No. _____

19-6971

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

COMFORT D.ROBERTS -PRO SE — PETITIONER
(Your Name)

FILED
DEC 13 2019
OFFICE OF THE CLERK
SUPREME COURT, U.S.

vs.

THE STATE OF TEXAS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

4TH COURT OF APPEAL - SAN ANTONIO, TEXAS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

COMFORT D. ROBERTS, PRO SE
(Your Name)

2720 GAINS MILL DRIVE
(Address)

FORT WORTH, TEXAS 76123
(City, State, Zip Code)

817-357-9836
(Phone Number)

QUESTION(S) PRESENTED

1. THE "TOTALITY OF REPRESENTATION" SHOWS THE PERFORMANCE OF,COUNSEL, RONALD D. ZIMMERMAN WAS OBJECTIVELY DEFICIENT AND THEREBY DENIED APPELLANT HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

2. THE "TOTALITY OF REPRESENTATION" SHOWS THE PERFORMANCE OF,COUNSEL, RONALD D. ZIMMERMAN WAS OBJECTIVELY DEFICIENT AND THEREBY DENIED APPELLANT HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW.

3. THE "TOTALITY OF REPRESENTATION" SHOWS THE PERFORMANCE OF,COUNSEL, RONALD D. ZIMMERMAN WAS OBJECTIVELY DEFICIENT AND THEREBY DENIED APPELLANT HIS SIXTH AMENDMENT RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY.

4.THE "TOTALITY OF REPRESENTATION" SHOWS THE PERFORMANCE OF,COUNSEL, RONALD D. ZIMMERMAN WAS OBJECTIVELY DEFICIENT AND THEREBY DENIED APPELLANT HIS SIXTH AMENDMENT RIGHT TO CONFRONT MY ACCUSER.

5.THE "TOTALITY OF REPRESENTATION" SHOWS THE PERFORMANCE OF,COUNSEL, RONALD D. ZIMMERMAN WAS OBJECTIVELY DEFICIENT AND THEREBY DENIED APPELLANT HIS UNIVERSAL DECLARATION OF HUMAN RIGHTS "UNDER ARTICLE 11, THE PRESUMPTION OF INNOCCENSE".

LIST OF PARTIES

[X] 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:

RELATED CASES

Comfort Roberts vs The State of Texas, 4th Court of Appeals District - San Antonio, Texas
No.04-18-00345CR,PDR 0444-19, Judgment Entered 10/09/2019

Comfort Roberts vs The State of Texas, 186 Judicial District - San Antonio, Texas
No. 2016-CR11457, Judgment Entered 05/17/2018

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U.S. Constitutional Amendment 5th

Universal Declaration of Human Rights

STATEMENT OF THE CASE

Appellant was charged by indictment on December 13, 2016 with theft-[$1,500-$20,000], check, alleged to have occurred on June 9, 2015. Appellant elected the Judge for sentencing if convicted .A jury found defendant guilty as charged on March 28, 2018. Sentencing occurred on May17, 2018, at which the trial court assessed: (1) a fifteen-hundred dollar [$1,500] fine; and (5) two [2] years in state jail probated for a like period of community supervision;(3) six-thousand dollars [$6,000] of restitution; and (4) 180 days' county jail as a condition of probation. Appellant timely filed notice of appeal on May 23, 2018. The Bexar County Public Defender's Office was appointed as appellate counsel on May 24, 2018. Appellant Brief filed December 18, 2018 in the 4th Court of Appeals in San Antonio, Texas. On August 28, 2019, PDR filed with the Criminal Court of Appeals (refused to hear).

