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

KEASLER, J., filed a concurring opinion.

CONCURRING OPINION

I agree that a new punishment hearing is merited in Hector Medina's case, for the reasons given in the Court's order granting relief. I write separately to address two matters: the Section 5 bar in Article 11.071 of the Texas Code of Criminal Procedure,[1] and trial counsel's truly reprehensible conduct in this case.

I. SECTION 5

I dissented to this Court's previous determination that Medina's initial habeas filing

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

was "not a proper writ application under Article 11.071."[2] While I shared the majority's concern that Medina's "one opportunity to seek habeas relief" would be "lost,"[3] I considered it unfair and inconsistent with the Court's practice to give Medina "an opportunity that other similarly situated applicants have been denied."[4] I would have held that Medina's filing indeed constituted an "application," as that term is understood in Article 11.071, such that any subsequent filing—including the present one—would need to overcome the statutory bars to reconsideration contained in Section 5 of Article 11.071.[5] With this understanding, most, if not all, of Medina's present claims should be dismissed with prejudice, because they could have been, but were not, included in his initial filing.[6]

I still believe that affording Medina (what amounts to) a second bite at the apple represented a "drastic reversal of course" from the Court's usual practice of denying insufficiently pled habeas applications on their merits.[7] I also continue to believe that giving Medina the opportunity—with the Court's blessing and encouragement—to correct the deficiencies in his pleadings was fundamentally unfair to the habeas applicants whose similar

---

[2] *Ex parte Medina*, 361 S.W.3d 633, 635 (Tex. Crim. App. 2011).

[3] *Id.* at 647 (Keasler, J., dissenting).

[4] *Id.* at 649 (Keasler, J., dissenting).

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

[6] *Id.* § 5(a)(1).

[7] *Medina*, 361 S.W.3d at 649 (Keasler, J., dissenting).

mistakes were met with no such similar sympathy.[8] Since *Medina*, as before, we have continued routinely to turn from the doors those habeas applicants whose filings "failed to adequately plead facts" justifying relief.[9]

But I also recognize that this matter was decided some six years ago, and every institutional entity involved in determining the fate of Medina's habeas proceeding has invested countless hours and immeasurable resources in the wake of our initial opinion. If ever there was an occasion to adhere to *stare decisis*, this is it. I voiced my concerns in our opinion addressing Medina's first filing, but my arguments did not carry the day. So in deference to the Court's initial *Medina* opinion, I have considered the claims in Medina's present application as though they were brought for the first time in an initial application.

II. TRIAL COUNSEL'S CONDUCT

I must also take a moment to express my profound disgust at the disgraceful punishment-phase "representation" trial counsel provided Hector Medina in this case. When trial counsel was initially denied a three-month continuance at the conclusion of the State's punishment case, she evidently gave the trial judge two options. Either the trial judge could agree to counsel's continuance, or counsel would refuse to put on any evidence whatsoever, and "we can try [the case] again in 10 years"—presumably at the conclusion of Medina's

---

[8] *Id.* at 647 (Keasler, J., dissenting).

[9] *Id.* (Keasler, J., dissenting).

appellate and collateral litigation.[10] When the judge did not relent, counsel, in a brazen attempt to plant the seeds of reversible error, intentionally torpedoed Medina's punishment case in front of the jury. There is some suggestion in the record that she took this approach on advice from colleagues unconnected to the case. She was nevertheless unrepentant, telling the trial judge "I don't care if I lose my law license over [this]."[11] Perhaps even more disgraceful, at no point did she inform Medina of her scheme. Instead, counsel contented herself to say only two words to her client: "Trust me."[12]

Cataloguing all of the ethical and professional lines trial counsel crossed in charting this course without her client's knowledge or consent would consume far more ink than I care to spill on the matter.[13] Suffice it to say, her ludicrous attempt to hold the trial court hostage[14] resulted in a death sentence she was duty-bound, but did shamefully little, to

---

[10] Findings of Fact and Conclusions of Law at 19, *Ex parte Hector Rolando Medina*, No. W07-32923-S(A) (282nd Dist. Ct., Dallas County, Tex. Dec. 30, 2016).

[11] *Id.*

[12] *Id.* at 24.

[13] *But see, e.g.*, TEX. DISCIPLINARY RULES PROF'L CONDUCT preamble ¶ 2 ("As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications."); GUIDELINES AND STANDARDS FOR TEXAS CAPITAL COUNSEL, Guideline 10.2(C) ("Counsel at all stages of the case should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case[.]").

[14] *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT preamble ¶ 4 ("While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process."); *id.* at R. 3.02 ("In the course of litigation, a lawyer shall not take a position that unreasonably increases the costs or other burdens of

oppose.[15]

It has been almost nine years since counsel declared her outrageous intentions to the trial judge. Counsel's first prediction—that Medina's punishment case would be tried again in ten years—was therefore potentially quite accurate. But if counsel feels any self-satisfaction in this regard, she shouldn't. This long and sordid saga is still far from over. All the witnesses, evidence, and resources expended in his initial punishment hearing must now be marshaled anew. The mother of two murdered children will once again be asked to relive her worst nightmare before a jury of twelve strangers. If there is any justice in this, perhaps trial counsel's second prediction—that post-conviction relief might come at the cost of her law license—will prove as prescient as her first.

It is a bitter task indeed to reward trial counsel's unprofessionalism by giving her what she has apparently wanted all along: a new punishment hearing for Medina. Still, in light of the habeas court's finding that Medina was oblivious to trial counsel's strategy, we should not hold Medina accountable for the decisions of his lawyer.

With these comments, I concur. A copy of this statement shall be sent to Office of the General Counsel of the State Bar of Texas.

Filed: October 4, 2017
Publish

---

the case or that unreasonably delays resolution of the matter.").

[15] *See id.* at R. 3.01 cmt. 1 ("The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure.").