NO. 01-24-00728-CR
NO. 01-24-00729-CR

IN THE COURT OF APPEALS
FOR THE FIRST JUDICIAL DISTRICT
AT HOUSTON

HECTOR RODRIGUEZ,
Appellant

v.

THE STATE OF TEXAS,
Appellee

APPELLANT'S BRIEF

On appeal from Cause Numbers 22-DCR-099555A & 24-DCR-107955
In the 240th District Court
Fort Bend County, Texas
Honorable Surrendran Pattel, Presiding

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STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument because it could aid the Honorable Court in its decision-making process. This appeal raises an unsettled issue that frequently recurs in this jurisdiction.

IDENTIFICATION OF THE PARTIES

Pursuant to Tex. R. App. P. 38.2(a)(1)(A), a complete list of interested parties is provided below.

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4. Trial Judge

Hon. Surrendran Pattel – 240th District Court, Fort Bend County, Texas

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STATEMENT OF THE CASE

The State charged Appellant, Hector Rodriguez, with the offense of continuous sexual abuse of a child in cause number 22-DCR-099555. CR 1:08. Appellant entered into a plea bargain agreement with the State in which Appellant would plead guilty to a lesser-included offense of aggravated sexual assault of a child and a new case of aggravated sexual assault of a child. CR 1: 192. The State and Appellant further agreed that the State would not recommend a punishment and the issue would be tried before the Court. CR 1:192.

On June 17, 2024, Appellant entered a plea of guilty to the offense of aggravated sexual assault of a child in cause number 22-DCR-099555A. CR 1: 190. Appellant also entered a guilty plea to the offense of aggravated sexual assault of child in cause number 24-DCR-107955. CR 1:32 (860). After a hearing, the trial court sentenced Appellant to serve thirty years in prison on both cases and ordered that the sentences run concurrently. CR 1: 49; CR 1:207. The trial court certified Appellant's right to appeal his punishment only. CR 1: 53; CR 1: 211. Appellant timely filed his Notice of Appeal. CR 1: 54; CR 1: 214. This appeal follows.

ISSUES PRESENTED

I. Appellant did not validly waive his right to a motion for new during pretrial or pre-sentence proceedings because the Appellant could not have reasonably known about the grounds for a motion for new trial at the time of the waiver. Therefore, Appellant could not have voluntarily, knowingly, and intelligently waived those claims

II. If Appellant had not waived his motion for new trial, Appellant would have been able to file a motion for new trial alleging ineffective assistance of counsel at his sentencing hearing.

SUMMARY OF THE FACTS

The state charged Hector Rodriguez with the offense of continuous sexual abuse of his 13-year-old stepdaughter, "Abigail Tate." After appellant was arrested for assaulting his wife, Abigail's mother, a CPS worker interviewed Abigail at school. CR 1: 7; CR 1: 165. Abigail informed the CPS worker that appellant had "touched her inappropriately." After an investigation, the State charged Appellant with continuous sexual abuse of a child. CR 1: 7; CR 1: 165.

In June of 2024, Appellant agreed to plea bargain agreement in which he would plead guilty to two counts of aggravated sexual assault of a child and submit the issue of punishment to the judge. Under the agreement, the State would waive its right to a jury trial, and it would not make an agreed punishment recommendation.

To complete the plea agreement, the State filed an information in cause number 24-DCR-107955 alleging that Appellant had committed the offense of

aggravated sexual assault by causing the penetration of Abigail's sexual organ with his finger. The State then made a motion to proceed on the lesser included offense of aggravated sexual assault in cause number 22-DCR-099555A.

At the time of the plea, but before his sentencing hearing, Appellant signed and initialed a set of documents entitled "Defendant's Plea of Guilty or Nolo Contendere Written Admonitions, Waiver of Statutory and Constitutional Rights, and Written Stipulation and Judicial Confession." CR 1: 32-37. The paperwork contained a recitation of Appellant's plea agreement with the State as follows:

> "The Defendant enters a plea of guilty without an agreed recommendation. As an affirmative part of this plea agreement, the State will proceed on the lesser-included offense of Aggravated Sexual Assault of a Child, the State consents to Defendant's waiver of a jury trial, and the Defendant waives the right to appeal his guilty plea. The Court will assess punishment at a hearing following a pre-sentence investigation." CR 1: 34.

