

No. 05-09-01457-CV

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DALLAS

**In the Court of Appeals for the  
Fifth District of Texas at Dallas**

**In re John R. Roach,**  
**Collin County Criminal District Attorney, §**  
Relator

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§

Seeking mandamus relief in cause numbers 199-80283-08, 199-80284-08, 199-80285-08 & 199-80286-08 in the 429th District Court of Collin County, Texas, the Honorable John McCraw, Judge Presiding by Assignment.

§ § §

**Petition for Writ of Mandamus**

§ § §

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## Identity of Parties and Counsel

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### Respondent:

The Honorable John McCraw  
Judge Presiding by Assignment  
429th District Court

### Real Party in Interest:

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### Counsel for Real Party in Interest:

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Seeking mandamus relief in cause numbers 199-80283-08, 199-80284-08, 199-80285-08 & 199-80286-08 in the 429th District Court of Collin County, Texas, the Honorable John McCraw, Judge Presiding by Assignment.

To the Honorable Court of Appeals:

**Statement of the Case**

These cases arise from four criminal cases pending in the 429th District Court. Robert Lee Blackburn, the Real Party in Interest, is charged by indictment with possession of a controlled substance, harassment of a public servant, tampering with physical evidence, and assault on a public servant. Respondent, the Honorable John McCraw, is the judge currently assigned to the 429th District Court. On December 3, 2009, Respondent permitted Blackburn to enter pleas of guilty to the Court without the State's consent to Blackburn's waiver of jury trial and over the State's objection on the record. Relator, Collin County Criminal District Attorney John Roach, seeks issuance of a writ of mandamus ordering Respondent to set aside Blackburn's guilty plea and set the cases for a jury trial. The case is on the docket for December 8, 2009. Concurrently with

this Petition, the State has filed an Emergency Motion for Temporary Relief seeking a stay of proceedings in the trial court.

### **Statement of Jurisdiction**

This Court has jurisdiction to issue writs of mandamus against a judge of a district court in Collin County. Tex. Gov't Code Ann. § 22.221(b)(1)(Vernon 2004)(general writ authority); Tex. Gov't Code Ann. § 22.201(f)(Vernon Supp. 2009)(Fifth Court of Appeals District includes Collin County). The 429th District Court is a Collin County District Court. Tex. Gov't Code Ann. § 24.573 (Vernon Supp. 2009). This Court's jurisdiction to issue writs of mandamus extends to criminal cases. *Padilla v. McDaniel*, 122 S.W.3d 805, 807 (Tex. Crim. App. 2003).

### **Issue Presented**

The Code of Criminal Procedure requires felony criminal cases be heard by a jury unless the defendant, the trial court, and the attorney for the State agree to waive a jury. The State declined to waive a jury in this case, but the trial court nonetheless allowed the defendant to plead guilty without a jury over the State's objection. Did the trial court violate a ministerial duty to convene a jury trial?

## **Statement of Facts**

Blackburn stands charged by indictment with four felony offenses. (Appendix A, certified copies of indictments). On December 3, Respondent allowed Blackburn to enter guilty pleas to the court. (Appendix G, reporter's record). The attorney for the State did not consent to Blackburn's waiver of jury trial. (Appendix C, certified copies of jury waivers; Appendix G at 7). The attorney for the State objected to the entry and acceptance of the guilty pleas and requested that the case be set for jury trial. (Appendix G at 6-16). Respondent overruled the objections and accepted Blackburn's pleas of guilty. (Appendix G at 16-17). The cases are on the trial court's docket for December 8, 2009. (Appendix C, certified copies of docket sheets).

## Argument

### *Mandamus is the Appropriate Relief*

When mandamus is sought to require a court to withdraw an order, the relator must demonstrate both that there is no other adequate legal remedy and there is an indisputable right to the relief sought. *Greenwell v. Court of Appeals 13th Jud. Dist.*, 159 S.W.3d 645, 648 (Tex. Crim. App. 2005). The issuance of the writ is not a matter of right but rests instead in the sound discretion of this court of appeals. *See Dickens v. Second Court of Appeals*, 727 S.W.2d 542, 549 (Tex. Crim. App. 1987).

