No. 09-8610

IN THE
Supreme Court of the United States

CHARLES DEAN HOOD

Petitioner,

v.

THE STATE OF TEXAS

Respondent.

BRIEF OF 30 LEADING ETHICISTS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES, RULES AND REGULATIONS

MISCELLANEOUS

INTEREST OF AMICI[1]

Amici curiae are experts in legal ethics and standards of judicial and prosecutorial conduct who are deeply troubled by the failure of the Texas judicial system to recognize and address the professional misconduct of the judge and prosecutor in this capital murder case. *Amici* have been involved in the formulation, implementation, and study of the ABA Model Code of Judicial Conduct, as well as the codes of judicial conduct in every United States jurisdiction. Based on their wide expertise, *amici* can attest that all of these jurisdictions require judges to refrain from presiding over cases where their impartiality might be reasonably questioned. Further, all of these jurisdictions treat a long running sexual affair between the judge presiding over a criminal matter and the lawyer prosecuting it as a substantial basis for questioning the court's impartiality. Indeed, all of these jurisdictions deem the failure of a judge to recuse herself in such circumstances, as well as the concealment of the romantic relationship, to be grave ethical violations that impair the right to a fair trial and undermine

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution intended to fund its preparation or submission. The parties have been given appropriate notice and have consented to the filing of this brief. Such consents are being lodged herewith.

public confidence in the outcomes of trials. As scholars and practitioners whose work has focused on protecting the integrity of the judicial system, *amici* believe that carrying out a death sentence here would damage that integrity, diminish the authority of the courts, and undermine the ethical principles guiding judges and lawyers.[2]

SUMMARY OF ARGUMENT

The bedrock principle of judicial conduct is that judges should avoid conflicts of interest in presiding over or ruling on cases. A judge who has engaged in an intimate, extramarital, sexual relationship with the prosecutor trying a capital murder case before her has a conflict of interest and must recuse herself. Of all the courts to have considered the issue, only the Texas Court of Criminal Appeals ("CCA") in this case failed to recognize this imperative. A system grounded on the rule of law cannot tolerate such blindness to ethical violations that strike at the very structure of the judicial process and necessarily deprive a criminal defendant of a fair trial. Texas' failure to engage this issue is particularly deplorable in a capital case, where the penalty is unique in its irrevocability. This Court has recognized the special care required

[2] A full list of *amici,* who join this brief as individuals and not as representatives of any institutions with which they are affiliated, is set forth in the Appendix to this brief.

in capital cases, directing that "judicial proceedings conducted for the purpose of deciding whether a defendant shall be put to death must be conducted with dignity and respect." *Wellons v. Hall*, 130 S. Ct. 727, 728 (2010). A trial so tainted by judicial *and* prosecutorial misconduct as this one falls far short of this standard.

In promulgating the Model Code of Judicial Conduct embraced by almost every United States jurisdiction, the American Bar Association ("ABA") explained that "deference to judgments and rulings of courts depends upon public confidence in the integrity and independence of judges." ABA MODEL CODE OF JUDICIAL CONDUCT Canon 1, cmt. (2004). This case is important and warrants review by this Court because the actions of the judge and prosecutor seriously undermine public confidence in the independence of judges. Such misconduct sullies the reputation of the judicial system not only in Texas, but in the nation at-large. To put a defendant to death based on such tainted proceedings undermines the credibility of our commitment to the rule of law. The Texas appellate courts have magnified the problem by refusing even to acknowledge it. It is therefore critical that this Court intervene.

The Court has jurisdiction to do so. Because the Texas CCA failed to specify whether the basis for its decision rested exclusively on state grounds, under *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983), it must be presumed that the Texas courts based their decision on application of federal law. Moreover, even if the Texas courts decided this issue under state law, this case presents exceptional circumstances under which the Texas CCA's application of state procedural rules obviously is not "adequate" to bar consideration of Mr. Hood's federal constitutional claim on the merits. Specifically, not only did the judge and the prosecutor engage in a flagrant conflict of interest, but they also concealed it until forced to divulge the facts under oath 18 years after Mr. Hood's conviction and death sentence. Indeed, Texas state officials took every possible step to keep the grounds for Mr. Hood's due process claim out of sight and to prevent Mr. Hood from complying with Texas Code of Criminal Procedure Article 11.071. To impute to Mr. Hood the fault for failing to uncover the State's own concealed misconduct is itself a violation of due process and manifestly an inadequate ground to bar petitioner from pressing his constitutional claim.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO HEAR HOOD'S DUE PROCESS CLAIM

The Texas trial court found that the judge presiding over Mr. Hood's capital murder trial carried on a prolonged, extramarital affair with the prosecutor in this case. The court found further that both the judge and prosecutor affirmatively concealed the facts of their relationship from Mr. Hood and the public at-large until their court-ordered depositions on September 8 and 9, 2008. *See* Pet. App. B 9-10.

