WRIT NO. W91-35666-H(B)

EX PARTE	**) COURT OF CRIMINAL**
EDWARD JEROME XXX	**) APPEALS OF TEXAS**
	)
	) 1ST CRIMINAL
Applicant	**) DALLAS COUNTY, TEXAS**
	)

MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR A WRIT OF HABEAS CORPUS SEEKING RELIEF FROM FINAL FELONY CONVICTION UNDER CODE OF CRIMINAL PROCEDURE, ARTICLE 11.07

Edward Jerome XXX was represented at his revocation hearing and was initially represented on appeal by Phillip H. Jones, Esq. The State Bar of Texas has already disciplined Jones for the very issues Mr. XXX raises in this 11.07 writ:

> On Oct. 15, **Phillip Howard Jones** [#10936950], 54, of Plano accepted a 12-month, fully-probated suspension with conditions, effective Dec. 1 The District 6-A Grievance Committee found that in June 1999, the complainant retained Jones to defend him in a criminal action seeking to revoke his probation. The complainant paid Jones $2,000 for the representation. The complainant was unable to make an informed decision about how he wished to proceed in the matter because he did not adequately understand the maximum sentence he could receive if the motion to revoke was granted. At a contested hearing on the motion, the complainant was sentenced to 30 years in jail. Thereafter, Jones filed a motion for new trial which was denied by operation of law. Jones failed to file a notice of appeal. He violated Rules 1.01(b), 1.02(a)(3), and 1.03(a) and (b).

Texas Bar Journal, April 2002 (attached hereto as Attachment A).

Not surprisingly, this is not the first time that Jones has been disciplined by the state bar. He also received a probated suspension on November 2, 1985, a probated suspension on February 12, 1998, and an active suspension on June 1, 1988.[1]

In the course of the proceedings in this case, Jones filed rambling pleadings. For example, in an unsupported Motion to Dismiss State's Motion to Proceed with Adjudication of Guilt, Jones explains Mr. XXX's alleged probation violation as follows:

> No promise was made, or could be made with absolute honesty or with a guarantee of successful performance, that Movant would experience no other difficulties or challenges either during the course of his probation or during his lifetime. None of us could honestly make such a promise. Movant would argue that each of us can, however, promise.

In that same pleading, he castigated the state:

> [T]he State had decided to "back on" the more serious original charge to insignificant, unrelated probation violations, an act so transparent that the most innocent 'bystander' can perceive the State's policy as a pure and simple case of "the tail wagging the dog" and it is the viciousness of the dog that causes one to think twice about the apparently skewed relationship between our criminal justice system and the ethics of those charged with its administration.

In his Motion for New Trial arguing that Judge Wader was not impartial, Jones

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[1] http://www.texasbar.com/Template.cfm?Section=Member_Directory&template=/Customsource/MemberDirectory/MemberDirectoryDetail.cfm&ContactID=217292

wrote:

> As Defendant argued in his pre-trial Motion to Dismiss State's Motion, as his attorney argued at trial [sic.], the violations alleged by the State are in no way egregious and pose no threat to the safety of society, but assume the character of the demonic when considered in the light of the violation originally charged to Defendant, *a distasteful violation in a gutless universe governed by a purely aesthetic morality.* (emphasis added)

Moreover, in connection with the proceedings, Jones often failed to show up to court dates so that the District Court even considered entering a show cause order against him. *See* Docket Sheet.

I. LEGAL BACKGROUND

On April 13, 1992, Mr. XXX pleaded guilty to the offense of aggravated sexual assault of a child under 14 and was placed on ten years deferred adjudication. On September 10, 1999, a hearing was held on the state's Motion to Revoke Probation and, following the hearing, the District Court adjudicated Mr. XXX's guilt and sentenced him to thirty years imprisonment.

On September 24, 1999, Jones filed a Motion for New Trial on Mr. XXX's behalf. He filed a Modified Motion for New Trial on October 21, 1999. Mr. Jones did not set the new trial requests for a hearing and, consequently, they were denied by operation of law.

