

COURT OF APPEALS OF TEXAS, FIFTH DISTRICT AT DALLAS

Mario Lopez Jucup v. The State of Texas

No. 05-13-00878-CR · No. 05-13-00878-CR · Decided March 6, 2015

SUMMARY

This document is Mario Lopez Jucup’s pro se Petition for Discretionary Review to the Texas Court of Criminal Appeals in CCA No. PD-1623-14, arising from a Dallas Court of Appeals decision affirming his conviction. The petition challenges Anders appellate procedures, the waiver of counsel and jury trial, the trial court’s handling of appointed counsel, and the calculation of back-time credit. It asks the Court of Criminal Appeals to grant review and clarify the duties of counsel and appellate courts in Anders appeals.

CASE DETAILS

COURT	Court of Appeals of Texas, Fifth District at Dallas
WRITING FOR THE COURT	Justice FitzGerald; Justice Lang; Justice Brown
JURISDICTION	Texas
DECIDED	March 6, 2015
DOCKET	05-13-00878-CR
DISPOSITION	affirmed
PROCEDURAL POSTURE	Anders appeal from a bench-trial conviction for continuous sexual abuse of a young child. Appointed appellate counsel filed an Anders brief stating that the appeal was wholly frivolous. The defendant filed a pro se response.
STANDARD OF REVIEW	In an Anders appeal, the appellate court must independently examine the entire record to determine whether any arguable ground supports the appeal; if the appeal is wholly frivolous, the court may affirm. The court may modify the judgment under Texas Rule of Appellate Procedure 43.2(b) when the record supports correction.
PRECEDENTIAL VALUE	unpublished memorandum opinion; not for publication
PARTIES	Mario Lopez Jucup v. The State of Texas

TOPICS

- appellate procedure
- right to counsel
- criminal procedure
- standard of review

PRACTICE AREAS

criminal appellate procedure

criminal procedure

right to counsel

QUESTIONS PRESENTED

1. Whether the Anders brief adequately demonstrated that the appeal was wholly frivolous and without merit.
2. Whether the record contained any arguable ground for appeal.
3. Whether the appellate court could modify the judgment to correct the sex-offender-registration designation and the victim's age.

HOLDINGS

1. After independently reviewing the Anders brief, the appellant's pro se response, and the record, the court found nothing that might arguably support the appeal and concluded that the appeal was frivolous and without merit.
2. The court modified the judgment to state that sex-offender-registration requirements apply to Jucup and that the victim was ten years old.

KEY QUOTATIONS

"After reviewing counsel's brief, appellant's pro se response, and the record, we agree the appeal is frivolous and without merit." (at 2)

"We find nothing in the record that might arguably support the appeal." (at 2)

"As modified, we affirm the trial court's judgment." (at 2)

FACTUAL BACKGROUND

Jucup was charged with continuous sexual abuse of a young child. He waived a jury, pleaded not guilty, and represented himself at trial. The trial court found him guilty and assessed thirty years' imprisonment. The record showed that the trial court informed Jucup that sex-offender-registration requirements applied and that the victim was ten years old, but the written judgment incorrectly stated that registration requirements did not apply.

PROCEDURAL HISTORY

Jucup was convicted in the 265th Judicial District Court of Dallas County after waiving a jury and pleading not guilty to continuous sexual abuse of a young child. The trial court assessed thirty years' imprisonment. The Fifth District Court of Appeals independently reviewed the Anders brief, the pro se response, and the record, modified the judgment to reflect applicable sex-offender-registration requirements and the victim's age, and affirmed as modified.

DISPOSITION

affirmed

REMAND INSTRUCTIONS

The trial court was ordered to issue an amended judgment reflecting that sex-offender-registration requirements apply and that the victim's age was ten years, and to include any other language required by the Texas sex-offender-registration statutes.

CASES CITED

- *Anders v. California*, 386 U.S. 738 (1967)
- *High v. State*, 573 S.W.2d 807, 811-12 (Tex. Crim. App. 1978)
- *Kelly v. State*, 436 S.W.3d 313, 319-21 (Tex. Crim. App. 2014)
- *Bledsoe v. State*, 178 S.W.3d 824, 826-27 (Tex. Crim. App. 2005)
- *Bigley v. State*, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993)
- *Asberry v. State*, 813 S.W.2d 526, 529-30 (Tex. App.—Dallas 1991, pet. ref'd)

OPINION

PER CURIAM.

/6 Z 3-M CCA NO. PD-1623-14 uhibilMAL IN THE COURT OF CRIMINAL APPEALS OF TEXAS AT, AUSTIN, TEXAS DECEIVE COURT OF CRI?#!AL APPEALS 02 2015 MARION LOPEZ JUCUP Appellant isS^oatei Clerk. VS. THE STATE OF TEXAS FILED IN COURT OF CRIMINAL APPEALS mar o c iz:5 IN APPEAL NO. 05-13-00878-CR FROM THE COURT OF APPEALS OF TEXAS Abel Acosta, Clerk FOR THE 5TH JUDICIAL DISTRICT AT DALLAS, TEXAS APPELLANT'S PRO SE PETITION FOR DISCRETIONARY REVIEW Mario Lopez Jucup TD'CJ No. 1870734 Hughes Unit Rt.

2, Box 4400 Gatesville, Texas 76597 APPELLANT PRO SE IDENTITY OF JUDGE, PARTIES, AND COUNSEL Trial Court Judge: Mark C. Stoltz THE STATE OF TEXAS represented by: Craig Watkins Dallas County District Attorney 133 N. Riverfront Blvd., LB 19 Dallas, TX 75202-4313 (at trial and on appeal) Jason Fine, ADA (at trial) UNKNOWN, ADA (on appeal) MARIO LOPEZ JUCUP (Appellant) TDCJ No. 1870734 Hughes Unit Rt.

