

## TEXAS COURT OF CRIMINAL APPEALS

# Ex parte Michael Ibenyenwa v. The State of Texas

Ibenyenwa · Decided January 26, 2015

### SUMMARY

This document is a pro se request by Michael Ibenyenwa asking the Texas Court of Criminal Appeals to rehear its denial of his state habeas corpus application. The filing raises issues concerning preservation of a constitutional challenge to Texas Penal Code section 21.02, ineffective assistance of counsel, and jury unanimity.

### CASE DETAILS

|                    |                                                                                                                                                                   |
|--------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT              | Texas Court of Criminal Appeals                                                                                                                                   |
| JURISDICTION       | Texas                                                                                                                                                             |
| DECIDED            | January 26, 2015                                                                                                                                                  |
| DISPOSITION        | other                                                                                                                                                             |
| PROCEDURAL POSTURE | Applicant filed a pro se request asking the Texas Court of Criminal Appeals to rehear its January 14, 2015 denial of his application for a writ of habeas corpus. |
| PRECEDENTIAL VALUE | nonprecedential filing                                                                                                                                            |
| PARTIES            | Michael Ibenyenwa v. The State of Texas                                                                                                                           |

### TOPICS

state post-conviction relief   habeas corpus   appellate procedure   preservation of error   ineffective assistance

### PRACTICE AREAS

criminal procedure   state post-conviction relief   constitutional law   ineffective assistance of counsel  
appellate procedure

### QUESTIONS PRESENTED

- Whether the Texas Court of Criminal Appeals should rehear its denial of the applicant's state habeas petition.
- Whether an unpreserved facial or as-applied constitutional challenge to Texas Penal Code section 21.02 may be raised for the first time in a first state habeas proceeding.

3. Whether trial counsel was ineffective for failing to object to or otherwise preserve a constitutional challenge to section 21.02.

#### KEY QUOTATIONS

*“A facial challenge to the Constitutionality of a Statute is a forfeitable right, that is, it may be lost by the failure to insist upon it by objection, request, motion, or some other behavior.”* (at 2)

#### FACTUAL BACKGROUND

The applicant was convicted or otherwise proceeded against under Texas Penal Code section 21.02, the continuous sexual abuse statute. He contends that the statute is unconstitutional because it eliminates jury unanimity and argues that trial counsel was ineffective for failing to preserve that constitutional challenge. The filing also relies on the asserted availability of constitutional and ineffective-assistance claims in a first state habeas proceeding.

#### PROCEDURAL HISTORY

The underlying habeas proceeding arose from Tarrant County Criminal District Court No. 3, trial court cause number C-3-010068-1149004-A. The applicant states that the trial court did not rule on a constitutional challenge to Texas Penal Code section 21.02, that the intermediate appellate court treated the issue as unpreserved, and that the Court of Criminal Appeals denied habeas relief on January 14, 2015. This document requests rehearing of that denial.

#### DISPOSITION

other

#### CASES CITED

- Karenev v. State, 281 S.W.3d 428, 432-434 (Tex. Crim. App. 2009)
- Richardson v. United States, 526 U.S. 813, 119 S. Ct. 1707, 143 L. Ed. 2d 985 (1999)
- Strickland v. Washington, 466 U.S. 668 (1984)

#### OPINION

Ibenyenwa, Michael Jerrial

PER CURIAM.

i^^-o^ Michael Ibenyenwa Robertson Unit # 1638105 12071 FM 3522 Abilene/ TX. 79601 01.20.15 Clerk of the Court: Court of Criminal Appeals P.O. Box 12308 Austin, TX 78711 re: filing of the enclosed request for the Court Upon It's Own Motion to rehear their denial of the writ of habeas corpus that was transmitted up from the Criminal District Court No. 3 of Tarrant County, Texas, in trial court cause number C-3-010068-1149004-A. Dear Clerk: Please file the enclosed request. Applicant-movant only has a matter of days left before the 15-day ruling for filing request for reharing is over. Thank you. Sincerely, Michael cc Cin7 97 vvr