On December 27, 1999, Jones forged Mr. XXX's name to a Notice of

Appeal. *See* Affidavit of Edward Jerome XXX ("XXX Aff.") (attached hereto as Attachment B) at ¶ 7.

On October 17, 2000, the Fifth Court of Appeals dismissed Mr. XXX's appeal, noting:

> Appellant filed a motion for new trial on September 24, 1999; thus his notice of appeal was due by December 9, 1999. *See* Tex. R. App. P. 26.2(a)(2). Appellant filed a notice of appeal on December 27, 1999, within the fifteen day period provided by rule 26.3(a). Appellant did not, however, file an extension motion in this Court as required by rule 26.3(b). Accordingly, because appellant's notice of appeal was untimely, we dismiss the appeal for want of jurisdiction. (footnote omitted).

In other words, Jones did not timely file the Notice of Appeal nor did he comply with Tex. R. App. P. 26(a)(2) for filing an out-of-time Notice of Appeal.

II. FACTUAL BACKGROUND

Mr. XXX was charged with violating his probation by testing positive on one occasion for opiates and for being unsuccessfully discharged from sex offender counseling.[2]

Prior to the revocation hearing, Jones told Mr. XXX that, if he did not contest the revocation, the state offered to recommend a sentence of ten years imprisonment to the Court. *See* XXX Aff. at ¶ 3. Jones told Mr. XXX that he

[2]The allegation that he was delinquent in the amount of $58.20 in probation fees was dropped by the state at the revocation hearing.

rejected the offer on Mr. XXX's behalf. *Id*. at ¶ .4 First, he told Mr. XXX that ten years was the maximum sentence he faced even if he were to be revoked. *Id*. at ¶ 3. Second, he told Mr. XXX that he would likely be continued on probation after "a little JTL" which he explained was a "judicial tongue lashing." *Id*. Third, he told Mr. XXX that the state's ten year recommendation offer was "ridiculous" because, if all else failed, he would be able to get the District Court to sentence Mr. XXX to "SAF-P." *Id*.[3] Had Mr. XXX knew that he faced life imprisonment upon adjudication and had he known that he was ineligible for "SAF-P," he would have waived a revocation hearing and agreed to the state's recommendation that he be sentenced to ten years imprisonment upon revocation. *Id*. at ¶ 4.

Following his revocation, Mr. XXX requested that Jones file a Notice of Appeal on his behalf. *Id*. at ¶ 6. As reflected in two letters sent by Jones to Mr. XXX, Jones fully understood Mr. XXX's desire to appeal from the judgment and sentence in this case. *See* Attachments C & D hereto. Nevertheless, Jones did not file a Notice of Appeal until December 27, 1999- fifteen days after the expiration of time to file a Notice of Appeal. *See* Tex. App. P. 26.2(a)(2). When filing the out-of-time appeal, Jones did not request an extension of time as provided for

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[3] As explained below, unbeknownst to Mr. XXX, he as *not* eligible for "SAF-P." *See* Tex. Code Crim. P. Art. 42.12 § 14(b)(2)(A). *See* XXX Aff. at ¶ 4.

under Tex. R. App. P. 26.3(b).

III. DISCUSSION

A. Ineffective Assistance by Jones for Failing to Correctly Explain Consequences in the Event of Adjudication

As noted above, prior to the revocation hearing held in this matter Jones told Mr. XXX that, if he did not contest the revocation, the state offered to recommend a sentence of ten years imprisonment to the Court. *See* XXX Aff. at ¶ 3. Jones told Mr. XXX that he (Jones) had rejected the offer because ten years was the maximum sentence Mr. XXX faced even if he were to be revoked. *Id*. at ¶ 4. Indeed, it is clear that Jones misunderstood the punishment range in this case because he argued at the sentencing hearing that Mr. XXX should be sentenced "[a]t the most two to three" years imprisonment" until he was reminded by the court that the minimum sentence of imprisonment for a first degree felony is five years. *See* Transcript of Revocation Hearing at 64 (attached hereto as Attachment E).

