

IN THE
SUPREME COURT OF THE UNITED STATES

No. 17A648

Thomas Leonard, *Applicant*

v.

The State of Texas, *Respondent*

On Petition for Writ of Certiorari to the Eighth Court of Appeals of Texas

**EMERGENCY APPLICATION TO STAY MANDATE OF THE
EIGHTH COURT OF APPEALS OF TEXAS PENDING DISPOSITION OF
A PETITION FOR WRIT OF CERTIORARI**

To the Honorable Samuel A. Alito, Jr.,
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Fifth Circuit

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EMERGENCY APPLICATION FOR STAY PENDING CERTIORARI
TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF
THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE
FOR THE FIFTH CIRCUIT:

Applicant Thomas Leonard (“Applicant”) respectfully moves for a stay of the issuance of the mandates in Cause Numbers 08-14-00139-CR & 08-17-00038-CR in the Eighth Court of Appeals of Texas pending the timely filing of a petition for writ of certiorari. In addition, or in the alternative, Applicant requests that the Court treat the application for stay as a petition for writ of certiorari, grant the petition, and summarily reverse the decision below.

I. OPINIONS BELOW

On April 26, 2017, the Eighth Court of Appeals of Texas issued an unpublished opinion in Cause Number 08-14-00139-CR affirming applicant’s convictions and concluding that applicant was not going to file a brief on the merits.¹ Applicant also filed an appeal concerning his appeal bond in Cause Number 08-17-00038-CR.² On May 17, 2017, the Eighth Court of Appeals of Texas issued an unpublished memorandum opinion dismissing the bond appeal as moot.³

¹ Appendix (“App”) A

² App B.

³ App B.

II. JURISDICTION

Applicant filed his petition for discretionary review for Cause Number 08-14-00139-CR in the Texas Court of Criminal Appeals on August 30, 2017. The Texas Court of Criminal Appeals refused that petition on October 18, 2017.⁴ Applicant filed a motion to extend time for filing a motion for rehearing on November 2, 2017, but the Court of Criminal Appeals denied that motion and applicant did not file a motion for rehearing.

Applicant filed a petition for discretionary review for the bond appeal, Cause Number 08-17-00038-CR, on August 30, 2017. The Texas Court of Criminal Appeals refused that petition on October 18, 2017.⁵ Applicant filed a motion to extend time to file a motion for rehearing on November 2, 2017. The Court of Criminal Appeals denied that motion on November 2, 2017 and applicant did not file a motion for rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

III. STATEMENT OF THE CASE

On April 9, 2014, applicant was convicted of four counts of aggravated assault with a deadly weapon and was sentenced to two years' incarceration on two counts and ten years' community supervision on two counts.⁶ The trial court

⁴ App C.

⁵ App D.

⁶ App E.

certified applicant's right to appeal. Due to appointed counsel's ineffective assistance of counsel, applicant asserted his right to represent himself on appeal. The Court of Appeals abated the appeal and the trial court conducted a hearing on applicant's motion to represent himself on appeal. The Court of Appeals granted applicant's request to represent himself on appeal and struck the brief filed by applicant's appointed counsel.

On September 7, 2016, the Court of Appeals denied applicant's motions to extend time to file his brief and ordered the case submitted without briefs. The Court of Appeals did not abate for a hearing under Texas Rule of Appellate Procedure 38.8(b)(3).

On September 19, 2016, applicant filed a motion to vacate the order submitting the case without briefs and denial of the motion to extend the time to file the brief and an additional motion to extend time to file the brief. The Court of Appeals denied this motion on September 22, 2016. The case was submitted without briefs on October 13, 2016. On that day, applicant filed a second motion to vacate the order submitting the case without briefs and denial of the motion to extend the time to file the brief and a motion to extend time to file the brief. The Court of Appeals did not rule on this motion until April 26, 2017 when it denied it as moot when the Court issue its opinion.⁷ On April 26, 2017, the Court

⁷ App A.

of Appeals issued an opinion affirming applicant's convictions and concluding that applicant was not going to file a brief on the merits.⁸

Applicant filed a motion for rehearing on April 27, 2017. On May 12, 2017, applicant filed his third motion to vacate the order submitting the case without briefs and denial of the motion to extend the time to file the brief; a motion to extend time to file the brief and a motion to withdraw opinion; and another motion to abate the appeal for disqualification hearings.

