IN THE
COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

No. _____

IN RE WARREN KENNETH PAXTON, JR., RELATOR

On Appeal from the 416th Judicial District Court
Collin County, Texas
Trial Court Cause Nos. 416-81913-2015,
416-82148-2015, 416-82149-2015

PETITION FOR WRIT OF MANDAMUS, PETITION FOR WRIT OF PROHIBITION, AND REQUEST FOR EMERGENCY RELIEF

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EMERGENCY RELIEF HAS BEEN REQUESTED

ORAL ARGUMENT NOT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

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RESPONDENT APPOINTED PRESIDING JUDGE OF THE 416TH JUDICIAL DISTRICT COURT, COLLIN CO., TX	Hon. George Gallagher 396th District Court Tarrant County, TX 401 W. Belknap Street Fort Worth, Texas 76196

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

INTRODUCTION

Relator, Warren Kenneth Paxton, Jr., seeks writs of mandamus and prohibition and requests emergency relief against Respondent, Hon. George Gallagher, presiding by assignment in the 416th Judicial District Court of Collin County, Texas, over Relator's three pending cases for alleged violations of the Texas Securities Act.[1] Emergency relief has been requested. Relator seeks a stay of Respondent's order setting a hearing for **Thursday, May 18, 2017 at 9:30 a.m.** pending resolution of Relator's petition.

At the State's request, Respondent entered an order changing venue from Collin County to Harris County pursuant to Article 31.02 of the Texas Code of Criminal Procedure on April 11, 2017. Despite the venue change, Respondent subsequently entered a scheduling order and continues to preside over the cases without the written consent of the accused or his counsel. After Relator filed written notice declaring that consent under Article 31.09 would not be forthcoming, Respondent expressed in writing his intent to continue to preside over the voir dire and jury trial in Harris County. Because Respondent had no discretion to enter the scheduling order after venue was changed to Harris County, mandamus is appropriate to vacate the scheduling order as well as a subsequent order scheduling

[1] Appx. Tab 1.

a hearing on a pleading recently filed by Relator. Moreover, Respondent has stated that he intends to continue to preside over the case without the consent of Relator or his counsel and even set a hearing in Harris County on May 18, 2017. A writ of prohibition is proper to prevent Respondent from continuing to act with respect to Relator's cases and emergency relief is necessary to stay any imminent action by Respondent.

STATEMENT OF THE CASE

Nature of the case: This is an original proceeding seeking writs of mandamus and prohibition prohibiting Respondent from continuing to preside over the case and vacating orders he has entered since venue was ordered changed.

Trial court: 416th District Court, Collin County, Texas, Honorable George Gallagher presiding by assignment.

Course of proceedings: The State filed a motion to change venue under Article 31.02 of the Texas Code of Criminal Procedure. After conducting two hearings on the motion, the trial court granted the State's motion and changed venue to Harris County. The trial court subsequently issued a scheduling order and signaled his intent to continue to preside over the case after the change without the consent of Relator or his counsel. Respondent also recently set a hearing for Thursday, May 18 2017, in connection with an objection filed by Relator pertaining to the fact that Relator's assignment to the case expired on December 31, 2016.

Trial court's disposition: The trial court entered an order changing venue to Harris County, and a scheduling order setting trial for September 11, 2017, and a hearing for May 18, 2017.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Section 22.221 of the Texas Government Code to "issue writs of mandamus and all other writs necessary to enforce the jurisdiction of the Court." TEX. GOV'T. CODE § 22.221(a). This Court has mandamus jurisdiction over Respondent because the Court in which Respondent is sitting and continuing to preside is in the district of this Court of Appeals. *Id.* at § 22.221(b). Jurisdiction to issue writs of prohibition is also conferred to this Court by Article V, Section 5(c) and 6 of the Texas Constitution. *See also* TEX. R. APP. P. 52.

ISSUES PRESENTED

Once an order changing venue in a criminal case has been entered, may a judge continue to preside over the case without the written consent of the Defendant and his counsel as required by Article 31.09 of the Texas Code of Criminal Procedure?

If not, will a writ of mandamus should issue to set aside orders entered after the change as well as a writ of prohibition issue to prohibit the judge from taking any further action on the case?

