UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-8393

WILLIAM R. KEEN, JR.,

Petitioner-Appellant,

VERSUS

JAMES A. COLLINS, Director, Texas Department of Criminal Justice, Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(CA-A-90-638)

July 14, 1993

Before GARWOOD and REAVLEY, Circuit Judges, and LAKE,[*] District Judge.[**]

LAKE, District Judge:

William R. Keen, Jr., who is currently in the custody of the Texas Department of Criminal Justice, appeals from the district court's dismissal of his petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. We **REVERSE** and **REMAND**.

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[*] Sim Lake, United States District Judge, Southern District of Texas, sitting by designation.

[**] Local Rule 47.51 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

In 1987 Keen was charged with the felony offense of burglary of a building with intent to commit theft. He pleaded not guilty and his case was tried to a jury. The jury returned a verdict of guilty and, after finding two prior convictions alleged for enhancement to be true, sentenced Keen to 99 years' imprisonment.

Following the entry of judgment against him on July 29, 1987, Keen gave oral notice of his intent to appeal. (Tr. 101)[1] Subsequently, both Keen (Tr. 105, 109-110) and his attorney (Tr. 102) filed written notices of appeal, and Keen, claiming indigence, moved pro se for a statement of facts at state expense (Tr. 111, 124) and for a new trial. (Tr. 120-123) Later, Keen's attorney also moved for a new trial challenging the sufficiency of the evidence and the denial of a requested jury charge. (Tr. 127-129)

On September 14, 1987, the trial court held an indigency hearing at which Keen's trial counsel stated in open court that he would represent Keen on appeal without charge. (ROA 227)[2] Keen testified that he had $2,950 in his inmate trust account, of which $2,250 belonged to his mother and $700 belonged to him. (ROA 233) Keen also testified that he owed his attorney $3,500. (ROA 238) Finding Keen not indigent the trial court ordered "that [Keen] pay $2,950.00 toward the preparation of the Statement of Facts in this matter, and the State will pay any additional moneys." (ROA 238)

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[1] Tr. refers to Transcript from the state trial court.

[2] ROA refers to the Record on Appeal before this court.

At the end of the indigency hearing the trial court denied the motion for a new trial urged by Keen's attorney. (ROA 239)

On October 2, 1987, Keen moved pro se in the state court of appeals for a free statement of facts arguing that the trial court had erroneously denied his application for a statement of facts at state expense and that he could not complete his appellate brief without one. (ROA 242) On October 14, 1987, Keen's attorney moved in the court of appeals for an extension of time in which to obtain the statement of facts from the indigency hearing held on September 14, 1987.[3] After personally paying $70.50 to have the statement of facts from the indigency hearing transcribed, Keen's attorney filed that statement of facts on November 16, 1987.[4] On February 22, and again on March 2, 1988, Keen's counsel filed an appellate brief challenging only the trial court's denial of Keen's request for a free statement of facts. (ROA 270-275)

On May 18, 1988, the court of appeals issued a one-and-a-half-page opinion affirming the trial court's denial of Keen's motion for a free statement of facts. (ROA 502-504) Although the court of appeals did not discuss the merits of Keen's conviction, since Keen's indigency was the only issue presented on appeal, the court concluded its opinion by stating that "[t]he judgment of conviction

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[3] See Motion for Extension of Time to File S/F of Appellant's Hearing on Indigent Motion for Statement of Facts filed on October 14, 1987. This motion and the response referred to in note 5 are contained in the state habeas records. The denials of Keen's applications for state habeas relief and the accompanying pleadings were forwarded to this court as part of the state court record.