On May 16, 2017, the Court of Appeals denied these motions without written order. Applicant filed his petition for discretionary review for Cause Number 08-14-00139-CR on August 30, 2017. The Texas Court of Criminal Appeals refused that petition on October 18, 2017.⁹ Applicant filed a motion to extend time for filing a motion for rehearing on November 2, 2017, but the Court of Criminal Appeals denied that motion and applicant did not file a motion for rehearing.

Applicant also filed an appeal concerning his appeal bond in Cause Number 08-17-00038-CR. The Court of Appeals dismissed this as moot.¹⁰ The Court of Appeals denied the appeal as moot because of the affirmance of applicant's convictions in Cause Number 08-14-00139-CR.¹¹ Applicant filed a petition for

⁸ App A.

⁹ App C.

¹⁰ App B.

¹¹ App B.

discretionary review for the bond appeal on August 30, 2017. The Court of Criminal Appeals refused that petition on October 18, 2017.¹² Applicant filed a motion to extend time to file a motion for rehearing on November 2, 2017. The Court of Criminal Appeals denied that motion on November 2, 2017 and applicant did not file a motion for rehearing.

Applicant filed motions to stay the issuance of the mandates pending the disposition of petitions for writ of certiorari in both cause numbers on November 5, 2017 in the Eighth Court of Appeals.¹³ Applicant requested an expedited decision on those motions because the mandate is scheduled to be issued on November 12, 2017 and applicant intended to seek a stay in this Court if the Eighth Court of Appeals did not issue a stay. The Court of Appeals has scheduled those motions to stay to be decided on November 22, 2017. Applicant sought clarification from the Court of Appeals regarding whether the Court of Appeals would be allowing the mandates to issue on November 12, 2017 but did not receive an answer. Consequently, applicant is seeking a stay in this Court for the reasons specified below.

Applicant filed a motion for emergency stay and emergency motions for writs of mandamus and prohibition on November 8, 2017 in the Court of Criminal Appeals and requested an expedited decision so that applicant would be able to

¹² App D.

¹³ App F.

seek a stay in this Court- the Texas Court of Criminal Appeals denied those motions on November 8, 2017.¹⁴

Subsequent to the Texas Court of Criminal Appeal's refusal of applicant's petitions for discretionary review, applicant obtained information regarding the possibility that the justices of the Court of Appeals may be disqualified because of the acceptance of campaign contributions from an interested party which leads to the appearance that the Court of Appeals may have intentionally denied applicant due process. After several days of examining campaign finance reports, applicant believes there is evidence to support this conclusion and will shortly file a motion asking all the justices on the Court of Appeals to disqualify themselves and vacate all rulings. Applicant will also be filing another emergency petition for writs of mandamus and prohibition in the Texas Court of Criminal Appeals, as well as a request for an emergency stay in that court, on the disqualification issue.

IV. REASONS FOR GRANTING A STAY

"To obtain a stay pending the filing and disposition of a petition for a 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

¹⁴ App G.

(3) a likelihood that irreparable harm will result from the denial of a stay.”¹⁵ 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.¹⁶ These standards are readily satisfied in this case.

The Texas Court of Criminal Appeal’s refusal of the petitions for discretionary review were issued on October 18, 2017, and applicant has promptly brought this application to the Court. The application is made within the time limits for petitioning for certiorari.¹⁷ Applicant has also complied with Supreme Court Rule 23.3- after the refusal of discretionary review, applicant sought stays from both the Eighth Court of Appeals and the Texas Court of Criminal Appeals.

V. There Is A “Reasonable Probability” That The Court Will Grant Certiorari And A “Fair Prospect” That The Court Will Reverse The Decision Below Because It Squarely Conflicts With Controlling Precedent.

a. GROUNDS FOR REVIEW

- i. The Court of Appeals erred in applying a harmless error analysis after finding that applicant was denied counsel at a critical stage; this directly contradicts settled caselaw by the*

¹⁵ *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

¹⁶ *Id* (citing *Lucas v. Townsend*, 486 U.S. 1301, 1304, 108 S.Ct. 1763, 100 L.Ed.2d 589 (1988) (Kennedy, J., in chambers); *Rostker v. Goldberg*, 448 U.S. 1306, 1308, 101 S.Ct. 1, 65 L.Ed.2d 1098 (1980) (Brennan, J., in chambers)).