STATEMENT OF FACTS

This original action arises from actions of Respondent in continuing to preside over Relator's cases after Respondent's April 11, 2017, "Supplemental Order on Motion for Change of Venue" and after Relator's written notice that the written consent required by Art. 31.09 for Respondent to remain as presiding judge would not be given. The relevant sequence of events is as follows:

February 9, 2017	The State filed a "Motion for Change of Venue" under Article 31.02;[2]
February 16, 2017	Hearing on State's contested motion to change venue;
March 29, 2017	Continued hearing on State's motion to change venue;
April 11, 2017	Respondent ordered a change of venue from Collin County to Harris County;[3]
April 11, 2017	Relator gave written notice that consent required by Art. 31.09 would not be given and requested compliance with Art. 31.05;[4]
April 12, 2017	4:18 A.M. Respondent emailed attorneys of record asking whether a formal hearing was requested and whether he should rule on the pleadings;[5]
April 12, 2017	12:12 P.M. Relator filed a supplement to his written notice clarifying that no order was sought, only notice that he expected statutory compliance with Section 31 and Articles 31.05 and 31.09 specifically to avoid delay;[6]

[2] Appx. Tab 2.
[3] Appx. Tab 3.
[4] Appx. Tab 6.
[5] Appx. Tab 7.
[6] Appx. Tab 8.

April 12, 2017 — 1:08-1:11 P.M. Relator's counsel emailed a courtesy copy of the supplement to his notice to Respondent and attorneys of record;[7]

April 12, 2017 — 2:31 P.M. Respondent emailed all attorneys of record that he signed a scheduling order and that he intended to conduct jury selection and the trial;[8]

April 12, 2017 — Respondent entered his Scheduling Order;[9]

April 17, 2017 — Respondent emailed all attorneys of record inviting them to accompany him in Harris County to view the courtroom and other facilities;[10]

May 1, 2017, — Relator sends letter to Collin County District Clerk requesting compliance with Art. 31.05;[11]

May 5, 2017, — Collin County District Clerk files letter stating that she will not comply with Art. 31.05 on account "expressed and/or implicit" directions of Respondent;[12]

May 12, 2017 — Respondent entered an order setting hearing on a pleading filed by Paxton on May 18, 2017;[13]

May 15, 2017, — Respondent enters an amended order setting hearing on May 18, 2017.[14]

As of the date of this filing, no written consent has been given by the State, Relator, or Realtor's counsel, to the Respondent presiding over the case or the use

[7] Appx. Tab 9.
[8] Appx. Tab 10.
[9] Appx. Tab 11.
[10] Appx. Tab 12.
[11] Appx. Tab 13.
[12] Appx. Tab 14.
[13] Appx. Tab 15.
[14] Appx. Tab 16.

of existing services, and no such consent from Relator or his counsel will be forthcoming. (Appx. Tab 6-9.) After Respondent ruled that venue would be changed, Relator's counsel merely stated that he did *not object* to venue being transferred to non-contiguous Harris County. (Appx. Tab 4 at RR 9.) No other consent was given. And, as noted above, Relator's counsel objected to the change and reserved all other rights under Chapter 31. (Appx. Tab 4 at RR 9.)[15] Respondent acknowledged as much on the record. (Appx. Tab 4 at RR 9.)

[15] This objection was made and preserved on the record in the April 10, 2017, hearing. (Appx. Tab 4 at pp. 8-9.) It is also acknowledged in the "Supplemental Order on Motion for Change of Venue." (Appx. Tab 5.)

SUMMARY OF THE ARGUMENT

Writs of mandamus and prohibition are proper because once Respondent changed venue to Harris County, he was statutorily prohibited from entering further orders or continuing to preside over the case without the statutorily required written consent of Relator and his counsel.