[4] See Response to Notice of Failure to File Brief for Appellant filed by Keen's attorney on January 5, 1988, p. 2.

is affirmed." (ROA 503) In February of 1989 Keen obtained a statement of facts from the guilt-innocence phase of his trial by paying the court reporter $650. (ROA 285-491)

Keen filed three pro se applications for state habeas relief in which he argued that the evidence used to convict him was insufficient, that his requested jury instruction on "possession" was erroneously denied, that he was improperly denied a free statement of facts, and that his attorney's ineffectiveness deprived him of his right to appeal. Keen's three pro se applications for state habeas relief were denied without written orders by the Texas Court of Criminal Appeals on January 20, 1988, February 28, 1990, and June 27, 1990. Ex Parte Keen, Application Nos. 8,216-08, -09, and -10. (ROA 278-279)

Following the denial of his applications for state habeas relief, Keen filed two pro se applications for federal habeas relief, Cause Numbers A-90-CA-065 and A-90-CA-638. Keen's applications for federal habeas relief were referred to a magistrate judge for findings and recommendations pursuant to 28 U.S.C. § 636(b) and Rule 1(e) of Appendix C of the Local Court Rules of the United States District Court for the Western District of Texas. Pursuant to a report and recommendation of the magistrate judge filed on June 22, 1990, the district court found that Keen's first application for federal habeas relief, Cause Number A-90-CA-065, failed to state a claim for which relief may be granted. Pursuant to a second report and recommendation filed by the magistrate judge on May 15, 1991 (ROA 612-643), and over Keen's objections (ROA 647-

680), the district court granted the state's motion for summary judgment, dismissed Keen's second application for federal habeas relief (Cause Number A-90-CA-638) without an evidentiary hearing (ROA 681-683), and denied Keen's application for a certificate of probable cause (ROA 711). Upon Keen's appeal to this court a certificate of probable cause was granted and counsel was appointed. We review de novo the district court's dismissal of a habeas corpus petition. Gisbert v. United States Attorney General, 988 F.2d 1437, 1440 (5th Cir. 1993); 2 Steven A. Childress & Martha S. Davis, Federal Standards of Review § 13.06 (1992).

II.

Through appointed habeas counsel Keen argues that the attorney who represented him in his state appeal was ineffective for failing to secure a direct appeal, that the evidence used to convict him was constitutionally insufficient, and that the trial court's refusal to instruct the jury on the incidents of possession deprived him of his constitutional right to due process. Keen seeks reversal of his burglary conviction, or, alternatively, an out-of-time appeal from the conviction. The state argues that Keen recognized and acknowledged his counsel's inability to file an appellate brief without a statement of facts from the trial, and yet failed to make any effort to obtain and pay for the required statement of facts while the indigency issue was being resolved. The state also argues that Keen's counsel was not ineffective in pursuing only the denial of Keen's request for a free statement of facts on appeal.

A. Standard for Assessing Ineffective Assistance of Counsel on Appeal

Criminal defendants in state courts have no federal right to appeal their convictions. McKane v. Durston, 153 U.S. 684, 687, 14 S.Ct. 913, 915 (1894). Nevertheless, in states such as Texas that provide a statutory right to appellate review,[5] the Supreme Court has held that the procedures employed in adjudicating appeals must satisfy the guarantees of the due process and equal protection clauses of the United States Constitution. Griffin v. Illinois, 351 U.S. 12, 18, 76 S.Ct. 585, 590 (1956). The due process clause of the Fourteenth Amendment guarantees criminal defendants pursuing an appeal as a matter of right the effective assistance of counsel. Douglas v. California, 372 U.S. 353, 356-357, 83 S.Ct. 814, 816 (1963); Evitts v. Lucey, 469 U.S. 387, 396, 105 S.Ct. 830, 836 (1985); Lofton v. Whitley, 905 F.2d 885, 887 (5th Cir. 1990).[6]

Claims for ineffective assistance of counsel are reviewed for constitutional error under the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 687-689, 104 S.Ct. 2052, 2064-2065 (1984). Under the Strickland analysis a petitioner must establish that counsel's performance fell below an objective standard of reasonable competence and that as a result of counsel's deficient performance, the petitioner was prejudiced. Id. at 687,

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[5] See Tex. Code. Crim. P. art. 44.02.

[6] In Douglas the Court held that defendants are constitutionally entitled to counsel on direct appeal, and in Evitts the Court held that the right to counsel on direct appeal recognized in Douglas comprehended the right to effective assistance of counsel.