¹⁷ See Rule 13.1.

United States Supreme Court that the complete denial of counsel at a critical stage is a structural error not subject to harm analysis.

The Court of Appeals held that applicant was denied his Sixth Amendment right to counsel but then applied a harmful error analysis, holding that the error was harmless beyond a reasonable doubt.

While the Eighth Court of Appeals correctly followed the United States Supreme Court's precedent in finding that the recusal hearings were critical stages;¹⁸ the Court of Appeals erred in not following the extensive precedents of the United States Supreme Court which hold that this is structural error not subject to harmless error analysis.¹⁹ The United States Supreme Court "has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage

¹⁸ *United States v. Cronin*, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *Mempa v. Rhay*, 389 U.S. 128, 134, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967).

¹⁹ *United States v. Cronin*, 466 U.S. 648, 659 & n. 25, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) (citing *Geders v. United States*, 425 U.S. 80 (1976); *Herring v. New York*, 422 U.S. 853 (1975); *Brooks v. Tennessee*, 406 U.S. 605, 612-613 (1972); *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961); *White v. Maryland*, 373 U.S. 59, 60 (1963) (per curiam); *Ferguson v. Georgia*, 365 U.S. 570 (1961); *Williams v. Kaiser*, 323 U.S. 471, 475-476 (1945)); *Satterwhite v. Texas*, 486 U.S. 249, 257, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988) (citing *Holloway v. Arkansas*, 435 U.S. 475 (1978) (conflict of interest in representation throughout entire proceeding); *Chapman v. California*, 386 U.S. 18, at 23, n. 8 (1967) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963) (total deprivation of counsel throughout entire proceeding)); *White v. Maryland*, 373 U.S. 59 (1963) (absence of counsel from arraignment proceeding that affected entire trial because defenses not asserted were irretrievably lost); *Hamilton v. Alabama*, 368 U.S. 52 (1961) (same)).

of the proceeding.”²⁰ Furthermore, the Court of Appeals also found that applicant was not harmed because he is an attorney, albeit an indigent one, and filed and argued two motions to recuse. However, the United State Supreme Court has held that the fact that the applicant “is an attorney is, of course, immaterial to a consideration of his right to the protection of the Sixth Amendment. His professional experience may be a factor in determining whether he actually waived his right to the assistance of counsel. But it is by no means conclusive.”²¹

Even if this was error subject to harmless error analysis, the Court of Appeals erred in finding the error harmless. Applicant has been denied further hearings on motions to disqualify based upon the hearings where applicant was without counsel. This has completely prevented applicant from making a case on the disqualification and recusal grounds.

The Court of Appeal’s decision appears to be the only case in the United States to address whether the time for preparing, filing, and then arguing at a hearing, motions for recusal or disqualification are a critical stage and what, if any, harm analysis should apply. Clearly, this time is a critical stage and this Court has repeatedly held that the complete deprivation of counsel throughout a critical stage is not subject to harm analysis. This is well settled law from this Court and there is a “reasonable probability” that the Court will grant certiorari and a “fair prospect”

²⁰ *Cronic*, 466 U.S. at 659 n.25.

²¹ *Glasser v. United States*, 315 U.S. 60, 70, 62 S.Ct. 457, 86 L.Ed. 680(1942) (citation omitted).

that the Court will reverse the decision below because it squarely conflicts with controlling precedent.

ii. The Court of Appeals has denied applicant due process of law by not abating for disqualification hearings and by submitting the case without briefs. The Court of Appeals is without legal authority to issue an opinion and must vacate its opinion and allow applicant to file his brief on the merits.

“A state is not required by the Federal Constitution to provide appellate courts or a right to appellate review.”²² “Nonetheless, Texas has granted criminal defendants a statutory right of appellate review.”²³ “When a State elects to act in a field where its action has significant discretionary elements, it must act consistent with the dictates of the Texas and Federal Constitutions.”²⁴ Applicant has a statutory right to appeal but applicant can waive this right.²⁵ However, any waiver must be made knowingly, intelligently, and voluntarily and must be reflected in the record.²⁶

²² *Ward v. State*, 740 S.W.2d 794, 796 (Tex.Crim.App. 1987) (citing *Griffin v. Illinois*, 351 U.S. 12, 18, 76 S.Ct. 585, 590, 100 L.Ed. 891, 898 (1956); *McKane v. Durston*, 153 U.S. 684, 687-688, 14 S.Ct. 913, 914-915, 38 L.Ed. 867, 868 (1894)).

