

**IN THE
COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS**

FILED IN
5th COURT OF APPEALS
DALLAS, TEXAS

Nos. **05-17-00507-CV, 05-17-00508-CV,** 5/23/2017 3:50:06 PM

AND 05-17-0509-CV

LISA MATZ
Clerk

IN RE WARREN KENNETH PAXTON, JR., RELATOR

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

**WARREN KENNETH PAXTON, JR.'S,
RESPONSE TO LETTER BRIEF**

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STATEMENT REGARDING CITATIONS TO THE RECORD

Relator attached an appendix/record to his Petition. Any citations to the Appendix in this Response are to that document and will be cited as “Appx. at Tab ____.”

INTRODUCTION

On May 16, 2017, Brian W. Wice, the attorney pro tem for the State of Texas, the real party in interest, filed a letter brief with this Court urging it to summarily dismiss Relator’s Petitions for lack of jurisdiction. This Court ordered that Relator file a response by May 23, 2017. As set forth below, the State’s letter brief actually goes to the merits of Relator’s Petitions and omits relevant statutes and case law that demonstrate that this Court of Appeals has exclusive jurisdiction over Respondent in this original proceeding.

ARGUMENT AND AUTHORITIES

In its argument, the State essentially agrees with a central premise of Relator’s Petitions, namely, that the instant cases have not been allowed to go to Harris County and have a *new* Court assigned in accordance with Chapter 31 notwithstanding Respondent’s ordered venue change. As the State notes, Respondent continues to

sit in the 416th District Court.¹ However, the Respondent, or any presiding judge of the 416th, is prohibited from sitting outside Collin County without the express consent required by Art. 31.09, all as pointed out in Relator’s Petitions. TEX. CONST. art. V, § 7; Tex. Code Crim. P. art. 31.09(a) (Vernon 2015); *Fain v. State*, 986 S.W.2d 666, 673 (Tex. App.—Austin 1998, pet ref’d). As a result, neither any court in Harris County nor either Houston Court of Appeals has acquired jurisdiction over this matter. *See In Re Sorrow*, No. 01-15-00536-CV, 2015 WL 3903515 (Tex. App.—Houston [1st Dist.] June 25, 2015, orig. proceeding), citing *In re McGee*, 213 S.W.3d 405, 405-06 (Tex. App.—Houston [1st Dist.] 2006, orig. proceeding).

The State’s entire argument is premised on the flawed assumption that Respondent remains the presiding judge over the instant criminal cases and that the 416th can “sit” in Harris County without Relator’s consent. It is the same faulty assumption Respondent has been operating under since he changed venue in the case and is the *basis* for Relator’s Petition. Both are wrong and it is Respondent’s very refusal to comply with Article 31.09 and his actions preventing the Collin County District Clerk from fulfilling her duties under 31.05 that deprives Harris County and both Houston Courts of Appeals of jurisdiction.

¹ “Because Judge Gallagher is the presiding judge in these matters exclusively, because these matters have been transferred to Harris County, and because Judge Gallagher, as the presiding judge of the 416th District Court is sitting in Harris County, § 22.221(a)(1) vests mandamus and prohibition jurisdiction in either the First or the Fourteenth Courts of Appeals and not in this Court.” *Wice Letter* at 2.

I. Jurisdiction is Over the 416th District Court of Collin County and the Respondent, which are Both within the Fifth Court of Appeals’ Statutory Jurisdiction.

The jurisdiction of this Court in this original proceeding is over the Respondent and the 416th District Court. As stated in the Texas Government Code, the “writ power,” of any Court of Appeals is “against a: (1) judge of a district or county court in the court of appeals district.” Tex. Gov’t Code. § 22.221(b). Respondent is sitting by assignment in the 416th District Court of Collin County. (See Appx. Tab 1).² By statute, “[t]he 416th Judicial District is composed of Collin County,” which is in the Fifth Court of Appeals’ geographic jurisdiction. Tex. Gov’t Code § 22.201(f) and § 24.560. Mandate may only issue to the 416th District Court as no other court has been assigned or acquired jurisdiction. *Id.* at § 22.226.

II. No Houston Court of Appeals Has Jurisdiction Over the Respondent or the 416th District Court and have Disclaimed Jurisdiction Under Similar Circumstances.

The jurisdiction of the First and Fourteenth Courts of Appeals is limited to “a... judge of a district or county court in the court of appeals district.” Tex. Gov’t Code § 22.221(b), and 22.201(b) and (o).³ Neither Collin County nor the 416th District Court are in the district of the First or the Fourteenth Courts of Appeals,

² Respondent is the elected presiding judge of the 396th Judicial District of Tarrant County, which is part of the Second Court of Appeals. Tex. Gov’t Code. §§ 24.541; 22.201(c).

