



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-78,375-01

EX PARTE MANUAL VALDIVIA, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. 2009CR0530-W1 IN THE 437th DISTRICT COURT
FROM BEXAR 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 four counts of aggravated sexual assault of a child and sentenced to life imprisonment on two counts and ninety-nine years' imprisonment on two counts. The Fourth Court of Appeals affirmed his conviction. *Valdivia v. State*, No. 04-10-00568-CR (Tex. App.–San Antonio, delivered July 20, 2011, pet. dismiss'd).

Applicant contends that his petition for discretionary review was improperly dismissed as untimely filed. Specifically, the Applicant alleges that he delivered his petition to prison authorities

on October 17, 2011, but the petition was not mailed until October 24, 2011, after the deadline for an extension had expired.¹ The trial court finds that the petition was “received and mailed out on October 24, 2011,” and recommends that relief be denied. However, the trial court’s findings are based upon an exhibit attached by the Applicant that only reflects that the petition was mailed on that date and not that it was received in the mail room on that date.

Applicant has alleged facts that, if true, might entitle him to relief. *Campbell v. State*, 320 S.W.3d 338 (Tex. Crim. App. 2010). 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 mail room logs from the Texas Department of Criminal Justice in order to resolve the validity of Applicant’s claim in this case.

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 and conclusions of law as to whether Applicant timely delivered his petition for discretionary review to prison authorities for mailing. 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

¹ The Applicant had been granted an extension of time until October 18, 2011, in order to file his petition.

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: October 3, 2012

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