2, Box 4400 Gatesville, TX 76597 represented by: Hugho Aguilar Attorney-At-Law 1327 Empire Central Dr. Dallas, TX 75247 (pre-trial only) Juantia Edgecomb Attorney-at-Law (UNKNOWN ADDRESS) Navarro County, Texas (pre-trial apperance only) PRO SE (at trial and on PDR) April E. Smith Attorney-At-Law P.O. Box 870550 Mesquite, TX 75187-0550 (on appeal only) TABLE OF CONTENTS PAGE Identity of Judge, Parties, and Counsel i Table of Contents ii Index of Authorites iii-iv Statement Regarding Oral Argument v Statement of the Case vi Statement of Procedural History vii GROUNDS FOR REVIEW viii SUMMARY OF THE ARGUMENT 1-2 GROUND ONE: COUNSEL'S DUTIES IN ANDERS APPEALS 2-12 Introduction 3-4 Conditional Request for Self-Representation 4-5 Incorrect Admonishments = Involuntary Waiver of Counsel..6 Should Have Granted Motion to Dismiss Counsel.....7 No Admonishments and No

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13 Selective Examination of the Record 13 How Much of the Record Does the Court of Appeals f? Have to Read 14 Arguable Issue ^ Harmful or Reversible Error.... 14-15 Favorable Reformation of the Judgment 15 PRAYER 16 Verification / Certificate of Service (TO DA & COURT) 16 Certificate of Translation and Adoption 16 APPENDIX - COA OPINION INDEX OF AUTHORTIES CASE LAW PAGE Aldrich v. State, 296 S.W.3d 225 (Tex.App. - Fort Worth 2008) 7 Alford v. State, 367 S.W.3d 855 (Tex.App. - Houston [14th Dist] 2012) 5 Anders v. California, 385 U.S. 738 (1967) PASSIM Asberry v. State, 813 S.W.2d 526 (Tex.App. - Dallas 1991) 9 Bledsoe v. State, 178 S.W.3d 824 (Tex.Crim.App.2005) 3,13,14 Bray v. State, 179 S.W.3d 725 (Tex.App. - Fort Worth 2005).

15 Brewer v. Williams, 97 S. Ct. 1232 (1977) 5,6 Boykin v. Alabama, 395 U.S. 238 (1969) 8,12 Burgees v. State, 790 S.W.2d 856 (Tex.App. - Houston [14th Dist] 1990), aff. 816 S.W.2d 424 (Tex.Cim.App.1991). 8 Ex parte Bynum, 772 S.W.2d 113 (Tex.Grim.App.1989) 9 Cerf v. State, 366 S.W.3d 778 (Tex.App. - Amarillo 2012) 6 Evans v. State, 933 S.W.2d 334 (Tex.App. - Waco 1996) Faretta v. California, 95 S. Ct.

2525 (1975).. 5 Godlinez v. Moran, 113 S. Ct. 2680 (1993) 6 High v. State, 573 S.W.2d 807 (Tex.Crim.App.[panel Op.] 1978)..4,11,12 Jones v. State, 775 S.W.2d 199 (Tex.Crim.App. 1990) 9 Jones v. State, 545 S.W.2d 771 (Tex.Crim. App.1975) 9 Kelly v. State, 436 S.W.3d 313 (Tex.Crim.App.2014) 3,10,11 Marquez v. State, 921 S.W.2d 217 (Tex.Crim.App.1996) 6 Marvin v. State, 851 S.W.2d 275 (Tex.Crim.App.1993) 8,12 Ex parte McCain, 67 S.W.3d 204 (Tex.Crim.

App. Aoo" ^) 8 McCoy v. COA, 486 U.S. 429 (1988) 11,15 Meza v. State, 206 S.W.3d 684 (Tex.CritfApp.Itfbb) 3,10 Moore v. State, 320 S.W.3d 520 (Tex.App. - Amarillo 2010) 15 Moore v. State, 916 S.W.2d 696 (Tex.App. - Beaumont 1996) 8 Ex parte Owens, 206 S;W.3d 670 (Tex.Crim.App.2006).3 Pension v. Ohio, 488 U.S. 75 (1988) 10 Smith v. Bobbins, 528 U.S. 259 (2000) 4,11,14,15 Rompilla v. Beard, 125 S. Ct.

2456 (2005) 7 Scarbough v. State, 777 S.W.2d 83 (Tex.Crim.1989) 5 In re Schulman, 252 S.W.3d 403 (Tex.Crim.App.2008) 3,10,13,15 Sims v. State, 326 S.W.3d 707 (Tex.App. - Texarkana 2010) 6 Taulung v. State, 979 S.W.2d 854 (Tex.App. - Waco 1998) 15 U.S. v. Wagner, 163 F.3d 551 (7th Cir 1996). 14 Walker v. State, 962 S.W.2d 124 (Tex.App. - Houston [1st Dist] 1997) 6 Ex parte Williams, 704 S.W.2d 773 (Tex.Crim.App.1986) 6 Wilson v. State, 40 S.W.3d 192 (Tex.App. - Texarkana 2001) 14 STATUSES fPAGE Texas Code Criminal Procedure Art. 1.13(c) 3>7>8 Art. 1.051(h) --6 Art. 26.04(i)(1)?

Art. 42.03 § 2 ' 1° Texas Rules of Evidence Rule 201 • JO 404(a)(2) I 405 • \ 412 b STATEMENT REGARDING ORAL ARGUMENT Appellant request oral argument because it would benefit the Court to be able to discuss the different standards for Anders Appeals that have been spoken of in the past and determine which standard is the best fit for Texas.

Moreover, Oral Argument would assist the Court in applying the Anders standards to the issues pointed out by Appellant. Simply put, oral argument would help simply the facts and clarify the issues. STATEMENT OF THE CASE This is an Anders appeal following a bench trial where the Appellant, Mario Lopez Jucup, represented himself at trial. Appellant, who speaks Spanish, was accused of continuous sexual abuse of his step-daughter and complained prior to trial that court-appointed trial counsel had not consulted with him about the facts of the case.

