



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-78,728-01

EX PARTE JUAN REYES RIVERA, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. 08-CR-1123-C IN THE 94TH DISTRICT COURT
FROM NUECES 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 continuous sexual abuse of a child and sentenced to life imprisonment without possibility of parole. The Thirteenth Court of Appeals affirmed his conviction. *Rivera v. State*, No. 13-09-00623-CR (Tex. App. – Corpus Christi, March 10, 2011, *pet. ref'd*).

On January 9, 2012, this Court remanded to the trial court to obtain affidavits and findings addressing Applicant's claims that his trial counsel rendered ineffective assistance. On May 3, 2013, this Court received the supplemental record, which included an affidavit from trial counsel and

findings of fact from the trial court. The trial court recommends that relief be denied.

Applicant alleges, *inter alia*,¹ that his trial counsel was ineffective for failing to challenge prior convictions used to enhance his punishment. In his affidavit, counsel states that no prior convictions were used for the purpose of punishment enhancement. The trial court finds that the charge in this case was not enhanced with any prior convictions. However, the judgment in this case reflects that Applicant received a sentence of life imprisonment without possibility of parole. A sentence of life without parole is available only under specific circumstances. Under Section 12.42(c)(4) of the Texas Penal Code, the sentence is available for the offense of continuous sexual abuse of a child only if the defendant has previously been finally convicted of certain sexual offenses. If no prior convictions were used in this case to enhance punishment, there is nothing in the record to support a sentence of life without possibility of parole.

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.*

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 first supplement the habeas record with copies of the punishment charge, the jury's punishment verdict, and a transcript of the punishment proceedings in this case. The trial

¹This Court has reviewed Applicant's other claims, and has determined them to be without merit.

court shall make findings of fact and conclusions of law as to what evidence was presented during the punishment stage of Applicant's trial to support the imposition of a sentence of life without possibility of parole. If the sentence was based on a prior conviction for one of the offenses enumerated in Section 12.42(c)(4) of the Texas Penal Code, the trial court shall state whether trial counsel investigated the validity of or challenged the admissibility of such a prior conviction. 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 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: June 5, 2013
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