REASONS FOR GRANTING THE PETITION

The 4th Court of Appeals decision to deny appellant's claims of ineffective assistance of trial counsel raised on direct appeal directly conflicts with Texas Criminal Court of Appeals. See (Lopez v.State, 315 S.W.3d 90, 96 (Tex. App.—Houston[1st Dist.] 2010) (citing, Robinson v. State, 16 S.W.3d 808, 813 n.7 (Tex. Crim. App.2000)). However, the conflict within The 4th Court of Appeals also creates conflict and contradiction of the laws and precedents previously established by The United States Supreme Court. See (Strickland v. Washington, 466 U.S. 668, 687, 694(1984); Tong v. State, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000); Hernandez v.State, 726 S.W.2d 53, 57 (Tex. Crim. App. 1984). Which in turn gives rise to a federal question under the 6th Amendments of the United States Constitution, requiring The United States Supreme Court to intervene in this matter. A failure of The United States Supreme Court to intervene in this matter would send a clear message to every other Court in the nation that they are above the law and not required to obey the rules established under the U.S. Constitution and enforced by the highest Court in the Land.

Prejudice is proven if a mere "reasonable probability" exists that, but for counsel's deficient performance, the result of the proceeding would have been different. (Hawthorn v. State, 848 S.W.2d 101, 118 (Tex. Crim. App. 1992).A reasonable probability is one sufficient to undermine confidence in the outcome of the case. Strickland, 446 U.S. at 694; Miniel v. State, 831 S.W.2d 310, 323 (Tex. Crim. App. 1992). However, a defendant need not prove that counsel's actions "more likely than not" altered the outcome of the trial. Harrington v. Richter, 131 S. Ct. 770, 792 (2001).

Deficient assistance exists whenever counsel's performance falls below an objective standard of reasonableness as judged by prevailing professional norms. Moore v. State, 4 S.W.3d 269, 272 (Tex. App.—Houston [1st Dist.] 1999). Any presumption that counsel did perform adequately may be overcome by a mere preponderance of the evidence that is well-grounded in the record. Robertson v. State, 187 S.W.3d 475, 482-83 (Tex. Crim. App. 2006). The representation is viewed from counsel's perspective at the time of trial so as to avoid the distorting effects of hindsight. Id. Ineffective assistance may arise from a single egregious error or may be inferred from the "totality of the representation." Vasquez v. State, 830 S.W.2d 948, 950-51 (Tex. Crim. App.

1992); McKinney v. State, 76 S.W.3d 463, 470-471 (Tex.App.—Houston [1st Dist.] 2002, no pet.).

If the totality of the representation shows that no competent attorney would have engaged in a particular course of conduct, then counsel's performance may be ruled ineffective, as a matter of law, even if the record does not list the subjective reasons that motivated counsel's actions or inactions. Goodspeed v. State, 187 S.W.3d 390, 392(Tex. Crim. App. 2005); see also Andrews v. State, 159 S.W.3d 98, 102 (Tex. Crim. App. 2005) (stating, "[If] no reasonable trial strategy could justify trial counsel's conduct, counsel's performance falls below an objective standard of reasonableness, as a matter of law, regardless of whether the record adequately reflects the trial counsel's subjective reasons for acting as counsel did") (emphasis added).

B. Application of Law to Facts.

Here, trial counsel, Ronald D. Zimmerman [TBN: 24038203], committed at least three [3] acts or omissions that either jointly or severally fell below an objective standard of reasonableness.

- **Counsel Failed to Properly Challenge the Transaction Video Admitted through Stephan Konecko, Because, By His Own Admission, Counsel Suspected that Video had Either been Edited or was Otherwise Incomplete.**

Counsel voiced concerns at trial that the video admitted through Stephan Konecko had either been edited or was incomplete, as the following record reflects:

[BY MS. BIGGS] Q: And is State's Exhibit Number 3 a true and accurate depiction of events as they occurred that day on June 9th, 2015?

A: Yes, it is exact.

MS. BIGGS: Okay. At this time, Your Honor, I would offer State's Exhibit Number 3 into evidence.

MR. ZIMMERMAN: Objection, Your Honor. If I may approach?

THE COURT: Yes, sir.

THE COURT: We are at a bench conference out of the hearing of the jury. Go ahead.

MR. ZIMMERMAN: Your Honor, the State has tendered a copy of that and I have a question as to the very beginning, whether it was edited or not. I'm a little concerned that if it was edited, then I would like to have at least the entire video available to the Defense.

THE COURT: Denied. This should have been brought up pretrial. What we'll do is we'll let you cross-examine the witness about it later when you get to cross-examine. Objection is overruled.

