IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-72,328-03

Ex parte CLIFTON DEWAYNE HARVIN, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS IN CAUSE NO. 95-08-0076M-CR-B FROM THE 97th DISTRICT COURT OF MONTAGUE COUNTY

KELLER, P.J., delivered the opinion of the Court in which KEASLER, HERVEY, RICHARDSON, YEARY and NEWELL, JJ., joined. ALCALA, J., filed a concurring opinion. MEYERS, J., filed a dissenting opinion. JOHNSON, J., concurred.

Applicant was placed on deferred adjudication for aggravated sexual assault. He tried unsuccessfully to have his community supervision terminated early, and he was later adjudicated guilty. Prior to applicant's plea, the complainant had recanted her allegations in a tape recording made by applicant, and she has recanted again in an affidavit and testimony in habeas proceedings. Applicant now raises a variety of claims. He alleges that he is actually innocent, that both his plea and adjudication attorneys were ineffective, that the prosecutor and law enforcement engaged in misconduct, and that his trial judge was biased. After hearing evidence, the trial court found, among other things, that the complainant's recantation was not credible. Concluding that none of applicant's claims have merit, we deny relief.

I. BACKGROUND

A. Pre-Prosecution Investigations[1]

In early 1994, applicant lived with his wife Barbara, his stepson, his son (C.D.), and his daughter (A.H.). In April of 1994, Child Protective Services (CPS) conducted an investigation of the Harvin home because of allegations that A.H. had been sexually abused. The alleged perpetrator of the sexual abuse was not identified in any of the documents that we have. Applicant, Barbara, and A.H. all denied any sexual abuse, and the allegations were ruled out by CPS. A.H. did tell CPS that the babysitter, Reisa Ford, had slapped her on the face.

Later that year, applicant and Barbara were in the process of getting a divorce, and Barbara and the children began living with Reisa. In October 1994, a CPS investigation of the Ford home indicated a reason to believe that Reisa's sister Janice had physically abused A.H. and one of the sons.

In November of 1994, Reisa called the Montague County Sheriff's Office, and Deputy Craig Crawford and an investigator went to the Ford home. Reisa explained to them that, while she was giving A.H. (then six years old) a bath,[2] A.H. complained that her vaginal area was hurting. Reisa said that she asked the child if she fell and it hurt or was it just raw. The child responded that her "daddy" put his hand in her "crawdad" area every time she went to see him. Reisa said that she asked the child why she had not told anyone before and A.H. responded that her vaginal area was hurting and had been hurting all day.

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[1] Our recitation of the facts is taken from various documents in the habeas record, including the sheriff's investigation report and CPS reports.

[2] Reisa said that she ran a day care out of her home and was babysitting A.H.

Deputy Crawford then interviewed the child. A.H. told him that her father always gave her a bath before church day and put his finger inside her crawdad area. Deputy Crawford asked A.H. specifically whether applicant put his finger in her or just "down there," and she said, "Inside." He asked how many times her father had done that, and A.H. responded by holding up three fingers and then five fingers. Deputy Crawford asked if it had happened on the last visit, and A.H. stated that it had. Deputy Crawford learned that the child had visited applicant the previous day.

Crawford then talked to Reisa's mother, Janie Ford. Janie said that, after Reisa told her what A.H. had said, Janie asked A.H. where and how many times the conduct had occurred. Janie said that A.H. responded that the conduct was happening at her grandmother's house.

Sergeant Rod Smith later arrived at the home. He asked A.H. most of the questions that Deputy Crawford had asked, and he received the same responses. Sergeant Smith then showed A.H. a doll and asked her to show him where her father touched her. A.H. placed her finger on the vaginal area of the doll and stated that her father put his finger in there every time she went to her grandmother's house with him. A.H. held up her index finger to indicate which finger her father placed inside her. Sergeant Smith then asked A.H. if she liked going with her father to the grandmother's house. A.H. shook her head "no."

Darlene Taylor of Child Protective Services (CPS) interviewed the child on videotape. A.H. said that her father had put his finger into her "tweetie" area when she was visiting him at her grandmother's home. She further said that her father is the only person who had done this to her. Holding up her index finger, she stated that her father would put his finger into her and move it. She then gestured her finger in and out. A.H. was adamant that her father was the one who had done this and denied any other kind of abuse or neglect from any other person.

CPS also interviewed the parents. Barbara said that she had a hard time believing that applicant would do something like this, and she had never suspected anything like this when they were living together, but A.H. had stuck with the story and had not wavered from what she said had happened. Applicant denied the allegations and stated that it was a ploy by Barbara and Reisa and that, if anything happened, it happened at Reisa's house. Applicant appeared to be cooperative and told Taylor to continue her investigation and "take it to the limit."

On December 16, Doctor Gerard Balsley examined the child. Dr. Balsley found a clear transection of the child's hymen, which he concluded was evidence of penetration of the vagina. The child told the doctor that "Daddy stuck his hand under my project."[3] She said he put one finger (indicating her index finger) in a "hole under my project" and that this activity was painful. She said that this happened at her grandmother's home "every day when it's church day" and that he had done this about ten times.

Applicant was arrested for aggravated sexual assault on December 20. He posted bond on January 3, 1995. The next day, Barbara reported that applicant had taken physical custody of A.H. and his son. Taylor was contacted, and she in turn contacted Judge Roger Towery. Judge Towery ordered that the children be removed from applicant's custody.

While applicant had custody of his children on January 4, he took A.H. to Calvary Baptist Church, where, while A.H. sat on his lap, he obtained a tape-recorded statement from the child in the presence of the church pastor and the pastor's wife. The recording reflects the following:

> Applicant: All you got to do is tell the truth, okay? Are you scared? You better talk baby. Are you scared? Huh?

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[3] Barbara told Balsley that the word "project" was A.H.'s term for "privates" and that she has used that term for a long time despite her attempts to get her to say the word "privates" instead.

A.H.: No.

Applicant: Okay. Look. Did Daddy hurt your tweetie?

A.H.: Uh Uh.

Applicant: Say it out loud.

A.H.: No.

Applicant: Who told you to say Daddy hurt your tweetie.

A.H.: Reisa.

Applicant: Did – Did somebody really hurt your tweetie? You have to answer out loud baby.

A.H.: No.

Applicant: Are you sure that nobody – nobody that you lived with over there, that you know of, nobody hurt your tweetie. Okay, answer out loud.

A.H.: No.

Applicant: Okay. Daddy loves you. (kissing sound)

That same day, the children were removed from applicant's custody and taken to the CPS office. Taylor asked A.H. what had occurred, and A.H. responded that her daddy was real nice to her and told her that he was sorry for putting his finger in her hole.[4] She related that he further told her that he was sorry for doing bad things to her, that he was in jail for doing bad things, and that he probably would not see her for a long time.

On March 17, 1995, applicant went to the Grayson County Sheriff's Office to take a

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[4] This information appears in the offense report from the Sheriff's Office. Applicant has attached a document entitled "On-Going Narrative" that appears to have been written by Taylor but is not expressly attributed to her or to CPS. One notation in the document says that A.H. "stated that her father had told her that he was sorry about touching her [and] that he probably wouldn't get to see her for a very long time."

polygraph examination, to be conducted by Grayson County Sheriff Jack Driscoll. Law enforcement was under the impression that applicant's attorney was Jack McGaughey and that he had agreed to allow applicant to take the examination. Applicant waived his rights, and Sheriff Driscoll explained the testing process to him and discussed the questions that would be asked. Applicant was advised that a variety of questions would have to be asked to make the test valid. When applicant was asked whether, between the ages of 18 and 20, he had ever fantasized about sexual acts with a child, applicant first said, "No," but then said that he was not comfortable with the question and would have to answer yes because he had fooled around with a fourteen-year-old when he was nineteen. Applicant then said that he was uncomfortable answering the question, "Is your daughter, [A.H.], telling the truth about whether you put your finger in her 'tweetie?'" Applicant maintained that A.H. was "a good copycat" and could remember and repeat things that people told her. Applicant and Sheriff Driscoll continued to discuss what questions applicant was comfortable answering, and it became clear that applicant was comfortable only with qualifying questions. Applicant stated that he wanted to answer only one question, "Did you place your finger in your daughter's tweetie?" Sheriff Driscoll explained that other questions were necessary to make the test valid. Applicant replied that he would only answer the questions he was comfortable with or he would not take the test. Sheriff Driscoll then told applicant that he would not conduct the test.

B. Indictment to Plea

Applicant was indicted for aggravated sexual assault. In August of 1995, a hearing was held to determine whether he was indigent for purposes of obtaining counsel. When the trial court asked applicant if he was going to hire an attorney, applicant responded, "I've met with several attorneys and I can't come up with the retainer." When asked who he had talked to, applicant recited several

names, including Jack McGaughey. When asked how he made a $40,000 bond, applicant replied that the person he had borrowed money from wished to remain anonymous. The trial court (Judge Towery) declined to appoint an attorney.

