IN THE 296TH JUDICIAL DISTRICT COURT
OF COLLIN COUNTY, TEXAS
AND
IN THE COURT OF CRIMINAL APPEALS OF TEXAS
IN AUSTIN, TEXAS

EX PARTE CHARLES DEAN HOOD,	)	**CAUSE NO. _____**
APPLICANT	)	

APPLICATION FOR WRIT OF HABEAS CORPUS

"The truth has a long fuse."

– unknown

The truth was deliberately concealed in this case for nearly twenty years. On September 8-9, 2008, the fortress of silence that had long protected the Honorable Verla Sue Holland and the former Collin County District Attorney Thomas S. O'Connell, Jr., collapsed. Despite the vehement opposition of the current Collin County District Attorney, a state court judge ordered Judge Holland and Mr. O'Connell to submit to depositions. They testified under oath that they had a clandestine, intimate sexual relationship in the years immediately leading up to Applicant Charles Dean Hood's capital murder trial. This revelation casts a deep shadow over justice in this case.

That a judge charged with avoiding the appearance of bias and a prosecutor tasked with doing justice would allow their desire for secrecy to trump their sworn constitutional duties is a stunning display of arrogance and the corrupting influence of power. That others in a position to correct this injustice condoned the principals' generation-long silence in a death penalty case is unconscionable. Mr. Hood survived five execution dates before the truth was disclosed. No one should escape blame for this reprehensible record that has eroded the public's faith in the integrity of the judiciary.

On June 17, 2008, Mr. Hood was minutes away from being executed. No individual or institution – not the Attorney General of Texas, not the current Collin County District Attorney, not the habeas court, not even this Court – gave any credence to Mr. Hood's evidence of an affair between Judge Holland and Mr. O'Connell. The previous day, this Court had dismissed Mr. Hood's subsequent habeas petition raising the judicial bias claim as abusive. The Court imposed on Mr. Hood a nearly impossible standard – demanding affidavits from witnesses with firsthand knowledge of an intimate sexual relationship the principals were determined to conceal – while simultaneously ignoring the clear implications of the evidence he did present, a sworn affidavit from a former prosecutor stating that the affair was "common knowledge."

The next day, when Judge Henderson unexpectedly withdrew the death warrant, the District Attorney sought a writ of mandamus to compel him to vacate his order. This Court denied the District Attorney leave to file the application. Instead of simply issuing a one-sentence order, as is done in the vast majority of cases, the Court addressed the merits – in *dicta* – and handed the District Attorney a procedural roadmap for vacating Judge Henderson's order. On his second attempt, the District Attorney succeeded in obtaining a writ of mandamus from this Court. But for a series of convoluted and serendipitous events later that night, Mr. Hood would have been executed. Time simply expired before the State of Texas could carry out Mr. Hood's execution. But for a judge willing to apply the plain language of Rule 202 of the Texas Rules of Civil Procedure, the truth would have been buried with Mr. Hood three months later, on September 10, 2008, when he faced his sixth execution date.

The more recent conduct of the current District Attorney and his minions has been no less troubling. Their actions have been marked by an overzealousness that calls into question their adherence to their duty "that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).[1] They repeatedly inserted

[1] The current Collin County District Attorney, the Honorable John R. Roach, served as the presiding judge of the 199th Judicial District Court of Collin County from 1981 until 1997, a period encompassing Judge Holland's 15 years on the bench of the 296th Judicial District Court

themselves into the Rule 202 civil proceedings – despite their lack of standing – and convinced Judge Dry to send all the pleadings to the convicting court. *See*, *e.g.*, State's Motion to Correct Misnomer of Pleadings and File as Subsequent Habeas Petition at 3 ("Petitioner elected to sit on a claim for years, gambling that its tabloid nature would excuse any procedural requirements imposed by the Legislature."); State's Motion to Forward All Pleadings to the Habeas Court at 3 ("Nothing justifies, only now, at this late date, initiating a search for the specter of an affair, which is an issue that could have been raised, investigated, and resolved years ago."). They later adamantly opposed Judge Brewer's efforts to consolidate the civil and criminal matters in his court. They opposed the Attorney General's decision to urge Judge Brewer to conduct a thorough review of Mr. Hood's allegations. They insisted in being permitted to have a representative of their office present during the depositions of Judge Holland and Mr. O'Connell. After the completion of the depositions, they rejected Mr. Hood's request that the District Attorney join him in seeking a 30-day reprieve from the Governor. In

