IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-83,873-02

Ex parte MALCOLM JAMON EVANS, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS FROM BELL COUNTY

KELLER, P.J., filed a concurring opinion in which HERVEY, J., joined.

The Court says that this case is controlled by *Hill v. Lockhart*,[1] but I read *Hill* differently. In *Hill*, the Supreme Court explicitly declined to decide whether erroneous advice about parole eligibility could ever be deemed constitutionally ineffective assistance:

> In the present case the claimed error of counsel is erroneous advice as to eligibility for parole under the sentence agreed to in the plea bargain. We find it unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel, because in the present case we conclude that petitioner's allegations are insufficient to satisfy the *Strickland v. Washington* requirement of "prejudice." Petitioner did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial.[2]

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[1] 474 U.S. 52 (1985).

[2] *Id.* at 60 (citation omitted).

The only thing *Hill* decided was that, even if erroneous advice about parole eligibility could ever be deemed ineffective assistance, the advice in the case before the Court failed to satisfy the *Strickland* standard.[3] But the Supreme Court did not decide that erroneous advice about parole eligibility could ever be constitutionally ineffective assistance, and in a line of cases culminating in *Moussazadeh II*,[4] we held that such erroneous advice could be deemed constitutionally ineffective assistance only when parole eligibility was an element of the plea bargain.[5] Because there is no binding Supreme Court precedent on whether erroneous advice about parole eligibility can ever be deemed ineffective assistance, the newness of the rule in *Moussazadeh III*[6] must be judged by this Court's own precedent.

Nevertheless, I concur in the result because I believe that, despite our general adherence to *Teague*,[7] several factors weigh in favor of retroactivity. First, the rule in *Moussazadeh III* was once the old rule, and we have come full circle.[8] It seems more appropriate to accord retroactive status to a new rule that once was the rule than to a new rule that is truly new, in the sense that it has never been the rule before. In addition, the type of claim before us is one that is generally raised on collateral review, and the new rule here was announced on collateral review. It is unnecessary to

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[3] *Strickland v. Washington*, 466 U.S. 668 (1984).

[4] *Ex parte Moussazadeh*, 64 S.W.3d 404 (Tex. Crim. App. 2001).

[5] *Id.* at 412.

[6] *Ex parte Moussazadeh*, 361 S.W.3d 684 (Tex. Crim. App. 2012).

[7] *Teague v. Lane*, 489 U.S. 288 (1989).

[8] *See Ex parte Evans*, 690 S.W.2d 274, 279 (Tex. Crim. App. 1985) (disavowing language in *Young v. State*, 644 S.W.2d 3 (Tex. Crim. App. 1983) that generally purported to authorize relief for misadvice about parole eligibility).

decide whether any of these factors alone would be sufficient to accord retroactive effect to a new rule.[9] The combination of these factors is, in my judgment, sufficient to accord retroactive effect here.

With these comments, I concur in the Court's judgment.

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[9] Given our holding in *Ex parte De Los Reyes*, 392 S.W.3d 675 (Tex. Crim. App. 2013) that claims under *Padilla v. Kentucky*, 559 U.S. 356 (2010) are not retroactive, it would not seem sufficient that the claim covered by the rule would ordinarily be raised on collateral review. I need not address whether any of the other factors recited would be sufficient, by itself, to require retroactive application of a new rule.