

**Court of Criminal Appeals**  
**March 12, 2014**

***Ex Parte Cockrell***

No. WR-78,986-01

Case Summary written by Leonardo De La Garza, Staff Member.

ALCALA, J., delivered the opinion of the Court in which MEYERS, WOMACK, JOHNSON, and COCHRAN, JJ., joined.

Applicant, who had experienced hearing loss due to chronic illness, was tried for sexual assault of a child in 2009. During trial, applicant was not provided with an interpreter, and thus, was unable to understand much of the proceedings. Trial counsel, however, was aware of applicant's hearing impairment, but did not request an interpreter or special equipment to assist applicant in understanding the proceedings. After sentencing, new counsel filed a motion for new trial, where applicant subsequently testified at a hearing that he had heard little of the trial proceedings. The trial court denied the motion. Applicant applied for post-conviction writ of habeas corpus, claiming ineffective assistance of counsel for the failure to seek accommodations for deafness. This failure, alleged the applicant, deprived applicant of his constitutional rights to confront witnesses against him, understand the nature and substance of the trial proceedings, and to assist in his own defense.

Issue: Under the Texas Code of Criminal Procedure, did trial counsel render ineffective assistance by failing to request hearing assistance, thereby depriving applicant of his constitutional rights to confront witnesses against him, understand the nature and substance of the trial proceedings, and to assist in his own defense?

The court answered affirmatively. First, the court applied the *Strickland v. Washington* standard, requiring a showing that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that applicant was prejudiced as a result of counsel's unreasonable conduct. Under this standard, the court found that, considering all the circumstances, counsel's failure to request an interpreter constituted deficient performance. In establishing deficient performance, the applicant must demonstrate that he was entitled to an interpreter and that the trial court would have erred in overruling an objection from counsel on that basis. Here, the court found that applicant was deaf as defined in Texas Code of Criminal Procedure art. 38.31(g)(1). The record indicated that applicant showed difficulty in comprehending trial proceedings, and the trial judge implicitly determined that applicant was deaf. Because a trial court is statutorily and constitutionally obligated to provide an interpreter for a deaf individual, the trial court here would have erred in overruling an objection from counsel on the issue of the lack of an interpreter.

The court then concluded that trial counsel's performance fell below the objective standard of reasonableness because a reasonably competent attorney would have realized that applicant's condition met the definition for "deaf person" as defined in the Code of Criminal Procedure and would have requested the assistance mandated by the Code. The court noted the record's clear indication that trial counsel was well aware of applicant's hearing impairment and his inability to hear witness testimony. Furthermore, the court found trial counsel's minimal efforts to accommodate applicant—such as using written notes, asking the court to turn up the volume on the witness-stand microphone, and yelling—constitutionally inadequate despite the several narrow habeas court findings indicating comprehension. The court also distinguished this failure from one where counselor's performance had been found adequate despite a failure to request an interpreter because, in those cases, the record indicated that the attorney could reasonably have been unaware of the defendant's comprehension difficulties. Additionally, this case differed from cases where the applicant remained silent during trial and complained of inability to hear only after the fact. Notably, this case more closely resembles the case *Gonzalez v. Phillips*, where a federal habeas court concluded that the defendant's trial counsel had rendered deficient performance by failing to request a language interpreter for a Spanish-speaking defendant. In short, the defendant's attorney was on notice that his client had limited English language abilities, and therefore, a failure to obtain an interpreter fell outside the range of reasonably competent professional assistance. Thus, the court found that trial counsel was ineffective under *Strickland's* first prong.