The Court's ruling shows this is an important issue which: (1) "should have been brought up pretrial;" or (2) at least have been made subject to vigorous adversarial testing during cross examination. The record reveals, however, that defense counsel did neither. Demonstrating no pretrial motion was ever filed or heard regarding edited or incomplete video. Also establishing counsel asked exactly no questions during cross examination concerning whether Konecko was aware that his video was either edited or incomplete). Thus, the trial court's own observations and ruling acknowledge the deficient nature of trial counsel's conduct.

- **Counsel Repeatedly Failed to Object to Testimonial Hearsay Gathered by Sandra Nagore in Anticipation of Criminal Litigation.**

(a) Law Enforcement Work Product.

Sandra Nagore, a former D.A. Check Section supervisor, identified the "DA's check section file on Comfort Roberts" as State's Exhibit 5. The file included various documents generated in anticipation of criminal litigation by personnel in her office. At trial, the State asked Nagore to read certain contents of the State's file, as the following record reflects:

Q: Okay. Can you tell me what that final notice says?

A: Um, verbatim? Basically...the letter is stating that this is the final notice that we will be giving you before we proceed [to trial].

Q: Tell me what it reads.

Formal declarations both colle

are very likely to be testimonial. See C

the objective purpose is to question a

would likely be relevant to a future crir

in question were not reduced to writin

testimonial hearsay. By not objecting

the declarants at the bank who origina

iii. Counsel Failed to Object When t

Evidence of Guilt.

As a matter of law, it's axiomatic that

law, both from the bench and in its wr

administrative document...that's not e

guilt"). Nevertheless, the State proffe

object, as the following record reflect

MR. FLORES: Your Honor, at this tir

for any objections and inspection.

MR. ZIMMERMAN: No objection.

Counsel also never requeste

nor did the trial court deliver one on

as it could readily be mistaken by th

could explain this level of profession

Because deprivation of the

shown if even a "reasonable probab

proceeding would have been differe

A: Bexar County District Attorney's Office has received a complaint against you for the offense of a theft by check. We have sent you a prior notice of this complaint and you have not responded. Continue?

Q: Keep going.

A: We are concluding our investigation on this case and a warrant for your arrest may be forthcoming. Upon the warrant being issued, you will be subject to arrest by any law enforcement agency in the State. You must comply with this notice within seven days in order to avoid a warrant being issued. If you wish to avoid this -- these consequences, you must immediately obtain a money order or Cashier's Check for restitution, merchant fees and district attorney's fees in the amount of $6,105. Make Cashier's Check or money order payable to the District Attorney's Office Check Section. No personal checks. If paying in person with cash, it must be in the exact amount as no change is provided or available. And then the address must be to deliver in -- in person is the -- at the Paul Elizondo Tower, 101 West Nueva, Suite 110, in San Antonio, Texas 78205.

Q: Okay. And was this letter or this notice sent certified mail?

A: No, ma'am.

This verbatim work product of the State should not have been admitted for two reasons: (1) given the correspondence in question was clearly made in anticipation of criminal litigation, that work product is not only hearsay, but rather is testimonial hearsay, and (2) even non-testimonial hearsay made by a member of law enforcement is inadmissible, by rule, in a criminal proceeding. See TEX. R. EVID. 803(8)(A)(ii)(exempting from exceptions to Texas hearsay rule "[any] matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law enforcement personnel"); see also Fischer v. State, 252 S.W.3d 375, 382 (Tex. Crim.App. 2008) (explaining, "[b]oth the federal and Texas hearsay rules have always excluded...investigation observations of law enforcement officers because their factual observations, opinions, and narrations are made while the officer is 'engaged in the often competitive enterprise of ferreting out crime'"); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 316, 321-22 (suggesting reports of investigating officers detailing circumstances surrounding crime are testimonial and noting that police work product does not qualify as business records because it is made essentially for use in court); Cole v. State, 839 S.W.2d 798, 811-812 (Tex.Crim.App.

reasonable probability is one sufficient to undermine confidence in the outcome of this case. Strickland, 446 U.S. at 694; Miniel v. State, 831 S.W.2d 310, 323 (Tex. Crim. App. 1992). That said, a defendant need not prove that counsel's actions "more likely than not" altered the outcome of the trial. Harrington v. Richter, 131 S.Ct. 770, 792 (2001).