IN THE

COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

EX PARTE MICHAEL IBENYENWA, § FROM THE CRIMINAL DISTRICT

APPLICANT-MOVANT, COURT NO. 3, TARRANTCO. TX

§ VS. §

§ TRIAL COURT' CAUSE NUMBER

THE STATE OF TEXAS,

RESPONDENT. § C-3-010068-1149004-A. requesting the court

UPON IT'S OWN MOTION

TO REHEAR THE DENIAL

TO THE HONORABLE JUDGES: COMES NOW, the above named applicant-movant, acting in his own behalf, respectfully requesting the court to rehear their denial of applicant's writ of habeas corpus upon the Court's Own Motion. IN SUPPORT THEREOF, applicant-movant would show the Court: I

JURISDICTION

THIS COURT'S JURISDICTION is retain in view of the Rules that grant applicant-movant 15-days to file motion for rehearing upon the Court's own motion and their recent denial was issued 8HH on the 14th day of January, 2015; and received by applicant-movanten January 20, 2015. This request for rehearing upon the Court's own motion was filed/mailed this same day of January 20, 2015. -1- II

REASONS FOR

GRANTING A REHEARING

[1] This request is being made in good faith because applicant-movant knows that as a matter of fact and law that his Constitutional Claims are meritorious. In that, a. Jurists of reason have already found that an attack on the Constitutionality of a Statute ought to be raised on appeal regardless of whether or not defense counsel lodged, objection(s) or motion(s). See *Karenev-v-State*, 281 SW.3d 428, 432-434 (Tex-Crim.App. 2009) [A facial challenge to the Constitutionality of a Statute is a forfeitable right, that is, it may be lost by the "failure to insist upon it by objection, request, motion, or some other behavior."]. In which *Karenev* was a plurality opinion of 5 -to- 4- In other words, four Judges dissented with Judge Cochran writing extensively on the issue that the requirement that a facial challenge to a Statute be preserved is not absolute, and a defendant may raise for the first time on appeal an unpreserved challenge to the Constitutionality of a Statute. Therefore, this Court ought to revisit *Karenev* when an applicant raises said issue [as applicant-movant has] on habeas corpus, in view of no court to date having determined whether a Statute's Constitutionality not preserved at trial or on motion for new trial and barred from being addressed on appeal due to not trial court preservation has right to raise said on habeas corpus. b. Likewise, since the trial court did not get opportunity to rule on the

Constitutionality of § 21.02, Texas Penal Code offense and the appellate court ruled applicant was barred from doing so because counsel did not preserve the issue; ought not applicant on first habeas corpus be able to raise ineffective assistance of counsel for failing to lodge objection, request, motion or some other type attack on the Constitutionality of said statute? In light of the Karenev-v-State, supra, case being ruled upon a year prior to applicant-movant's trial? -2- c Thus, the issue of whether the Continuous Sexual Abuse Statute embodied in § 21.02 of the Texas Penal Code is unconstitutional on its face and as applied under the State and Federal Constitution because it eliminates unanimity has not been addressed by this Court on habeas corpus. Whether it be in/of itself? or whether counsel's failure to lodge some objection, request, motion, etc. is deficient conduct? In view of the four Judges in Karenev who dissented and the five Judges who ruled it had to be preserved at trial or on motion for new trial but counsel failed to do so in the instant case? ) Defense counsel's self-serving position that he had no valid reason to lodge said to preserve the constitutionality issue because the law on the matter was equivocal is invalid because both the Karenev case and the Richardson-v-United States, 526 U.S. 813, 119 S. Ct. 1707, 143 L. Ed. 2d 985 (1999), were published opinions readily available to defense counsel. But apparently he was not current and/or did not research the law on this issue in view of the Texas progeny mandating unanimity from a jury in reaching its decisions at trial. It is incumbent upon counsel to know the law as it applies to the facts of the instant case. Strickland-v-Washington 466 U.S. 668 (1984).

[2] Each of applicant-movant's other grounds of error within the framework of the proposition relied within his memorandum of law are meritorious and worthy of this Court's rehearing thereof.