Appellant also signed a document entitled "Defendant's Waiver of Right to Appeal." CR 1: 40. The waiver contained the following language:

> "I understand that if the limited right to appeal as stated above comes into effect, l have thirty (30) days after sentencing or suspension of sentence to file a Motion for New Trial, a Motion in Arrest of Judgment, or a Notice of Appeal.
>
> I voluntarily waive my right to file a Motion for New Trial, a Motion in Arrest of Judgment, a Notice of Appeal, or any right to appeal that l may have with respect to my plea of guilty in this case. I reserve only my right to appeal my punishment which, by agreement of the parties, will be assessed by the Court." CR 1: 37.

Appellant also signed a Trial Court's Certification of Defendant's Right of Appeal pursuant to Texas Rule of Appellate Procedure article 25.2 (b). On the form, two boxes are marked. The first box is checked next to a statement which reads that the trial court certifies that Appellant's case "is a plea-bargain case with regard to the plea of guilty, and the defendant has NO right of appeal regarding matters related to the guilt of the defendant; AND." CR 1: 41. The second box is checked next to a statement which reads, "the defendant waives the right of appeal regarding the guilt of the defendant. The defendant reserves the right of appeal for purposes of punishment." CR 1: 41. The "AND" connects the first and second statements. CR 1: 41. Appellant entered his pleas of "guilty" before the trial court on June 17, 2024.[1]

Appellant reappeared for his sentencing hearing on August 26, 2024. The State called Abigail Tate to testify to the incidents of abuse. RR 1: 8. The defense called Appellant to testify. Appellant testified that he served in the United States Army from 1989 to 1997. He testified that he saw combat when he served in Kuwait during the invasion of Iraq as part of Operation Desert Storm. RR 1: 30. In 1993, he began to suffer from symptoms of post traumatic stress disorder. RR 1: 31. Appellant was diagnosed with PTSD and bipolar disorder. RR 1:31. Before his

[1] There is no record of the plea proceedings. Appellant waived the right to have a court reporter record his plea. CR 1:

arrest, he received psychological treatment at the local Veterans Affairs center. RR 1: 31. Appellant's psychological illnesses led to a finding of 100% disability by the VA. RR 1: 30.

Appellant asserted that his psychological disorders caused him to have trouble remembering events, and that he did not remember the incidents that Abigail alleged. RR 1: 30. The defense did not introduce any records of from the VA, nor did the defense call any other witnesses. The trial court assessed punishment at thirty years confinement in the Texas Department of Criminal Justice – Institutional Division in each case and ordered that the sentences be served concurrently. RR 1: 49-50.

After the court pronounced its sentence, Appellant signed another Trial Court's Certification of Defendant's Right of Appeal. CR 1: 53. This form certified that this case was "not a plea bargain case as to punishment, and the defendant has the right of appeal as to punishment," and that this case was "a plea bargain case as to guilt, and the defendant has NO right of appeal as to guilt, and the defendant has waived the right of appeal as to guilt." CR 1: 53.

Trial counsel did not file a notice of appeal, nor did he file a motion to withdraw. Appellant filed a pro se notice of appeal and a pro se motion to appoint appellate counsel. CR 1: 54-57; CR 1: 59-61.

SUMMARY OF THE ARGUMENT

Appellant's waiver of his motion for new trial was invalid because it was not made knowingly, intelligently, or voluntarily. A defendant has the right to file a motion for new trial separate from his right to appeal. A defendant may waive his statutory rights if the waiver is knowingly, intelligently, and voluntarily made.