Applicant subsequently hired attorney Patrick Morris, who communicated with District Attorney Tim Cole about the case. Morris told Cole that his client would agree to plead nolo contendere in exchange for ten years' probation.

In a January 23, 1996 letter to Barbara, Cole explained that he was "inclined to accept this offer because the fact that [A.H.] had recanted on one occasion will make this case difficult." He further explained that the recantation "gave the Grand Jury considerable trouble as it considered the case" and he believed that "any other jury will have the same reaction." He said one advantage of the proposed plea deal would be that Barbara's daughter "would not be required to endure the trauma of the public trial." Cole also assured Barbara that applicant's behavior "would be strictly controlled on probation" and that any violation would subject applicant to revocation and a prison term that might exceed the period a jury might assess. The District Attorney closed the letter by asking Barbara to contact him with her thoughts.

On March 25, CPS received another allegation that sexual abuse had been committed against A.H. The investigation report in the habeas record is a single page and is bare-bones. The document recites when the investigation was initiated, that the investigation was completed on March 29, that the "overall disposition" was "ruled out," that the "risk finding" was "risk indicated," that the recommended action was "close," that no safety plan was completed, that the case was not sensitive, and that the priority level was "2."

On April 3, Barbara signed a sworn statement saying that she did not wish applicant to be

sent to the Texas Department of Corrections for his offense and that she "did not object to him being given probation."

On April 16, 1996, applicant pled nolo contendere to aggravated sexual assault in exchange for ten years on deferred adjudication. His signature appears in numerous places on the plea papers, in sections entitled "waiver of jury," "waiver of rights," "waiver of 10 days preparation and approval of counsel," "present competency," and "voluntariness of plea." The "voluntariness of plea" section includes the following language: "I herein state that my plea is freely and voluntarily made, that my plea is not made as a result of any threats, that my plea is not made out of fear, that my plea is not made because of any delusive hope of pardon or parole or because of any promises made by anyone."

At the plea hearing, Cole represented the State, Morris represented applicant, and Judge Towery presided as the trial judge. The parties entered into a stipulation that A.H., if called as a witness, would testify that applicant did intentionally and knowingly cause his finger to penetrate her female sexual organ. The State offered the plea papers, the stipulation, and Barbara's April 3 statement into evidence. The trial court questioned applicant about the plea papers and explained various rights that applicant was giving up. Applicant agreed that he had signed the plea papers freely and voluntarily, that he wished to waive various rights, and that he read the various documents and discussed them with his attorney. Applicant was also informed of, and expressed his understanding of, consequences that attach specifically to deferred adjudication, and he expressed his understanding of the requirement to register as a sex offender.

With respect to the fact that applicant was pleading "nolo contendere," the following colloquy occurred:

Q. Now, you have pled nolo contendere, it does appear from the stipulation of

evidence that if this stipulation is admitted into evidence by the Court that there would be sufficient evidence for the Court to find you guilty on your plea of nolo contendere. Did you understand that at the time that you entered your plea and signed the stipulation?

A. Yes.

Q. Now, there would also be sufficient evidence for the Court to find that the evidence substantiates your guilt as to this offense. Did you understand that at the time that you entered your plea.

A. That there is evidence, yes.

Later in the proceedings, the trial court further addressed with applicant the significance of his nolo contendere plea:

Q. You understand that the Court, based upon your plea and the plea bargain agreement and the evidence submitted, that the Court would find that the evidence substantiates your guilt as to the first degree felony offense of aggravated sexual assault?

A. The Court finds me guilty, yes, I understand that.

Q. No, you understand that based upon your plea and the evidence admitted that the Court will not find you not guilty?

A. Yeah, that's better, I understand that.

Q. Okay. But that the Court would find that the evidence substantiates your guilt?

A. Yes, Your Honor.

Q. All right. Do you still wish to enter your plea of nolo contedere?

A. Yes.

During the plea proceeding, defense counsel also asked applicant questions. Included in this examination was the following colloquy regarding grand jury testimony:

Q. As part of the discovery in this case the District Attorney's office has

> provided us with the Grand Jury testimony, as well as all the written reports in this case. Is that correct?
>
> A. Yes.
>
> Q. And we have thoroughly gone over all those reports and all that Grand Jury testimony, have we not?
>
> A. Yes.

Defense counsel also asked questions about (1) applicant's understanding that there were strengths and weaknesses in the State's case, (2) his ineligibility for probation if he went to trial and were found guilty, (3) his ineligibility for parole (upon revocation) until he served half of his sentence, and (4) the fact that, upon revocation, he would be open to the full range of punishment—from five years to life. Defense counsel then asked, "And you are satisfied with my representation, is that correct?" Applicant responded, "Very satisfied."

C. Probation to Revocation

In the two years that followed the plea, applicant filed motions to terminate his deferred adjudication early, claiming actual innocence. On these motions, the State was represented by Barry Retherford, applicant was represented by attorney William Walsh, and Judge Towery presided as the trial judge. Over the course of several hearings, the trial court admitted three polygraph examinations that applicant had passed.[5] At the last hearing, held in October 1998, the trial court

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[5] The State did not object to the admission of the polygraph results. The first polygraph examination was conducted by Michael Strain, "[u]tilizing a Bi-Zone of Comparison Technique." The relevant questions were:

> 5. Other than for medications and cleaning purposes, did you ever touch [A.H.'s] vagina for sexual reasons?
>
> 7. Other than for medications and cleaning purposes, did you ever touch [A.H.'s] vagina for sexual reasons by putting your finger in her vagina?

said that it was "not inclined to terminate [probation] at this time" but would take the matter "under advisement."

On May 9, 2001, applicant's plea attorney, Patrick Morris, was disbarred. The judgment of disbarment was a default judgment because Morris had failed to file a timely responsive pleading

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The answer to both questions was "no," and Strain concluded, "Evaluation of the polygrams failed to reveal criteria indicative of deception to the relevant questions." The second polygraph examination was conducted by Eric Holden, who stated that the examination was "evaluated by numerical scoring and grading consistent with nationally standardized procedures" and that the test data was reviewed using computerized Algorithms of Johns Hopkins University Applied Physics Laboratory. The relevant questions were:

> RELEVANT Q1: Were you touching your daughter's vagina with your finger in 1994 at your mother's house?
>
> RELEVANT Q2: Did you put any of your finger inside your daughter's vagina in 1994?
>
> RELEVANT Q3: When you were separated in 1994, did you ever sexually finger your daughter's vagina?

All of these questions were answered "no," and the analytics Holden conducted yielded a conclusion of "no deception indicated." In his professional opinion, Holden concluded that applicant's answers to these questions "are considered to be: Truthful." The third polygraph examination was taken by Don West, who was recommended by the prosecutor's office. West's examination also relied upon Johns Hopkins algorithms, and the relevant questions were

> 2. Regarding the touching of your daughter, [A.H.], in a sexual manner, do you intend to answer my questions truthfully?
>
> 5. Have you even one time put your finger in your daughter's vagina?
>
> 8. Have you even one time attempted to put your finger in your daughter's vagina?
>
> 11. Have you even one time touched your daughter in any sexual manner?

The answer to question 2 was "yes" while the answers to questions 5, 8, and 11 were "no." After analyzing the test charts, West concluded, "[I]t is the opinion of this examiner that [applicant] was being truthful in his responses to all above listed relevant questions."

to the disciplinary petition and had failed to appear. The grounds for disbarment were Morris's failure, in two family-law matters in 1998, to do meaningful work and to communicate with the clients.[6]

In September 2003, the State filed a motion to revoke applicant's deferred adjudication on the basis of events occurring earlier that year. In the revocation proceedings, the State was represented by McGaughey (then an assistant district attorney in Cole's office), applicant was represented by Walsh, and Judge Towery presided as the trial court. At the revocation hearing, applicant testified that he went to see McGaughey in 1995 to obtain his representation at the Grayson County polygraph test. Applicant testified that he discussed all of the facts of the aggravated-sexual-assault case with McGaughey and paid him $150. Under cross-examination, applicant acknowledged that McGaughey never entered an appearance on his behalf. Applicant further stated that McGaughey was on vacation at the time the Montague County Sheriff wanted applicant to take the polygraph examination. Applicant claimed that, even though McGaughey advised applicant not to take the polygraph without him, applicant went to take the polygraph anyway because the sheriff was putting pressure on him to take the test or refuse it. When McGaughey asked at the revocation hearing if applicant had any proof of payment, applicant responded, "I can check for a record on that. I don't have one with me today. I wasn't prepared to have that." Observing that the State's original motion to adjudicate had been filed in September 2003, the trial court concluded that applicant's complaint with respect to McGaughey was untimely and therefore had not been preserved.