Next, the court found that counsel's deficient performance prejudiced applicant; that is, but for counsel's errors, there is a reasonable probability of a different outcome. For this determination, the court focused on the fundamental fairness of the proceeding, or, as noted in the Supreme Court case of *Lafler v. Cooper*, whether a particular proceeding is unreliable because of a breakdown in the adversarial process contrary to just results. With these principles in mind, the court concluded that applicant suffered a serious injury in being unable to understand substantial portions of the proceedings, and thus, could not adequately participate in his own defense. Furthermore, had he been able to understand, applicant would have been able to participate in his own defense in a possibly verdict-changing way. The court noted that the evidence at trial, namely, testimony by the 12-year old alleged victim, raised the issue of credibility. Impeachment may have been possible, as well as the introduction of further testimony contradicting the alleged victim's accounts. Thus, the court concluded that applicant satisfied *Strickland's* second prong.

Ultimately, the court granted relief and remanded to the trial court for a new trial.

KELLER, P.J., filed a dissenting opinion in which KEASLER and HERVEY, JJ., joined. PRICE, J., dissented.

The dissent argued that the majority misconstrued Article 38.31, failed to give appropriate deference to the habeas court, and misread the record regarding significant facts. First, Art. 38.31 only provides an appointment of an interpreter as a remedy, not special equipment or other hearing assistance. Second, the majority should view the record in light most favorable to the habeas court's recommendation to deny relief, not the light most favorable to the applicant. Third, the majority erred in finding significance in certain facts. For instance, the majority wrongly associated communication by notes to applicant's hearing impairment although counsel indicated it was customary with defendants. Furthermore, the majority erred in concluding that counsel knew applicant was "deaf." It seems that trial counsel's efforts were sufficient to prevent the violation of applicant's constitutional rights; therefore no deficient performance occurred. Finally, the dissent argues, the correct question to answer here is whether a defendant who alleges any degree of hearing impairment may wait until after trial to claim that he could not understand the proceedings. Overall, the dissent concludes that the record does not support the majority's decision.

### ***In re Bonilla***

No. WR-76,736-02

Case Summary written by Megan Kateff, Staff Member.

Judge Alcala delivered the opinion of the Court, in which Presiding Judge Keller and Judges Meyers, Womack, Johnson, Keasler, Hervey, and Cochran joined.

In this case, the imprisoned relator, serving a sentence for aggravated assault, wrote a letter to the Harris County District Clerk requesting information regarding the cost to obtain his trial and appellate transcript. The clerk denied the request pursuant to Section 552.028 of the Texas Government Code, which permits governmental bodies to decline to give information requested by an imprisoned individual or his agent, unless the agent is an attorney. Upon the first denial, the relator sent another letter detailing his reasons for requesting the transcript; specifically, the relator intended to use the transcripts to prepare an application for a writ of habeas corpus to challenge his conviction. In response, the clerk again declined to provide the information per Section 552.028. The relator then filed a motion to compel the clerk to provide the information. He requested this relief from the Court of Criminal Appeals on the grounds that the clerk had denied him his constitutional right of access to the courts. Upon the relator's filing of the motion to compel, the Court of Criminal Appeals filed the motion as an

application for a writ of mandamus, abated the case, and requested a response from the clerk.

Issue: Did the Harris County District Clerk deny the indigent, imprisoned relator of his constitutional right of access to the courts by declining to provide him information about the cost of purchasing his trial and appellate transcripts for the purpose of preparing an application for a writ of habeas corpus?

Although the Court of Criminal Appeals had never directly addressed the above question, the court agreed with the relator, citing precedent from the Supreme Court of the United States and provisions of the Texas Constitution and Code of Criminal Procedure.

The Supreme Court has established precedent supporting the constitutional right of access to the courts. It has also held that the right to apply to a federal court for a writ of habeas corpus may not be abridged or impaired by a state and its officers. The Court has struck down multiple restrictions impeding habeas applicants, as well as state laws and rules impeding inmates' access to the courts. It has required no docketing fees for indigent habeas applicants, access to jailhouse lawyers, and prison authorities' assistance to inmates in the preparation and filing of legal documents by providing adequate prison law libraries.

