No. 19-6971

In the Supreme Court of the United States

Comfort Delando Roberts-Pro Sec, Applicant

v.

The State of Texas,

Respondents.

On Application for Recall and Stay

EMERGENCY APPLICATION FOR A RECALL AND STAY OF ~~MANDATE~~ mandate cr.
PENDING THE FILING AND DISPOSITION OF
A PETITION FOR A WRIT OF CERTIORARI

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

The parties to the proceeding below are as follows:

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The related proceedings below are:

1. *Comfort D. Roberts vs The State of Texas, 4th Court of Appeals District* No. 04-18-00345CR, Judgment entered October 09, 2019;

2. *Comfort Roberts vs The State of Texas*, 186th Judicial District- San Antonio, Texas. No.2016-CR-11457 – Judgment entered May 17, 2018.

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To the Honorable Justice(s) of the Supreme Court of the United States:

Less than three weeks ago, petitioner filed an application for Stay and or Relief of Mandate with the 4th Court of Appeals pending the filing and disposition of a writ of certiorari with the United States Supreme Court. The application with the 4th Court of Appeals was filed in accordance with Rule 18.2 and 18.7 of Texas Rules of Appellate Procedures (see ~~exhibit~~ Appendix A). Under Texas Rule of Appellate Procedure 18.2, parties are entitled to "move to stay issuance of the mandate pending the United States Supreme Court's disposition of a petition for writ of certiorari." Petitions for writ of certiorari in this matter would be due on or before January 08, 2020. Because of Appellant's right to move the 4th Court of Appeals to stay the mandate under Rule 18.2, issuance of the mandate was premature, and the mandate should have been recalled and its issuance stayed pending filing and disposition of a petition for writ of certiorari with The United States Supreme Court. However, The State of Texas is well known for its discriminatory practices toward African American men, see (***Miller-El v. Dretke***, 545 U.S. ____ (2005)).

14 days after the filing of the application for stay and or recall of mandate, the 4th Court of Appeals denied petitioner's request for stay despite the substantial grounds within the application to include the serious harm to petitioner or others if the mandate's issuance were to later be reversed by the United States Supreme Court (see ~~exhibit~~ Appendix B). The petitioner to-date has already suffered grave harm as a result of the unjustified and discriminatory practices of the 186th Judicial Court District in San Antonio, Texas. The matter was compounded when the 4th Court of Appeals knowing refused to rule on the side of justice for concern of it being an election year in Bexar County. Therefor the action of the 4th Court of Appeals left petitioner no choice but to turn to The United States Supreme Court to be heard and given a voice so that the

millions of other African American men behind petitioner will not have to suffer the same illegal and unjustified discriminatory practice of denying defendants their rights as guaranteed by the US Constitution.

The Petitioner is an honorable veteran with over twelve years of service in the United States Army, an advanced degree college graduate, skilled nurse and single father of 5 biological children. Petitioner is raising his minor children without the assistance of the absent mother or any other family member to rely upon. In addition to the five children of petitioner, one is a special needs child, whom has a close bond with his father. The petitioner has been a law-abiding citizen with no prior convictions and has served his community well. As a result of the 4th Court of Appeals actions to prematurely issue the mandate on 10/09/2019 and denying petition right to stay the mandate pending filing and disposition of writ of certiorari with The United States Supreme Court, petitioner and others have suffered grave harm with the potential for more harm to follow. Thus far the petitioner has suffered grave harm resulting in the loss of his federal license to practice as a Licensed Nursing Facility Administrator, a six-figure salary and a reduced ability to care for his minor children. However, the worst is yet to come, the Judge ordered petitioner to serve 2 years jail time with 5 years supervised probation, with full knowledge that petitioner has fully paid Anceria Motors the entire sum due of $6000.00 (see ~~exhibit~~ Appendix C, receipt from Bexar County showing Anceria has been paid in full).

Prior to sentencing Judge Moore, stated that he personally felt defendant was guilty of other criminal offenses, despite no other charges or convictions that he was going to levy a harder sentence because he could as the judge. The Judge's actions and behavior is a

gross abuse of judicial power and a violation of defendants 5th amendment right to Due Process of Law, defendant's Universal Declaration of Human Rights under Article 11, The Presumption of Innocence. Because of premature issuance of mandate, petitioner was ordered to surrender himself to Bexar County Jail on 01/03/2020. Going to jail before this Court would issue the Stay would cause further undue harm to petitioner and his minor children. Petitioner's children would go into foster care and be spit up, the family residence would be lost to foreclosure, and petitioner's nursing license would be revoked. Leaving petitioner unable to return to society and care for his minor children.