Several times at the hearing, Walsh accused the State of not giving him access, or timely access, to materials in its file, despite nominally having an open file policy. On one of those

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[6] This included failing to communicate the fact that he had closed his law office.

occasions, Walsh complained about not being given lab results. McGaughey had three responses. First, McGaughey maintained that the materials in the State's file had always been available for inspection by the defense. Second, he stated that, if the defense had an issue, it should have filed a motion for discovery. And third, McGaughey said that the particular item that Walsh had sought was the "original report on the original underlying case" and it "was a mystery to us as to why it would be sought." Walsh then accused McGaughey of turning over one item and saying, "You're not getting anything else." McGaughey denied the allegation. The trial court then asked, "Do you have an extra copy of the report now?" When McGaughey answered affirmatively, the trial court asked if he could give that copy to Walsh. Walsh then stated, "The Court should take note that Mr. McGaughey threw it on the ground at me." McGaughey responded, "That's a lie." The trial court responded, "Actually, Mr. McGaughey put it over there. It slid off the desk, Mr. Walsh. Now sit down."

After hearing evidence with respect to the allegations in the motion to revoke, the trial court found that applicant had violated the conditions of his probation by possessing controlled substances, associating with a person involved with drugs, and refusing to submit a urine sample. Defense counsel said he did not have witnesses ready for a punishment hearing and asked for a continuance. The trial judge granted the continuance and ordered the preparation of a presentence investigation report (PSI). At the punishment hearing, defense counsel said that he had no objection to the PSI, and it was admitted. Despite the earlier representation that he needed a continuance to get defense witnesses, defense counsel produced no witnesses at the punishment hearing. Instead, defense counsel made arguments to the court that attacked the original plea of nolo contendere. The trial court revoked applicant's deferred adjudication and sentenced him to sixty years in prison.

D. Appeal

Applicant appealed but the court of appeals rejected his complaints because they were challenges to the trial court's decision to adjudicate, and a trial court's decision to adjudicate was not appealable at the time.[7] Applicant subsequently filed an initial habeas application that included a number of claims raised in the present application but also included a claim that appellate counsel (Walsh) failed to timely notify applicant of the court of appeals's decision. Agreeing that appellate counsel failed in this regard, we granted applicant the opportunity to file an out-of-time petition for discretionary review.[8] Applicant then filed a petition for discretionary review, which we refused.[9]

E. Habeas Evidence

1. *A.H. (the complainant)*

In September 2010, A.H.—then an adult—executed an affidavit stating that applicant had never sexually molested her or been sexually inappropriate with her. She also stated that she had reported in November 1994 that her father had sexually molested her but that, soon after making this allegation, she told her father, a preacher, and the preacher's wife that her father did not molest her

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[7] *Harvin v. State*, No. 2-04-294-CR, 2005 Tex. App. LEXIS 8133, *5 (Tex. App.–Fort Worth September 29, 2005) (not designated for publication). *See also Hogans v. State*, 176 S.W.3d 829 (Tex. Crim. App. 2005). The legislature has since amended the deferred-adjudication statute to allow such appeals. *See Durgan v. State*, 240 S.W.3d 875, 877 n.1 (Tex. Crim. App. 2007). However, it is still true that challenges to the original plea of guilty or nolo contendere may not be raised in an appeal from the adjudication, *Manuel v. State*, 994 S.W.2d 658 (Tex. Crim. App. 1999), unless the alleged defect in the original plea proceedings is one that would render the judgment void. *Nix v. State*, 65 S.W.3d 664, 667-70 (Tex. Crim. App. 2001).

[8] *Ex parte Harvin*, No. AP-76,914, 2013 Tex. Crim. App. Unpub. LEXIS 581 (Tex. Crim. App. May 15 2013) (not designated for publication).

[9] *See Harvin v. State*, No. PD-0634-13, 2013 Tex. Crim. App. Unpub. LEXIS 1202 (Tex. Crim. App. October 13, 2013).

and that Reisa had told her to make the sexual-abuse allegation. She further stated, "I want . . . him released from prison. I do not want to testify at any trial, but if I do, I will testify to the truth of this affidavit."

At a habeas hearing held in October 2010, A.H., then twenty-two years old, testified that her prior allegations of sexual abuse against applicant were false. She also answered "no" to the question, "Was there anybody that did sexually molest you on or about November of 1994?" A.H. further testified that Reisa told her to tell the authorities that applicant sexually molested her. When asked about the tape-recorded recantation made in 1994 before applicant and his pastor, A.H. testified that she was not under any coercion, compulsion, or pressure at the time.

On cross-examination, A.H. was asked who she told for the first time that her father had molested her. She answered "Reisa Ford." When asked how many times she had visited her father in prison, A.H. responded, "Never."

On redirect examination, A.H. was asked, "Somebody did molest you, did they not?" A.H. responded affirmatively, but she stated that it was her brother, not her father, that had done so. Habeas defense counsel then asked, "You told Reisa Ford that your brother had molested you?" A.H. responded "yes" and then responded "yes" to the question, "That's when Reisa told you to tell the police your daddy did it?" A.H. further testified that Reisa responded to her outcry about her brother's abuse by saying "she doesn't care" and "she didn't want to hear about it" but that, around the same time, Reisa repeatedly told her to "keep telling" that her father did it. A.H. also testified that Reisa was physically cruel to her.

On recross, A.H. clarified that the brother who sexually molested her was applicant's stepson. A.H. acknowledged that she never mentioned her brother in the tape-recorded recantation made in

the presence of applicant and his pastor. However, A.H. testified that she told them that someone had molested her but that she did not give a name. When asked whether she said that on the tape, A.H. responded, "No." She acknowledged that she had said on the tape that no one had molested her and that that statement on tape was a lie. A.H. further testified that applicant's stepson currently lives "with us." When asked when she was last molested by him, A.H. responded, "I was twelve or thirteen" and applicant's stepson would have been "nineteen or twenty."

In a habeas hearing in December 2011, A.H. was asked if she tried to tell people when she was six that her brother was the one who molested her. She said she tried to tell CPS and told her babysitter once but could not remember if she told anyone else. When asked what the reaction was to this information, she said, "I got in trouble more for saying my brother did it, and they would make me out to be a liar. No your brother wouldn't do that. And if I would say my father did it, which is a lie, I would—they would have more sympathy and things like that." A.H. then testified that she told the principal that her brother "humps" her and that CPS came to the home later that night to investigate, but A.H. said nothing much happened. When asked if an issue was raised about her father, A.H. said that nothing was said directly to her about it. According to A.H., after that, from third grade to fourth grade, the principal did not want A.H. in the office anymore and would call her a liar behind her back. A.H. then stated, "So I just pretty much gave up at that point." When asked what did she give up on, A.H. replied, "Telling the truth." When asked what that was, A.H. said, "That my father didn't do it."

On cross-examination, A.H. testified that she told her father before his plea that his stepson had molested her. A.H. said she did not come to the authorities until she was eighteen because she was afraid her mother would kick her out of the house and she would not be able to care for the

younger brother, C.D.[10]

2. *Cynthia Harvin (applicant's sister)*

In December 2010, Cynthia Harvin, applicant's sister, executed a statement about conversations she had with A.H. in 2005. According to Cynthia's statement, A.H. maintained that applicant was innocent but said she was afraid to come forth with that information because she was afraid her mother would find out. Cynthia further stated that A.H. said it was her brother and not her father.

At the 2011 habeas hearing, Cynthia testified that, in 2004, A.H. and her brother C.D. came to her home to "reunite because we had lost touch." Cynthia testified that she asked A.H. if applicant "did this" and A.H. responded that he did, but later that evening, A.H.'s eyes started tearing up and she said that her father did not do it and that her brother (applicant's stepson) did. Cynthia stated that A.H. told her that if she (A.H.) said her brother did it, and her father did not, she would get in trouble.

3. *Kasi Scoughton*

The habeas record also contains what purports to be a handwritten letter to applicant from "Kasi Lei," who appears to be Kasi Scoughton, a family friend.[11] The letter addressed applicant as "Uncle Clifton." The letter states that A.H. told Kasi that applicant was innocent but that A.H. could not do anything about it because Barbara had threatened to take her brother C.D. away from her. According to the letter, A.H. said that she had practically raised C.D. but that Barbara would keep

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[10] Evidence in the habeas record suggests that the younger brother suffers from some form of autism.

[11] There is an unsigned handwritten notation on the letter that says it was postmarked on October 28, 2011.

him from her if she came forward.

At the 2011 habeas hearing, Scoughton testified that she was a family friend because her mother and applicant had been lifelong friends. She further testified that she told A.H. that her father loves her and misses her and that A.H. sent an email back saying that she loved her father, and that she knew that he was innocent, but she could not say anything else about it. Scoughton testified that A.H. said that she was taking care of C.D. and was afraid of losing him.