104 S.Ct. at 2064. Moreover, unless a petitioner alleging ineffective assistance of counsel on appeal establishes that he suffered an "[a]ctual or constructive denial of the assistance of counsel altogether" (in which case prejudice is presumed as a matter of law), he must also demonstrate a reasonable probability that but for counsel's unprofessional errors, the appeal would have been successful. Strickland, 466 U.S. at 692, 104 S.Ct. at 2067; Penson v. Ohio, 488 U.S. 75, 88, 109 S.Ct. 346, 354 (1988). The constructive denial of counsel occurs "in only a very narrow spectrum of cases where the circumstances leading to counsel's ineffectiveness are so egregious that the defendant was in effect denied any meaningful assistance at all." Craker v. McCotter, 805 F.2d 538, 542 (5th Cir. 1986), quoting Chadwick v. Greene, 740 F.2d 897, 901 (11th Cir. 1984).

B. Performance Falling Below an Objective Standard of Reasonable Competence

The record before this court demonstrates that by failing to secure Keen an appeal counsel's performance fell below an objective standard of reasonable competence. Counsel's unprofessional errors include failing to follow the Texas Rules of Appellate Procedure for filing a statement of facts or a brief on the merits, erroneously advising Keen that necessary portions of the statement of facts would cost at least $2,000 when in fact they cost only $650, and wrongfully promoting the disallowed practice of hybrid representation.

1. Failure to Follow Texas Rules of Appellate Procedure

Due to Keen's counsel's failure to follow the Texas Rules of Appellate Procedure for perfecting and processing Keen's appeal, counsel failed either to challenge, or to preserve the right to challenge, the merits of Keen's conviction before the court of appeals. The record indicates that these failures were caused by counsel's erroneous belief that Keen's appeal on the merits would be abated pending the outcome of his challenge to the trial court's denial of a free statement of facts.

The trial court entered judgment against Keen on July 29, 1987. (Tr. 99-101) On August 4, 1987, Keen's counsel filed a timely written notice of appeal in accordance with Tex. R. App. P. 41(b). (Tr. 102) However, Keen's counsel failed to satisfy the requirement imposed by Tex. R. App. P. 53(a) that he submit a written request to the court reporter for a statement of facts consisting of designated portions of the evidence and other proceedings needed by the appellate court to decide the issues to be presented on appeal.[7] Nor did Keen's counsel prepare and file a condensed statement of facts in narrative form of all or part of the testimony in lieu of requesting a statement of facts in question-and-answer-form from the court reporter as allowed by Tex. R. App. P. 53(i).

On August 28, 1987, Keen's attorney filed a motion for a new trial (Tr. 127-129), which was denied at the indigency hearing held

[7] On August 10, 1987, Keen himself submitted a written request to the court reporter for a transcription of all proceedings in his case. (Tr. 104)

on September 14, 1987. (ROA 239) The version of Tex. R. App. P. 54(b) in effect in 1987 required the transcript and statement of facts, including evidence and other proceedings needed to decide the issues to be presented on appeal, to be filed within 100 days of the trial court's denial of the motion for new trial. Tex. R. App. P. 54(b) historical note (Vernon Special Pamphlet 1993)[Order of June 16, 1987].[8] Appellants who are unable to file the transcript and statement of facts within the required time may obtain an extension of time by filing a motion with the court of appeals no later than 15 days after the last day for filing the record reasonably explaining the need for an extension and, if applicable, the reason for delay in requesting a statement of facts from the court reporter. Tex. R. App. P. 54(c).

If the clerk of the court of appeals does not receive a statement of facts when due, the clerk must notify the trial judge and the appellant's attorney that a statement of facts has not been filed and that in the absence of a statement of facts, the appeal will be submitted on the transcript alone. Tex. R. App. P. 53(m). In such a situation the court of appeals may order the trial court to hold a hearing to determine whether the appellant has been deprived of a statement of facts due to the ineffective assistance of counsel or for any other reason, to make findings of fact and conclusions of law, to appoint counsel if necessary, and to transmit the record of the hearing to the court of appeals so that

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[8] The time period for filing the transcript and statement of facts from Keen's trial expired on December 23, 1987.

the appellate court can, if it so decides, order the late filing of the statement of facts. Id.

