NO. 14-24-00859-CR

IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS

ADIL SALEEM KHAN
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause Number 2406814
From County Criminal Court at Law No. 7
Harris County, Texas
Hon. Andrew Wright, Judge Presiding

BRIEF FOR APPELLANT

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

This case involves the revocation of community supervision (*i.e.*, probation)[1] in a DWI conviction. The trial court found five bases for revoking the probation of Mr. Adil Saleem Khan. On appeal, Mr. Khan challenges the sufficiency of the evidence in regard to each of the bases for revocation. He also asserts that the judge was not impartial based on certain comments the judge made in connection with the revocation hearing.

[1] The terms will be used interchangeably in this brief.

STATEMENT REGARDING ORAL ARGUMENT

Mr. Khan respectfully requests that his appellate attorney be permitted to make an oral argument. This appeal involves important issues concerning the propriety of remarks made by trial judges. Questions of harm and preservation of error are in play. Oral argument could be a significant help to this Court in deciding these issues.

ISSUES PRESENTED

Issue One

One of the five bases for revoking Mr. Khan's probation was that he used an illegal drug (cocaine). But insufficient evidence was produced at the hearing on the motion to support this finding. Should this basis be eliminated from the written judgment revoking probation?

Issue Two

A second basis for revoking Mr. Khan's probation was his possession, consumption, or use of alcohol. But no probation condition barred him from doing that. Rather, one condition prohibited Mr. Khan from ingesting alcohol "causing [him] to be impaired or intoxicated." The revocation motion alleged Mr. Khan used alcohol, but did not allege he became impaired or intoxicated. Also, there was no evidence of impairment or intoxication. Can this basis for revocation stand?

Issue Three

A third basis for revoking Mr. Khan's probation was his failure to submit to an evaluation of his educational skill level as directed by the CSCD. But there was never any evidence introduced showing Mr. Khan had not done this. Can this basis for revocation stand?

Issue Four

A fourth basis for revoking Mr. Khan's probation was failing to comply with vendor's rules concerning use and maintenance of an ignition interlock device. There was insufficient evidence to show the vendor had any rules or that, if there were rules, they were communicated to Mr. Khan. Can this basis for revocation stand?

Issue Five

A fifth basis for revoking Mr. Khan's probation was two failures to report to his probation officer. One time, Mr. Khan arrived late. Another time, he apologized a week afterwards for not reporting. Both times, his meetings were rescheduled and he attended those meetings. There was no testimony that either occasion was considered a failure to report at the time. Is the evidence sufficient to support a finding that Mr. Khan violated his probation?

Issue Six

If this Court sustains Issues One, Two, Three, Four, and Five, there will be no remaining basis for the trial court's Judgment Revoking Community Supervision. Given that there will be no basis for the revocation judgment, should this Court reverse the judgment?

Issue Seven

During preliminary proceedings at a probation-revocation hearing, the trial judge seemed upset that the defendant had not pursued treatment for drinking. The judge made comments indicating the truth of the allegations in the motion to revoke probation was a foregone conclusion. And the judge said the defendant "has wasted enough of this Court's time." Due process entitles a defendant to a fair hearing in a fair tribunal? Was due process satisfied here?

Issue Eight

During proceedings before a probation-revocation hearing, the judge said there was "not a chance in the world" the defendant would be put on house arrest. House arrest is a possible term of probation. Due process requires judges to consider the full range of punishment. Did the judge's statement constitute an arbitrary refusal to consider the full range of punishment?

STATEMENT OF JURISDICTION

The trial judge certified that the cause being appealed is not a plea bargain case and that Mr. Khan has the right of appeal.[2] This certification is accurate. Generally, the defendant in a criminal action has the right of appeal.[3]

Additionally, a defendant must timely file a notice of appeal to give a court of appeals jurisdiction over an appeal.[4] A notice of appeal is timely if it is filed within 30 days after the day the sentence is imposed or suspended in open court.[5] In this case, Mr. Khan timely filed a notice of appeal. The trial judge imposed a sentence on October 25, 2024.[6] Mr. Khan filed his notice of appeal on November 8, 2024.[7] Accordingly, this Court has jurisdiction to hear this appeal.

[2] C.R. at 97.
[3] Tex. Code Crim. Proc. art. 44.02.
[4] *Olivo v. State*, 918 S.W.2d 519, 522 (Tex. Crim. App. 1996).
[5] Tex. R. App. P. 26.2(a)(1).
[6] C.R. at 98-99.
[7] C.R. at 107.

STATEMENT OF PROCEDURAL HISTORY

Adil Khan's probation for a DWI offense was revoked on October 25, 2024.[8] He filed a notice of appeal.[9] The trial court signed a document entitled "Trial Court's Certification of Defendant's Right of Appeal" on October 25, 2024.[10]

The judgment is now before this Court on appeal. The district clerk filed the clerk's record on December 20, 2024.[11] The court reporter filed the reporter's record on January 31, 2025.[12] Generally, an appellant's brief must be filed within 30 days after the later of the filing of the clerk's record or the reporter's record.[13] In this case, the reporter's record was filed after the clerk's record. Accordingly, the appellant's brief in this case was due to be filed by the 30th day after January 31, 2025, which was March 2, 2025.

On March 3, 2025, this Court granted Mr. Khan's request for an extension of time to file his brief. The new due date is Wednesday, April 2, 2025. Mr. Khan timely filed his initial brief on March 31, 2025.

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[8] C.R. at 98.
[9] C.R. at 107.
[10] C.R. at 97.
[11] C.R. at 1.
[12] R.R. at 1.
[13] Tex. R. App. P. 38.6(a).

STATEMENT OF FACTS

Adil Khan pled guilty to DWI.[14] In September 2022, the judge sentenced Mr. Khan to 180 days in jail, but placed him on two years' probation.[15] In June 2024, the State filed a motion to revoke Mr. Khan's probation alleging eight violations.[16] He pled "not true" to each allegation.[17] The judge found five allegations true and revoked Mr. Khan's probation.[18] He sentenced him to 100 days in jail.[19]

Mr. Khan appeals, advancing eight issues. Further facts will be detailed in connection with each issue.

[14] C.R. at 51.
[15] *Id.*
[16] C.R. at 66-67.
[17] R.R. at 12-16.
[18] R.R. at 66-68.
[19] R.R. at 77.

SUMMARY OF THE ARGUMENT

Adil Khan advances eight issues on appeal in order of the greatest possible relief.

The State alleged eight reasons for revoking Mr. Khan's probation.[20] Mr. Khan pleaded "not true" to each allegation.[21] The trial court found five allegations "true."[22] Issues One through Five challenge the sufficiency of the evidence to support those "true" findings. If this Court finds the evidence insufficient to support any of the findings, we reach Issue Six. The relief requested in Issue Six is that the revocation judgment be overturned.

If this Court finds sufficient evidence to support any revocation reason, Issue Six becomes irrelevant because a single violation will support a probation-revocation order.[23] But a finding of insufficient evidence to support even one basis for revocation is still important. If such a finding is made, that reason for revocation cannot stand.

If Issue Six is reached and sustained, this Court need not reach Issues Seven and Eight. But if this Court does not reach (or sustain) Issue Six, Issue Seven should be considered.

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[20] C.R. at 66-67.
[21] R.R at 12-16.
[22] R.R. at 66-67.
[23] *Sanchez v. State*, 603 S.W.2d 869, 871 (Tex. Crim. App. [Panel Op.] 1980).

In Issue Seven, Mr. Khan contends the trial judge was biased. Prior to the revocation hearing, the judge declared that Mr. Khan "has wasted enough of my time."[24] And the judge made other comments suggesting he had already determined Mr. Khan had violated probation.[25] These comments revealed the judge's bias. The lack of an impartial judge violates due process. The judgment revoking Mr. Khan's probation should be reversed. The case should be remanded for a new revocation hearing before a different judge.

Issue Eight need not be addressed unless this Court overrules Issue Seven. Issue Eight complains of the judge's failure to consider the entire range of punishment. Before hearing evidence, the judge said there was "not a chance in the world" for house arrest[26]. This statement constitutes a failure to consider the full range of punishment and equates to judicial bias which violates due process. This Court should sustain Issue Eight and remand the case for a new punishment hearing before a different judge.

[24] R.R. at 8.
[25] *See e.g.,* R.R. at 9 ("at this point we are talking about punishment").
[26] *See* R.R. at 8.

ARGUMENT

Issue One

One of the five bases for revoking Mr. Khan's probation was that he used an illegal drug (cocaine). But insufficient evidence was produced at the hearing on the motion to support this finding. Should this basis be eliminated from the written judgment revoking probation?

The State's motion to revoke alleged eight ways Mr. Khan violated probation.[27] The trial judge found five of the allegations "true."[28] One allegation the judge found true was that Mr. Khan used an illegal drug (cocaine).[29]

But there was insufficient evidence of this finding. This alleged violation was only mentioned twice. The first mention came from the hearing's first witness – Amber Hoffman.[30] Ms. Hoffman testified as Mr. Khan's probation officer who had access to his probation file.[31] The prosecutor asked her if Mr. Khan had violated any terms of his probation.[32] She said he had.[33] The prosecutor then asked Ms. Hoffman to "walk us through" the violations.[34] She said:

> Sure. Failing to report to myself. He didn't report as scheduled anymore. No. 8, failing to participate in Supportive Outpatient Treatment by his deadline. Failing to complete CSR hours by his deadline. **He tested positive for cocaine.** When asked to provide his educational skill level, he did not provide. Per his alcohol monitoring device, he had positives. He also failed to maintain his alcohol-monitoring device each month by

[27] C.R. at 66.
[28] R.R. at 66-67.
[29] R.R. at 67.
[30] R.R. at 22.
[31] R.R. at 18-20.
[32] R.R. at 21.
[33] *Id.*
[34] *Id.*

> getting it calibrated and maintaining it. He also failed to participate in the second Impact Panel by the deadline.[35]

The highlighted language is the only statement by anyone concerning Mr. Khan using, possessing, or consuming an illegal drug. Ms. Hoffman did not say when or where the alleged positive test occurred. She did not state the amount of cocaine found in Mr. Khan's body. Indeed, Ms. Hoffman's statement that Mr. Khan tested positive for cocaine came during a summation of alleged violations. There was no detail beyond the naked statement that Mr. Khan testified positive for cocaine. Ms. Hoffman never testified to personal knowledge of the test.

Mr. Khan testified.[36] During cross-examination, the prosecutor asked him if he had "consumed any illegal substances since" beginning probation in September 2022.[37] Mr. Khan said he had not.[38] This was the only other evidence touching upon the cocaine-use allegation.

The probation officer's bare statement that Mr. Khan testified positive for cocaine is not enough. It does not constitute sufficient evidence to support the judge's finding that Mr. Khan violated his probation by using, possessing, or consuming an illegal drug. Case law says so.

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[35] R.R. at 21-22 (emphasis added).
[36] R.R. at 39-64.
[37] R.R. at 53-54.
[38] R.R. at 54.