ARGUMENT AND AUTHORITIES

Venue for trial may be changed in a criminal case pursuant to Chapter 31 of the Texas Code of Criminal Procedure. Once a change of venue order is entered, the Clerk sends the certified copy of the order, bond, together with the originals of the other documents under seal to the clerk of the court to which venue has been changed until the exhaustion of appeals. TEX. CODE CRIM. P. art. 31.05 and 31.08 § 1(a). However, "with the written consent of the prosecuting attorney, the defense attorney, and the defendant," the judge, clerk, court reporter, and court reporter in the original county may remain with the case (and keep the original papers) in the new venue. TEX. CODE CRIM. P. art. 31.09, 31.08 Sec. 2(b). No such written consent from the accused or counsel has been given or will be in this case. Regardless, Relator continues to preside over the case in Harris County.

I. Mandamus is Appropriate Because Respondent Erred in Not Removing Himself as the Presiding Judge and Issuing Orders After He Changed Venue to Harris County in Contravention of Article 31.09 of the Texas Code of Criminal Procedure.

A. The Appropriateness of Mandamus Relief.

It is well settled that mandamus relief is appropriate if it is shown that the act sought to be compelled by the writ is purely ministerial and there is no adequate remedy at law. *In re McCann,* 422 S.W.3d 701, 704 (Tex. Crim. App. 2013) (internal citations omitted). "The ministerial act requirement is satisfied if the relator can show a clear right to the relief sought because the facts and circumstances dictate but one rational decision under unequivocal, well-settled, and clearly controlling legal principles." *In re Medina,* 475 S.W.3d 291, 298 (Tex. Crim. App. 2015) (citing *In re Bonilla*, 424 S.W.3d 528, 533 (Tex. Crim. App. 2014). Similarly, "If a trial judge lacks authority or jurisdiction to take particular action, the judge has a 'ministerial' duty to refrain from taking that action, to reject or overrule requests that he take such action, and to undo the action if he has already taken it." *Id.* "In some cases, a remedy at law may technically exist; however, it may nevertheless be so uncertain, tedious, burdensome, slow, inconvenient, inappropriate or ineffective as to be deemed inadequate." *Smith v. Flack*, 728 S.W.2d 784, 792 (Tex. Crim. App. 1987).

B. Art. 31.09 Makes Clear that Respondent Had No Discretion to Continue to Preside Over the Cases Post-Venue Change Given the Lack of Written Consent of the Accused and Counsel.

Texas Code of Criminal Procedure art. 31.09 unequivocally provides, in pertinent part, "[i]f a change in venue in a criminal case is ordered under this chapter, the judge ordering the change of venue may, *with the written consent of the prosecuting attorney, the defense attorney, and the defendant*, maintain the original case number on its own docket, preside over the case, and use the services of the court reporter, the court coordinator, and the clerk of the court of original venue." TEX. CODE CRIM. PROC. art 31.09(a) (emphasis added). The necessary corollary from this provision is that if the defendant and defense attorney do not provide written consent, the judge ordering the change of venue may *not* preside over the case. Respondent was notified of this provision and Relators' withholding of consent (Appx. Tab 4). Thereafter, Respondent immediately entered his Scheduling Order and gave written notice of his intent to continue presiding over the case. (Appx. Tabs 9, 10).

As a matter of law, when Respondent changed venue to Harris County the mandates of Articles 31.05 of the Texas Code of Criminal Procedure applied. Because no written consent was or would be given by Relator or his counsel, the provisions for use of the existing judge and services in Article 31.09 is not applicable. Respondent had no discretion to enter the scheduling order and

subsequent order setting a hearing which action this Court must cure by issuing a writ of mandamus vacating the scheduling order and hearing notice and a writ of prohibition precluding Respondent from continuing to preside over or taking any further action in Relator's case other than to facilitate the change of venue to Harris County as ordered.

Prior to 1995, there was no vehicle by which a judge could change venue to another county while still maintaining the case on his or her own docket. This vehicle came in Article 31.09, but it necessitated the written consent of all parties before such an action could be taken. *Fain v. State*, 986 S.W.2d 666, 673 (Tex. App.—Austin 1998, pet ref'd). A court's actions that violate statutory procedure, such as article 31.09, are voidable. *Id.* at 671 (quoting *Davis v. State*, 956 S.W.2d 555, 559 (Tex. Crim. App. 1997)).