The Texas Constitution also states that the right to a writ of habeas corpus shall never be suspended. Pursuant to the Texas Constitution, the Texas Legislature codified procedures for filing applications for writs of habeas corpus, in both death and non-death cases. Specifically for non-death cases, as in the present case, Article 11.07 of the Texas Code of Criminal Procedure states that the burden to file an initial application for a writ of habeas corpus will usually fall on the inmate alone. Article 11.07 also precludes a court from considering the merits of or granting relief based on a subsequent application, unless the application contains sufficient specific facts establishing one of two narrow exceptions. The provision essentially results in an indigent inmate getting one bite at the "habeas corpus apple". To that end, although an indigent prisoner has a right to appointed counsel and a free trial record on direct appeal, the same right neither applies to discretionary review of a decision of the court of appeals, nor to collateral attacks on a conviction. While an indigent prisoner may eventually receive legal counsel in pursuit of a writ of habeas corpus application, the initial preparation of the application will most likely be pro se.

This reality makes important an indigent inmate's ability to have access to his entire record when preparing an application for a writ of habeas corpus, in order to ensure that he has presented all claims in what will likely be his only bite at the apple.

The Court of Criminal Appeals held that by declining to provide the relator with information regarding the cost to purchase trial and appellate transcripts, the clerk impeded the relator's ability to prepare and submit an

adequate application for a writ of habeas corpus. This deprivation effectually denied the relator of his constitutional right to access the courts. To be entitled to mandamus relief, however, the relator must show not only that he has no adequate remedy at law, but also that what he seeks to compel is a ministerial act. The court found that the relator had no adequate remedy at law because the information he sought pertained to an unfiled, future post-conviction application. The court found that the relator had satisfied the ministerial-act requirement based on his demonstration of a clear right to the relief sought, particularly because the facts and circumstances dictated one rational decision under unequivocal, well-settled, and clearly controlling legal principles.

The court declined to grant mandamus relief to the relator and ultimately dismissed the petition for mandamus, though, because when the court requested a response from the clerk on the motion to compel, the clerk provided the relator with the information he initially sought, rendering the matter moot.

### ***Maxwell v. State***

NO. AP-76,964

Case Summary written by Tarryn Johnson, Staff Member.

Judge Cochran delivered the opinion of the Court, joined by Judges Meyers, Price, Johnson, and Alcalá. Judge Womack filed a dissenting opinion, which Presiding Judge Keller joined. Judge Keasler also filed a dissenting opinion, which Presiding Judge Keller and Judge Hervey joined.

In his application for a writ of habeas corpus, Maxwell argued that his sentence of life imprisonment without the possibility of parole for a crime he committed as a juvenile violated the Eighth and Fourteenth Amendments to the United States Constitution under *Miller v. Alabama*. Maxwell was convicted of capital murder, which he committed at the age of seventeen. Because Maxwell was a juvenile at the time he committed the murder, the State did not seek the death penalty; instead, the punishment was automatically assessed at life imprisonment without the possibility of parole in accordance with TEX. PENAL CODE § 12.31(a) (2009). In accordance with the statute, Maxwell's sentence was imposed and affirmed on direct appeal before the United States Supreme Court issued their opinion in *Miller v. Alabama*, holding that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."

Issue: Does *Miller v. Alabama* apply retroactively to a claim raised in a post-conviction proceeding, and if so, what remedy is appropriate?

The court held that *Miller* does indeed apply retroactively because the *Miller* Court announced a new substantive rule under the first exception of

*Teague v. Lane*. Thus, the court granted Maxwell relief and remanded for further sentencing proceedings not inconsistent with *Miller v. Alabama*.

Under the *Teague* framework, a “new rule” applies retroactively in a collateral proceeding only if the rule (1) is substantive, or (2) is a “watershed” rule of criminal procedure. The court noted that although not required, Texas state courts follow *Teague* as a general matter of state habeas practice. Additionally, the court acknowledged the circuit split on the issue, as well as the split of authority among states’ highest courts deciding the issue. The dispositive factor that courts cannot seem to agree on is whether the *Miller* decision falls under the first *Teague* exception of being a substantive rule or not. Those courts that have held *Miller* is not retroactive have strictly construed *Teague*, holding that it applies only when the new rule entirely removes a particular punishment from the list of punishments that may be constitutionally imposed on a class of defendants--not when a rule addresses the considerations for determining a particular sentence. These courts conclude that *Miller* does not satisfy the test for retroactivity because it does not categorically bar all sentences of life without parole for juveniles; *Miller* bars only those sentences made mandatory by an explicit sentencing scheme.

