

No. _____

IN THE COURT OF APPEALS FOR THE FIFTH JUDICIAL DISTRICT
OF TEXAS, AT DALLAS

Mark Bell,

Relator

v.

**The Honorable Chris Oldner,
and the Honorable John R. Roach,**

Respondents

**Application for Writs of Mandamus
and/or Prohibition with Incorporated
Brief in Support and Motion for Stay
of Proceedings Below**

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Issues Presented

1. May a Prosecutor represent the State of Texas in a capital prosecution when that prosecutor has engaged in conduct which was designed to circumvent the due process rights of the defendant and which did, in fact, violate those rights?
2. May a Prosecutor represent the State of Texas in a capital prosecution when that prosecutor has instigated actions which have resulted in the loss or destruction of exculpatory evidence thus denying defendant's due process rights?
3. May a Prosecutor represent the State of Texas in a capital prosecution when that prosecutor has engaged in conduct which was designed to circumvent the defendant's right to the effective assistance of counsel and which did, in fact, violate that right?
4. Is a District Judge required to disqualify a Prosecutor from representing the State in a capital prosecution when evidence shows the prosecutor has engaged in conduct which deprived the defendant of his right to due process of law?
5. Is a District Judge required to disqualify a Prosecutor from representing the State in a capital prosecution when evidence shows the prosecutor has engaged in conduct which deprived the defendant of his right to effective assistance of counsel?

Certificate of Parties

Pursuant to the Rules of Appellate Procedure (“Tex.R.App.Pro.”), the following is a complete list of the names and addresses of all parties to the trial court’s final judgment and their counsel in the trial court, as well as appellate counsel, so the members of the court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of the case and so the Clerk of the Court may properly notify the parties to the trial court’s final judgment or their counsel, if any, of the judgment and all orders of the Court of Appeals.

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TO THE HONORABLE JUSTICES OF THE FIFTH COURT OF APPEALS:

COMES NOW, Mark Bell, Relator, complaining of the actions of the Hon. Chris Oldner, Presiding Judge of the 416th District Court of Collin County ("Respondent Oldner"), and John R. Roach, the elected Criminal District Attorney of Collin County ("Respondent Roach"), and requesting that this Honorable Court issue its writ of mandamus, its writ of prohibition, or both, against said Respondents, and in support of such application would respectfully show the Court as follows:

Relevant Facts

On February 28, 2008, a Thursday, a subpoena *duces tecum* was issued in the name of the Grand Jury investigating the State's capital murder case against Mark Bell, for the production of various items thought to be in the possession of Keith Gore, co-counsel for the Defendant, Mark Bell (see Defense Exhibit 1, RR Vol. 2, PP. 19-

20). Thereafter, Gore appeared in chambers and presented a motion to quash to the Hon. Robert T. Dry ("Judge Dry"), the trial court judge in charge of the particular grand jury. The Criminal District Attorney was represented at this meeting and at the time the court set the matter, by and through several of his assistants ("CDA Attorneys"), as detailed below.

After reviewing the documents, Judge Dry set the matter for a hearing to be held five days later, on Tuesday March 4, 2008, following the weekend (RR Vol. 2, P. 25). As stated, CDA Attorneys were present at all times, but at no time did any CDA Attorney express any fear that Gore would tamper with or destroy evidence, nor did any CDA Attorney ever expressed a problem with the timing of the hearing or, in any manner, requested that it be held earlier. No emergency was ever mentioned (RR Vol. 2, P. 26).

The record is abundantly clear that Respondent, John R. Roach, and members of the Collin County District Attorney's Office ("CDA's Office"), had actual notice that the items that it sought had been subpoenaed by the Grand Jury, that a motion to quash the grand jury subpoena, raising constitutional grounds, had been filed, and that a hearing on the Motion to Quash had been scheduled. Judge Dry fully expected the CDA's Office to comply with his order and was surprised by their actions in seeking and receiving a search warrant instead (RR Vol. 2, P. 27).

Additionally, and presumably unknown to the CDA Attorneys, Gore and co-counsel, Steve Miars, went immediately to the office of the Hon. Mark J. Rusch, with an *ex parte* request for funds for additional counsel. At that meeting, Gore and Miars

specifically expressed their concerns about the possibility of Gore's office being searched. As mentioned below, Judge Rusch dismissed such concerns out of hand.

