IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-62,840-02

EX PARTE JESSE JOE HERNANDEZ

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS AND MOTION FOR STAY OF EXECUTION FROM CAUSE NO. W02-00777-Q IN THE 204TH DISTRICT COURT DALLAS COUNTY

Per Curiam. **PRICE, J, filed a concurring statement.**

ORDER

This is a subsequent application for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5, and a motion for a stay of execution.

In July 2002, a jury found applicant guilty of the offense of capital murder. The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set applicant's punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Hernandez v. State*, No. AP-

74,401 (Tex. Crim. App. May 26, 2004)(not designated for publication). Applicant filed his initial post-conviction application for writ of habeas corpus in the convicting court on May 4, 2004. This Court denied applicant relief. *Ex parte Hernandez*, No. WR-62,840-01 (Tex. Crim. App. May 3, 2006)(not designated for publication). This, applicant's first subsequent application, was filed in the trial court on March 20, 2012.

In his application, applicant raises a claim that his trial counsel was ineffective for failing to investigate and present evidence regarding the victim's cause of death. He argues that this Court should address this claim in his subsequent application because his initial state habeas counsel was ineffective in failing to properly raise the claim in his initial application. Applicant's allegation fails to meet the dictates of Article 11.071, § 5. Accordingly, we dismiss the application as an abuse of the writ without considering the merits of the claim, and we deny his motion for a stay of his execution.

IT IS SO ORDERED THIS THE 21ST DAY OF MARCH, 2012.

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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-62,840-02

EX PARTE JESSE JOE HERNANDEZ, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS IN CAUSE NO. W02-00777-Q FROM THE 204TH DISTRICT COURT OF DALLAS COUNTY

PRICE, J., filed a concurring statement.

CONCURRING STATEMENT

In this subsequent application for writ of habeas corpus seeking relief from a capital judgment and impending execution, the applicant has invoked the United States Supreme Court's grant of certiorari review in *Martinez v. Ryan,*[1] in which that Court was expected to address whether a habeas applicant has a constitutional right to the effective assistance of counsel in his initial state habeas proceedings, at least for any claim that can be raised for the first time only at that stage.[2] Yesterday, the Supreme Court handed down its opinion in

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1 131 S.Ct. 2960 (2011).

2 The question presented in *Martinez* is: "Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial

Martinez.[3] In its opinion, however, the Supreme Court avoided the constitutional question it had explicitly granted certiorari to decide. Instead, it held that the ineffective assistance of counsel during initial state habeas proceedings may constitute "cause" to permit federal habeas corpus review, under the rubric of federal "cause and prejudice,"[4] of the merits of a claim of ineffective assistance of trial counsel if this claim was procedurally defaulted in state court because it was not raised in the initial state habeas corpus application and state law will not entertain such a claim until post-conviction habeas corpus proceedings. While this ruling means that a claim such as the one that the applicant presently raises may hereafter be reviewable on the merits in an initial federal habeas corpus proceeding, it hardly avails this applicant in the here and now.

Having endeavored to avoid the federal constitutional issue, the Supreme Court said nothing in its *Martinez* opinion that would serve to undermine this Court's holding in *Ex*

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counsel, but who has a state-law right to raise such a claim in a first post-conviction proceeding, has a federal constitutional right to effective assistance of first post-conviction counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim." *Martinez v. Ryan*, 2011 WL 3467246, at i (Appellate Brief) (U.S. Aug. 4, 2011). While defendants in criminal cases in Texas are not absolutely prohibited by law from challenging the effectiveness of their trial counsel on direct appeal, such claims typically call for extensive factual development beyond what is disclosed in the appellate record, and thus, as a practical matter, post-conviction habeas corpus is the first opportunity to raise them. *See Thompson v. State*, 9 S.W.3d 808, 813-14 (Tex. Crim. App. 1999).

[3] *Martinez v. Ryan*, ___ U.S. ___, 2012 WL 912950 (Mar. 20, 2012).

[4] *E.g.*, *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law[.]").

parte Graves.[5] In *Graves*, the Court refused to construe Section 5 of Article 11.071 in such a way as to allow a subsequent habeas applicant to invoke the ineffectiveness of initial state habeas counsel as a reason to permit a claim to be raised for the first time in his subsequent habeas application.[6] In other words, ineffective performance by initial state habeas counsel cannot overcome our statutory abuse of the writ doctrine. The applicant nevertheless argues that this Court should "recognize the equitable principles expressed in *Martinez*" and reconsider our holding in *Graves*.[7] Although I dissented in *Graves*, it was essentially a case about statutory construction, and I do not think it prudent to indulge equitable principles as a basis to revisit our long-held construction of statutory language. In the absence of a holding from the Supreme Court, or another case currently pending under certiorari review, with respect to whether an initial habeas applicant has a *constitutional* right to effective assistance of counsel that would trump the statutory language of Article 11.071, Section 5 as this Court has authoritatively construed it, I revert to my former reliance upon *Graves* as binding *stare decisis*, and join the Court's order dismissing the applicant's subsequent writ application and denying his request for a stay of execution.[8]

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5 70 S.W.3d 103 (Tex. Crim. App. 2002).

6 *Id.*; TEX. CODE CRIM. PROC. art. 11.071, § 5.

7 Applicant's Additional Briefing Regarding *Martinez v. Ryan* in Support of Subsequent Application for Writ of Habeas Corpus at 10.

8 *See Ex parte Foster*, No. WR-65,799-02, 2010 WL 5600129, at *2 (Tex. Crim. App. Dec.

The applicant complains that "the result" of our leaving *Graves* in place following the Supreme Court's holding in *Martinez* "would be an almost blanket deferral to federal courts."[9] I agree. Any initial federal habeas applicant who is able to show the federal court that his initial state habeas counsel provided constitutionally ineffective assistance may be able, after yesterday's holding in *Martinez*, to obtain *de novo* consideration of claims in federal court, the Antiterrorism and Effective Death Penalty Act notwithstanding. But this is an appeal to be made to the Legislature in the name of Texas's right, under our federal system, to be afforded the first opportunity to decide federal constitutional issues that arise in the context of state post-conviction proceedings. I urge the Legislature to consider amending the abuse of the writ provisions of Article 11.071, Section 5, expressly to permit this Court to review claims raised in subsequent capital habeas applications that could have been raised in the initial state habeas application but were not because of the demonstrated ineffectiveness, as measured under *Strickland v. Washington*, of initial state habeas counsel.[10]

FILED: March 21, 2012
DO NOT PUBLISH

30, 2010) (not designated for publication) (Dissenting Statement of Price, J.) ("Since [*Graves*] was decided, I have generally bowed to its holding under *stare decisis*.").

[9] Applicant's Additional Briefing, *supra*, at 10.

[10] *Martinez*, *supra*, at *8 ("cause" to justify a federal court in reaching the merits of an issue that was procedurally defaulted in state court may be established by showing initial state habeas counsel's ineffectiveness in failing to raise the claim, ineffectiveness to be measured by the Sixth Amendment standard announced in *Strickland v. Washington*, 466 U.S. 668 (1984)).