Initially, a review of the law on motions to revoke probation is in order. This Court explained the basics in *Moore v. State*:

> In a hearing on a motion to revoke probation, the State must prove every element of the ground asserted for revocation by a preponderance of the evidence. *See McCullough v. State,* 710 S.W.2d 142, 145 (Tex. App.—Houston [14th Dist.] 1986, pet. ref'd). The State satisfies its burden of proof when the greater weight of credible evidence before the court creates a reasonable belief that it is more probable than not that a condition of probation has been violated as alleged in the motion to revoke. *See Joseph v. State,* 3 S.W.3d 627 (Tex. App.—Houston [14th Dist.] 1999, no pet.). In a probation revocation hearing, the trial judge is the sole trier of fact and determines the credibility of the witnesses and the weight to be given to their testimony. *See Battle v. State,* 571 S.W.2d 20, 22 (Tex. Crim. App. 1978). Appellate courts review an order revoking probation under the abuse of discretion standard. *See Cardona v. State,* 665 S.W.2d 492, 493-94 (Tex. Crim. App. 1984). In making this determination, [appellate courts] examine the evidence in the light most favorable to the trial court's order. *See Garrett v. State,* 619 S.W.2d 172, 174 (Tex. Crim. App. 1981).[39]

In our case, the probation officer testified Mr. Khan tested positive for cocaine. But there is no "foundation" for this statement. There must be a foundation.[40]

This Court's opinion in *Rodriguez v. State* demonstrates the insufficiency of the evidence here.[41] The facts in *Rodriguez* are similar to the facts here. The defendant was

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[39] *Moore v. State*, 11 S.W.3d 495, 498 (Tex. App.—Houston 2000, no pet.). *See Smith v. State*, No. 14-24-00314-CR, 2025 WL 556462 at *2 (Tex. App.—Houston [14th Dist.] Feb. 20, 2025, no pet. h.) (mem. op., not designated for publication) (court abuses its discretion in finding probation violation when insufficient evidence is not presented).

[40] *See Clemens v. State*, No. 03-05-00156-CR, 2008 WL 2065986 at *6 (Tex. App.—Austin May 15, 2008, no pet.) (mem. op., not designated for publication) (Court "cannot ignore the lack of a foundation" regarding arson investigator's testimony that bottles contained gasoline).

[41] *See Rodriguez v. State*, 2 S.W.3d 744 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

facing a motion to revoke probation for using cocaine.[42] The State's allegation was based on two urine samples.[43] Two probation-department employees (Daniels and Siurna) testified about the samples.[44] This Court found the evidence insufficient:

> Appellant argues that this testimony of Daniels and Siurna was insufficient to show that he violated his probation by using cocaine because the State failed to prove the chain of custody of his urine samples. We agree. The combined testimony of Siurna and Daniels is not enough to show the proper chain of custody of appellant's urine. The prosecutor needed to elicit some testimony from these two witnesses that showed what occurred, specifically, with appellant's urine samples and not just what occurs generally in each witness's office. Thus, based on the evidence, the trial court improperly revoked appellant's probation for violating the condition that required appellant to avoid the use of controlled substances.[45]

So, in *Rodriquez*, this Court found the evidence insufficient to show a positive cocaine test because of chain-of-custody problems with urine samples. If the evidence in *Rodriguez* was insufficient to show the defendant tested positive for cocaine, then the evidence in this case is insufficient too. Here, there was no evidence about urine samples. All we have is a naked statement that Mr. Khan testified positive for cocaine. It is not enough. There is no foundation. There was insufficient evidence to show Mr.

[42] *Id.* at 745.
[43] *Id.* at 746.
[44] *Id.* at 747-48.
[45] *Id.* at 748.

Khan violated a term of his probation by using cocaine.[46] Accordingly, this basis for revocation should be removed from the judgment.

[46] *Accord Schielak v. State*, No. 14-99-00064-CR, 2000 WL 1611202 at *1 (Tex. App.—Houston [14th Dist.] Oct. 26, 2000, no pet.) (mem. op., not designated for publication) (evidence sufficient because chain of custody for urine samples was proven).

Issue Two

A second basis for revoking Mr. Khan's probation was his possession, consumption, or use of alcohol. But no probation condition barred him from doing that. Rather, one condition prohibited Mr. Khan from ingesting alcohol "causing [him] to be impaired or intoxicated." The revocation motion alleged Mr. Khan used alcohol, but did not allege he became impaired or intoxicated. Also, there was no evidence of impairment or intoxication. Can this basis for revocation stand?

Mr. Khan was not prohibited from using alcohol as a condition of probation. Probation Condition 18 says:

> Not ingest, use or consume alcohol an alcoholic beverage any item which is marked not for human consumption causing you to be impaired or intoxicated [sic].[47]

The motion to revoke alleged:

> The State would further show the defendant used, possessed, or consumed an alcoholic beverage as evidenced by confirmed alcohol readings on his alcohol monitoring device on the following dates with the BAC reading: 06/18/2023; BrAC .036, BrAc .034 and BrAC .033.[48]

The allegation says nothing about impairment or intoxication. So, no violation of Mr. Khan's probation was even alleged. This is problematic:

> While there is no right to either the court's or the jury's grace, once granted, probation should not be arbitrarily withdrawn by the court and **the court is not authorized to revoke without a showing that the probationer has violated a condition of his probation.**[49]

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[47] C.R. at 54.

[48] C.R. at 66.

[49] *Campbell v. State*, 456 S.W.2d 918, 922 (Tex. Crim. App. 1970) (emphasis added).

Here, the State offered proof that Mr. Khan used alcohol. But there was no evidence Mr. Khan was, therefore, impaired or intoxicated. There was insufficient evidence to show Mr. Khan violated this probation term. The probation revocation cannot stand on this basis.[50] This basis for revocation should be removed from the judgment.

[50] *See DeGay v. State,* 741 S.W.2d 445, 449 (Tex. Crim. App. 1987) (probation-revocation order must be based on probation condition).

Issue Three

Another basis for revoking Mr. Khan's probation was his failure to submit to an evaluation of his educational skill level as directed by the CSCD. But there was never any evidence introduced showing Mr. Khan had not done this. Can this basis for revocation stand?

Condition 17 of Mr. Khan's probation says:

> Submit to an evaluation of your educational skill level by 10/02/22. If it is determined that you have not attained the average skill of students who have completed the sixth grade in public schools in this State, you shall participate in a program that teaches functionally illiterate persons to read.[51]

Mr. Khan's two-year probation period began September 2, 2022.[52] The State alleged Mr. Khan violated Condition 17:

> The State would further show the said Defendant did then and there violate terms and conditions of supervision by: Failing to submit to an evaluation of the education skill level as directed by the CSCD on the following date(s): October 2, 2022.[53]

But the State produced no evidence of this alleged failure. The State only called one witness – Mr. Khan's probation officer, Amber Hoffman. The prosecutor asked Ms. Hoffman if Mr. Khan violated any terms of his probation.[54] Ms. Hoffman said he had.[55] The prosecutor requested that Ms. Hoffman go through the violations one by one.[56] Regarding this violation, Ms. Hoffman said only: "When asked to provide his

[51] C.R. at 54.
[52] C.R. at 51, 53.
[53] C.R. at 66. Mr. Khan pled not true. R.R. at 15.
[54] R.R. at 21.
[55] *Id.*
[56] *Id.*

educational skill level, he did not provide."[57] During the State's direct examination of Ms. Hoffman, there was no further testimony about Mr. Khan not providing his educational skill level. During cross-examination, the following colloquy occurred between Mr. Khan's lawyer, Jim Elick, and Ms. Hoffman:

> Q. [by Mr. Elick] Did you ever receive his transcripts from his university?
>
> A. [by Ms. Hoffman] I do not have verification of it, no, sir.
>
> Q. Did he ever do an evaluation of his educational skill level?
>
> A. No, sir.[58]

Ms. Hoffman gave no further testimony about Mr. Khan not providing his educational skill level. Mr. Khan testified and had the following colloquy with his lawyer:

> Q. [Mr. Elick] Did you request that your transcripts be sent to Ms. Hoffman?
>
> A. [Mr. Khan] Yes, sir.
>
> Q. Okay. Were you aware that you had not completed the educational skill level evaluation?
>
> A. I was not aware there was an evaluation test to be taken.[59]

On cross-examination, the prosecutor had this exchange with Mr. Khan:

> Q. [Prosecutor] Are you an educated person?

[57] R.R. at 22.
[58] R.R. at 29-30.
[59] R.R. at 48.

A. [Mr. Khan] It's a – I will let you decide on that.

Q. Do you have a degree?

A. I do.

Q. So you didn't understand the rules of your probation?

A. I understood the rules of probation.

Q. But you didn't read them closely enough?

A. You would have to specify which rules you are talking about.

Q. That's what you said previously about – let's see – the evaluation of your educational skill level. You said you weren't aware that was a requirement?

A. Was the evaluation an actual written test or was it a submission of the documents? Transcripts?

All testimony relevant to this issue is shown above. There is nothing else. This evidence is insufficient to show, by a preponderance of the evidence, a violation of Condition 17.

The evidence does not show CSCD[60] ever directed Mr. Khan to participate in an evaluation of his educational skill level. That being so, how could he be expected to submit to an evaluation? What we have here is a condition of probation contingent on

[60] "CSCD" means the Harris County Community Supervision and Corrections Department.

a third party's action, namely, the CSCD. Mr. Khan could only have submitted to an evaluation of his educational skill level if CSCD directed him to do so.

A relevant Court-of-Criminal-Appeals opinion is *Leonard v. State*.[61] In *Leonard*, the defendant had been placed on deferred adjudication.[62] One probation requirement was to:

> Attend and participate fully in and successfully complete psychological counseling, treatment, and aftercare sessions for sex offenders with an individual or organization as specified by the Court or the supervision office.[63]

The defendant was adjudicated guilty because for failing to complete a sex-offender-treatment program.[64] The Court reversed the defendant's adjudication.

> In a revocation proceeding, the trial court has discretion to revoke community supervision when a preponderance of the evidence supports one of the State's allegations that the defendant violated a condition of his community supervision. . . . On appeal from a trial court's decision to revoke, therefore, appellate courts review the record only to ensure that the trial court did not abuse its discretion. Upon close examination, however, it is not obvious how an abuse-of-discretion standard applies in this case. The trial court ordered the appellant to "[a]ttend and participate fully in and successfully complete" a program. The evidence at the adjudication hearing showed that the appellant did "[a]ttend and "participate fully" in the program, both of which were within his power to do. **The appellant did not have full control over his ability to "successfully complete" the program, however**; he was discharged because the therapist came to believe that he was being dishonest. Thus, it was the therapist's discretion that caused the appellant to be in violation of the term of his community supervision. . . . What has happened here is

[61] *Leonard v. State*, 385 S.W.3d 570 (Tex. Crim. App. 2012).
[62] *Id.* at 572.
[63] *Id.*.
[64] *Id.* at 576.

