No. 09-8610 (Capital Case)

In the Supreme Court of the United States

CHARLES DEAN HOOD,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition for a Writ of Certiorari to The Texas Court of Criminal Appeals

BRIEF OF FORMER JUDGES, STATE OFFICIALS, AND PROSECUTORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are twenty-one former federal and state judges and prosecutors and former state officials, identified in the Appendix, with extensive experience in the administration of justice in criminal cases. Judges and prosecutors play integral roles in the criminal justice system; state governors not only are responsible for the administration of the laws within their states, but in addition have especially important duties in connection with the administration of the death penalty. Each of the *amici* maintains an active interest in the fair and effective functioning of the criminal justice system.

Judges must be impartial guardians of fairness and justice, especially in criminal proceedings. Prosecutors are officers of the court obligated to seek justice, not simply to strive to prevail over their opponents regardless of the merits of the case. They also have an interest in preserving the courts' reputation for impartiality in order to promote public confidence in and participation in the criminal justice system. Permitting a trial judge to preside in a criminal case prosecuted by the person with whom she had a secret intimate relationship violates fundamental principles of fairness, discredits the administration of justice, and diminishes the authority of the Nation's courts.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. Counsel of record for both parties received notice of *amici's* intention to file this brief at least 10 days prior to its due date. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

Although *amici* hold different opinions with respect to the death penalty, they are united in their view that the Due Process Clause forbids a trial judge from presiding over a criminal proceeding in the circumstances presented here. *Amici* are deeply concerned that, if the judgment below is allowed to stand, the Due Process Clause's guarantee of fundamental fairness—especially in death penalty cases—will be imperiled, and public confidence in the courts will suffer. The question presented in this case is therefore critically important to both the integrity of the American judicial system and the constitutional rights of criminal defendants.

SUMMARY OF ARGUMENT

The facts of this case are shocking. A trial judge presided over a capital case being prosecuted by an individual with whom she had had a secret intimate relationship—a relationship that she and the prosecutor continued to conceal, with the prosecutor lying about its existence to petitioner's habeas counsel. After the relationship finally was brought to light, through depositions compelled by court order, and a trial judge recommended that petitioner's habeas application move forward, the Texas Court of Criminal Appeals, over a vigorous dissent, rejected petitioner's application in two opaque sentences.

The conduct of the trial judge and prosecutor in a proceeding that resulted in imposition of the death penalty, combined with the short shrift given to petitioner's claim by the Court of Criminal Appeals, cast grave doubt on the impartiality and fairness of the trial in this case and tarnish significantly the reputation of the judiciary as a whole. This Court likely is the last court with an opportunity to prevent the in-

fliction of this serious harm—both to petitioner and to the judiciary.

The undisputed facts establish a clear due process violation. "[D]ue process is denied by circumstances that create the likelihood or the appearance of bias." *Peters* v. *Kiff*, 407 U.S. 493, 502 (1972). The extreme facts of this case—involvement of the trial judge in a secret relationship, lying by the prosecutor and concealment by the judge, and imposition of the death penalty—constitute an "instance[] which, as an objective matter, require[s] recusal." *Caperton* v. *A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2259 (2009).

Because the constitutional violation is clear, this Court's jurisdiction is undeniable, and this Court has an extraordinarily strong interest in preserving the reputation of the judiciary—in particular affirming the courts' willingness to recognize and remedy appalling acts by a judge and officer of the court that violate fundamental fairness—the Court should grant the petition and reverse the judgment below.

ARGUMENT

I. THE COURT MUST INTERVENE IN THIS CASE TO PRESERVE THE INTEGRITY AND REPUTATION OF OUR NATION'S JUDICIAL SYSTEM.

This Court has long recognized that impartiality—"the lack of bias for or against either party to the proceeding"—is the essential attribute of the judicial process. *Republican Party of Minn.* v. *White*, 536 U.S. 765, 775 (2002) (emphasis omitted). Impartiality "assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to

any other party." *Id*. at 775-776; see also *id*. at 804 (Ginsburg, J., dissenting) ("[a] judiciary * * * owing fidelity to no person or party, is a 'longstanding Anglo-American tradition,' an essential bulwark of constitutional government, a constant guardian of the rule of law. * * * Without this, all the reservations of particular rights or privileges would amount to nothing") (citation omitted)).