The Court should grant this application to recall and stay the mandate issued by the 4th Court of Appeals on October 9, 2019. The petitioner filed a Writ of Certiorari with The United States Supreme Court on December 13, 2019 in which petitioner asked the Court to consider the following federal questions:

The "TOTALITY OF REPRESENTATION "SHOWS THE PERFORMANCE OF COUNSEL, RONALD D. ZIMMERMAN WAS OBJECTIVELY DEFICIENT AND THEREBY DENIED APPELLANT HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

The "TOTALITY OF REPRESENTATION "SHOWS THE PERFORMANCE OF COUNSEL, RONALD D. ZIMMERMAN WAS OBJECTIVELY DEFICIENT AND THEREBY DENIED APPELLANT HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW.

The "TOTALITY OF REPRESENTATION "SHOWS THE PERFORMANCE OF COUNSEL, RONALD D. ZIMMERMAN WAS OBJECTIVELY DEFICIENT AND THEREBY DENIED APPELLANT HIS SIXTH AMENDMENT RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY.

The "TOTALITY OF REPRESENTATION "SHOWS THE PERFORMANCE OF COUNSEL, RONALD D. ZIMMERMAN WAS OBJECTIVELY DEFICIENT AND THEREBY DENIED APPELLANT HIS SIXTH AMENDMENT RIGHT TO CONFRONT MY ACCUSER.

The "TOTALITY OF REPRESENTATION "SHOWS THE PERFORMANCE OF COUNSEL, RONALD D. ZIMMERMAN WAS OBJECTIVELY DEFICIENT AND THEREBY DENIED APPELLANT HIS UNIVERSAL DECLARATION OF HUMAN RIGHTS "UNDER ARTICLE 11, THE PRESUMPTION OF INNOCCENSE

For these reasons listed in this application, Applicants respectfully ask the Court to recall and stay the 4th Court of Appeals mandate pending the filing and disposition of Applicants' petition for certiorari.

Petitioner ask the Court to administratively recall and stay issuance of the mandate pending disposition of this Application by January 2, 2020.

OPINIONS BELOW

The 4th Court of Appeals opinion is not yet reported.

JURISDICTION

On December 4, 2019, Applicants filed a motion to recall and stay the mandate with the 4th Court of Appeals. On December 18, 2019, the 4th Court of Appeals denied Petitioner's Applicants for Stay. Petitioner and others will suffer irreparable harm on January 3, 2020. This Court has jurisdiction now to entertain and grant a request for a recall and stay of the mandate pending filing of a petition for certiorari under 28 U.S.C. § 2101(f),(d).

STATEMENT OF THE CASE

Appellant was charged by indictment on December 13, 2016 with theft-[$1,500-$20,000],check, alleged to have occurred on June 9, 2015. Appellant elected the Judge for sentencing if convicted. A jury found defendant guilty as charged on March 28, 2018. Sentencing occurred

on May17, 2018, at which the trial court assessed: (1) a fifteen-hundred dollar [$1,500] fine; and (5) two [2] years in state jail probated for a like period of community supervision;(3) six-thousand dollars [$6,000] of restitution; and (4) 180 days' county jail as a condition of probation. Appellant timely filed notice of appeal on May 23, 2018. The Bexar County Public Defender's Office was appointed as appellate counsel on May 24, 2018. Appellant Brief filed December 18, 2018 in the 4th Court of Appeals in San Antonio, Texas. On August 28, 2019, PDR filed with the Criminal Court of Appeals (refused to hear).

The 4th Court of Appeals decision to deny appellant's claims of ineffective assistance of trial counsel raised on direct appeal directly conflicts with Texas Criminal Court of Appeals. See (Lopez v.State, 315 S.W.3d 90, 96 (Tex. App.—Houston[1st Dist.] 2010) (citing, Robinson v. State, 16 S.W.3d 808, 813 n.7 (Tex. Crim. App.2000)). However, the conflict within The 4th Court of Appeals also creates conflict and contradiction of the laws and precedents previously established by The United States Supreme Court. See (Strickland v. Washington, 466 U.S. 668, 687, 694(1984); Tong v. State, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000); Hernandez v. State, 726 S.W.2d 53, 57 (Tex. Crim. App. 1984). Which in turn gives rise to a federal question under the 6th Amendments of the United States Constitution, requiring The United States Supreme Court to intervene in this matter. A failure of The United States Supreme Court to intervene in this matter would send a clear message to every other Court in the nation that they are above the law and not required to obey the rules established under the U.S. Constitution and enforced by the highest Court in the Land.