The defendant signed waivers that included his right to file a motion for new trial prior to his plea and prior to his sentencing hearing when he could have no knowledge of the possible outcome or the possible errors that may be committed during his sentencing hearing. When a defendant waives a right granted by statute, the waiver must be knowingly, intelligently, and voluntarily made. A defendant cannot knowingly, intelligently, and voluntarily waive a right if the consequences of waiving the right cannot be known at the time of the waiver.

The waiver in this case contained no exceptions for issues such as ineffective assistance of counsel, involuntary pleas, new evidence, or excessive punishment. When a defendant seeks to appeal on any of these issues, a motion for new trial is either required or critical to the development of the record on appeal. Appellant's waiver contained no exceptions for matters that could not be foreseen at the time of his plea. As such, Appellant could not knowingly and intelligently execute this waiver of a motion for new trial as he had no ability to foresee the possible errors made by his trial counsel or the outcome of his sentencing hearing.

If Appellant had not waived his right to file a motion for new trial, Appellant could have filed a motion for new trial alleging ineffective assistance of counsel and an involuntary plea. Trial counsel failed to investigate possible mitigating evidence and failed to present mitigating evidence at the punishment hearing.

ARGUMENT

I. Appellant did not validly waive his right to a motion for new during pretrial or pre-sentence proceedings because the Appellant could not have reasonably known about the grounds for a motion for new trial at the time of the waiver. Therefore, Appellant could not have voluntarily, knowingly, and intelligently waived those claims.

Prior to entering his plea of guilty and prior to his sentencing hearing, Appellant signed plea paperwork stating that as part of his plea bargain agreement, Appellant waived his right to appeal any matters relating to his guilty plea and his right to file a motion for new trial. CR 1: 37. CR 1: 198. The waiver does not exempt claims of new evidence, allegations of ineffective assistance of counsel, involuntary plea, excessive punishment, or even new evidence claims. As it is written, Appellant's blanket waiver prevents him from filing *any* motion for new trial. CR 1: 37, CR 1: 198. Appellant's waiver of his right to file a motion for new trial is invalid because it was not knowingly, intelligently, and voluntarily made.

Absent his waiver, Appellant had a right to file a motion for new trial. Rule 21 of the Texas Rules of Appellate Procedure grants defendants a statutory right to file a motion for new trial. Tex. R. App. P. 21; *Bearman v. State*, 425 S.W.3d 328,

329-30 (Tex. App. – Houston [1st Dist.] 2010, no pet.) This is a separate right from the right to appeal. In *Lundgren v. State*, the Court of Criminal Appeals held that, although they are closely related, "motions for new trial and appeals are sufficiently different that an appellate waiver will not waive a defendant's right to file a motion for new trial." *Lundgren v. State*, 434 S.W.3d 594, 600 (Tex. Crim. App. 2014).

For many years, the courts held that pretrial and presentence waivers of appeal and motions for new trial were always invalid because the defendant could not knowingly and intelligently waive a right he did not know he needed or wanted to exercise. In *Smith v. State*, the Court of Criminal Appeals ruled that "a defendant should not be deprived of the opportunity to file a motion for new trial by reason of a waiver filed prior to the trial and at a time when he could not know whether he would desire or have reason or ground for seeking a new trial." *Smith v. State*, 440 S.W.2d 843, 844 (Tex. Crim. App. 1969). In 2011, this Court, in *Delatorre v. State*, reaffirmed the holding of *Smith,* noting that "the right to file a motion for a new trial cannot be waived knowingly and intelligently at a time when [a defendant does] not know whether he would desire or have reason or ground for seeking a new trial." *Delatorre v. State*, 358 S.W.3d 280, 284 (Tex. App. – Houston [1st Dist.] 2011, no pet) (quoting *Smith* at 844).

