

**IN THE SUPERIOR COURT OF HARRIS COUNTY
STATE OF TEXAS**

STATE OF TEXAS,

Plaintiff

v.

CHRIS BRAUGHTON

Defendants

COURT CASE No.:

2013-V-0349

MOTION FOR NEW TRIAL

DEFENDANT'S MOTION FOR NEW TRIAL

COMES NOW the Defendant, CHRISTOPHER BRAUGHTON, by
and through the undersigned counsel files this motion for new trial.

PRELIMINARY STATEMENT

1. In the motion for new trial, the Defendant alleges, *inter alia*,
 - a. That Defendant believed that his expert witness, Dr. Grossberg, was subpoenaed for trial.
 - b. That Dr. Grossberg, M.D., was actually not served for trial.
 - c. That counsel for the Defendant, MT Sandoval, Esq., believes that the testimony of Dr. Grossberg, Esq. was critical to the defense of the case and proving the self-defense argument proffered by the Defendant at trial.
 - d. That Dr. Grossberg was available for trial and would have appeared with a properly served subpoena.
 - e. Finally, Dr. Grossberg's testimony would have aided the Defendant at trial and illustrated that the victim was shot in a downward reaching position, thereby providing reasonable doubt as to the State's prima facie case.
2. As a result, Defendant respectfully requests that this Court grant a new trial in this matter

EXHIBITS IN SUPPORT OF THIS MOTION

3. Defendant submits the following exhibits in support of this motion for new trial

- a. Affidavit of MT Sandoval, Esq. (Exhibit “A”).
- b. Affidavit of Vic Moran (Exhibit “B”).
- c. Affidavit of Dr. Grossberg, MD (Exhibit “C”).

MEMORANDUM OF LAW

4. A defendant may rebut the presumption of effectiveness of counsel by providing a record from which the reviewing court may determine that trial counsel's performance was not based on sound trial strategy. *Gravis v. State*, 982 S.W.2d 933, 937 (Tex.App.—Austin 1998). A defendant may provide that record by filing a motion for new trial and obtaining a hearing thereon based on ineffective assistance of counsel. *Reyes v. State*, 849 S.W.2d 812, 815 (Tex.Crim.App.1993).

5. A motion for new trial may be granted on special grounds, among which include: failing to subpoena a witness.

6. Dr. Grossberg agreed to testify on Defendant’s behalf when trial counsel spoke with her the weekend before trial.

7. At the time, trial counsel, Mr. Sandoval, attempted to subpoena Dr. Grossberg, MD, she told him “very emphatically” that she would be at trial.

8. To overcome any financial obstacles, Defendant paid his trial lawyer, MT Sandoval, who was instructed to deliver all necessary funds to Dr. Grossberg to appear at trial.

9. Trial counsel arranged to serve Dr. Grossberg with a subpoena for trial, however, when the server arrived at Dr. Grossberg’s office, he was greeted by a clerk who took possession of the subpoena for trial.

10. Despite considering her an important witness and being told that she would accept a subpoena at the designated location, counsel made no further attempt to secure her presence at trial or to request a continuance because of her absence.

11. Granting Defendant a new trial for trial counsel's failure to subpoena Dr. Grossberf is justified because, if given at a new trial, the testimony of Dr. Grossberg could indeed be helpful to Defendant.

12. In this case, the Defendant presents the Affidavit of trial counsel MT Sandoval in support of this motion for new trial, which offers a credible statement that Dr. Grossberg’s testimony was necessary as part of

the self defense argument proffered by the Defendant and could have cast reasonable doubt on the state's argument.

13. The Defendant also presents the Affidavit of Dr. Grossberg, where she states the following:

- a. Dr. Grossberg would have appeared at trial.
- b. Dr. Grossberg would have determined if the State's medical examiner's testimony was supported by scientific fact.
- c. Dr. Grossberg would have testified that the "location of the bullet wound path could be consistent with the decednant reaching forward at the time he was shot". (See Affidavit of Dr. Grossberg, paragraph 7(d)).

14. In addition, MT Sandoval's statement illustrates the testimony of Dr. Grossberg would have helped the defense and that she was an important witness, because Dr. Grossberg would have shown:

- a. That the victim was bending down when he was shot;
- b. That the victim's hands were not pointing upward as the State suggested.

15. Because the record reflecting what facts Dr. Grossberg could have actually provided, prejudice from counsel's failure to subpoena her is shown by trial counsel's failure to properly secure Dr. Grossberg for trial.

MEMORANDUM OF LAW

16. The Defendant has shown by the affidavits of MT Sandovol and Dr. Grossberg that the testimony of the Defendant's expert would have helped the defense. Therefore, this case is distinguishable from *Melancon v. State*, 66 S.W. 3d 375 (14th Dist. 2001), and this Court should grant a new trial.

17. In *Melancon*, the lower court did not award a new trial based on a motion for new trial filed by a Defendant alleging failure to subpoena a witness because such motion for new trial was not accompanied with a supporting affidavit stating the parameters of how the non-subpoenaed witness would have changed the outcome of the trial.

18. This case is opposite to *Melancon* because the Defendant presents an affidavit from trial counsel and an affidavit of the expert witness providing factual support as to how Dr. Grossberg's testimony would have led to an acquittal or provided reasonable doubt as to the prosecution's theory of criminal liability, namely that the Defendant had no reasonable

basis to believe that victim appeared to reach for a firearm after making a threat to the Defendant to “[get] a gun”.

19. Once counsel has investigated the facts and developed a defensive theory, counsel “has a professional duty to present all available testimony and other evidence to support the defense of his client.” *Shelton v. State*, 841 S.W.2d 526, 527 (Tex.App.—Fort Worth 1992); *Everage v. State*, 893 S.W.2d 219 (Tex.App.—Houston [1st Dist.] 1995).

20. In this case, failure to take the necessary steps to secure attendance of a key witness demonstrates a lack of reasonable diligence. As a result, the Defendant is entitled to a new trial.

CONCLUSION

This lack of subpoena undeniably prejudiced and injured the Defendant and changed the outcome of the case. As a result, the Defendant requests a new trial in this matter or a hearing on this motion to develop the evidence.

WHEREFORE, the Defendant respectfully requests that this Court enter an Order:

- a. Granting a new trial in this matter;

b. Awarding such other further relief as this
Honorable Court deems fit and proper.

DATED this ___ day of February 2015.

Respectfully submitted,

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Counsel for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was
served HAND DELIVERY this ____ day of March 2015 to:

ROBERT SIRIANNI, Esq.