Specifically, the Texas trial court found that Judge Holland and the prosecutor, Mr. O'Connell, "were involved in an intimate sexual relationship prior to [Mr.] Hood's capital murder trial," that Judge Holland never disclosed the relationship to Mr. Hood "[p]rior to the capital murder trial and during the appellate and post-conviction proceedings," that, indeed, "Judge Holland and Mr. O'Connell took deliberate measures to ensure that their affair would remain secret," that they "wrongfully withheld relevant information from defense counsel prior to and during the trial, the direct appeal, the state habeas proceedings, the federal habeas proceedings, and the successive state habeas proceedings," and that Mr. O'Connell affirmatively "misled habeas counsel during the successive state habeas proceedings" while "Judge

Holland resisted counsel's investigative efforts." *Id.* These serious and repeated ethical violations deprived Mr. Hood of a fair trial, and prevented him from discovering the facts establishing his constitutional due process claim until 18 years after his conviction and capital sentence.

Though Mr. Hood raised his federal constitutional claim in a habeas petition filed on September 25, 2008 — less than three weeks after the trial judge and the prosecutor were compelled to answer questions under oath about their relationship — the Texas CCA invoked Texas Code of Criminal Procedure Article 11.071 Sections 5(a)-(c) and refused to consider the merits of the claim. The CCA's application of this Texas procedural rule is inadequate to block consideration of Hood's due process claim for three separate reasons and it does not preclude this Court's review.

First, the Court must presume that the decision below rests on the Texas CCA's interpretation of federal law. *See generally Long*, 463 U.S. at 1040-41 (state court judgment involving mixed question of state and federal law presumed to rest on federal grounds where "state law ground is not clear from the face of the opinion"). The lower courts that have construed Article 11.071 have concluded that its application requires consideration of both state and federal questions, permitting the filing of otherwise untimely habeas petitions where "(1) the factual or legal basis for the subsequent

claim was previously unavailable and (2) where the facts alleged would constitute a federal constitutional violation that would likely require relief from either the conviction or sentence." *Ruiz* v. *Quarterman*, 504 F.3d 523, 527 (5th Cir. 2007) (citing *Ex Parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007)); TEX. CODE CRIM. PRO. ANN. art. 11.071 § 5(a) (Vernon Supp. 2010).

Because the CCA did not provide *any* reasoning in its *per curiam* ruling dismissing Hood's petition, *see* Pet. App. C 3, this Court's precedents apply a presumption that "the state court decided the case the way it did because it believed that federal law required it to do so." *See Long*, 463 U.S. at 1041.

Second, even if the decision below had rested exclusively on state legal grounds, this Court still could review it because the application of Article 11.071 Section 5 to this matter is an inadequate state ground. "'The adequacy of state procedural bars to the assertion of federal questions' is not within the State's prerogative finally to decide; . . . rather, adequacy 'is itself a federal question.'" *Lee v. Kemna*, 534 U.S. 362, 375 (2002) (quoting *Douglas v. Alabama*, 380 U.S. 415 (1965)).

Here, Texas' interest in requiring habeas petitions to raise all issues in a timely manner, though legitimate, is not "adequate" to bar review of a constitutional due process claim that the *State's own officials* blocked Mr. Hood from discovering and establishing until weeks before he filed the habeas petition at issue. *See* Cert. Petition 5 (Dec. 15, 2009). Certainly, inasmuch as Mr. Hood raised his unfair trial claim at his first real opportunity, his current habeas petition satisfies the state interests that underlie Article 11.071 Sections 5(a)-(c). *See Lee*, 534 U.S. at 378 ("an objection which is ample and timely . . . is sufficient to serve legitimate state interests").

More fundamentally, the CCA's application of a procedural default rule based on *petitioner's* delay is astonishing and is itself a due process violation. As demonstrated below, the judge and prosecutor's post-trial concealment and roadblocks violated the basic canons of judicial and prosecutorial ethics that undergird the legitimacy of the criminal justice system. The State cannot constitutionally affirmatively conceal this due process violation and then attribute the delay to Mr. Hood's inaction. The CCA's application of Article 11.071 Section 5 is grossly inadequate to ensure the most minimal due process safeguards guaranteed to citizens before the state can deprive them of life and liberty.

The CCA's decision also conflicts with its own prior rulings construing Texas Code of Criminal Procedure Article 11.071 Sections 5(a)-(c), and for that reason cannot serve as an "independent and adequate state ground" that would bar this Court's review of Mr. Hood's unfair trial claim. *See*, *e.g.*, *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (state procedural rule not "adequate" to bar review of federal question where the rule is not consistently or regularly applied); *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964) ("state procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review"). As the trial court explained the state of the law prior to the decision below: "When State officials have suppressed favorable evidence, the CCA has found the reasonable diligence requirement satisfied — even if habeas counsel could have uncovered the evidence had counsel undertaken fairly routine investigative tasks during the previous proceedings." Pet. App. B 12-13 (citing *Ex Parte Toney*, WR-51,047-03 (Tex. Crim. App. Sept. 20, 2006) (unpublished) and *Ex Parte Rousseau*, WR-43-534-02 (Tex. Crim. App. Sept. 11, 2002) (unpublished)). Indeed, before this case, the CCA consistently found *no* procedural default under these circumstances.

