IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-75,835-01

Ex parte HECTOR ROLANDO MEDINA, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS FROM DALLAS COUNTY

KELLER, P.J., filed a dissenting opinion.

The habeas court concluded that "the proper analysis of Applicant's claims falls under *Cronic*,"[1] obviating a need to conduct an inquiry into prejudice.[2] But in our opinion on Applicant's direct appeal, this Court held that *Strickland*,[3] rather than *Cronic*, controlled because "the only portions of appellant's trial that defense counsel did not participate in were presenting punishment evidence and presenting a jury argument during the punishment phase."[4] Ordinarily, when the

[1] *United States v. Cronic*, 466 U.S. 648 (1984).

[2] *See* Finding (10).

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

[4] *Medina v. State*, AP-76,036, 2011 Tex. Crim. App. Unpub. LEXIS 1, * 38-39 (Tex. Crim. App. January 12, 2011) (not designated for publication).

defendant has an attorney and that attorney has been afforded the opportunity to prepare, the *Cronic* presumption of prejudice applies only when counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing."[5] Defense counsel did not entirely fail to subject the State's punishment case to meaningful adversarial testing because she fully participated in the State's punishment case, including cross-examining witnesses. For this reason, the Supreme Court's more recent holding in *Lee* also does not apply because Applicant has not been deprived of an entire proceeding.[6] Because our holding on direct appeal is the "law of the case,"[7] the habeas court erred to rely upon *Cronic*. Counsel's conduct must be evaluated under *Strickland*'s prejudice prong, and the habeas court has not done that. I would remand for findings on the issue of prejudice.

I respectfully dissent.

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[5] *Cronic*, 466 U.S. at 659-60.

[6] *See Lee v. United States*, 137 S.Ct. 1958, 1965 (2017) ("But in this case counsel's 'deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself.'").

[7] *State v. Swearingen*, 478 S.W.3d 716, 720 (Tex. Crim. App. 2015) ("According to that ['law of the case'] doctrine, 'an appellate court's resolution of questions of law in a previous appeal are binding in subsequent appeals concerning the same issue.'").