Appeals affirmed the judgment of the trial court, holding that:

1. The Court of Appeals cannot infer ineffective assistance of counsel and that counsel's failure to object or request a severance was not so outrageous

that no competent attorney would have engaged in it. Further, because the record does not offer an explanation for failing to seek a severance, the Court presumes that trial counsel made all significant decisions in the exercise of reasonable judgment; and

2. The Court of Appeals concluded that competent counsel could have reasonably credited and relied on the trial judge's representations that her association with the complaining witness was limited and that her sentencing decision would not be impacted by that association. Therefore, trial counsel's unexplained decision to not inquire further about the association was not so outrageous that no competent attorney would have made the same decision.

QUESTION PRESENTED FOR REVIEW

I.

DID THE COURT OF APPEALS PROPERLY DETERMINE THAT APPELLANT'S TRIAL COUNSEL WAS NOT INEFFECTIVE BY FAILING TO REQUEST THAT THE TRIALS OF THE CO DEFENDANTS BE SEVERED AND THAT APPELLANT BE GIVEN A SEPARATE TRIAL PURSUANT TO TEX. CODE CRIM PROC. 36.09 AND WAS ALSO NOT INEFFECTIVE BY FAILING TO INQUIRE FURTHER AS TO THE TRIAL COURT'S RELATION TO A COMPLAINING WITNESS AND WHETHER THE TRIAL COURT JUDGE SHOULD BE RECUSED?

REASONS FOR REVIEW AND ARGUMENT AND AUTHORITIES

DID THE COURT OF APPEALS PROPERLY DETERMINE THAT APPELLANT'S TRIAL COUNSEL WAS NOT INEFFECTIVE BY FAILING TO REQUEST THAT THE TRIALS OF THE CO DEFENDANTS BE SEVERED AND THAT APPELLANT BE GIVEN A SEPARATE TRIAL PURSUANT TO TEX. CODE CRIM PROC. 36.09 AND WAS ALSO NOT INEFFECTIVE BY FAILING TO INQUIRE FURTHER AS TO THE TRIAL COURT'S RELATION TO A COMPLAINING WITNESS AND WHETHER THE TRIAL COURT JUDGE SHOULD BE RECUSED?

a. Failure to ask for severance of co-defendants

The Court of Appeals held that they cannot infer ineffective assistance of counsel and that counsel's failure to object or request a severance was not so outrageous that no competent attorney would have engaged in it. Further, because the record does not offer an explanation for failing to seek a severance, the Court presumes that trial counsel made all significant decisions in the exercise of reasonable judgment.

Appellant contends that his trial counsel was ineffective because counsel failed to request that the Court sever the punishment hearings of Appellant and his co-defendant. Two or more co-defendants who are jointly or separately indicted or complained against for the same offense or any offense growing out of same transaction may be, in the discretion of the Court, tried jointly or separately as to one or more defendants. Tex. Code Crim. Proc. art. 36.09. However, it is

incumbent upon trial counsel to request such a severance prior to trial in order to protect the rights of Appellant.

As a result, Appellant's trial counsel was constitutionally ineffective and, but for his trial counsel's actions, a reasonable probability existed that the result of the proceeding would have been different. To establish ineffective assistance of counsel, a defendant must show that: (1) his attorney's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for his attorney's error, the result of the proceeding would have been different. See *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005); *Strickland v. Washington*, 466 U.S. 668, 684, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

A claim of ineffective assistance of counsel must be "firmly founded in the record" and "the record must affirmatively demonstrate" the meritorious nature of the claim. *Goodspeed v. State*, 187 S.W.3d at 392. Direct appeal is usually an inadequate vehicle for raising such a claim because the record is generally underdeveloped. *Id.* This is true with regard to the question of deficient performance in which counsel's conduct is reviewed with great deference, without the distorting effects of hindsight where counsel's reasons for failing to do something do not appear in the record. *Id.*

Trial counsel should ordinarily be afforded with an opportunity to explain his actions before being denounced as ineffective. *Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003). Absent such an opportunity, an appellant court should not find deficient performance unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001).