Likewise it is also clear that Jones misunderstood that, upon adjudication, a term of imprisonment was required. First, prior to the revocation hearing, he told Mr. XXX the state's ten year recommendation offer was "ridiculous" because, if all else failed, he would be able to get the District Court to sentence Mr. XXX to "SAF-P." *See* XXX Aff. at ¶ 3. Second, after the District Court adjudicated

Mr. XXX's guilt, Jones still argued that Mr. XXX should be "continued on probation or given the opportunity to go to treatment." *See* Attachment E. Nevertheless, Mr. XXX was never eligible for "SAF-P." *See* Tex. Code Crim. P. Art. 42.12 § 14(b)(2)(A). Nor was Mr. XXX eligible to be "continued on probation" following the adjudication of his guilt. *Id*. at 42.12 § 3g(a)(1)(E).

As noted above, the state bar proceedings conclusively established that Mr. XXX "was unable to make an informed decision about how he wished to proceed in the matter because he did not adequately understand the maximum sentence he could receive if the motion to revoke was granted" because of Jones' misadvice. *See* Attachment A.

It is well established that a defendant is entitled to competent counsel during the course of probation revocation proceedings.[4] It is likewise well established that a counsel's failure to fully explain a plea offer effectively denies a defendant the opportunity to make an informed decision about whether to accept or reject the offer and thereby deprives him of the effective assistance of counsel. *See State v. Williams*, 83 S.W.3d 371 (Tex. App.--Corpus Christi 2002).

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[4] *See McGary v. State*, 2003 Tex. App. Lexis 1557, *9 (Tex. App.--El Paso Feb. 20, 2003) (unpublished) ("A probation revocation proceeding is neither a criminal nor a civil trial, but rather an administrative hearing. Although the proceeding is administrative in nature, a probationer has the right to be assisted by counsel. The right to assistance of counsel includes the right to reasonably effective assistance of counsel."), *citing, Mempa v. Rhay*, 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967). *See also, Hill v. State*, 480 S.W.2d 200, 202-03 (Tex.Crim.App. 1971).

Instructive is the federal case of *United States v. Day*, 969 F.2d 39 (3rd Cir. 1992) which held that a defendant receives ineffective assistance of counsel when he is "seriously misled about his sentence exposure" by his counsel while considering a plea bargain offer.

Here, Mr. XXX avers that, had he known of his true sentencing exposure, he would have accepted the state's offer for a ten year sentence recommendation upon revocation in exchange for not contesting the revocation. *See* XXX Aff. at ¶ 4. This makes sense. It would have been obvious to Mr. XXX that he escaped revocation on at least one other occasion. It was also obvious that Mr. XXX had no defense to the charge that he used opiates while on probation and that adjudication on that charge alone was likely if he could not be sent to "SAF-P." Moreover, although it was not explained to him, he faced a minimum of five years imprisonment upon adjudication in any event.

Upon granting habeas relief on this ground, the remedy would be to allow Mr. XXX a new habeas hearing in which he does not contest revocation in exchange for the state's ten year punishment recommendation upon revocation. *Cf. Ex Parte Lemke*, 13 S.W.3d 791(Tex. Crim. App. 2000).

B. Ineffective Assistance by Jones for Failing to File a Timely Notice of Appeal

There is no question that Mr. XXX desired Jones to file a Notice of Appeal on his behalf. That fact is established not only by Mr. XXX's affidavit but also is established by letters sent to Mr. XXX by Jones both before and after the Notice of Appeal was filed. *See* XXX Aff. at ¶ 6; Attachments C & D. Finally, this issue was litigated in connection with the disciplinary proceedings against Jones and the Disciplinary Board found that "Jones failed to file a notice of appeal" despite being requested to do so. *See* Attachment A.