Impartiality is critical not only for even-handed decisionmaking, but also to preserve respect for the judiciary. "The power and the prerogative of a court to [resolve disputes] rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order." *Republican Party*, 536 U.S. at 793 (Kennedy, J., concurring); see also *Mistretta* v. *United States*, 488 U.S. 361, 407 (1989) ("[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship").[2]

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[2] Judge Roger K. Warren, former President of the National Center for State Courts, has explained:

> [When the public thinks] that the courts are unfair, that the judges are not neutral, that the judges are not honest, that the judges are not trust worthy, that the judges do not have integrity, these are issues of character, not competence—when the public feels that there are character flaws in the judiciary, that's what undermines their trust and their confidence in the entire justice system.

Roger K. Warren, President, Nat'l Ctr. for State Courts, The Importance of Judicial Independence and Accountability 4 (Jan. 2003), available at http://207.242.75.69/cgi-bin/showfile.exe?CISOROOT=/judicial&CISOPTR=207.

Empirical research confirms this conclusion. The perception of unfair or unequal treatment "is the single most important source of popular dissatisfaction with the American legal system." Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513, 517 (2003). "What matters to people is neutrality, absence of bias, honesty, evidence of efforts to be fair, politeness, and respect for the rights of individuals." David B. Rottman, Nat'l Ctr. for State Courts, Public Perceptions of the State Courts: A Primer 2 (Aug. 2000), available at http://207.242.75.69/cgi-bin/showfile.exe?CISOROOT=/ctcomm&CISOPTR=24.

For these reasons, this Court has been vigilant in safeguarding the impartiality of our Nation's courts, intervening to protect litigants against decisionmakers who are—or who even just appear to be—biased. *E.g.*, *Caperton*, 129 S. Ct. 2252 (2009); *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813 (1986); *Withrow* v. *Larkin*, 421 U.S. 35 (1975); *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972); *Mayberry* v. *Pennsylvania*, 400 U.S. 455 (1971). *In re Murchison*, 349 U.S. 133 (1955); *Tumey* v. *Ohio*, 273 U.S. 510 (1927).

This case presents that issue in the most serious context in which it can arise: a litigant sentenced to death in proceedings tainted by an indisputable appearance of bias resulting from a prior secret, intimate relationship between judge and prosecutor. Not only did the judge and prosecutor fail to disclose their relationship to defendant's trial counsel at the start of the case; they also both concealed the facts when asked directly by petitioner's habeas counsel about the existence of such a relationship. As a re-

sult, there are grave questions about the legitimacy of the imposition of the death penalty in this case.

The harm inflicted on the integrity and reputation of the American judicial system has been magnified significantly by the Texas Court of Criminal Appeals' issuance of an opinion that rejects petitioner's due process claim in two boilerplate sentences. That decision, which received substantial publicity in Texas and elsewhere, gives every appearance of seeking to "sweep the issue under the rug"—a perception that is enhanced by the fact that the trial judge in this case was a member of the Court of Criminal Appeals from 1997-2001.

Intervention by this Court is essential to prevent serious harm to the reputation and integrity of our country's judiciary.

A. The Underlying Events In This Case, Together With The Texas Court's Unexplained Ruling, Severely Tarnish The Reputation Of The Judiciary.

Undisputed evidence in this case—the deposition testimony of the trial judge and district attorney—establishes the following:

- The trial judge presiding in this capital murder case had been involved in a multi-year intimate relationship with the district attorney responsible for the prosecution of petitioner on charges of capital murder, who had appeared personally during the trial court proceedings. The trial judge testified that she "loved" the district attorney during the time of their intimate relationship, and the district attorney agreed that they were "in love

with each other." They discussed the possibility of marriage. Pet. App. B 2-3; D 52; E 17, 22-23.[3]

- Both the district attorney and the judge were married to other individuals at the time the intimate relationship commenced. The district attorney's marriage ended while the intimate relationship was ongoing; the judge became divorced at a later date. Pet. App. D 30; E 19.
- The judge and the district attorney kept their intimate relationship secret, both while it was going on and after it was over. Pet. App. B 3; D 31-32, 35; E 42-43.
- The two individuals remained friends after the end of their intimate relationship, and—following the judge's divorce—the prosecutor joined the judge and her family on vacations. Pet. App. D 39-41; E 29-30, 34-35.
- When questioned by petitioner's counsel about the intimate relationship, the prosecutor lied about the existence of such a relationship and the judge refused to comment. Pet. App. B 9.