²³ *Id* (citing Article 44.02, Tex. Code Crim. Proc.).

²⁴ *Id* (citing *Evitts v. Lucey*, 469 U.S. 387, 401, 105 S.Ct. 830, 839, 83 L.Ed.2d 821, 833 (1985)).

²⁵ Article 44.02, Tex. Code Crim. Proc.; Article 1.14, Tex. Code Crim. Proc.; *Marin v. State*, 851 S.W.2d 275, 280 (Tex. Crim. App. 1993); *Garcia v. State*, 429 S.W.3d 604, 607 (Tex. Crim. App. 2014).

²⁶ *Marin*, 851 S.W.2d at 280; *Garcia*, 429 S.W.3d at 607-10.

The Fourteenth Amendment guarantees a criminal appellant pursuing a first appeal as of right certain minimum safeguards necessary to make that appeal “adequate and effective.”²⁷ Due process requires that a State that has afforded a right of appeal must make that appeal more than a “meaningless ritual.”²⁸ “A fundamental requirement of due process is ‘the opportunity to be heard.’”²⁹ It is an opportunity which must be granted at a meaningful time and in a meaningful manner. *Id.*

The express language of Texas Rule of Appellate Procedure 38.8 states that an appeal can only be considered without briefs if the trial court, after a hearing, found that the appellant no longer desired to prosecute the appeal.³⁰ The rule mandates a hearing at which the trial court would inquire whether or not the appellant desired to prosecute the appeal.³¹ This would obviously satisfy the requirement of the record reflecting a waiver if appellant expressly stated on the record that he did not wish to prosecute his appeal. However, the Court of Appeals did not order a hearing and there is no record upon which that Court could conceivable find that applicant no longer desired to prosecute the appeal and waived his right to a statutory appeal on the merits of his case. The cases relied

²⁷ *Evitts*, 469 U.S. at 401, 105 S.Ct. 830, 83 L.Ed.2d 821 (citing *Griffin*, 351 U.S. at 20, 76 S.Ct. 585, 100 L.Ed. 891).

²⁸ *Id.* at 393-94 (citing *Douglas v. California*, 372 U.S. 353, 358, 9 L.Ed.2d 811, 83 S.Ct. 814 (1963)).

²⁹ *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62, 66 (1965).

³⁰ TEX.R.APP. P. 38.8(b)(1) & (4).

³¹ TEX.R.APP. P. 38.8(b)(2).

upon by the Court of Appeals make no mention of waiver at all and are in the vein of cases where a *pro se* appellant simply stops communicating with the appellate court and the appellate court can draw a reasonable conclusion that appellant no longer desires to pursue his appeal. That is not the case here. Applicant has repeatedly filed motions attempting to get the Court of Appeals to allow him to file his brief, sought discretionary review in the Texas Court of Criminal Appeals, and is now seeking relief in this Court- the mere fact that applicant has done this squarely and unequivocally shows that applicant has not waived his statutory right to appeal.

“The Rules of Appellate Procedure are not an act of the Legislature, and they may not ‘abridge, enlarge, or modify the substantive rights of a litigant’ or conflict with the Code of Criminal Procedure.”³² In the Court of Appeal’s decision, the Court submitted the case without briefs, relying upon Texas Rule of Appellate Procedure Rule 38.8(b) and *Lott v. State*, 874 S.W.2d 687, 688 n.2 (Tex.Crim.App. 1994) (discussing the predecessor to Rule 38.8(b)) and *Burton v. State*, 267 S.W.3d 101, 103 (Tex.App.--Corpus Christi 2008, no pet.) for the premise that, essentially, applicant had waived his statutory right to appeal by failing to timely file a brief, although applicant had filed a motion for extension of time to file his brief which the Court of Appeals had been “holding” and applicant filed numerous motions for

³² *Marin*, 851 S.W.2d at 278 (citing Tex. Gov. Code Ann. § 22.108(a); Tex. Code Crim. Proc. Ann. art. 44.33(a)).