Under current law, a defendant *may* execute a valid pretrial/presentence waiver of appeal only if the defendant knowingly, voluntarily, and intelligently

waived his rights. Courts may find the defendant executed a knowing, intelligent, voluntary waiver if the defendant bargained for and the State gave consideration for the waiver of the right to appeal. But regardless of the existence of a plea bargain, a waiver of the right to appeal must be knowingly, intelligently and voluntarily made. *Carson v. State*, 559 S.W.3d 489, 495 (Tex. Crim. App. 2018). The question then becomes whether the defendant's waiver is knowingly, intelligently and voluntarily made even in the situation in which the defendant agreed to waive the right of appeal pursuant to a plea bargain. The CCA addressed explained the extent to which a waiver of the right to appeal may be enforced in *Ex parte Reedy*.

In *Ex parte Reedy*, the defendant entered into a plea bargain agreement with the State to plead guilty to capital murder and avoid the possibility of a death sentence. As part of the agreement, Reedy waived his statutory rights to appeal and to pursue a writ of habeas corpus under article 11.071 of the Texas Code of Criminal Procedure. Despite his waiver, Reedy then filed a writ raising several issues including ineffective assistance of counsel.

The CCA reviewed its prior holdings on the waiver of appeal and concluded, "a defendant may waive his right to appeal, but … his waiver will be knowingly and intelligently made only under circumstances in which, and to the extent that, he is aware of what has occurred in the trial proceedings. Only then is he in a position to know the nature of the claims he could have brought on appeal but for his waiver."

Ex parte Reedy, 282 S.W.3d 492, 498 (Tex. Crim. App. 2009). The Court then applied that logic to Reedy's case and held his waiver unenforceable as to his claim of ineffective assistance of counsel. The Court noted that "[c]laims such as actual innocence based on newly available evidence, the suppression of material, exculpatory evidence by the State, and ineffective assistance of counsel" were often predicated on facts that did not exist or were not known to the defendant at the time he executed his waiver. It then found that "when it comes to claims of this type" an applicant's waiver "cannot be knowing and intelligent, and cannot, therefore, be enforceable." *Reedy* at 498.

Although a motion for new trial may be part of the appellate process, motions for new trial are not the same as appeals. See *Lundgren* at 599-600. The CCA has suggested that waivers of a motion for new trial should be treated like waivers of habeas review. In her concurrence in *Lundgren*, Judge Keller noted that the Court had held that "the waiver of post-conviction remedies may be ineffective in the face of a claim that could not have been anticipated at the time the waiver occurred. Logically, the same should be true of the right to file a motion for new trial." *Lundgren v. State*, 434 S.W.3d 594, 601 (Tex. Crim. App. 2014).

A few years later, in *Arizmendi v. State*, the appellant filed a motion for new trial alleging an involuntary plea and ineffective assistance of counsel after she had entered into a plea bargain for a sentence of five years. *Arizmendi v. State*, 519

S.W.3d 143, 152 (Tex. Crim. App. 2017). The State complained that Arizmendi had waived her right to file a motion for new trial. *Id*. In her concurring opinion, Judge Hervey would have held that Arizmendi's waiver of a motion for new trial was unenforceable because Arizmendi did not learn of the availability of an ineffective assistance of counsel plea until after she had completed her plea. *Id*. Judge Hervey noted that the Court had taken a similar approach in *Ex parte Reedy,* and she saw no reason to apply a different rule because "[b]oth cases involved a plea, and in both cases, allegations of an involuntary plea have been made based on ineffective assistance of counsel that was not known at the time of the plea." *Id*.

It makes sense to treat waivers of motions for new trial like waivers of habeas review because both involve "claims that could not have been anticipated at the time the waiver occurred." *Lundgren* at 601. Motions for new trial are used to present claims of newly discovered evidence to the trial court. *Bearman* at 329-30; Tex. R. App. P. 21.3. Article 40.001 of the Code of Criminal Procedure provides, "A new trial *shall* be granted an accused where material evidence favorable to the accused has been discovered since trial." Tex. Code Crim. Proc. Ann. art. 40.001 (West 2024). Texas Rule of Appellate Procedure 21.3 sets out the statutory grounds for a motion for new trial. Rule 21.3 (e) requires the trial court to grant a new trial "when a material defense witness has been kept from court by force, threats, or fraud, or when evidence tending to establish the defendant's innocence has been intentionally

destroyed or withheld, thus preventing its production at trial." Tex. Rule App. P. 21.3 (e).