Texas law, like federal law, requires a judge's recusal in any proceeding in which "his impartiality might reasonably be questioned" or in any proceeding in which "he has a personal bias or prejudice concerning the subject matter or a party." Tex. R. Civ. P. 18b(2)(a)-(b).[4] Recusal is required where "a reasona-

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[3] The duration of the relationship is not clear; it lasted at least several years. Pet. App. B; D 27-29; E 15, 24.

[4] This standard applies in both criminal and civil cases. See *De Leon* v. *Aguilar*, 127 S.W.3d 1, 5 (Tex. Crim. App. 2004).

In addition, Canon 1 of the Texas Code of Judicial Conduct provides that a judge should "personally observe [high stan-

ble member of the public at large, knowing all the facts in the public domain concerning the judge and the case, would have a reasonable doubt that the judge is actually impartial." *Burkett* v. *State*, 196 S.W.3d 892, 896 (Tex. App. 2006); see *Kniatt v. State*, 239 S.W.3d 910, 917 (Tex. App. 2007) (per curiam). Compare 28 U.S.C. § 455(a) (federal judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned").

The facts here plainly give rise to strong questions regarding the judge's impartiality. A reasonable observer would be concerned that the judge would favor the district attorney because of affection remaining from their intimate relationship or for fear that the district attorney, if displeased by a ruling, might disclose that relationship and tarnish the judge's reputation. The false denial of the existence of the relationship—even following the trial—provide further support for the conclusion that the relationship could well have influenced the judge's decisions.

The judge in this case could have complied with the governing standard in several ways. She could have recused herself without providing a reason. She could have informed the parties of the essential facts regarding her relationship with the district attorney and asked whether they gave rise to any concerns.[5]

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dards of conduct] so that the integrity and independence of the judiciary is preserved." Canon 2 states that a judge "should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary," and that she "shall not allow any relationship to influence judicial conduct or judgment."

[5] As for the district attorney, the Texas Disciplinary Rules of Professional Conduct (DRPC) prohibit attorneys, including

But she did neither. Instead, she and the district attorney continued to conceal their relationship—throughout the course of the trial and even in responses to direct questions from petitioner's counsel in connection with post-trial proceedings.

The result is that petitioner received the ultimate penalty—death—in a proceeding presided over by a judge whose impartiality appears doubtful at best. That result not only violates petitioner's rights, it also undermines the reputation of the entire judicial system.

And the adverse effect of these actions on the reputation of the judiciary have been amplified substantially by the decision of the court below. After remanding the matter for factfinding, the Court of Criminal Appeals received a detailed 16-page report from the trial court, including a finding that the judge and district attorney "did not abide by their ethical and constitutional duties to disclose the fundamental conflict caused by their relationship" and a recommendation that petitioner "meets the dictates of Article 11.071 § 5 of the Texas Code of Criminal Procedure," which governs successive habeas petitions. Pet. App. B 7, 16.

The Texas Court of Criminal Appeals nonetheless denied petitioner's habeas application by a 6-3 vote, with the majority's determination resting en-

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prosecutors, from "knowingly assist[ing] a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct." DRPC 8.04(a)(6). The district attorney's complicity in concealing the facts relating to the judge's potential bias—both during the trial court proceedings and after the trial—would appear to violate this standard.

tirely on an unexplained conclusory statement that petitioner's application "fails to satisfy the requirements of Article 11.071, § 5(a). Accordingly, the application is dismissed as an abuse of the writ." Pet. App. C 3.

