IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-83,873-02

EX PARTE MALCOLM JAMON EVANS, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS FROM BELL COUNTY

KEEL, J., delivered the opinion of the Court in which ALCALA, RICHARDSON, YEARY, NEWELL, and WALKER, JJ., joined. KELLER, P.J., filed a concurring opinion in which HERVEY, J., joined. KEASLER, J., filed a dissenting opinion.

O P I N I O N

Applicant was charged with causing serious bodily injury to a child under Texas Penal Code section 22.04(a)(1). After the State abandoned the deadly weapon allegation, he pled guilty with a 50-year cap, and the trial court sentenced him to 50 years in prison. Applicant now claims that his plea was involuntary because his attorney misadvised him about the effect of a deadly weapon finding on his parole eligibility. He says that if his attorney had correctly advised him, he would have insisted on going to trial. The habeas

court found those claims to be true and recommended that we grant relief. The habeas court's findings are supported by the record.[1] The only question we face is whether the law as it existed when Applicant's conviction became final entitles him to relief. We conclude that it does.

Applicant's claim for relief is grounded in the federal constitution. U.S. CONST. amend. VI (rights to jury and counsel). The ultimate authority on federal constitutional law is the U.S. Supreme Court. U.S. CONST. art. VI, cl. 2; *Marbury v. Madison*, 5 U.S. 137, 177-78 (1803); *Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999); *State v. Guzman*, 959 S.W.2d 631, 633 (Tex. Crim. App. 1998). The Supreme Court's pronouncements about federal constitutional law are binding on this Court. *Ex parte Ramey*, 382 S.W.3d 396, 397 (Tex. Crim. App. 2012); *Coronado v. State*, 351 S.W.3d 315, 317 (Tex. Crim. App. 2011); *Coble v. State*, 330 S.W.3d 253, 270 (Tex. Crim. App. 2010). Thus, the validity of Applicant's claim must be judged in accordance with applicable U.S. Supreme Court precedent.

A defendant is entitled to effective assistance of counsel in the guilty plea context.

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[1] Applicant's first attorney correctly explained Applicant's parole eligibility to him, but their relationship soured to the point that they could not communicate, and the trial court appointed a second attorney. The second attorney assumed responsibility for communicating with Applicant, and negotiated two alternative plea agreements: One called for the abandonment of the deadly weapon allegation with a cap of 50 years, and the other called for a 35-year cap with the deadly weapon allegation in place. Applicant chose the first option, which exposed him to more time in prison without any reciprocal benefit because his offense date was after September 1, 2007, when first degree injury to a child became an enumerated offense, i.e., aggravated even without a deadly weapon finding. *See* TEX. CODE CRIM. PROC. art. 42.12 § 3g(a)(1)(I); TEX. GOV'T CODE § 508.145(d).

Hill v. Lockhart, 474 U.S. 52, 59 (1985). To prevail on a claim of ineffective assistance of counsel due to bad advice about parole eligibility, a defendant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id*. at 58-59. *Accord Ex parte Moussazadeh*, 361 S.W.3d 684, 691 (Tex. Crim. App. 2012) ("*Moussazadeh III*").[2]

Because Applicant's claim meets the *Hill* formula, and *Hill* predated the finality of his conviction, we grant relief. The judgment is vacated, and Applicant is remanded to the custody of the Bell County Sheriff to answer the charges set out in the indictment.

Delivered: September 20, 2017

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[2] *Hill*'s failure to decide whether the bad advice about parole eligibility in that case amounted to deficient performance does not diminish its significance because "garden variety" applications of *Strickland v. Washington*, 466 U.S. 668 (1984), do not announce "new rules" within the meaning of *Teague v. Lane*, 489 U.S. 288, 306 (1989). *Chaidez v. United States*, 568 U.S. 342, ___,133 S.Ct. 1103, 1108 (2013). "[W]e have granted relief under *Strickland* in diverse contexts without ever suggesting that doing so required a new rule." *Id.* Our failure to recognize *Hill*'s straightforward application of *Strickland* sooner did not make *Moussazadeh III*, 361 S.W.3d at 691, a new rule.