CAUSE NO._____

IN THE 238TH JUDICIAL DISTRICT COURT
MIDLAND COUNTY, TEXAS

EX PARTE	**§**
DWIGHT HOWARD ETCHISON	**§**
	§

MEMORANDUM OF LAW IN SUPPORT OF WRIT OF HABEAS CORPUS

TO THE HONORABLE JUDGES OF THIS COURT: This Application for a Writ of Habeas Corpus is made on behalf of Dwight Howard Etchison who is now illegally restrained in his liberty by the State of Texas.

Summary of the Case

Dwight Etchison is a Vietnam veteran and former U.S. Army Ranger. This case arises from Etchison's arrest on August 4, 2011 for felony driving while intoxicated. Because the State alleged in its indictment that Etchison had twice before been convicted of driving while intoxicated, the August 4, 2011 arrest was a felony.

Etchison was tried on June 4 and 5, 2012. Etchison elected to have a jury determine guilt/innocence and for the trial court to assess punishment. On both days of trial, Etchison wore what the judge and witnesses described as a "gray jumpsuit," or "gray coveralls." When the State successfully admitted two prior judgments for driving while intoxicated, Etchison's attorney did not request a limiting instruction. And Etchison's trial counsel did not request that the lesser-included offense of misdemeanor driving while intoxicated be added to the jury charge that had been prepared by the trial court.

Etchison received appointed-appellate counsel. This appointed-appellate counsel filed an *Anders* brief. The Eleventh Court of Appeals accepted this brief, allowed appointed-appellate

counsel to withdraw, and dismissed the appeal. Through counsel, Etchison filed a petition for discretionary review, which was refused on September 18, 2013.

Arguments and Authorities

Standard for Ineffective Assistance of Counsel

In *Hernandez v. State*, the Court of Criminal Appeals adopted the standard from *Strickland v. United States* for the evaluation of claims of ineffective assistance of counsel in Texas. To prevail on a claim of ineffective assistance of counsel under *Strickland,* an appellant must show that (1) counsel's representation fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the appellant.[1]

To satisfy the first prong, "an appellant must identify counsel's acts or omissions that he alleges are not the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the acts or omissions were outside the wide range of professionally competent assistance."[2] Ordinarily, to prevail on the first prong of the *Strickland* test, the courts must hear testimony from the trial counsel to determine whether there was a legitimate trial strategy for a certain act or omission. [3] But when no reasonable trial strategy could justify a trial attorney's conduct, then that identified performance falls below an objective standard of reasonableness as a matter of law—regardless of counsel's subjective reasons for his conduct.[4]

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[1] *Andrews v. State*, 159 S.W.3d 98, 101 (Tex.Crim.App. 2005).

[2] *Okonkwo v. State*, 398 S.W.3d 689, 693 (Tex.Crim.App. 2013).

[3] *Andrews* at 103.

[4] *Okonkwo* at 693.

"To satisfy the second prong of the *Strickland* test, the Court of Criminal Appeals does not require that the appellant show that there would have been a different result if counsel's performance had not been deficient. Instead, the defendant must show only that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'"[5] "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome."[6]

The doctrine of cumulative error provides that the cumulative effect of several errors can, in the aggregate, constitute reversible error, even though no single instance of error would.[7] The cumulative error doctrine provides relief only when constitutional errors so fatally infected the trial that they violated the trial's fundamental fairness.[8]

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[5] *Andrews* at 102 (citing, *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

[6] *Id*. at 105 n.19 (citing, *Strickland*, 466 U.S. at 694).

[7] *See United States v. Munoz*, 150 F.3d 401, 418 (5th Cir. 1998); *Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex.Crim.App. 1999) (stating, in *dicta*, that cumulative error could constitute reversible error).

[8] *United States v. Bell*, 367 F.3d 452, 471 (5th Cir. 2004); *Estrada v. State*, 313 S.W.3d 274, 311 (Tex. Crim. App. 2010) (two or more errors that may have occurred during guilt-innocence phase of trial do not necessarily render trial fundamentally unfair).