That the State of Texas has deviated from its prior procedural rulings here with the effect of denying Mr. Hood an opportunity to be heard is also a due process violation that invites this Court's review. *See*, *e.g.*, *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) ("When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law in its primary sense of an opportunity to be heard and to defend his substantive right."). Indeed, the apparent *ad hoc* divergence from precedent in itself undermines the standing of the judicial system and makes it even more important that this Court accept review.

Finally, even if there was a procedural default, Mr. Hood amply has established any "cause and prejudice" requisite to excuse it. *See generally Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977).[3] This Court has long recognized that where interference by state officials makes compliance with the state's procedural rule impracticable, a party

[3] While this Court has only applied the "cause and prejudice" standard in the context of federal habeas claims — in which the basis for the "independent and adequate state ground doctrine" is somewhat different than on direct review — this Court has frequently treated as equivalent the obligations of habeas petitioners to overcome state procedural defaults in the direct review and federal habeas contexts. *See, e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

establishes "cause" sufficient to excuse state procedural default of a federal claim. *See Amadeo v. Zant*, 486 U.S. 214, 222 (1988); *Murray v. Carrier*, 477 U.S. 478 (1986).

Regarding the impact of the misconduct here, the type of ethical and due process violation at issue — an affirmatively concealed, extramarital, sexual relationship between a prosecutor and the presiding trial judge — leaves no room for doubt that Mr. Hood suffered "prejudice." A trial conducted by a judge or jury whose impartiality is compromised is "structurally defective," rendering *per se* invalid any resulting conviction or sentence. *See*, *e.g.*, *Gray v. Mississippi*, 481 U.S. 648 (1987) (reversing as *per se* invalid death sentence imposed by jury impaneled by excluding jurors who expressed conscientious scruples against capital punishment); *Tumey v. Ohio*, 273 U.S. 510 (1927) (reversing judgment where the trial judge had direct pecuniary stake in the outcome). As discussed below, a criminal proceeding — let alone a capital murder prosecution — presided over by a judge secretly and intimately involved with the prosecutor is not a fair trial.

II. THE ACTIONS OF THE JUDGE AND PROSECUTOR IN THIS MATTER VIOLATE WELL-ESTABLISHED NORMS OF PROFESSIONAL CONDUCT, CONSTITUTE SERIOUS ETHICAL VIOLATIONS THAT UNDERMINE THE LEGITIMACY OF HOOD'S CONVICTION AND THE JUDICIAL SYSTEM, AND WARRANT SUMMARY REVERSAL

The failure of the Texas CCA to address the ramifications of the Holland-O'Connell relationship demeans the seriousness of the misconduct and conflicts with universally accepted ethical norms.

The first canon of the ABA's Model Code of Judicial Conduct, from which all other rules of conduct flow, mandates that "a judge shall uphold the integrity and independence of the judiciary." ABA MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2004). To this end, "a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities." *Id.*, Canon 2. These core rules of ethics preserve "public confidence in the integrity and independence of judges," and violation of these rules "diminishes public confidence in the judiciary and thereby does injury to the system of government under law." *Id.*, Canon 1, cmt. As the Framers of the United States Constitution recognized, "the ordinary administration of criminal and civil justice" is the "great cement of society," and "contributes,

more than any other circumstance, to impressing upon the minds of the people, affection, esteem, and reverence towards the government." THE FEDERALIST No. 17 (Alexander Hamilton). Actions by judges and prosecutors that draw into question the fair administration of even a single case weaken the rule of law.

As discussed below, every court or ethics panel in the United States, except for the Texas CCA, would find that Judge Holland's and Mr. O'Connell's relationship — kept secret during a capital murder trial resulting in a sentence of death — constitutes a serious ethical violation that cannot be tolerated. Because the judicial misconduct here constitutes a clear due process violation the Court may wish to consider summary reversal. Alternatively, the Court should grant the petition.