Prejudice is proven if a mere "reasonable probability" exists that, but for counsel's deficient performance, the result of the proceeding would have been different. (Hawthorn v. State, 848 S.W.2d 101, 118 (Tex. Crim. App. 1992). A reasonable probability is one sufficient to undermine confidence in the outcome of the case. Strickland, 446 U.S. at 694; Miniel v. State, 831 S.W.2d 310, 323 (Tex. Crim. App. 1992). However, a defendant need not prove that counsel's actions "more likely than not" altered the outcome of the trial. Harrington v. Richter, 131 S. Ct. 770, 792 (2001). Deficient assistance exists whenever counsel's performance falls below an objective standard of reasonableness as judged by prevailing professional norms. Moore v. State, 4 S.W.3d 269, 272 (Tex. App.—Houston [1st Dist.] 1999). Any presumption that counsel did perform adequately may be overcome by a mere preponderance of the evidence that is well-grounded in the record. Robertson v. State, 187 S.W.3d 475, 482-83 (Tex. Crim. App. 2006). The representation is viewed from counsel's perspective at the time of trial so as to avoid the distorting effects of hindsight. Id. Ineffective assistance may arise from a single egregious error or may be inferred from the "totality of the representation." Vasquez v. State, 830 S.W.2d 948, 950-51 (Tex. Crim. App. 1992); McKinney v. State, 76 S.W.3d 463, 470-471 (Tex.App.—Houston [1st Dist.] 2002, no pet.).If the totality of the representation shows that no competent attorney would have engaged in a particular course of conduct, then counsel's performance may be ruled ineffective, as a matter of law, even if the record does not list the subjective reasons that motivated counsel's actions or inactions. Goodspeed v. State, 187 S.W.3d 390, 392(Tex. Crim. App. 2005); see also Andrews v. State, 159 S.W.3d 98,

102 (Tex. Crim. App. 2005) (stating, "[If] no reasonable trial strategy could justify trial counsel's conduct, counsel's performance falls below an objective standard of reasonableness, as a matter of law, regardless of whether the record adequately reflects the trial counsel's subjective reasons for acting as counsel did") (emphasis added).

B. Application of Law to Facts.

Counsel voiced Here, trial counsel, Ronald D. Zimmerman [TBN: 24038203], committed at least three [3] acts or omissions that either jointly or severally fell below an objective standard of reasonableness.

- **Counsel Failed to Properly Challenge the Transaction Video Admitted through Stephan Konecko, Because, By His Own Admission, Counsel Suspected that Video had Either been Edited or was Otherwise Incomplete.**

Counsel voiced concerns at trial that the video admitted through Stephan Konecko had either been edited or was incomplete, as the following record reflects:

[BY MS. BIGGS] Q: And is State's Exhibit Number 3 a true and accurate depiction of events as they occurred that day on June 9th, 2015?

A: Yes, it is exact.

MS. BIGGS: Okay. At this time, Your Honor, I would offer State's Exhibit Number 3 into evidence.

MR. ZIMMERMAN: Objection, Your Honor. If I may approach?

THE COURT: Yes, sir.

THE COURT: We are at a bench conference out of the hearing of the jury. Go ahead.

MR. ZIMMERMAN: Your Honor, the State has tendered a copy of that and I have a question as to the very beginning, whether it was edited or not. I'm a little concerned that if it was edited, then I would like to have at least the entire video available to the Defense.

THE COURT: Denied. This should have been brought up pretrial. What we'll do is we'll let you cross-examine the witness about it later when you get to cross-examine. Objection is overruled.

The Court's ruling shows this is an important issue which: (1) "should have been brought up pretrial;" or (2) at least have been made subject to vigorous adversarial testing during cross examination. The record reveals, however, that defense counsel did neither. Demonstrating no pretrial motion was ever filed or heard regarding edited or incomplete video. Also establishing counsel asked exactly no questions during cross examination concerning whether Konecko was aware that his video was either edited or incomplete). Thus, the trial court's own observations and ruling acknowledge the deficient nature of trial counsel's conduct.

- **Counsel Repeatedly Failed to Object to Testimonial Hearsay Gathered by Sandra Nagore in Anticipation of Criminal Litigation.**

(a) Law Enforcement Work Product.

