

18-8097

No. _____

Supreme Court, U.S.
FILED

DEC 20 2018

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

Robert Herrera Prose PETITIONER
(Your Name)

vs.

Attorney General of Texas RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Texas Court of Criminal Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Robert Herrera #1546369 Prose
(Your Name)

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(Address)

New Boston, Texas 75570
(City, State, Zip Code)

(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

~~Why has the Tex. Court Criminal Appeals denied~~

Why has the Tex. Court of Criminal Appeals denied my petition, if the Fourth Court of Appeals stated and argued the Counsels actions were below a reasonable standard of effectiveness.

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was Oct. 10, 2018.
A copy of that decision appears at Appendix A.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment Article V - No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the Land or naval forces, or in the militia, when in actual service in time of War or Public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against Himself, nor be deprived of Life, Liberty, or Property, without Due Process of Law; nor shall private property be taken for public use, without just Compensation.

Amendment Article XIV - Section 1 All persons born or naturalized in the United States, and subject to the Jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; Nor shall any State deprive any person of Life, Liberty, or Property, without Due Process of Law; nor deny to any person within its Jurisdiction the equal protection of the Laws.

STATEMENT OF THE CASE

On the 7th of November 2008, Defendant was found guilty of aggravated sexual assault of a child. Defendant was sentence to life with parole. On appeal, the Fourth Court of Appeal, Affirmed conviction with statements of Counsels' actions.

These statements and Arguments in effect showed that counsel actions fell below a level of reasonableness. On petition for a Habeas Corpus, the Texas Court of Criminal Appeals denied a Writ on Oct. 10, 2018.

Initially I will ask the court to "Construe my petition liberally." *Lunaugh*, 852 F2d 832 (5th Cir. 1988) rev. and remanded. I also plead with the Court not to hold my petition to the "same standard of articulation as an attorney". *Bledsoe v. Johnson* 188 F3d 250 (5th Cir. 1999) reversed and remanded. I request "mere errors of pleading and other matters of form will not bar consideration." *Golden v. Newsome*, 755 F2d 1478, 1480 (11th Cir. 1985) reversed and remanded. Finally, I pray the Court use an "active interpretation... to encompass any allegation stating relief." *Franklin v. Rose*, 765 F2d 828 (6th Cir 1985) remand in part.

In the following arguments I will show that my counsel violated my Sixth and Fourteenth Amendments of the U.S. Constitution. His actions are the basis for my contention that he provided no effective assistance of Counsel. In *Strickland v. Washington*, 104 S.Ct. 2052 the Supreme Court set a two-part standard to bring all the

lower courts into agreement as to what is ineffective assistance of counsel. The facts indicate that counsels' representation fell below an objective level of reasonableness and that there is a reasonable probability that, but for the counsels' unprofessional errors, the result of the proceeding would have been different. *Id.* @ 2064-2067. See also *McMann v. Richardson* 90 S.Ct 1441. I will state the facts defined and used by the Fourth Court of Appeals and the States' Attorney in my Appeal. I will then show how on every ground for error, but for counsels unprofessional errors the result of the proceeding would have been different.

Argument and Authorities

The arguments set forth in grounds of error three, four, and five, are from essentially, from two sources. Other than introductory statements and/or closing statements. The facts and arguments are directly asserted by fourth Court of Appeals Memorandum Opinion No. 04-08-00931-CR, and Brief for the Appellee on Cause #2005-CR-4565 B. The Honorable Judges of the Appeals Court and the Attorney for the State of Texas have shown and argued that my Counsel in above styled cause number was ineffective. during the Voir dire His assistant, Mr. Gamez, also proved to be ineffective. The fourth source that I contend also shows Counsel was ineffective was the trial court Judge. The Honorable Judge Mark Luitjen overruled numerous objections by Counsel due to Counsel not stating appropriate grounds to object. Any competent and effective attorney should and must know how to object appropriately or He/she is not providing effective assistance. Essentially Judge Luitjen contend at each "Overruled" that Counsel representation fell below an objective level of reasonableness.