A. The ABA Model Rules and State and Federal Laws Regarding Recusal All Make Clear That A Judge Should Recuse Herself "In Any Proceeding in Which Her Impartiality Might Reasonably Be Questioned"

As this Court recently recognized in *Caperton*, "almost every State . . . has adopted the American Bar Association's objective standard . . . [that] '[a] judge shall avoid impropriety and the appearance of impropriety.'" *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2266 (2009) (quoting ABA ANN. MODEL CODE OF JUDICIAL CONDUCT Canon 2 (2004)). This principle is formalized in the ABA Model Code, which requires a judge to "disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." ABA MODEL CODE OF JUDICIAL CONDUCT Canon 3(E) (2004).[4] Texas has adopted this rule. *See* TEX. R. CIV. P. 18b(2)(a) (1990) ("A judge shall recuse himself in any proceeding in which . . . his impartiality might reasonably be questioned."); *Westbrook v. State*, 29 S.W.3d 103, 121 (Tex. Crim. App. 2000) (applying rule in criminal proceeding).

[4] The ABA House of Delegates adopted a new Model Code of Judicial Conduct in 2007, which has been adopted by several states but remains under active study by several others, including Texas.

Congress, too, has codified this standard of conduct, requiring that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (1990).

Judge Holland's failure to recuse herself *sua sponte* from capital murder proceedings prosecuted by her sexual partner violates these basic ethical principles. Indeed, apart from direct pecuniary interest in the outcome, it is hard to imagine circumstances in which a judge's impartiality might be as open to question as when she has engaged in an intimate relationship with counsel for a party. For this reason, Congress and the States have also expressly barred judges from presiding over cases in which their spouse appears as counsel for a party. *See* 28 U.S.C. § 455 ("Any justice, judge, or magistrate judge of the United States . . . shall disqualify himself in the following circumstances: . . . [h]e or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such person . . . [i]s acting as a lawyer in the proceeding."). The 2007 ABA Model Code of Judicial Conduct, which *amici* expect will soon become prevailing law in the majority of States, contains this express prohibition as well, and adds language requiring recusal where a judge's "domestic partner" acts as a lawyer in the proceeding. ABA MODEL CODE OF JUDICIAL CONDUCT R. 2.11 (2007).

B. Courts Have Found That a Sexual Affair Between a Judge and an Attorney Constitutes a Clear Ethical Violation and Seriously Undermines the Integrity of Judicial Proceedings

While the ethical rules do not expressly single out extramarital affairs as giving rise to a judicial obligation to recuse, courts (except the Texas CCA below) have uniformly found it intolerable for judges to carry on sexual affairs with attorneys appearing before them.[5] Courts confronting such conflicts have

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[5] *See, e.g., People v. Biddle*, 180 P.3d 461, 463, 465 (Colo. 2007) (3-year suspension for judge who engaged in, and later attempted to dispel unconfirmed rumors of, an affair with a deputy district attorney who appeared before him); *In re Adams*, 932 So.2d 1025, 1028 (Fla. 2006) (public reprimand for judge who entered into a romantic relationship with a lawyer who practiced before him); *In re Gerard*, 631 N.W.2d 271, 280 (Iowa 2001) (60-day suspension without judicial pay for judge who had a secret intimate relationship with a county attorney who daily appeared before him); *In re Chrzanowski*, 636 N.W.2d 758, 771 (Mich. 2001) (one-year suspension without pay for judge who appointed attorney with whom she was intimately involved to 56 cases without disclosing the relationship and later denied the affair); *United States v. Berman*, 28 M.J. 615 (1989) (U.S. Air Force Court of Military Review disqualifing judge who had an intimate relationship with prosecuting attorney from six trials, including trials occurring prior to the date the judge first spent the night with the attorney, and holding "the totality of [the judge's] relationship with [the prosecuting attorney] creates an

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unanimously recognized that an intimate sexual relationship between a judge and an attorney appearing before him or her threatens to bias the outcome and inherently undermines the integrity of the proceedings. In *Gerard*, the Iowa Supreme Court suspended without pay a district judge who carried on a secret two-month sexual relationship with an assistant county attorney who regularly appeared before the judge. 631 N.W.2d at 277, 280. The Iowa Supreme Court ruled that the judge violated Canon 2 of the Iowa Code of Judicial Conduct, which requires that a judge "promote public confidence in the integrity and impartiality of the judiciary." *Id.* at 277. The Court was not swayed by a lack of evidence "that [the judge] acted

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indelible appearance of partiality that legal arguments will not wash away."); *In re DiBlasi*, Determination (N.Y. State Comm'n on Judicial Conduct, Nov. 19, 2001) *available at* http://www.scjc.state.ny.us/Determinations/D/diblasi.htm (finding judge's impartiality suspect when he presided over ten cases brought by an attorney with whom he was intimately involved); *In re Bogutz & Gordon PC v. Carondolet Health Network*, No. C2001-0922, 2002 WL 33966260, *4 (Ariz. Super. Dec. 16, 2002) (Trial Order) (granting plaintiff's motion for new trial where trial judge had an undisclosed close personal relationship with defense counsel twenty years in the past). *See also Commonwealth v. Croken*, 733 N.E.2d 1005, 1011 (Mass. 2000) (ordering investigation of non-marital intimate relationship between a prosecutor and defense attorney and finding "no appreciable difference" in the ethical implications of marital and "other intimate relationships" in these circumstances).

