



**COURT OF APPEALS  
SECOND DISTRICT OF TEXAS  
FORT WORTH**

**NO. 2-09-374-CV**

IN RE TONY CHAVEZ

RELATOR

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ORIGINAL PROCEEDING  
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**MEMORANDUM OPINION<sup>1</sup>**  
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The court has considered relator's petition for writ of mandamus and is of the opinion that relief should be denied.<sup>2</sup> Accordingly, relator's petition for writ of mandamus is denied.

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<sup>1</sup> [▲](#) See Tex. R. App. P. 47.4.

<sup>2</sup> [▲](#) In its response, the State of Texas states that the Tarrant County District Clerk's office has not received relator's "Second Motion for Appointment of Counsel for Post-Conviction DNA Testing." Presentment of the motion to the trial court is a prerequisite to mandamus relief. *See O'Connor v. First Court of Appeals*, 837 S.W.2d 94, 97 (Tex. 1992) (orig. proceeding) ("Mandamus will issue when there is a legal duty to perform a non-discretionary act, a demand for performance, and a refusal."); *In re Chavez*, 62 S.W.3d 225, 228 (Tex. App.—Amarillo 2001, orig. proceeding) ("Indeed, one can hardly be faulted for doing nothing if he were never aware of the need to act."). Because relator's motion has never been received by the district clerk's office for filing, the Respondent has not been provided an opportunity to rule upon the motion.

PER CURIAM

PANEL: LIVINGSTON, J.; CAYCE, C.J.; and WALKER, J.

DELIVERED: November 20, 2009