The February 28, 2008 Indictment for Capital Murder and February 29, 2008 Warrant to Search Gore's Office

Despite the pendency of the hearing set for March 4, 2008, CDA Attorneys proceeded to secure an indictment, on Thursday, February 28, 2008, at 7:58 p.m., charging Relator with capital murder. On Friday, February 29, 2008, police officers and CDA Attorneys appeared at Judge Rusch's chambers requesting a warrant to search Gore's office. No notice was given to Relator's counsel of this request.

At 7:05 p.m. on a Friday night, after being assured by members of the prosecution team that their informant specifically corroborated earlier information about the presence of certain items, assurances later shown to be blatantly false, Judge Rusch issued a search warrant authorizing the search of Gore's office and seizure of materials pertaining to Relator's case -- in particular, items which could only be considered to be part of Gore's file pertaining to Relator's case. There was no participation by either Gore or Miers in the issuance of the warrant or the search. Additionally, Judge Rusch issued the warrant despite actual knowledge of the filing of the motion to quash the grand jury subpoena, the first attempt by CDA Attorneys to gain the information sought by the search warrant, and his oral assurances to both Gore and Miers that no judge would issue a search warrant for the offices of defense counsel authorizing the seizure of a client's file.

The Execution of the Search Warrant on Gore's Office and the Retention of Privileged Materials by the CDA's office

During the search of Gore's law office, law enforcement officers executing the search warrant took photographs of some or all of the contents. These photographs captured still and, perhaps, moving images of visible attorney-client files, documents, and other privileged materials in his office. These seized items also included photographic recordings of the files of Gore's other clients unrelated to this case. It is presently unknown, to the undersigned, whether simply still photos were taken, or if audio and/or video recordings were made during the search and seizure.

After seizing some of the materials identified in the warrant, and even materials not identified in the warrant that were part of Relator's file, the police officers, accompanied by attorney Eric Higgins, an attorney appointed by Judge Rusch to act as a "master"¹ over the search, took the materials to Judge Rusch's home. Among the materials taken to Judge Rusch's home was a sealed shoebox. The box had been delivered to Gore with the admonitions from Relator that it was "crushal" (*sic*) to his defense and that Gore preserve the integrity of its contents. Someone opened the sealed shoebox -- either Judge Rusch or one of the police officers.

Neither Gore nor Miars had previously opened the shoebox, and the contents of the once sealed container were unknown to them. Thus, Relator's counsel now has no way of refuting what may or may not have been inside the shoebox. After

¹ The authority of Judge Rusch to appoint a master to assist in this matter is questionable, at best. See *In re John R. Roach*, No. AP-76,086 (Tex.Cr.App. January 28, 2009) (unpublished).

inspecting all the privileged materials seized from Gore's office, Judge Rusch, again, without notice to Relator's counsel, turned all the materials over to the prosecution team including the CDA Attorneys.

Subsequent Grand Jury Proceedings

First Assistant District Attorney, Greg Davis, caused a grand jury subpoena to issue out of Respondent Oldner's Court to an employee of the law firm of Philips & Epperson, with whom Mr. Gore shares office space. Mr. Davis sought to interrogate the employee about the shoebox, its contents, and other subjects. A motion to quash the grand jury subpoena was filed and a hearing was held. Respondent Oldner ordered Davis to propound only certain limited approved questions to the witness, from a list of questions, as it concerned the shoebox and other subjects. These limitations were presumably designed to protect the privileges of attorney-client and attorney work product.

In the confines of the secret proceedings of the grand jury, however, where no Judge was present, Davis intentionally deviated from the list and asked several questions concerning the shoebox and other subjects that were forbidden by Respondent Oldner. Pursuant to a Court Order, counsel for Relator obtained a copy of this grand jury transcript.

Relator subsequently filed the pending motion to disqualify the District Attorney's office. That motion is based upon, among other things, Davis' intentional prosecutorial misconduct in the grand jury proceedings.

Recusal of Judge Rusch

As a result of the above actions by Judge Rusch, Relator's counsel filed a motion to recuse him from the trial. A contested hearing before an assigned Judge was conducted, and the assigned Judge granted Relator's motion to recuse Judge Mark Rusch from conducting further proceedings in this case.