Etchison's Specific Claims for Ineffective Assistance of Counsel

A. Etchison's Trial Counsel Failed to Object that Etchison was Tried in Identifiable Jail-Issued Clothing

1. Law

The Court of Criminal Appeals has recognized that trying a defendant in identifiable-jail-issued clothing can violate that defendant's constitutional right to the presumption of innocence.[9] In *Randle*, the Court of Criminal Appeals, citing to the United States Supreme Court, held that "[i]f a defendant timely objects to being put on trial while dressed in prison clothes, he should not be compelled to stand trial in that attire. Such a compulsion would violate the defendant's right to a fair trial and his right to be presumed innocent."[10] The *Randle* court further clarified that it is clothing which "bears the indicia of incarceration," that subverts a defendant's right to a presumption of innocence.[11]

Generally stated, to show that a trial attorney's failure to object would have constituted ineffective assistance of counsel, the movant must show that if an objection had been presented properly, then the trial court would have erred in overruling the objection.[12]

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[9] *Randle v. State*, 826 S.W.2d 943, 944−45 (Tex.Crim.App.1992) (citing *Estelle v. Williams*, 425 U.S. 501, 504 (1976)).

[10] *Id.*

[11] *Id.*, at 946.

[12] *See generally*, *Ex parte Parra*, AP-76,871, 2013 Tex. Crim. App. LEXIS 1316, 5 (Tex. Crim. App. Sept. 18, 2013) (stating "[i]n order to succeed with an ineffective-assistance-of-counsel claim based on counsel's failure to object, one 'must show that the trial judge would have committed error in overruling such objection.'); and, *Vaughn v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996) (stating, "in order to argue successfully that her trial counsel's failure to object to the State's questioning and argument amounted to ineffective assistance, appellant must show that the trial judge would have committed error in overruling such an objection.").

2. Facts

Here, Etchison was tried in identifiable-jail-issued clothing. In the presence of the jury, the trial judge and the witnesses identified Etchison as wearing a "gray jumpsuit," or "gray coveralls." Etchison has provided an affidavit that indicates that he was tried in his jail-issued clothing. (Ex. A). The Midland County Sherriff, Sherriff Gary Painter, has provided an affidavit that states that when a defendant does not have his/her own clothing to wear at trial that the defendant is tried in identifiable-jail-issued clothing that includes markings on the leg and the shoulder that identifies the clothing as having been issued by the jail. (Ex. B). Etchison's trial lasted two days and he wore the same or similar clothing on both days. Each time Etchison was identified by his clothing, the identification was in the presence of the jury. Three of these identifications were made at the specific request of the attorney for the State. During the punishment phase of the trial, when the trial judge was the finder of fact, witnesses were not asked to identify Etchison by his clothing.[13]

When Etchison was arrested, he was wearing overalls. When Etchison left jail on an appellate bond the overalls were returned to him. The overalls were not admitted as evidence at trial. Etchison lived in Midland County at the time of the arrest. Etchison could have worn his overalls or he could have had other clothing delivered to him. (Ex. A).

Etchison's trial counsel failed to object to Etchison being tried in identifiable-jail issued clothing nor did he make any efforts on the record to secure more appropriate clothing for Etchison.

[13] The attorney for the State called one witness during punishment and the defense called only Etchison.

3. Analysis

The Court of Criminal Appeals recognizes that compelling a defendant to attend trial in identifiable-jail-issued clothing violates the defendant's right to a fair trial and his right to be presumed innocent.[14] Here, the record and affidavit testimony indicates that Etchison was tried in a gray jumpsuit, gray overalls, and/or gray coveralls that were issued to Etchison by the Midland County Jail. (Ex. A). Sherriff Gary Painter has provided an affidavit that testifies that when a defendant lacks his or her own clothing they are tried in identifiable-jail-issued clothing.

Etchison's trial counsel failed Etchison by not objecting to the identifiable jail-issued clothing. Accordingly, Etchison requests that an evidentiary hearing so that evidence of his trial counsel's trial strategy can be produced and entered into the record.

B. Failure to Request a Lesser-Included Offense Instruction

1. Law

The Court of Criminal Appeals has established a two-pronged test to determine whether a charge on a lesser-included offense should be given.[15] The first step is to determine whether the requested offense is a lesser-included offense of the charged offense.[16] Misdemeanor driving while intoxicated is a lesser-included offense of felony driving while intoxicated.[17]

The second prong of the test requires an evaluation of the evidence to determine whether some evidence exists that would permit a rational jury to find that, if the defendant is guilty as

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[14] *Randle*, 826 S.W.2d at 944−45.