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of Collin County. Judge Holland, joined by Judge Roach, crossed party lines in 1982 to urge voters to re-elect Collin County District Attorney Tom O'Connell, who ran as a Democrat. Judge Holland deposition [hereinafter "JH"] at 23-24 (Ex. 12). Judge Holland and Mr. O'Connell testified that they did not know whether Judge Roach knew about their romantic relationship. JH at 31; Tom O'Connell deposition [hereinafter "TOC"] at 36 (Ex. 13). Given Judge Roach's long acquaintanceship with Judge Holland and Mr. O'Connell, serious questions remain about whether Judge Roach knew about their romantic relationship.

retrospect, their vitriolic complaints about Mr. Hood's attempts to depose Judge Holland and Mr. O'Connell sound like "the fear of too much justice." *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

The Attorney General of Texas is not without fault in this debacle either. Although he eventually aligned himself with Mr. Hood by filing an amicus brief calling for a thorough review of the unique issues in this case, the Attorney General also emphasized that Mr. Hood's allegations were "unsubstantiated." Ex. 10,[2] and he refused to take a position on "whether this relationship existed." Ex. 11. The Attorney General then trotted out the tired mantra that Mr. Hood's lawyers had abused the judicial process through their dilatory tactics, "wait[ing] years before raising last minute claims," and criticized counsel for re-traumatizing "the victims' families, who desperately want, need, and deserve finality." Ex. 10. The Attorney General's cake-and-eat-it desires – to restore the public's faith in the judiciary while castigating Mr. Hood's attorneys for not coming forward earlier with credible, compelling evidence of this furtive relationship – raise serious questions about his commitment to justice in this case.

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[2] Exhibits 1-11 referred to in this application were appended to Mr. Hood's two previous applications raising the judicial bias claim. He incorporates them by reference here. Mr. Hood will provide the Court with additional copies of the exhibits from his previous applications, if the Court should need them.

It staggers the imagination to believe that the Attorney General would take the unprecedented action of filing an amicus brief on behalf of a death row inmate days away from execution based solely on "unsubstantiated" rumors. But, of course, the Attorney General knew when he wrote to the Collin County District Attorney that Mr. Hood's allegations were no longer unsubstantiated: By then, a lawyer in the Attorney General's Office had been representing Judge Holland for ten days in the Rule 202 proceedings.[3] Once the Attorney General confirmed the truth of the allegations, he withdrew from representing Judge Holland because of a conflict of interest. In short, the Attorney General had no choice but to join Mr. Hood.

With this Court's own motives called into question by its eleventh-hour interest in a jury instruction claim it had soundly rejected on three previous occasions,[4] it may be that only the Governor is in a position to deliver justice here. Nonetheless, this Court should find that Mr. Hood uncovered the new evidence only through the exercise of extraordinary diligence. The Court should, therefore, grant him a new trial. Remand to the convicting court is unnecessary. There is no

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[3] Judge Holland initially contacted the Attorney General's Office, because she "just was tired of laying over – getting licked without any input." JH at 19.

[4] *See Wait a Minute: A Stay of Execution for Convicted Murderer Charles Hood Raises Troubling Questions of Judicial Integrity*, Hous. Chron. (Sept. 15, 2008), *available at* http://www.chron.com/disp/story.mpl/editorial/5996805.html (last visited on Sept. 24, 2008).

dispute that Judge Holland and Mr. O'Connell were engaged in a long-term, intimate sexual relationship prior to Mr. Hood's trial and did not disclose that fact to Mr. Hood or his counsel. The damage to Mr. Hood's constitutional right to a fair and impartial tribunal is obvious and egregious.