extensions of time and motions to vacate the submission of the case without briefs and the Court's opinion. The Court's holding also has the faulty premise that, since the appeal had been abated for applicant to assert his right to represent himself on appeal, that this knowing, intelligent, and voluntary relinquishment of his right to counsel on appeal is also somehow a valid waiver of his statutory right to appeal or his due process or due course of law rights under the United States and Texas Constitutions. The only right applicant has waived in this case is his right to counsel on appeal. Applicant has never waived his right to an effective and adequate appeal on the merits of his case, his right to an unbiased trial judge, his right to unbiased appellate judges, his right to be heard, his right to an adequate record on appeal, his right to compel witnesses, or any other enumerated rights or rights covered under the due process and due course of law provisions of the United States and Texas constitutions. In essence, the appeal became a "meaningless" ritual where the Court of Appeals misused a rule of appellate procedure to deprive applicant of his substantive rights and his right to an adequate and effective appeal on the merits of his case. Applicant has never, and does not now, waive his right to appeal. Applicant desires to continue to prosecute his appeal and file a brief on the merits of his case.

Applicant filed multiple motions requesting that the Court of Appeals abate the appeal under Texas Rule of Appellate Procedure 44.4 for a disqualification hearing, but the Court did not do so nor did it address that issue in its opinion.

Texas Rule of Appellate Procedure 44.4 states that a court of appeals must not affirm or reverse a judgment or dismiss an appeal if the trial court's erroneous action or failure or refusal to act prevents the proper presentation of a case to the court of appeals and the trial court can correct its action or failure to act.³³

“When a trial court has erroneously withheld information necessary to evaluate a defendant's claim on appeal (e.g. failure to file required findings of fact) or has prevented the defendant from submitting information necessary to evaluate his claim (e.g. refusing to permit an offer of proof), the appellate court is directed to step in and order the trial court to correct the situation.”³⁴ “Rule 44.4 of the Texas Rules of Appellate Procedure states that the ‘court of appeals *must* not affirm or reverse a judgment or dismiss an appeal,’ and it ‘*must* direct the trial court to correct the error’ if two preconditions exist.”³⁵ “Due to the mandatory language of Rule 44.4, if the preconditions are satisfied, the court of appeals must

³³ Tex.R.App. P. 44.4; *Lapointe v. State*, 225 S.W.3d 513, 520-21 (Tex.Crim.App. 2007).

³⁴ *Id* at 522 (emphasis supplied) (footnotes and citations omitted).

³⁵ *Henery v. State*, 364 S.W.3d 915, 918 (Tex.Crim.App. 2012) (emphasis supplied) (footnote omitted) (citation omitted).

abate the case, even if neither the State nor the defendant has requested the abatement.”³⁶

The procedures for disqualification/recusal of judges set out in Rule 18a of the Texas Rules of Civil Procedure apply in criminal cases.³⁷ Texas Rule of Civil Procedure 18a(g)(6) expressly provides for a hearing and provides for notice and the admission of evidence. There is nothing in that rule which suggests that a hearing is discretionary. The Eighth Court of Appeals has previously ruled on this and held that the hearing is mandatory and no objection to a lack of hearing is necessary.³⁸ The Eighth Court of Appeals has also ruled in multiple cases that when the trial court erred in failing to have a hearing on a motion to recuse, the proper remedy is to abate the appeal and order the administrative judge of the judicial region to hear, or assign another judge to hear, the recusal motion.³⁹

In addition to applicant’s due process rights to have appointed counsel⁴⁰ and an unbiased trial judge,⁴¹ applicant is entitled to procedural due process and due course of law.⁴² At a minimum, due course requires notice and an opportunity to be

³⁶ *Id.*

³⁷ *De Leon v. Aguilar*, 127 S.W.3d 1, 5 (Tex.Crim.App. 2004).

³⁸ *Sanchez v. State*, 926 S.W.2d 391, 394 (Tex.App. —El Paso 1996, pet. ref’d).

³⁹ *Id.* at 396 (citing *Arnold v. State*, 778 S.W.2d 172, 180 (Tex.App.--Austin 1989), *aff’d*, 853 S.W.2d 543 (Tex.Crim.App.1993); *Morris v. State*, 692 S.W.2d 109, 110 (Tex.App.--El Paso 1985, pet. ref’d).

⁴⁰ U.S. CONST. AMEND. VI; *Gideon v. Wainwright*, 372 U.S. 335, 340-45, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

⁴¹ *Brumit v. State*, 206 S.W.3d 639, 645 (Tex.Crim.App. 2006) (citation omitted).