### *Relator Has No Other Remedy*

Relator is the attorney for the State in Collin County and represents the State of Texas in all felony cases in his county. *See* Tex. Code Crim. Proc. Ann. art. 2.01 (Vernon 2005)(duties of district attorneys); Tex. Gov't Code Ann. § 44.143 (Vernon 2004)(duties of Collin County Criminal District Attorney). As a party in criminal litigation, the State has only a limited right of appeal. *See generally* Tex. Code Crim. Proc. Ann. art. 44.01 (Vernon Supp. 2009). A trial court's determination to conduct a bench trial in the absence of the State's consent and over the State's objection is not among the enumerated items that the State may appeal. *See id.* Respondent's order in this case does not exclude evidence, dismiss a case, grant DNA testing, or assess an illegal sentence. Accordingly, Relator has no other means but mandamus in order to enforce the provisions of Article 1.13.

*Respondent Has a Ministerial Duty to Conduct a Jury Trial if the Attorney for the State Does Not Consent to a Bench Trial*

In Texas, a jury must hear felony criminal cases unless the defendant waives his right to a jury trial in writing in open court, with the consent and approval of the trial court, and with the consent and approval of the attorney for the State. Tex. Code Crim. Proc. Ann. art. 1.13 (Vernon 2005). A trial court has a ministerial duty to conduct a jury trial in the absence of the attorney for the State's consent and approval of a defendant's waiver of jury trial. *State ex rel. Curry v. Carr*, 847 S.W.2d 561, 562 (Tex. Crim. App. 1993)(per curiam); *State ex rel. Turner v. McDonald*, 676 S.W.2d 371, 374 (Tex. Crim. App. 1984).

In this case, the attorney for the State did not consent to Blackburn's waiver of a jury trial. Indeed, the reporter's record demonstrates that the attorney for the State did not consent and objected to Respondent's acceptance of Blackburn's guilty plea. (Appendix G at 6-16). Respondent overruled the objection and accepted the plea. (Appendix G at 12, 16). Moreover, Blackburn's written jury waivers do not contain the signature of the attorney for the State. (Appendix C). Respondent was fully apprised of the applicable law during the proceeding below. (Appendix G at 7, 9). The attorney for the State provided Respondent with copies of Article 1.13, *Carr*, and *McDonald*. Accordingly, Respondent violated a ministerial duty by accepting the guilty pleas without the State's consent and over the State's objection. *See Carr*, 847 S.W.2d at 561; *McDonald*, 676 S.W.2d at 374.

*Blackburn Has No Overriding Right to a Bench Trial Before a Particular Judge*

Respondent stated on the record that he believed a criminal defendant had the right to plead guilty under the federal constitution even if the State did not consent. (Appendix G at 7). Criminal defendants do not have a unilateral right in Texas to have their guilt and punishment for a felony determined by a judge. *McDonald*, 676 S.W.2d at 373. The United States and Texas Constitutions guarantee only the right to a jury trial. U.S. Const. amend. VI; Tex. Const. Art. 1, §10; *Singer v. United States*, 380 U.S. 24, 36 (1965)(no right to bench trial under federal constitution); *McDonald*, 676 S.W.2d at 373 (no right to bench trial under Texas constitution).

Under Texas law, to have punishment for a felony determined by a judge, a defendant must validly waive a jury trial and plead guilty, or he must plead not guilty to a jury and elect that the judge assess punishment. *See* Tex. Code Crim. Proc. Ann. art. 1.13; Tex. Code Crim. Proc. Ann. art. 26.14 (Vernon 2009); Tex. Code Crim. Proc. Ann. art. 37.07, § 2(b) (Vernon Supp. 2009). In the absence of a valid jury waiver, a defendant retains the right to plead guilty, but in such cases a jury must assess punishment. Tex. Code Crim. Proc. Ann. art. 26.14. The Legislature's enactment of the "consent" language in Article 1.13 ensures that, if the attorney for the State believes that justice requires a jury to pass on the guilt of an accused, there is a means to vindicate that interest. *McDonald*, 676 S.W.2d at 373-74.

Blackburn's counsel at trial argued that he was entitled to plead guilty because he did not want to dispose of the case before a different visiting judge but rather wanted the elected judge to assess punishment on the case. (Appendix G at 10-12). The Court of

Criminal Appeals has held that parties to criminal cases have no right to object to a properly assigned judge presiding over a criminal case. *Lanford v. Fourteenth Court of Appeals*, 847 S.W.2d 581, 587 (Tex. Crim. App. 1993). Respondent's improper acceptance of Blackburn's guilty pleas allows Blackburn an end run around the prohibition announced in *Lanford*. Just as Blackburn has no unilateral right under Texas or federal law to have his guilt and punishment determined by a judge, he has no right to have such determined by a *particular* judge. *See id.*, *see also Singer*, 380 U.S. at 36; *McDonald*, 676 S.W.2d at 373.