The Court of Criminal Appeals, however, recognized that *Miller* is driven first and foremost by the conclusion that “children are constitutionally different from adults for purposes of sentencing.” The court concluded that *Miller* is a “new substantive rule” that puts a juvenile’s mandatory “life without parole” sentence outside the ambit of the State’s power. Accordingly, *Teague* requires that *Miller* be applied retroactively. Thus, Maxwell’s sentence of life without parole violated the Eighth and Fourteenth Amendments of the United States Constitution under *Miller v. Alabama*, and relief should be granted in the form of a re-sentencing in accordance with *Miller*.

Womack, J., Dissenting, joined by Keller, P.J.

Judge Womack argues that *Miller v. Alabama* failed to announce a new substantive rule for the purposes of *Teague*’s retroactive application. Womack believes that the Supreme Court has not ruled on the retroactive applicability of its decision in *Miller*. Additionally, he argues that the Supreme Court’s decision in *Teague* generally held that new constitutional rules of criminal procedure would not be applicable to cases that had become final before the new rules were announced, and Maxwell’s case became final before *Miller*. Womack articulates that although *Miller* undoubtedly announced a new rule, the new rule does not satisfy the *Teague* exceptions for retroactive application. Therefore, the application for a writ of habeas corpus should be denied.

Keasler, J., Dissenting, joined by Keller, P.J., and Hervey, J.

Judge Keasler argues that the majority erroneously characterizes the

*Miller* rule as substantive, but that it is procedural, and therefore not subject to retroactivity. Keasler begins by pointing out a distinguishing characteristic: *Miller* did not prohibit life-without-parole sentences for juveniles; it prohibited imposing them mandatorily. This distinction is key in that it recognizes precisely how the Supreme Court has drawn the line between substantive rules that are retroactive and procedural rules that are not. Additionally, Keasler argues that the majority ignores precedent cases defining “substantive rules” and “procedural rules”. For these reasons, Judge Keasler would not hold that *Miller* applies retroactively and would not grant Maxwell’s request for a writ of habeas corpus.

***Easley v. State***

No. PD-1509-12

Case Summary written by Caleb Segrest, Staff Member.

KEASLER, J., delivered the unanimous opinion of the Court.

Damian Easley was convicted of family-violence assault charges by a jury and sentenced to twenty years confinement. During voir dire, the judge refused to allow Easley’s counsel to question the jury panel on the differences between the criminal and civil burdens of proof. On appeal, the Waco Court of Appeals held that the judge erred in not allowing Easley’s counsel to question the jury panel about the differences between the criminal and civil burdens of proof. The court of appeals further held that the error was non-constitutional and subject to a harm analysis under Rule 44.2(b). Applying a Rule 44.2(b) harm analysis, the court of appeals held that the error was harmless and that the conviction would stand. The Court of Criminal Appeals of Texas AFFIRMED the judgment of the court of appeals.

Issue: Should the Court of Criminal Appeals of Texas reevaluate its precedent (*Plair v. State* and its progeny) that prohibiting a defendant’s proper question in voir dire is an error that runs afoul of the Texas Constitution?