Retention of the Items Seized

At the hearing on the Motion to Disqualify the CDA's office, the police officers involved in the operation by which the evidence was removed from Relator's counsel's safe-keeping, admitted that there had been a switch of the evidence, at some unknown time, while it was supposed to have been in their evidence room. The receipt which was in the shoebox, and which had been seen by several witnesses, had been taken and replaced with a business card from a security officer at Wal-Mart. Simply put, the evidence which Relator had deemed crucial to his defense, and which CDA Attorneys believed important enough that it required the issuance of a search warrant for Gore's office and all of the behavior detailed above, has been either lost or destroyed but, in any event, has been replaced with a worthless piece of paper.

Along with that destruction, Relator's defense has both literally and figuratively perished, due to the loss of the paper. Besides the obvious damage due to the loss of the actual receipt, Relator's ability to defend himself has been severely damaged in a more general sense, in that the State now knows the defense and has already started trying to diminish it by downplaying the importance of the now destroyed piece of evidence.

Seeking to develop the necessary record on the motion concerning Davis' prosecutorial misconduct, Relator's attorneys caused a subpoena to issue to Davis for his testimony. They sought to establish the facts surrounding Davis' knowledge and intent concerning the questions he asked, which Respondent Oldner presumably had not allowed. This testimony remains critical to making a record which would substantiate the violations of due process necessary to establish the grounds for the disqualification of the CDA's Office.

Relator's attempts to secure Davis' testimony for purposes of confrontation and cross-examination were thwarted at every turn by Respondent Oldner by his granting the motions of the CDA's Office to quash the subpoena. Davis was never forced to testify and give account for his actions.

Denial of the Motion to Disqualify the CDA's Office

In denying Relator's motion to disqualify, Respondent Oldner entered a "Memorandum," on October 8, 2009, in which it was simply stated that the motions filed, individually, were denied. There were no individualized findings or conclusions of law based on the hearing held.² On October 19, 2009, Applicant filed his Motion to Enter Findings of Fact and Conclusions of Law. Some two hours later, Respondent Oldner forwarded his detailed Findings of Fact and Conclusions of Law.³ Those findings are incomplete as many of the factual issues raised in the hearing were not addressed.

² See Exhibit A, attached hereto.

³ See Exhibit B, attached hereto.

For example, Respondent Oldner finds that the "Master" appointed to "oversee" the search of Attorney Gore's officer, had taken "custody" of the seized items, ignoring the fact that it was not Higgins who transported those items to Judge Rusch's home, but the police, and that Higgins merely accompanied the officers. Those items were delivered to Judge Rusch but, once again, Respondent fails in his duty to make complete findings by failing to make findings of fact on the very important issue of the opening of the box at the judge's home.

Similarly, there are no findings related to what was found in the shoebox. Since Relator's attorneys were not privy to the discovery of the receipt, having maintained a very strict policy of not opening the shoebox, the harm to Relator is palpable. Several persons purportedly saw what was in the box, and they disagree on what was there,⁴ even though the majority characterized it as a receipt. Now the contents of the box have been lost, and, as a direct result, Relator's defense has been immeasurably damaged.

Judge Dry established the procedure necessary to protect Relator's due process rights when he scheduled the hearing on the motion to suppress the grand jury subpoena for Attorney Gore, Relator's lawyer. Having been present when Judge Dry set the time and date, the CDA Attorneys were fully aware of the pendency of that hearing.

⁴ Relator would point out that, the only people to admit seeing what was in the shoebox are members of the Frisco Police Department, and they disagree on the nature of what they saw. This, if nothing else, demonstrates clearly the inherent problem caused by the misconduct of the CDA Attorneys. There will always be a conflict in the evidence, and the only item which could resolve the conflict, is now gone forever.

The evidence which Relator deemed "crushal" to his defense was taken from his attorney's possession by the unwarranted and unauthorized end run around Applicant's Due Process rights, by the attorneys for Respondent Roach, the CDA Attorneys described herein.