In *Fain*, the prosecutor, defense lawyer, and defendant entered into a written agreement allowing a change of venue to Smith County while maintaining the court's docket in Williamson County. *Fain,* 986 S.W.2d at 671. On appeal, the defendant's attorney objected to this arrangement as article 31.09 had not been made effective until September 1, 1995, nine months after the parties made their agreement. *Id.* at 673.

While first assigning this as a constitutional error and reversing the conviction, the Court of Appeals changed course on rehearing and held that the error

was statutory in nature and must be objected to at trial. *Id.* The *Fain* court went on to describe article 31.09 as an *exception* to Article V, section 7 of the Texas Constitution, which requires a district court to conduct its proceedings in the county seat of the county in which the case as pending. *Id.*, TEX. CONST. art. V, § 7. While the error was not preserved, the *Fain* court held that allowing the trial judge to preside and keep the judge on the Williamson County docket was error. *Id.* at 676 ("…the trial judge made a procedural error in his attempt to change venue while maintaining the case on his court's docket").

Similarly, here Respondent has attempted to change venue to another county while continuing to preside over the case an maintaining the case on his docket. Article 31.09 provides the sole method by which a court may continue to preside over a case in which venue has been changed. That method is only applicable where the State, defendant's counsel, and the defendant give written consent. As the requisite consent is lacking, the general rule applies and Respondent cannot preside over the case outside Collin County.

While there is no authority addressing these precise facts, the Texas Court of Criminal Appeals in *Medina, supra,* made clear that "an issue of first impression can sometimes qualify for mandamus relief when the factual scenario has never been precisely addressed but the principle of law has been clearly established." *Id.* (citing *In re State ex rel. Weeks*, 391 S.W.3d 117, 122 (Tex. Crim. App. 2013)). A relator

will be entitled to relief on an issue of first impression if "the principle of law he relies upon is 'positively commanded and so plainly prescribed under the law as to be free from doubt." *Id.* (citing *In re Allen*, 462 S.W.3d 47, 50 (Tex. Crim. App. 2015)). The principle of law upon which Relator relies upon is clearly established by the unambiguous text of Articles 31.05 and 31.09. According to those provisions, it is crystal clear that Respondent no longer had authority to preside over the case once he changed venue to Harris County without the requisite written consents.

C. Relator Has No Adequate Remedy at Law.

Neither the "Scheduling Order," nor Respondent's subsequent order setting a hearing on a defense objection, nor the Respondent's act of continuing to preside are interlocutory orders that Relator may appeal. *See* TEX. R. APP. P. 25.2; TEX. CODE CRIM. PRO. Art 44.02 *et seq*. Absent intervention by mandamus and prohibition, the Respondent will continue to unlawfully preside over the case. Thus, Relator has no adequate legal remedy.

1. Mandamus Was Appropriate Where Similarly Situated Civil Litigants Exercised their Statutory Right to Object to the Presiding Judge.

To determine that mandamus is the appropriate remedy to enforce a statutory right to object to a presiding judge, the Court need look no further than the operation of Section 74.053 of the Texas Government Code. Mandamus is routinely used to enforce the similar mandates of § 74.053 which gives a party to a civil case the right

to timely object to a visiting judge. Under that statute, if a party timely objects, the judge may not hear the case. TEX. GOV'T CODE § 74.053(b). The disqualification of the assigned judge is automatic and mandamus is appropriate where the judge erroneously continues to preside after a timely objection. *Id.; In re Canales,* 52 S.W.3d 698, 701 (Tex. 2001); *In re M.A.S.*, 05-03-00401-CV, 2005 WL 1039967, at *2 (Tex. App.—Dallas May 5, 2005, no pet.). This is nearly identical to the similar mandate of Code of Criminal Procedure Article 31.09 at issue in this case.

When the State sought, and obtained a change of venue, it, as well as Relator, obtained the right to withhold written consent to the Respondent's continued involvement in the new court and county. This is a statutorily-created right, just as civil litigants have the right to object to an assigned judge. After changing venue, the case goes to a new court with its own clerk. *See* TEX. CODE CRIM. PRO. Art. 31.05 ("and [the clerk] shall transmit the same [file] to the clerk of the court to which the venue has been changed"). As a natural consequence of changing venue to a new court, the case would ordinarily be presided over by the judge of the new court, unless the parties and their counsel consented. *See* TEX. CODE CRIM. P. art 31.09. Relator's withholding of consent under 31.09 is virtually identical to a timely objection under § 74.053, both of which are statutorily created rights for litigants. As mandamus is a proper remedy after a timely objection under that circumstance,

so it is here. As discussed below, any other potential remedy Relator is alleged to hold is illusory.