³ The First and Fourteenth Courts of Appeals’ districts are identical, “composed of the counties of Austin, Brazoria, Chambers, Colorado, Fort Bend, Galveston, Grimes, Harris, Waller, and Washington.” Tex. Gov’t Code Sec. 22.201(b) and (o).

which cannot and would not exercise jurisdiction over Respondent. *Id.* at § 24.560 and 22.201(b) and (o). The First Court of Appeals recently declined to compel a “trial court to vacate its order granting a transfer of venue to Brazoria County” because it found it did not have jurisdiction over the respondent judge of the 419th District Court in Travis County. *In Re Sorrow*, 2015 WL 3903515 at *1. In *McGee*, *supra*, the case relied upon by *Sorrow*, the First Court of Appeals dismissed a mandamus petition against Walker County officials because they were outside its statutory geographic jurisdiction. These decisions are determinative, because, as the State concedes, Respondent is acting on behalf of the 416th District Court of Collin County and Respondent cannot by law be a Harris County official. *See* fn 1-2; TEX. CONST. art. V, § 7. The State’s argument assumes that Respondent can legally sit in Harris County, which he cannot.

As noted in Relators’ Petitions, the only way that Respondent can lawfully conduct any matter on behalf of the 416th District Court outside of Collin County in this case is with the consent of Defendant and his counsel as required by Article 31.09, which has not been given.⁴ TEX. CONST. art. V, § 7; *Fain v. State*, 986 S.W.2d at 673.⁵ In effect, the only way for either Houston Courts of Appeals to acquire

⁴ *See* Appx. Tabs 6 and 8.

⁵ “[T]he legislature has amended the change of venue provisions to permit a court to change venue to another county while still maintaining the case on its own docket, ...Article 31.09 prescribes a manner of changing venue that permits a district court, with the agreement of the prosecutor and the defendant, to accomplish a change of venue while maintaining the cause on its

jurisdiction over the 416th District Court or the Respondent would have been for Respondent to obtain the written consent from Relator required by Article 31.09, which he did not, or for the Collin County District Clerk to send the case documents to Houston under 31.05, which she has not, and a new court be assigned.⁶

III. Harris County Has Not Acquired Jurisdiction Because of Respondent's Interference with the Collin County District Clerk, Causing No Documents to be Sent to Harris County.

As documented in Relator's Petitions and the Appendix at Tab 14, Ms. Lynne Finley, the Collin County District Clerk, filed a letter in these cases stating in pertinent part that:

I strive to fulfill my duties as the Collin County District Clerk with fairness and to treat all parties equally. Your letter puts me in the unenviable position of complying with your request and, by doing so, perhaps running afoul of the directions, expressed and/or implicit, of the Presiding Judge regarding venue and my office's ongoing role. It is my understanding that Judge Gallagher continues to preside over these cases under their current Collin County cause numbers and that he continues to use the services of the Collin County District Clerk's office as the custodian of the records in the above referenced cause numbers. Until I am directed otherwise, I will continue to perform the duties of District Clerk that I was elected by the citizens of Collin County to perform. Thus, I am unable under the current status of these cases to comply with your request and I have not, nor do I plan to transmit the case papers to Harris County at this time.

Respondent has given "directions" to the Collin County District Clerk to behave as if written consent had been given and Article 31.09(b) applicable. *See*

own docket, and preside over the trial in the courthouse of the county to which venue has been changed." *Fain*, 986 S.W.2d 673.

⁶ Even then, this is not certain. For example, where a direct appeal is transferred to another Court of Appeals by the Supreme Court under the equalization process, there is no jurisdiction in the transferee court in original proceedings, i.e., mandamus, arising from the transferred case. *In re Davis* 87 S.W.3d 794 (Tex. App.—Texarkana 2002, orig. proceeding).

Appx. Tab 14 (emphasis added). Following Respondent’s “directions,” the Clerk will not send the file to Harris County. *Id.*

Thus, it is Respondent’s actions that have prevented the transfer contemplated by Article 31.05 and the case has not yet been assigned a clerk’s file, case number, court, or any other indicia of filing in Harris County, Texas. Felony criminal cases in Harris County are assigned to one of the twenty-two district courts in the Criminal Division pursuant to the “Automatic Random Assignment System” as described in Sections J and G of the local Direct Filing Order.⁷ Because *no* documents have been sent to Harris County by the Clerk in Collin County, no Court in Harris County has acquired jurisdiction over this matter.

Prior to Texas permitting a waiver of indictment, it was well-settled that the court to which venue is changed does not acquire jurisdiction until the indictment is transmitted to it. *Hollingsworth v. State*, 221 S.W. 978 (Tex. Crim. App. 1920) overruled on other grounds by *King v. State*, 473 S.W.2d 43 (Tex. Crim. App. 1971) (recognizing jurisdiction may vest upon an information or valid waiver of indictment). Relying on *Hollingsworth*, the Court of Criminal Appeals concluded, “that, where a court having jurisdiction of the person and subject matter of one accused of a felony, by order changes the venue of the case, under and in accordance with the applicable statutes of this state, such change carries with it, and confers

⁷ Certified Copy published at <https://www.justex.net/Courts/Criminal/CriminalCourts.aspx>.