partially toward the State," *id.* at 278, finding that "[t]he key concern" is the "appearance of impropriety. In this situation, once the public learned of the judge's relationship with the State's attorney who appeared before him daily, *the appearance of bias was very real.*" *Id.* (emphasis added). The Iowa Supreme Court emphasized the corrosive impact that the judge's affair had upon criminal trials prosecuted before him by his paramour:

> *[W]hat is a criminal defendant to think when the judge sentences that defendant or overrules that defendant's motion to suppress, when the assistant county attorney with whom he is having a sexual relationship was arguing the case on behalf of the State.*

Id. (emphasis in original).

Likewise in *Biddle*, the Office of the Presiding Disciplinary Judge of the Supreme Court of Colorado suspended a Colorado judge for three years where he concealed a sexual relationship with a prosecutor and failed to recuse himself from trials she prosecuted before him. Even though the record showed that the judge's conduct "did not result in any favorable treatment to [the prosecutor] or anyone else," the Colorado Supreme Court found that the judge committed a serious ethical violation,

holding that "the appearance of favoritism" "caused actual injury and serious potential injury to the integrity of the legal process." 180 P.3d at 463, 464. The Supreme Court of Colorado further found that the authority of the judicial system was at risk:

> The actual injury and serious potential injury caused to the integrity of the legal process is the most disturbing factor in this case. An independent and honorable judicial system is crucial to our system of justice. Indeed the integrity of our judicial system is at the core of our democratic system of government. When a public official flagrantly abandons his ethical duties, he necessarily damages the public's confidence in the rule of law and the integrity of our judicial system.

Id. at 465.

And in *Adams*, the Supreme Court of Florida reached a similar result, finding that the appearance of impropriety inherent in a sexual relationship between judge and attorney degrades the judicial office and undermines the justice system even in the circumstances of a civil case:

> Even in the absence of evidence that a romantic relationship with an attorney practicing in a judge's court has influenced the judge's judgment, the judge's authority necessarily suffers. First, the intimate relationship itself is contrary to the judge's role of maintaining detached neutrality as to the litigants and lawyers who appear in his or her courtroom. Second, in continuing to preside over cases in which the lawyer appears during the relationship, the judge necessarily depletes the single most important source of his or her authority — the perception of the legal community and public that the judge is absolutely impartial in deciding cases.

932 So.2d at 1027.

Likewise, in *Chrzanowski*, the Supreme Court of Michigan agreed with the Judicial Tenure Commission's recommended suspension of one year without pay for a district court judge who assigned 56 criminal cases to an attorney with whom she was intimately involved for over one year and who failed to disclose — and later denied — her ongoing relationship. In that case, the court found the ethical violation at odds with the central mission of the judicial system:

> Respondent's conduct on the bench was unbecoming of the office that she holds. Her action undermined public confidence in the integrity and impartiality of the judiciary, and were prejudicial to the administration of justice. . . . "As the corner stone of our tripartite system of government, the judiciary has a public trust to both uphold and represent the rule of law." . . . "Judges . . . are bound to conduct themselves with honor and dignity."

636 N.W.2d at 771 (quoting *In re Hocking*, 546 N.W.2d 234, 237 (Mich. 1996)).

The Texas CCA took a radically different approach than all these other courts. Far from protecting the integrity of the judicial system, the Court invoked a procedural rule to avoid addressing serious judicial misconduct. It did so even though the facts here — including Mr. Hood's sentence of death — present far more serious concerns than in any of the cases discussed above and frame an even graver ethical violation. Judge Holland's prolonged secret sexual affair with the attorney who prosecuted before her Mr. Hood's capital murder trial plainly compromises the legitimacy of her judicial office and discredits Mr. Hood's conviction and sentence. Indeed, Judge Holland's ethical violations deprived Mr. Hood of a fair trial. They present the "serious risk of actual bias" that this

Court has found deprives a civil litigant — let alone a criminal defendant in a death penalty case — of constitutional due process. At least in a civil case, the injustice can be rectified. The death penalty cannot be undone.

C. Judge Holland and Mr. O'Connell Committed Additional Serious Ethical Violations By Concealing Their Relationship

Judge Holland's post-trial concealment of the affair is likewise a serious ethical violation. Such a cover-up directly undermines public confidence in the judicial system and strikes at its integrity. Presiding over the capital trial was bad enough. Indeed, it was blatantly unconstitutional.[6] But to compound that structural defect by continuing to hide the relationship despite Mr. Hood's repeated inquiries shocks the conscience.

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[6] *See infra* § II D.