Sandra Nagore, a former D.A. Check Section supervisor, identified the "DA's check section file on Comfort Roberts" as State's Exhibit 5. The file included various documents generated in anticipation of criminal litigation by personnel in her office. At trial, the State asked Nagore to read certain contents of the State's file, as the following record reflects:

Q: Okay. Can you tell me what that final notice says?

A: Um, verbatim? Basically...the letter is stating that this is the final notice that we will be giving you before we proceed [to trial].

Q: Tell me what it reads.

A: Bexar County District Attorney's Office has received a complaint against you for the offense of a theft by check. We have sent you a prior notice of this complaint and you have not responded. Continue?

Q: Keep going.

A: We are concluding our investigation on this case and a warrant for your arrest may be forthcoming. Upon the warrant being issued, you will be subject to arrest by any law enforcement agency in the State. You must comply with this notice within seven days in order to avoid a warrant being issued. If you wish to avoid this -- these consequences, you must immediately obtain a money order or Cashier's Check for restitution, merchant fees and district attorney's fees in the amount of $6,105. Make Cashier's Check or money order payable to the District Attorney's Office Check Section. No personal checks. If paying in person with cash, it must be in the exact amount as no change is provided or available. And then the address must be to deliver in -- in person is the -- at the Paul Elizondo Tower, 101 West Nueva, Suite 110, in San Antonio, Texas 78205.

Q: Okay. And was this letter or this notice sent certified mail?

A: No, ma'am.

This verbatim work product of the State should not have been admitted for two reasons: (1) given the correspondence in question was clearly made in anticipation of criminal litigation, that work product is not only hearsay, but rather is testimonial hearsay, and (2) even non-testimonial hearsay made by a member of law enforcement is inadmissible, by rule, in a criminal proceeding. See TEX. R. EVID. 803(8)(A)(ii)(exempting from exceptions to Texas hearsay rule "[any] matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law enforcement personnel");

see also Fischer v. State, 252 S.W.3d 375, 382 (Tex. Crim.App. 2008) (explaining, "[b]oth the federal and Texas hearsay rules have always excluded...investigation observations of law enforcement officers because their factual observations, opinions, and narrations are made while the officer is 'engaged in the often competitive enterprise of ferreting out crime'"); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 316, 321-22 (suggesting reports of investigating officers detailing

circumstances surrounding crime are testimonial and noting that police work product does not qualify as business records because it is made essentially for use in court); Cole v. State, 839 S.W.2d 798, 811-812 (Tex.Crim.App. 1992) (op. on reh'g) (ruling full-time forensic chemists employed by department of Public Safety are law enforcement personnel for purposes of "public records" hearsay exception and noting, "Police reports, especially in criminal cases, tend to be one-sided and self-serving"). While the general fact that letters were mailed might have been admissible, reading the verbatim language of those out-of-court declarations into the record was improper. Counsel should have objected under the rule announced in Crawford v. Washington and the Sixth Amendment.

(b) Bank Records.

Nagore admitted that, as a part of her investigation, she subpoenaed bank records of appellant primarily for evidentiary purposes. When the State sought to admit those records at trial, counsel again failed to object to the testimonial nature of that hearsay, which was unquestionably proffered as proof of the matters asserted. The following record illustrates:

Q: Okay....contained within State's Exhibit Number 5, which we have deemed the DA's check section file on Comfort Roberts, do you know if part of the investigation was to get the bank records of any check writer that had written a hot check?

A: Yes.

Q: Okay. And was that done in this particular case?

A: Yes.

Q: All right.

MS. BIGGS: At this time, Your Honor, I would offer State's Exhibit Number 6. These records have been made and filed with the Court with an affidavit to support its authentication. And they have been,in fact, been provided to Defense counsel in both paper form as well as through E-discovery.

MS. BIGGS: Any objection?

MR. ZIMMERMAN: No objection..

Formal declarations both collected as evidence by law enforcement and actually used by the State at trial are very likely to be testimonial. See Coronado v. State, 351 S.W.3d 315, 324 (Tex.Crim.App. 2011) (stating, "If the objective purpose is to question a person about past events and that person's statements about those events would likely be relevant to a future criminal proceeding, then they are testimonial"). Here, given the bank records in question were not reduced to writing until the State requested them for trial, those records also constitute testimonial hearsay. By not objecting under the Sixth Amendment, counsel waived his appellant's right to confront the declarants at the bank who originally answered the State's request. Counsel's conduct was thus deficient.

iii. Counsel Failed to Object When the State Proffered its Indictment in this case as if were Substantive Evidence of Guilt.

