IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-69,470-02

EX PARTE RODRIGO HERNANDEZ, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS IN CAUSE NO. 2002-CR-8100 FROM THE 144TH JUDICIAL DISTRICT COURT OF BEXAR COUNTY

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

DISSENTING STATEMENT

Although the applicant was tried after the United States Supreme Court issued its ground-breaking opinion in *Atkins v. Virginia*,[1] the applicant's trial counsel did not attempt to raise mental retardation as an issue at his capital murder trial. In his initial post-conviction application for writ of habeas corpus filed under the auspices of Article 11.071 of the Texas Code of Criminal Procedure,[2] the applicant again failed to raise mental retardation or to

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[1] 536 U.S. 304 (2002).

[2] TEX CODE CRIM. PROC. art. 11.071.

challenge the competency of his trial counsel in failing to do so. Now, for the first time in this subsequent post-conviction application for writ of habeas corpus, the applicant argues that he cannot be lawfully executed because of his mental retardation and because his trial counsel rendered ineffective assistance of counsel at the punishment phase of his capital murder trial in failing to conduct a meaningful investigation into his mental retardation. Today the Court dismisses both claims because they could have been, but were not, raised in the initial writ application and thus cannot be entertained in a subsequent writ application.[3] The Court additionally dismisses the applicant's substantive claim of mental retardation for failing to satisfy the rigorous standard we set out in *Ex parte Blue*.[4] Because I would at least entertain the applicant's ineffective assistance of trial counsel claim, I dissent to the Court's refusal to stay the applicant's execution.

Although each claim could indeed have been included in the initial post-conviction writ application that applicant's initial state habeas counsel filed, the applicant's subsequent habeas counsel has now proffered substantial evidence to show that initial state habeas counsel failed to conduct any meaningful investigation into those claims.[5] The applicant's subsequent habeas counsel also proffers substantial evidence to show that, had initial state

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[3] *Id*. § 5(a)(1).

[4] 230 S.W.3d 151 (Tex. Crim. App. 2007).

[5] Initial state habeas counsel's vouchers for work done on the original post-conviction application seem to indicate that he conducted no investigation whatsoever beyond reading the appellate record, reviewing the appellate briefs and opinion, and perusing trial counsels' files.

habeas counsel conducted an investigation, he could have produced a fairly convincing claim that the applicant is mentally retarded.[6] The applicant now argues that the ineffectiveness of his initial state habeas counsel's assistance in demonstrating both his mental retardation and the ineffectiveness of his trial counsel for not establishing mental retardation at the punishment phase of trial should count as sufficient justification for allowing him to pursue those claims in his subsequent writ application. Alternatively, he argues that this Court should at least stay his execution pending resolution of litigation currently pending in the United States Supreme Court that should be decided imminently and may shed substantial light on this question.

I agree. On October 4th of last year, the United States Supreme Court heard oral argument in *Martinez v. Ryan*.[7] 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

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[6] Current habeas counsel's expert, a clinical psychologist, reviewed the applicant's available school records and conducted two IQ tests, including the Wechsler Adult Scale of Intelligence–Fourth Edition (full scale IQ score of 57), as well as a standardized measure for assessing adaptive deficits, the Adaptive Behavior Assessment System–Second Edition. The applicant scored lower than the required two standard deviations below the norm in all of these instruments, and the fact that he exhibited scholastic difficulties well before he turned 18 led the applicant's expert to conclude that his mental retardation had already manifested by that time.

[7] 131 S.Ct. 2960 (2011). Just this past Wednesday, 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 definitively obviate the applicant's current contentions, the trial court can set another execution date as early as the thirty-first day thereafter. TEX. CODE CRIM. PROC. art. 43.141(c).

only be raised for the first time in the habeas corpus forum.[8] Since granting review in *Martinez*, the Supreme Court has stayed the execution of several 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.[9] I do not know whether the Supreme Court will regard it as prudent to stay the applicant's execution in light of *Martinez*, *Balentine*, and *Foster*, but I do not think that this Court ought to tolerate allowing the applicant's execution to proceed without knowing how the Supreme Court will ultimately dispose of the issues raised in those cases. For reasons already expressed in my dissenting

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[8] 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).

[9] *See Balentine v. Texas*, 131 S.Ct. 3017 (2011); *Foster v. Texas*, __ S.Ct. __, 2011 WL 4360018 (2011).

statements in *Ex parte Foster*,[10] *Ex parte Balentine*,[11] the second *Ex parte Foster*,[12] and, most recently, *Ex parte Garcia*,[13] and because this Court refuses even to grant the applicant's motion for stay of execution pending the Supreme Court's dispositions of *Martinez*, *Balentine*, and *Foster*, I once again find myself dissenting.

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DO NOT PUBLISH

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[10] 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.).

[11] 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.).

[12] 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.).

[13] 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.).