4. ***Applicant***

Applicant testified at the 2010 habeas hearing. He testified that he did not sexually molest his daughter. He also claimed that the April 1994 CPS report was the result of an outcry by A.H. against his stepson. He further claimed that he confronted Reisa in November about physical abuse of the children and threatened to call CPS. According to applicant, Reisa responded that, if he went to CPS, she would play "hardball" with him.

Applicant said that he talked to several lawyers about representing him, including McGaughey, but that he had difficulty obtaining a lawyer because the cheapest retainer quoted was $16,500. However, applicant maintained that McGaughey advised taking a polygraph examination if applicant was innocent and that McGaughey accepted $150 to sit with him in the examination and took physical custody of the tape recording of A.H.'s recantation. Applicant claimed that he got his money and the tape back when McGaughey did not show up for the examination. According to applicant, after he tried but failed to obtain appointed counsel, Morris offered to represent him for $800, so applicant hired him.

Applicant said that he testified before the grand jury, that he told grand jury that he was an

abusive husband and a drug dealer[12] but did not molest his daughter, and that the tape-recorded recantation was discussed in front of grand jury, but that no one asked for the tape. Applicant maintained that he never saw a copy of a grand jury transcript and that he answered yes to the question about being provided the grand jury testimony because his attorney (Morris) told him to answer yes to all of his questions. Applicant further testified, "Nearly every place that I said yes in there is a lie and I have admitted perjury to the Court of Criminal Appeals in conjunction with those answers."

Applicant testified that Morris said the tape-recorded recantation was trash, could not be used, would not be admitted as evidence, and nobody would pay any attention to it. Applicant claimed that he talked to Morris for a total of 55 minutes during the entire representation—a 45 minute initial conversation and then a few more minutes when Morris came to court for resettings. According to applicant, Morris never contacted any witnesses, even though applicant asked him to contact his wife Barbara, his daughter A.H., and the pastor and his wife. Applicant said that Morris told applicant that he needed to plead guilty and was agitated when applicant said no. Applicant claims that he had to point out to his attorney that the State's letter to Barbara said the deal was for a plea of nolo contendere rather than for a plea of guilty.[13] He claims that Morris threatened to quit if applicant forced him to take the case to trial: "He told me that if I didn't take the deal that he would walk out. And he told me that the case was too strong against me, that I didn't have any

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[12] Applicant admitted that he had faced a felony drug charge and a misdemeanor marijuana charge in Texas and a felony marijuana charge in Oklahoma. Applicant testified that the Texas felony drug charge was never indicted and that he received 45 days in county jail on the Oklahoma charge.

[13] Applicant testified that he became aware of the letter because he and Barbara reconciled and she moved back in with him at his mother's house.

evidence of innocence. And you know, they had me. He said, if you go to trial, you're going to get 40 years." Applicant said that he could not afford another lawyer, and if he could have afforded one, " I would have had another lawyer that day." Applicant further stated that he told Morris, "[P]lease, pay attention to what I'm trying to show you." Applicant also said that Morris told him that as long as he did not plead guilty or confess or be found guilty or convicted, "I could come back and fight this case while I was on probation when I could afford a lawyer." Applicant said that neither the judge nor Morris told him that a plea of nolo contendere has the same effect in criminal cases as a guilty plea. In summing up some of applicant's claims regarding Morris's representation, habeas counsel asked, "If Mr. Morris had not threatened you with the jury giving you 40 years and if Mr. Morris had fully explained the effect of a nolo contendere plea, if he had not threatened to quit you as your lawyer and not told you that the tape was inadmissible, what would you have done that day?" Applicant replied that he would have gone to trial.

Applicant was asked why he said during the plea hearing that he was "very satisfied" with Morris's representation. Applicant responded:

> Because I believed that I had made a plea that showed that I was innocent and that I was maintaining my innocence and that he had went to the judge and got the plea marked up to indicate that to me just as he had told me, that I would be able to come back. And I believe that anybody could see that I was maintaining my innocence because I made him mark all the words of guilt out. I even made them mark the word convicted out later on. I just believe that anybody could see that I was maintaining my innocence and that I wasn't admitting guilt.

On cross-examination, applicant was asked about an earlier statement about having sexual relations with a fourteen-year-old that was made during the unsuccessful attempt to conduct a polygraph examination in Grayson County. The State's habeas attorney asked, "But you did fool around with a fourteen-year-old girl when you were nineteen?" Applicant responded, "No, I did

not." The State's attorney then asked, "How old was your wife when you started fooling around with her?" Applicant responded, "My wife was—she's actually three years older than I am." This testimony contradicted a statement attributed to applicant in the pretest interview before his first successfully completed polygraph examination. The polygraph report said, "He stated the only sexual contact he had had with a minor as an adult involved in [sic] wife. He stated that he was 19 and she was 14." On redirect, applicant said that he did not tell the polygraph operator that and that it came from the sheriff's report. But the paragraph containing this statement in the polygraph report indicates that the statements made in that paragraph occurred "[d]uring the pretest interview."

At the end of applicant's testimony, the habeas court asked applicant about his assertion that the district attorney's letter to Barbara showed that the grand jury had heard a recantation that applicant was not made aware of:

> Q. Isn't that, in fact, the statement that you taped?
>
> A. I've always had the opinion, Your Honor, that there was more than one recantation. I have no knowledge of that.
>
> Q. Then why did you allege that in something you swore to the Court of Criminal Appeals?
>
> A. Because I believe there is [sic] other recantations out there.
>
> Q. You know, I have to decide this based on what I think about your testimony and your believability. Do you understand that?
>
> A. Yes, sir.
>
> Q. Yet there's an allegation made in this application that you prepared—
>
> A. Yes, sir.
>
> Q. —that says the State was hiding evidence that you just think might be out there, not because you know it's out there?

A. The thing is, Your Honor, I was never provided the knowledge from the State that they had any recantation.

Q. Because the only recantation they had was that that you taped. How could they provide you that, you already knew it?

A. Well, Tim Cole is speaking in the letter there of a recantation at grand jury. I've no idea what—I've never seen all of the evidence of what was presented to the grand jury. I don't know what was presented there.

* * *

Q. Well, what have you heard here today or in these two days to make you think there is some other recantation?

A. I don't think there is.

On May 20, 2014, applicant executed an affidavit in which he summarized his conduct in recording the complainant's audiotaped recantation. He also stated that he was aware in April 1994 "that the Complainant had made sexual assault outcrys against her step brother that were ruled out after in school interviews where the Complainant reported no one sexually assaulted her and that [Reisa] had physically abused her that morning prior to the school interview." However, applicant said that he was never told before his plea that A.H. had "reasserted her claims of the brother's abuse" that were documented in a new investigation in which abuse was ruled out.

5. ***Morris (the plea defense attorney)***

Applicant's plea attorney (Morris) and the plea prosecutor (Cole) filed affidavits in response to applicant's first habeas application. Morris stated in his affidavit that he did not recall the evidence investigated in the case but that Cole had an open file policy and Morris always read the prosecutor's file. Morris did not recall the complainant recanting her accusation, but, if she did, he would have discussed that with applicant. Morris also stated that he could not recall ever telling a client the amount of prison time a jury would give in a case and was certain that he would not have

told applicant that a jury would assess forty years. And Morris said that it was his habit and routine to explain the effect of a nolo contendere plea and that he did explain to applicant that such a plea would be interpreted as a plea of guilty.

At the 2010 habeas hearing, Morris testified that he did not recognize applicant and recalled nothing about the case. Morris did recall that Cole had an open file policy, and if a grand jury transcript was in the file, then Morris would have seen it. With regard to his plea colloquy question referring to grand jury testimony, Morris stated, "There would be no reason to ask that if you didn't have it," and, "That was certainly not part of my standard questioning in a guilty plea." Morris further testified that, if there was a recantation, he would have discussed it with the client. He also stated that he would have discussed the witnesses and evidence, just as he did in every case. And Morris stated that telling a client that he would get certain amount of years if the case went to trial is "not something that I would have done." Morris also replied affirmatively when asked if he would have "explained that a no contest plea and a guilty plea have the same legal effect in a criminal proceeding." Morris answered, "No," when asked whether he could have pressured a client or given false hopes.

Morris also testified that he was a former district attorney of Wise County and that, after his stint at the district attorney's office, he represented criminal defendants. But as part of his private practice, he branched off into civil cases, which ultimately became his undoing: "And if you notice the disbarment, the disbarment had problems – I got in trouble with civil cases. Taking on criminal cases, I knew what I was doing." Morris's problem with civil cases occurred when he suffered from a "deep, dark," "full blown" depression during the last half of 1998 and going into 1999. But in 1996, Morris said, "[W]e were fine."

On cross-examination Morris testified that, given the reference to grand jury testimony in the plea colloquy, the State must have provided a transcript of grand jury testimony. But Morris had no actual memory of that, and if there was a grand jury transcript, it would be in the files of the current district attorney (McGaughey) unless it had been removed.