As one Texas newspaper recognized in commenting on the Court of Criminal Appeals' decision, "the issue is the integrity of the Texas court system and the appeals court's interest in flushing out the stench of corrupted justice. Sadly, the court has proved itself unwilling." Editorial, *Ruling in Hood Case Degrades Court System*, DALLAS MORNING NEWS (Sept. 17, 2009). Another commentator declared that the ruling below "shocks the conscience." Andrew Cohen, *An Eventful Week for America's Justice System*, VANITY FAIR (online), Sept. 18, 2009; see also Ann Woolner, *Judge's Sex With Prosecutor Gets a Pass in Texas*, BLOOMBERG, Oct. 2, 2009.

B. The Harm To The Judicial System Is Magnified Because This Case Involves The Imposition Of The Death Penalty.

The facts of this case would be disturbing if they had arisen in any sort of judicial proceeding. Impartiality is an essential hallmark of judicial decision-making for cases large and small. Because this case involves a criminal prosecution in which the defendant received the death penalty, however, the interest in fairness and impartiality is at is zenith and the damage—both to the perception of judicial fairness and to the judiciary's overall reputation—is much more severe.

This Court has long recognized that "federal constitutional standards * * * have been designed to ensure heightened sensitivity to fairness and accuracy

where imposition of the death penalty is at issue." *Williams* v. *Florida*, 465 U.S. 1109, 1110-1111 (1984); see also *Sawyer* v. *Whitley*, 505 U.S. 333, 361 (1992) (Stevens, J. concurring) ("[b]ecause the death penalty is qualitatively and morally different from any other penalty, 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, the consequence of scrupulously fair procedures") (internal quotation marks omitted); *Gardner* v. *Florida*, 430 U.S. 349, 358 (1977) ("[i]t 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").

Petitioner's case—literally involving life or death—necessitated especially strict adherence to the requirement of an impartial judge to preempt any doubts about the legitimacy of a decision to impose the harshest sanction available to society. The proceedings below have led to precisely the opposite result—undermining confidence in the fairness of the proceedings because of the actions of the trial judge, district attorney, and the Court of Criminal Appeals. Failing to vindicate petitioner's due process claim will inflict significant damage to public trust in our system of justice, both in Texas and throughout the Nation.

II. THE COURT SHOULD CONSIDER SUMMARY REVERSAL OF THE JUDGMENT BELOW.

The question presented in the certiorari petition warrants review not only because it is important, but also because the decision below is wrong—petitioner's due process rights were violated by the appearance of bias stemming from the secret rela-

tionship between the judge and prosecutor and their subsequent actions. The Court may wish to consider summary reversal because of the clarity of the constitutional violation. Alternatively, the Court should grant the petition and set the case for plenary consideration.

Review by the Court is essential at this stage of the litigation, because petitioner may not be able to vindicate his due process claim in a subsequent federal habeas action. Petitioner previously filed a federal habeas petition, which was denied. See *Hood* v. *Dretke*, 93 F. App'x 665 (5th Cir.) (per curiam), cert. denied, 543 U.S. 836 (2004). It is not at all clear that a subsequent federal habeas petition would satisfy the requirements of the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2244(b)(2)(B). The present certiorari petition accordingly may well constitute petitioner's only opportunity prior to imposition of the death penalty to vindicate his due process right to an impartial judge.

A. Petitioner's Evidence Establishes A Clear Due Process Violation.

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. at 136. Actual bias is not required to establish a violation of due process; tribunals "must avoid even the appearance of bias." *Commonwealth Coatings Corp.* v. *Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968).

Even without proof of actual bias, therefore, circumstances that "would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." *Tumey*, 273 U.S. at 532; accord, *Ward*, 409 U.S. at

60. "[D]ue process is denied by circumstances that create the likelihood or the appearance of bias." *Peters*, 407 U.S. at 502. "Such a 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. But to perform its high function in the best way justice must satisfy the appearance of justice." *In re Murchison*, 349 U.S. at 136 (internal quotation and citation omitted). See also *Lavoie*, 475 U.S. at 825; *Withrow*, 421 U.S. at 47; *Mayberry*, 400 U.S. at 465-466.