As a matter of law, it's axiomatic that an indictment is not evidence. Even the trial court recognized this rule of law, both from the bench and in its written jury charge. Informing venire panel, "The indictment is...just an administrative document...that's not evidence of crime"); (instructing ,"The grand jury indictment is not evidence of guilt"). Nevertheless, the State proffered its indictment into evidence in this case, and counsel again did not object, as the following record reflects:

MR. FLORES: Your Honor, at this time the State offers State's Exhibit Number 7 and tenders to Defense counsel for any objections and inspection.

MR. ZIMMERMAN: No objection.

Counsel also never requested a limiting instruction contemporaneously with this admission into evidence, nor did the trial court deliver one on its own. Thus, the State's indictment was essentially rendered **"self-proving"** as it could readily be mistaken by the jury evidence of the very facts alleged therein. No reasonable trial strategy could explain this level of professional neglect.

C. Harm, i.e., "Prejudice".

Because deprivation of the right to effective assistance of trial counsel is constitutional error, prejudice is shown if even a "reasonable probability" exists that, but for counsel's deficient performance, the result of the proceeding would have been different. Hawthorn v. State, 848 S.W.2d 101, 118 (Tex. Crim. App. 1992). A reasonable probability is one sufficient to undermine confidence in the outcome of this case. Strickland, 446 U.S. at 694; Miniel v. State, 831 S.W.2d 310, 323 (Tex. Crim. App. 1992). That said, a defendant need not prove that counsel's actions "more likely than not" altered the outcome of the trial. Harrington v. Richter, 131 S.Ct. 770, 792 (2001).

ADDITIONAL FEDERAL QUESTIONS

The 4th Court of Appeals decision to deny appellant's His Right to Due Process of Law under The Fifth Amendment, His right to the Presumption of innocence under Universal Declaration of Human Rights Article 11, and His SIXTH AMENDMENT RIGHT TO CONFRONT HIS ACCUSER all as a direct correlation to ineffective assistance of trial counsel raised on direct appeal directly conflicts with Texas Criminal Court of Appeals and The United States Supreme Court.

As pertinent here, Texas law provides that, if: (1) a holder in due course presents a check exchanged for property or a service within thirty [30] days of its issuance;(2) a bank or other drawee refuses payment on that check for insufficient funds; and (3) the issuer fails to pay the holder in full within 10 days after receiving notice of that refusal, then such predicate facts constitute "prima facie evidence of the issuer's intent to deprive the owner of property under Section 31.03 (Theft)". TEX. PENAL CODE § 31.06(a)(2) (West 2013). Regarding what exactly suffices as "notice of that refusal, "the statute clarifies:

For purposes of Subsection (a)(2) ... notice may be actual notice or notice in writing that [is addressed and mailed in a specified manner] [and] contains the following statement: "This is a demand for payment in full for a check or order not paid because of a lack of funds or insufficient funds. If you fail to make payment in full within 10 days after the date of receipt of this notice, the failure to pay creates a presumption for committing an offense, and this matter may be referred for criminal prosecution."

TEX. PENAL CODE § 31.06(b)(1),(2),(3) (West 2013). "The facts giving rise to [any such] presumption must be proven beyond a reasonable doubt."

THE COURT OF APPEALS ERRED IN HOLDING THAT ONLY ISSUERS WHO ARE DELIVERED WRITTEN NOTICE OF A REFUSED CHECK ARE ENTITLED TO KNOW THAT FAILING TO PAY THE HOLDER IN TEN DAYS "CREATES A PRESUMPTION FOR COMMITTING AN OFFENSE, AND THE MATTER MAY BE REFERRED FOR CRIMINAL PROSECUTION."

Jury charge error for which no objection is made may nevertheless support a reversal if the error results in egregious harm. See, e.g., Ngo v. State, 175 S.W.3d 738,743 n.7 (Tex. Crim. App. 2005) (citing Bluitt v. State, 137 S.W.3d 51, 53 (Tex. Crim.App. 2004) (holding, "An appellant may raise such unobjected-to charge error on appeal, but may not obtain a reversal for such error unless it resulted in egregious harm")). Jury charge error "is egregiously harmful if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory. "Sanchez v. State, 209 S.W.3d 117, 120 (Tex. Crim. App. 2006).