6. *Cole (the plea prosecutor)*

In his affidavit, Cole explained that his office had an open file policy and that he could not recall an occasion when Morris did not review a file in a case in which he was the defense attorney. Cole also stated that he recalled that the defense had provided him with a tape recording of a recantation made by A.H.

At the 2010 habeas hearing, Cole testified that the statement in his affidavit about being provided with the tape-recorded recantation was probably not accurate. He had subpoenaed the pastor, but the pastor did not have the tape. Cole now believed that he did not hear the tape or have a copy but that he knew the substance of the tape because applicant testified about it to the grand jury.

Cole did not recall a court reporter taking down grand jury testimony, and it was not required, but there might have been a tape recording of it. Normally there would not be a tape recording, but he recalled a requirement to tape a target witness, which applicant would certainly have been. Cole was not aware of any testimony being reduced to writing.

Cole explained that, as district attorney, he had an open file policy, and that the policy in existence at the time of applicant's prosecution was to mail the file to the defense attorney. Even after the file was mailed, however, the defense attorney could still come look at the file. Cole thought applicant probably was vocal about not pleading guilty, given the ultimate plea of nolo

contendere. Cole was not aware of any problems with Morris at the time of applicant's plea, and believed Morris was a competent attorney, but, in later years, Morris had a problem with depression, which led to his disbarment.

7. *Walsh (defense attorney on adjudication and appeal)*

We need not detail Walsh's testimony regarding what he did to notify applicant that the court of appeals had affirmed the trial court's judgment[14] because applicant has already received relief in the form of an out-of-time petition for discretionary review. Walsh also testified that, while representing applicant on the motion to adjudicate, he sought a transcript of grand jury proceedings but never received one. The reason given for not turning over a grand jury transcript to applicant was "[t]here wasn't one."

Walsh was also asked if he had difficulty obtaining discovery from Cole's office under the open file policy with respect to applicant's adjudication proceedings. Walsh replied, "It sounds like something I would have said, but I don't recall." When asked if he had ever told Judge Towery that he had gone over to the district attorney's office to obtain discovery in the Harvin case and received an "antagonistic nasty response" from Cole, he answered, "Yeah, I probably said that on a number of occasions." However, Walsh could not remember a specific date. When asked if Cole truly had an open file policy, Walsh replied, "At that time, no." Walsh said he had gone to court to ask Cole for immunity for applicant to testify on someone else's case, and Cole threw papers at Walsh and threatened to assault him. Walsh claimed that he filed assault charges with the Montague County Sheriff's Department as a result. When asked if the Cole open file policy was "no more," Walsh replied, "Well, it was open alright, but it was open all over the courtroom floor."

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[14] Neither the State nor the trial court found Walsh's testimony to be credible in this regard.

8. *McGaughey (adjudication prosecutor)*

When applicant came to see him in 1994, McGaughey quoted a fee, and applicant never came back. When asked whether applicant gave him a tape, McGaughey responded that he did not receive anything tangible from applicant. When asked whether he received $150 from applicant, McGaughey stated that he had no record of receiving any money from applicant, and there would be a record if he had done so. The State further asked, "If he says you refunded that $150 after you did not show up for the polygraph examination, would you say that happened or not?" McGaughey responded, "I would say no." When asked whether applicant requested his presence at a polygraph examination, McGaughey replied, "I do not believe that he did. I don't recall being asked to appear anywhere." "[W]hen you were practicing criminal defense work," the State's habeas attorney further asked, "did you ever tell a client you would appear with them at a polygraph and you failed to show?" McGaughey answered, "I recall no occasion like that, no." And McGaughey answered "no" when asked, "Do you ever take any money for performing some kind of legal services and not perform the legal services?"

McGaughey further testified that he did not recall seeing any grand jury transcript or notes in the State's file. The State entered a stipulation that the State's habeas attorney found no grand jury transcript testimony in the State's file delivered to him by McGaughey.

F. Habeas Court's Findings

Because applicant's first habeas application was remanded twice to the habeas court, the current habeas record contains three sets of findings of fact. We detail those findings that are relevant to the current habeas action and that have not been superseded or rendered moot:

1. *First Set*[15]

1. The performance of Applicant's trial counsel was not deficient. Trial counsel investigated all evidence and witnesses. Trial counsel allowed Applicant to decide how to plead in the case after having advised him and visited with him about the witnesses and evidence on many occasions. Among the things that was discussed was the recantation of the victim. Trial counsel was willing to represent Applicant at a trial and did not tell him he would be sentenced to forty years if he insisted on a trial. Trial counsel and the Court explained to Applicant the effect of a no contest plea. Reading the Reporter's Record of the plea hearing, it becomes very obvious that Applicant was very satisfied with the representation he had received from trial counsel. It is worthy of note that the recantation of the victim, the daughter of Applicant, was on a tape that was presented to the District Attorney by the defense and which tape had the Applicant's voice on it.

2. *Second Set*[16]

1. Trial counsel for applicant was retained by applicant.

2. Trial counsel for applicant does not remember this case.

3. Trial counsel for applicant testified as to his habit and custom when representing clients.

4. Trial counsel always reviewed the State's file pursuant to the open file policy.

5. Trial counsel met with applicant and discussed the case.

6. Applicant had a prior felony conviction in Oklahoma.

7. Trial counsel arranged a plea bargain for deferred adjudication.

8. Applicant was aware of the alleged recantation by the complainant.

9. Applicant was admonished of the effect of his plea by trial counsel.

10 Applicant was admonished of the effect of his plea by the trial judge.

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[15] Signed April 6, 2010.

[16] Signed October 27, 2010.

* * *

12. Applicant had never established an attorney client relationship with Jack McGaughey.

3. *Third Set*[17]

1. Considering the testimony and the affidavit, the fact that the complainant recanted before the Applicant's pastor, prior to the plea, the trial court does not find the recantations to be of such a nature as to be credible.

2. . . . Since the recantation was made in front of Applicant's pastor, in Applicant's presence, the recantation was certainly in Applicant's knowledge when he made his plea.

* * *

4. The trial court does not find that there was any recorded grand jury transcript of testimony, based upon the testimony of the witness Jack McGaughey.

5. A. Applicant's allegation that the State failed to disclose exculpatory evidence is totally without merit. The evidence shows that the Applicant made the State aware of the complainant's recantation in front of Applicant's pastor.

B. Had there been any transcribed grand jury testimony, it would have been available to use to cross-exam the witness who gave it, if the witness had testified at trial.

II. ANALYSIS

A. Actual Innocence

In ground one, applicant contends that he is actually innocent. To advance a freestanding actual-innocence claim in habeas proceedings, an applicant must produce newly discovered or newly available evidence[18] that unquestionably establishes his innocence.[19] And he must prove by clear and

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[17] Signed February 13, 2012.

[18] *Ex parte Brown*, 205 S.W.3d 538, 545 (Tex. Crim. App. 2006).

[19] *Ex parte Harleston*, 431 S.W.3d 67, 70 (Tex. Crim. App. 2014).

convincing evidence that no reasonable juror could have found him guilty in light of the new evidence.[20] This burden is a "Herculean task" because, once an applicant has been afforded a fair trial and convicted, the presumption of innocence disappears.[21]

Applicant presents, as newly discovered evidence, the recantations by A.H. in her affidavit and at the habeas hearing, as well as testimony and documentary material from Cynthia Harvin and Kasi Scoughton. He also presents the tape-recorded recantation made by A.H. in front of applicant and his pastor and points to allegations of physical abuse made against Reisa and Janice Ford. Further, applicant points to the CPS investigation on March 25, 1996, as involving new recantations and ruled-out sexual-assault outcries.

Within his actual-innocence ground, applicant also criticizes his plea attorney (Morris) for later becoming disbarred and for failing to properly investigate his case. He further claims that Morris, the district attorney (Cole), and the trial judge conspired to obtain his plea and knowingly allowed "perjured testimony in order to suborn schooled perjured responses" regarding whether applicant had reviewed grand jury testimony. He also argues that these alleged conspirators knew that he was pleading only in order to come back and prove his innocence on probation. And applicant refers to polygraph tests that were ordered and what he believes to be erroneous advice that early termination of probation was possible when it was not.

Some of the items of evidence cited by applicant—e.g., the tape-recorded recantation and physical abuse allegations against the Fords—are not newly discovered. However, we will assume, without deciding, that these items can be considered as background evidence in determining whether

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[20] *Id. See also Ex parte Elizondo*, 947 S.W.2d 202, 207 (Tex. Crim. App. 1996).

[21] *Harleston*, 431 S.W.3d at 70.

his newly discovered evidence establishes his innocence. Even with that assumption, applicant's actual innocence claim must fail.

