

[12] In this case, the agreed judgment's recitation that Swedish failed to pay all valid bank drafts alters the terms of Swedish's bond with LSC. As we have discussed at length, Swedish did not fail to pay any valid bank drafts; Swedish merely failed to pay its promissory notes to Riverbend. Because the agreed judgment altered the terms of the surety bond between LSC and Swedish, Swedish and Riverbend were required to give LSC notice before agreeing to the judgment. Because Swedish and Riverbend did not give LSC the requisite notice, LSC is not bound by the agreed judgment.

[13] Riverbend relies on *Howze* as support for its position that the agreed judgment is absolutely enforceable despite the lack of notice to LSC. In *Howze* the Texas Supreme Court held that, once a judgment is obtained against the principal on a judgment bond, the surety is bound by the judgment absent proof of fraud or collusion. *See Howze*, 584 S.W.2d at 265–66. A judgment bond is one in which the surety agrees to be liable for a judgment based on a specific statutory violation covered by the bond. The surety is bound by the judgment even though it did not receive notice of the alleged violation or the lawsuit that resulted in the judgment. *See id.*

But *Howze* is inapposite here. Unlike the situation in this case, the judgment enforced in *Howze* did not alter the terms of the statutory bond. The parties seeking to enforce the judgment against the bond were specifically covered by the bond and the bonding statute, and the acts on which the judgment was based were specifically covered by the bond. *See id.* at 264–66. Thus, the Texas Supreme Court held that the judgment against the principal—a mobile home dealer—was enforceable against the surety bond, even though the surety did not receive notice of the underlying lawsuit. *See id.* at 265–66. Notably, *Howze* does *not* preclude a reviewing court from determining whether an underlying judgment altered the terms of a statutory judgment bond.

Also, entering into an agreed judgment that alters the terms of a statutory judgment bond without the surety's consent is a type of fraud or collusion by the principal and credi-

tor. The surety on a judgment bond is not entitled to notice of the alleged violation or the underlying proceedings. By entering into such an agreed judgment, the principal and creditor can render a surety absolutely liable on a judgment bond even though the principal never violated a condition of the bond. This is what Riverbend attempts to do in this case; therefore, LSC is not bound by the agreed judgment. *See Howze*, 584 S.W.2d at 266 (holding that surety is not bound when judgment was obtained by fraud or collusion).

VI. CONCLUSION

Because Swedish paid all valid bank drafts it drew on Riverbend, because Swedish's nonpayment of the promissory notes covering its floor plan line of credit was not covered by the surety bond, and because the agreed judgment altered the terms of the bond without notice to LSC, we sustain LSC's second and third issues. In light of our holdings with regard to these issues, we need not consider LSC's first issue, and we overrule Riverbend's issue that it is entitled to attorney's fees. We reverse the trial court's judgment and render judgment that Riverbend take nothing from LSC.



Evaristo VALENCIA, Appellant,

v.

The STATE of Texas, Appellee.

No. 01–91–00152–CR.

Court of Appeals of Texas,
Houston (1st Dist.).

March 26, 1998.

Defendant was convicted in the 263rd District Court, Harris County, Don Humble, J., of delivery of at least 400 grams of cocaine, and he appealed. The Court of Ap-

peals, 891 S.W.2d 652, affirmed, and petition for discretionary review was granted. On rehearing, the Court of Criminal Appeals, 946 S.W.2d 81, vacated and remanded. On remand, the Court of Appeals, O'Connor, J., held that defense counsel provided ineffective assistance as a matter of law by failing to object at punishment stage to closing argument of prosecutor, who invited jury to consider parole laws in sentencing and who supplied erroneous formula to jury for calculating parole eligibility.

Reversed and remanded.

Mirabal, J., filed dissenting opinion.

1. Criminal Law ⇔641.13(7)

In reviewing an attorney's representation during punishment, Court of Appeals examines the totality of the representation to determine if defendant received reasonably effective assistance from counsel. U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇔641.13(7)

For purposes of evaluating ineffective assistance claim, defense counsel should have objected to closing argument of prosecutor, who invited jury to consider parole law in assessing punishment by informing jury of the effect that the parole law might have on a 40-year sentence, since Code of Criminal Procedure expressly prohibited jury from considering manner in which parole law may be applied to particular defendant. U.S.C.A. Const.Amend. 6; Vernon's Ann.Texas C.C.P. art. 37.07, § 4.