*The Record Adequately Reflects the Matters Complained of*

Additionally, although there is no written order reflecting Respondent's ruling, this does not preclude the Relator's request for mandamus relief. The appellate rules require that a mandamus petition contain, within its appendix, "a certified or sworn copy of any order complained of, or *any other document* showing the matter complained of." Tex. R. App. P. 52.3(j)(1)(A) (emphasis added). Accordingly, this Court has recognized that in cases where the reporter's record adequately shows the matter complained of, the record is adequate for purposes of appellate rule 52.3(j)(1)(A) and will support a petition for mandamus relief. *See, e.g., In re Red River Construction Co.*, No. 05-07-01117-CV, 2007 WL 2447290, at \*1 (Tex. App.—Dallas Aug. 30, 2007, orig. proceeding) (recognizing that a reporter's record may adequately show the matter complained of for purposes of rule 52.3(j)(1)(A) but holding that the reporter's record in that case was not adequate to show the trial judge's "definite ruling").

Other courts have also held that a reporter's record that adequately shows the complained-of ruling is sufficient to support a request for mandamus relief. *See, e.g., In re Bill Heard Chevrolet, Ltd.*, 209 S.W.3d 311, 314 (Tex. App.—Houston [1st Dist.] 2006, orig. proceeding); *In re Mata*, 212 S.W.3d 597, 604 (Tex. App.—Austin 2006, orig. proceeding); *In re Bledsoe*, 41 S.W.3d 807, 811-12 (Tex. App.—Fort Worth 2001, orig. proceeding); *In re Perritt*, 973 S.W.3d 776, 779-80 (Tex. App.—Texarkana 1998), *overruled on other grounds*, 992 S.W.2d 444 (Tex. 1999). Cases that hold otherwise are based on an interpretation of the former version of appellate rule 52.3(j)(1)(A), which explicitly required that the mandamus petition be accompanied by a written order. *See In re Perritt*, 973 S.W.2d at 779.

In this case, the reporter's record accurately reflects the proceedings below. Respondent accepted Blackburn's guilty pleas without the consent of the attorney for the State as to Blackburn's waiver of jury trial. Moreover, certified copies of Blackburn's written jury waivers are attached to this petition—they are not signed by the attorney for the State or the trial judge. (Appendix C). The record therefore reflects that Respondent violated a ministerial duty even in the absence of a written order on the matter.<sup>1</sup>

The benchmark for criminal justice in Texas—and the United States—is the trial by jury. Only on agreement of all three parties concerned—the defendant, the State, and the trial court—is a trial before the court authorized by law. Relator's ultimate duty as Collin County Criminal District Attorney is to see that justice is done. Tex. Code Crim.

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<sup>1</sup> The attorney for the State presented respondent with a written order, approved by counsel for Blackburn, memorializing the events below. Respondent declined to sign the order.

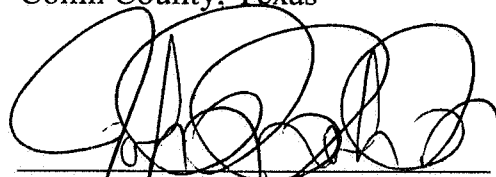
Proc. Ann. art. 2.01 (Vernon 2005). That duty may require Relator to seek a jury trial in accordance with Texas law. *McDonald*, 676 S.W.2d at 373-74. Because Respondent's rulings in this case contravene Article 1.13 and the well-established cases construing it, he has a ministerial duty to conduct a jury trial on Blackburn's criminal cases. Relator lacks any other remedy. Accordingly, this Court should grant this Petition and order Respondent to vacate his acceptance of Blackburn's guilty pleas, to set those pleas aside, and to set the cases for jury trial.

**Prayer**

Relator prays that this Court grant this Petition and order Respondent to vacate his acceptance of Blackburn's guilty pleas, to set those pleas aside, and to set the cases for jury trial.

Respectfully submitted,

**JOHN R. ROACH**  
Criminal District Attorney  
Collin County, Texas

A handwritten signature in black ink, appearing to read "John R. Rolater, Jr.", written over a horizontal line.

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