The habeas court found that A.H.'s recantations were not credible. Although this Court is the ultimate factfinder in a habeas proceeding under Article 11.07, and has some discretion to disregard the findings of fact from the habeas trial court, this Court "ordinarily defers to the habeas court's fact findings, particularly those related to credibility and demeanor, when those findings are supported by the record."[22] The habeas court saw A.H. testify at two live hearings and was therefore in a position to evaluate her demeanor. We are not. And although we have before us the tape recorded recantation from A.H. when she was six, the habeas court—having seen her testify—was in a better position than we are to evaluate the credibility of *all* of her statements, including the tape recording.[23]

Moreover, the record provides "a number of bases" for disbelieving A.H.'s recantations.[24]

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[22] *Ex parte De La Cruz*, 466 S.W.3d 855, 865 (Tex. Crim. App. 2015).

[23] There may be times when an electronic recording speaks for itself—when, for example, a video recording shows that the defendant did not do something that a police officer says he did. *See Carmouche v. State*, 10 S.W.3d 323, 331-32 (Tex. Crim. App. 2000). But that is not the case here. In the motion to suppress context, we have held that a deferential standard of review applies even to the review of a trial court's assessment of a video recording. *Montanez v. State*, 195 S.W.3d 101, 108-09 (Tex. Crim. App. 2006).

[24] *See Keeter v. State*, 74 S.W.3d 31, 38-39 (Tex. Crim. App. 2002). In *Keeter*, we held that, for recantations occurring soon after trial (within the time for filing a motion for new trial), courts have often applied a less deferential standard than the norm, but even under that less deferential standard, "the trial court acts within its discretion so long as the record provides some basis for disbelieving the testimony." *Id.* at 38. We have not decided whether that standard is actually appropriate for evaluating recantations in the motion for new trial context (instead of the usual standard), much less whether it is appropriate on habeas corpus. *Id.* at 38; *Whitehead v. State*, 130 S.W.3d 866, 876 n.52 (Tex. Crim. App. 2004) ("we express no opinion concerning the suitability of that standard to the recantation context"). *See also In re M.P.A.*, 363 S.W.3d 277, 283 & n.3 (Tex. 2012) (rejecting an actual innocence claim because the finding that the recantation was not

First, the circumstances under which the tape-recorded recantation was made cast doubt on its credibility.[25] The recantation was made while A.H. sat on applicant's lap, in the presence of people who could have appeared to A.H. to be aligned with applicant, and without the presence of anyone who might have counteracted any pressure exerted by applicant's presence.[26]

In addition, the claim on the tape recording that no one molested A.H. is inconsistent with the medical evidence of penetration. And once A.H. was removed from applicant's custody, she told a CPS worker that applicant had said he was sorry he molested her.

The record also provides reasons to disbelieve the new recantations made by A.H. in the habeas proceedings. A.H.'s current claim that her brother (applicant's stepson) molested her contradicts her statement on the tape-recorded recantation that no one molested her. Moreover, A.H.'s further testimony at the habeas hearing that, at the time of the recording, she told applicant, the pastor, and the pastor's wife that someone had molested her would mean, if believed, that all four of them participated in the recording of a statement that they knew was untrue. The credibility of A.H.'s habeas recantation is further undermined by the fact that, at the time of her habeas testimony, she still lived with the brother in question—in spite of the fact that his most recent molestation of

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credible had record support and observing, "In the context of a motion for a new trial, the Court of Criminal Appeals has noted that it is unclear whether a trial court's rejection of a recantation requires record support. Because we find that there is record support for the habeas court's rejection of the recantations, we do not address this issue.").

[25] *See Keeter*, 74 S.W.3d at 39.

[26] In a supplemental, post-submission brief, applicant seems to suggest that the tape-recording may have continuously run from the time that he picked up A.H. to the time he took her to the church. We will assume, without deciding, that the record sufficiently establishes that no unrecorded conversations occurred between applicant and A.H. on the day of the interview before the interview took place.

her allegedly occurred when he was an adult. By contrast, at the time of her habeas testimony, A.H. had never visited applicant in prison, despite his supposed innocence.

And the witnesses to whom A.H. allegedly recanted are closely associated with applicant. One is applicant's sister and the other is a family friend who calls applicant "Uncle Clifton."

We do not find applicant's other new evidence to be particularly probative of innocence. Even if we assume that applicant was unaware of the CPS investigation that occurred within a month before his plea, the bare-bones document of that investigation does not say against whom the sexual-abuse allegation was directed, why it was ruled out, or why a "risk indicated" finding was made. And even if we assume, without evidence, that applicant's stepson was the subject of the allegation, the CPS document would be, at most, impeachment and would not be enough to establish innocence.[27] Nor are applicant's passing results on three polygraph examinations particularly probative of innocence. "For more than sixty years, we have not once wavered from the proposition that the results of polygraph examinations are inadmissible over proper objection because the tests are unreliable."[28]

The habeas court could also have considered the fact that A.H. made sexual-abuse allegations against applicant to seven different people who had a variety of affiliations—Reisa Ford, Janie Ford, Barbara Harvin, Deputy Craig Crawford, Sergeant Rod Smith, CPS worker Darlene Taylor, and Doctor Gerard Balsley. The habeas court could also have considered applicant's attempt to control precisely what questions were asked in the attempted Grayson County polygraph examination as evidence of his own consciousness of guilt. Further, the habeas court could have considered A.H.'s

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[27] *See Ex parte Franklin*, 72 S.W.3d 671, 678 (Tex. Crim. App. 2002).

[28] *Leonard v. State*, 385 S.W.3d 570, 577 (Tex. Crim. App. 2012).

statement that applicant said he was sorry for molesting her to indicate that applicant was in fact guilty. We conclude that applicant has not met his "Herculean" burden of showing actual innocence.

B. Ineffective Assistance of Plea Counsel (Morris)

1. *Legal Standard*

In grounds two through five, applicant contends that his attorney at the plea proceedings (Morris) was ineffective for various reasons. The Sixth Amendment right to counsel includes the right to the effective assistance of counsel.[29] To show a Sixth Amendment violation of the right to the effective assistance of counsel, the convicted person must show that counsel's performance was deficient and that this deficient performance prejudiced the defense.[30]

In assessing whether counsel's performance was deficient, courts must review counsel's conduct through a highly deferential lens and avoid the distorting effects of hindsight.[31] Courts must "indulge a strong presumption that, under the circumstances, the challenged action might be considered sound trial strategy."[32] Further, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable" and "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."[33]

The standard for determining prejudice is whether "there is a reasonable probability that, but

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[29] *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

[30] *Id.* at 687.

[31] *Id.* at 689.

[32] *Id.* (internal quotation marks omitted).

[33] *Id.* at 690-91

for counsel's unprofessional errors, the result of the proceeding would have been different."[34] "A reasonable probability is a probability sufficient to undermine confidence in the outcome."[35] When a convicted person challenges the voluntariness of a plea based on the ineffectiveness of his attorney, he must show that, "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[36] In this context, a plea of nolo contendere is treated as the equivalent of a plea of guilty.[37]

2. *Failure to Investigate*

In ground two, applicant claims that Morris did no meaningful work or investigation and that he advised applicant to plead guilty without hearing the facts of the case or the tape recorded recantation. Applicant also faults Morris, though, for recommending that applicant plead guilty while being aware of a whole host of facts that applicant views as exculpatory.[38] Applicant contends that Morris failed to follow up on the information that applicant gave him, contenting himself with a review of the State's file. Applicant further complains that Morris was disbarred for lying to clients about work he had not done.

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[34] *Id.* at 694.

[35] *Id.*

[36] *Ex parte Barnaby*, 475 S.W.3d 316, 318 n.2 (Tex. Crim. App. 2015);

[37] *See Ex parte Calderon*, 309 S.W.3d 64, 65 n.2 (Tex. Crim. App. 2010) (citing TEX. CODE CRIM. PROC. art. 27.02(5)).

[38] Applicant contends that Morris was aware that the complainant had recanted, that the complainant had said that Reisa told her to accuse applicant, that the complainant had accused Reisa of physically abusing her, that there was an investigation into possible physical abuse by Reisa's sister Janice, that applicant had threatened to start custody proceedings if the physical abuse from the Fords did not stop, and that applicant had adamantly denied guilt.

Morris did not remember applicant's case, but he testified that he always read the prosecutor's file and in every case discussed the evidence, including any recantation, with his client. He indicated that branching off into civil cases in private practice was a mistake but that, in criminal cases, he knew what he was doing. Cole, the district attorney at the time of the plea, stated that he had an open file policy—which included mailing the file to the defense attorney—and that he did not recall an occasion when Morris did not review the file. The habeas court obviously credited these statements when it found that Morris testified about his habit and custom, that Morris was not deficient, that he investigated all evidence and witnesses, that he always reviewed the State's file, and that he met with applicant and discussed the case, including the complainant's recantation.