Respondent Oldner's Finding # 16 is particularly egregious, in that it recites that the items seized, after being taken from Judge Rusch and delivered to the police department, were "maintained" until they were ordered turned over to the court reporter. This finding neglects a central controversy shown by the testimony -- that the receipt which was in the shoebox seized and taken from Attorney Gore's office was separated from the box at some point, and presumably lost. This highly important piece of evidence, which Relator thought so important that he directed his wife to deliver it to his attorney because it was exculpatory, was most certainly not "maintained" by the police. It may have been lost, but it was clearly not maintained, or it could have been produced.

By Conclusion # 5, Respondent Oldner found that the CDA's Office did not have to abide by ("*had no . . . obligation*") a lawful order of a court with jurisdiction over the matter, nor accord Applicant the level of process due by Judge Dry's Order setting a hearing, but could circumvent that lawful order by "forum shopping" the case away from Judge Dry's court. Respondent Oldner specifically concluded, without citation to any authority, that neither Respondent Roach, nor the CDA Attorneys, had any "statutory or Constitutional obligation to wait for the hearing on the Motion to Quash Subpoena *Duces Tecum* and Motion for Protective Order set by Hon. Robert

Dry before seeking a search warrant to be issued by Hon. Mark J. Rusch." In so concluding, Respondent Oldner has called into question the obligation each and every member of the bar has to obey lawfully entered orders and, while not attacking those orders head on, to refrain from "forum shopping" in an attempt to avoid those lawfully entered orders. The conclusion is particularly offensive because it condones behaviors which are universally excoriated as appropriate or lawful for members of the bar.

Jurisdiction

Article V §6, Texas Constitution gave, and still gives, the Courts of Appeals the general appellate jurisdiction to which we have referred and "*such other jurisdiction, original and appellate, as may be prescribed by law.*" Thus, this Court has the jurisdiction and authority to entertain Relator's application.

As to mandamus, the law before 1983 gave the Courts of Appeals mandamus jurisdiction and authority in certain election matters,⁵ and authority to issue the writ of mandamus to protect its appellate jurisdiction⁶ or to compel a judge of the district or county court to proceed to trial and judgment in a cause.⁷ Otherwise the "Court of Civil Appeals ha[d] no power to mandamus the district court." See *Crofts v. Eighth Court of Civil Appeals*, 362 S.W.2d 101, 104 (Tex.1962).

⁵ See Act of June 8, 1981, 67th Leg., R.S., ch. 291, § 20, 1981 Tex. Gen. Laws 761, 773

⁶ See Act of April 13, 1892, 22d Leg., C.S., ch. 15, § 6, 1892 Tex. Gen. Laws 389, 390 (formerly VERNON'S ANN. CIV. STAT. art. 1823), amended by Act of June 19, 1983, 69th Leg., R.S., ch. 839, § 3, 1983 Tex. Gen. Laws 4767, 4768-69.

⁷ See *Id.*

In 1983, shortly after the Courts of Appeals were given jurisdiction of appeals in criminal cases, an act of the Legislature expanded their mandamus jurisdiction, and provided general mandamus authority to enforce their jurisdictions, and general mandamus authority against district and county judges in their districts.⁸ The Court of Criminal Appeals has held that the 1983 act gave the Courts of Appeals mandamus jurisdiction in criminal law matters that is concurrent with the jurisdiction of the Court of Criminal Appeals. *Dickens v. Second Court of Appeals*, 727 S.W.2d 542, 546 (Tex.Cr.App. 1987).

Relater suggests that, although the prosecution against him is for a capital offense, jurisdiction for mandamus would lie with either the Court of Appeals or the Court of Criminal Appeals, as a sentence of death has not been imposed and a life sentence would clearly provide this Court with jurisdiction over the appeal. Additionally, the Court of Criminal Appeals has recently suggested that one seeking mandamus relief should first seek relief in the Court of Appeals, "unless there is a compelling reason not to do so." See *Ex parte Ybarra*, 149 S.W.3d 147 (Tex.Cr.App. 2004).

Argument & Authorities

To demonstrate an entitlement to the requested relief, Relator must show that (1) the act sought to be compelled is purely ministerial and (2) there is no other adequate remedy at law. *Stotts v. Wisser*, 894 S.W.2d 366, 367 (Tex.Cr.App. 1995).

⁸ See Act of April 13, 1892, *supra* FN3.