This Court recently reaffirmed these long-established principles in *Caperton* v. *A.T. Massey Coal Co.*, *supra*, making clear that the due process requirement of an impartial judge is not limited to the standards that applied at common law. The Court recognized that "[p]ersonal bias or prejudice 'alone would not be sufficient basis [under common law standards] for imposing a constitutional requirement under the Due Process Clause[,]' * * * [but that as] new problems have emerged that were not discussed at common law, * * * the Court has identified additional instances which, as an objective matter, require recusal." *Caperton*, 129 S. Ct. at 2259 (quoting *Lavoie*, 475 U.S. at 820) (alterations ours). "These are circumstances 'in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Ibid.* (quoting *Withrow*, 421 U.S. at 47).

"[T]he Court has asked whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the [judge's] interest 'poses such a risk of actual bias or prejudgment that the practice must be

forbidden if the guarantee of due process is to be adequately implemented.'" *Caperton*, 129 S. Ct. at 2263 (quoting *Withrow*, 421 U.S. at 47); see also *id.* at 2262 ("[t]he Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias'").

Here—as in *Caperton* and its predecessors—the due process violation rests on objective facts; in particular the facts concerning the relationship between the trial judge and district attorney, as well as their subsequent conduct. When it comes to criminal defendants facing the death penalty, society—and those defendants themselves—have a special need for due process standards that preclude protection from judges who may be biased against them. When a life hangs in the balance, it is especially important that the judge both be and appear to be impartial in order to preclude any doubts about the fairness of the proceedings that led to the imposition of the ultimate sanction.

The facts here involve a secret, multi-year intimate affair between the trial judge and prosecutor, who continued to conceal their relationship in the face of inquiries by petitioner's counsel. Under the objective test established in *Caperton*, these facts are more than sufficient to raise an "unconstitutional potential for bias." This is precisely the type of "extreme case" that is "likely to cross constitutional limits, requiring this Court's intervention." *Caperton*, 129 S. Ct. at 2265; cf. *United States* v. *Berman*, 28 M.J. 615, 618 (Air Force Ct. Mil. Rev. 1989) (setting aside convictions in cases in which trial judge and prosecutor were in intimate relationship; court noted

the "indelible appearance of partiality that legal arguments will not wash away").

B. Under This Court's Precedents, The Court Of Criminal Appeals' Ruling Must Be Construed To Reject On The Merits Petitioner's Federal Constitutional Claim.

The Court of Criminal Appeals did not set out in detail the rationale for its decision, stating only that petitioner's application "fails to satisfy the requirements of Article 11.071, § 5(a). Accordingly, the application is dismissed as an abuse of the writ." Pet. App. C 3. The settled principles applied by this Court in interpreting state court decisions require the Court to construe the decision below to rest on the denial on the merits of petitioner's federal constitutional claim. Even if the Court rejects that conclusion, moreover, it may review the question presented in the petition.

1. Article 11.071 incorporates elements of both state and federal law. Thus, the Texas Court of Criminal Appeals has held that "to satisfy Art. 11.071, § 5(a), 1) the factual or legal basis for an applicant's current claims must have been unavailable as to all of his previous applications; and 2) the specific facts alleged, if established, would constitute a constitutional violation that would likely require relief from either the conviction or sentence." *Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007). The court in *Campbell* concluded that the applicant had satisfied the first requirement, but that "applicant does not * * * state even a potential violation of the United States Constitution." *Id.* at 423. The court ended its opinion by stating that "the allegations do not satisfy the requirements of Article

11.071, § 5. Accordingly, the application is dismissed as an abuse of the writ." *Id.* at 425. See also *Ruiz* v. *Quarterman*, 504 F.3d 523, 527 (5th Cir. 2007) (Article 11.071 allows the filing of a successive habeas application 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"); *Ex parte Staley*, 160 S.W.3d 56, 63 (Tex. Crim. App. 2005) (per curiam) (recognizing that "[u]nder * * *Article 11.071, [a] * * * subsequent application for a writ of habeas corpus must state specific, particularized facts which, if proven true, would entitle [the applicant] to habeas relief").