> that **the trial court, through a condition of the appellant's community supervision, made the appellant's compliance with the terms of his community supervision subject to the discretion of a third party.**[65]

Our case is similar. Mr. Khan could submit to an evaluation of his educational skill level only upon direction by the CSCD (a third party). There is no evidence that happened. This basis for revoking Mr. Khan's probation cannot stand.[66] It should be removed from the judgment.

[65] *Id.* at 576-77 (emphasis added).
[66] *See DeGay v. State,* 741 S.W.2d 445, 449 (Tex. Crim. App. 1987) (order revoking probation must be based on probation condition).

Issue Four

A fourth basis for revoking Mr. Khan's probation was failing to comply with vendor's rules concerning use and maintenance of an ignition interlock device. There was insufficient evidence to show the vendor had any rules or that, if there were rules, they were communicated to Mr. Khan. Can this basis for revocation stand?

Condition 21 of Mr. Khan's probation says:

> You must place a court-approved deep-lung breath analysis mechanism (ignition interlock) with photographic capabilities on any vehicle you drive, to make impractical the operation of the motor vehicle if ethyl alcohol is detected in your breath beginning 09/09/22 until released by further order of the Court. You may not operate a motor vehicle unless it is equipped with an [sic] above said device. If you do not have a vehicle or access to a vehicle upon which you can install the above said device, you are ordered to have a court-approved At-Home Alcohol Monitor of a Secure Continuous Remote Alcohol Monitoring (SCRAM) device within 7 days of this order. You must comply with all vendors [sic] rules pertaining to the use and maintenance of the device.[67]

The revocation motion alleged Mr. Khan violated this condition by "[f]ailing to comply with all vendors' rules pertaining to the use and maintenance of the device."[68] The allegation does not say exactly how Mr. Khan failed to comply with the rules.

The State called a single witness to testify in support of its allegations. That witness was Mr. Khan's probation officer, Amber Hoffman. The prosecutor asked Ms. Hoffman how Mr. Khan had violated his probation.[69] She said one way was that he

[67] C.R. at 54.
[68] C.R. at 66.
[69] R.R. at 21.

"failed to maintain his alcohol-monitoring device each month by getting it calibrated and maintaining it:"

> He would go in between calibrations each month – going without calibrations. And any other – just the BAC violations that he had previously, but the biggest one is failing to maintain it and keep it calibrated each month.[70]

On cross-examination, Mr. Khan's lawyer, Jim Elick, questioned Ms. Hoffman:

> Q. And you don't have any personal knowledge of his maintenance of [the] Interlock device, correct?
>
> A. I have what is reported to me from Smart Start, the vendor, and what was reported to me by Mr. Khan.[71]

Mr. Khan testified.[72] Mr. Elick questioned Mr. Khan as follows:

> Q. Did you hear the allegations that you were [not] maintaining the Interlock device?
>
> A. I did hear the allegations.
>
> Q. Okay. And did you do, in good faith, your best to maintain the device?
>
> A. It was a good faith effort. I wasn't disclosed of the maintenance routine on it. But my intentions was [sic] to proceed in the Court's request, so.
>
> Q. Okay.
>
> A. In good faith, I did.
>
> Q. When it was installed, did the provider give you the instructions or explain what all needed to be done?

[70] *Id.*
[71] R.R. at 30.
[72] R.R. at 39-64.

> A. The provider did not give me any instructions as far as monthly maintenance, per 30 days, until later on in the course – in the duration of that probation. I had to request specifics. It was very hard to get, you know, substantial information from both the supervisor and the Smart Start vendor. [73]

On cross-examination, the prosecutor did not address Mr. Khan's alleged failure to follow rules regarding the ignition interlock.[74] So, at the hearing's end, we knew only that he did not get his ignition-interlock device calibrated every thirty days. That's it.

Now, what do we not know? We do not know if the vendor had any rule requiring ignition-interlock devices to be calibrated every thirty days. Even if we knew of such a rule, we do not know if it was communicated to Mr. Khan.

It is the States' burden to prove the defendant violated a probation condition.[75] That proof is lacking when it comes to the allegation that Mr. Khan did not follow the vendor's rules regarding his ignition-interlock device. Accordingly, this basis for revocation should be removed from the judgment

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[73] R.R. at 46-47.

[74] *See* R.R. at 51-62, 64. Mr. Khan testified as follows during cross-examination (*see* R.R. at 53):

> And, you know, for the last two years I've been operating with a device. I still have a device in my car.

[75] *Campbell v. State*, 456 S.W.2d at 922; *Zane v. State*, 420 S.W.2d 953, 954 (Tex. Crim. App. 1967) ("The burden is upon the State to prove the violations alleged for revocation. Upon the State's failure to meet this burden, the court was without authority to enter the order revoking probation."). *See also Simpson v. State*, 591 S.W.3d 571, 577 n. 29 (Tex. Crim. App. 2020).

Issue Five

A fifth basis for revoking Mr. Khan's probation was two failures to report to his probation officer. One time, Mr. Khan arrived late. Another time, he apologized a week afterwards for not reporting. Both times, his meetings were rescheduled and he attended those meetings. There was no testimony that either occasion was considered a failure to report at the time. Is the evidence sufficient to support a finding that Mr. Khan violated his probation?

Condition 2 of Mr. Khan's probation says:

> Report to the Community Supervision Officer **as directed** for the remainder of the supervision term unless so ordered differently by the Court.[76]

The "Motion to Revoke Community Supervision" alleged Mr. Khan violated this condition:

> The State would further show the said Defendant did then and there violate terms and conditions of Community Supervision by: Failing to report to the Community Supervision Officer; to wit: the Defendant failed to report **as directed** for the months of February 2023, December 2023.[77]

Mr. Khan's probation officer, Amber Hoffman, testified that Mr. Khan violated his probation by "failing to report to myself."[78] The following exchange between Ms. Hoffman and the prosecutor is the only relevant direct-examination testimony:

> Q. Did he ever report to his community supervision officer?
>
> A. Yes, ma'am.
>
> Q. Which months did he not report to the officer?

[76] C.R. at 53 (emphasis added).
[77] C.R. at 66.
[78] R.R. at 21.

A. February 2023 and December 2023.[79]

The February Appointment

On cross-examination, Ms. Hoffman addressed an appointment scheduled for February 10, 2023:

> Q. Ms. Hoffman, you testified that Mr. Khan failed to report in February of 2023?
>
> A. Yes, sir. Yes, sir.
>
> Q. Okay. Was he in communication with you at that time?
>
> A. There were periods where we asked to reschedule numerous times, but in those two instances I did not receive a call or an email that I recall.
>
> . . .
>
> Q. Okay. And what time – what day and what time was the appointment in February?
>
> A. He was scheduled for February 10th at 11:00 a.m.
>
> Q. Okay. And your testimony is that he did not make it by 11:00 a.m., correct?
>
> A. Correct.
>
> Q. Isn't it true that he did come, but it was after you'd already left at 12:00 o'clock p.m. that day?
>
> A. No, sir. He – it looks – per my notes on February 15, 2023, he was rescheduled because he failed to report and then he was rescheduled for March 2nd, 2023.

[79] R.R. at 22.

Q. What day was his appointment? Was it on February 10th?

A. Yes, sir. It was on February 10th. His appointment was at 11:00 and I left the office at 12:00.

Q. Okay. He did come. He just didn't get there by 11:00, correct?

A. Correct. He left – I guess, he came and then I don't know if he was seen. There's no notes in there that he was seen. Per his email, he cited his father coming back from overseas.

Q. And so on February 15th, you responded and said that you didn't have any more availabilities for the month of February, correct?

A. Correct.

Q. So he didn't have it on February 15th, right?

A. On February 15th, he was rescheduled –

Q. Okay

A. – for his next appointment date.

Q. Okay. So he did attempt to report, but he was just an hour – over an hour late?

A. I am assuming so. There's no notes of – following [sic] after I left.[80]

Mr. Khan also testified regarding the allegation:

Q. [Mr. Elick] Can you tell the Court what was going on in February of 2023 and why you were a few hours or over an hour late to the –

A. First of all, I apologize. I don't have my notes in front of me, but my intention and respect for the Court, the Judge, the State was to be here on time, but since I do take care of my ailing father, I was not able to be here at that specific time. But rest assured my intentions was to abide by those

[80] R.R. at 26-28.

> confines of the probation restrictions. **I was late, but my intention was to be there on time for Officer Hoffman,** so.[81]

So, Mr. Khan arrived for his appointment with his probation officer on February 10th, albeit late. He sent an e-mail message to Ms. Hoffman explaining why he could not arrive by 11:00.[82] He also attempted to reschedule his appointment for later in February.[83] And the rescheduling of appointments by both parties was not unusual.[84] Ms. Hoffman had no other appointment times available in February, so she reset the appointment for March 2nd.[85] There is no allegation Mr. Khan missed this meeting.

The question is whether Mr. Khan "failed to report as directed" to his probation officer "for the month[ ] of February of 2023. The evidence is insufficient to show this. He was late to his appointment. He sent an explanatory e-mail. He attempted to reschedule his appointment for later that month. His probation officer could not arrange another February appointment, so she reset the appointment for March 2nd. Mr. Khan honored that appointment. So, he did as his probation officer directed, after his tardy February 10th appearance. He honored his February appointment (which was conducted on March 2nd due to Ms. Hoffman's unavailability). There is no evidence Mr. Khan's tardiness on February 10th was considered a failure to report at that time.

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[81] R.R. at 40-41 (emphasis added).
[82] R.R. at 27.
[83] R.R. at 28.
[84] R.R. at 26 (Ms. Hoffman testified "[t]here were periods when **we** asked to reschedule numerous times . . . .") (emphasis added).
[85] R.R. at 27.

All indications are the rescheduled meeting on March 2nd was simply an alteration of Mr. Khan's February reporting date. So, Mr. Khan fulfilled his February reporting obligation.

The December Appointment

On cross-examination, Ms. Hoffman testified about Mr. Khan's non-appearance for a scheduled December meeting:

> Q. [Mr. Elick] And what day was his day to report in December?
>
> A. [Ms. Hoffman] December 22, 2023, at 9:30.
>
> Q. Did he communicate about his reason for not making that meeting?
>
> A. Per my notes, I don't have any emails regarding him not being able to show up. I did receive an email on December 29th stating that he apologized for missing his monthly meeting and cited his workload and family obligations.
>
> Q. And when was the next time he reported?
>
> A. January 12th, 2024.[86]

The evidence shows a history of rescheduling appointments. Mr. Khan missed his December appointment. But given the history of rescheduling, it is unsurprising Mr. Khan did not immediately e-mail Ms. Hoffman about his missed appointment. There is no question Mr. Khan was overly casual in the timing of his email. But there is also no question that, having missed the meeting, Mr. Khan followed Ms. Hoffman's

[86] R.R. at 29.

directions for the next meeting. That meeting was scheduled for January 12, 2024, and Mr. Khan appeared as directed.[87] So, Mr. Khan attended his December meeting (which was necessarily moved to January).