Keen's counsel never filed the statement of facts from the trial, never requested an extension of time for filing the statement of facts from the trial, and never prepared or filed a condensed statement of facts in narrative form in lieu of a statement of facts in question-and-answer-form. However, on November 16, 1987, Keen's attorney did file a statement of facts from the September 14, 1987, indigency hearing at which the trial court had denied Keen's request for a free statement of facts.[9] (ROA 224-241) Because Tex. R. App. P. 53(c) and (d) require appellants to file only those portions of the evidentiary record necessary for deciding the issues to be presented on appeal, counsel's decision to file the statement of facts from the indigency hearing without requesting an extension of time for filing the statement of facts from the guilt-innocence phase of Keen's trial had the effect of preventing activation of the mechanism provided by Tex. R. App. P. 53(m) for insuring that statements of fact are either timely filed with the court of appeals or are not needed.

Counsel's November 16, 1987, filing of the statement of facts from the indigency hearing also triggered the 30-day period within which a brief presenting the issues on appeal had to be filed with the appellate court. See Tex. R. App. P. 74(k). Under Tex. R. App. P. 74(n), extensions of time for filing appellate briefs may

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[9] Counsel obtained the statement of facts from the indigency hearing by personally paying the court reporter.

be granted in response to written motions reasonably explaining the need for more time. Because counsel failed to file either an appellate brief or a motion to extend the time within which to file an appellate brief on Keen's behalf within 30 days of November 16, 1987, the clerk of the court of appeals notified him on December 23, 1987, that the brief for Keen's appeal was overdue, and that unless he filed a satisfactory response by January 7, 1988, a hearing would be held pursuant to Tex. R. App. P. 74(l)(2). Under this rule if an appellant fails to timely file a brief and to satisfactorily explain why the brief has not been filed, the court of appeals may order the trial court to conduct a hearing to determine whether the appellant desires to prosecute the appeal. Among other things, the trial court may "take appropriate action to insure that the appellant's rights are protected . . . ."

On January 5, 1988, Keen's attorney filed a response to the clerk's December 23, 1987, notice in which he stated that the only statement of facts that had been filed was from the indigency hearing, and that absent an order from the court of appeals requiring the state to provide a complete statement of facts from Keen's trial, counsel could not file a brief on the merits of Keen's conviction.[10] On January 8, 1988, Keen's attorney moved for an extension of time within which to file a brief appealing the denial of a free statement of facts.[11] On January 22, 1988, Keen's

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[10] See Response to Notice of Failure to File Brief for Appellant filed by Keen's attorney on January 5, 1988.

[11] See Motion for Extension of Time to File Brief on (continued...)

attorney filed a brief that Keen himself had prepared in support of his appeal of the trial court's denial of a free statement of facts. (ROA 255-263) On February 19, 1988, at the direction of the court of appeals, Keen's attorney again moved for an extension of time within which to file a brief addressing the denial of a free statement of facts from the trial. (ROA 264-269) On February 22, 1988, Keen's attorney filed a brief that he prepared which challenged only the trial court's denial of the free statement of facts. (ROA 270-275) Although the brief stated that a statement of facts was necessary for review of the merits, it failed to state the issues on appeal that necessitated a complete statement of facts.

Thus, although Keen's attorney filed a brief on Keen's behalf, the brief that he filed failed to set forth the points that he had urged in his motion for a new trial and the points on which he actually intended to predicate Keen's appeal, i.e., the sufficiency of the evidence and the denial of the requested jury instruction on "possession." However, the filing of a brief, even though it only challenged the trial court's indigency ruling, prevented the clerk activation of the safeguard mechanism provided by Tex. R. App. P. 74(l)(2).

To summarize, Keen's counsel on appeal failed to follow the Texas Rules of Appellate Procedure for perfecting and prosecuting Keen's appeal in three ways: (1) by failing to properly request

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[11](...continued)
Appellant's Denial of Indigent Motion for Statement of Facts filed on January 8, 1988.