THE SECTION 5 REQUIREMENTS

Mr. Hood exhibited extraordinary diligence in forcing Judge Holland and Mr. O'Connell to break their self-imposed silence after 18 years. Consequently, their deposition testimony constitutes a new factual basis for the judicial bias claim that "was not ascertainable through the exercise of ***reasonable*** diligence" at the time Mr. Hood filed his previous application. *See* Tex. Code. Crim. P. art 11.071, § 5(e) (emphasis added).

In June 2005, as Mr. Hood's fourth execution date was approaching, Mr. O'Connell affirmatively misled Mr. Hood's counsel by denying that he had been in a romantic relationship with Judge Holland. For her part, Judge Holland simply refused to cooperate with Mr. Hood's investigation at that time. Three years later, shortly before the June 17th execution date, Judge Holland did not return counsel's phone call, after he had left her a message beseeching her to discuss the allegations. *See* JH at 15-16. Judge Holland and Mr. O'Connell never spoke publicly about the allegations or denied them in any responsive pleading. Their

depositions reveal that they actively concealed their relationship. *See* Part I, *infra*.

On August 19, 2008, Mr. Hood filed a request, pursuant to Rule 202 of the Texas Rules of Civil Procedure, seeking pre-suit investigatory depositions of Judge Holland and O'Connell. Mr. Hood argued that the depositions could lead to evidence supporting a possible civil rights lawsuit, a bar complaint, or an application for clemency or request for reprieve. He emphasized that simply because the depositions might also yield evidence pertinent to a challenge to his conviction and sentence did not undermine their validity for purposes expressly contemplated by Rule 202.

Conceding that Rule 202 specifically authorized the request Mr. Hood made, the County Court at Law nonetheless characterized the petition as a writ for extraordinary relief in a felony case and held that Mr. Hood "impliedly" sought a stay of execution. The County Court concluded that it did not have jurisdiction to grant such relief and transferred the petition to the Collin County District Clerk's Office for assignment to a district court judge.

On August 20, 2008, the Honorable Robert T. Dry, Jr., of the 199th Judicial District Court of Collin County was assigned to the case. Two days later, the District Attorney convinced Judge Dry to "sever" the Rule 202 petition, and send the "criminal" portion to the judge assigned to preside over the habeas corpus

proceedings. Ex. 9. Judge Dry then scheduled a hearing on the civil portion of the case for two days ***after*** Mr. Hood's execution. Judge Dry also provided a copy of his order to the District Attorney and the Attorney General, finding that they "are persons with adverse interests because you may be exploring the thought processes of a judge and a Collin County District Attorney concerning a criminal trial." *Id.* Finally, in passing, Judge Dry noted that he knew Judge Holland and Mr. O'Connell and said that he would consider a motion to recuse.

In a motion to reconsider the decision setting the Rule 202 hearing after his execution, Mr. Hood argued that any proceeding designed to obtain executive clemency would not impermissibly invade the exclusive post-conviction jurisdiction of this Court in death penalty cases and would not improperly interfere with the order of the trial court setting the execution. Accordingly, he asked Judge Dry to set the hearing a week in advance of the execution. Having no additional information about the nature of Judge Dry's relationship with Judge Holland and Mr. O'Connell, Mr. Hood did not file a motion to recuse.

On September 3, 2008, Judge Dry suddenly recused himself because of his "previous business relationship with Earl Holland, ex-husband of Judge Sue Holland." *See* http://cijspub.co.collin.tx.us/CaseDetail. aspx?CaseID=463266

(last visited on Sept. 22, 2008).[5] The Honorable Greg Brewer of the 366th Judicial District Court of Collin County was assigned to the case. He promptly set a hearing for September 8, 2008, to consider Mr. Hood's request to take depositions. Before the hearing could take place that morning, Judge Holland and Mr. O'Connell removed the proceedings to federal court. By the early afternoon, Mr. Hood had succeeded in convincing the federal district court to send the matter back to state court. In the meantime, Mr. Hood had filed his previous habeas application. Judge Brewer did not grant Mr. Hood's request to take the depositions of Judge Holland and Mr. O'Connell until later that evening. Mr. Hood completed the deposition of Mr. O'Connell at 7:17 p.m. on September 8, 2008, TOC at 2, and completed the deposition of Judge Holland at 12:19 p.m. on