The Law

Review of probation-revocation orders is limited to whether the trial court abused its discretion.[88] A court abuses its discretion if it revokes someone's probation when the evidence is insufficient to support the State's allegations.[89] In a probation-revocation hearing, the measure of the sufficiency of the evidence is by a preponderance of the evidence.[90] The evidence is sufficient when the greater weight of credible evidence before the court creates a reasonable belief that a probation condition has been violated.[91] The trial court is the sole trier of the facts, the credibility of the witnesses, and the weight to be given the testimony.[92] Appellate courts must review the evidence in the light most favorable to the trial court's findings.[93] So, the question here is whether a preponderance of evidence existed that Mr. Khan failed to report as directed.

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[87] R.R. at 46.
[88] *Burke v. State*, 930 S.W.2d 230, 232 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd).
[89] *Cardona v. State*, 665 S.W.2d at 493.
[90] *Anderson v. State*, 621 S.W.2d 805, 808 (Tex. Crim. App. [Panel Op.] 1981).
[91] *Goode v. State*, 685 S.W.2d 789, 790 (Tex. App.—Fort Worth 1985, no pet.).
[92] *Grant v. State*, 566 S.W.2d 954, 956 (Tex. Crim. App. [Panel Op.]1978).
[93] *Garrett v. State*, 619 S.W.2d 172, 174 (Tex. Crim. App. [Panel Op.] 1981).

As for the February allegation, Mr. Khan had an appointment to meet his probation officer on February 10th at 11:00. He showed up late. His probation officer directed him to meet on March 2nd. He followed those directions. This was the February meeting – even though it was delayed until March. The probation officer never suggested Mr. Khan had ruined his chance to successfully complete probation. The evidence suggests Mr. Khan's late arrival to the February 10th meeting was simply treated as an event requiring another adjustment to his reporting schedule.

Similarly, Mr. Khan had an appointment to meet his probation officer on December 22nd. He did not attend. A week later he apologized for missing his appointment and the probation officer directed him to meet on January 12th. He attended that meeting. This was his "December" meeting even though it was not held until January. The probation officer did not suggest to Mr. Khan that he had ruined his chance to successfully complete probation.

In both instances, Mr. Khan was imperfect in attending the initially arranged meetings. He was then directed how to correct things and report for the two months in question. He followed those directions. The evidence is insufficient to show he failed in his duty to report. As support for his argument, Mr. Khan points to *Campbell v. State* in which our Court of Criminal Appeals said:

> The probationary condition imposed upon appellant relating to reporting reads as follows:

> '(d) Report to the Probation Officer as directed; Defendant is Paroled to P. L. Crossley, Adult Probation Officer, or his successors in office; Defendant shall report this day in person, **and thereafter as directed by the said P. L. Crossley**.' (Emphasis Supplied.)
>
> **By such condition the court delegated to the probation officer the responsibility for establishing reporting dates and periods and imparting the same to the appellant.** No evidence was offered to show when the appellant was directed to report. Mr. Crossley, the Adult Probation Officer, did testify that he received a written report from appellant on November 8, 1965 (13 days after probation was granted) and none thereafter. **While there was testimony to the effect that appellant had failed to report for a number of months, Mr. Crossley did not testify that he had directed appellant to report monthly or otherwise, and that appellant was in violation of such instructions**.[94]

Our case resembles *Campbell*. There is no evidence Ms. Hoffman limited Mr. Khan's ability to comply with his February reporting requirement to meeting on February 10th at 11:00. In fact, it is at least equally likely the probation officer permitted Mr. Khan to satisfy his February-reporting requirement on March 2nd. The same goes for December. There is no evidence the probation officer limited Mr. Khan's ability to comply with his December reporting requirement to meeting on December 22nd. It is equally likely the probation officer permitted Mr. Khan to satisfy his December reporting requirement on January 12th.[95]

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[94] *Campbell v. State*, 420 S.W.2d 715, 715 (Tex. Crim. App. 1967) (emphasis added).

[95] To revoke a defendant's probation, there must be a preponderance of the evidence that the defendant violated a probation term. *Anderson v. State*, 621 S.W.2d at 808. Stated differently, violation of the term must be be more likely than not. *Comm'n for Lawyer Discipline v. Rosales,* 577 S.W.3d 305 n. 3 (Tex. App.—Austin 2019, pet. denied). Thus, when the question of whether a probation term has been violated results in a 50-50 answer, the violation has not been proven by a preponderance of the evidence. *Banford v. Entergy Nuclear Operations, Inc.,* 74 F.Supp.3d 658, 674 (D. Vermont 2015) ("To

Cotton v. State is also instructive.[96] *Cotton* involved a probation-revocation motion in which the defendant allegedly failed to report as directed.[97] The Court of Criminal Appeals said:

> With regard to the failure to report to the probation department as directed, there is no evidence in the record as to when appellant was to report. Therefore, we conclude that the trial court abused its discretion in revoking probation on this ground.[98]

In our case, there is evidence Mr. Khan was to report on February 10th and on December 22nd. But there is no evidence these were the only dates that would satisfy his reporting obligation for those months. The evidence suggests Mr. Khan reported on alternative dates to satisfy his reporting obligation. As in *Cotton*, there is no evidence as to the probationer's reporting options.

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prove something by a preponderance of the evidence, the proponent must introduce a quantum of proof sufficient to push the factfinder over the line from less likely **or equally likely** to more likely than not.") (emphasis added).

[96] *Cotton v. State*, 472 S.W.2d 526 (Tex. Crim. App. 1971).

[97] *Id.* at 527.

[98] *Id.*

Several other cases exist in which evidence was insufficient to support revocation because of a reporting failure. Those cases include *Hartsfield v. State*,[99] *Davis v. State*,[100] and *Brewer v. State*.[101]

The evidence is insufficient to show Mr. Khan failed to report to his probation officer "as directed." This Court should sustain this issue and remove from the judgment the finding of a probation violation based on a reporting failure.

[99] *Hartsfield v. State*, 523 S.W.2d 683 (Tex. Crim. App. 1975). In *Hartsfield*, the defendant was to report to "Lewis" (or to any other probation officer if Lewis was unavailable). *Id.* at 685. The evidence showed only that the defendant did not report to Officer Lewis for certain months. *Id.* The evidence did not show the defendant failed to report to another probation officer. *Id.* The Court of Criminal Appeals found the evidence insufficient to support revocation. *Id.*

[100] *Davis v. State*, 563 S.W.2d 264, 266 (Tex. Crim. App. 1978) (like *Hartsfield*).

[101] *Brewer v. State*, 572 S.W.2d 719, 722 (Tex. Crim. App. [Panel Op.] 1978) (evidence of reporting failure insufficient to support revocation).

Issue Six

If this Court sustains Issues Two, Three, Four, Five, and Six, there will be no remaining basis for the trial court's Judgment Revoking Community Supervision. Given that there will be no basis for the revocation judgment, should this Court reverse the judgment?

This issue should be reached only if Issues One through Five are sustained. This is because the court found five reasons for revoking Mr. Khan's probation. Those five reasons are addressed in Issues One through Five. In each of those issues, Mr. Khan asks this Court to remove the particular reason for revoking his probation from the judgement. If this Court finds all five reasons improper, there should never have been any revocation. If this is the case, the judgment revoking community supervision should be reversed.

Of course, a single probation violation will support an order revoking probation.[102] So, if this Court finds even one of the five reasons for revocation to be sound, this issue is moot.

[102] *Sanchez v. State*, 603 S.W.2d at 871.

Issue Seven

During preliminary proceedings at a probation-revocation hearing, the trial judge seemed upset that the defendant had not pursued treatment for drinking. The judge made comments indicating the truth of the allegations in the motion to revoke probation was a foregone conclusion. And the judge said the defendant "has wasted enough of this Court's time." Due process entitles a defendant to a fair hearing in a fair tribunal? Was due process satisfied here?

The Judge's Comments at the Probation-Revocation Hearing

Before testimony began, the judge, prosecutor, and defense counsel conversed:[103]

> MS. HOPKINS [prosecutor]: Judge, I wanted to get the final offers on the table before we start the hearing.
>
> THE COURT: Okay.
>
> MS. HOPKINS: I know as of the 2nd of October, there was an option for treatment or 60 days Harris County Jail. As of today, have those offers changed or are they off the table?
>
> THE COURT: They are off the table.
>
> MS. HOPKINS: Okay.
>
> THE COURT: I have had a lengthy discussion with Mr. Elick, the Court was involved, the State, we were all trying to move Mr. Khan in a way that would give him the treatment that the Court thinks he needs. He rejected that flatly, and said he wanted this hearing; and that's what I plan on doing today. I am going to have that hearing. What happens at that – whether it be he's not revoked, or whether he is revoked, or whether it means he's sentenced to less, more, or zero jail time – I don't know. We'll see what happens at that hearing. But the Court is not planning on doing that, unless you've been authorized to actually seek that out. I am guessing you have not, correct?
>
> MR. ELICK: Seek out?

[103] R.R. at 7-11. The hearing was October 25, 2024. The prosecutor was Kaitlin Hopkins. Defense counsel was James Elick. The judge was the Honorable Andrew Wright.

THE COURT: Whether or not something could be resolved today?

MR. ELICK: I have been authorized to seek out if something can be resolved today, Your Honor.

THE COURT: Is he ready to go to treatment today or jail today? Because if it is neither, we are having a hearing.

MR. ELICK: **I was going to ask for house arrest.**

THE COURT: **Not a chance in the world that's happening**, Mr. Elick. I understand that Mr. Khan thinks that he's the only person that can help take care of his father – and I do not have any lack of sympathy for his father,[104] but there are things that can be done that, frankly, don't make Mr. Khan a necessary party to being at home. And frankly, **that should have given him more reason why he should not have done the things he was supposed to – that he did on probation.** We're also talking about somebody – and this was prior to your involvement – but one DWI, picked up a second DWI while he was on bond, and then went on probation. He didn't understand that it was serious then when his bond got revoked the first time and realized jail was a real consequence. **Then obviously, he doesn't care about his father enough not to mess up his probation. And at this point, we're talking punishment.** So, obviously – I haven't heard any evidence – but if I am satisfied beyond a preponderance of the evidence, that he has violated his probation, then jail is a real possibility because he has already indicated he doesn't want treatment, which I tried to get him to do three weeks ago. So that's where we are at.

MR. ELICK: Your Honor, if – would I have five minutes to talk to my client?

THE COURT: 100 percent. Yeah. I am not telling you that we are going to jump straight into the hearing at 10:00 o'clock. Let's say this, we'll start at 10:20. That will give you some ample time to talk to Mr. Khan. If there's something else that you want to possibly talk – we can hear from you, and he's interested, I'll hear you out. But [I] intended this morning

[104] Earlier testimony indicated Mr. Khan's father was in failing health and needed Mr. Khan him to administer medications. R.R. at 4-5.