Courts have held that a reviewing court may credit a defense counsel's statement of habit or routine in declining to find deficient performance: "Time inevitably fogs the memory of busy attorneys. . . . [T]he . . . Rules of Evidence allow habit evidence to be used to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice . . . and courts have relied on such evidence in habeas corpus proceedings to find effective assistance of counsel."[39] We agree.[40] Moreover, some of applicant's own allegations indicate that he and counsel discussed the case extensively and that counsel was aware of the relevant evidence. Further, when asked at the plea proceeding if he was satisfied with his attorney's performance, applicant responded that he was "very" satisfied. Applicant's volunteering of the "very" modifier

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[39] *Dasher v. Witt*, 574 F.3d 1310, 1314 (11th Cir. 2009) (alteration marks and internal quotation marks omitted); *Carrion v. Smith*, 549 F.3d 583, 590 (2d Cir. 2008) (same).

[40] *See* TEX. R. EVID. 406 ("Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.").

in connection with his satisfaction is inconsistent with his habeas testimony that he was frustrated with his attorney's failure to pay attention to evidentiary leads that applicant was trying to give him.

And though applicant does not now claim that his attorney threatened to quit and told him that the jury would otherwise assess forty years, he testified to that at the 2010 habeas hearing in connection with his prior application. The record supports the habeas court's rejection of those earlier allegations made by applicant, and the falsity of those earlier allegations adversely impacts applicant's credibility on the allegations at hand, which also depend on the evidence submitted in the prior habeas proceeding.

Counsel's subsequent disbarment does not in this case change our conclusion that he conducted an adequate investigation. We have declined to impose a *per se* rule finding counsel ineffective even when suspension or disbarment of counsel's law license was in effect at the time he represented the defendant.[41] We held that a suspended or disbarred attorney may be found incompetent as a matter of law (and thus ineffective) only "if the reasons for the discipline imposed reflect so poorly upon the attorney's competence that it may reasonably be inferred that the attorney was incompetent to represent the defendant in the proceeding in question."[42] But Morris was not disbarred at the time he represented applicant; that disbarment occurred years later based on conduct that began occurring two years after applicant's plea. Both Morris and Cole indicated that Morris's bout with depression did not begin until 1998. And the trial court could have believed, from Morris's statement and the disbarment documents, that Morris's problem was only with civil cases and that Morris, a former district attorney, handled criminal cases competently.

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[41] *Cantu v. State*, 930 S.W.2d 594, 600-03 (Tex. Crim. App. 1996).

[42] *Id.* at 602.

3. *Failure to Discover Other Recantations*

In ground three, applicant contends that counsel was ineffective for failing to discover the CPS investigation that was conducted on March 25, 1996 (within a month before his plea). Applicant also contends that the complainant persisted in her recantation against applicant to her mother, Barbara, who in turn signed what applicant calls a letter of non-prosecution (in response to a letter from the district attorney mentioning a recantation). Applicant claims that, had he known only days before his plea that "his daughter was telling teachers, CPS and her mother that applicant was innocent and that she was being sexually assaulted, there would have been no plea." Applicant claims that he was aware of no other recantations aside from the tape-recorded recantation that he helped produce.

But nothing in the bare-bones CPS report from March 1996 indicates that A.H. had recanted her allegations against applicant. And applicant is mistaken to characterize Barbara's notarized statement to the prosecutor as a "letter of non-prosecution." It was no such thing; rather, Barbara simply indicated that she did not want applicant to go to prison—ratifying the district attorney's intention to agree to probation. And the habeas record clearly shows that the recantation referred to in the district attorney's letter to Barbara was the tape-recorded recantation that applicant was involved in. When confronted by the habeas court about his contention that there were other recantations prior to his plea, applicant admitted that he had no evidence of other recantations and that, after the habeas hearing, he no longer believed that there were other pre-plea recantations.

4. *Failure to Inform of Consequences of Plea*

In ground four, applicant contends that he was not properly informed of the legal consequences of his nolo contendere plea and that he was led to believe, inaccurately, that his plea

would give him the opportunity to later prove his innocence while he was on probation. The habeas court, however, found that both Morris and the trial court informed applicant of the effect of a no contest plea.

Although the trial court did not expressly advise applicant at the plea proceedings that a plea of nolo contendere has the same legal effect in criminal cases as a guilty plea, Morris's sworn statements and testimony indicated that he did so. In his affidavit, Morris stated that it was his habit and routine to explain the effect of a nolo contendere plea, and he testified at the 2010 habeas hearing that he would have explained that a no contest plea and a guilty plea have the same legal effect in criminal cases. Morris further indicated that he would never pressure a client into a plea or give a client false hope. Moreover, applicant's statement in the plea proceedings, "The Court finds me guilty," suggests that applicant was indeed aware that a nolo contendere plea had the same effect as a guilty plea, and the trial court's clarification in those proceedings that it would find that the evidence "substantiates" applicant's guilt was not necessarily confusing, given the use of that language in the deferred adjudication statute.[43]

5. *Suborning Perjury*

In ground five, applicant contends that Morris "knowingly suborned perjured testimony" about whether applicant was provided with testimony from the grand jury prior to the plea. Applicant also contends that Cole's letter to Barbara (about the recantation before the grand jury) demonstrates that there was an uninvestigated recantation that made the grand jury hesitate in

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[43] *See* TEX. CODE CRIM. PROC. art. 42.12, § 5(a) ("[T]he trial judge may, after receiving a plea of guilty or a plea of nolo contendere, hearing the evidence, and finding that it substantiates the defendant's guilt, defer further proceedings without an adjudication of guilt, and place the defendant on community supervision.")

returning an indictment.

Though worded negatively ("The trial court does not find"), we take the habeas court's finding to be that there never was a transcript of the grand jury proceedings. This finding is supported by the record. It does not necessarily follow, however, that Morris sought to elicit perjured or false testimony when he asked applicant if the district attorney's office "has provided us with the Grand Jury testimony." It is possible that the substance of the grand jury testimony was conveyed to the defense in some manner other than the delivery of a transcript: e.g., orally. Or it may be that Morris was told that the witnesses simply testified consistently with their reports, and so he equated the reports (which were in the State's file) with the grand jury testimony in his question at the plea. What is clear is that neither Morris nor Cole remember whether, or how, grand jury material would have been conveyed, and there is no apparent motive for Morris to ask a false question about whether the defense received grand jury testimony.

Even if Morris did elicit perjured or false testimony, it was applicant's testimony, and we do not see how applicant would have been adversely impacted. Applicant obtained what he and counsel wanted, regardless of whether counsel had elicited the testimony about the grand jury. And applicant's claim that there was an uninvestigated recantation has already been debunked.[44] Consistent with the habeas court's finding that applicant was aware of, and made the State aware of, the recantation, the record supports a conclusion that the grand jury heard about only one recantation—the tape recorded recantation produced by applicant—and it heard about this recantation through applicant's own testimony.

C. Ineffective Assistance of Adjudication Counsel (Walsh)

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[44] *See supra* part II.B.3.

1. *Failing to Raise Conflict of Interest*

In grounds six and seven, applicant contends that adjudication counsel (Walsh) was ineffective for failing to complain that the adjudication prosecutor (McGaughey) had a conflict of interest because he (McGaughey) had been applicant's defense attorney earlier in the case. It is a conflict of interest in violation of the defendant's right to counsel for a person who was the defense attorney in the proceedings in which probation was imposed to represent the State in proceedings to revoke that probation.[45]

The habeas court, however, found that no attorney-client relationship ever existed between applicant and McGaughey. This finding is supported by the record. McGaughey testified that he quoted a fee when applicant came to see him, and applicant never came back. McGaughey also explained that he had no record of receiving money from applicant and that such a record would exist if he had done so. McGaughey did not recall being asked to attend a polygraph examination, and he testified that he would not have told a client that he would attend and then not show. Because McGaughey never had an attorney-client relationship with applicant, he had no conflict of interest for Walsh to complain about.

2. *Failing to Seek Recusal of the Trial Judge*

In grounds eight and nine, applicant contends that Walsh was ineffective for failing to file a motion to recuse Judge Towery at the adjudication and sentencing hearings. Applicant contends that Judge Towery was biased because he had denied him appointed counsel, "had entered into and modified the plea bargain," and had concurred with erroneous advice from Morris that the plea was not a guilty plea and that applicant could return to prove his innocence. Applicant also pointed out

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[45] *Ex parte Spain*, 589 S.W.2d 132 (Tex. Crim. App. 1979).

that the judge had held proceedings on the motion to terminate probation, had requested a third polygraph test, and had taken the motion under advisement.