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[5] A search of Collin County civil cases reveals that Judge Dry was a co-defendant with Earl Holland in three separate lawsuits filed against them in November 1987. *See Robby M. Mitchell, Ind., and as Executrix, Glenn Mitch v. William H. Vitz, Robert T. Dry, Jr., and Earl S. Holland, Jr.*, Case No. 366-0160889 (filed Nov. 24, 1987) (docket sheet available at http://cijspub.co.collin. tx.us/CaseDetail.aspx?CaseID=309764 (last visited on Sept. 4, 2008)); *Richardson Credit Union v. Robert T. Dry, Jr., Earl S. Holland, Jr., and William H. Vitz*, Case No. 199-0198087 (filed Nov. 23, 1987) (docket sheet available at http://cijspub.co.collin.tx.us/CaseDetail.aspx?CaseID=382900 (last visited on Sept. 4, 2008)); *Texas American Bank/McKinney N.A. v. Earl Holland, William Vitz, and Robert T. Dry*, Case No. 219-0188287 (filed Nov. 3, 1987) (docket sheet available at http://cijspub.co.collin.tx.us/CaseDetail.aspx?CaseID=423799 (last visited on Sept. 4, 2008)). In *Mitchell* and *Richardson*, Judge Dry also served as Earl Holland's attorney of record. It is not without significance that Earl Holland and Judge Holland's divorce became final in October 1987, and that Judge Dry appeared as a judicial officer in those proceedings. *See In the Matter of the Marriage of Verla Sue Holland and Earl S. Holland, Jr.*, Case No. 199-000987 (filed May 6, 1987) (available at http://cijspub.co.collin.tx.us/CaseDetail.aspx?CaseID=390470 (last visited on Sept. 4, 2008)).

September 9, 2008. JH at 2.

Counsel for Mr. Hood cannot be faulted for failing to develop earlier the Holland and O'Connell evidence in support of the judicial bias claim. First, Judge Holland and Mr. O'Connell maintained their silence until a court ordered them to speak. Second, the Rule 202 strategy demanded painstaking research, as well as substantial time and money to conduct the intensive litigation – including responding to the notice of removal. Because counsel was unaware of anyone previously attempting such a strategy, the chance of success was remote. An attorney exercising ordinary care and reasonable diligence would not have felt compelled to expend limited resources on such a speculative undertaking. Instead, counsel exercised extraordinary diligence, prudence, and care in protecting Mr. Hood's constitutional rights. The Court should find that the current application meets the requirements of Section 5 of Article 11.071.

CLAIM FOR RELIEF

JUDGE HOLLAND'S INTIMATE SEXUAL RELATIONSHIP WITH THE DISTRICT ATTORNEY CONSTITUTIONALLY DISQUALIFIED HER FROM PRESIDING OVER MR. HOOD'S TRIAL AND DEPRIVED MR. HOOD OF HIS RIGHT TO A FAIR AND IMPARTIAL TRIBUNAL.

I. THE FACTUAL ALLEGATIONS

In 1990, Mr. Hood was convicted of capital murder and sentenced to death for killing Ronald Williamson and Tracie Lynn Wallace in the same criminal transaction. His trial took place before the Honorable Verla Sue Holland of the 296th Judicial District Court of Collin County, Texas. Thomas S. O'Connell, Jr., the elected District Attorney of Collin County, actively participated in the prosecution of Mr. Hood. Paired with assistant district attorney John Schomburger, Mr. O'Connell addressed panels of venirepersons in general voir dire and individually questioned numerous potential jurors, including every venireperson who eventually served on Mr. Hood's jury.[6] He conducted the cross-examination of the defense witnesses at both the guilt-innocence and punishment

[6] *See* 16 RR 182 (voir dire of Juror Huff); 17 RR 388 (voir dire of Juror Ensminger); 18 RR 447 (voir dire of Juror Thompson); 18 RR 520 (voir dire of Juror Van Duren); 20 RR 806 (voir dire of Juror Kerin); 20 RR 833 (voir dire of Juror Baker); 24 RR 1273 (voir dire of Juror Mathews); 24 RR 1317 (voir dire of Juror Epstein); 26 RR 1559 (voir dire of Juror K. Smith); 26 RR 1599 (voir dire of Juror Balthis); 28 RR 1854 (voir dire of Juror L. Smith); 34 RR 2535 (voir dire of Juror St. John). Citations to the reporter's record of the capital murder trial are noted as "__ RR __." Citations to the clerk's record of the trial are designated as "__ CR __."