> to have a hearing on it, whether it be yourself or Mr. Asafi,[105] and that's what I plan on doing today. **Frankly, Mr. Khan has wasted enough of this Court's time.** He had a court setting in July, August, September – at the beginning of this month – and he has not taken this seriously at all. Only because we are here at the time that stuff is about to get serious that he actually engages in you to actually deal with it appropriately. That's not on you, Mr. Elick, because I know that every time you come and done your best as can for your client, **but he's – he's wasted enough of my time.** Got it?[106]

Due Process Requires a Fair Hearing and a Fair Tribunal

"A fair trial in a fair tribunal is a basic requirement of due process."[107] And "[d]ue process guarantees the absence of actual bias on the part of a judge."[108] "Public policy demands that a judge who tries a case act with absolute impartiality."[109] As this Court explained, these requirements apply in probation-revocation proceedings:

> The defendant at a revocation of probation proceeding need not be afforded the full range of constitutional and statutory protections available at a criminal trial. *See Gagnon v. Scarpelli,* 411 U.S. 778, 93 S.Ct. 1756, 36

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[105] The reference to Mr. Asafi is to Attorney Jay Asafi who had addressed the Court.

[106] The Judge's antagonism toward Mr. Khan came out during the hearing when Mr. Khan was testifying and his cell phone rang. R.R. at 43. Mr. Khan said: "Those are my alarms, Your Honor. Sorry about that." The Judge responded (R.R. at 43):

> You want to turn that off, man? Why don't you do that. Go ahead and turn that off. Mr. Elick, he's going to turn off his phone, which he can't apparently do before he comes into this court. Just turn it off.

[107] *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed.2d 942 (1955). The Supreme Court has called the right to a fair trial "the most fundamental of all freedoms." *Estes v. Texas*, 381 U.S. 532, 540, 85 S.Ct. 1628, 1632, 14 L.Ed.2d 543 (1965).

[108] *Ex parte Halprin*, ---S.W.3d ---, 2024 WL 4702377 at *2 (Tex. Crim. App. 2024). *See also Bracy v Gramley*, 520 U.S. 899, 904-05, 117 S.Ct. 1793, 1797, 138 L.Ed.2d 97 (1997) ("[T]he Due Process Clause clearly requires a fair trial in a fair tribunal, before a judge with no actual bias against the defendant or interest in the outcome of his particular case."); *Brumit v. State*, 206 S.W.3d 639, 645 (Tex. Crim. App. 2006) ("Due process requires a neutral and detached hearing body or officer.").

[109] *Hoggett v. Brown*, 971 S.W.2d 472, 495 (Tex. App.—Houston [14th Dist.] 1997, pet. denied).

L.Ed.2d 656 (1973). This is so because the defendant's guilt is not at issue; the trial court is not concerned with determining the defendant's original criminal culpability. The question at a revocation hearing is whether the appellant broke the contract he made with the court after the determination of guilt. *See Davenport v. State,* 574 S.W.2d 73, 75 (Tex. Crim. App. 1978) (quoting *Kelly v. State*, 483 S.W.2d 467, 469 (Tex. Crim. App. 1972)). "This is not to say, however, that all constitutional guarantees of due process fly out the window at a probation revocation hearing." *Ruedas v. State*, 586 S.W.2d 520, 523 (Tex. Crim. App. 1979). A probationer is entitled to certain due process protections in the revocation proceedings. *See Bradley v. State,* 564 S.W.2d 727, 729 (Tex. Crim. App. 1978); *Whisenhant v. State*, 557 S.W.2d 102, 105 (Tex. Crim. App. 1977). In *Gagnon v. Scarpelli,* the Supreme Court enunciated the minimum requirements of due process, which must be observed in probation revocation hearings. They include: written notice of the claimed violations of probation, disclosure to the probationer of the evidence against him, the opportunity to be heard in person and to present witnesses, the right to confront and cross-examine adverse witnesses, **a neutral and detached hearing body**, and a written statement by the fact finders as to the evidence relied on and the reasons for revoking probation. *See id.,* 411 U.S. at 786, 93 S.Ct. at 1761-62; *Ruedas*, 586 S.W.2d at 523; *Osborne v. State*, 845 S.W.2d 319, 321 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd). The probationer's interests are also protected by the due course of law provisions of the Texas Constitution. TEX. CONST. Article I, § 19; *Rogers v. State*, 640 S.W.2d 248, 252 (Tex. Crim. App. 1982) (Opinion on State's Motion for Rehearing); *Wester v. State,* 542 S.W.2d 403, 406 (Tex. Crim. App. 1976).[110]

Was the Trial Judge Biased?

Did Judge Wright's courtroom comments evidence bias which made the probation-revocation proceeding unfair? To answer this question, we look to a Supreme-Court opinion – *Liteky v. United States* – that addressed biased judicial comments: Writing for the majority, Justice Scalia said:

[110] *Moore v. State*, 11 S.W.3d at 499.

> [J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source, and **they *will* do so if they reveal such a high degree of favortism or antagonism as to make fair judgment impossible.** An example of the latter (and perhaps the former as well) is the statement that was alleged to have been made by the District Judge in *Berger v. United States*, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed.2d 481 (1921), a World War I espionage case against German-American defendants: "One must have a very judicial mind, indeed, not [to be] prejudiced against the German-Americans" because their "hearts are reeking with disloyalty." *Id* at 28 (internal quotation marks omitted). ***Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display.** A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune.[111]

Judge Wright seemed annoyed and angry with Mr. Khan.[112] Under *Liteky*, annoyance and anger are not enough to make the judge biased. But Judge Wright's statements went beyond annoyance and anger. The comments "reveal[ed] such a high degree of . . . antagonism as to make fair judgment impossible."[113]

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[111] *Liteky v. United States*, 510 U.S. 540, 555-56, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994) (brackets, parentheses, and italics as in original).
[112] *See* R.R. at 7, 10.
[113] *See* quote from *Liteky* above. *See also Hunter v. State*, 691 S.W.3d 247, 250 (Tex. App.—Dallas 2024, pet. filed late and was not considered) (when judicial comments reveal a high degree of antagonism, fair judgment is impossible).

By twice saying Mr. Khan had wasted his time, Judge Wright suggested the probation-revocation hearing was unnecessary. This indicates Judge Wright had already decided Mr. Khan had violated his probation. Judge Wright also said:

> I have had a lengthy discussion with Mr. Elick, the Court was involved, the State, we were all trying to move Mr. Khan in a way that would give him the treatment that the Court thinks he needs. He rejected that flatly, and said he wanted this hearing; and that's what I plan on doing today.[114]

This comment indicates Judge Wright had already determined Mr. Khan violated his probation. Judge Wright was focused on getting Mr. Khan treatment (which would only be necessary if he had violated his probation). Judge Wright also said:

> I understand that Mr. Khan thinks that he's the only person that can help take care of his father – and I do not have any lack of sympathy for his father, but there are things that can be done that, frankly, don't make Mr. Khan a necessary party to being at home. And frankly, that should have given him more reason why he should not have done the things he was supposed to – that he did on probation.[115]

This comment reveals Judge Wright's mindset that Mr. Khan had not done the things he was supposed to do while on probation.

Another troubling judicial comment was:

> Then obviously, he doesn't care about his father enough not to mess up his probation. And at this point, we're talking punishment.[116]

[114] R.R. at 7.
[115] R.R. at 8-9.
[116] R.R. at 10.

Obviously, the punishment question does not arise until the judge finds a probation violation. Yet, Judge Wright said "at this point" (before any evidence had been introduced) "we're talking punishment."[117]

The foregoing statements are significant. They suggest Judge Wright had made up his mind before the hearing started that Mr. Khan had violated his probation.

To be fair, Judge Wright did say:

> So, obviously – I haven't heard any evidence – but if I am satisfied beyond a preponderance of the evidence, that he has violated his probation, then jail is a real possibility because he has already indicated he doesn't want treatment, which I tried to get him to do three weeks ago.[118]

This is a good thing for Judge Wright to have said. But it is not enough to overcome his other statements. Even this statement is connected to Judge Wright's thought three weeks earlier that Mr. Khan should opt for treatment. And this statement came before Judge Wright twice told Mr. Khan he had wasted his (Judge Wright's) time.

In summary, Judge Wright's comments indicate a lack of impartiality which rendered unfair the probation-revocation hearing.[119] This violated Mr. Khan's right to a fair trial in a fair tribunal.[120] Such a right is a matter of due process to which Mr. Khan

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[117] *Id.*
[118] R.R. at 9.
[119] "Fundamental fairness demands that the defendant is able to 'present his case with assurance that the arbiter is not predisposed to find against him.'" *Ex parte Halprin*, ---S.W.3d---, 2024 WL 4702377 (Tex. Crim. App. 2024) (Richardson, J., concurring).
[120] *See In re Murchison*, 349 U.S. at 136.

is entitled under the Fourteenth Amendment.[121] This also violates Mr. Khan's due-course-of-law right under Article I, Section 19 of the Texas Constitution.

Relevant Cases

As noted earlier, judicial comments will support a partiality challenge if they reveal such a high degree of antagonism as to make fair judgment impossible.[122] Most cases addressing partiality challenges based on judicial comments have not found bias.[123] But in many cases, bias has been found.

One such case is *Blue v. State.*[124] The case is well known for holding that defendants can complain about judicial comments for the first time on appeal.[125] But along the way, the Court of Criminal Appeals said the judge's comments "cannot be viewed as fair and impartial."[126] The comments "tainted appellant's presumption of innocence in front of the venire."[127] The judge had said:

> [This case] which we are going on, is a situation where the attorney has been speaking to his client about what does he want to do. And when you are on the button like these cases, it's a question. Frankly, an offer has been made by the State, or do I go to trial. And he has been back and forth and so I finally told him enough of that, we are going to trial. You

[121] U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law;").
[122] *Liteky v. United States*, 510 U.S. at 555. *See also Ex parte Halprin*, 2024 WL 4702377 at *3; *Gaal v. State*, 332 S.W.3d 448, 454 (Tex. Crim. App. 2011); *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 240 (Tex. 2001);
[123] *See, e.g., Gaal v. State,* 332 S.W.3d at 459; *Jasper v. State,* 61 S.W.3d 413, 420-21 (Tex. Crim. App. 2001); *Dow Chem. Co. v. Francis,* 46 S.W.3d at 239-41.
[124] *Blue v. State*, 41 S.W.3d 129 (Tex. Crim. App. 2000).
[125] *Id.* at 132.
[126] *Id.*
[127] *Id.*

> have been sitting out here and this is holding up my docket and I can't get get anything done until we know if we are going to trial or not.
>
> Frankly, obviously, I prefer the defendant to plead because it gives us more time to get things done and I'm sure not going to come out here and sit. Sorry, the case went away and we were all trying to work toward that and save you time and cost of time, which you have all been sitting here and I apologize about that. Like I said, I have enough of this and going to trial.[128]

Judge Wright's comments resembled the comments in *Blue* (albeit they were not made to a venire panel). Judge Wright suggested he would prefer Mr. Khan plead true to the allegations in the revocation motion. His comments showed he was entering the hearing without the required presumption of Mr. Khan's innocence.

