IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-62,425-02

EX PARTE KEITH THURMOND, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS IN CAUSE NO. 01-12-07721-CR FROM THE 410TH JUDICIAL DISTRICT COURT OF MONTGOMERY COUNTY

PRICE, J., filed a dissenting statement in which JOHNSON and ALCALA, JJ., joined.

DISSENTING STATEMENT

This is a subsequent application for writ of habeas corpus in which the applicant attempts to meet the threshold requirements for consideration under Article 11.071, Section 5 of the Texas Code of Criminal Procedure.[1] In it he claims that his trial lawyers provided constitutionally ineffective assistance of counsel in that they failed to conduct an adequate investigation into the existence of evidence mitigating against the death penalty in preparation for the punishment phase of his capital murder trial, as required by the United

[1] TEX. CODE CRIM. PROC. art. 11.071, § 5.

States Supreme Court in *Wiggins v. Smith*.[2] The applicant presents facts suggesting that his trial counsel waited until the week before his trial commenced to begin a mitigation investigation in earnest, and that, because of this untimely start, they did not uncover readily available evidence of substantial physical and emotional abuse inflicted upon the applicant and his siblings during their upbringing, as well as upon his mother, by the applicant's alcoholic and mentally unstable father. It seems to me that the applicant has proffered a colorable claim of ineffective assistance of counsel at the punishment phase of his trial.

The problem, of course, is that he could have raised this claim in his initial post-conviction application for writ of habeas corpus, but he did not. Ordinarily, the failure to raise a claim in an initial writ application will bar consideration of the merits of that claim in a subsequent writ application challenging a capital conviction or death sentence, and we have held in the past that the ineffectiveness of initial state habeas counsel does not enable a subsequent writ applicant to overcome that bar.[3] But recently the United States Supreme Court granted review and heard oral argument in *Martinez v. Ryan,*[4] in order to consider whether a post-conviction habeas corpus applicant ought to be regarded as constitutionally entitled to the effective assistance of initial state habeas counsel at least with respect to

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[2] 539 U.S. 510 (2003).

[3] *Ex parte Graves*, 70 S.W.3d 103 (Tex. Crim. App. 2002).

[4] 131 S.Ct. 2960 (2011).

claims that may only be raised for the first time in the habeas corpus forum.[5] Since granting review in *Martinez*, the Supreme Court has stayed the execution of a pair of condemned Texas inmates who argued, as does the applicant today, that the ineffectiveness of initial state habeas counsel with respect to an issue that may be raised for the first time only in a post-conviction application for writ of habeas corpus proceeding ought to justify allowing the inmate to raise that issue for the first time in a subsequent writ application.[6] For reasons already expressed in my dissenting statements in *Ex parte Foster*,[7] *Ex parte Balentine*,[8] the second *Ex parte Foster*,[9] *Ex parte Garcia*,[10] *Ex parte Hernandez*,[11] and, most recently, *Ex*

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[5] The question presented in *Martinez* is: "Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state-law right to raise such a claim in a first post-conviction proceeding, has a federal constitutional right to effective assistance of first post-conviction counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim." *Martinez v. Ryan*, 2011 WL 3467246, at i (Appellate Brief) (U.S. Aug. 4, 2011). While defendants in criminal cases in Texas are not absolutely prohibited by law from challenging the effectiveness of their trial counsel on direct appeal, such claims typically call for extensive factual development beyond what is disclosed in the appellate record, and thus, as a practical matter, post-conviction habeas corpus is the first opportunity to raise them. *Thompson v. State*, 9 S.W.3d 808 (Tex. Crim. App. 1999).

[6] *See Balentine v. Texas*, 131 S.Ct. 3017 (2011); *Foster v. Texas*, 132 S.Ct. 69 (2011).

[7] 2010 WL 5600129, WR–65,799-02 (Tex. Crim. App. delivered Dec. 30, 2010) (not designated for publication) (Dissenting Statement of Price, J., joined by Holcomb, J.).

[8] WR-54,071-03 (Tex. Crim. App. delivered June 14, 2011) (not designated for publication) (Dissenting Statement of Price, J., joined by Johnson and Alcala, JJ.).

[9] 2011 WL 4071983, WR-65,799-03 (Tex. Crim. App. delivered Sept. 12, 2011) (not designated for publication) (Dissenting Statement of Price, J., joined by Womack, J.).

[10] 2011 WL 5189081, WR-66,977-02 (Tex. Crim. App. delivered Oct. 27, 2011) (not

parte Adams,[12] because this Court will not stay the applicant's impending execution until the Supreme Court can dispose of *Martinez*, *Balentine*, and *Foster*,[13] I respectfully dissent.

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DO NOT PUBLISH

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designated for publication) (Dissenting Statement of Price, J., joined by Womack and Johnson, JJ.).

[11] 2012 Tex. Crim. App. Unpub. LEXIS 55, WR-69,470-02 (Tex. Crim. App. delivered Jan. 23, 2012) (not designated for publication) (Dissenting Statement of Price, J., joined by Womack and Johnson, JJ.).

[12] 2012 WL 476538, WR-68,066-03 (Tex. Crim. App. delivered Feb. 15, 2012) (not designated for publication) (Dissenting Statement of Price, J.).

[13] Just last month, the Supreme Court decided another case that was argued on the same day it heard oral argument in *Martinez*. *See Maples v. Thomas*, 132 S.Ct. 912 (2012). There is no reason to think that the Supreme Court will not decide *Martinez* in the very near future.