stages of the trial. *See* 45 RR 910 (cross-examination of Kelly King); 54 RR 1483 (cross-examination of Deborah Lacroix); 54 RR 1497 (cross-examination of Michael Todd); 54 RR 1567 (cross-examination of Sandra Hood). He delivered the rebuttal argument to the jury at the guilt-innocence closing. 46 RR 969-85. At the sentencing charge conference, he urged Judge Holland to overrule Mr. Hood's *Penry I* objections to the former special issues and, instead, provide the jurors with a nullification instruction. 54 RR 1594-96. His arguments were successful. 55 RR 1616.[7] During punishment phase closing arguments, Mr. O'Connell spoke last to the jury, urging them to sentence Mr. Hood to death. 55 RR 1657-71. After the jury convicted Mr. Hood of capital murder and answered the former special issues affirmatively, Judge Holland sentenced him to death the next day. 2 CR 381-84 (Ex. 1); 56 RR 1676-77.

Neither Judge Holland nor Mr. O'Connell disclosed to Mr. Hood that they had been involved in a long-term, intimate sexual relationship prior to the capital murder trial. JH at 36; TOC at 37.[8]

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[7] It is the former special issues scheme and Judge Holland's attempt to minimize its unconstitutional impact with the nullification instruction on which this Court *sua sponte* ordered reconsideration and granted a stay of execution. *See Ex parte Hood*, AP-75,370 (Tex. Crim. App. Sept. 9, 2008) (unpublished).

[8] Judge Holland and Mr. O'Connell have not yet reviewed and signed their depositions. When they do, Mr. Hood will provide the Court with copies of the certified depositions.

Judge Holland and Mr. O'Connell first met in 1974 when Mr. O'Connell hired her as the juvenile prosecutor for the Collin County District Attorney's Office. JH at 19-20; *see* TOC at 11-13. She worked for Mr. O'Connell for nearly five years, until 1979, JH at 20, when she was appointed to the County Court at Law bench. TOC at 13. In 1981, she became the presiding judge of the 296th Judicial District Court of Collin County.[9]

In 1982, Judge Holland, a Republican, crossed party lines (along with Judge Roach) to urge voters to re-elect Mr. O'Connell as the District Attorney. JH at 23-24. Mr. O'Connell lost his bid for re-election. Shortly after the campaign ended, according to Judge Holland, she and Mr. O'Connell began their affair. JH at 27. Mr. O'Connell testified that the romantic relationship began later, around 1984 or 1985. TOC at 15.[10] He testified that he was "in love" with Judge Holland, TOC at 16-17, and that she had talked about the possibility of their getting married. TOC at 22-23. Judge Holland confirmed that they professed their love for each other, JH at 51-52, although she denied that they had ever spoken about getting married. JH at 52. It is undisputed that their relationship included sexual intimacy. JH at

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[9] *See* http://www.texasjudge.com/courts/history.html (last visited on Sept. 1, 2008).

[10] Both witnesses recall being married at the time their affair began. JH at 30; TOC at 15. Mr. O'Connell filed for divorce in 1985. His divorce from Patricia O'Connell was finalized in 1986. TOC at 19. Judge Holland and Earl Holland divorced in 1987. JH at 30.

30; TOC at 21, 56.

Judge Holland and Mr. O'Connell were determined to keep the relationship secret. There were no public displays of affection. JH at 52; TOC at 43. Their sexual encounters took place at each other's homes when their spouses were away. TOC at 16-17; JH at 52. Mr. O'Connell could not recall telling anyone, except possibly his sisters, about his romantic relationship with Judge Holland. TOC at 18. Judge Holland told no one. JH at 31, 33.