A second case finding bias is *Ex parte Halprin.*[129] This case concerned a judge's anti-Semitic comments outside the courtroom.[130] The Court found the defendant had shown the judge "was actually biased against him at the time of trial because [he] is Jewish."[131] Judge Richardson concurred:

> Whether a judge is biased or not does not change based on whether the judge spoke his virulent antisemitic or racist remarks inside the courtroom in front of the jury.[132]

[128] *Id.* at 130.
[129] *Ex parte Halprin*, ---S.W.3d---, 2024 WL 4702377 (Tex. Crim. App. 2024).
[130] *Id.* at *3.
[131] *Id.* at *4.
[132] *Id.* at *8 (Richardson, J., concurring).

This statement is particularly relevant here. It shows judicial comments outside the jury's presence can constitute bias.

A third case in which judicial comments revealed bias is *Abdygapparova v. State*.[133] Those comments included:

> This defendant is quite intelligent. I suppose that it's no big deal to her to spend a year, another year in jail, but as far as Ms. Rosado's [murder victim's] family is concerned, they have been waiting a long time for justice;[134]

Another troubling comment was:

> Isn't it ironic [Counsel], that the taxpayers of this county had to pay for an outfit for this Defendant and yet you received a retainer?[135]

Yet another problematic comment was:

> I can assure you [retained counsel], that there will be no plea bargain agreement accepted by this Court. I can tell you that right now, without reservation. That is not going to be an option in this case.[136]

The Fourth Court of Appeals found that these comments (along with certain judicial actions) constituted bias:

> This is clearly a case in which the absence of an impartial trial judge on the bench infected the entire trial process, robbing Abdygapparova of her basic protections and undermining the ability of the criminal trial to reliably serve as a vehicle for the determination of guilt or innocence.[137]

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[133] *Abdygapparova v. State*, 243 S.W.3d 191 (Tex. App.—San Antonio 2007, pet. ref'd).
[134] *Id.* at 197 n. 4.
[135] *Id.*
[136] *Id.* at 196 n. 2.
[137] *Id.* at 210.

A fourth case comes from Maryland – *Scott v. State*.[138] *Scott* is relevant because it concerns judicial comments directed at the defendant. This is similar to our case in which Judge Wright directed comments to Mr. Khan. The comments in *Scott* included:

> THE COURT: Do you want to step forward, sir? You can step forward because if you feel like your goose is about to get cooked, you are on the right track . . . .[139]
>
> THE COURT: I can tell you that I feel rather strongly about people who come in here and lie, eyeball to eyeball with me, such as the guy sitting next to you staring at me as if he feels that he is a tough guy.[140]
>
> THE COURT: If he decides that he wants to and let the record reflect that it is my view of looking at the visage of Mr. Scott that he feels that somehow or another he is going to be able to stare this member of the bench down and that would be a tricky business, at best, from his point of view. To say that I am not pleased with him is an understatement.[141]
>
> THE COURT: I think it is fairly well known in the legal community that I try to be reasonable and try to be fair and try to settle cases and that sort of thing, but if there is one thing that I will follow somebody until hell freezes over is if that person lies to me. Then I will pursue it like an avenging angel, and that is what is going on right now.[142]

The Maryland Court said:

> Although judicial anger is understandable, a judge should not let his displeasure with litigants, witnesses, or lawyers unduly affect his conduct in the courtroom—particularly in a contempt proceeding. In this case, Judge McKenna allowed his anger to get the best of him; as a result, he adopted an unjudicial attitude toward appellant, David Scott, and Mr.

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[138] *Scott v. State*, 110 Md. App. 464, 677 A.2d 1078, 1089-90 (Md. Ct. Spec. App. 1996). This Court discussed *Scott* at length in *Sommers v. Concepcion*, 20 S.W.3d 27, 44 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).
[139] *Id.* at 1090.
[140] *Id.* This comment was directed to defense counsel, but concerned the defendant.
[141] *Id.* This comment was also made to defense counsel.
[142] *Id.*

Regan [Scott's attorney]. We think it is important to repeat the following admonition of this Court in *Betz v. State,* 99 Md. App. 60, 635 A.2d 77 (1994):

> Many judges have experienced aggravating—sometimes even defiant—conduct on the part of lawyers and others (just as many lawyers, and others, have experienced aggravating conduct on the part of judges), and, in the press of attempting to move dockets and resolve cases fairly and efficiently, the experience can cause instant irritation. Judges, too, are human and have human emotions; they get angry, often for good reason. **But, unlike other people, judges have the sovereign power to punish, to deprive persons of their liberty and property, and that alone requires that they restrain their irritation.** Punishment for contempt should never be imposed in anger, as an immediate emotionally reflexive response.[143]

A fifth case supporting Mr. Khan's argument is *George v. State.* This Court said:

> Here, appellant attempted to show that the trial judge had not merely erred, but had purposefully intervened in the plea negotiations and by deliberate intimidation, coerced an involuntary plea. If true, these actions would cast serious doubt on the judge's suitability to impartially decide his request for a new trial.[144]

In the current case, Judge Wright was heavily involved in plea negotiations. He said certain plea offers were "off the table."[145] And he spoke of his "lengthy discussion with" counsel for both sides.[146] This discussion was an effort to "move Mr. Khan in a

[143] *Id.* (internal citations omitted) (emphasis added).
[144] *George v. State*, 20 S.W.3d 130, 138 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd).
[145] R.R. at 7.
[146] *Id.*

way that would give him the treatment that the Court thinks he needs."[147] Judge Wright's intentions were honorable. Nonetheless, the discussion was a major intervention into plea negotiations. As recognized by this Court in *George*, such a discussion casts serious doubt on a judge's impartiality.

A sixth case warranting notice is *People v. Conyers.* In *Conyers,* a conviction was reversed because of inappropriate judicial comments.[148] Regarding the judge, the Michigan Court of Appeals said:

> His campaigning from the bench also had the appearance of showing the jury that he was "tough on crime" and that **he wasn't the one wasting the jury's time in a trial of an obviously guilty defendant.**[149]

Here, Judge Wright twice said Mr. Khan was wasting his [Judge Wright's] time.[150] Consistent with *Conyers*, that indicated Mr. Khan had "obviously" violated his probation. Such pre-judgment indicates Judge Wright was not impartial in deciding the State's motion to revoke Mr. Khan's probation.

A seventh case also concerns judicial comments about a defendant wasting the court's time. In *Rosales v. State*, the Nevada Supreme Court reversed a conviction because of judicial comments directed to the defendant during pretrial proceedings

> The evidence against you is absolutely overwhelming. If I were a member of that jury, if your mother was a member of that jury, she would find you

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[147] *Id.*
[148] *People v. Conyers*, 194 Mich. 395, 406, 487 N.W.2d 787 (1992).
[149] *Id.* (emphasis added).
[150] R.R. at 10.

> guilty beyond a reasonable doubt, Mr. Rosales. That's what I'm saying. You are leading your lawyer on a wild goose chase. You're leading yourself on a wild goose chase. **And to go through the trial, in my humble opinion, is a waste of time, a waste of resources, time, and energy** . . . . In my opinion, the evidence is overwhelming for you to attempt to—and waste the tax payers' money of the State of Nevada. You're not paying for it out of your own pocket. You're not paying for the psychiatrist, psychologist, the lawyer, the time.[151]

The Nevada Supreme Court reversed the defendant's conviction because the judge's involvement in plea negotiations was improperly coercive.[152] But the basis of the Court's finding was the judge's comments. The comments about the trial being a waste of time resemble Judge Wright's comments. When a judge says going to trial (or a hearing) is a waste of time, the judge is not acting with impartiality.

These cases show judicial comments have frequently been found unacceptable. Such comments "reveal such a high degree of favortism or antagonism as to make fair judgment impossible."[153] There is ample precedent for this Court to find Judge Wright's comments showed bias rendering him unfair.

Mr. Khan may advance these complaints for the first time on appeal

Mr. Khan lodged no complaint about Judge Wright's comments at trial. But he can still challenge the comments on appeal.

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[151] *Rosales v. State*, 125 Nev. 1074 at *1, 281 P.3d 1214 (Nev. 2009) (emphasis added).
[152] *Id.* at *2.
[153] *See Liteky v. United States*, 510 U.S. at 555.

It is beyond peradventure that defendants may appeal improper judicial comments made in front of a jury even without a trial-court objection.[154] But our case involves no jury – hearings on probation-revocation motions never do.[155] So, the question is whether Mr. Khan may complain about judicial comments (outside a jury's presence) for the first time on appeal.[156]

A relevant case is *Hernandez v. State* which involved a bench trial after which the defendant was found guilty.[157] The defendant argued the trial court failed to consider the full range of punishment when determining his sentence.[158] But the issue had not been raised at trial. The Thirteenth Court of Appeals said the issue could be advanced on appeal:

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[154] *Proenza v. State*, 541 S.W.3d 786, 801 (Tex. Crim. App. 2017):

> [W]e hold today that claims of improper judicial comments raised under article 38.05 [of the Code of Criminal Procedure] are not within *Marin*'s third class of forfeitable rights. Rather, we believe that the right to be tried in a proceeding devoid of improper judicial commentary is at least a category-two, waiver-only right.

Marin, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993), established three types of rights for purposes of appellate review:

> Thus, our system may be thought to contain rules of three distinct kinds: (1) absolute requirements and prohibitions; (2) rights of litigants which must be implemented by the system unless expressly waived; and (3) rights of litigants which are to be implemented upon request.

[155] *See* Texas Code Crim. Proc. art. 42A.751(d) ("After a hearing **without a jury**, the judge may continue, extend, modify, or revoke the community supervision.") (emphasis added).
[156] Mr. Khan is not contending the judge's comments violated Article 38.05.
[157] *Hernandez v. State*, 268 S.W.3d 176, 179-81 (Tex. App.—Corpus Christi—Edinburg 2008, no pet.).
[158] *Id.* at 181 (defendant contended court did not consider full range of punishment because court's policy was to sentence repeat offenders [which he was] to double their previous sentence).

> **We find that a defendant has an absolute right to an impartial judge not only when guilt and innocence are at issue, but also when punishment is at issue**. Guided by Judge Keasler's concurrence in *Blue* and the First Court of Appeals' reasoning in *Jaenicke*, we further find that a defendant may complain for the first time on appeal about a trial court's refusal (*i.e.*, lack of impartiality) to consider the full range of punishment.[159]

Another relevant case is *Hunter v. State* which involved a bench trial and a guilty plea.[160] On appeal, the defendant alleged the judge violated her due-process right to a neutral arbiter by cross-examining her during punishment.[161] The threshold question was whether this issue could be raised on appeal.[162] The Court recognized *Proenza* was not controlling.[163] This was because the case did not involve improper judicial comments in front of the jury as prohibited under Code of Criminal Procedure, Article 38.05.[164] The Court then "assume[d], without deciding" the defendant could advance a biased-judge argument for the first time on appeal.[165] *Hunter* relied partially on Judge Keasler's concurring words in *Blue v. State:*

> [It]t is clear to me that the violation of the right to an impartial judge is an absolute right.[166]

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[159] *Id.* at 184-85 (emphasis added). The reference to *Jaenicke* is to *Jaenicke v. State,* 109 S.W.3d 793, 796 (Tex. App.-Houston [1st Dist.] 2003, pet. ref'd).
[160] *Hunter v. State*, 691 S.W.3d 247, 249 (Tex. App.—Dallas 2024, pet. filed).
[161] *Id.* at 250.
[162] *Id.* at 251.
[163] *Id.*
[164] *Id.*
[165] *Id.* at 251 n. 1. *Hunter* cited *Saldano v. State*, 70 S.W.3d 873, 888 (Tex. Crim. App. 2002) for the proposition that "certain restraints on the comments of a judge" are "absolute rights."
[166] *Hunter v. State*, 691 S.W.3d at 251 n. 1 (citing *Blue v. State*, 41 S.W.3d 129, 138 (Tex. Crim. App. 2000) (Keasler, J., concurring)).