(as opposed to relying on Keen's pro se request) and file a statement of facts consisting of those portions of the evidentiary record necessary for reviewing the merits of Keen's conviction as mandated by Tex. R. App. P. 53(a);[12] (2) by filing a partial statement of facts that was inadequate for review of the merits of Keen's conviction without preserving the right to file a complete statement of facts if the court of appeals resolved the indigency issue against Keen by moving under Tex. R. App. P. 54(c) to extend the time for filing the complete statement of facts;[13] and (3) by filing a brief addressing only the trial court's denial of a free statement of facts without moving under Tex. R. App. P. 74(n) to extend the time for filing a brief addressing the merits of Keen's conviction. As a result of these errors, Keen's appellate counsel failed either to challenge, or to preserve Keen's right to challenge, the merits of his conviction before the court of appeals. His performance fell, therefore, below an objective standard of reasonable competence.

2. Erroneous Advice Concerning Fee for Statement of Facts

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[12] As we explain infra at pages 14-16, had counsel contacted the court reporter he would have learned that the necessary parts of the statement of facts could be purchased for $650, a sum less than the $700 in Keen's inmate trust account that Keen admitted belonged to him.

[13] As the state points out, Tex. R. App. P. 81(a) would have permitted the court of appeals to allow Keen to file an out-of-time statement of facts and brief on the merits if the court of appeals had found that the trial court erred in denying Keen a free statement of facts. Since the court of appeals did not find error by the trial court, Rule 81(a) never became applicable, and Keen was trapped in the procedural imbroglio we have described.

That Keen's appellate counsel erroneously advised Keen that he would have to pay between $2,000 and $2,950 to have the court reporter transcribe the portions of his trial needed for appellate review, when the actual cost was $650, is evident in the Response to Notice of Failure to File Brief for Appellant filed by counsel on January 5, 1988, the brief that counsel submitted on February 22, 1988 (ROA 270-275), and the letter that the court reporter sent to Keen in February of 1988 (ROA 281). In his response to the appellate court's notice of failure to file a brief, Keen's counsel stated that "[t]he court reporter has estimated that the cost of transcription of the Statement of Facts of the trial of WILLIAM R. KEEN, JR. will cost approximately Two Thousand and NO/100 Dollars ($2,000.00)."[14] In the brief that counsel filed on Keen's behalf, he stated:

> On or about September 14, 1987, the 167th Judicial District Court of Travis County, Texas, held a hearing on Appellant's Indigent Motion for Statement of Facts. Upon hearing the evidence and argument of counsel, the trial court held that Appellant was not indigent and ordered Appellant to pay approximately Two Thousand Nine Hundred Fifty and NO/100 Dollars ($2,950.00) to the Court Reporter for the transcription of said trial. See Statement of Facts: Indigency Hearing herein filed. (ROA 270-271)

The fact that the portion of the statement of facts actually needed for appellate review of the issues to be presented on appeal -- sufficiency of the evidence and denial of a requested jury charge -- actually cost only $650 is found in a letter that the court reporter sent to Keen in February of 1988 stating that the

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[14] Response to Notice of Failure to File Brief for Appellant filed January 5, 1988, p. 2.

cost for preparing the statement of facts is as follows: "voir dire examination, $500.00; trial on guilt-innocence, $650.00; trial on punishment, $150.00." (ROA 281)[15] Because the only portion of the statement of facts that Keen needed to submit for appellate review of the merits of his conviction was that from the guilt-innocence phase of his trial, because the court reporter estimated the cost for transcribing the guilt-innocence phase of Keen's trial at only $650, and because Keen testified at the indigency hearing that he had over $700 at his disposal (ROA 233, 272), counsel's failure to advise Keen of the true cost of the statement of facts needed for appellate review in time to prepare and file the statement of facts and the brief on the merits is an additional error that fell below an objective standard of reasonable competence.

Although Keen learned on his own the true cost of the statement of facts in February of 1988, long after the time had expired for filing the statement of facts with the court of appeals (but before the court had affirmed his conviction) Keen's knowledge does not militate against our conclusion of ineffective assistance by his counsel. Keen cannot be faulted for not filing the necessary portion of the statement of facts before the court of appeals ruled since he had no way of knowing whether the court reporter could transcribe the statement of facts before the court ruled, and since absent an accompanying brief, the statement of facts alone was un-

[15] Although the court reporter's letter is dated February 29, 1987, the court reporter could not have written the letter on that date because Keen was not tried until the summer of 1987.

likely to have influenced the outcome of the appeal. Furthermore, and most importantly, notwithstanding his counsel's delegation to Keen of the responsibility for submitting the record to the court of appeals, this remained counsel's responsibility.

