IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-68,066-03

EX PARTE BEUNKA ADAMS, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS IN CAUSE NO. 15,057 FROM THE 2ND JUDICIAL DISTRICT COURT OF CHEROKEE COUNTY

PRICE, J., filed a dissenting statement.

DISSENTING STATEMENT

This is a second 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, *inter alia*, that he received ineffective assistance of counsel on direct appeal. He claims that his appellate lawyer rendered constitutionally defective representation when he failed to complain that the trial court denied his request for a particular jury instruction at the punishment phase of his

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

capital murder trial. The requested instruction would have informed the jury that the instructions it had received at the conclusion of the guilt/innocence phase of trial with respect to the applicant's liability under the law of parties in Texas do not apply to its deliberations on the special issues at the punishment phase of trial. The applicant claims he was entitled to the requested instruction under this Court's opinion in *Nichols v. State*,[2] and that, had appellate counsel raised the error in this Court on direct appeal, there is a reasonable probability that we would have granted him a new punishment hearing. Although the statutory special issues have been modified since *Nichols*,[3] I am of the view that, even under the current regime, the anti-parties instruction would yet have some utility and that the applicant might still be entitled to it, upon request. It seems to me, therefore, that the applicant has proffered a plausible claim of ineffective assistance of appellate counsel.

The problem, of course, is that he could have raised this claim in his initial post-

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[2] 754 S.W.2d 185, 198-99 (Tex. Crim. App. 1988), *overruled on other grounds by Green v. State*, 764 S.W.2d 242, 247 n.2 (Tex. Crim. App. 1989) and *Harris v. State*, 784 S.W.2d 5, 19 (Tex. Crim. App. 1989). *See* Elizabeth Berry, George Gallagher & Paul J. McClung, TEXAS CRIMINAL JURY CHARGES § 6:70, at 6-11 (rev. 12) (2011).

[3] When *Nichols* was decided, a capital defendant sought an anti-parties instruction mainly to dissuade the jury at the punishment phase from taking the conduct of his co-defendants into account when considering what was at that time the first statutory special issue, "whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would occur." *See* Acts 1973, 63rd Leg., ch. 426, p. 1125, § 1, eff. June 14, 1973. The so-called "deliberateness" special issue has since been replaced with another, to be given specifically whenever the jury might have found the defendant guilty as a party under Sections 7.01 and 7.02 of the Penal Code, *see* TEX. PENAL CODE §§ 7.01, 7.02, asking "whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken." *See* Acts 1991, 72nd Leg., ch. 838, p. 2899, § 1, eff. Sept. 1, 1991.

conviction application for writ of habeas corpus, but he did not. He did raise this claim in his first subsequent post-conviction application for writ of habeas corpus, which we dismissed for failure to satisfy Article 11.071, Section 5.[4] Since that time, however, the United States Supreme Court has granted review and heard oral argument in *Martinez v. Ryan*.[5] There, the Supreme Court is considering 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 claims that may only be raised for the first time in the habeas corpus forum.[6] 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

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[4] *Ex parte Beunka Adams*, No. WR-68,066-02, 2009 WL 1165001 (Tex. Crim. App. delivered Apr. 29, 2009) (not designated for publication).

[5] 131 S.Ct. 2960 (2011).

[6] 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). In any event, post-conviction habeas corpus will *always* be the first opportunity a death row inmate will have to raise a claim of ineffective assistance of his *appellate* counsel.

proceeding ought to justify allowing the inmate to raise that issue for the first time in a subsequent writ application.[7] The applicant's execution date is currently set for April 26, 2012, more than ten weeks away. It is highly likely that the Supreme Court will issue its opinion in *Martinez* during the interim. There is no pressing reason that the Court must hurry to decide the reviewability of the merits of the applicant's ineffective assistance of appellate counsel claim before then. We do not even have to stay the applicant's currently scheduled execution in the meantime—at least not for the next few months, assuming it takes that long for *Martinez* to come down. For reasons already expressed in my dissenting statements in *Ex parte Foster*,[8] *Ex parte Balentine*,[9] the second *Ex parte Foster*,[10] *Ex parte Garcia*,[11] and, most recently, *Ex parte Hernandez*,[12] and because this Court refuses even to simply hold the

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

[8] 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.).

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

[10] 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.).

[11] 2011 WL 5189081, WR-66,977-02 (Tex. Crim. App. delivered Oct. 27, 2011) (not designated for publication) (Dissenting Statement of Price, J., joined by Womack and Johnson, JJ.).

[12] 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.).

applicant's second subsequent application for writ of habeas corpus pending the Supreme Court's dispositions of *Martinez*, *Balentine*, and *Foster*,[13] I respectfully dissent.

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DO NOT PUBLISH

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[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*, ___ S.Ct. ___, 2012 WL 125438 (U.S. Jan. 18, 2012). There is no reason to think that the Supreme Court will not decide *Martinez* in the very near future. Should *Martinez* be decided in such a way as to foreclose the applicant's current contentions before the applicant's currently scheduled execution date on April 26, 2012, we could simply dismiss the applicant's second subsequent post-conviction writ application at that time.