IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-82,014-01

Ex parte CRISTIAN AGUILAR, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. 1388321-A IN THE 337TH DISTRICT COURT FROM HARRIS COUNTY

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

The Court acknowledges that it extends the holding of *Padilla*[1]—a case involving the deportation consequences of a plea—to a case that involves the anticipated loss of a protected status, which might ultimately lead to deportation. I would not extend *Padilla*'s holding to such a case. The Court also makes statements about the habeas harm standard that have no basis in our jurisprudence. For these reasons, I must respectfully dissent.

[1] *Padilla v. Kentucky*, 559 U.S. 356 (2010).

Some crimes automatically make an alien deportable.[2] The Court has not suggested that Applicant's state-jail felony is such a crime. Instead, the Court concludes that the state-jail felony conviction will result in terminating applicant's "Temporary Protected Status" (TPS) under federal law that allows him to be present in this country. But applicant's status has not yet been terminated, so he is not yet deportable. Because applicant has not yet been determined to be deportable, we cannot know whether some other factor or circumstance may intervene to prevent applicant from becoming deportable. And if he never becomes deportable, then his plea cannot be said to be involuntary based on deportation consequences.

Applicant was in the process of attempting to adjust his status and may perhaps be able to adjust his status before his TPS is terminated. Even if that fails, applicant may be able to avoid deportation through other means, such as applying for asylum or withholding of removal.[3] Or some other factor of which we are unaware may come into play to prevent applicant from being deported or even from ever being considered deportable. We should at least wait until applicant's TPS has actually been terminated before deciding to grant relief.

With regard to harm, the Court says, "While habeas has a general harm standard, that

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[2] *See Torres v. Lynch*, 136 S. Ct. 1619, 1623 (2016) ("The INA makes any alien convicted of an "aggravated felony" after entering the United States deportable.").

[3] *See Java v. Immigration and Customs Enforcement*, 543 U.S. 335, 348 (2005) ("If aliens would face persecution or mistreatment in the country designated under § 1231(b)(2), they have a number of available remedies: asylum, § 1158(b)(1); withholding of removal, § 1231(b)(3)(A); relief under an international agreement prohibiting torture, see 8 CFR §§ 208.16(c)(4), 208.17(a) (2004); and temporary protected status, 8 U.S.C. § 1254a(a)(1)."); *Blandino-Medina v. Holder*, 712 F.3d 1338, 1340-41, 1343-48 (9th Cir. 2013) (foreign national on TPS was sentenced to a felony but applied for withdrawal of removal—remanded to determine whether the offense was ineligible for withdrawal of removal as a "particularly serious crime," which, absent a five year sentence or more, must be determined on a case-by-case basis).

standard is only at play when we have not previously set out a definition for prejudice or harm." This is an overly broad statement that is not supported by the cases cited. *Moussazadeh* addressed the appropriate standard for analyzing the prejudice prong of *Strickland*.[4] *Martinez* explained that the *Strickland* prejudice standard is more onerous on defendants than the harm standards found in Rule 44.2,[5] so meeting the *Strickland* standard necessarily satisfied the general harm standard applicable in a direct appeal. That does not mean, though, that a prejudice standard that is a component of a constitutional violation will always displace a more generally applicable harm standard. In *Ex parte Fierro*, in fact, we said the general harm standard was not displaced, where the general harm standard (on habeas) was more onerous on defendants than the materiality standard that was a component of the constitutional violation (knowing use of perjured testimony).[6] However, *Fierro* suggested, and *Ghahremani* later held, that the habeas harm standard would not apply if the applicant had no opportunity to raise the issue on direct appeal.[7] Whether the general habeas harm standard applies, then, depends on whether direct appeal was an available remedy, not on whether the claim at issue incorporates a harm standard of its own, unless the harm standard is actually more

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[4] *See Ex parte Moussazadeh*, 361 S.W.3d 684, 690-91 (Tex. Crim. App. 2012).

[5] *Ex parte Martinez*, 330 S.W.3d 891, 903-04 (Tex. Crim. App. 2011).

[6] *See Ex parte Fierro*, 934 S.W.2d 370, 373-74 (Tex. Crim. App. 1996) ("But, because the materiality standard for the knowing use of perjured testimony is the Chapman harmless error standard, the materiality standard is more stringent (on the State) than either the state or federal habeas harmless error standards. This leaves open the possibility of applying a separate harmless error standard on collateral review. . . . In accordance with the above discussion, we hold that the knowing use of perjured testimony is trial error, subject to the harmless error standard applicable on habeas corpus.")

[7] *See id.* at 374 n.10; *Ex parte Ghahremani*, 332 S.W.3d 470, 481-83 (Tex. Crim. App. 2011).

onerous on defendants than the general habeas harm standard (e.g., actual innocence).[8]

I respectfully dissent.

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[8] The standard for actual innocence, "by clear and convincing evidence that no reasonable juror would have convicted [the defendant] in light of the new evidence," *Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996) is an example of a harm standard that is more onerous on defendants than the preponderance of the evidence standard generally applicable on habeas. *See Fierro*, 934 S.W.2d at 372.