

TEXAS COURT OF CRIMINAL APPEALS

Ex parte Michael Ibenyenwa v. The State of Texas

Ibenyenwa · Decided January 26, 2015

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 de nial 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 ap^plicant-movant 15-
days to file morion 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 rerquest for reharing 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 the 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 *Rickardson-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 PARYS THIS Honorable Court will GRANT ^this request for the Court upon it's own motion to rehear their decision to deny and revisit the habeas issues raised in the writ. Thank you. /' Respectfully requested,

MICHAEL IBENYENWA: M'PLICANT-MOVANT

-3-

VERIFICATION

I, Michael Ibenyenwa, applicnat-movant in the foregoing re quest for the Court Upon It's Own Motion to Rehear their denial of the writ of habeas corpus does hereby verify under penalty of per jury that the facts contained in said request are true. I attest to this by affixing my signature below:

<eMjtft

SIGNATURE: MICHAEL /LBENYENWA

ROBERTSON UNIT # Ql638105

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 C.iminsal Appeals upon it's own motion to rehear their denial of th. writ of habeas corpus. I certify that true cqpies of said request were placed in the Robertson Unit's mail box addres sed to the Clerk of the Court of Criminal Appeals on the 20th DAY OF JANUARY 2015. I attest to this- by affixing my signature beloo: *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 Clark of the CouirtJ Court of Criminal Appeala P.O. Boat 12308 Austin, TX 78711 res filing of the enclosed request for the Court Upon it's Own Motion '•.; to rehear their denial of the vrit of habeas corpus that was transmitted i •;' up froa the Criminal District Court Ho. 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 15r-<3ay rulia^ for filing request for reharing is .over.-Thanit"you.: "• Sincerely* MtJUC Michael y CO

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COURT OP CRXHXSAL APPEALS

AUSTIN, TEXAS

EX PARTE MICHAEL IBENYSNIM, PROS TBB CRIMINAL DISTRICT

APPLICANT-MOVANT, COURT HO. 3, TARSANSO. TX

VS.

TRIAL COURT CAUSE NUMBER

TBS STATE OF TEXAS,

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

requesting the court

UPON ITS OWN MOTION

TO REHEAR TBB DENIAL

TO TBB HONORABLE JUDGES; COMES NOW, the undersigned on behalf/ respectfally requesting the court to rehear their denial of applicant's writ of habeas corpus upon the Court's Own motion. I SUPPORT TBB REQUEST/ applicant-movant would show the Courts I JURISDICTION

THIS COURT'S JURISDICTION is retained in view of the Rules that grant applicant-movant 15-days to file a motion for rehearing upon the court's own motion and their recent denial was issued 8KH on the 14th day of January, 2015 and received by applicant-movant on January 20/2015. This request for rehearing upon the Court's own motion was filed/mailed this same day of January 20/ 2015. •*»»j^«» .# II

REASONS FOR

GRANTING A REVERSAL

[1] This request is being made in good faith because applicant-movant knows that as a matter of fact and law that the 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 motions). See *Karenev-v-State*, 281 S.W.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 brevier."). 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/ 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*, suprar ease being ruled upon a year prior to applicant-movant's trial? -2- '."V*?*

15. ! c. Thus, the issue of whether the Continuous Sexual Abuse Stat ue embodied in § 21.02 of the Texas Penal Code is unconstitutional on it's face and as applied under the State and Pederal Constitut ion 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 nse trial but counsel failed to do so in the instant .-Case? - ' Defense counsel's self-serving position that he had no val id reason to'lodge said to preserve the constitutbnality.isse be cause the law on the matter was equivocal is invalid because both the karenev. case and the Ricgardson-v-Onited States, 526 U.S. 813, 119 S.Ct- 1707/143 L.Ed.2d 9S5 (1999}; were publshied opinions readily available to defense counsel* But apparently ha wa3 not cur-^ rent ahd/or-did .not. rej^ar^ in view of the- Texas progeny mandating unanimityfrom ajury in reaching it's de- cions 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 thmem.

CONCLUSION

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

MICHAEL IBENYENWA: APPLICANT-MOVANT

VERIFICATION

I, Michael ibenyenwa, applenat-movant in the foregoing re quest for the Court Upon It's Own Motion to Rehear their denial of the writ of habeas corpus does hereby verify under penalty of per jury that the facts contained in said request are true. I attest to this by affixing my signature below:

, •' s<^J^frtM^r -

SIGNATURE: MICHAEL IBENYENWA

i ., •

J ROBERTSON UNIT #CI638I05

12071 PH 3522

••>> ABItENE, TX. 79601

cc -4-

CERTIFICATE OF SERVICE

I, Michael Ibenyenwa, applicant-movant in the foregoing request for the Texas Court of Criminsal Appeals upon it's own motion to rehear their denial of the writ of habeas corpus. I Certify that true aag&m of said request were placed in the Robertson Unit's mail box addres sed to the Clerk of the Court of Criminal Appeals on the 20th DAY OP JANUARY 2015- I attest to this by affixing my

signature bel«e; •SitoA#RE. MtCHABL/IBENYENWA ^

ROBERTSON UNIT ? 1638105 ;\

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cc *»5-. niehael Ibenyenwa Robertson Unit I 1638105 12071 P» 3522 Abilene, TX. 79601
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APPLXCANT-MOV&NTf COURT NO. 3, TARRMfCO. TX

I vs.- y y • §

TRIAL COURT CAUSE gftMBBR

TBS STATS OP TEXAS,

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

UPON IT'S GHS MOTION

TO RSBS&R TBB DENIAL

TO TBS HONORABLE JUDGES. 'own behalf,' respectfully requesting the court to rehear' their
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COURT OP CRX8XSAE. APPEALS

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APPtGAST-fSOVAHT PARKS TBXS Boeorahl© Court will GRAHT ythls request for the Court upon it's own taction to rehear their decision to deny and revisit the habeas issues, rained In the writ. Thank you. 1 Respectfully requested*

HICHABL IBBNSBHWA: 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
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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

ROSSRTSOS USJXT # 1638105

12071 m 3522

ABXkSESB* TK. 79601

cc -5-