It is well established that Jones had a duty to file a Notice of Appeal on Mr. XXX's behalf given Mr. XXX's expressed desire to appeal from the judgment and sentence:

> We also hold that trial counsel, retained or appointed, has the duty, obligation and responsibility to consult with and fully to advise his client concerning meaning and effect of the judgment rendered by the court, his right to appeal from that judgment, the necessity of giving notice of appeal and taking other steps to pursue an appeal, as well as expressing his professional judgment as to possible grounds for appeal and their merit, and delineating advantages and disadvantages of appeal. The decision to appeal belongs to the client.
>
> While the former practice was orally to give notice of appeal in open court, it was permissible then -- and now is mandatory under Tex. R. App. Pro. Rule 40(b)(1) -- that notice be given in writing filed with the clerk of the trial court. But it was not then, and is not now, required that written notice of appeal be made by trial counsel, and thus "volunteer" to become attorney of record on appeal. "Such notice shall be sufficient if it shows the desire of the defendant to appeal from the judgment or other appealable order," *ibid;* cf. former article 44.08(a). A written notice of

> appeal signed solely by defendant is an indication that trial counsel "does not wish to pursue his client's appeal;" when complemented by a contemporaneously presented motion to withdraw showing good cause, and along the lines of DR 2-11(A), Texas Code of Professional Responsibility, and, "the trial court is immediately placed on notice that appellate counsel must be appointed," -- unless, of course, defendant has retained another attorney.
>
> In the instant cause, that retained counsel did not intend to handle the resultant appeal does not justify his failing to assist his allegedly indigent client in giving notice of appeal. Contrary to his assertion at the evidentiary hearing, "that ended my period of time with him," counsel did need to file a motion to withdraw because, knowing that applicant did indeed desire to appeal, in truth he had *not* "concluded the case." As we said in *Ward*, supra, at 740:
>
> > "In the present case, the arguable limitation of representation for trial purposes only is not dispositive. Since appellant's trial counsel did not affirmatively withdraw, he remained appellant's counsel on appeal."
>
> We find that in reality this presumptively indigent applicant did not receive any practical assistance of counsel in protecting and preserving his appellate rights. Thus he has been denied effective assistance of counsel on appeal in violation of his due process rights under the Fourteenth Amendment and his due course rights under Article I, § 10, of our own Bill of Rights.

Ex Parte Axel, 757 S.W.2d 369, 374-75 (Tex. Crim. App. 1988) (citations and footnote omitted). *See also, Jones v. State*, 98 S.W.3d 700, 702-03 (Tex. Crim. App. 2003).

Moreover, in deciding to grant habeas relief in the form of allowing an

applicant to file an out-of-time appeal, a habeas court does *not* look to the merits of the appeal but simply determines whether the applicant had expressed a desire to appeal to his counsel. *Ex Parte Crow*, 180 S.W.3d 135, 138 (Tex. Crim. App. 2005) ("When a defendant's right to an entire judicial proceeding has been denied, the defendant is 'required to show a reasonable probability that, absent counsel's errors, a particular proceeding would have occurred, but he [is] not required to show that the proceeding would have resulted in a favorable outcome.' Or put another way, to meet the limited showing of prejudice in this context, 'counsel's deficient performance must actually cause the forfeiture of the proceeding in question.'"). Here, as noted above, Mr. XXX can clearly establish "that he would have availed himself of the [appeal] proceeding in question." *Id*.

IV. CONCLUSION

Mr. XXX respectfully requests that the District Court be directed to grant him habeas relief based upon the first ground raised above and permit a new habeas hearing in which the state recommends that he be imprisoned for a term of ten years. In the alternative, Mr. XXX requests permission to file an out-of-time appeal with the Fifth Court of Appeals from the judgment and sentence entered by the District Court on September 10, 1999.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on April 16, 2007, I caused a copy of the above document to be mailed by first class mail, postage prepaid, on the Dallas County District Attorney's Office, 133 North Industrial Blvd., Dallas, Texas 75207.

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F. Clinton Broden