Appellant requested the trial court to appoint counsel that was appointed to represent him in a different court on similar charges (that had spoken to Appellant about the facts). Appellant only requested to represent himself because the trial court refused to appoint different counsel.

As a result of that and Appellant not knowing the law, available evidence did not get properly introduced at trial that would have supported Appellant's testimony (that the charges were fabricated due to jealousy within the family and the mother's use of sexual activities with her children as a test of family members loyalty)* STATEMENT OF PROCEDURAL HISTORY In Cause No. F10-55339-R the Appellant, Mario Lopez Jucup, was charged with the offense of continuous sexual abuse of a child.

The Appellant was convicted of that offense on May 29, 2013. A notice of appeal was timely filed on the same date. On June 19, 2014 court-appointed appellate counsel filed a motion to withdraw and Anders brief. & copy of the Anders brief was provided to Appellant along with a copy of the appellate record and an extension of time to file a PRO SE Response. Appellant was not able to file a complete PRO SE Response because during that time period he was in transit between several TDCJ units for in-process and medical treatment.

Moreover, Appellant does not fully understand the English language. On November 24, 2014, the 5th District Court of Appeals of Texas ISSUED its Memorandum Opinion and AFFIRMED the conviction (as modified). NO MOTION FOR REHEARING WAS FILED.

On December 12, 2014 this Court of Criminal Appeals granted Appellant an extension of time until February 27, 2015 to file this PRO SE PDR. Then, On January 22, 2015 this Court suspended Rule 9.3(b) and permitted Appellant to file only one original of this PDR. PDR. This PDR was FILED, by placing it in the prison mail system on *ET IK&B&eD ZC2JDIE~ GROUNDS FOR REVIEW GROUND ONE: IN AN ANDERS APPEAL, WHAT LEVEL OF "DUE DILIGENCE" IS SUFFICIENT FOR COURT-APPOINTED APPELLATE COUNSEL'S ASSAYING THE RECORD FOR ERROR AND DID COUNSEL IN THIS CASE EXERCISE THAT LEVEL OF

"DUE DILIGENCE" WHEN HER ANDERS BRIEF FAILED TO DISCLOSE RECORD FACTS SUPPORTING THAT: 1) Appellant did not clearly and unequivocally assert his right to self-representation at trial when his request was conditioned upon the trial court's refusal to appoint different counsel.

2 RR 13, 17, 20; 3 RR 8-9,13; 2) Appellant's waiver of counsel was not intelligently, knowingly, and voluntarily executed when the trial court incorrectly admonished Appellant that trial counsel could never introduce evidence of the victim's character and that Appellant could never reassert his right to counsel once the court approved the waiver of counsel. 2 RR 14; 3 RR 10, 18; 3) The trial court should have granted Appellant's motion to dismiss counsel when appointed trial counsel admitted that he had not consulted with Appellant about the facts of the charge.

1 CR 48, 50; 2 RR 16, 3 RR 8, 13, 14, 18; 4) The trial court violated Article 1.13(c) of the Texas Code of Criminal Procedure when the court failed to appoint counsel to advise Appellant prior to accepting the jury waiver.(even if it was prior counsel) and the jury waiver was not /intelligently, knowingly, and voluntarily executed when the trial court never admonished Appellant about his Sixth Amendment right to a jury trial.

1 CR 57; 3 RR 19-20; 5) There was a clerical error in the Judgment concerning the back-time, where it failed to include the time period a detainer was lodged with TDGJ for this offense -- which reformation of the Judgment would be favorable to Appellant. 1 CR 10, 60; 2 RR 7, 8; 5 RR 13; 6 RR 4, cxl. GROUND TWO: IN AN ANDERS APPEAL, WHAT DEGREE OF INDEPENDENT EXAMINATION MUST THE COURT OF APPEALS MAKE OF THE RECORD AND HOW DOES A COURT MEASURE IF AN "ARGUABLE ISSUE" HAS ENOUGH MERIT SO THAT THE APPEAL IS NOT "WHOLLY FRIVOLOUS" (MUST IT BE HARMFUL, OR REVERSIBLE ERROR OR IS REFORMATION OF THE JUDGMENT FAVORABLE TO AN APPELLANT SUFFICIENT); AND, WHEN THE COURT OF APPEALS IN THIS CASE OVERLOOKED THE ISSUES RAISED BY APPELLANT (IN GROUND ONE) DID THE COURT TRULY FOLLOW THE CORRECT ANDERS STANDARDS?

SUMMARY OF THE ARGUMENT The right to counsel, both at trial and on appeal, is central to our system of criminal justice. This case concerns both. Appellant, Mario Lopez Jucup, was, and is, indigent. Thus, at all times it was the duty of the trial court to appoint counsel to represent Appellant. It has been said that one reason counsel is so necessary is the need to deal with the complex mix of technical rules that govern trials and appeals.

That is exactly the breakdown experienced in this case. At trial, due to the absence of counsel, evidence that supported Appellant's testimony that the charges were fabricated due to jealousy within the family and the mother's use of sexual activities with her children as a test of family members' loyalty was not correctly admitted into evidence. 6 RR cxl. And, then on appeal, the lack of clear guidelines for Anders appeals resulted in an Anders brief that failed to disclose record

facts to the court of appeals that arguably would have supported that there was a denial of the right to counsel and a denial of the right to a trial by jury.

The right to counsel is so important that courts must indulge every reasonable presumption against the waiver of counsel. Yet, both the trial court and appellate counsel have ignored that maxim in this case. After all, the record is replete with references that Appellant's request to represent himself was confrontational on the trial court's refusal to replace court-appointed counsel and that the waiver of counsel was not intelligently, knowingly, and voluntarily executed.

All Appellant really wanted was a court-appointed attorney that would talk to him about the facts of the charge -- which trial counsel practically admitted he had not consulted with Appellant about the facts. Nevertheless, the trial court refused to appoint Appellant's court-appointed counsel from a different county that was present at trial and ready to proceed to trial.