The Sixth Amendment to the United States Constitution guarantees the right to reasonably effective assistance of counsel in criminal prosecutions. U.S. Const. amend. VI; *McMann v. Richardson*, 397 U.S. 759, 777 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). The standard of proof necessary to establish an ineffective assistance of counsel claim is based upon a preponderance of the evidence. *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). A review of the record indicates that Appellant's trial counsel's failure to inquire of potential jurors as to this crucial element of the offense fell below the standard as set forth in *Strickland*.

No matter the strength of weakness of the State's case or trial strategy, trial counsel's decision to fail to request severance of the two co-defendant's punishments hearings was devastating on a review of the record in this case.

As a result, the first prong of the *Strickland* test, under a preponderance of the evidence test has been met by a review of what appears "firmly within the record." *Goodspeed v. State*, 187 S.W.3d at 392. Even under a highly deferential review of the defense counsel's actions, the performance fell below an objective standard of reasonableness. *Bone v. State*, 77 S.W.3d at 833; *Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000).

Moving on to the second prong of the *Strickland* test, a review of the record based on the trial counsel's inaction therefore shows that, but for this failure to act, a probability exists that the result of the proceeding would be different. *Strickland v. Washington,* 466 U.S. at 684; *Jaynes v. State*, 216 S.W.3d 839, 851 (Tex. App. – Corpus Christi 2006, no pet.). It is reasonable to believe that, given the participation of Appellant in the offense for which he was convicted as compared to his co-defendants, his strategy for defending himself at punishment would vary greatly with that of his co-defendants.

In fact, while testifying on his own behalf at punishment, Appellant made it clear how his role differed from that of his co-defendants:

> MR. RICHARDS: In what respect is he [Mr. Burns] the reason that you got into this situation in the first place?
>
> MR. WHITE: Because he was the – the main party, I would say.

MR. RICHARDS: Well then, that gets back to what I was originally asking you. As far as who was the leader and who were the follower, you're now saying he was – he was the leader. He's the one that thought this up?

MR. WHITE: Yes, sir.

R. III-199-200.

In sum, a review of the record in this case shows that each co-defendant had an entirely different level of involvement in the cases for which Appellant pled guilty and, at a minimum, trial counsel should have made a motion that each co-defendant's punishments hearings should be severed. A review of the record based on the inactions of trial counsel therefore shows that, but for his ineffectiveness, a probability does exist that the result of this proceeding would be different. *Goodspeed v. State*, 187 S.W.3d at 392; *Strickland v. Washington*, 466 U.S. at 684; *Jaynes v. State*, 216 S.W.3d at 851. For these reasons, the Court should grant review on this issue.

b. Failure to request that the trial court judge be recused

The Court of Appeals further held that competent counsel could have reasonably credited and relied on the trial judge's representation that her association with the complaining witness was limited and that her sentencing decision would not be impacted by that association. Therefore, trial counsel's

unexplained decision to not inquire further about the association was not so outrageous that no competent attorney would have made the same decision.

Prior to the punishment proceedings, the trial Court informed all parties involved that she was acquainted with one of the complaining witnesses in the cases over which she was about to preside. However, after receiving this information, counsel for Appellant failed to inquire further whether this could possibly impact the rights of Appellant by going further at this hearing. An excerpt of that hearing is as follows:

> THE COURT: And as to both attorneys, the Court has also communicated with all parties, I believe it was yesterday, by e-mail, or maybe the day before, that the Court had received information that one of the injured parties who – in a burglary, who would be testifying today, was someone who was known to this Court, to the Judge personally, from church. Not known well or a person with whom the Court has – this Judge has socialized, but I do know this person from church. And both Mr. Richards and Mr. McKinney are aware of that fact and have decided to proceed with that fact known and understood.
>
> MR. MCKINNEY: That is correct.
>
> MR. RICHARDS: Yes, Your Honor.

THE COURT: And the Court will not be taking any personal association or knowledge of a person involved in this case into account to either increase or decrease the sentence, will not have an impact on this Court's decision.