3. Criminal Law ⇔641.13(7)

For purposes of evaluating ineffective assistance claim, defense counsel should have objected to closing argument of prosecutor, who mislead jurors by giving them an erroneous formula for application of parole law to 40-year sentence. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇔717

It is error for the state to present a statement of law that is contrary to that presented in the charge to the jury.

5. Criminal Law ⇔641.13(2.1)

Sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard. U.S.C.A. Const.Amend. 6.

6. Criminal Law ⇔641.13(2.1)

To ignore a grievous error simply because it is single, while granting relief when multiple errors cumulatively reach the same magnitude, would be contrary to the reasons that caused the creation of the doctrine of ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

7. Criminal Law ⇔641.13(7)

Failure to object to an argument that invites consideration of parole laws and supplies an erroneous formula for calculating parole eligibility in direct violation of the Code of Criminal Procedure is, as a matter of law, ineffective assistance of counsel. U.S.C.A. Const.Amend. 6; Vernon's Ann.Texas C.C.P. art. 37.07, § 4.

Randy Schaffer, Houston, for appellant.

John B. Holmes, Carol M. Cameron, Houston, for appellee.

Before MIRABAL, O'CONNOR and NUCHIA, JJ.

OPINION ON REMAND FROM THE TEXAS COURT OF CRIMINAL APPEALS

O'CONNOR, Justice.

Evaristo Valencia, the appellant, was convicted by a jury of delivery of at least 400 grams of cocaine, and his punishment was assessed at 75 years and a \$250,000 fine. On appeal to this Court, a divided panel affirmed the conviction. On petition for review, the Court of Criminal Appeals vacated our judgment and remanded the case for us to reconsider the appellant's claims of ineffective assistance during punishment under the standard it enunciated in *Ex parte Duffy*, 607 S.W.2d 507 (Tex.Crim.App.1980). See *Valencia v. State*, 891 S.W.2d 652 (Tex. App.—Houston [1st Dist.] 1993), *rev'd*, 946 S.W.2d 81 (Tex.Crim.App.1997). Applying

that standard, we reverse the judgment of the trial court, and remand for a new punishment hearing.

Ineffective Assistance of Counsel

In point of error two, the appellant claims he was deprived of effective assistance of counsel because his lawyer did not object to an argument by the assistant district attorney (ADA) that was both improper and incorrect.

[1] The standard we apply under *Duffy* is whether the defendant received reasonably effective assistance from his counsel. *Duffy*, 607 S.W.2d at 516; *Simms v. State*, 848 S.W.2d 754, 758 (Tex.App.—Houston [1st Dist.] 1993, pet. ref'd). In reviewing an attorney's representation during punishment, we examine the totality of the representation. *Ex parte Walker*, 794 S.W.2d 36, 37 (Tex. Crim.App.1990); *Simms*, 848 S.W.2d at 758.

[2] During closing arguments of the punishment phase of the trial, the ADA argued:

The charge talks about the award of good conduct time to a prisoner who exhibits good behavior and parole. To caution you right now, first off, you can't guess or estimate anything about good conduct time or parole to this guy. This is for your information, for you to know that whatever the term of years in a case that a defendant gets sentenced to, his time in the penitentiary can be reduced by the award of good conduct time and by parole. They say the formula here as to when he becomes eligible for parole would be when a defendant has his actual time plus his good conduct time added together and they equal one fourth of the sentence. *That means if there is a forty-year sentence, one-fourth of that is ten years, and let's say you get three days credit for every one you serve. That's the good conduct time. That means you can effectively become eligible for parole on a forty-year sentence*

in about two years. That's the way it reads.

(Emphasis added.)

The State concedes that the ADA's math was wrong, that a person who receives a 40-year sentence cannot be eligible for parole in two years.

In his argument, the ADA invited the jury to consider the parole law in assessing punishment by informing the jury the effect the parole law might have on a 40-year sentence. Article 37.07, section 4 of the Texas Code of Criminal Procedure expressly prohibits the jury from considering the manner in which parole law may be applied to a particular defendant. The appellant's counsel should have objected to the ADA's argument inviting the jury to consider the parole law.

[3, 4] By his argument, the ADA gave the jury an erroneous formula regarding the application of the parole law to a 40-year sentence. It is error for the State to present a statement of law that is contrary to that presented in the charge to the jury. *Whiting v. State*, 797 S.W.2d 45, 48 (Tex.Crim. App.1990). The ADA's miscalculation misled the jury. The appellant's counsel should have objected to the formula for parole.

