



## IN THE COURT OF CRIMINAL APPEALS OF TEXAS

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NO. WR-76,587-02

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**EX PARTE ROBERT EARL HOLMES, Applicant**

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**ON APPLICATION FOR A WRIT OF HABEAS CORPUS  
CAUSE NO. 1251976 IN THE 228<sup>TH</sup> JUDICIAL DISTRICT COURT  
FROM HARRIS COUNTY**

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*Per curiam.*

### ORDER

Pursuant to the provisions of Article 11.07 of the Texas Code of Criminal Procedure, the clerk of the trial court transmitted to this Court this application for writ of habeas corpus. *Ex parte Young*, 418 S.W.2d 824, 826 (Tex. Crim. App. 1967). Applicant was convicted of violation of a protective order and sentenced to eight years' imprisonment.

Applicant contends that his counsel rendered ineffective assistance because counsel failed to preserve his right to appeal by notifying him of what an appeal was, or how to file one. Applicant attempted to file a *pro se* notice of appeal, but it was untimely and the appeal was dismissed. Applicant's trial counsel has provided an affidavit, in which he states that he advised Applicant of

his right to appeal, and of the deadlines for doing so. However, the affidavit does not state whether Applicant was asked if he wanted to appeal, or indicated any desire to appeal.

Applicant has alleged facts that, if true, might entitle him to relief. *Strickland v. Washington*, 466 U.S. 668 (1984); *Ex parte Lemke*, 13 S.W.3d 791,795-96 (Tex. Crim. App. 2000). In these circumstances, additional facts are needed. As we held in *Ex parte Rodriguez*, 334 S.W.2d 294, 294 (Tex. Crim. App. 1960), the trial court is the appropriate forum for findings of fact. The trial court shall obtain an additional affidavit from trial counsel, stating whether he specifically advised Applicant of how to pursue an appeal, as to whether he asked Applicant whether he wanted to appeal, and as to whether Applicant expressed any desire to appeal. Counsel shall state whether he advised Applicant of how to request appointment of appellate counsel, and shall state why he did not file notice of appeal on Applicant's behalf. The trial court may use any means set out in TEX. CODE CRIM. PROC. art. 11.07, § 3(d). In the appropriate case, the trial court may rely on its personal recollection. *Id.*

If the trial court elects to hold a hearing, it shall determine whether Applicant is indigent. If Applicant is indigent and wishes to be represented by counsel, the trial court shall appoint an attorney to represent Applicant at the hearing. TEX. CODE CRIM. PROC. art. 26.04.

The trial court shall make findings of fact as to whether Applicant was denied his right to a meaningful appeal because Applicant's counsel failed to timely file a notice of appeal. The trial court shall also make any other findings of fact and conclusions of law that it deems relevant and appropriate to the disposition of Applicant's claim for habeas corpus relief.

This application will be held in abeyance until the trial court has resolved the fact issues. The issues shall be resolved within 90 days of this order. If any continuances are granted, a copy of the

order granting the continuance shall be sent to this Court. A supplemental transcript containing all affidavits and interrogatories or the transcription of the court reporter's notes from any hearing or deposition, along with the trial court's supplemental findings of fact and conclusions of law, shall be returned to this Court within 120 days of the date of this order. Any extensions of time shall be obtained from this Court.

Filed: December 14, 2011  
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