Other appellate opinions have recognized an absolute right to an impartial judge in connection with judicial comments not in front of a jury.[167] One such case is *Jaenicke v. State* which involved a bench trial.[168] The defendant argued the trial court erred by assessing the maximum sentence based on jury verdicts in other cases.[169] The argument was couched in due-process terms because the judge was not impartial as is constitutionally required.[170] The claim had not been raised at trial.[171] But the First Court of Appeals, following Judge Keasler's concurrence in *Blue*, agreed the claim could be advanced on appeal.[172] The Court agreed with Judge Keasler's characterization of the right as "the right to an impartial trial judge."[173]

Cases involving the right to an impartial judge often spring from a judge's improper comments revealing bias. This is our situation. This kind of complaint can be advanced for the first time on appeal.

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[167] An absolute right (*i.e.,* an absolute requirement or prohibition) is a category-one right under *Marin* that cannot be forfeited or waived. *Marin v. State*, 851 S.W.2d at 280.
[168] *Jaenicke v. State*, 109 S.W.3d 793, 795 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd).
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.* at 796.
[173] *Id.*

Harm Analysis

"Where the judge is not impartial, the error is structural and immune to harmless error analysis."[174] The Supreme Court said so in *Arizona v. Fulminanate*:

> The admission of an involuntary confession—a classic "trial error"—is markedly different from the other two constitutional violations referred to in the *Chapman* footnote as not being subject to harmless-error analysis. One of those violations, involved in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), was the total deprivation of the right to counsel at trial. **The other violation, involved in *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed.2d 749 (1927), was a judge who was not impartial. These are structural defects in the constitution of the trial mechanism, which defy analysis by "harmless-error" standards. The entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial.**[175]

The error in our case is structural. This Court need not analyze harm.

If this Court does not agree Judge Wright's partiality constitutes structural error, a harmless-error analysis should be conducted under Texas Rule of Appellate Procedure 44.2(a). This rule contains the test for harm in criminal cases in which the error is constitutional. And the error here is definitely constitutional. In *Bracy v. Gramley*, the Supreme Court said:

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[174] *Ex parte Halprin*, 2024 WL 4702377 at *2 (Tex. Crim. App. 2024).

[175] *Arizona v. Fulminante*, 499 U.S. 279, 309-10, 111 S.Ct. 1246, 1265, 113 L.Ed.2d 302 (1991) (emphasis added). The reference to *Chapman* is to *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

> [T]he Due Process Clause clearly requires a fair trial in a fair tribunal, before a judge with no actual bias against the defendant or interest in the outcome of his particular case.[176]

Rule 44.2 is entitled "Reversible Error in Criminal Cases." Subsection (a) is entitled "Constitutional Error." It says:

> If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.

The error here is the lack of an impartial judge. The error affects the entire conduct of the trial from beginning to end.[177] This is why the error is structural. But even if the error were not structural, the error is harmful under Rule 44.2(a). It cannot be said beyond a reasonable doubt that the biased judge made no contribution to the conviction. This Court should reverse the trial court's judgment and remand the case for a hearing before an impartial judge.

[176] *Bracy v. Gramley*, 520 U.S. at 904-05.
[177] *See Arizona v. Fulminante*, 499 U.S. at 309-10.

Issue Eight

During proceedings before a probation-revocation hearing, the judge said there was "not a chance in the world" the defendant would be put on house arrest. House arrest is a possible term of probation. Due process requires judges to consider the full range of punishment. Did the judge's statement constitute an arbitrary refusal to consider the full range of punishment?

This issue should be reached only if Issue Seven is overruled.

The Judge's Comments at the Probation-Revocation Hearing

During proceedings before the probation-revocation hearing, Mr. Khan's counsel told Judge Wright he "was going to ask for house arrest."[178] Judge Wright replied "[n]ot a chance in the world that's happening, Mr. Elick."[179]

Judge Wright's comment occurred before the hearing had started. No evidence had been produced. Nevertheless, Judge Wright announced one possible result for a probation violation– house arrest – was off the table.[180] This is a refusal to consider the full range of punishment. Several appellate opinions concern a judge's failure to consider the entire range of punishment.

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[178] R.R. at 8.

[179] R.R. at 8.

[180] "After a hearing [on a probation-revocation motion] without a jury, the judge may continue, extend, modify, or revoke the community supervision." Tex. Code Crim. Proc. art. 42A.751(d). If the judge chooses to continue probation, the judge may impose any other conditions the judge deems appropriate. Tex. Code Crim. Proc. art. 42A.752(a). General discretionary conditions of probation are listed in Code of Criminal Procedure, Article 42A.301. These conditions include permitting probation officers to visit the defendant at home. Tex. Code Crim. Proc. art. 42A.301(b)(5). Another possible condition requires the defendant to "remain within a specified place." Tex. Code Crim. Proc. art. 42A.301(b)(6). Yet another possible condition requires the probationer to "support the defendant's dependents." Tex. Code Crim. Proc. art. 42A.301(b)(8). Given these provisions, putting a defendant on house arrest is a judicial option.

Cabrera v. State

In *Cabrera v. State*, this Court remanded a case for a new punishment hearing because the judge failed to consider the full range of punishment:

> It is a denial of due process for a trial court to arbitrarily refuse to consider the entire range of punishment for an offense or to refuse to consider the evidence and impose a predetermined punishment.[181]

The judge in *Cabrera* spoke to the defendant immediately after he elected to have a jury trial.[182] The judge inquired if he wanted the jury or judge to assess punishment.[183] The defendant chose the judge.[184] The judge then said: "All right, Mr. Cabrera. I hope you're not under any illusion you are going to get 30 days after [going to] trial, are you?"[185] The judge's statements were made before any evidence was introduced.[186] The fact the judge made these comments before hearing any evidence was key to this Court's ruling:

> The record reflects that prior to jury selection, the trial court told appellant that if he chose to exercise his right to a jury trial he should not be "under any illusion: that he would receive a 30-day sentence. The trial court's statement clearly indicates that the court, without any evidence before it, had arbitrarily dismissed a portion of the permissible range of punishment.[187]

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[181] *Cabrera v. State*, 513 S.W.3d 35, 38 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd).
[182] *Id.* at 37.
[183] *Id.*
[184] *Id.*
[185] *Id.* The judge had earlier told the defendant he was willing to consider setting punishment at 30 days in jail. *Id.* But that statement was based on the defendant pleading guilty. *Id.* at 40.
[186] *Id.*
[187] *Id.* at 39.

Here, Judge Wright had heard no evidence when he said there was "not a chance in the world" Mr. Khan would get house arrest.[188] Like the judge in *Cabrera*, Judge Wright failed to consider the full range of punishment.

The *Cabrera* Court reversed the punishment portion of the court's judgment and remanded the case for a new punishment hearing. This is what should happen here.

Ex parte Brown

Another important case is *Ex parte Brown*.[189] In a post-conviction application for habeas-corpus relief, the applicant contended the original trial judge violated his due-process rights.[190] The applicant argued the judge did this by not considering the full range of punishment at the hearing on the State's motion to adjudicate.[191]

Significantly, the Court of Criminal Appeals said defendants have a due-process right to a probation-revocation hearing before a "neutral and detached hearing body."[192] Here, Mr. Khan contends he did not have an impartial judge in his hearing. So, the holding in *Ex parte Brown* is relevant.

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[188] R.R. at 8.
[189] *Ex parte Brown*, 158 S.W.3d 449 (Tex. Crim. App. 2005).
[190] *Id.* at 451.
[191] *Id.*
[192] *Id.* at 454.

The judge in *Ex parte Brown* sentenced the defendant to 20 years.[193] The sentence was the exact sentence the judge promised to impose when placing the defendant on deferred adjudication.[194] The Court of Criminal Appeals said:

> [A] trial court's arbitrary refusal to consider the entire range of punishment in a particular case violates due process. A trial judge may certainly impress upon a prospective probationer the seriousness of the *possible* consequences of a failure to abide by the terms and conditions of probation, but it is an altogether different thing to promise to impose the maximum punishment if a prospective probationer fails to abide by the terms of probation and then carrying through on that promise without "actually *consider[ing]* the evidence presented at the revocation hearing."[195]

The Court of Criminal Appeals "remand[ed] the case to the trial court at the point immediately after adjudication of guilt."[196] This Court should do likewise.

Jefferson v. State

Another relevant case is *Jefferson v. State*.[197] In *Jefferson*, the Dallas Court of Appeals considered a situation involving the same judge as in *Ex parte Brown*.[198] The trial judge, Larry Baraka, was telling defendants who he placed on deferred adjudication what their sentence would be if they were eventually adjudicated.[199] Then he would

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[193] *Id.* at 455-56. This was the maximum sentence.
[194] *Id.* at 456.
[195] *Id.* at 456-57 (emphasis and brackets in original) (quoted language from *Gonzales v. Johnson*, 994 F. Supp. 759, 762 (N.D. Tex. 1997)).
[196] *Id.* at 457.
[197] *Jefferson v. State*, 803 S.W.2d 470 (Tex. App.—Dallas 1991, pet. ref'd).
[198] *Id*
[199] *Id.* at 472.

impose that exact sentence upon adjudication.[200] The Court of Appeals said the judge's procedure violated due process. This was because the judge "fail[ed] to consider the full range of punishment for the offense charged when he imposed a predetermined punishment period."[201]

Early v. State

Early v. State is another case involving Judge Baraka.[202] The defendant was placed on deferred adjudication. Judge Baraka said:

> This is giving you a chance, but if you foul up, I want you to know that I'll probably set your punishment right at the top level of the punishment range, and I won't have any sympathy for you, because I'm giving you every chance that I possibly can to straighten yourself out . . . If you foul up, you're coming back here before me and I'll tell you right now I'm probably going to give you the maximum.[203]

Two years later, the State filed a motion to adjudicate.[204] When the defendant appeared before Judge Baraka, the Judge, before hearing evidence, said:

> I am just upset, Bradley, I'm just upset that you did a third-degree felony. I would rather have seen you with a first-degree, because I would like to give you life.[205]

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[200] *Id.*
[201] *Id.*
[202] *Early v. State*, 855 S.W.2d 260 (Tex. App.—Corpus Christi-Edinburg 1993), *pet. dism'd, improvidently granted,* 872 S.W.2d 758 (Tex. Crim. App. 1994).
[203] *Id.* at 261-62 (ellipses in original).
[204] *Id.* at 261.
[205] *Id.* at 262.