Some issues may *only* be raised in a motion for new trial or on habeas review. The Court of Criminal Appeals has ruled that a defendant may not challenge the voluntariness of his plea bargain on appeal. *Buck v. State*, 601 S.W.3d 365, 366 (Tex. Crim. App. 2020). But in a concurring opinion, Judge Keller justified the Court's holding, in part, on the fact that a "meritorious involuntary-plea claim may be raised by other procedures: motion for new trial and habeas corpus." *Id.* at 367. The *Arizmendi* case, as previously noted, involved an involuntary plea claim that was unknown to the Arizmendi at the time she executed her waiver.

Similarly, a defendant who desires to appeal a sentence as excessive or "grossly disproportionate" must raise the issue at sentencing or "in a timely post-trial motion." Failure to do so forfeits the alleged error on appeal. *Adaira v. State*, 673 S.W.3d 348, 351 (Tex. App. – Corpus Christi 2023, no pet.). The defendant who signs a waiver of his motion for new trial prior to his sentencing hearing, as Appellant did, does not know what his sentence will be and whether it might be "grossly disproportionate" at the time he signs the waiver. If his trial counsel fails to object at sentencing, a waiver of a motion for new trial may preclude a defendant from bringing a valid claim.

Finally, claims of ineffective assistance of counsel may be raised in a motion for new trial. *Reyes v. State*, 849 S.W.2d 812, 815 (Tex. Crim. App. 1993). A claim of ineffective assistance will generally not be apparent prior to signing a waiver pursuant to a plea agreement, and a hearing on a motion for new trial is crucial to developing claims of ineffective assistance of counsel on direct appeal. In the absence of a motion for new trial, the record will likely be insufficient to support a claim of ineffective assistance of counsel. The trial record will not typically contain an explanation for trial counsel's actions or omissions. Unfortunately, in the face of "silent record" on appeal, "[c]ourts 'commonly assume a strategic motive if any can be imagined and find counsel's performance deficient only if the conduct was so outrageous that no competent attorney would have engaged in it.'" *Hart v. State*, 667 S.W.3d 774, 782 (Tex. Crim. App. 2023) citing *Okonkwo v. State* , 398 S.W.3d 689, 693 (Tex. Crim. App. 2013). A hearing on a motion for new trial provides a way to develop the record and allow trial counsel the opportunity to explain his conduct (or not, as the case may be). *Goodspeed v. State* , 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). An appellant who cannot file a motion for new trial is effectively prevented from raising a meritorious claim of ineffective assistance of counsel.

This Court should follow its own precedent in *Delatorre* and the logical inferences suggested in *Arizmendi* and *Lundgren* and find that a waiver of a motion

for new trial must be knowingly, intelligently, and voluntarily made and that any waiver of the motion for new trial is unenforceable when the motion is predicated on facts that did not exist or were not known to the defendant at the time he executed his waiver

II. If Appellant had not waived his motion for new trial, Appellant would have been able to file a motion for new trial alleging ineffective assistance of counsel at his sentencing hearing.

The 6th Amendment to the United States Constitution and Article I, Section 10 of the Texas Constitution guarantee the defendant the right to the effective assistance of counsel. U.S. Const. Amend. VI; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PRO. ANN. ART. 1.051 (West Supp. 2016); *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prove ineffective assistance of counsel, the appellant must show that his attorney performed deficiently, and that the attorney's deficient performance harmed him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show deficient performance, appellant must prove by a preponderance of the evidence that his counsel's representation fell below the standard of professional norms. *Id*. Then, the defendant must show that the attorney's error "prejudiced the defense." *Id*. In assessing a claim of ineffective assistance, there is a presumption that counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *Id.* at 689.