Judge Holland said that the romantic encounters ended in 1987. JH at 29. Mr. O'Connell testified that the romantic encounters continued until the middle of 1989, TOC at 24, and may even have continued beyond that time. TOC at 26. In any case, he continued to have feelings for Judge Holland, asserting that she was a "wonderful person" whom he "enjoyed being with." TOC at 26. Even after the nature of their relationship changed around 1991, according to Mr. O'Connell, they remained "good friends." TOC at 30. Judge Holland agreed that they remained "good friends," even after 1987, the time she asserted their romance ended. JH at 38. For example, Mr. O'Connell and Judge Holland went on a trip to Santa Fe, New Mexico, in 1991, TOC at 30, 34; *see* JH at 40, and he attended her family reunion in Branson, Missouri, the same year. TOC at 34; *see* JH at 39. He testified that they did not stop seeing each other until 1991 or 1992. TOC at 33.

Judge Holland never disclosed her romantic relationship with Mr. O'Connell to a single litigant or lawyer who appeared before her, and she never recused herself from a single case because of the affair. TOC at 40. Remarkably, even after the allegations of the romantic relationship came to their attention in the recent litigation, neither Judge Holland nor Mr. O'Connell felt any obligation to come forward and substantiate them. JH at 15-16; TOC at 45-46. To this day, Judge Holland believes that it was "absolutely not" improper for her to preside over Mr. Hood's capital murder trial. JH at 38.

II. THE CONSTITUTIONAL VIOLATIONS

A. The Texas Constitution

The Texas Constitution sets out the grounds for judicial disqualification:

> No judge shall sit in any case wherein the judge may be interested, or where either of the parties may be connected with the judge, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when the judge shall have been counsel in the case.

Tex. Const. Art. V, § 11. If a judge is constitutionally disqualified, he or she lacks jurisdiction to hear the case and, therefore, any judgment rendered is void and a nullity. *Davis v. State*, 956 S.W.2d 555, 558 (Tex. Crim. App. 1997); *Buckholts Indep. Sch. Dist. v. Glaser*, 632 S.W.2d 146, 148 (Tex. 1982); *Fry*, 202 S.W.2d at 220; *In re Orsagh*, 151 S.W.3d 263, 265-66 (Tex. App. 2004).

1. Judge Holland had a personal and direct interest in the outcome of Mr. Hood's case.

To be disqualifying under the Texas Constitution, a judge's "interest" in the result of the litigation "must necessarily affect him to his personal or pecuniary loss or gain." *Ex parte Kelly*, 10 S.W.2d 728, 729 (Tex. Crim. App. 1928); *see Cameron v. Greenhill*, 582 S.W.2d 775, 776 (Tex. 1979) ("It is a settled principle of law that the interest which disqualifies a judge is that interest, however small, which rests upon a direct pecuniary or personal interest in the result of the case presented to the judge or court."). The interest must be "direct, real, and certain, not merely incidental, remote, contingent, or possible." *Kelly*, 10 S.W.2d at 729. If any doubt exists about a judge's interest, a court should resolve that doubt in favor of disqualification. *Gulf Maritime Warehouse Co. v. Towers*, 858 S.W.2d 556, 559 (Tex. App. 1993). The constitutional disqualification provision rests upon the notion that "[a]n independent, unbiased, disinterested, fearless judiciary is one of the bulwarks of American liberty, and nothing should be suffered to exist that would cast a doubt or shadow of suspicion upon its fairness and integrity." *Cotulla State Bank v. Herron*, 202 S.W. 797, 798 (Tex. App. 1918). Finally, the Texas Constitution's use of the term "may be interested" suggests that disqualification is called for even if the judge's interest cannot be precisely or

definitively determined. *Gulf Maritime*, 858 S.W.2d at 559.

Judge Holland's interest in the result of Mr. Hood's capital murder trial was neither too remote nor too speculative to support constitutional disqualification. Judge Holland's intimate sexual relationship and subsequent close friendship with Mr. O'Connell created a situation where she naturally would be inclined to adopt his interests as her own or be solicitous and supportive of his interests.