Applicant further contends that more evidence of the judge's bias was revealed at the adjudication hearing. He faults the judge for overruling defense objections, for ignoring McGaughey's (alleged) act of throwing evidence on the floor, for falsely stating that McGaughey put the evidence on a desk and that it slid onto the floor, for ignoring false statements by the prosecutor regarding whether the defense had attempted to discover evidence through the State's open file policy, and for refusing to consider evidence of innocence after ordering the State to disclose this evidence.

Applicant's allegations of bias flow solely from the judge's actions during the criminal proceedings and the information he received in connection with those proceedings. "[A] judge's remarks during trial that are critical, disapproving, or hostile to counsel, the parties, or their cases, usually will not support a bias or partiality challenge, although they may do so if they reveal an opinion based on extrajudicial information, and they will require recusal if they reveal 'such a high degree of favoritism or antagonism as to make fair judgment impossible.'"[46] Reviewing applicant's allegations in light of the record before us, we see nothing in Judge Towery's conduct that reveals a high degree of favoritism or antagonism as to make fair judgment impossible. Applicant has not even shown that Judge Towery erred in overruling the defense objections or that any of the statements the judge made were in fact untrue. But even if it were shown that the conduct or statements by the judge were erroneous as alleged, that would not establish the high degree of favoritism or antagonism required to show bias. Because the record does not show that applicant

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[46] *Gaal v. State*, 332 S.W.3d 448, 454 (Tex. Crim. App. 2011).

was entitled to have Judge Towery recused, at either the adjudication or sentencing proceedings, Walsh was not ineffective for failing to seek such recusal.

3. *Failing to File a Motion for Discovery or Present Punishment Evidence*

In grounds ten and eleven, applicant contends that Walsh was ineffective for failing to file a motion for discovery and that applicant was prejudiced as a result at both the adjudication and sentencing hearings. In ground twelve, applicant contends that counsel was ineffective for failing to call witnesses or present other evidence at punishment. Applicant discusses the exchange that occurred between Walsh and McGaughey at the adjudication hearing in which Walsh accused McGaughey of saying, "You're not getting anything else," and in which McGaughey stated that Walsh should have filed a motion for discovery. Applicant contends that McGaughey was correct that a discovery motion should have been filed. And applicant faults Walsh for failing to file a discovery motion in time for the sentencing hearing despite McGaughey's suggestion at the adjudication hearing that such a motion was appropriate. Finally, applicant faults Walsh for not presenting any witnesses or evidence at the punishment hearing except to attack the underlying plea of nolo contendere.

With respect to the adjudication hearing, applicant says it was "a due process violation not to receive these materials," but he does not specify what the alleged materials are or how they would have affected the trial court's decision to adjudicate.

With respect to the sentencing hearing, applicant contends that Walsh failed to obtain written reports that were contained in the defense exhibit for the sentencing proceedings. The defense exhibit consists of documents that were generated prior to applicant's plea of nolo contendere to the

original sexual assault case: the Sheriff's report of investigation, the letter Cole sent to Barbara, and the 1994 CPS report. Applicant contends that the documents listed willing witnesses who were very credible who could have testified at the sentencing hearing. He does not say which of the many people listed in these documents are the willing witnesses, nor does he say what these witnesses would have said. Given the nature of these documents and the fact that they were from before the original plea proceedings, it is not apparent how they would be relevant to applicant's sentencing upon adjudication. Although counsel produced no witnesses for the sentencing hearing, applicant has not, on habeas, produced—or even pointed to—any mitigating evidence that he thinks should have been presented at sentencing.

To even obtain a hearing on whether counsel's investigation was deficient, the convicted person must explain what further investigation would have revealed and how that information would be beneficial to him.[47] Applicant has failed to do this.

D. Prosecutorial Misconduct

1. *Failure to Reveal Exculpatory Evidence*

In ground thirteen, applicant contends that there were "other recantations" and ruled-out sexual assault outcries that the prosecutor (Cole) failed to reveal before applicant's plea of nolo contendere. Applicant points to the CPS investigations on April 16, 1994 and March 25, 1996, as well as to the January 4, 1995 recantation that he recorded. Applicant was aware of the April 1994

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[47] *See Jordan v. State*, 883 S.W.2d 664, 665 (Tex. Crim. App. 1994) (Motion for new trial did not put judge on notice that reasonable grounds existed to believe that counsel's representation may have been ineffective when it failed to say what further investigation would have revealed and what the witnesses would have said that would have exculpated the defendant.); *King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983) ("Counsel's failure to call witnesses at the guilt-innocence and punishment stages is irrelevant absent a showing that such witnesses were available and appellant would benefit from their testimony.").

CPS proceedings and report and of the 1995 tape-recorded recantation, in which he participated.[48] It has already been established that the tape-recorded recantation was the only recantation made prior to applicant's plea.[49] The 1996 CPS report indicates some sort of sexual abuse allegations that were ruled out, but the bare-bones document does not explain what the allegations were, who the alleged perpetrator was, or why the allegations were ruled out. At best, this document would be impeachment evidence, which the State is not required to reveal prior to a negotiated plea of guilty or nolo contendere.[50]

2. *Failure to Correct Known False Testimony*

In ground fourteen, applicant contends that Cole engaged in prosecutorial misconduct by failing to correct known false testimony in order to coerce an unwilling plea of nolo contendere. The testimony applicant alleges to be false is his own testimony that he reviewed grand jury testimony and written reports. The trial court found that Morris visited with applicant about the witnesses and the evidence, and that finding is supported by the record. The trial court did find that there was no *transcript* of the grand jury testimony, but as we have discussed earlier, that does not mean that "the grand jury testimony" was not provided in some form to applicant, and even if it were not provided, we do not see how applicant would have been adversely impacted.[51]

E. Biased Judge

In ground fifteen, applicant contends that Judge Towery was biased and should have been

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[48] *See supra* part I.A, F and part II.B.3.

[49] *See supra* part II.B.3.

[50] *See United States v. Ruiz*, 536 U.S. 622 (2002).

[51] *See supra* part II.B.5.

recused from his adjudication and sentencing proceedings. We concluded in an earlier section of this opinion that applicant has failed, from the information available at his adjudication and sentencing, to show that the judge was biased.[52]

The only new information proffered is the evidence in the habeas proceedings, and the corresponding finding, that no transcript of the grand jury proceedings ever existed. However, applicant has not convinced us that this fact means that his testimony about reviewing grand jury testimony was perjured,[53] but if it was, he does not show that the judge would necessarily have been aware of that fact. The judge is not responsible for keeping track (*sua sponte*) of what happens at the grand jury proceedings or how much of that is shared with the defendant, and as we have explained above, there are ways for the prosecution to share that information with the defendant without a transcript.[54]

F. Improper Investigation by the Sheriff's Office

In ground sixteen, applicant contends that he was denied due process because of "improper investigative procedures that conveyed a suggestive impression of guilt due to a blind focus to convict." Applicant criticizes the Sheriff who investigated his case at the time of his plea for not sending the child to a doctor on the night of her outcry. He also points to Dr. Balsley's report's mentioning that Barbara lived with her "cousins" after separating from applicant. Applicant takes this information to mean that Reisa is Barbara's cousin, and he criticizes the report of the Sheriff's Office for failing to mention that fact. He also criticizes the Sheriff's report for not mentioning

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[52] *See supra* part II.C.2.

[53] *See supra* part II.B.5.

[54] *See id.*

abuse allegations against Janice Ford. He contends that these are pertinent facts that were needed by the district attorney and the grand jury to understand the case.

We are not aware of a due process right to have the police conduct an investigation that unearths every fact or piece of evidence that might be relevant to a case. The facts and evidence applicant refers to are, at best, matters of impeachment, which the prosecution is not required to disclose to a defendant prior to a negotiated guilty plea.[55]

G. Ineffective Assistance of Appellate Counsel (Walsh)

In ground seventeen, applicant contends that Walsh was ineffective because he failed to raise any argument on appeal that the court of appeals could consider. At the time of applicant's appeal, a deferred-adjudication defendant who was adjudicated guilty was not allowed to appeal the trial court's decision to adjudicate.[56] Even now, such a defendant may not attack the original plea unless the claimed defect was one that would render the judgment void.[57] Because the defense failed to introduce any evidence at sentencing other than to attack the original plea of nolo contendere, we do not see what claim he could have raised on appeal, and applicant does not suggest one. Indeed, applicant indicates that he raises this claim merely "to properly preserve future collateral claims."

III. DISPOSITION

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[55] *See Ruiz*, 536 U.S. 622. Moreover, applicant does not claim that he was unaware of these facts. Given that Barbara was his wife, it would seem likely that he did know that Reisa was her cousin, if in fact that was the case. And applicant testified at the habeas hearing that he confronted Reisa in November about physical abuse of his children in her household. Therefore, he himself had some ability to impart these facts to the district attorney and to the grand jury (before which he testified).

[56] *See supra* n.7.

[57] *Id.*

Concluding that all of applicant's grounds are without merit, we deny the application.

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