



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-78,955-01

EX PARTE DANNY LEE HOLLOWAY, II, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. 18662 IN THE 6TH DISTRICT COURT
FROM LAMAR COUNTY**

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 a writ of habeas corpus. *Ex parte Young*, 418 S.W.2d 824, 826 (Tex. Crim. App. 1967). Applicant was charged with murder, but found guilty of the lesser-included offense of manslaughter and sentenced to twenty years' imprisonment. The Sixth Court of Appeals affirmed his conviction. *Holloway v. State*, No. 06-02-00216-CR (Tex. App. – Texarkana, November 5, 2003).

In 2007, Applicant requested DNA testing under Chapter 64 of the Texas Code of Criminal Procedure. The request was granted, and testing was performed in 2009. The results of the post-conviction DNA testing apparently excluded the victim as a contributor to DNA on a knife found

in Applicant's car shortly after the homicide. Applicant contends that the DNA test results constitute newly-discovered evidence of his actual innocence. The trial court conducted an evidentiary hearing, after which it signed an order purportedly granting Applicant a new trial.

The State appealed the trial court's order, and the Court of Appeals held that the trial court lacked jurisdiction to grant Applicant a new trial under these circumstances. *Holloway v. State*, No. 06-10-00033-CR (Tex. App. – Texarkana, December 10, 2010). On petition for discretionary review, this Court upheld the Court of Appeals' determination that the trial court lacked jurisdiction to grant Applicant a new trial, noting that post-conviction habeas corpus is the proper means for obtaining the relief sought by Applicant. *Holloway v. State*, No. PD-0324-11 (Tex. Crim. App. 2012). Applicant subsequently filed this application, in which he alleges, *inter alia*, that he is actually innocent of the offense, as shown by the newly-available DNA tests, that the State withheld favorable evidence from the defense, and that his trial counsel was ineffective. The trial court has not entered new findings of fact since this Court's opinion on the petition for discretionary review.

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 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.*

The trial court shall first supplement the habeas record with a transcript of the evidentiary hearing held on February 25, 2010. The trial court shall make findings of fact and conclusions of law as to whether the performance of Applicant's trial counsel was deficient and, if so, whether counsel's deficient performance prejudiced Applicant. The trial court shall make findings of fact as to whether the State withheld favorable evidence from the defense. The trial court shall make findings of fact and conclusions of law as to whether the results of the post-conviction DNA testing

establish that no reasonable jury would have voted to convict Applicant had the evidence been available at the time of Applicant's trial. 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. 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 forwarded to this Court within 120 days of the date of this order. Any extensions of time shall be obtained from this Court.

Filed: February 13, 2013
Do not publish