Then, court-appointed appellate counsel failed to disclose these facts to the court of appeals, even in an Anders brief. And, the court of appeals failed to uncover these facts during its independent examination of the record.

The problem is that there are no set standards to guide court-appointed counsel and the appellate court in their examination of the record. Exactly what kind of facts are they looking for as they examine the record?

In other words, what exactly makes an appeal "wholly frivolous" -- is the reformation of the judgment favorable to an appellant to correct back-time an "arguable issue"? In answering these type of questions, this Court can clarify the amount of due diligence in assaying the record that is sufficient, for both appellant counsel and the appellate court in Anders appeals.

ARGUMENT GROUND ONE: IN AN ANDERS APPEAL, WHAT LEVEL OF "DUE DILIGENCE" IS SUFFICIENT FOR COURT-APPOINTED APPELLATE COUNSEL'S ASSAYING THE RECORD FOR ERROR AND DID COUNSEL IN THIS CASE EXERCISE THAT LEVEL OF "DUE DILIGENCE" WHEN HER ANDERS BRIEF FAILED TO DISCLOSE RECORD FACTS SUPPORTING THAT: 1) Appellant did not clearly and unequivocally assert his right to self-representation at trial when his request was conditioned upon the trial court's refusal to appoint different counsel.

2 RR 13, 17, 20; 3 RR 8-9, 13; 2) Appellant's waiver of counsel was not intelligently, knowingly, voluntarily executed when the trial court incorrectly admonished Appellant that trial counsel could never introduce evidence of the victim's character and that Appellant could never reassert his right to counsel once the court approved the waiver of counsel. 2 RR 14; 3 RR 10, 18; 3) The trial court should have granted Appellant's motion to dismiss counsel when appointed trial counsel admitted that he had not consulted with Appellant about the facts of the charge.

1 CR 48, 50; 2 RR 16, 20; 3 RR 8, 13, 14, 18; 4) The trial court.: violated Article 1.13(c) of the Texas Code of Criminal Procedure when the court failed to appoint 1 counsel to advise Appellant prior to accepting the jury waiver (even if it was prior counsel) and the jury waiver was not intelligently, knowingly, and voluntarily executed when the trial court never admonished Appellant about his Sixth Amendment right to a jury trial.

1 CR 57; 3 RR 19-310; 5) There was a clerical error in the Judgment concerning the backtime, where it failed to include the time period a detainer was lodged with TDCJ for this offense -- which reformation of the Judgment would be favorable to Appellant. 1 CR 10, 60; 2 RR 7, 8; 5 RR 13; 6 RR sx4, cxl. This Court has recently "acknowledged 'that there is a need for uniform procedures for those cases in which an Anders brief is filed, especially as the Texas Rules of Appellate Procedure do not provide any explicit guidance.'" Kelly v. State, 436 S.W.3d 313, (Tex.Crim.App.2014)(quoting In re Schulman, 252 S.W.3d 403, 410 (Tex.Crim.App.2008).

In recent years this Court has individually addressed several of the Anders procedures. See, Kelly, 436 S.W.3d at (duty to provide Appellant with access to the appellate record to prepare PRO SE Response), Schulman, 252 S.W.3d at 410- 411 (counsel's duty to file motion to withdraw), Meza v. State, 206 S.W.3d 684, 689 (court of appeals duty to grant motion to withdraw), Ex parte Owens., 206 S.W.3d 610, 611 (Tex.Crim.

App. 2006) (counsel's duty to notify about right to file PRO SE PDR), Bledsoe v. State, 178 S.W.3d 824, 826-827 (Tex.Crim.App.2005)(court of appeals duty in writing Opinion). However, the last time this Court addressed counsel's duty in examining the record and drafting the Anders brief was in 1978 when the appellate rules were very different and the trial court reviewed the appellate briefs.

See, High v. State, 573 S.W.2d 807, 811-812 (Tex.Crim.App.[Panel Op.] 1978). And, since that time the U.S. Supreme Court has clarified the Constitutional principals that control Anders appeals. See, Smith v. Robbins, 528 U.S. 259 (2000). It is time for this Court of Criminal Appeals of Texas to directly address the duties of court-appointed appellate counsel in Anders appeals in relation to examining the record and drafting the Anders brief.

This appeal is the perfect example to use to review the duties of court-appointed appellate counsel in examining the record and drafting the Anders brief because of the several different types of issues pointed out by Appellant.

To begin with, the court of appeals did hold that counsel's Anders brief was adequate. COA Op. pg. 1. Indeed, counsel did present a cursory review of the record in her Anders brief. Anders Brief pg. 1, 3-6. However, as pointed out by Appellant herein there are several important record facts that appellate counsel did not disclose in her Anders brief.

Thus, the question: did court-appointed appellate counsel have a duty to present these facts to the appellate court in her Anders brief (with supporting legal authorities)? **CONDITIONAL REQUEST FOR SELF-REPRESENTATION** The important facts that counsel failed to disclose in her Anders brief mostly relate to Appellant's request to represent himself that was conditional.

Primarily, appellate counsel failed to disclose to the court of appeals that facts existed that arguably could have raised the very issue that Appellant's request to represent himself was conditioned upon the trial court's refusal to replace trial counsel. 1 CR 48-51 (motion to dismiss counsel and supporting affidavit); 2 RR 16-17 ("If I have no other option, can I not represent myself?"), 20 ("How can I go to trial if he doesn't know anything that's happened?"), 21 ("From what I'm understanding is even though I don't have a legal law degree, I can speak for myself.

'V 3 RR 8-9 ("WhatX've seen is that nothing is going in my favor so I need to face my situation, and if I fail, it's going to be because of what I say....during the time that I've been here in this county, my attorney came to see me. for about five minutes.... And five minuets ago he told me I- r:. wasvstupid. And. I honestly don't feel well with those words so I need to face my situation by myself."); 13 ("If I cannot be given another one, of course, yes....