Courts have frequently disciplined judges for such judicial conduct involving deceit, concealment, false statements and misrepresentation.[7]

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[7] *See, e.g., In re Cruickshanks*, 648 S.E.2d 19, 22-24 (W. Va. 2007) (suspension without pay for magistrate judge who secretly conspired with her incarcerated son to retaliate against fellow inmate who testified against him); *In re McCormick*, 639 N.W.2d 12, 18 (Iowa 2002) (public reprimand for judge's misrepresentations regarding improper political activity); *In re Riffle*, 558 S.E.2d 590, 593 (W. Va. 2001) (public censure and one-year suspension for magistrate judge who made false statements to, and filed untrue reports with, the Department of Public Safety to obtain fraudulent workers' compensation benefits); *In re Frank*, 753 So.2d 1228, 1242 (Fla. 2000) (public reprimand for judge who provided false statements to grievance commission); *In re Ford-Kaus*, 730 So.2d 269, 277 (Fla. 1999) (removal of judge who demonstrated "a pattern of deceit and deception"); *In re Bybee*, 716 N.E.2d 957, 962-63 (Ind. 1999) (public reprimand for a judge who made knowing misrepresentations in campaign pamphlet about a fellow candidate for judicial office); *In re Edwards*, 694 N.E.2d 701, 718-19 (Ind. 1998) (part-time judge permanently enjoined from seeking judicial office, disbarred, and fined $100,000 for, *inter alia*, creating a fraudulent court decree absolving a marriage and awarding child custody; lying to his client, judges and court staff about the falsified court document; and presiding over a case involving a woman with whom he was sexually involved); *In re Kroger*, 702 A.2d 64, 73 (Vt. 1997) (one-year suspension for judge who provided false testimony at a grievance commission hearing); *Adams v. Comm'n on Judicial Performance*, 10 Cal.4th 866 (1995) (removal of judge who provided false information to judicial qualifications commission); *In re Richie*, 870 P.2d 967, 968 (Wash. 1994) (removal of judge who repeated a pattern of deceit and

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Likewise Mr. O'Connell, as prosecutor, was required to disclose information that he knew would compromise the integrity of the proceedings. Rules 8.04(a)(4) and (6) of the Texas Rules of Disciplinary Conduct forbid a lawyer from "assist[ing] a judge . . . in conduct that is a violation of applicable rules of judicial conduct or of other law." TEX. DISCIPLINARY R. PROF'L CONDUCT 8.04 *reprinted in* TEX. GOV'T CODE ANN. tit. 2, subtit. G, app. A (Vernon Supp. 2010). *See also* ABA MODEL RULES OF PROF'L CONDUCT R. 8.4(f) (2004). Moreover, Rule 8.03(b) requires a lawyer to report a judge to the appropriate disciplinary authority if the lawyer has knowledge that the judge "has committed a violation of applicable rules of judicial conduct." ABA MODEL RULES OF PROF'L CONDUCT R 8.3(b) (2004). Mr. O'Connell's actions in concealing his relationship with Judge Holland, his silence regarding Judge Holland's failure to recuse herself, and his continued prosecution of the case plainly violated these

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misrepresentation); *In re Dreyfus*, 513 N.W.2d 604, 605 (Wis. 1994) (suspension for judge who filed false case reports and willfully mislead investigators); *In re Codispoti*, 429 S.E.2d 549 (W. Va. 1992) (public censure and fine for judge involved in misleading campaign advertisements); *In re Fowler*, 602 So.2d 510, 510-11 (Fla. 1992) (public reprimand for judge who provided false information to police); *In re Brennan*, 447 N.W.2d 712, 713-14 (Mich. 1989) (public censure for a judge who plagiarized material for publication in law review).

standards and compounded the damage inflicted by Judge Holland's decision to preside over the case.

D. The Extraordinary Facts Presented Here Clearly Offend Constitutional Due Process

This Court has recently clarified that there are "circumstances 'in which experience teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable.'" *See Caperton*, 129 S. Ct. at 2259 (quoting *Winthrow v. Larkin*, 421 U.S. 35, 47 (1975)). And the Constitution requires that a judge "not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Cont'l Co.*, 393 U.S. 145, 150 (1968). This "stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *In re Murchison*, 349 U.S. 133, 136 (1955).

In these cases, a judge must recuse herself from the case, and her failure to do so offends the requirements of due process and invalidates the outcome of the proceedings. *See Caperton*, 129 S. Ct. at 2259. "A fair trial in a fair tribunal is a basic requirement of due process," *id.* (*quoting Murchison*, 349 U.S. at 136), and inherently requires "[t]rial before an 'unbiased judge.'" *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971); *accord Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 617 (1993) ("due process requires a neutral and detached judge in the first instance') (internal quotation marks and citation omitted).

