



**IN THE COURT OF CRIMINAL APPEALS  
OF TEXAS**

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**NO. AP-76,383**

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**JOHN ALLEN RUBIO, Appellant**

**v.**

**THE STATE OF TEXAS**

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**ON MOTION FOR REHEARING FROM CAUSE NO. 03-CR-457-B  
IN THE 138<sup>TH</sup> DISTRICT COURT  
OF CAMERON COUNTY**

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*Per Curiam.*

**ORDER**

This case is before us on a motion for rehearing. Appellant was convicted in November 2003 of capital murder related to the killings of his three children. Based on the jury's answers to the special issues set forth in Texas Code of Criminal Procedure article 37.071, the trial judge sentenced appellant to death. This Court reversed appellant's

conviction and sentence on direct appeal. *Rubio v. State*, 241 S.W.3d 1 (Tex. Crim. App. 2007). Upon retrial, appellant was again convicted of capital murder and sentenced to death on August 2, 2010.

Just a few days after appellant was convicted and sentenced to death on retrial, the trial court appointed William L. Hubbard to represent appellant on direct appeal, and it appointed David A. Schulman to represent applicant in a post-conviction writ of habeas corpus under Article 11.071. Hubbard filed a brief on direct appeal and appeared at oral argument. This Court subsequently issued an opinion affirming the trial court's judgment and sentence of death. *Rubio v. State*, No. AP-76,383 (Tex. Crim. App. Oct. 10, 2012)(not designated for publication).

On the last day it would have been timely to file a motion for rehearing, Schulman and John G. Jasuta filed an appearance of counsel stating that "they have agreed to be co-counsel for Appellant during the remainder of the direct appeal process." They also filed a Motion for Rehearing. The Motion for Rehearing states that it is submitted by Hubbard, Jasuta, and Schulman; however, only Schulman signed the document.

Rule 10 adopted by the presiding judges of the administrative regions for the appointment of Article 11.071 counsel states that the convicting court may not appoint as habeas counsel an attorney who represented appellant at trial or on direct appeal unless the defendant and the attorney request the appointment on the record, and the convicting court finds good cause to make the appointment. *See Texas Government Code* § 78.056.

Although this scenario is somewhat backwards from the initial appointment scenario, it appears that no request by appellant or good cause showing from the trial court is in this record. *See also* Texas Code of Criminal Procedure article 26.052(k) (stating a similar prohibition against serving as both trial and direct appeal counsel.)

Therefore, within thirty days of the date of this order, appellant's direct appeal counsel Hubbard and appellant's habeas counsel Schulman shall respond as to (1) why they believe a motion for rehearing on the direct appeal filed by and signed only by habeas counsel is properly before this Court, and (2) why it is not a violation of Rule 10 adopted by the presiding judges of the administrative regions. The trial court is also invited to respond.

IT IS SO ORDERED THIS THE 12<sup>th</sup> DAY OF DECEMBER, 2012.

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