THE COURT OF APPEALS ERRED BY HOLDING THE RECORD CONTAINS SUFFICIENT EVIDENCE FROM WHICH THE JURY COULD RATIONALLY FIND THAT APPELLANT ACTUALLY RECEIVED AT LEAST TEN DAYS' NOTICE BEFORE THE INSTANT JURY CHARGE WAS READ BELOW.

The Reasoning of the Court of Appeals is Flawed Because the Only Notice Ever Shown to be "Actually Received" Here Includes No Proof of the Content Specified by § 31.06(b)(3).

To be sure, certain types of actual notice will not admit to the mailing and address requirements of § 31.06(b)(1) & (2). However, that fact, alone, should not be taken to mean that written notice is the only actual notice that must include the admonition set forth in § 31.06(b)(3). Appellant never said anything different. Stating that an issuer actually received notice ... [that is] at least functionally equivalent to the language quoted in § 31.06(b)(3) ... then the State is not entitled to a presumption

Crim. App. 2007) (Cochran, J. concurring) (stating, "[a] petition for discretionary review need not (and should not) attempt to resolve the merits of the question presented. It need only attract the interest of at least four judges concerning the legal issue [presented]") (second parenthetical in original).

Trial began in this case on March 26, 2018. The only notice ever shown to have been actually received below was a phone call between Nagore & Roberts. But so far as any factfinder could rationally infer, that conversation could have taken place as late as March 25, 2019. Certainly nothing in our record supports an inference that it occurred ten [10] days before the jury charge was read here. Because the State produced no evidence of when Nagore spoke with appellant, the instructions included below should not have been given.

D. Harm

In the briefs below, appellant discussed at length how the instant instructions caused him egregious harm. Reasserting that same argument again here would be beyond the proper scope of a petition for discretionary review. See Bradley, 235 S.W.3d at 810 (Cochran, J. concurring) (stating, "[a] petition for discretionary review need not (and should not) attempt to resolve the merits of the question presented").

A. Preservation of Error.

No trial objection is necessary to preserve error caused by legally insufficient evidence. As such, this issue may be raised for the first time on direct appeal. Mayer v. State, 309 S.W.3d 552, 555 (Tex. Crim. App. 2010).

B. Guiding Legal Principles.

Certain facts and circumstances, if sufficiently proven, may either: [1] serve as"prima facie evidence of the issuer's intent to deprive the owner of property under Section 31.03 (Theft);" or [2] permit a finding that "the actor's intent to deprive the owner of the property under Section 31.03 (Theft) is [simply] presumed. "TEX. PENAL CODE 31.06(a),(f) (West 2017). "The facts giving rise to [any such] presumption must be proven beyond a reasonable doubt."

Because Comfort Roberts has indeed been subjected to egregious harm, appellant should be granted The Emergency Order of Stay or Recall of Mandate.

REASONS FOR GRANTING THE STAY

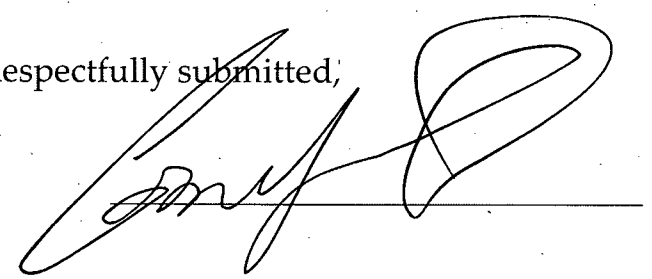
The standards for granting a stay are "well settled," *Deaver v. United States*, 483 U.S. 1301, 1302 (1987) (Rehnquist, C.J., in chambers), and they apply equally to applications for recall and stay of a mandate, *see Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 572 U.S. 1301, 1301 (2014) (Roberts, C.J., in chambers); *Wise v. Lipscomb*, 434 U.S. 1329, 1333-34 (1977) (Powell, J., in chambers). To receive such relief pending the filing and disposition of a petition for writ of certiorari, an applicant must show "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.* Applicants meet this test.

CONCLUSION

For these reasons, Applicant respectfully ask the Court to recall and stay the 4th Court of Appeals mandate pending the filing and disposition of Applicants' petition for certiorari. Applicant also respectfully ask the Court to administratively recall and stay issuance of the mandate pending disposition of this Application by January 2, 2020.

The application for Emergency Stay or Recall of Mandate should be granted.

Respectfully submitted,



Date: 12/23/2019