The extraordinary trial court findings in this case — that Judge Holland concealed an intimate sexual relationship with the district attorney responsible for prosecuting Mr. Hood's capital murder trial and sentencing, *see* Pet. App. B 2-3 — present the high probability of actual bias found unconstitutional in *Caperton*. Her failure to recuse herself denied Mr. Hood a fair trial in a fair tribunal. The Court should address this serious due process violation which not only undermines the integrity of the judicial system, but discredits its authority as an instrument of the rule of law. No person in the United States should be convicted, let alone sentenced to death, under the circumstances present here.

III. THE FACT THAT GROSS ETHICAL VIOLATIONS AND UNCONSTITUTIONAL CONDUCT OCCURRED IN A CAPITAL CASE PROVIDES FURTHER REASON FOR THIS COURT'S REVIEW

Given the circumstances, the fact that Mr. Hood's trial resulted in a capital sentence sharpens the urgency for this Court's review. The Court has recognized that "death is a different kind of punishment from any other which may be imposed in this country. . . . It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and *appear to be*, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 357 (1977) (citations omitted, emphasis added). For this reason, the Court imposes heightened procedural requirements on capital trials and sentencing proceedings. *See*, *e.g.*, *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978) (plurality opinion); *Turner v. Murray*, 476 U.S. 28, 37 (1986).

Given Judge Holland's intimate relationship with the prosecutor, it is difficult to see how any result reached in Mr. Hood's capital murder trial could be free of the suspicion that it was influenced by "caprice or emotion" or satisfied the more stringent guarantees of due process afforded capital defendants. By its inaction, however, the Texas CCA has allowed this dark cloud of impropriety to hang

over a capital sentence. This Court should act to prevent the serious damage to our legal system threatened by allowing an execution to proceed under these circumstances.

CONCLUSION

For the reasons cited herein, the petition for a writ of certiorari should be granted and the judgment of the Texas Court of Criminal Appeals should be reversed.

Respectfully submitted,

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February 18, 2010

APPENDIX

AMICI CURIAE

John W. Amberg

Mr. Amberg is a former advisor to California State Bar's Committee on Professional Responsibility and Conduct (COPRAC), is a former Chair of COPRAC (2006-2007) and a member and former Chair (2001-2002) of Los Angeles County Bar Association's Professional Responsibility and Ethics Committee.

James Ellis Arden

Mr. Arden has handled legal malpractice and appellate issues involving ethics since 1987. He has lectured on ethics and legal practice issues for several California bar associations, and writes the "TechnoEthics" column in *GPSOLO* magazine, published by the American Bar Association General Practice, Solo and Small Firm Division. He also sat some years as a judge pro tem for the Los Angeles Superior Court.

Robert H. Aronson
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Professor Aronson served as Chair of the the Association of American Law Schools (AALS) Section on Professional Responsibility, National Conference of Bar Examiners MPRE Drafting Committee, Washington Legislative Ethics Board, and the AALS Committee on Bar Admission and Lawyer Performance. He was

also a member of the drafting committee for the Association of Trial Lawyers of America Code of Conduct.

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Mr. Cantor was previously a Professor at the University of Denver School of Law and gave numerous lectures on ethics throughout Colorado, most extensively with the Colorado Criminal Defense Bar.

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Mr. Creamer has written numerous articles on legal ethics and is currently a member of the ABA Standing Committee on Ethics and Professional Responsibility.

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Mr. Cummins formerly served on behalf of the American Judicature Society as advisor to the American Bar Association's Joint Commission to Evaluate the Model Code of Judicial Conduct. He is a former member of the ABA Standing Committee on Professionalism; is past Chairman of the American Bar Association Standing Committee on Professional Discipline; a past member of the Standing Committee on Lawyers' Professional Liability. He is the former Chairman of the Illinois Judicial Inquiry Board.

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Lieutenant Eveland served in the U.S. Army Standards of Conduct Office and sat on the Indianapolis Bar Association Ethics Committee and is currently at the Walter Reed Army Institute of Research.

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Mr. Fox is a former Chair of the ABA Standing Committee on Ethics and Professional Responsibility and a co-author of six books on ethics, including the casebook *Traversing the Ethical Minefield*.

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Professor Freedman lectures annually on lawyer's ethics at Harvard Law School and is a Visiting Professor at Georgetown University Law Center. He authored the treatise *Lawyers' Ethics in an Adversary System* (1975) and more recently, *Understanding Lawyers' Ethics* (2004).

Lillian B. Hardwick

Ms. Hardwick currently works as a consultant on judicial and attorney ethics, which includes judicial disqualification and recusal. She is the co-author of the *Handbook of Texas Lawyer and Judicial Ethics* and serves as Chair of the State

Bar Committee on the Texas Disciplinary Rules of Professional Conduct.

Mark Harrison

Mr. Harrison chaired the ABA Commission to Revise the Model Code of Judicial Conduct until it was adopted unanimously by the ABA House of Delegates in February 2007.