Ithink that's one of my rights, that if I'm not comfortable with him X can -- that I can find a legal attroeny that I know can advise me. That's why I have to face my personal situation."). These facts arguably support that Appellant's request to represent himself at trial was not clearly and unequivocally asserted. See, *Alford v. State*, 367 S.W.3d 855 (Tex.App. - Houston [14th Dist] 2012); See also, *Faretta v. California*, 95 S. Ct.

2525, 2541 (1975), *Scarborough v. State*, 777 S.W.2d 83, 92 (Tex.Crim.App.1989). Moreover, it is well-established that courts must consider every reasonable presumption against a waiver of counsel. See, *Brewer v. Williams*, 97 S. Ct. 1232, 1242 (1977)(same standard for pre-trial and trial). Appellate counsel should have presented these facts in her Anders brief that would have supported a presumption that Appellant did not clearly and unequivocally invoke his right to represnt himself.

1 "Arvter-g" rpfprs to *Anders v. California*, 385 U.S. /38 (1967) throughout., 2' Awellant'fPRO SE Response did noL include these issues because, as demonstrated by the record, Appellnat needs an interpreter to understand Slish and was it tarnsiet Stween TDCJ units, leaving him unable to complete a response on his own or to seek the help of another Inmate. **INCORRECT ADMONISHMENTS = INVOLUNTARY WAIVER OF COUNSEL** Appellate counsel also failed to disclose in her Anders. brief that the trial court's admonishment concerning the waiver of <&unsel were not always correct.

The trial court incorrectly admonished Appellant that Appellant could never reasserlhis right to counsel once the court approved the waiver. 3 RR 10, 18; See cf., Tex. Code Crim. Proc. art.

1.051(h); *Marquez v. State*, 921 S.W.2d 217, 221-22 n.4 (Tex.Crim.App.1996), *Walker v. State*, 962 S.W.2d 124, 127-128 (Tex.App. - Houston [1st Dist] 1997). Additionally, the trial court incorrectly told Appellant that trial counsel could never introduce evidence at trial concerning 3 the character of the alleged victim.

2 RR 13-14; See cf., Tex. R. Evid. 404(a)(2), 405, 412. The trial court probably did not have a duty to make these types of admonishments; however, once the trial court choose to make them, the admonishments had to be accurate. See, *Ex parte Williams*, 704 S.W.2d 773 (Tex.Crim.App.1986)(incorrect admonishment about probation for guilty plea), *Sims v. State*, 326 S.W.3d 707 (Tex.App. - Texarkana 2010)(incorrect admonishment about right to appeal).

Again, courts must indulge every reasonable presumption against the validity of a waiver of counsel. See, *Brewer*, 97 S. Ct. at 1242, *Cerf v. State*, 366 S.W.3d 778, *TbyV*^(Tex.App. - Amarillo 2012). These facts support that Appellant's waiver of the right to counsel was not intelligently, knowingly, and voluntarily executed. See, *Godlinez v. Moran*, 113 S. Ct.

2680, 2687 (1993). Appellate counsel should have presented these facts in her Anders brief. 3. In his Affidavit supporting his motion to dismiss counsel Appellant explained he, {O^n+e^an investigator to establish the character of the complaintant, (eg), Does the complaintant have a history of embellishing the truth, does this accusation further a private agenda of the complaintant (etc)."

1 CR 50. SHOULD HAVE GRANTED MOTION TO DISMISS COUNSEL Moreover, counsel failed to disclose in her Anders brief facts -fceto*- arguably would support that the trial court should have granted Appellant's request to "dismiss" court-appointed counsel (and appoint new counsel). Appellant's main complaint was that trial counsel had not consulted with Appellant about the facts of the charge.

1 CR 48, 50; 2 RR 13, 20; 3 RR 8-9, 13. In response to those accusations, rather than refute that he had consulted with Appellant about the facts, trial counsel explained that he had gathered informationfcabout the facts of the charge from Appellant's counsel from another county. 3 RR 14. Can trial counsel rely upon a different attorney to consult with a criminal defendant and to investigate the facts?

No, the attorney that the trial court appoints to represent a criminal defendant must himself consult with the defedant and persoanlly investigate the facts. See, Tex. Crim. Proc, art. 26.04(j)(l); *Rompilla Beard*, 125 S. Ct. 2456 (2005), *Aldrich v. State*, 296 S.W.3d 225, 244-245 (Tex.App. Fort Worth 2009). Yet, no where in her Anders brief did appellate counsel disclose these facts to the court of appeals.

NO ADMONISHMENTS AND NO COUNSEL APPOINTED FOR JURY WAIVER Perhaps most importantly, appellate counsel did not present in her Anders brief that the waiver of a jury

was executed (and accepted) without counsel. Article 1.13(c) requires that: 4. Appellant specifically requested the trial court to appoint, Juanita Edgecomb, who was his court-appointed attorney from Corsicana because she was already familiar with the facts of the charge and was present at trial.

3 RR 13, 18. "... before a defendant charged with a felony who has no attorney can agree to waive a jury, the court must appoint an attorney to represent him." Tex. Code Crim. Proc, art. 1.13(c); See also, Ex parte McCain, 67 S.W.3d 204, 212 n.3 (Tex.Crim.App. 2002) (Dissent by Holcomb, J.) (majority did not address that Article 1.13(c) is still mandatory when a defendant chooses to represent himself), Burgess v. State, 790 S.W.2d 856, 861 (Tex.App. - Houston [14th Dist] 1990) (parties viewed Art. 1.13(e) to apply when defendant represented himself), aff. on other grounds, 816 S.W.2d 424 (Tex.Crim.App.1991); cf., Moore v. State, 916 S.W.2d 696, 697 (Tex.App. - Beaumont 1996).

The trial court in this case "discharged"1 appointed trial counsel prior to any discussion about a jury waiver. 3 RR 19-20. Indeed, the jury waiver form, that has a blank for &&£&&£& counsel to sign, has no signature of any defense counsel. 1 CR 57. This is type of error that may be raised for the first time on direct appeal. See ie., Marvin v. State, 851 S.W.2d 275 (Tex.Crim.App.1993);—; Additionally, the trial court did not specifically admonish Appellant about his Sixth Amendment right to a jury trial..

