

**Petition for Writ of Mandamus Denied, in Part, and Dismissed, in Part, and  
Memorandum Opinion filed March 29, 2016.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-16-00203-CR**

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**IN RE VICTOR CRUZ GONZALEZ, Relator**

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**ORIGINAL PROCEEDING  
WRIT OF MANDAMUS  
183rd District Court  
Harris County, Texas  
Trial Court Cause No. 1045834**

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**MEMORANDUM OPINION**

On March 14, 2016, relator Victor Cruz Gonzalez filed a petition for writ of mandamus in this court. *See* Tex. Gov't Code Ann. § 22.221 (West 2004); *see also* Tex. R. App. P. 52. In the petition, relator asks this court to compel the presiding

judge of the 183rd District Court of Harris County, to rule on his motion for the appointment of counsel and motion for DNA testing.<sup>1</sup>

This court affirmed relator's conviction for aggravated assault and twenty-year sentence. *See Gonzalez v. State*, No. 14-07-00277-CR, 2008 WL 1991776 (Tex. App.—Houston [14th Dist.] May 8, 2008, pet. ref'd) (mem. op., not designated for publication). Relator claims that, on May 27, 2015, he filed a motion for the appointment of counsel and a motion for DNA forensic testing, and sent letters. Relator further claims that, on July 20, 2015, he sent a letter to the Harris County District Clerk advising that he not received the file-stamped copies of his motions, and asking the clerk to advise the trial court that he does not have appointed counsel, and a letter to the trial court requesting it to rule on his motion for DNA testing. On September 15, 2015, relator wrote the trial court, requesting that it either grant the motion for DNA testing, or deny it so that he could appeal the order.

Relator contends that the appointment of counsel under article 64.01(c) of the Texas Code of Criminal Procedure is a ministerial duty, and all that is required is a request for counsel and a showing of indigence.

To be entitled to mandamus relief, a relator must show that he has no adequate remedy at law to redress his alleged harm, and what he seeks to compel is a ministerial act, not involving a discretionary or judicial decision. *State ex rel.*

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<sup>1</sup> Relator names the Honorable Mary Bacon as respondent. Judge Bacon is not the presiding judge of the 183rd District Court. Instead, the Honorable Vanessa Velasquez is the current presiding judge of that court.

*Young v. Sixth Judicial Dist. Court of Appeals at Texarkana*, 236 S.W.3d 207, 210 (Tex. Crim. App. 2007) (orig. proceeding). Consideration of a motion that is properly filed and before the court is a ministerial act. *State ex. Rel. Curry v. Gray*, 726 S.W.2d 125, 128 (Tex. Crim. App. 1987) (orig. proceeding) (opinion on reh’g). However, the trial court generally has no ministerial duty to rule a certain way on such a motion. *State ex rel. Young*, 236 S.W.3d at 210.

Article 64.01 of the Texas Code of Criminal Procedure provides that a convicted person may submit to the convicting court a motion for forensic DNA testing of evidence containing biological material. Tex. Code Crim. Proc. Ann. art. 64.01(a) (West Supp. 2015). The motion must be accompanied by an affidavit, sworn to by the convicted person, containing statements of fact in support of the motion. *Id.* The convicting court shall appoint counsel if the person informs the court that (1) the person wishes to submit a motion under this chapter, (2) the court finds reasonable grounds for a motion to be filed, and (3) the court determines that the person is indigent. *Id.* art. 64.01(c).

Under the 2001 version of article 64.01(c), the Texas Court of Criminal Appeals held that the appointment of counsel was mandatory if the trial court determined that the convicted person was indigent. *See Neveu v. Culver*, 105 S.W.3d 641, 642 (Tex. Crim. App. 2001) (orig. proceeding). However, the Legislature amended article 64.01(c) in 2003. *In re Ludwig*, 162 S.W.3d 454, 454 (Tex. App.—Waco 2005, Waco, orig. proceeding). The convicting court is now required to appoint counsel only if it determines that the convicted person is indigent and finds reasonable grounds for a motion to be filed. *Id.* at 454–55.

Even if the convicting court determines that a convicted person is indigent, the court is not required to appoint counsel if it finds there are no reasonable grounds for the motion to be filed. *Id.* at 455. Such a finding is reviewed for an abuse of discretion. *Id.* Therefore, the appointment of counsel is no longer a ministerial act. *Id.* Consequently, we cannot compel the trial court to appoint counsel for relator with respect to his motion for DNA testing.

Relator also requests that we compel the trial court to rule on his motion for DNA testing. As stated above, the trial court has a ministerial duty to rule on a motion that is presented for a ruling. To be entitled to mandamus relief compelling a trial court to rule on a properly filed motion, relator must establish that the trial court (1) had a legal duty to rule on the motion; (2) was asked to rule on the motion; and (3) failed or refused to rule on the motion within a reasonable time. *In re Layton*, 257 S.W.3d 794, 795 (Tex. App.—Amarillo 2008, orig. proceeding); *In re Molina*, 94 S.W.3d 885, 886 (Tex. App.—San Antonio 2003, orig. proceeding).

It is relator's burden to provide a sufficient record to establish that he is entitled to relief. *See Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). Relator has not done so. Relator has not provided this court with a file-stamped copy of his motion, establishing that his motion is pending in the court. *See Tex. R. App. P. 52.3(k), 52.7(a)*. Relator also has not shown that his motion has been presented to the trial court. The trial court is not required to consider a motion that has not been called to its attention by proper means. *See Layton*, 257 S.W.3d at 795. Relator has not established that he is entitled to mandamus relief against the presiding judge of the 183rd District Court.

Relator also names the Harris County District Clerk as a respondent.<sup>2</sup> This court's mandamus jurisdiction is governed by section 22.221 of the Texas Government Code. Section 22.221 expressly limits the mandamus jurisdiction of the courts of appeals to: (1) writs against a district court judge or a county court judge in the court of appeals' district; and (2) all writs necessary to enforce the court of appeals' jurisdiction. Tex. Gov't Code Ann. § 22.221. The district clerk is not a district court or county court judge in this court's district, and relator has not shown that the issuance of a writ compelling the requested relief is necessary to enforce this court's appellate jurisdiction. Therefore, we do not have jurisdiction to issue a writ of mandamus against the district clerk.

Accordingly, we deny relator's petition for a writ of mandamus to the extent relator seeks relief against the presiding judge of the 183<sup>rd</sup> District Court and we dismiss relator's petition for writ of mandamus to the extent relator seeks relief against the District Clerk.

#### PER CURIAM

Panel consists of Chief Justice Frost and Justices Boyce and Wise.  
Do Not Publish — Tex. R. App. P. 47.2(b).

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<sup>2</sup> Although relator refers to Loren Jackson as the District Clerk, we note that Loren Jackson no longer holds that position. Chris Daniel is the current District Clerk.