I contend that the arguments of four Honorable Judges and a Appellee Attorney definitely prove part one of the standard set by Strickland v. Wash. 104 S.Ct. 2052 also requires that I show that there is a reasonable probability that but for Counsel's unprofessional errors, the result of the proceedings would have been different. McMann v. Richardson 90 S.Ct. 1441. For each argument to grounds for error I will distinctly point out what the difference would have been in the proceeding were it not but for the unprofessional errors of Counsel.

Ground One:

Counsel, with knowledge and foresight caused a conflict of interest detrimental to my defense. Counsel owes client a duty of loyalty - a duty to avoid conflicts of interest, Strickland v. Washington 104 S.Ct. 2052. Counsel ~~knew~~ knew he had a Civil case and Criminal case scheduled for same date yet decided on his own volition to not notify myself or the Court ahead of time. Defense Counsel has an ethical obligation to avoid conflicting representation and advise the Court promptly when (it may)

arise. *Cuyler v. Sullivan* 100 S.Ct. 1708. The Court admonishes this action by stating he could have been granted a continuance on the civil cases due to the case being a first degree felony with potential life sentence. Effective representation is lacking if counsel, unknown to accused and without his knowledgeable assent, is in a duplicitous position where his full talents are hobbled or fettered or restrained by commitment to others. *Randazzo v. US* 399 Fed 79; *Porter v. US* 298 Fed 461. Counsel's actions according to Judge Luitjen and Competency attorney State Bar Standards fell below an objective level of reasonableness. If counsel had asked the civil trial court for a continuance, based on Courts reasoning, Counsel would have been present for voir dire. Instead of an ~~assistant~~ who did not even know if an election had been turned in prior to voir dire (see Ground two error). The Court of Criminal Appeals has stated consequently it may be seen that the Voir Dire examination of a jury panel is a critical state of a criminal prosecution at which the right of

Counsel attaches Baker v. State 519 SW 2d 648 (Tex. Cr. App. 1975); Hooper v. State 557 SW 2d 122 (Tex. Cr. App. 1977). The proceeding would have been different had counsel been present.

Ground two:

Counsel failed in even filing the barest of motions in a Criminal case. The filing of an election for the punishment phase of trial is as common place as a motion for Discovery. It is one of the basic requirement to ask a defendant. When I found out what it meant I was agasped as to what had transpired, the indictment on this case was six months old yet Counsel Never inform me of a filing for election or its ramifications. Counsel's representation fell below any objective level at reasonableness. Strickland v. Washington 104 S.Ct. at 667; Mc Mann v. Richardson 905 Ct 1441. Court admonished Counsel repeatedly over counsels objections to the election which he had not filed. Even to the point that the court stated

"It's the Law" as if counsel did not realize the error.

Most likely main counsel, Ruiz, failed to file the election.

In either case the second standard of the Strickland case is a fact the result of the proceeding would have been different. I would have chosen the jury for the punishment phase of the trial or given the option I would have chosen the jury for the innocence / guilt phase. I would never agree to have one person's beliefs, reasoning and / or biases decide my fate. Thus the two part standard is met.

Ground Three:

My contention is that counsel was ineffective and / or incompetent in preserving issues for appeal.

We need not address Counsel's contention regarding "other, crimes, wrongs, or acts" because counsel did not preserve this issue for appeal. To preserve an issue for appeal, counsel must make a timely and specific

Objection to the evidence that comports with his complaint on appeal. Tex. R. App. P. 33.1(a); Turner, 805 sw 2d at 431; Hernandez, 171 sw.3d at 358. The record reflects counsel only objected to the evidence on the grounds that it was irrelevant and more prejudicial than probative not that the evidence was inadmissible under Rule 404(b). Accordingly, Counsel waived his Rule 404(b) complaint. See id.