Where, as here, a state determination turns on a federal constitutional standard, a state court's decision that—because the federal constitutional standard is not met—relief is not available constitutes a federal question reviewable by this Court. See *Enterprise Irrigation Dist.* v. *Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917) ("where the non-federal ground is so interwoven with the [federal ground] as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the [federal issue, this Court's] jurisdiction is plain").

In some circumstances, however, it will not be clear whether the state court rested its decision barring the filing of a successive application on the applicant's failure to satisfy the state law prong or on his failure to meet the federal law prong of Article 11.071. "[W]hen the adequacy and independence of any possible state law ground is not clear from the face of the opinion, [this Court] will accept as the

most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983); see *Ake* v. *Oklahoma*, 470 U.S. 68, 75 (1985) ("when resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded"); *Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991).

This presumption enables the Court to avoid the need to "examine state law in order to decide the nature of the state court decision," render advisory opinions, or require "state courts to clarify their decisions to the satisfaction of this Court." *Long*, 463 U.S. at 1041. "'[A]mbiguous or obscure adjudications by state courts [must] not stand as barriers to a determination by this Court of the validity under the federal constitution of state action.'" *Ibid.* (quoting *Minnesota* v. *National Tea Co.*, 309 U.S. 551, 557 (1940)).

The Fifth Circuit has utilized this approach in determining—for purposes of ascertaining the availability of a federal habeas claim—whether a decision of the Court of Criminal Appeals under Article 11.071 rests on state or federal grounds. See *Coleman*, 501 U.S. at 729-730 (equating the application of the adequate and independent state ground doctrine in federal habeas cases to the standard applied by this Court on direct review of state court judgments). In *Ruiz*, for example, the Fifth Circuit was faced with a "boilerplate dismissal by the CCA of an application for abuse of the writ [that was] itself uncertain on this point, being unclear whether the CCA decision was based on the first element, a state-law

question, or on the second element, a question of federal constitutional law." 504 F.3d at 527. The court found that the Court of Criminal Appeals' decision fell "far short of the clarity insisted upon by *Michigan v. Long*" and held that the applicant's federal constitutional claims were properly before the district court. *Id*. at 528.

The Fifth Circuit, speaking through Judge Higginbotham, explained the reason for its reliance on the *Michigan* v. *Long* principle:

> This settled principle gives to state courts control over the federal review of their opinions. It has become a rote rule at the fingertips of every writing member of state courts of last resort – where studied ambiguity or clarity in the decisional footing is an art form and an absence of clarity in an opinion is seldom inadvertent. Calibrated uncertainty can play a mediating role in garnering support for an outcome. * * * At best, the CCA did not make clear whether it relied on state or federal law in dismissing Ruiz's application. As the CCA is keenly aware, its choice of language was made against a background legal standard -- which directs the CCA in either granting an application for consideration of subsequent claims or dismissing that application as an abuse of the writ – that is interwoven with federal law.

Ruiz, 504 F.3d at 527.[6]

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[6] Some subsequent Fifth Circuit panels have stated that a decision labeling a state habeas petition an "abuse of the writ" under Article 11.071 is necessarily a decision on state law

Here, because the Court of Criminal Appeals did not indicate whether its decision rested on the state law or federal law prong of Article 11.071, the *Michigan* v. *Long* presumption requires the Court to construe the decision as resting on federal grounds. The opinion below falls "far short of the clarity" necessary to show independence of federal law. *Ruiz*, 504 F.3d at 528. Indeed, the substance of petitioner's federal constitutional claim was before the Court of Criminal Appeals, the opinion indicates that the court reviewed petitioner's specific allegation, and the opinion does not indicate that it rested its decision on state law grounds. Therefore, this Court must construe the lower court's ruling as resting on federal constitutional grounds.[7]

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grounds. See *Hughes* v. *Quarterman*, 530 F.3d 336, 341-342 (5th Cir. 2008), cert. denied, 129 S. Ct. 2378 (2009); *Morris* v. *Dretke*, 90 F. App'x 62, 66-67 (5th Cir. 2004). But that conclusion is inconsistent with the Texas courts' construction of Texas law, which makes clear that the merits of the federal constitutional claim is an element of the analysis. See pages 15-16, *supra*., Indeed, the State itself has argued that a decision that a habeas petition does not satisfy the Article 11.071 standard can be a decision on the merits of the constitutional question. *Rivera* v. *Quarterman*, 505 F.3d 349, 355 (5th Cir. 2007), cert. denied, 129 S. Ct. 176 (2008).