[15] *Mathis v. State*, 67 S.W.3d 918, 925 (Tex.Crim.App. 2002).

[16] *Id.*

[17] TEX. CODE CRIM. PROC. ANN. ART. 37.09; TEX. PENAL CODE ANN. §§ 49.04, 49.09; and, *Reyes v. State*, 394 S.W.3d 809, 812 (Tex. App.—Amarillo 2013, no pet.).

alleged in the indictment, that he is guilty only of the lesser offense.[18] If facts are elicited during trial that support the inclusion of a lesser-included offense, and the charge is requested properly, then the requested lesser-included offense must be included in the court's charge.[19] A mere scintilla of evidence entitles a defendant to an instruction on the requested-lesser offense.[20]

The "[f]ailure to request a jury instruction on a lesser included offense can render assistance of counsel ineffective if, under the particular facts of the case, the trial judge would have erred in refusing the instruction had counsel requested it."[21]

2. Facts

Here, Etchison was indicted for felony driving while intoxicated. Etchison's indictment specifically predicted the felony charge on the allegation that Etchison had been convicted of driving while intoxicated in cause numbers 121932 and 126945.

Etchison did not stipulate to the prior convictions alleged in his indictment; accordingly, the State introduced evidence of these two prior convictions. Specifically, the State successfully offered Exhibits 1 and 2, which purported to be final judgments from cause numbers 121932 and 126945. In introducing these judgments to the jury, the attorney for the State referenced them incorrectly as cause numbers 12923 and 126945. The judgments entered as Exhibits 1 and 2 had the same cause numbers as the judgments in the indictment. The judgments that became Exhibits 1 and 2 included the fingerprints of the convicted defendant. To establish that the judgments entered as Exhibits 1 and 2 were judgments against Etchison, the State called Tony

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[18] *Mathis*, 67 S.W.3d at 925; *Hall v. State*, 225 S.W.3d 524, 528 (Tex.Crim.App. 2007).

[19] *Ross v. State*, 861 S.W.2d 870, 877 (Tex. Crim. App. 1993)(op. on reh'g.).

[20] *Hall*, 225 S.W.3d at 536.

[21] *Jones v. State*, 170 S.W.3d 772, 775 (Tex. App. Waco 2005, pet. ref'd) (citing *Vasquez v. State*, 830 S.W.2d 948, 951 (Tex. Crim. App. 1992)).

Barrett, an expert on fingerprint identification. Barrett testified that the fingerprints taken from Etchison on June 4, 2012 matched those on Exhibits 1 and 2.

In addition to the judgments entered as Exhibits 1and 2, the State successfully admitted two judgments *nunc pro tunc*. These judgments *nunc pro tunc* were admitted as State's Exhibits 1-A and 2-A. Exhibits 1-A and 2-A contained no fingerprints and superseded the judgments entered as Exhibits 1 and 2. Furthermore, Exhibits 1, 1-A, 2, and 2-A were styled, "The State of Texas v. Dwight *Elchinison*." (Emphasis added.). The attorney for the State, reading from the indictment, told the jury that the case before them was styled, "The State of Texas versus Dwight Howard *Etchison*."[22] (Emphasis added). When the court read the charge to the jury, the court identified Dwight Howard *Etchison* as the defendant. (Emphasis added.). Neither the attorney for the State nor the trial judge indicated that the indictment was titled, "The State of Texas v. Dwight Elchinson AKA Dwight Howard Etchison AKA Dwight Elchinison." Etchison's trial counsel did not request the inclusion of a lesser-included offense and affirmatively stated that he had "no objections," to the jury charge.

3. Analysis

Misdemeanor driving while intoxicated is a lesser-included offense of felony driving while intoxicated when that felony is predicated on prior convictions.[23] Etchison's indictment alleged that he had been convicted of driving while intoxicated in cause numbers 121932 and 126945. But, in these prior convictions, the final judgments—the judgments *nunc pro tunc*—did not contain a fingerprint from Etchison and the defendant's name on both judgments *nunc pro*

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[22] The indictment is styled "The State of Texas v. Dwight Elchinson AKA Dwight Howard Etchison AKA Dwight Elchinison."