⁴² U.S. CONST. amend. XIV; TEX. CONST. art. I, § 19; *Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex.2001).

heard, at a meaningful time and in a meaningful manner.⁴³ “And, under certain circumstances, the right to be heard assures a full hearing before a court having jurisdiction over the matter, the right to introduce evidence at a meaningful time and in a meaningful manner, and the right to judicial findings based upon that evidence.”⁴⁴ “This right also includes an opportunity to cross-examine witnesses, to produce witnesses, and to be heard on questions of law.”⁴⁵

An appellate court reviews an order denying a motion to recuse/disqualify under an abuse of discretion standard.⁴⁶ “In its abuse-of-discretion review, an appellate court considers the totality of the evidence and information elicited at the recusal hearing to see if the record reveals sufficient evidence to support the recusal judge's ruling that the trial judge was unbiased.”⁴⁷

Texas Rule of Civil Procedure 18a(g)(6) clearly provides for a hearing and a hearing affords applicant an opportunity to develop a record regarding the motions to disqualify.⁴⁸ The Court of Appeal's denial of applicant's motion to abate for

⁴³ *Perry*, 67 S.W.3d at 92.

⁴⁴ *Perry*, 67 S.W.3d at 92 (citation omitted).

⁴⁵ *Id* (citation omitted).

⁴⁶ *De Leon v. Aguilar*, 127 S.W.3d 1, 5 (Tex.Crim.App. 2004).

⁴⁷ *Gaal v. State*, 332 S.W.3d 448, 456 (Tex.Crim.App. 2011) (citation omitted).

⁴⁸ See *In re Rio Grande Valley Gas Co.*, 987 S.W.2d 167, 172, 176 (Tex. App.-Corpus Christi 1999, orig. proceeding); *Winfield v. Daggett*, 846 S.W.2d 920, 922 (Tex.App.--Houston [1st Dist.] 1993, no writ).

disqualification hearings has deprived applicant of his ability to litigate the issues of disqualification and has denied applicant due process.⁴⁹

Additionally, “[i]t is well established that an indigent defendant is entitled to an adequate record on appeal.”⁵⁰ “[T]he trial court still has a duty under the Texas and Federal constitutions to provide an indigent defendant with an adequate record on appeal.”⁵¹ The refusal by the regional presiding judge and the Court of Appeals to abate for a disqualification hearing which is required by the rules of civil procedure has violated applicant’s right to an adequate record. “In Texas[,] the absence of a statement of facts severely limits appellate review.”⁵² “Consequently, the absence of a statement of facts renders appellant’s appeal a ‘meaningless ritual.’”⁵³

Furthermore, the denial of this hearing affects the ability of any appellate court to determine its subject matter jurisdiction. “[A]ppellate courts do not have jurisdiction to address the merits of appeals from void orders or judgments; rather, they have jurisdiction only to determine that the order or judgment underlying the

⁴⁹ *Morris v. State*, 692 S.W.2d 109, 110 (Tex.App. —El Paso 1984, pet. ref’d); *See also De Leon v. Aguilar*, 127 S.W.3d 1, 6 (Tex. Crim. App. 2004) (citing *In re Chavez*, 130 S.W.3d 107, 115-16 (Tex. App.-El Paso 2003, orig. proceeding, no pet.).

⁵⁰ *Ward v. State*, 740 S.W.2d 794, 796 (Tex.Crim.App. 1987) (citing *Griffin v. Illinois*, 351 U.S. 12, 18-19, 76 S.Ct. 585, 590-91, 100 L.Ed. 891, 898-99 (1956) and *Guillory v. State*, 557 S.W.2d 118, 120 (Tex.Crim.App.1977).

⁵¹ *Guillory*, 557 S.W.2d at 120-21 (citations omitted).

⁵² *Ward*, 740 S.W.2d at 800 (citations omitted).