More recently, in *Banales v. Thirteenth Court of Appeals*, 93 S.W.3d 833 (Tex.Cr.App. 2002), the Court of Criminal Appeals said that to establish a right to mandamus relief, a relator must demonstrate that he has "*no other adequate legal remedy*" and that "the act sought to be compelled is "*purely ministerial*." The Court further stated that a relator may satisfy the ministerial act requirement by demonstrating "*a clear right to the relief sought*." See *Id.*, citing *Hill v. Fifth Court of Appeals*. 34 S.W.3d 924 (Tex.Cr.App. 2001).

No Other Adequate Legal Remedy

If Relator cannot compel the recusal / disqualification of Respondent Roach, then his only remedy would be to submit to trial by jury, hope for an acquittal, and, if convicted, to seek relief on appeal. For the reasons stated in several cases from the Court of Criminal Appeals, and as set out below, appeal is not an adequate legal remedy. The Supreme Court of Texas recognized the futility of appeal as an adequate remedy at law such as to defeat the issuance of a writ of mandamus in a case involving, as does this case, an action seeking to disqualify an attorney. In *National Medical Enterprises, Inc. v. Godbey*, 24 S.W.3d 123, 133 (Tex. 1996), that Honorable Court wrote:

In the several cases in which we have granted mandamus relief to disqualify counsel we have not addressed the prerequisite that relief by appeal be inadequate [Citations Omitted]. This omission is attributable, not to oversight and certainly not to a view that inadequate appellate relief is not a prerequisite in disqualification cases, but to the obviousness of the issue. Plainly, NME is not required to simply hope that the pending case is concluded without disclosure of its confidences, nor is Cronen required to wait until any damage will have been done and will be irremediable. A new criminal investigation into Cronen's activities,

sparked by discovery in the pending case, cannot be reversed on appeal of this case. Moreover, the injury to the legal profession from representation by lawyers who are disqualified cannot be cured by appeal.

The Court of Criminal Appeals has previously found that appeal was not an adequate remedy at law, and, thus, granted leave to file mandamus petitions in pre-trial settings involving the attorney-client relationship. See *Stearnes v. Clinton*, 780 S.W.2d 216 (Tex.Cr.App. 1989). Similarly, it has found that appeal was not an adequate remedy at law in regards to a trial court's post-trial rulings. See *Buntion v. Harmon*, 827 S.W.2d 945 (Tex.Cr.App. 1982); see also, *Stotts v. Wisser*, *supra*.

Surely the wisdom of the State's two highest courts, expressed in the cases cited above, demonstrate that, as in those cases, it would be entirely inequitable to require Relator to endure a capital trial, under these circumstances, and the inadequacies of the appellate process in this regard. Relator has no other adequate remedy than mandamus / prohibition. .

Ministerial Acts / Entitlement to Relief

The Court of Criminal Appeals has stated that the "ministerial act" requirement means the relief sought must be "clear and indisputable" such that its merits are "beyond dispute" with "nothing left to the exercise of discretion or judgment." See *Hill*, *supra*, 34 S.W.3d at 927-928. Thus, Relator acknowledges that he must demonstrate that under the law and the facts of the case, Respondent Roach is required to recuse himself, and, that if Respondent Roach fails to do so, Respondent Oldner is required to disqualify Respondent Roach from the prosecution against Relator.

Respondent Roach Must Recuse Himself

There are instances when a prosecutor must recuse himself from the prosecution of an individual. See *Eidson v. Edwards*, 793 S.W.2d 1, 6 (Tex.Cr.App. 1990); see also generally, 31 A.L.R.3d 953. State Prosecutors are subject to the Texas Disciplinary Rules of Professional Conduct, but they must police themselves at the trial court level because of their status as independent members of the judicial branch of government. *Eidson*. 793 S.W.2d at 7.

The question then becomes, what happens when, instead of policing themselves, the prosecutors intentionally and knowingly subvert the process set by a judge in their presence, not once but twice, which, in the end, results in palpable harm to the defendant. Movant submits that the only possible remedial action is to disqualify and remove from the case Respondent Roach, the CDA Attorneys, and the entire staff of the CDA's Office, and substitute a prosecutor who has not willfully violated Relator's constitutional rights.