Here the Fourth Courts of Appeal points out incompetence and/or ineffectiveness of Counsel by not preserving issues for appeal. On redirect examination of Melissa the State inquired as to whether the complainant had been undergoing counseling since the events that formed the basis for the prosecution. The witness responded that the complainant had been undergoing counseling. Counsel then objected on the grounds that the testimony was not relevant. The counsel's relevance objection was over ruled. (CR. 3-269). Counsel's ineptness at properly objecting ~~was over~~

is evident during these remarks. The Appeals Court in no uncertain terms labeled his "other crimes, wrongs, or acts" objection as representation calling below on objective level or reasonableness.

Ground Four:

Counsel first should have deposition M'Clung, Tex. Code Criminal Proc. Art. 39.02. to ascertain what she will be testifying. Counsel should have asked for a 38.072 hearing when he was notified that the state was labling Hamilton the outcry witness. An outcry witness is the first adult to who the child/victim provides the who, when, and where the assault. Reyes v. State 274 SW 3d. at 727. A true "Outcry" statement is one in which the child/victim describes the alleged in some discernable way. Garcia v. State id-729 SW2d at 91. Hamilton's testimony was sufficient to sustain the trial court's determination that Hamilton was an outcry witness. Garcia 792 SW2d 92; Reyes 274 SW3d at 727. Unlike

Hamilton's testimony McClung's testimony established that A.M. made only a general allegation of abuse to McClung. If counsel deposed McClung, and then held a 38.072 hearing on Hamilton when notified, then Counsel would have been more knowledgeable for trial. Counsel could then have questioned the victim, McClung and Hamilton in an objective level of reasonableness standard for attorney. Counsel would not have been summarily overruled and admonished at every turn by the court. With proper questioning and objectives at hand by counsel the proceedings would have been different.

Ground Five:

Counsel's trial objection does not comport with his complaint on appeal. To preserve an issue for appeal, Counsel must make a timely and specific objection at trial Tex. R. App. P. 33.1(a); see *Turner v. State* 805 SW2d 423, 431 (Tex. App. - Houston [14 Dist.] 2005 ~~Oct. ref'd~~ (Tex. Crim. App. 1991)); *Hernandez v. State* 171 SW3d 347, 358 (Tex. App. - Houston [14 Dist.]

2005 pet. ref'd) (explaining that objection must alert trial court to specific complaint). A trial objection must correspond with the issue presented on appeal. see id "An objection stating one legal basis may not be used to support a different legal theory on appeal." Edwards v. State, 97 SW3d 279, 287 (Tex. App. - Houston [14th Dist.] 2003 pet. ref'd.). In this case Counsel did not object to Kellogg's testimony on grounds of improper bolstering percentage of sexually abused children exhibited symptoms of abuse, Counsel objected and stated. "I think that's beyond the scope again of this witness. It's not relevant to the proceeding." Questioning continued, and through out the State's line of questioning dealing with Kellogg's opinion regarding findings with respect to sexually abused children and their behavior, Counsel made several objections. Including "I'm going to object, Judge, in terms of relevance," and "I'm going to reiterate my objection. It's beyond the scope of this witness." Based on the record before us, it is clear Counsel objected to Kellogg's testimony on the

grounds of relevance, not improper bolstering or denial of a fair trial. Accordingly, because the objection made at trial does not comport with the issues presented on appeal, counsel waived these complaints for appeal. See Tex. R. App. P. 33.1(a)(1); Turner, 805 SW 2d at 431; Hernandez, 171 SW 3d at 358.

According to the counsel, Kellogg's testimony resulted in the impermissible bolstering of the complainant. See generally: Yount v. State, 872 SW 2d 706 (Tex. Crim. App. 1993). This complaint must fail for two reasons. Initially it must fail because it is being raised for the first time in this court.