Judge Baraka then sentenced the defendant to the maximum punishment.[206] The Court of Appeals concluded Judge Baraka erred because he decided the case "before listening to the evidence."[207] The Court reversed the conviction.[208]

In our case, Judge Wright erred by emphatically stating (before hearing evidence) that he would not consider house arrest.[209]

Complaints about a judge not considering the full range of punishment can be made for the first time on appeal

Mr. Khan did not complain at trial about Judge Wright not considering the full range of punishment. But that does not prevent him from complaining now. In *Cabrera*, this Court held:

> The right to be sentenced after consideration of the full range of punishment is a category-two waivable only right. Therefore, appellant's complaint that the trial court failed to consider the full range of punishment was not forfeited by his failure to object at trial.[210]

Cabrera relied on *Grado v. State* in which the Court of Criminal Appeals said:

> A court's arbitrary refusal to consider the entire range of punishment constitutes a denial of due process. And despite a judge's wide discretion in determining the proper punishment **in a revocation hearing, due process requires the right to a hearing before a neutral and detached hearing body**. . . . The nature of the right Grado seeks to vindicate leads us to conclude that it is one that is a significant feature of our judicial

[206] *Id.*
[207] *Id.* at 262-63.
[208] *Id.* at 263.
[209] *See Howard v. State*, 830 S.W.2d 785 (Tex. App.—San Antonio 1992, pet. ref'd) (judge violated due process by not considering entire punishment range).
[210] *Cabrera v. State*, 513 S.W.3d at 38 (internal citations omitted).

> system and should be classified as a *Marin* category-two right. In the absence of a defendant's effective waiver, a judge has an independent duty both to identify the correct statute under which a defendant is to be sentenced and the range of punishment it carries and to consider the entire range of punishment in sentencing a defendant irrespective of a defendant's request that he do so. And as we have made clear, a defendant "need make no request at trial for the implementation of such rights, as the judge has an independent duty to implement them. [citing *Marin*, 851 S.W.2d at 280]. The unfettered right to be sentenced by a sentencing judge who properly considers the entire range of punishment is a substantive right necessary to effectuate the proper functioning of our criminal justice system. . . . The nature of this right is too significant to the judicial system to conclude that it is extinguished by mere inaction.[211]

Mr. Khan may complain about Judge Wright's failure to consider the full range of punishment for the first time on appeal.[212]

Harm Analysis

Does a judge's failure to consider the full range of punishment mean the judge was biased? This is an important question for two reasons. First, Judge Wright failed to consider the full range of punishment. Second, a situation in which a judge is biased is structural error.[213] A structural error is one in which no harm analysis is necessary.[214]

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[211] *Grado v. State*, 445 S.W.3d 736, 739-41 (Tex. Crim. App. 2014).
[212] *Hernandez v. State,* 268 S.W.3d at 184.
[213] *Arizona v. Fulminante*, 499 U.S. at 309-10.
[214] *Schmultz v. State*, 440 S.W.3d 29, 35 (Tex. Crim. App. 2014) ("structural error affects the framework within which the trial proceeds, rather than simply an error in the trial process itself, and is not amenable to a harm analysis").

So, a judge's failure to consider the full range of punishment means the judge is biased. Thus, structural error exists. And if structural error exists, no harm analysis is necessary[215] Several appellate opinions say so.

In *Hernandez v. State*, the Thirteenth Court of Appeals equated a judges' non-consideration of the full punishment range with a "lack of impartiality."[216] Finding the judge failed to consider the full range of punishment, the Court reversed the judgment and remanded the case for a new punishment trial.[217] No harm analysis was conducted.[218]

Jefferson v. State is also instructive.[219] The judge (Judge Baraka) had promised a defendant whom he placed on probation that he would face a 20-year sentence if he violated probation.[220] Ultimately, the defendant's probation was revoked and Judge Baraka sentenced him to 20 years.[221] The Dallas Court of Appeals found the judge was biased:

> This is the evil which the eminent Chief Justice Guittard warned of in his dissent in *Fielding*. The Chief Justice considered an approach like that used by Judge Baraka not to be in accordance with due course of law because (1) it effectively excludes evidence relevant to punishment; (2) it precludes

[215] *Lake v. State*, 532 S.W.3d 408, 409 (Tex. Crim. App. 2017) (error is subject to harmless-error analysis unless error is structural).
[216] *Hernandez v. State*, 268 S.W.3d at 184 (defendant may complain for first time on appeal about judge's refusal to consider full range of punishment -- "*i.e.,* lack of impartiality").
[217] *Id.* at 185.
[218] *Id.* at 184-85.
[219] *Jefferson v. State*, 803 S.W.2d 470 (Tex. App.—Dallas 1991, pet. ref'd).
[220] *Id.* at at 471-72.
[221] *Id.* at 470.

> the judge from considering the full range of punishment prescribed by law; (3) **hence,** it deprives the defendant of a fair and impartial trial at the punishment hearing.[222]

As used in the passage above, the word "hence" means "therefore."[223] With that understanding, the passage's takeaway is clear. When judges do not consider the full range of punishment, defendants do not get a fair and impartial trial. Stated differently, a judge who does not consider the full range of punishment is biased.

Ex parte Brown is also pertinent. The Court of Criminal Appeals found the judge "prejudge[d] the punishment to be assessed once he decided to revoke [the defendant's] probation.[224] The Court remanded the case for a new punishment hearing.[225] There was no harm analysis.[226]

> *Buerger v. State*, from this Court, is instructive:
>
> > The Constitutional mandate of due process requires a neutral and detached judicial officer who will consider the full range of punishment and mitigating evidence. A trial court denies due process where it arbitrarily refuses to consider the entire range of punishment for an offense or refuses to consider mitigating evidence and imposes a predetermined punishment.[227]

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[222] *Id.* at 472 (emphasis added). The reference to *Fielding* is to *Fielding v. State*, 719 S.W.2d 361 (Tex. App.—Dallas 1986, pet. ref'd). The word "hence" did not appear in Chief Justice Guittard's opinion in *Fielding*. The *Jefferson* Court inserted it.

[223] *See* entry for "hence" at Dictionary.com ("as an inference from this fact; for this reason; therefore"). Website last consulted on March 2, 2025.

[224] *Ex parte Brown*, 158 S.W.3d at 457.

[225] *Id.*

[226] *Id.*

[227] *Buerger v. State*, 60 S.W.3d 358, 363-64 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (internal citations omitted).

As this quotation demonstrates, this Court equated consideration of the full punishment range with a neutral (*i.e.*, impartial) judge. The converse of this idea is that a judge who cannot consider the full range of punishment is not neutral (*i.e.*, the judge is biased). *Buerger* clarifies that a judge's failure to consider the full range of punishment means the judge was biased.

> Another relevant case is *McLenan v. State.* Our Court of Criminal Appeals said:
>
> A court's *arbitrary* refusal to consider the entire range of punishment would constitute a denial of due process . . . .[228]

This statement equates a judge's refusal to consider the entire range of punishment with a biased judge. This is why *McLenan* is significant. A judge who fails to consider the full range of punishment is not impartial. And the lack of an impartial judge is a structural error. No harm analysis is necessary.

Bias exists when a judge's comments indicate consideration of less than the full punishment range. The lack of an impartial judge shows bias which is structural error.

Here, Judge Wright did not consider the entire range of punishment. Thus, he was not impartial. And the presence of a biased judge is structural error.

If this Court does not agree Judge Wright's lack of impartiality constitutes structural error, a harmless-error analysis should be conducted. Texas Rule of Appellate

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[228] *McLenan v. State*, 661 S.W.2d 108, 110 (Tex. Crim. App. 1983) (emphasis in original).

Procedure 44.2(a) should be followed. This rule contains the test for harm in criminal cases in which the error is constitutional. And the error here is definitely constitutional. In *Buerger*, this Court said:

> **The Constitutional mandate of due process** requires a neutral and detached judicial officer who will consider the full range of punishment and mitigating evidence. **A trial court denies due process** where it arbitrarily refuses to consider the entire range of punishment for an offense or refuses to consider mitigating evidence and imposes a predetermined punishment.[229]

Rule 44.2 is entitled "Reversible Error in Criminal Cases." Subsection (a) is entitled "Constitutional Error," and says:

> If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, **the court of appeals must reverse a judgment of** conviction or **punishment unless** the court determines beyond a reasonable doubt that **the error did not contribute to the** conviction or **punishment.**[230]

Here, Judge Wright said there was "not a chance in the world" he would put Mr. Khan on house arrest.[231] Sure enough, the judge did not place Mr. Khan on house arrest.[232] It would be hard for anyone to find beyond a reasonable doubt that the judge's statement did not contribute to Mr. Khan's punishment. The problem with the

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[229] *Buerger v. State*, 60 S.W.3d at 363-64 (emphasis added).
[230] Tex. R. App. P. 44.2(a) (emphasis added).
[231] R.R. at 8.
[232] *See* R.R. at 77; C.R. at 98-99.

judge's lack of impartiality was not harmless. This case should be remanded for a new punishment hearing conducted by a different judge.[233]

[233] *See Fielding v. State*, 719 S.W.2d at 372 (Guittard, C.J., dissenting) (Chief Justice Guittard would remand for a punishment hearing "before a different judge.").

PRAYER

Mr. Khan prays that this Court find the evidence insufficient to support any of the trial court's five reasons for revoking his probation. If this Court so finds, Mr. Khan asks this Court to sustain his sixth issue and reverse the judgment revoking probation.

If this Court finds sufficient evidence to support at least one basis for revocation, then Mr. Khan makes a different request. He asks that any basis for which sufficient evidence does not exist to support revocation be struck from the judgment.

If this Court overrules Issue Six, Mr. Khan asks this Court to sustain his seventh issue and find the judge was not impartial. He asks this Court to remand the case for a new hearing before a different judge.

If Issue Seven is overruled, Mr. Khan prays that this Court find the trial judge failed to consider the entire range of punishment. He asks that this Court remand the issue for a new punishment hearing before a different judge.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by the Texas Rules of Appellate Procedure,[234] I certify that this brief contains 14,999 words. This word-count is calculated by the Microsoft Word program used to prepare this brief. The word-count does not include those portions of the brief exempted from the word-count requirement under the Texas Rules of Appellate Procedure.[235] The number of words generally permitted for this type of computer-generated brief (a brief in an appellate court) is 15,000.[236]

/s/ Ted Wood
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[234] Tex. R. App. P. 9.4(i)(3).
[235] *See* Tex. R. App. P. 9.4(i)(1).
[236] Tex. R. App. P. 9.4(i)(2)(B).

CERTIFICATE OF SERVICE

I certify that on March 31, 2025, I provided this brief to the Harris County District Attorney via the EFILETEXAS.gov e-filing system. Specifically, service was made on Ms. Jessica Caird. This service is required by the Texas Rules of Appellate Procedure.[237]

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[237] *See* Tex. R. App. P. 9.5(a), (b)(1).

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