3 RR 19-20. The trial court simply accepted the waiver of a jury. The trial court had a duty to admonish Appellant about his Sixth Amendment right to a jury trial and without that admonishment the jury waiver was not intelligently, knowingly, and voluntarily executed. See ie., Boykin v. Alabama, 395 U.S. 238, 243 (1969)(admonishment about right to jury trial must be "spread on the record" for a voluntary guilty plea).

These are the type of facts (and law) that appellate counsel had a duty to present in an Anders brief. INCORRECT BACK-TIME Finally, court-appointed appellate counsel failed to disclose in her Anders brief that the Judgment had a clerical error in the recording of the awarded back-time.

In sentencing Appellant the trial court orally awarded "credit for all your back-time." 5 RR 13. AND, the record demonstrates that a detainer was lodged with TDCJ for this offense on August 1, 2011. 1 CR 10 ("TWX" stamp) Yet, the Judgment only credited back-time from October 1, 2012 until May 29, 2013 (the date of sentencing). 1 CR 60. This was a clerical error in the Judgment -- the correction of which would be favorable to Appellant.

It is well-established that a criminal defendant is entitled to back-time credit for when a detainer was lodged against him for the charged offense. See, Ex parte Bynum, 772 S.W.2d 113, lib (Tex.Crim.App.1989). And, the record-kas.se multiple references that Appellant was incarcerated in TDCJ's Sanchez State Jail in El Paso, Texas during the investigation of this offense.

2 RR 7-8; 6 RR sx4, cxl(offense report and affidavit of Evelyn Brister). Moreover, the arrest warrant itself lists Appellant's address as the State Jail in El Paso. 1 CR 10. Yet, the Judgment only includes back-time from when Appellant was "arrested" by the Dallas County Sheriff on October 1, 2012 (and transported from the Navarro County Jail to the Dallas County Jail).

1 CR 10, 2 RR 7. The trial court had a mandatory duty to include the time period of the detainer in the credited back-time. See, Tex. Code Crim. Proc, art. 42.03 § 2; Jones v. State, 545 S.W.2d 771 (Tex.Crim.App.1975). Just as the court of appeals corrected the clerical error in the Judgment about the sex offender registration, so the court of appeals could have corrected this clerical error for the first time on appeal.

See, Jones v. State, 775 S.W.2d 199 (Tex.Crim.App.1990), Asberry v. State, 813 S.W.2d 526, 529-530 (Tex.App. - Dallas 1991). Appellate counsel should have disclosed this concern in her Anders brief. UNDEFINED CURRENT ANDERS STANDARDS Court-appointed appellate counsel's Anders brief should "set[] out the attorneys due diligence investigation" to allow the appellate court to make a "determination whether counsel has exercised sufficient diligence in assaying the record for error..."

Kelly, 436 S.W.3d at n.17 (quoting Meza v.State, 206 S.W.3d at 687 and citing Pension v. Ohio, 488 U.S. 75, 82-83 (1988)), Schulman, 252 S.W.3d at 407. Additionally, the purpose of an Anders brief is to: "assur[e] the appellate court that the attorney has indeed made a thorough and conscientious examination of the record, has provided the appellate court with appropriate facts of the case and its procedural history, and has pointed out any potentially plausible points of error."

Schulman, 252 S.W.3d at 406. While this court appears to have set forth some standards of "due diligence" and "potentially plausible points of error", the Court given no guidance to what a "sufficiently]" diligent examination of the record is measured by nor what type of issue would be considered a/(potentially plausible point of error."

The Court should grant review to set forth specific standards of the level of due diligence counsel must exercise in assaying the record for error and define what constitutes a potentially plausible point of error or "arguable issue." There have been many platitudes made about counsel's duty to zealously represent her client. See ie., Kelly, 436 S.W.3d at n.18 (quoting Schulman, 252 S.W.3d at 411); See also, ~, Appellant asks the Court to take JUDICIAL NOTICE of the address of the TDCJ's Sanchez State Jail in El Paso, Texas.

See, Tex. R. Evid. McCoy v. COA, 486 U.S. 429, 438 (1988). These include statements made about the type of attitude with which appellate counsel should approach her examination of the record. See, Robbins, 528 U.S. at 293 (Dissent by Souter, J.)(counsel's examination of the record should be with "An advocate's eye, identifying and weighing potential issues for appeal.

This is not by a dispassionate legal mind but a committed representative, pledged to [her] client's interest, primed to attack the conviction on any grounds the record may reveal."), McCoy, 486 U.S. at 444 ("a zealous advocate will resolve all doubts and ambiguous legal questions in favor of his or her client."), High, 573 S.W.2d at 812 ("if necessary advocating a change in the rules of law if rational arguments can be advanced in support of the change.").

However, there is not set, or measurable standard of diligence, that has been defined to determine if counsel has sufficiently investigated the record. And, in spite of these wonderful ideas about zealous representation, it is the common practice for appellate courts in Texas to simply repeat the formulaic terms that "the brief presents a professional evaluation of the record showing why, in effect, there are no arguable grounds to advance."

COA Op. pg 2. This formulaic terminology used by the court of appeals, is used in no small part as a result of the fact that the last time this Court directly addressed court-appointed counsel's duty in examining the record and drafting an Anders brief was in 1978. At that time, this Court held that an Anders brief must: "discuss the evidence adduced at the trial, point out where pertinent testimony may be found in the record, refer to pages in the record where objections were made, the nature of the objection, the trial court's ruling, and discuss[] why the trial court's ruling was correct..."

"High, 573 S.W.2d at 813. Yet, much has changed in Texas' criminal law jurisprudence in the past 35 years. For instance, it has been clarified that there are some types of errors that may be raised for the first time on appeal. See, Marvin, 851 S.W.2d at 409. Not to mention that today the vast majority of Anders appeals involve guilty plea cases -- where, similar to this case, the major concern is the voluntariness of the waiver of several constitutional rights.

