



## IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-79,073-01

EX PARTE MARCUS ARNOLD, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS  
CAUSE NO. 95157-A IN THE 147TH DISTRICT COURT  
FROM TRAVIS 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 convicted of sexual assault of a child and was sentenced to two years' incarceration. There was no direct appeal.

Applicant, through habeas counsel, claims his guilty plea was involuntary because his trial counsel: (1) failed to investigate and discover and/or the State failed to disclose exculpatory evidence; (2) failed to interview or properly advise him regarding several witnesses who could have provided a defense of promiscuity, *see, e.g., Harling v. State*, 899 S.W.2d 9 (Tex.App.—San Antonio 1995) (recognizing “The [now abolished] defense of promiscuity require[d] proof that the

complainant had engaged in consensual sexual relations with a variety of partners, continuing over a reasonable period of time”); and (3) failed to contact a witness who reported he had overheard the incident. Applicant insists he would not have pled guilty and would have proceeded to trial had trial counsel learned of the exculpatory evidence and the potential witness testimony and properly advised him on the defense.

Applicant has alleged facts that, if true, might entitle him to relief. *Strickland v. Washington*, 466 U.S. 668 (1984); *Ex parte Patterson*, 993 S.W.2d 114, 115 (Tex. Crim. App. 1999). There are no findings from the trial court regarding the veracity of the affidavits in the writ record or addressing the disputed factual allegations. In these circumstances, additional information is 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 make credibility determinations and shall resolve the disputed factual issues. To do so, 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, and if Applicant is no longer represented by habeas counsel, the trial court 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 and conclusions of law regarding the claims raised in the writ application. The trial court may also make any other findings of fact and conclusions of law it deems relevant and appropriate to the disposition of Applicant’s claims 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: March 6, 2013  
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