Donald R. Lundberg

Mr. Lundberg served as executive secretary of the Indiana Supreme Court Disciplinary Commission for eighteen years investigating and prosecuting claims of attorney misconduct. Mr. Lundberg frequently speaks and writes on professional responsibility and legal ethics issues and is a member of the Editorial Board of the ABA/BNA Lawyers' Manual on Professional Conduct and a Founder's Circle member of the ABA Center for Professional Responsibility.

Susan R. Martyn
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Professor Martyn has co-authored several books on lawyer's ethics, acted as an advisor to the American Law Institute's Restatement of the Law Governing Lawyers (1987-2000), and was a member of the American Bar Association's Ethics 2000 Commission (1997-2002).

Judith L. Maute

Professor, University of Oklahoma College of Law

Professor Maute has been on the Oklahoma Bar Association Rules of Professional Conduct Committee for twenty-five years and writes extensively in the field of legal ethics. She also chaired the Section on Professional Responsibility of the Association of American Law Schools and has served on the Multi-State Professional Responsibility Test-Drafting Committee.

Kurt W. Melchior

Mr. Melchior served as Chair of the California State Bar Board of Governors' Committee on Rules of Professional Conduct, served on the drafting commission for the California rules in the 1980s and currently serves as a member of the Rules Revision Commission.

Sharisse O'Carroll

Adjunct Professor, University of Tulsa College of Law

Ms. O'Carroll has published numerous articles and frequently lectures on legal ethics. As a member of the Oklahoma Bar Association (OBA) Bench & Bar Committee, Ms. O'Carroll is responsible for redrafting the Oklahoma Judicial Code in accordance with the new ABA Model Judicial Code. She is also the former co-chair of the OBA Legal Ethics Committee.

Arden J. Olson

Mr. Olson sat on the ABA Standing Committee on Ethics & Professional Responsibility from 2006-09 (during which time the amendments to the Model Code of Judicial Conduct were approved), currently sits on the ABA Standing Committee on Professionalism, and recently concluded serving on the Oregon Supreme Court's Committee to Review the Oregon Code of Judicial Conduct.

Ellen A. Pansky

Ms. Pansky is a former President of the Association of Professional Responsibility Lawyers, served as a member of the Editorial Board of the ABA/BNA Lawyers' Manual on Professional Conduct (2004-2007) and is a charter member of the ABA Center for Professional Responsibility. Ms. Pansky has published extensively and is a frequent lecturer in the area of legal ethics.

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Professor Pizzimenti teaches Legal Ethics and Professional Responsibility and was active in the State Bar of Michigan Committee on Professional and Judicial Ethics.

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Professor Rapoport has taught courses in Professional Responsibility and authored *Enron: Corporate Fiascos and Their Implications* (2004) and *Enron and Other Corporate Fiascos: The Corporate Scandal Reader* (2009).

Seth Rosner

Mr. Rosner is a founding Director and past President of the Association of Professional Responsibility Lawyers. Mr. Rosner served on the ABA Ethics Committee subcommittee that revised the ABA Model Code of Judicial Conduct (1987-90), was liaison from the ABA Center for Professional Responsibility to the ABA Commission on Evaluation of the Code of Judicial Conduct (2003-07) and is presently a member of the New York State Bar Association Committee to revise the New York Code of Judicial Conduct.

Robert Schuwerk
Professor, University of Houston Law Center

Professor Schuwerk served as an assistant reporter on the committee that wrote the current Texas Disciplinary Rules of Professional Conduct, co-authored a book-length article discussing those rules, and co-authored the *Handbook of Texas Lawyer and Judicial Ethics* (2006-2007).

Mitchell Simon
Professor, Franklin Pierce Law Center

Professor Simon chaired the New Hampshire Bar Association's Ethics Committee from 1988-1993 and served on the Rules Revision Committee. Last year, the New Hampshire Supreme Court appointed him to the Judicial Ethics Committee.

Abbe Smith,
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Professor Smith co-authored *Understanding Lawyers' Ethics* (2002, 2004, 2007, forthcoming 2010) with Monroe Freedman. Professor Smith teaches and writes on the topic of legal ethics.

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Mr. Smoot formerly prosecuted lawyer disciplinary cases throughout the State of Texas as First Assistant General Counsel of the State Bar of Texas and currently specializes in the areas of legal malpractice and legal ethics.

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Mr. Steele is also a Lecturer in Legal Ethics at University of California, Berkeley School of Law and Stanford Law School, and is an Advisory Board Member at the Georgetown Journal of Legal Ethics.

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Professor Swisher has authored numerous scholarly articles addressing legal and judicial ethics including *Pro-Prosecution Judges: "Tough on Crime," Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. (forthcoming 2010).

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Mr. Zitrin previously taught legal ethics at the University of San Francisco, School of Law and was the founder and Director of the Center for Applied Legal Ethics (currently known as the Center for Law and Ethics). He has published extensively on legal ethics and lectures frequently on the subject.