In *Landers v. State*, 256 S.W.3d 295 (Tex.Cr.App. 2008), the Court examined a typical situation in which arises a motion to disqualify the district attorney - that being prior representation by the newly elected district attorney which presents a potential conflict. The trial court in *Landers* conducted an extensive evidentiary hearing relating to the claim, and concluded that the prosecutor should not be disqualified because he used no confidential information which he had derived through the attorney client privilege but, rather, only information readily available to any prosecutor through public records. The Court of Appeals relied on this factor in

upholding the trial court's action and the Court of Criminal Appeals affirmed that action, finding no abuse of discretion on the part of the trial court. *See also, Ex parte Morgan*, 616 S.W.2d 625, 626 (Tex.Cr.App. 1981).

What the Court actually did decide in *Landers*, and which must be examined in the context of the instant case, is that a district attorney and / or his staff cannot be disqualified for any violation which does not demonstrate a Due Process violation. *Landers*, 256 S.W.3d at 304; see *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 927 (Tex.Cr.App. 1994); *Eidson*, 793 S.W.2d at 6. Other forms of prosecutorial conduct, such as the making of erroneous statements which are so prejudicial as to deny a fair and impartial trial, can deny a defendant Due Process or due course of law. *Miller v. State*, 741 S.W.2d 382, 392-393 (Tex.Cr.App. 1987).

In the case at bar, it has been apparent from the very action of the District Attorney's Office to circumvent that process set by Judge Dry, that Relator's Due Process rights, in this capital murder case, have been deliberately subverted by Respondent Roach and members of his office, despite Respondent Oldner's conclusion that there is no obligation on the part of a prosecutor's office to follow lawful orders of a court, either statutorily or constitutionally based. Respondent Oldner's failure to fully address the Due Process allegations, cannot be hidden or avoided by entry of incomplete and erroneous findings and conclusions.

Respondent Oldner has also failed to directly address factual issues which are the essence of both Applicant's contentions in this action as well as his defense at trial, the primary issue being the seizure of, mishandling and subsequent loss of evidence

which Applicant sought to ensure was in his attorney's hands for his defense. The shoebox was being "maintained" by the Frisco Police Department, whose representatives admitted that there had been a Wal-Mart "receipt" in the box, that it had been separated from the box which Relator had delivered to his attorney, and that it was no longer in their possession. The destruction or loss of this evidence, is nowhere addressed by Respondent Oldner in his Findings and Conclusions. This despite the fact that this loss or destruction is the definitive proof that the prosecution team's intentional actions have destroyed Relator's Due Process rights, as established by Judge Dry in his order on the motion to quash the grand jury subpoena for attorney Gore. This failure on the part of Respondent Oldner demonstrates his refusal to protect the due process rights of Applicant and, in fact, the exact opposite, a willingness to circumvent established and set process and, in so doing, the due process rights which had been granted to Relator.

Respondent Oldner is Required to Disqualify Respondent Roach

The specific holding of the Court of Criminal Appeals in *Eidson* was that a trial court is without the authority to enforce the disciplinary rules by disqualifying an entire prosecutorial office. See *Eidson, supra*, 793 S.W.2d at 7. It must be noted, however, that such ruling was supported by only a plurality of the judges involved. Four judges of the Court felt that way, but five argued that a trial court had the authority to recuse a prosecutor under the right set of facts. Four of the five concurred in the "ultimate result," but argued that the language of the plurality opinion was "unnecessarily broad . . ." *Id.*, 793 S.W.2d at 7, Berchelmann, J., concurring,

joined by Judges Clinton, Miller and Sturns. Judge Teague would have sustained the trial court's actions even under the facts of the case. See *Id.*, 793 S.W.2d at 14, Teague, J., dissenting.

Thus, even when it was delivered, it was not clear whether *Eidson* would stand for the proposition the Court's opinion was proposing. Later opinions made clear that it did not, and a trial court certainly has the authority to disqualify a prosecutor from a particular case, when the facts warrant it.

Pirtle, supra, correctly viewed *Eidson*, not as an absolute bar to disqualification of a prosecutor or his staff but, rather, cited *Eidson* for the proposition that, "A trial court may not disqualify a district attorney or his staff on the basis of a conflict of interest that does not rise to the level of a due process violation." *Pirtle, supra*, 887 S.W.2d at 927.

Additionally, *Pirtle* can be read for no proposition other than a trial court most assuredly has the power to disqualify a prosecutor, and, perhaps in the right circumstances, his entire office, and that *Eidson* should not be read as it has been - that the judge cannot, for good cause arising to a due process violation, disqualify a prosecutor from a particular case.