3. Wrongful Promotion of Disallowed Hybrid Representation

Keen's belief that he was entitled to hybrid representation, i.e, partly pro se and partly by counsel, is evident from a letter that Keen sent to the clerk of the court of appeals on November 30, 1987:

> My attorney on appeal is . . . of Austin, Texas. Although I have `retained' him as my counsel, I am unable to afford to pay his fees; therefore, I am assisting in the preparation and submission of my appeal record before the Court of Appeals. He will prepare the final brief in my behalf in this cause; however, it is my duty to assist in securing all necessary records to timely and properly perfect the appeal. Please assist me in this endeavor.[16]

Keen's attorney not only failed to advise Keen that he was not entitled to hybrid representation, he actually promoted and assisted Keen's pro se efforts to obtain the statement of facts needed to brief the merits of Keen's appeal. In his second motion to extend, counsel stated:

> Appellant's counsel filed Appellant's pro se Brief in Support of the Motion for Indigent Statement of Facts with the understanding that this would suffice for the requirement that a brief be filed in support of said Motion on Indigent Statement of Facts. (ROA 265-266)

In the brief that counsel subsequently prepared and filed, Keen's counsel explained the reasons for which he had filed the second

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[16] Letter from Keen to Susan K. Bage, Clerk of the Third Court of Appeals, dated November 30, 1987, and file-stamped December 2, 1987.

motion to extend and the accompanying brief:

> Appellant's attorney, . . . , filed Appellant's pro se Brief in support of the Motion for Indigent Statement of Facts on or about January 22, 1988. Appellant's counsel was notified on or about February 14, 1988 that a hearing would be had before the trial court pursuant to Texas Rules of Appellant Procedure 74(l) unless the Court received a second Motion for Extension of Time to File Brief from Appellant's Counsel on or before February 22, 1988. Appellant's counsel filed said Motion for Extension of Time to File Brief on or about February 19, 1988. Appellant and Appellant's counsel seek to set aside, for good and meritorious cause, the ruling and order of the trial court denying Appellant a Statement of Facts in Cause Number 86,039. (ROA 271)
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> . . .
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> Further, Appellant and Appellant's counsel pray that the Court consider the pro se brief filed by Appellant and pray for all other relief to which Appellant may be justly entitled. (ROA 274)

Both Texas and United States courts have long recognized that defendants in criminal trials have the right either to represent themselves, Faretta v. California, 422 U.S. 806, 819, 95 S.Ct. 2525, 2533 (1975), or to be represented by counsel, Powell v. Alabama, 287 U.S. 45, 52, 53 S.Ct. 55, 58 (1932), but that they do not have the right to hybrid representation, partly by themselves and partly by counsel. United States v. Daniels, 572 F.2d 535, 540 (5th Cir. 1978); Landers v. State, 550 S.W.2d 272, 280 (Tex. Crim. App. 1977). Courts faced with situations in which defendants represented by counsel have filed instruments and made other attempts to represent themselves pro se have refused to recognize the pro se filings as valid presentations of issues for judicial determination. Neal v. Texas, 870 F.2d 312, 315-316 (5th Cir. 1989); Satterwhite v. Lynaugh, 886 F.2d 90, 93 (5th Cir. 1989); Rudd v. State, 616 S.W.2d 623, 625 (Tex. Crim. App. 1981). Because

Texas law has long forbid hybrid representation, because Texas courts have failed to consider the pro se filings of represented defendants, and because at a minimum appellate counsel must be able to ascertain and follow well established principles of Texas law, counsel's willing participation in and promotion of the disallowed practice of hybrid representation, and his concomitant abandonment of Keen to pro se efforts for obtaining the statement of facts needed to present the merits of his appeal, demonstrate that his performance on this appeal fell below an objective standard of reasonable competence.

C. Prejudice

The facts of this case resemble those in Evitts,[17] the case in which the Supreme Court held that the right to counsel on direct appeal comprehended the right to the effective assistance of counsel. In Evitts defendant's counsel filed notice of appeal, brief, and record, but failed to file the statement of facts required by the Kentucky Rules of Appellate Procedure.[18] The Kentucky Court of Appeals dismissed the case due to counsel's failure to file a statement of facts. The Supreme Court ultimately affirmed the

[17] 469 U.S. 387, 105 S.Ct. 830.