[7] When a state court enters an opinion from which the grounds of decision cannot be ascertained, this Court may look to other parts of the record to determine whether an adequate nonfederal basis for the decision exists. See *Staub* v. *City of Baxley*, 355 U.S. 313, 318-319 (1958) (holding that this Court may inquire beyond the express language of a state court opinion to determine if the substance and effect of the decision was to deny constitutional rights). Here, it is clear from the record that petitioner's federal constitutional claims were before the Court of Criminal Appeals at the time it considered the application and issued its decision. See Application for Writ of Habeas Corpus (Sept. 25, 2008) at 23-25.

This Court accordingly has jurisdiction over the issue, and it should reverse the Texas court's erroneous denial of petitioner's federal due process claim.

2. Even if—contrary to our submission—the decision below rested on state law grounds, this Court would have jurisdiction to review the federal constitutional issue, because the decision would fall within the "limited category" of "exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." *Lee* v. *Kemna*, 534 U.S. 362, 376 (2002); see also *Johnson v. Mississippi*, 486 U.S. 578 (1988); Eugene Gressman et al., SUPREME COURT PRACTICE 222-224 (9th ed. 2007).

Moreover, state procedural rules may not be applied in a manner that offends the Due Process Clause. See *Medina* v. *California*, 505 U.S. 437, 448 (1992) (the Due Process Clause prohibits states from regulating criminal procedure in ways that contravene any "recognized principle of fundamental fairness in operation") (internal quotation marks omitted); *Evitts* v. *Lucey*, 469 U.S. 387, 393 (1985) ("the procedures used in deciding appeals must comport with the demands of the Due Process [Clause]"); *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923) (Holmes, J.) ("[w]hatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice"). Here, the Texas court's invocation of procedural defects to defeat petitioner's federal claim of unconstitutional bias—allowing the judge and the prosecutor's *concealment of their own impropriety* to form the basis of a finding of laches or lack of reasonable diligence—is sufficiently unsup-

portable, as explained by the trial judge (Pet. App. B 6-8, 11-15) and the dissenting opinion below (Pet. App. C, Dissent at 6-9 & n.14), to itself constitute a violation of due process. That is an additional reason why any lurking state law decision cannot bar review by this Court of the federal constitutional issue.

III. ALTERNATIVELY, THE COURT SHOULD GRANT THE PETITION, VACATE THE JUDGMENT BELOW, AND REMAND FOR FURTHER PROCEEDINGS.

If this Court determines that it does not wish to address the merits of petitioner's due process claim in the absence of an express discussion of that claim by the court below, it should grant the petition, vacate the judgment, and direct the Court of Criminal Appeals to address the federal claim explicitly on remand.

Although the lower court disposed of the federal issue, it did so without analysis. Requiring the Texas court to set forth its reasoning might aid this Court in resolving the question.

Given the extraordinary, undisputed evidence in support of petitioner's claim, allowing the Court of Criminal Appeals' decision to stand—and petitioner to be executed—without an assessment on the merits of his constitutional claim will significantly damage the judicial system. *Amici* understand that judicial review on habeas claims should only be conducted under the strictest of constitutional parameters. However, confidence in the justice system cannot be maintained if no court ever expressly assesses the merits of this extremely substantial constitutional claim.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the Court of Criminal Appeals reversed, and the case remanded for further proceedings.

Respectfully submitted.

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APPENDIX

AMICI CURIAE

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Alfred Wolin, Judge, United States District Court for the District of New Jersey, 1987-2004; Presiding Judge, Superior Court of New Jersey, Criminal Division, 1983-1987; Judge, Superior Court of New Jersey, Civil Division, 1982-1983; Judge, Superior Court of New Jersey, Juvenile and Domestic Relations Division, 1980-1982; Judge, Union County (New Jersey) District Court, 1980-1985.

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