ADDITIONAL FEDERAL QUESTIONS

The 4th Court of Appeals decision to deny appellant's His Right to Due Process of Law under The Fifth Amendment, His right to the Presumption of innocence under Universal Declaration of Human Rights Article 11, and His SIXTH AMENDMENT RIGHT TO CONFRONT HIS ACCUSER all as a direct correlation to ineffective assistance of trial counsel raised on direct appeal directly conflicts with Texas Criminal Court of Appeals and The United States Supreme Court.

As pertinent here, Texas law provides that, if: (1) a holder in due course presents a check exchanged for property or a service within thirty [30] days of its issuance;(2) a bank or other drawee refuses payment on that check for insufficient funds; and (3) the issuer fails to pay the holder in full within 10 days after receiving notice of that refusal, then such predicate facts constitute "prima facie evidence of the issuer's intent to deprive the owner of property under Section 31.03 (Theft)". TEX. PENAL CODE § 31.06(a)(2) (West 2013). Regarding what exactly suffices as "notice of that refusal, "the statute clarifies:

> For purposes of Subsection (a)(2) ... notice may be actual notice or notice in writing that [is addressed and mailed in a specified manner] [and] contains the following statement:"This is a demand for payment in full for a check or order not paid because of a lack of funds or insufficient funds. If you fail to make payment in full within 10 days after the date of receipt of this notice, the failure to pay creates a presumption for committing an offense, and this matter may be referred for criminal prosecution."

TEX. PENAL CODE § 31.06(b)(1),(2),(3) (West 2013). "The facts giving rise to [any such] presumption must be proven beyond a reasonable doubt."

THE COURT OF APPEALS ERRED IN HOLDING THAT ONLY ISSUERS WHO ARE DELIVERED WRITTEN NOTICE OF A REFUSED CHECK ARE ENTITLED TO KNOW THAT FAILING TO PAY THE HOLDER IN TEN DAYS "CREATES A PRESUMPTION FOR COMMITTING AN OFFENSE, AND THE MATTER MAY BE REFERRED FOR CRIMINAL PROSECUTION."

Jury charge error for which no objection is made may nevertheless support a reversal if the error results in egregious harm. See, e.g., Ngo v. State, 175 S.W.3d 738,743 n.7 (Tex. Crim. App. 2005) (citing Bluitt v. State, 137 S.W.3d 51, 53 (Tex. Crim.App. 2004) (holding, "An appellant may raise such unobjected-to charge error on appeal, but may not obtain a reversal for such error unless it resulted in egregious harm")). Jury charge error "is egregiously harmful if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory. "Sanchez v. State, 209 S.W.3d 117, 120 (Tex. Crim. App. 2006).

THE COURT OF APPEALS ERRED BY HOLDING THE RECORD CONTAINS SUFFICIENT EVIDENCE FROM WHICH THE JURY COULD RATIONALLY FIND THAT APPELLANT ACTUALLY RECEIVED AT LEAST TEN DAYS'NOTICE BEFORE THE INSTANT JURY CHARGE WAS READ BELOW.

The Reasoning of the Court of Appeals is Flawed Because the Only Notice Ever Shown to be "Actually Received" Here Includes No Proof of the Content Specified by § 31.06(b)(3).

To be sure, certain types of actual notice will not admit to the mailing and address requirements of § 31.06(b)(1) & (2). However, that fact, alone, should not be taken to mean that written notice is the only actual notice that must include the admonition set forth in § 31.06(b)(3). Appellant never said anything different. Stating that an issuer actually received notice ... [that is] at least functionally equivalent to the language quoted in § 31.06(b)(3) ... then the State is not entitled to a presumption instruction like the one given here"). Indeed, all targets of State debt collection under § 31.06 deserve to be told that a failure to meet the State's demands within ten [10]days will create legal presumption that may be used against them in a future criminal proceeding. Only when such warnings are actually or presumably given are presumptions like those used below justified. But when no proof of such admonition is present, as here, then neither is the justification. The State may still prosecute the issuer, and even point to the same facts in support of its claim of culpable intent, but they shouldn't be able to use legal presumptions to make its burden any easier. The court of appeals effectively ruled the notice required by §31.06 may vary in content with the means used to deliver that notice. Targets who receive written notice