The right to effective assistance of counsel applies at the punishment stage of trial. Defense counsel has a duty to make reasonable investigations into mitigating evidence or to make a reasonable decision that further investigations are unnecessary. *Wiggins v. Smith,* 539 U.S. 510, 527 (2003). When an appellate court reviews the reasonableness of an attorney's investigation, it must consider the evidence already known to defense counsel and whether the known evidence would lead a reasonable attorney to investigate further. *Id.* Trial counsel's failure to uncover and present mitigating evidence "cannot be justified as a tactical decision when defense counsel has not conducted a thorough investigation of the defendant's background." *Shanklin v. State*, 190 S.W.3d 154, 164 (Tex. App. – Houston [1st Dist.] 2005, pet. dism'd).

If the record demonstrates that mitigating evidence was available, and that defense counsel failed to investigate and present it, the appellant must still show that the failure prejudiced him. In determining prejudice, the appellate court must determine whether there is a reasonable probability that, absent the deficient performance, the sentencer would have assessed a more lenient punishment. *See Miller v. State,* 548 S.W. 497, 499 (Tex. Crim. App. 2018).

A motion for new trial is crucial to presenting a claim of ineffective assistance of counsel on direct appeal because support for ineffective assistance claims must be firmly rooted in the trial record. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim.

App. 2001). The appellant also needs a motion for new trial to show the existence of new mitigating evidence. An appellant cannot establish ineffective assistance based on a failure to present mitigating evidence when the appellant has not shown that additional mitigating evidence was available. *Bone v. State,* 77 S.W.3d 828, 834-35 (Tex. Crim. App. 2002).

The record in this case indicates that trial counsel failed to investigate mitigating evidence of Appellant's mental health struggles. Trial counsel had reasons to suspect that additional mitigation evidence could be uncovered to present on Appellant's behalf. Trial counsel called on Appellant to testify that he was a United States Army combat veteran who served in Operation Desert Storm. RR 1: 30. The Department of Veteran's Affairs determined that, as a result of his service, Appellant suffered from post-traumatic stress disorder and deemed him one hundred percent disabled. RR 1: 31.

Appellant also testified that he suffered from bipolar disorder. During his testimony, Appellant asserted that his mental illness led him to commit acts he would not have committed otherwise. Trial counsel also alluded to the idea that Appellant's PTSD made him less culpable. However, trial counsel did not present records to document Appellant's mental health history. The record does not show whether trial counsel engaged spoke with Appellant's treatment providers or engaged his own expert in PTSD and psychology. Nor did he present any other mitigating evidence

on Appellant's behalf. A motion for new trial would have allowed Appellant to raise and develop this issue for appeal.

Appellant's range of punishment for these offenses was not less than five years and up to 99 years or life in prison. The trial court assessed a punishment of thirty years. It is reasonable to believe that had the trial court been provided with additional evidence of his mental illness, and how it affected his behavior, the trial court would have assessed a lower punishment. Appellant could not have known that his attorney would fail to investigate or present available mitigating evidence at the time that he signed his waiver of a motion for new trial. His waiver was not knowingly and intelligently waived and cannot be enforced.

PRAYER FOR RELIEF

Appellant, Hector Rodriguez, requests that this Court find that his waiver of a motion for new trial was not knowingly, intelligently, and voluntarily made as to claims that could not have been foreseen at the time of his waiver. Appellant respectfully requests that on this finding, the Court ABATE this appeal and REMAND it to the trial court to allow Appellant to proceed with an out-of-time motion for new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief was duly delivered to Fort Bend County District Attorney's Office, on the date of filing through the e-file system.

BY: 

Julia Bella
ATTORNEY FOR APPELLANT

CERTIFICATE OF COMPLIANCE

I hereby that this brief contains approximately 4,993 words and complies with the word limit established by the Texas Rules of Appellate Procedure. This document was created with Microsoft Word 10 and I have relied on the word count function of the software in this certificate of compliance.

By: 

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