The Court held that the *Plair* opinion, decided some ninety years ago, and its progeny is overruled. The *Plair* opinion stated that every restriction on counsel’s voir dire presentation violated an accused’s constitutional right to counsel. The Court disagreed with this “overly broad conclusion” based on the unrealistic application of this rule. If the Court were to strictly follow the rule of *Plair*, then any trial error relative to counsel’s efforts in making challenges to potential jurors, making opening statements, objecting to evidence, cross-examining a witness called by the State, offering evidence, etc., would rise to the level of constitutional dimension. This reasoning, according to the Court, is no longer acceptable. The Court listed a plethora of more recent cases that have undermined the force of *Plair* by continuing to apply a non-constitutional harm analysis to errors that, under *Plair*’s reasoning, could be considered an infringement on the accused’s right to be

heard by counsel. The Court further stated that: “Only in specific instances in which the precluded evidence forms a vital portion of the defendant’s case will such an error be considered constitutional error. A constitutional violation may arise only if ‘(1) a state evidentiary rule categorically and arbitrarily prohibits the defendant from offering otherwise relevant, reliable evidence vital to his defense; or (2) a trial court’s clearly erroneous ruling results in the exclusion of admissible evidence that forms the vital core of a defendant’s theory of defense and effectively prevents him from presenting that defense.’”

After holding that the court of appeals properly applied a non-constitutional harm standard, the Court next considered whether the court of appeals reached the proper conclusion under the Rule 44.2(b) standard. Considering that Easley’s counsel was still permitted to question the jury panel regarding their understanding of the concept of the “beyond a reasonable doubt” standard, the Court agreed with the court of appeal’s holding that the trial judge’s error was harmless.

“The court of appeals correctly concluded that the error in refusing Easley’s counsel from discussing other burdens of proof in voir dire was a non-constitutional error analyzed under Rule 44.2(b). We further conclude that the court of appeals was correct in finding the error harmless. The court of appeals’ judgment is affirmed.”

***Juan Manual Gonzales v. The State of Texas***

Nos. PD-0954, 0955, 0956-13

Case Summary written by Matt McKee, Staff Member.

Womack, J., delivered the opinion of the unanimous Court.

After Appellant plead guilty to four drug-related charges, the trial court consolidated the four cause numbers into one for the sentence hearing. Following the verdict, Appellant filed notice of appeal under the cause number used at sentencing, later amending the notice to include all four cause numbers before the parties filed briefs. On appeal, the court dismissed the three causes Appellant failed to list in his initial notice for lack of jurisdiction.

Considering the legislature’s 2002 amendments to the Texas Rules of Appellate Procedure, the Supreme Court noted “defects in notices of appeal should not be described as affecting jurisdiction.” *See* TEX. R. APP. P. 25.2(f). Finding the notice sufficient to indicate Appellant’s desire to appeal, the Court preserved Appellant’s right to appeal, reversing the court of appeals and remanding accordingly.

***Perez v. State***

No. PD-0498-13

Case Summary written by Jamie Vaughan, Staff Member.

Judge Johnson delivered the opinion of the Court, in which Presiding Judge Keller and Judges Meyers, Womack, Keasler, Hervey, Cochran, and Alcala, joined. Judge Alcala filed a concurring opinion in which Presiding Judge Keller and Judges Hervey and Cochran joined. Judge Price concurred.

Eduardo Perez pleaded guilty to burglary and was placed on deferred-adjudication community supervision for three years. Perez was also fined \$300 and ordered to pay \$203 in court costs. Perez did not appeal the order. When Perez did not pay the court costs, the state motioned for an adjudication of guilt, which the court granted, sentencing Perez to two years incarceration and ordering him to pay a \$300 fine and \$240 in court costs. At that time, Perez appealed the order to pay \$240 in court costs, claiming that the court costs were not substantiated by a proper cost bill, and that the screen shots the state used as evidence were insufficient, thus violating Perez's due process rights. Perez further argued that he was never given the opportunity to challenge the costs due to this insufficiency of evidence. The state argued that a bill of costs was not required to establish court costs and that the evidence presented was sufficient. Additionally, the state argued that Perez had waived his right to appeal court costs by not preserving the error at the trial court. The appellate court reformed the judgment by deleting court costs, holding that the trial court erred in entering the specific dollar amount of court costs because the evidence of the court costs was insufficient.

Issue: Did Perez's failure to appeal court costs at the time of the order of deferred adjudication preclude him from appealing the order of court costs at the time the court adjudicated his guilt?