#### CONCLUSION

APPLICANT-MOVANT PRAYS THIS Honorable Court will GRANT this request for the Court upon its own motion to rehear their decision to deny and revisit the habeas issues raised in the writ. Thank you. /s/ Respectfully requested,

MICHAEL IBENYENWA: APPLICANT-MOVANT

-3-

#### VERIFICATION

I, Michael Ibenyenwa, applicant-movant in the foregoing request for the Court Upon Its Own Motion to Rehear their denial of the writ of habeas corpus does hereby verify under penalty of perjury that the facts contained in said request are true. I attest to this by affixing my signature below:

<eMjtft

SIGNATURE: MICHAEL /LBENYENWA

ROBERTSON UNIT # Q1638105

12071 FM 3522

ABILENE, TX. 79601

cc -4-

CERTIFICATE OF SERVICE

I, Michael Ibenyenwa, applicant-movant in the foregoing request for the Texas Court of Criminal Appeals upon its own motion to rehear their denial of the writ of habeas corpus. I certify that true copies of said request were placed in the Robertson Unit's mail box addressed to the Clerk of the Court of Criminal Appeals on the 20th DAY OF JANUARY 2015. I attest to this- by affixing my signature below: \*ekM/(W

SIGNATURE: MICHAEL/IBENYENWA

ROBERTSON UNIT Hf 1638105

12071 FM 3522

ABILENE, TX. 79601

cc -5- Michael Ibenyenwa Robertson Unit § 1638105 12071 m 3522 Abilene i'3U 79601 01.20.15  
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18 THE

COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

EX PARTE MICHAEL IBENYENWA, PRO SE CRIMINAL DISTRICT

APPLICANT-MOVANT, COURT NO. 3, TARRANT COUNTY, TX

VS.

TRIAL COURT CAUSE NUMBER

TARRANT STATE OF TEXAS,

RESPONSE, C-3-010068-1149004-A. ,

requesting the court

UPON ITS OWN MOTION

TO REHEAR TBB DENIAL

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, 's<^J^frtM^^r -

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i ., •

J ROBERTSON UNIT #C1638105

12071 PH 3522

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ROBERTSON UNIT # 1638105 ;\

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APPLICANT-MOVANT COURT NO. 3, TARRANT COUNTY, TX

I vs.- y y • §

TRIAL COURT CAUSE # 1638105

TBS STATE OF TEXAS,

RESPONDENT. § C-3-G10QS8-11490Q4-A. requesting the court

UPON IT'S GHS MOTION

TO RSBS&R TBB DENIAL

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COURT OP CRX8XSAE. APPEALS

AUSTIN\* TESAS

axouun. immsmti, pros ?m otxaiM\*\* district APPS,ie&\$tT-g|0v-AI9T, 10. 3\* vs.

miM. COURT GAUSS 8BSS8BR

TBB STATS OP T8SAS\*

C-3-010068-1149004-A. esquestlaa tae court spob it's ©an noTios

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TO THE aOSORA&LE JUBGSS: CO»8S aot9\* the abov,a,;,»a®®d'applicaat-^9ant\* actiaq In.His own banal fi\* .respectfully •requestin® ttta ..court to rehear thai\*-- "'da- alal of applicant4® writ of toabeaa corpus upon the court's Own ftotlaa\* m SUPPORT TisasoP, applleaat-siovaat would anew the Courts jurisdiction THIS COURT'S JURXSDXCTX08 la retain in ?iew of the Rules tint qraot ap^plleaat-ssovanfc IS-days to file morion for (tHatvUf upon the Court's awn motion and their recent denial was issued mm on the 14th day of January\* 2015\* and received by apolicsat-iiovaat en January 20\* 2015. fala rerquest for refta\*inq upon the Court's own ©etion was fHad/sailed this ®a»a day of January 20\* 2015. •1. XX

SEASONS POR

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HICHABL IBNSBHWA: APPLICAST-flOTAST

VERXPXCafX08

I, Michael ibenyaawa\* applienat-®ovant in the foregoing re quest for the Court upon It's Own ESotioa to Rehear their denial of the' writ of habeas corpus does hereby verify under penalty of per-., jury that the facts contained la said request are true. X attest to this by affiaing ®y signature belows signature's hxcraei. tumnitmmh

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X\* Michael Xbenyeawa\* applieaat-siovant in the foregoing request, for th© Texas Court of Crlsainsal Appeals upon it's own action to rehear their denial of the writ of habeas corpus. X certify that true espies of said request were placed in the Robertson Unit's mail bos addres sed to the Clerk of the Court- ©f Criminal Appeal® ©a the 20th DAX OP JAffUARy 2015. X attest to this by affising my signature beiaas

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