⁵³ *Id* (citing *Evitts v. Lucey*, 469 U.S. 387, 394, 105 S.Ct. 830, 834, 83 L.Ed. 2d 821, 828 (1985)).

appeal is void and make appropriate orders based on that determination.”⁵⁴ An appellate court must consider its jurisdiction, even if that consideration is *sua sponte*.⁵⁵

In *Freedom Communications*, the Texas Supreme Court examined the constitutional disqualification of the trial judge due to bribery.⁵⁶ “The Texas Constitution provides that ‘[n]o judge shall sit in any case wherein the judge may be interested.’”⁵⁷ “A judge is ‘interested’ in a case— and thus disqualified under Article V, Section 11— if an order or judgment in the case will directly ‘affect him to his personal or pecuniary loss or gain.’”⁵⁸ “A disqualified judge has no power to act in the case.”⁵⁹ “Discretionary judicial acts by a disqualified judge are void.”⁶⁰ “Thus, the disqualification of a judge is a jurisdictional issue that cannot be waived.”⁶¹ Unlike in *Freedom*, where the Texas Supreme Court took judicial notice of the plea agreement in which the trial judge admitted to taking bribes regarding that case,⁶² or in *De Leon v. Aguilar*,⁶³ where the Texas Court of Criminal Appeals found a trial judge disqualified as a matter of law based upon the

⁵⁴ *Freedom Communications, Inc. v. Coronado*, 372 S.W.3d 621, 623-24 (Tex. 2012) (citations omitted).

⁵⁵ *Id* at 624 (citations omitted).

⁵⁶ *Id*

⁵⁷ *Id* (quoting TEX. CONST. art. V, § 11).

⁵⁸ *Id* (citations omitted).

⁵⁹ *Id* (citation omitted).

⁶⁰ *Id* (citations omitted).

⁶¹ *Id* (citations omitted).

⁶² *Id* at 623-24.

⁶³ 127 S.W.3d 1, 5-6 (Tex. Crim. App. 2004).

trial judge's conduct in denying the litigants a hearing and based upon a prior judicial ruling on a different recusal motion- applicant has been denied any ability to make a case for disqualification- either in a hearing or by introducing evidence outside the record- has been denied a fair hearing, and has been denied the ability to utilize the appellate process based upon a full evidentiary record.

iii. The Justices of the Court of Appeals are disqualified from the case due to campaign contributions from an interested party.

Applicant learned after the Court of Criminal Appeals refused the petitions for discretionary review that the same law firm that applicant had alleged in his motion to disqualify the trial judge to have made disqualifying campaign contributions to the trial judge had also made significant campaign contributions to all the members of the Eighth Court of Appeals, as well as a former justice, during the pendency of this case. In particular, the firm made significant contributions to the Chief Justice, the author of the Court's opinion, during the pendency of this case.

This law firm and its client have a substantial stake in the outcome of this case. Furthermore, the substantial campaign contributions appeared to have influenced both the trial judge and the justices of the Court of Appeals to not provide the due process applicant is constitutionally entitled to.

The United States Supreme Court in *Caperton v. A. T. Massey Coal Company*, 556 U.S. 868, 884, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009) held that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The Court held that due process required an objective inquiry into whether the contributor's influence on the election under all the circumstances “would offer a possible temptation to the average . . . judge to ... lead him not to hold the balance nice, clear and true.”⁶⁴ The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.⁶⁵

The law firm in question, Kemp Smith in El Paso, represents the hospital and its parent corporation, Tenet, that has had significant involvement in this case, either currently or formerly employing both alleged victims in this case.⁶⁶ The firm has represented potential witnesses in the case and obtained a fraudulent judgment against applicant personally and his mother and was sending demands for payment

⁶⁴ *Id* at 885 (citation omitted).

⁶⁵ *Id* at 884 (citations omitted).

⁶⁶ App A.

of \$8000 in attorney's fees to applicant and his mother, who was a witness in the trial, immediately before testimony in this case. The firm never attempted to collect that judgment after the trial ended. One of the purported victims testified at trial that attorneys for the hospital had met with the alleged victims before trial. Applicant was formerly employed as an associate attorney at the same firm.

The facts of the underlying case involve applicant's father passing away at the local Tenet facility (at which he had been employed before retiring).⁶⁷ The purported victims in this case learned of this and then went to applicant's house, claiming to be bringing paperwork from the hospital, threatened applicant with reporting him to adult protective services if they were not allowed to speak with applicant's mother, refused to leave the premises when ordered to, and then claimed that applicant pointed a firearm at them. These employees claimed that applicant was leaving the remains of his father at the facility.