2. Any Remedy that Exists by Direct Appeal is Inadequate.

Relator cannot effectively avail himself of any other remedy. While a direct appeal or separate proceeding may be an *alternative* remedy, it is not *adequate*. The Court of Criminal Appeals has recognized that "[i]n some cases, a remedy at law may technically exist; however, it may nevertheless be so uncertain, tedious, burdensome, slow, inconvenient, inappropriate, or ineffective as to be deemed inadequate." *Smith v. Flack*, 728 S.W.2d 784, 792 (Tex. Crim. App. 1987). Under the circumstances of this case, delaying correction of Respondent's error until direct appeal "would be too burdensome and would only aggravate the harm and most likely result in a new trial compelling relator to again endure a trip through the system." *Stearns v. Clinton*, 780 S.W.2d 216, 225 (Tex. Crim. App. 1989).

In *In re Amos*, this Court found mandamus appropriate where a judge continued to issue rulings after the case had been transferred to a new Court. *In re Amos*, 397 S.W.3d 309, 315 (Tex. App. – Dallas 2013, no pet.). In that case, the Fifth Court of Appeals held that if it withheld mandamus relief, further proceedings would be improper "and any orders or judgments resulting from those proceedings will be erroneous and subject to reversal, resulting in a waste of judicial resources."

Id. at 317 citing *De Leon v. Aguilar*, 127 S.W.3d 1, 7 (Tex. Crim. App. 2004) (orig. proceeding).

This Court also recently concluded that a trial judge's order consolidating criminal cases for trial on its own motion was a circumstance a party had no adequate remedy at law to address. *In re Watkins*, No. 05-08-00103-CV, 2008 WL 400348 (Tex. App.—Dallas, February 15, 2008, orig. proceeding). As in this case, the consolidation order in *Watkins* was not the type of order that could be challenged by the relator by interlocutory appeal and violated a clear statutory mandate. *Id.* at *1-2. The remaining options available to that relator of seeking a continuance or dismissing and re-filing the charges, were deemed "uncertain at best." *Id. at* *1.

Relator should not be required to prepare for and endure a trial presided over by a statutorily prohibited judge only to challenge the error by direct appeal, and then endure another trial before a proper judge. This potential relief is even less certain than the state's ability to re-indict a criminal case and present it for trial on another day to avoid consolidation. Relator's circumstance in this case is, in fact, more urgent as he is an elected public official near the end of his term of office.

II. A Writ of Prohibition is Also Appropriate Because Respondent Has No Discretion to Continue to Preside over Relator's Cases.

A writ of prohibition is appropriate to prevent future actions of Respondent in this case. "A writ of prohibition must meet the same standards as a writ of mandamus, the former being used to 'prevent the commission of a future act whereas

the latter operates to undo or nullify an act already performed . . . .” *Medina*, 475 S.W.3d at 297 (citing *State ex rel., Wade v. Mays*, 689 S.W.2d 893, 897 (Tex. Crim. App. 1985)); *See also In re Amos*, 397 S.W.3d at 312-13. There is no question that Respondent intends to continue to preside over Relator’s cases as if consent had been given under article 31.09. Respondent has entered a scheduling order, visited Harris County to consider facilities and accommodation for trial, and entered an order setting a hearing for later this week. (Appx. Tab 15-16). Additionally, Respondent has informed the Collin County District Clerk of his intention to continue to preside over the cases, and that the Collin County District Clerk will also continue to serve as the clerk for the cases, just as if consent had been given and article 31.09 is applicable. (Appx. Tab 14). As a result, the Clerk will not send the file to Harris County. *Id.*

For the reasons articulated in the foregoing application for a writ of mandamus, Respondent had no discretion to issue the scheduling order or his order setting a hearing for Thursday, May 18th, all after changing venue, and may not continue to preside over these cases absent the required consent from Realtor and his counsel. Relator’s cases have been changed to Harris County where by statute, they should be presided over by a judge in that venue. Because Relator has no adequate remedy at law, a writ of prohibition should also issue.