The Attorney for the State of Texas points to where counsel representation fell below any objective level of reasonableness, again, counsel objected to Kellogg's testimony but only as to the "Scope of the witness (ie experience, professional training.) and relevance. Not to a valid objection with basis to allow trial court to rule. The outcome of the proceeding would have been different with proper objection."

Namely jury would not have been able to regard Kellogg's statements about other sexual abused children and ascribe them to A.M. this led to biasing the jury in favor of the Complainant, and this bias would not have affected the jury's decision which I believe it did.

In conclusion Counsel's actions throughout representation was deficient. From the pre-trial phase to guilt/innocence phase to punishment phase, Counsel's representation fell below an objective level of reasonableness. During the pre-trial phase Counsel did NOT request a 38.072 hearing or depose Rebecca M'Clung to determine who if any were the outcry witness. But for this unprofessional error the result at proceeding would have been different as Counsel would have had a better understanding of State's angle of attack and could have defended me more properly. After all, this is supposed to be an adversarial proceeding with both parties attempting to garner the approval of a jury of twelve. Counsel though did not respond properly

to questions of the Court or object with purpose.

Also at the pretrial phase, Counsel did not file an election with the court - a rudimentary step in any Criminal Court proceeding. Do we know if he even filed a motion for Discovery ?? The third error during this phase was Counsel deciding to attend to a civil trial instead of the Voir Dire of a Criminal case with a punishment of LIFE. Counsel Ruiz is the counsel I hired yet he couldn't attend a critical step in a Criminal prosecution. During the guilt/innocence phase, Counsel did not properly object to preserve for appeal. This egregious error caused an improper use of expert witness statements to the detriment of my defense. The proceeding would definitely have been different since the bolstering would not have been allowed by the Court or if Court had allowed it than the Appeals Court would have ruled that it should not have allowed it.

The Texas Court of Criminal Appeals recently set aside a conviction due to unintelligent errors by Counsel. In Ex

parte Lewis 537 SW3d 917 (2017), the Court noted that "in order to be reasonably likely to render reasonably effective assistance to his client, a lawyer must be sufficiently abreast of developments in criminal law aspects implicated in the case at hand", Citing Ex parte Williams 753 SW2d 695 (Tex. Cr. App. 1988). This is relevant to Counsel Ruiz action in not filing an election, not requesting a 38.07a hearing prior to trial and improper objections mentioned as grounds for error. Further more, the Texas Court of Criminal Appeals stated ignorance "of well defined general laws, statutes and legal propositions is not excusable" and can serve as a basis of determination of constitutionally ineffective assistance of Counsel, Citing Ex parte Chandler, 182 SW3d 350 (Tex. Crim. App. 2005).

It is my contention that every error by Counsel fell below an objective level of reasonableness and, at times, unreasonable. The Honorable trial Judge and Judges of the Appeals Court all agree on his errors. Thus, There is a reasonable probability that, but for Counsels' unprofessional

errors, the results of the proceedings would have been different. I have stated how these proceedings would have been different in each ground. I pray that the Court agrees that I have met the Strickland v. Washington two part standard to show ineffective assistance of Counsel. I would pray the Court reverse and remand my case.

REASONS FOR GRANTING THE PETITION

As per Rule 10(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another State Court of last resort or of a United States Court of Appeals.

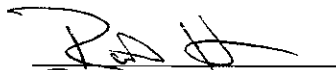
The proceeding would have been different if I would have been notified to file an election, my Counsel had been at the VOIR DIRE and if Counsel had properly objected to preserve grounds for error.

In my Appeal, States' Counsel and the Fourth Court of Criminal Appeals stated and vehemently admonished trial counsel Ruiz due to these errors. Ineffect they argued counsel Ruiz was incompetent in these points of errors. My arguments fulfill the two part standard used to determine ineffectiveness in the Strickland v. Washington Cite.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,


Robert Herrera

Date: Dec. 10, 2018