are deemed special, for they, alone, get to be informed that a harmful legal presumption may be taken against them in a future criminal proceeding. But treating "written notice" and "actual notice" as if they're mutually exclusive is unwarranted. The two constructs are not separate and distinct. Written notice is just one means of achieving actual notice. Thus, the latter subsumes the former. What's more, incorporating the § 31.06(b)(3) warning into the "actual notice" already required in every case would work no undue burden on the State, while adding substantial fairness to the process. The warning set out in § 31.06(b)(3) should thus be held to apply to all issuers equally. Because the court of appeals held otherwise, in a footnote, this case presents a novel and interesting issue of statutory construction. When construing a statute, this Court will give effect to the plain meaning of its text unless the text is ambiguous or the plain meaning leads to absurd results that the legislature could not possibly have been intended. The words and phrases are read in context and construed according to accepted rules of grammar and usage. A statute must be read as a whole in determining the meaning of particular provisions, and it is presumed that the entire statute is intended to be effective.

If the statute is ambiguous or leads to absurd results, extra textual factors may be consulted, including: (1) the object sought to be attained, (2) the circumstances under which the statute was enacted, (3) the legislative history, (4) common law or former statutory provisions, including laws on the same or similar subjects, (5) the consequences of a particular construction, (6) administrative construction of the statute, and (7) the title [caption], preamble, and emergency provision. Oliva, 548 S.W.3d 521-22. Here, the court of appeals analyzed none of those factors. If discretionary review is granted, appellant will treat each factor individually. See Bradley v. State, 235 S.W.3d 808, 810 (Tex. Crim. App. 2007) (Cochran, J. concurring) (stating, "[a] petition for discretionary review need not (and should not) attempt to resolve the merits of the question presented. It need only attract the interest of at least four judges concerning the legal issue [presented]") (second parenthetical in original).

Trial began in this case on March 26, 2018. The only notice ever shown to have been actually received below was a phone call between Nagore & Roberts. But so far as any factfinder could rationally infer, that conversation could have taken place as late as March 25, 2019. Certainly nothing in our record supports an inference that it occurred ten [10] days before the jury charge was read here. Because the State produced no evidence of when Nagore spoke with appellant, the instructions included below should not have been given.

D. Harm

In the briefs below, appellant discussed at length how the instant instructions caused him egregious harm. Reasserting that same argument again here would be beyond the proper scope of a petition for discretionary review. See Bradley, 235 S.W.3d at 810 (Cochran, J. concurring) (stating, "[a] petition for discretionary review need not (and should not) attempt to resolve the merits of the question presented").

A. Preservation of Error.

No trial objection is necessary to preserve error caused by legally insufficient evidence. As such, this issue may be raised for the first time on direct appeal. Mayer v. State, 309 S.W.3d 552, 555 (Tex. Crim. App. 2010).

B. Guiding Legal Principles.

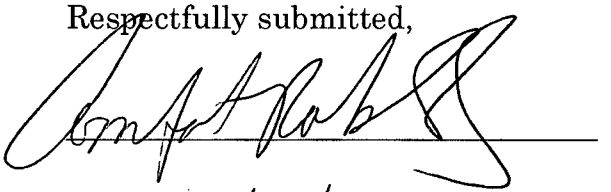
Certain facts and circumstances, if sufficiently proven, may either: [1] serve as"prima facie evidence of the issuer's intent to deprive the owner of property under Section 31.03 (Theft);" or [2] permit a finding that "the actor's intent to deprive the owner of the property under Section 31.03 (Theft) is [simply] presumed. "TEX. PENAL CODE 31.06(a),(f) (West 2017). "The facts giving rise to [any such] presumption must be proven beyond a reasonable doubt."

Because Comfort Roberts has indeed been subjected to egregious harm, appellant should be granted writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 12/13/2019