A sister Court of Appeals has also recognized the authority of a trial court to disqualify a prosecutor under the appropriate circumstances. See *Fluellen v. State*, 104 S.W.3d 152 (Tex.App. - Texarkana 2003). Appellant respectfully suggests that this case represents those circumstances.

In *Fluellen*, the defendant claimed that he was denied due process when the trial court refused to disqualify the prosecutor, based on a previous encounter during which "words were exchanged" between the prosecutor and the defendant. See *Id.* 104 S.W.3d 161. Citing both *Eidson* and *Pirtle*, the Texarkana Court held that a "trial court may not disqualify a district attorney or his staff on the basis of a conflict of interest that does not rise to the level of a due process violation." *Id.* Relying on language from *Eidson* that "there are instances when a prosecutor must recuse himself . . .," the Court addressed the issue from the standpoint that the prosecutor's involvement in a case would violate the Fourteenth Amendment, "'if the prosecution's failure to recuse itself violated Fluellen's due process rights, such conviction would violate the Fourteenth Amendment to the United States Constitution.'" *Id.*

Conclusion

The continued involvement in the capital prosecution of Relator by Respondent Roach and the CDA Attorneys has worked and will continue to work to violate Relator's right to due process. Respondent Roach has the ministerial duty to recuse himself and the CDA Attorneys from such prosecution. Alternatively, because Respondent Roach has refused to recuse himself, the CDA Attorneys and all of the CDA's staff, Respondent Oldner has the ministerial duty to do so. Relator has no other adequate remedy at law and is clearly entitled to relief. This Court's writs of mandamus / prohibition should issue.

Motion for Stay of Proceedings Below

Relator would respectfully show the Court that pre-trial hearings are set to begin soon. Relator would further show the Court that, should the pre-trial matters and, ultimately, the trial be permitted to begin as scheduled, the harm he will suffer from Respondent Roach's involvement in the case will become irreparable. Consequently, Relator respectfully requests that this Court issue its order staying all proceedings in case number 416-80453-08 in the 416th District Court of Collin County, styled "*The State of Texas v. Mark Bell*," until such time as this Court has had the opportunity to address the merits of the claims stated herein.

Requests for Supporting Record Have Been Made

Relator would also show the Court that he has this day forwarded to the court reporters who transcribed the hearing discussed in this application a request for production and filing of an official transcription ("reporter's record") of those proceedings.⁹ Additionally, Relator would show the Court that he has also forwarded to the District Clerk a request for production and filing of true and correct copies of any and all documents related to the claims asserted herein.¹⁰ Relator respectfully requests that this Court issue its order instructing the District Clerk and court reporters to forward the requested records to this Court, to be used in conjunction with this application.

⁹ See Exhibit C, attached hereto.

¹⁰ See Exhibit D, attached hereto.

Prayer

WHEREFORE, PREMISES CONSIDERED, Mark Bell, Relator, respectfully prays that this Honorable Court will issue its order instructing the District Clerk and court reporters to forward the requested records to this Court, to be used in conjunction with this application, and staying all proceedings in case number 416-80453-08 in the 416th District Court of Collin County, styled "*The State of Texas v. Mark Bell*," until such time as this Court has had the opportunity to address the merits of the claims stated herein; and, in due course, issue its writ of mandamus and/or prohibition requiring Respondent John R. Roach, to recuse himself from the capital prosecution against Relator; or, alternatively, requiring Respondent Judge Chris Oldner to issue an order disqualifying Respondent Roach from the capital prosecution against Relator.

Respectfully submitted by:

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Certificate of Service

This is to certify that a true and correct copy of the above and foregoing “*Application for Writs of Mandamus and/or Prohibition with Incorporated Brief in Support*” was hand-delivered, mailed postage pre-paid or transmitted via telecopier (*fax*) to the Hon. Chris Oldner, Presiding Judge, 416th District Court, 2100 Bloomdale Rd, Ste 20030, McKinney, Texas 75071; and to the Hon. John R. Roach, Criminal District Attorney, 2100 Bloomdale Rd, Ste 20004, McKinney, Texas 75071; on November 20, 2009.

Steven R. Mears