[18] The "statement of facts" missing in Evitts required the names of the appellants and the appellees, counsel and the trial judge, the date on which notice of appeal had been filed, and certain other information.

granting of a writ of habeas corpus on the ground that the appellant had been denied the effective assistance of counsel on appeal. The Supreme Court's analysis guides our decision in the present case.

> In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful. To prosecute the appeal, a criminal appellant must face an adversary proceeding that--like a trial --is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant--like an unrepresented defendant at trial--is unable to protect the vital interests at stake. To be sure, respondent did have nominal representation when he brought this appeal. But nominal representation on an appeal as of right--like nominal representation at trial--does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all.

Evitts, 469 U.S. at 396, 105 S.Ct. at 836.

In Ward v. State, 740 S.W.2d 794, 800 (Tex. Crim. App. 1987), the Texas Court of Criminal Appeals similarly held that because counsel's failure to file a statement of facts rendered review of the appeal a "meaningless ritual," appellant had been denied effective assistance of counsel on appeal under both the Texas and the United States Constitutions.[19] See also Ex Parte Dietzman, 790 S.W.2d 305 (Tex. Crim. App. 1990). Moreover, Texas courts have consistently held that appellants whose attorneys on appeal fail to

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[19] Even before the Texas Court of Criminal Appeals' decision in Ward Texas courts of appeals had consistently held that appellants whose attorneys on appeal had failed to designate and/or file a statement of facts necessary for a meaningful appeal had suffered ineffective assistance of counsel on appeal. Shead v. State, 711 S.W.2d 345, 347-348 (Tex. App. -- Dallas 1986, no pet.); Vicknair v. State, 702 S.W.2d 304, 307 (Tex. App. -- Houston [1st Dist.] 1985, pet. ref'd.).

have the merits of their convictions reviewed due to their failure to request and/or file statements of facts necessary for meaningful review have suffered ineffective assistance of counsel for which the proper remedy is either the abatement of an appeal or, if necessary, an out-of-time appeal. Dietzman, 790 S.W.2d at 307; Shead, 711 S.W.2d at 347-348; Vicknair, 702 S.W.2d at 307.

The record before us demonstrates that Keen's appellate counsel erred in failing to follow the Texas Rules of Appellate Procedure for filing a statement of facts and a brief on the merits, in erroneously advising Keen that the court had ordered him to pay at least $2,000 for the necessary portions of the statement of facts that actually cost $650, and in promoting the disallowed practice of hybrid representation. The record further demonstrates that the effect of these errors was to constructively deny Keen the assistance of counsel on appeal by placing Keen in the position of having had no appeal at all because no potentially reversible error was ever presented to the appellate court.[20] The Texas Court of Appeals' summary affirmance of Keen's conviction placed Keen in a position similar to that of the defendants in Evitts and Ward, whose appeals were dismissed due to counsels' failure to comply with applicable procedural rules by failing to file required statements of facts. As the Evitts Court stated, "[i]n a situation

[20] Counsel's willing participation in the disallowed practice of hybrid representation additionally prejudiced Keen on habeas review because Keen's pro se filings prompted the magistrate judge, who recommended dismissing his application for federal habeas relief, to attribute the procedural failings of which Keen now complains to Keen himself rather than to his attorney.

like that here, counsel's failure was particularly egregious in that it essentially waived respondent's opportunity to make a case on the merits; in this sense, it is difficult to distinguish respondent's situation from that of someone who had no counsel at all." 469 U.S. at 394, n.6, 105 S.Ct. at 835, n.6.

III.

Because Keen was denied the effective assistance of counsel on appeal in violation of his right to due process under the Fourteenth Amendment of the United States Constitution, the judgment of the district court is **REVERSED** and this case is **REMANDED** to the district court with instructions to grant Keen's petition for writ of habeas corpus unless the state court of appeals grants him an out-of-time appeal with the effective assistance of counsel within 60 days of the issuance of this court's mandate.