We find that counsel was ineffective for not objecting to the ADA's argument.

Totality of Representation

[5, 6] Under *Duffy*, we must review the "totality of the representation" to determine if the appellant was given the "reasonably effective assistance of counsel." *Ex parte Walker*, 777 S.W.2d 427, 431 (Tex.Crim.App. 1989); *Thomas v. State*, 923 S.W.2d 611, 612 (Tex.App.—Houston [1st Dist.] 1995, no pet.). However, sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard. *Cooper v. State*, 769 S.W.2d 301, 305 (Tex.App.—Houston [1st Dist.] 1989, pet. ref'd). Courts have frequently found counsel ineffective because of a single error affecting only the punishment assessed. *Jackson v. State*, 766 S.W.2d 504, 510 (Tex.Crim. App.1985)¹ (trial counsel did not advise de-

1. This *Jackson* case was reversed and remanded by the U.S. Supreme Court when it issued *Texas v. McCullough*, 475 U.S. 134, 106 S.Ct. 976, 89 L.Ed.2d 104 (1986). See *Texas v. Jackson*, 475

U.S. 1114, 106 S.Ct. 1627, 90 L.Ed.2d 175 (1986). The purpose of the remand in *Jackson* was to reconsider the issue of ineffective assistance of counsel in light of the Supreme Court's

Cite as 966 S.W.2d 188 (Tex.App.—Houston [1st Dist.] 1998)

defendant about the consequences of electing jury to assess punishment on retrial); *Ex parte Scott*, 581 S.W.2d 181, 182 (Tex.Crim.App.1979) (trial counsel did not investigate circumstances of convictions used for enhancement); *Oliva v. State*, 942 S.W.2d 727, 734–35 (Tex.App.—Houston [14th Dist.] 1997, pet. granted, 8–27–97) (trial counsel did not object to improper argument of ADA); *Cooper*, 769 S.W.2d at 305 (trial counsel permitted defendant to testify at punishment on an insignificant issue, which subjected him to cross-examination about 14 convictions); *Stone v. State*, 751 S.W.2d 579, 583 (Tex.App.—Houston [1st Dist.] 1988, pet. ref'd) (trial counsel mistakenly told defendant that court could grant probation when it assessed punishment); *Burnworth v. State*, 698 S.W.2d 686, 690 (Tex.App.—Tyler 1985, pet. ref'd) (trial counsel did not request charge on probation); *Snow v. State*, 697 S.W.2d 663, 667 (Tex.App.—Houston [1st Dist.] 1985, pet. dism'd) (trial counsel did not request a jury instruction on probation); *May v. State*, 660 S.W.2d 888, 889–90 (Tex.App.—Austin 1983), *aff'd*, 722 S.W.2d 699 (Tex.Crim.App.1984) (trial counsel did not submit sworn application for probation, which waived defendant's right to be considered for probation). To ignore a grievous error simply because it is single, while granting relief where multiple errors cumulatively reach the same magnitude, would be contrary to the reasons that caused the creation of the doctrine of ineffective assistance of counsel. *Cooper*, 769 S.W.2d at 305.

[7] The adversarial process broke down at the punishment stage in this case. The ADA argued matters that he should not have, and he erroneously computed the time for parole eligibility. Defense counsel did not object. The failure to object cannot be justified by any trial strategy within our imagination. There is a strong possibility that the prosecutor's argument resulted in a higher sentence.

holding in *McCullough*, that due process is not violated when, on retrial, a judge imposes a greater sentence than after the first trial. On remand in *Jackson*, the Court of Criminal Appeals held that trial counsel's failure to advise defendant about the consequences of electing a jury was not error in light of *McCullough*. *Jackson v. State*, 766 S.W.2d 518, 521 (Tex.Crim.App.

We hold that the failure to object to an argument that invites consideration of parole laws and supplies an erroneous formula for calculating parole eligibility which is in direct violation of the Code of Criminal Procedure is, as a matter of law, ineffective assistance of counsel.

Conclusion

We affirm the trial court's judgment concerning conviction. We reverse the trial court's judgment concerning punishment, and remand the cause to the trial court for a new punishment hearing.

MIRABAL, J., dissenting.

MIRABAL, Justice, dissenting.