Applicant has been denied a hearing on his pre-trial motion to disqualify where he would have introduced documents, emails, and recorded telephone conversations describing how the hospital would not release the remains to applicant's family and that there was no paperwork being delivered by the purported victims in this case. Applicant filed criminal complaints with the FBI

⁶⁷ App A.

and other government agencies regarding the hospital and the law firm's violations of federal law and was initiating civil litigation against the hospital at that time.

Applicant has been denied an ability to call witnesses, including a local judge whom applicant was associated with who related to applicant information regarding local law firms engaging in a pattern of bribing of local judges. Similar allegations have been made in federal criminal pleadings involving the multiple federal corruption prosecutions in El Paso. When applicant initially tried to recuse the trial judge, the trial judge impermissibly allowed applicant's counsel to withdraw and did not appoint counsel for the recusal hearings.

Applicant has been effectively and totally prevented from having counsel and an opportunity to present his recusal and disqualification case. This raises the appearance that the law firm made substantial campaign contributions to judges involved in the case and that these judges have intentionally deprived applicant of his ability to pursue a line of inquiry that may negatively impact the client hospital and law firm financially and reputationally.

**VI. CIRCUMSTANCES REQUIRING A STAY-THERE IS A
LIKELIHOOD THAT IRREPARABLE HARM WILL RESULT FROM
THE DENIAL OF A STAY**

The applicant will incur serious hardship from the mandate's issuance if the United States Supreme Court were later to reverse the judgment. Applicant is

currently released on appeal bond and can research, file motions and has access to all the records in the case. Applicant already served eighteen months of the two-year sentence and if the mandate were to issue, applicant would be remanded back into custody to serve out the remaining six months of his sentence. Applicant repeatedly brought to the Court of Appeal's attention the difficulty in filing motions while incarcerated- from motions taking significant amounts of time to reach the Court, to prison officials threatening to confiscate applicant's legal materials. There is a significant possibility that if applicant were remanded to custody that he would be unable to file his petition for writ of certiorari within ninety days or a motion for extension of time or stay in the United States Supreme Court. Applicant has substantial grounds for review and would suffer significant and irreparable harm if a stay is not issued. Moreover, applicant has been completely denied due process and an "adequate and effective" appeal on the merits of his case. If this Court does not issue a stay, the State of Texas will succeed in denying applicant counsel and wrongfully imprisoning applicant in violation of the due process clause of the Fourteenth Amendment.

VII. REQUEST TO TREAT THE STAY APPLICATION AS PETITION
FOR
CERTIORARI, GRANT THE PETITION, AND SUMMARILY REVERSE
THE DECISION BELOW

In addition to granting the application for stay, or in the alternative, applicant asks the Court to treat the application as a petition for certiorari, grant the petition, and summarily reverse the decision below.⁶⁸ Summary disposition is appropriate where “the lower court result is so clearly erroneous, particularly if there is a controlling Supreme Court precedent to the contrary, that full briefing and argument would be a waste of time.”⁶⁹ That is precisely the circumstance here. Further briefing and argument will not aid the Court in resolution of the case. For the reasons set forth above, it is well settled law that the complete denial of counsel at a critical stage is presumed prejudicial and requires automatic reversal- the Court of Appeals’ decision is so clearly erroneous, in the face of overwhelming Supreme Court precedent, that full briefing and argument would be a waste of time and this Court should summarily reverse the convictions and remand to the trial court.

Alternatively, controlling precedent and rules of appellate procedure clearly hold that the Court of Appeals cannot arbitrarily and unilaterally deny applicant his statutory right to appeal and his due process right to an adequate and effective appeal on the merits of this case and this Court should summarily find a due process violation, vacate the Court of Appeal’s decision, and remand to the Court

⁶⁸ S. Ct. R. 16.1; *see, e.g., Purcell v. Gonzalez*, 549 U.S. 1, 2 (2006).

⁶⁹ Eugene Gressman *et al.*, *Supreme Court Practice* 344 (9th ed. 2007).

of Appeals so applicant can file his brief on the merits. Accordingly, summary reversal is warranted in this case.

VIII. CONCLUSION

For the foregoing reasons, this Court should grant the application for a stay and, or in the alternative, treat the application as a petition for certiorari, grant the petition, and summarily reverse the decision below.

Respectfully submitted,

A handwritten signature in cursive script, reading "Thomas John Leonard", is written over a horizontal line.

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