III. Emergency Relief is Necessary to Prevent Respondent from Presiding in Harris County.

Respondent has set a hearing in Harris County on a pleading by Relator for Thursday, May 18, 2017. (Appx. Tab 15-16). Relator requests this Court to issue an immediate stay of any action in Case Numbers 416-81913-2005, 416-82148-2005, and 416-82149-2005, until further Order of this Court and any ruling on Relator's Petition for Writ of Mandamus and for Writ of Prohibition.

PRAYER

In addition to the emergency stay requested immediately above, Warren Kenneth Paxton, Jr., Relator, prays that this Court issue a writ of mandamus to vacate Respondent's scheduling order of April 12, 2017 as well as any other post-venue change orders, and a writ of prohibition to prevent Respondent from further presiding over these cases, including presiding over a hearing Relator has set for Thursday, May 18, 2017. Relator also prays for such other and further relief, at law or in equity, to which Relator may be entitled.

Respectfully submitted,

HILDER & ASSOCIATES, P.C.

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CERTIFICATE OF REDACTION

I certify that I have made any necessary redactions in accordance with the Orders of the Texas Supreme Court. None were required in this case.

/s/ Philip H. Hilder
Philip H. Hilder

CERTIFICATE OF COMPLIANCE

1. This Petition for Mandamus complies with the type-volume limitations of Tex. R. App. P. 9.4 because it contains 3837 words, excluding the parts of the Petition exempted by Tex. R. App. P. 9.4(i).

2. This Petition complies with the typeface requirement of Tex. R. App. P. 9.4(i)(3) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font.

Dated May 15, 2017.

/s/ Philip H. Hilder
Philip H. Hilder

RULE 52.3(j) CERTIFICATION

I have reviewed the Petition and concluded that every factual statement in the Petition is supported by competent evidence in the appendix or record.

/s/ Philip H. Hilder
Philip H. Hilder

RULE 52.10(a) CERTIFICATION

I hereby certify that I have complied with TRAP 52.10(a) by notifying all parties via electronic mail that a request for emergency relief has been filed prior to or contemporaneous with the filing of this Petition.

/s/ Philip H. Hilder
Philip H. Hilder

AFFIDAVIT REGARDING APPENDIX PURSUANT TO RULES 52.3(k) AND 52.7(a) OF THE TEXAS RULES OF APPELLATE PROCEDURE

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

Before me, the undersigned notary, on this day personally appeared Philip H. Hilder, the affiant, a person whose identity is known to me, who under oath, testified as follows:

1. "My name is Philip H. Hilder. I am Counsel for Relator Defendant Warren Kenneth Paxton, Jr., in this mandamus proceeding. I am over 21 years of age, of sound mind, and competent to make this Affidavit. I have personal knowledge of the facts in this Affidavit, all of which are true and correct. I make this Affidavit on behalf of the Relator in support of Relator's Petition for Writ of Mandamus.

2. Relator's Petition for Writ of Mandamus is supported by an Appendix containing district court orders and the Parties' filings in the district court and other documents.

3. In compliance with Rules 52.3(k) and 52.7(a) of the Texas Rules of Appellate Procedure, I attest that the pleadings, motions, orders, and other documents and information contained in the Relator's Petition for Writ of Mandamus and its Appendix are true and correct copies of such documents and information filed with, or issued by, the district court, or from my file in this case.

4. Further, Affiant sayeth not."

Philip H. Hilder

SWORN to and SUBSCRIBED before me on this the 15th day of May 2017.

Notary Public in and for
The State of Texas

NOTARY PUBLIC STATE OF TEXAS
M. Jane Faber
My Commission Expires
11/23/2020
ID No. 8050155

CERTIFICATE OF SERVICE

I certify that on May 15, 2017, I provided a copy of the foregoing Petition for Mandamus and Request for Emergency Relief to all counsel of record by delivering a true and correct copy to them by electronic delivery at the time this Petition was filed.

/s/ Philip H. Hilder
Philip H. Hilder