The court began by stating that claims regarding court costs do not need to be preserved at the trial court but may be raised initially at the appellate court. However, the court noted that Perez failed to timely appeal the order of court costs because he did not appeal within thirty days of the order of deferred adjudication. Additionally, the court held that Perez had waived his right to appeal by pleading guilty and signing documents of waiver at the time the order of deferred adjudication was entered. At the same time however, the court held that Perez's waiver did not excuse him from failing to appeal from the initial order. Because Perez did not appeal the order of court costs at the time of the order of deferred adjudication, the court determined he could not appeal as to the \$203. The court therefore remanded the case to the appellate court for determination on the remaining \$37 in costs.

Alcala, J., concurring.

Judge Alcala wrote separately to highlight the fact that “sitting on your rights or waiving them may cause you to lose them.” He also wrote to detail the five methods that are available for people who do not sit on their rights and wish to timely appeal impositions of court costs: (1) the appellant can file a direct appeal; (2) the appellant can, within a year, challenge cost assessments under the Texas Code of Criminal Procedure; (3) the appellant can file a petition for mandamus; (4) the appellant can choose not to pay until a bill is produced, or ready to be produced, under the Texas Code of Criminal Procedure; however, this can be risky because the definition of “ready to be produced” is unclear; or (5) if the appellant is an inmate, the appellant can seek a civil remedy under the Government Code; however, the appellant did not do this here.

***Mathis v. State***

No. PD-0536-13

Case Summary written by Jessica Rugeley, Online Edition Editor.

Judge Cochran delivered the opinion of the Court in which Judges Womack, Johnson, and Alcala joined. Presiding Judge Keller filed a dissenting opinion in which Judges Keasler and Hervey joined. Judge Meyers filed a dissenting opinion in which Presiding Judge Keller and Judges Keasler and Hervey joined. Judge Price concurred.

Mathis was convicted of sexual assault and sentenced to ten years of probation and an unprobated \$10,000 fine. The trial judge added the requirement of confinement in an Intermediate Sanction Facility for six months to treat alcohol issues. The trial judge also ordered Mathis to be fitted with a SCRAM device, which monitors alcohol levels, once he was released. Mathis submitted financial affidavits of indigency both before and after sentencing, and was appointed an attorney, but the trial judge still required he pay a total of \$23,736.19 in attorneys fees, supervision fees, and court costs. He was also required to pay an undefined amount for the SCRAM device. The trial judge noted Mathis’s concern about his ability to pay for the device after getting out of jail, but told him to work it out with probation. Mathis appealed and the court of appeals modified the trial court’s judgment to delete the requirement that he pay for the SCRAM device.

Issue: Must the trial court consider a defendant’s ability to pay for a term of probation?

The Court held that, pursuant to Article 42.12 of the Texas Code of Criminal Procedure, the trial court must actually consider the defendant’s ability to pay without undue hardship before imposing monetary conditions as a condition of probation. The defendant must provide evidence to support any claims of undue hardship. Here, Mathis submitted two sworn affidavits

of indigency and was appointed counsel at both trial and on appeal. But the trial court must do more than refer the defendant to “work with probation.” The Court reversed and remanded to allow the trial court to conduct a hearing and determine if Mathis can pay the SCRAM fees without undue hardship.

Keller, P.J., Dissenting

Presiding Judge Keller states that the trial court did consider Mathis’s ability to pay when it noted Mathis’s concern. Furthermore, Article 42.12, § 11(b), which applies to Mathis’s conviction, does not require the trial court’s decision on assessing payments to be based on the defendant’s ability to pay, just that the court shall consider the ability of the defendant to make payments. Finally, Presiding Judge Keller notes that there is no indication that the trial court would order Mathis confined for failure to pay.

Meyers, J., Dissenting

Judge Meyers notes that the trial court did consider Mathis’s ability to pay and thus required him to work with probation. There is no set standard as to the degree that a court must consider a defendant’s ability to pay and probationers can request extensions.