R. III-12.

However, despite the Court's assurances, it is incumbent upon trial counsel to inquire further into this matter given the relationship that a complaining witnesses' testimony can bear on the punishment assessed by the trial Court. As a result, Appellant's trial counsel was constitutionally ineffective and, but for his trial counsel's actions, a reasonable probability existed that the result of the proceeding would have been different. To establish ineffective assistance of counsel, a defendant must show that: (1) his attorney's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for his attorney's error, the result of the proceeding would have been different. See *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005); *Strickland v. Washington*, 466 U.S. 668, 684, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

A claim of ineffective assistance of counsel must be "firmly founded in the record" and "the record must affirmatively demonstrate" the meritorious nature of the claim. *Goodspeed v. State*, 187 S.W.3d at 392. Direct appeal is usually an

inadequate vehicle for raising such a claim because the record is generally underdeveloped. *Id.* This is true with regard to the question of deficient performance in which counsel's conduct is reviewed with great deference, without the distorting effects of hindsight where counsel's reasons for failing to do something do not appear in the record. *Id.*

Trial counsel should ordinarily be afforded with an opportunity to explain his actions before being denounced as ineffective. *Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003). Absent such an opportunity, an appellant court should not find deficient performance unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001).

The Sixth Amendment to the United States Constitution guarantees the right to reasonably effective assistance of counsel in criminal prosecutions. U.S. Const. amend. VI; *McMann v. Richardson*, 397 U.S. 759, 777 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). The standard of proof necessary to establish an ineffective assistance of counsel claim is based upon a preponderance of the evidence. *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). A review of the record indicates that Appellant's trial counsel's failure to inquire of potential jurors as to

this crucial element of the offense fell below the standard as set forth in *Strickland*.

No matter the strength of weakness of the State's case or trial strategy, trial counsel's decision not to pursue a hearing into this matter was devastating on a review of the record in this case. At the very least, counsel should have called the complainant as a witness to inquire of her relationship with the trial Court.

As a result, the first prong of the *Strickland* test, under a preponderance of the evidence test has been met by a review of what appears "firmly within the record." *Goodspeed v. State*, 187 S.W.3d at 392. Even under a highly deferential review of the defense counsel's actions, the performance fell below an objective standard of reasonableness. *Bone v. State*, 77 S.W.3d at 833; *Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000).

Moving on to the second prong of the *Strickland* test, a review of the record based on the trial counsel's inaction therefore shows that, but for this failure to act, a probability exists that the result of the proceeding would be different. *Strickland v. Washington*, 466 U.S. at 684; *Jaynes v. State*, 216 S.W.3d 839, 851 (Tex. App. – Corpus Christi 2006, no pet.). It is reasonable to believe that, given the Court's familiarity with a key witness for the State and despite assurances to the contrary, it is possible that this previous knowledge by the Court could unfairly prejudice the Appellant.

In sum, counsel for Appellant, upon hearing that a relationship existed between the trial Court and a complainant, immediately requested a hearing and called the complainant as a witness to inquire further into this relationship. Counsel for Appellant should have also inquired further from the Court as to the extent and duration of this relationship. A review of the record based on the inactions of trial counsel therefore shows that, but for his ineffectiveness, a probability does exist that the result of this proceeding would be different. U.S. Const., amend VI, *Goodspeed v. State*, 187 S.W.3d at 392; *Strickland v. Washington*, 466 U.S. at 684; *Jaynes v. State*, 216 S.W.3d at 851. For these reasons, the Court should grant review on this issue.

PRAYER FOR RELIEF

Appellant prays that this Court grant Appellant's petition for discretionary review and reverse the Court of Appeals and remand this cause of the appropriate proceedings and remedies offered under the law.

Respectfully submitted,

____/s/ Barry J. Alford____
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Petition for Discretionary Review was this 18th day of August, 2015 delivered by e-mail to Hon. Debra Windsor, Assistant Criminal District Attorney, counsel for the State, 401 W. Belknap Street, Tim Curry Justice Center, Fort Worth, Texas 76196.

_____/s/ Barry J. Alford_____
Barry J. Alford
Attorney for Appellant

CERTIFICATE OF TYPEFACE AND WORD COUNT COMPLIANCE

This document complies with the typeface requirements of Tex. R. App. Proc. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14 point for text and 12 point for footnotes. This document also complies with the word count limitations of Tex. R. App. Proc. 9.4(i), if applicable, because it contains 2,054 words, excluding any parts exempted by Tex. R. App. Proc. 9.4(i)(1).

_____/s/ Barry J. Alford_____
Barry J. Alford
Attorney for Appellant