See, Boykin, 359 U.S. at 243. The old requirements of High, that focused on trial testimony, simply do not address the realities of today's criminal law jurisprudence. To address this situation the 5th Circuit, U.S. Court of Appeals, has established specific guidelines for court-appointed appellate counsel to follow in drafting Anders briefs. See, Such detailed guidelines might not be appropriate in Texas.

Nevertheless, some form of specific guidelines that provides the court of appeals with an accurate measuring standard to determine if appellate counsel has exercised sufficient, or due, diligence in assaying the record for error should be established by this Court.

Therefore, this Court should review in this case to set forth the proper procedures and standards for Anders appeals. GROUND TWO: IN AN ANDERS APPEAL, WHAT DEGREE OF INDEPENDENT EXAMINATION MUST A COURT OF APPEALS MAKE OF THE RECORD AND HOW DOES A COURT MEASURE IF AN "ARGUABLE ISSUE" HAS ENOUGH MERIT SO THAT THE APPEAL IS NOT "WHOLLY FRIVOLOUS" (MUST IT BE HARMFUL, OR REVERSIBLE ERROR OR IS REFORMATION OF THE JUDGMENT FAVORABLE TO AN

APPELLANT SUFFICIENT).; AND, WHEN THE COURT OF APPEALS IN THIS CASE OVERLOOKED THE ISSUES RAISED BY APPELLANT (IN GROUND ONE) DID THE COURT TRULY FOLLOW THE CORRECT ANDERS STANDARDS?

6. High required counsel to explain why the error was not harmful, In Ground for Review Two Appellant questions whether it is proper to base a determination of if an appeal is wholly frivolous based upon the lack of "harmful error." This Court has recently held that it will continue to follow Anders that requires a court of appeals to conduct "a full examination of all the proceedings, to decide whether the case is wholly frivolous."

Schulman, 252 S.W.3d at 408-409 (following Anders, 386 U.S. at 744). Yet, this Court has also allowed that the court of appeals do not have to "show their work" in their Opinions in Anders appeals showing how the court examined the record. See, Bledsoe, 178 S.W.3d at 826-827.

Therefore, in this case, the court of appeals simply stated in their Opinion that the court had reviewed the record and agreed with counsel that the appeal was "frivolous." COA Op. pg. 2. However, as discussed in Ground for Review One, there are multiple "arguable issues" that could be raised in this appeal. How did the court of appeals' independent examination of the record miss these arguable issues?

SELECTIVE EXAMINATION OF THE RECORD The court of appeals' Opinion addressed a clerical error in the Judgment and held it was not an arguable issue (because it was not favorable to Appellant). Yet, the court of appeals failed to uncover that in the same Judgment it incorrectly recorded that Appellant "appeared in person with Counsel" and did not waive counsel.

1 CR 60-61; cf. 1 CR 58. Why would the court of appeals be selective in their examination of the record? Could it be that the failure of the Judgment to state the waiver of counsel was voluntary would be favorable, to Appellant's arguable issues that he presents about the waiver of counsel -- in that, there would be no presumption of regularity of the Judgment to overcome?

In any event, the court's failure to uncover all the clerical errors in the Judgment reveals that its "full examination" of the record was not as in depth as the Opinion would lead one to believe it was. **HOW MUCH OF THE RECORD DOES THE COURT OF APPEALS HAVE TO READ?** There are three separate concerns, other than the pro forma Opinions, that if this Court addressed them the Court could clarify the degree of independent examination of the record required by the court of appeals in Anders appeals.

First, this Court could directly address how much of the record a court of appeals must read during its independent examination. This must be addressed because at least one court of appeals has held that an appellate court does not have to "scour the record for any possible error." See, *Wilson v. State*, 40 S.W.3d 192, 198 (Tex.App.- Texas 2001) (following *U.S. v. Wagner*, 163 F.3d 551, 552 (7th Cir.

1996). It may sound reasonable to limit the amount of the record that the court of appeals must actually read; yet, *Anders* itself requires "a full examination of all the proceedings." ARGUABLE ISSUE f HARMFUL OR REVERSIBLE ERROR SECOND, THERE ARE NO CLEAR GUIDELINES AS TO EXACTLY WHAT STANDARD MAKES AN APPEAL "WHOLLY FRIVOLOUS".

The U.S. Supreme Court has itself recognized the confusion over what "wholly frivolous" means in the *Anders* context. See, *Robbins*, 528 U.S. at 282. The Supreme Court left it to the states to resolve the problem. In the past this Court has implied that wholly frivolous could be defined as an appeal having no harmful, or reversible error. See, *Bledsoe*, 178 S.W.3d at 828, *High*, 573 S.W.2d at 813.

However, the U.S. Supreme Court has at the very least held what wholly frivolous is NOT: "unlikely to prevail on appeal", "no grave of prejudicial errors", or "that the appeal would be unsuccessful. See, *Robbins*, 528 U.S. at 279.* Most recently, this Court has used the term "potentially plausible grounds for appeal" to describe what an appellate court is looking for during its independent examination of the record.

See, *Schulman*, 252 S.W.3d at 409. Nevertheless, in this case, the court of appeals looked for "arguable issues" which is perhaps the most common term appellate courts use to describe whether an appeal is frivolous. COA Op. pg. 2. Yet, "arguable issue" is the very term that the Supreme Court recognized as causing the confusion over what "wholly frivolous" actually means.

See, *Robbins*, 528 U.S. at 285. Not to mention, if counsel were truly being a zealous advocate, they could almost always present some arguable issue, regardless of how convincing it might be. See, *McCoy*, 486 U.S. at 446 (Dissent by Brennan, J.), *Taulung v. State*, 979 S.W.2d 854, 857 (Tex.App. - Waco 1998). Without better guidance on how wholly frivolous is to be measured the court of appeals do not know what to look for during their independent examination of record, FAVORABLE REFORMATION OF THE JUDGMENT Third, there is split among the court of appeals concerning if reformation of the judgment favorable to an appellant negates a finding of an appeal being wholly frivolous.