upon the court to which the venue is changed, full and complete jurisdiction of the case.” *Williams v. State*, 170 S.W.2d 482, 486 (Tex.Crim.App. 1943)(emphasis added). But, in this case, Relator *was* indicted, however *no* originals or certified copies of *any* pleadings have been transmitted to Harris County in compliance with 31.05. *See* Appx. Tab 14. Moreover, Respondent has *not* transferred venue “under and in accordance with the applicable statutes,” namely Article 31.09, thus jurisdiction has not vested in any court in Harris County and concomitantly, neither has jurisdiction vested with the First or Fourteenth Courts of Appeals.⁸

The effective preclusion of assignment to a court in Harris County stands in contrast to the otherwise analogous decision of this Court in *In re Amos*, wherein the case had been expressly transferred to a specific court, Dallas County Criminal Court of Appeals No. 2, by the local presiding administrative judge. *In re Amos*, 397 S.W.3d 309 at 315 (Tex. App.–Dallas 2013, no pet). No such assignment is even *possible* in this case by the presiding administrative judge in Harris County because the case file has not been sent by the Collin County District Clerk to the Harris County District Clerk or any judge there due to Respondent’s interference. *See*

⁸ Moreover, this Court of Appeals is without jurisdiction to issue mandamus to the District Clerk to send documents, however, “unless the clerk is interfering with its own appellate jurisdiction.” *In re Wilkerson*, 05-16-00322-CV, 2016 WL 1320815, at *1 (Tex. App.-Dallas Apr. 5, 2016, orig. proceeding) (citing *In re Simpson*, [997 S.W.2d 939](#), 939 (Tex. App.-Waco 1999, orig. proceeding)). There is law that even were the clerk to send a portion of the required documents to Harris County, the court there could then by its own authority compel the Collin County District Clerk to remedy any deficiencies. *See, e.g., Hollingsworth*, 221 S.W. at 979.

Appx. Tab 14. There are twenty-two district courts in Harris County that may hear criminal cases, none of which has been assigned to these cases.⁹ Underscoring this Court of Appeals' writ jurisdiction over Respondent further, the 416th District Court cannot, without consent, sit anywhere other than the county seat of Collin County [McKinney], Texas. TEX. CONST. art. V, § 7.

IV. Absent 31.09 Consent, the 416th May Not Sit Outside Collin County.

Code of Criminal Procedure Article 31.09 has been described as an *exception* to Article V, section 7 of the Texas Constitution, which requires a district court to conduct its proceedings in the county seat of the county in which the case is pending. *Fain v. State*, 986 S.W.2d 666, 673 (Tex. App.—Austin 1998, pet ref'd), TEX. CONST. art. V, § 7. A Respondent's acts that violate that statutory procedure are voidable. *Fain* at 671 (quoting *Davis v. State*, 956 S.W.2d 555, 559 (Tex. Crim. App. 1997)). No documents from these cases have been sent to Harris County and the case has been maintained on the docket of the 416th District Court.

V. The State's Cited Authority Is Irrelevant.

The State's cited authority does not withstand scrutiny. Nowhere in any of the cited cases do any of the decisions hold that mandamus under these

⁹ The 174th, 176th, 177th, 178th, 179th, 180th, 182nd, 183rd, 184th, 185th, 208th, 209th, 228th, 230th, 232nd, 248th, 262nd, 263rd, 337th, 338th, 339th, and 351st. See Tex. Gov't Code Sec. Chapter 24, Subchapters B and C. See also, <https://www.justex.net/Courts/Criminal/CriminalCourts.aspx>

circumstances lies in a Houston Court of Appeals. All are silent on any jurisdictional issues related to Article 31.09. In any event, all authority cited, even if remotely relevant, involve cases filed *prior* to the effective date of Art. 31.09¹⁰, the import of which is spelled out in Relator's Petitions.

As a result of the Respondent's complained of actions, no court in Harris County has been assigned the instant cases. The effect of his unlawful acts is that Respondent continues to preside over the 416th District Court of Collin County, Texas, over which this Court of Appeals has statutory jurisdiction.

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¹⁰ One decision cited by the State of Texas, *Saldivar v. State*, was the appeal from the highly publicized trial of the killer of Tejano music star Selena Quintanilla. See New York Times coverage at <http://www.nytimes.com/1995/10/27/us/woman-who-murdered-singer-gets-a-sentence-of-life-in-prison.html>. Although the opinion was issued in 1998, the trial occurred the month after the effective date of Art. 31.09, which did not apply as the Act only applied to cases filed after September 1, 1995. 74th Leg. Acts 1995, 74th Leg., ch. 651, Sec. 3 and 4 at pg. 3535, published online at http://www.lrl.state.tx.us/scanned/sessionLaws/74-0/HB_2949_CH_651.pdf (last viewed May 16, 2017).

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of May 2017, a true and correct copy of the above and foregoing **Response** was served on all counsel of record via electronic case filing, certified mail, return receipt requested, email, electronically, or hand delivery.

/s/ Philip H. Hilder
Philip H. Hilder

CERTIFICATE OF COMPLIANCE

1. This Response complies with the type-volume limitations of Tex. R. App. P. 9.4 because it contains 2275 words, excluding the parts of the Response exempted by Tex. R. App. P. 9.4(i).

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

Dated May 23, 2017.

/s/ Philip H. Hilder

Philip H. Hilder