[23] TEX. CODE CRIM. PROC. ANN. ART. 37.09; TEX. PENAL CODE ANN. §§ 49.04, 49.09; and, *Reyes*, 394 S.W.3d at 812.

tunc was "Elchinison," rather than "Etchison." Further, the attorney for the State referred to these cause numbers as 12923 and 126945 rather than by the correct cause numbers, 121932 and 126945.

Accordingly, at least a scintilla of evidence existed that would have allowed a jury to find that Etchison was guilty of only the lesser offense of misdemeanor driving while intoxicated.[24] Thus, Etchison's trial counsel should have requested that the trial court include the lesser-included offense of misdemeanor driving while intoxicated in the jury charge. For these reasons, by failing to request that the lesser-included offense of misdemeanor driving-while intoxicated be included in the jury charge, Etchison's trial counsel was ineffective.

C. Failure to Request a Limiting Instruction

1. Law

Rule 105(a) of the Texas Rules of Evidence provides that:

> When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly. . . [25]

Under § 49.09(b) of the Penal Code, a third conviction for driving while intoxicated is a felony.[26]

If a Rule 105(a) limiting instruction is not requested when the jury first receives the evidence, then the trial court is not obligated to include the limiting instruction in the jury charge.[27] Further, if the limiting instruction is not made when the jury first receives the

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[24] TEX. CODE CRIM. PROC. ANN. ART. 37.09.

[25] TEX. R. EVID. 105(a).

[26] TEX. PENAL CODE ANN. § 49.09(b).

[27] *Delgado v. State*, 235 S.W.3d 244, 251 (Tex.Crim.App. 2007).

evidence, then the evidence that should be admissible for only one purpose is admissible for any or all purposes.[28]

2. Facts

Here, Etchison was indicted for felony driving while intoxicated. The indictment included an allegation that in cause numbers 121932 and 126945 Etchison had been convicted previously of driving while intoxicated. Etchison did not stipulate to these previous convictions. Thus, the State introduced evidence of the prior convictions alleged in the indictment through its expert witness, Tony Barrett. But, when these prior convictions were admitted, Etchison's trial counsel did not request, and the trial court did not issue, a limiting instruction under Rule 105(a).

3. Analysis

An element for the offense of felony driving while intoxicated is the finding that the defendant has been convicted previously, at least twice, of driving while intoxicated.[29] Accordingly, a trial attorney defending such a case should anticipate that the State is going to introduce evidence of such prior convictions and should be prepared to request that the trial court issue a limiting instruction under Rule 105(a).[30] Here, no such request was made. The failure to request a limiting instruction risked allowing the evidence of the prior convictions to be used to convict Etchison of the charge for which he was then on trial.[31] Further, this failure also jeopardized Etchison's ability to obtain this instruction in the Court's charge to the jury.[32]

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[28] *Hammock v. State*, 46 S.W.3d 889, 893−94 (Tex.Crim.App. 2001).

[29] TEX. PENAL CODE ANN. §§ 49.04; 49.09(b).

[30] *Id.*

[31] *Hammock*, 46 S.W.3d at 893−94.

[32] *Delgado*, 235 S.W.3d at 251.

Although, *sua sponte*, the trial court included a limiting instruction in its charge to the jury, it was not obligated to do so. Critically, while the jury did ultimately receive a limiting instruction, it did not receive this instruction until the following day.

CONCLUSION

Here, Etchison's trial attorney failed to object to the fact that Etchison wore identifiable-jail-issued clothing at trial, did not request the inclusion of a lesser-included offense, and failed to request a limiting instruction. These errors are well grounded in the record and have been substantiated by affidavit testimony. Such representation falls below professional norms and prejudiced Etchinson.

Etchison requests that under Article 11.07 of the Code of Criminal Procedure:

FIND that there are controverted, previously unresolved matters of fact material to the legality of Etchison's confinement and either through a hearing where evidence may be presented or through an order enter findings of fact and conclusions of law and recommend that relief should be granted by the Court of Criminal Appeals.

Respectfully Submitted.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Application for Writ of Habeas Corpus was sent to Carolyn D. Thurmond, Assistant District Attorney, Midland County District Attorney's Office, 500 North Loraine, Suite 200 Midland, Texas 79701, on the 14th day of October 2013.

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NILES S. ILLICH