The majority first acknowledges that under *Duffy*¹ we must review the "totality of the representation" to determine if appellant was afforded "reasonably effective assistance of counsel." The majority then ignores the "totality of the representation" of appellant and holds that a *single error*, the failure to object to one portion of the prosecutor's closing argument, constituted *per se* ineffective assistance of counsel. In my opinion, the facts of this case do not support the holding that, because of a single failure to object during closing argument, appellant received ineffective assistance of counsel as a matter of law. Accordingly, I dissent.

The constitutional right to counsel does not mean errorless counsel or counsel whose competency is to be judged by hindsight. *Ex parte Cruz*, 739 S.W.2d 53, 58 (Tex.Crim.App.1987). The right to effective assistance of counsel at the punishment phase means counsel reasonably likely to render and rendering reasonably effective assistance of counsel. *Duffy*, 607 S.W.2d at 514, n. 4. On appeal, in examining the totality of the representation, we must judge a full scope of assistance—representation, performance, de-

1988). The *Jackson* holding still stands for the proposition that a single, substantial error in representation can result in a reversal.

1. *Ex parte Duffy*, 607 S.W.2d 507 (Tex.Crim.App. 1980).

livery—for effectiveness. The standard mandates an examination both of competence, “likely to render,” and of assistance, “and rendering,” in determining effectiveness of counsel. *Ex parte Walker*, 794 S.W.2d 36, 37 (Tex.Crim.App.1990); *Duffy*, 607 S.W.2d at 516, n. 17.

In the present case, the majority concludes appellant’s counsel failed the second part of the *Duffy* test—“and rendering reasonably effective assistance”—because of an isolated failure to object to closing argument.

The majority opinion sets out the portion of the prosecutor’s closing argument that concerns us. The jury charge included the same information about the parole laws that the prosecutor argued, except for his italicized statements. It is not error for the prosecutor to quote or paraphrase the jury charge, even if the charge instructs the jury regarding parole laws. *Whiting v. State*, 797 S.W.2d 45, 48 (Tex.Crim.App.1990); *Jones v. State*, 641 S.W.2d 545, 550 (Tex.Crim.App. 1982). In the present case, the prosecutor did not contradict the court’s charge. He told the jury they “can’t guess or estimate anything about good conduct time or parole”. He did not make a definite statement about good time credit—rather he gave a hypothetical, “let’s say you get three days credit for every one you serve.” I agree with our assessment of the prosecutor’s jury argument in our *first opinion* in this case, before remand:

[U]nlike the objectionable arguments [in other cases], the prosecutor’s comment spoke to a constitutionally mandated jury instruction, did not state that good conduct time and parole would always operate to reduce a sentence by a certain amount, did not attempt to have the jury figure how the parole laws would operate in appellant’s case, and did not suggest a punishment to offset the parole law’s application or effect.

Valencia v. State, 891 S.W.2d 652, 658 (Tex. App.—Houston [1st Dist.] 1993), *rev’d*, 946 S.W.2d 81 (Tex.Crim.App.1997).

I acknowledge that if the prosecutor meant for his hypothetical to be precisely accurate, rather than to be a broad-brush example to get the concept across, he made a mistake—a

person could not become eligible for parole in *two* years on a 40-year sentence—rather it would take *four* years to become eligible for parole. *Valencia*, 891 S.W.2d at 657 n.l. The difference between *two years* and *four years* in such a hypothetical is *de minimis*. The fact that appellant’s counsel did not “catch” the mathematical error is nowhere near *per se* ineffective assistance.

In my opinion, the prosecutor’s argument does come dangerously close to crossing the statutory line of permissible argument; however, because of the hypothetical nature of the comments, a reasonable defense counsel hearing the argument in the courtroom could have concluded it fell short of urging the jury to consider how the parole law would actually be applied to appellant. The failure to object in such a situation is not *per se* ineffective assistance. See *Davis v. State*, 712 S.W.2d 827, 829 (Tex.App.—Houston [1st Dist.] 1986, no pet.).



DOCUDATA RECORDS MANAGEMENT SERVICES, INC., Appellant,

v.

Keith WIESER, Appellee.

No. 01-96-00341-CV.

Court of Appeals of Texas,
Houston (1st Dist.).

March 26, 1998.

Corporation and its wholly-owned subsidiary sued former employee for breach of covenant not to compete, and employee counterclaimed for breach of employment contract in failing to pay him bonus. The 189th District Court, Harris County, Carolyn Marks Johnson, J., entered judgment for employee after bench trial, and subsidiary appealed. The Court of Appeals, Andell, J., held, as matters of first impression, that