See, *Moore-v. State*, 320 S.W.3d 520 (Tex. App. - Amarillo 2010), *Evans v. State*, 933 S.W.2d 334- (Tex.App. - Waco 1996) (following *McCoy*, 108 S. Ct. at 1905); cf. *Bray v. State*, 179 S.W.3d 725 (Tex. App. - Ft. Worth 2005).

In this case, the back-time issue raised in Ground one would result in reformation of the judgment favorable to Appellant. PRAYER Thus, Appellant, Mario Lopez Jucup, PRAYS that this Court GRANT review in this case to "establish "uniform procedures for those cases in which an *Anders* brief is filed" for any, one, or some of the reasons given on one or both the presented, grounds or

upon any ground the Court crafts on its own motion; AND, ANY AND ALL OTHER RELIEF THIS COURT FINDS PROPER IN THE INTEREST OF JUSTICE.

Respectfully Submitted, Mario Lopez Jucup TDCJ No. 1870734 Hughes Unit Rt. 2, Bldg. 4400 Gatesville, TX 76597 APPELLANT PRO SE VERIFICATION / CERTIFICATE OF SERVICE (TO DA AND COURT) I, Mario Lopez Jucup, TDCJ Id No. 1870734, being presently incarcerated in the Hughes Unit of TDCJ-CID, in Coryell County, Texas do declare that the facts in this PDR are true and correct under the penalty of perjury and that I have caused a copy of this PDR to be served on the Dallas County District Attorney and the State Prosecuting Attorney; AND that I have mailed this PDR to the Clerk of the Court of Criminal Appeals of Texas by placing the PDR (and its copies) in the prison mail system to be mailed 1st Class USPS on the date executed below.

EXECUTED on this the "23" day of February, Mario Lopez Jucup Appellant PRO SE CERTIFICATION OF TRANSLATION AND ADOPTION This PDR has been translated into to Spanish to be read to the Appellant and the Appellant, Mario Lopez Jucup, understands that he is adopting this PDR as his own as if he wrote it himself Affirmed as Modified and Opinion Filed November 24, 2014 In The Court of Criminal Appeals of Texas at Dallas No. 05-13-00878-CR MARIO LOPEZ JUCUP, Appellant V. THE STATE OF TEXAS, Appellee On Appeal from the 265th Judicial District Court Dallas County, Texas Trial Court Cause No. F10-55339-R MEMORANDUM OPINION Before Justices Fitzgerald, Lang, and Brown Opinion by Justice Fitzgerald Mario Lopez Jucup waived a jury and pleaded not guilty to continuous sexual abuse of a young child.¹ After finding appellant guilty, the trial court assessed punishment at thirty years' imprisonment.

On appeal, appellant's attorney filed a brief in which she concludes the appeal is wholly frivolous and without merit. The brief meets the requirements of *Anders v. California*. The brief presents a professional evaluation of the record showing why, in effect, there are no arguable grounds to advance. Counsel delivered a copy of the brief to appellant. ¹See Tex. Penal Code Ann. § 21.02(b) (West Supp. 2013).

2386 U.S. 738(1967). *See *High v. Slate*, 573 S.W.2d 807, 811-12 (Tex. Crim. App. [Panel Op.] 1978), ~Z.\$• Appellant filed a pro se response raising several issues. After reviewing counsel's brief, appellant's pro se response, and the record, we agree the appeal is frivolous and without merit.⁵ We find nothing in the record that might arguably support the appeal.

Although not an arguable issue, we note the trial court's judgment contains an error. In addition to assessing punishment, the trial court stated that appellant was subject to the sex offender registration requirements of Chapter 62 and that the age of the victim was less than fourteen years of age.

The trial court told appellant that he would be required to register as a sex offender.⁶ The judgment, however, states the sex offender registration requirements "do not apply to the Defendant." We modify the judgment to show that sex offender registration requirements apply and the victim's age was ten years.⁷ As modified, we affirm the trial court's judgment.

We order the trial court to issue an amended judgment that reflects this change and to include any other language required by the Texas sex offender registration statutes. Do Not Publish Tex. R. App. P. 47.130878F.U05 4 See *Kelly v. State*, 436 S.W.3d 313, 319-21 (Tex. Crim. App. 2014) (identifying duties of appellate courts and counsel in *Anders* cases). 5See *Bledsoe v. State*, 178 S.W.3d 824, 826-27 (Tex.

Crim. App. 2005) (explaining appellate court's duty in *Anders* cases). 6See Tex. Code Crim. Proc. Ann. art. 62.001(5)(A) (West Supp. 2013). 7See TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993); *Asberry v. State*, 813 S.W.2d 526, 529-30 (Tex. App.—Dallas 1991, pet. refd); Court of Appeals Fifth District of Texas at Dallas; JUDGMENT MARIO LOPEZ JUCUP, Appellant Appeal from the 265th Judicial District Court of Dallas County, Texas (Tr.Ct.No.

No. 05-13-00878-CR V. F10-55339-R). Opinion delivered by Justice Fitzgerald, THE STATE OF TEXAS, Appellee Justices Lang and Brown participating. Based on the Court's opinion of this date, the trial court's judgment is MODIFIED to show that Sex Offender Registration Requirements do apply to the defendant and that the age of the victim as the time of the offense was ten years.

As modified, we AFFIRM the trial court's judgment. We ORDER the trial court to issue an amended judgment that reflects the above changes and to include any other language required by the Texas sex offender registration statutes. Judgment entered November 24, 2014. *o o 5? o e \J SLfc c> X -XT -i 2 X: o CO o \] r) -J -..^^^ C~r "" s^ "2? \J or § CCi o > -J CD r a ' r u'r u^k. i! a ',,\.:mN,^ i it v. v i- u us.*