Mr. O'Connell wanted, of course, to secure a capital murder conviction and death sentence against Mr. Hood. To this end, he did not simply hand over the case to an underling while he remained seated behind a desk in his office. Instead, he actively participated in the prosecution – questioning potential jurors, cross-examining witnesses, and arguing before the jury. He put his professional reputation, and the prestige of his office, at stake in a special way when he decided to try the case himself. Participating as a front-line prosecutor, he indicated the importance of the case and of a conviction and death sentence, along with his belief in the strength of the State's case. The nature of the charges and sentence sought made it more likely that Mr. O'Connell's constituents were aware of the case and his involvement in it. It would have been a damaging blow for him personally to try an important case like Mr. Hood's and lose. On the other hand, obtaining a death verdict would enhance his credentials and those of his office.

His tenure in office – his professional livelihood – depended on successful outcomes, especially in death penalty cases.

Judge Holland would have been concerned about handing Mr. O'Connell a galling defeat in such a highly visible case. Her long-term, intimate sexual relationship and later close friendship with him attuned her to his professional and personal interests and made those interests her own. Under these circumstances, it is inconceivable to assert that Judge Holland did not have a direct and real interest in the outcome of Mr. Hood's trial.

2. Public confidence in the integrity of the judiciary is severely eroded by an extended intimate sexual relationship between a judge and an elected district attorney trying a case in her courtroom.

This Court has recognized that bias unrelated to a judge's "interest" in the outcome of the litigation can constitute a ground for disqualification. The Court has held that for judicial bias to be disqualifying it must be of "such a nature and to such an extent as to deny a defendant due process of law." *McClenan v. State*, 661 S.W.2d 108, 109 (Tex. Crim. App. 1983), *overruled on other grounds*, *DeLeon v. Aguilar*, 127 S.W.3d 1 (Tex. Crim. App. 2004). The standard for assessing judicial bias in this context is whether the allegation of lack of impartiality is grounded on facts that would create doubts concerning the judge's

impartiality – ***not*** in the mind of the judge herself, or even, necessarily, in the mind of the party filing the motion, but rather in the mind of a reasonable person with knowledge of all the circumstances involved. *Kemp v. State*, 846 S.W.2d 289, 305 (Tex. Crim. App. 1992) (citing *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1165 (5th Cir. 1982)); *see McClenan*, 661 S.W.2d at 109 (same).

Requiring courts to evaluate judicial bias under an objective standard signifies that this ground for constitutional disqualification is less concerned with the reality of bias than with its appearance. Irresponsible or improper conduct by judges diminishes public confidence in the integrity of the judiciary. Although the Texas Constitution's disqualification provision seeks to ensure fairness to individual litigants, it also fosters a broader concern:

> Public policy demands that the judge who sits in a case act with absolute impartiality. Beyond the demand that a judge ***be*** impartial, however, is the requirement that a judge ***appear to be*** impartial so that no doubts or suspicions exist as to the fairness or integrity of the court. The judiciary must strive not only to give all parties a fair trial but also to maintain a high level of public trust and confidence. The legitimacy of the judicial process is based on the public's respect and on its confidence that the system settles controversies impartially and fairly. Judicial decisions rendered under circumstances that suggest bias, prejudice, or favoritism undermine the integrity of the courts, breed skepticism and mistrust, and thwart the very principles on which the judicial system is based. The judiciary must be extremely diligent in avoiding any appearance of impropriety and must hold

> itself to exacting standards lest it lose its legitimacy and suffer a loss of public confidence.

Sun Exploration & Production Co. v. Jackson, 783 S.W.2d 202, 206 (Tex. 1989) (Spears, J., concurring) (emphases in original, citations omitted).

In light of this rationale for disqualification, the test is not whether Judge Holland believed herself capable of disregarding her romantic relationship with Mr. O'Connell, but whether a reasonable person would believe that she could. *See In re K.E.M.*, 89 S.W.3d 814, 829 (Tex. App. 2002). The answer, of course, is a resounding "no." When a judge has been involved in a long-term intimate sexual relationship with an attorney who is appearing before her, the judge's impartiality is certainly suspect, even without evidence of actual impropriety.

An intimate sexual relationship and later close friendship, like that shared between Judge Holland and Mr. O'Connell, not only implies a special willingness of the judge to accept the prosecutor's representations and arguments, but also suggests extensive personal contacts beyond the confines of the courtroom. The reasonable onlooker would have grave concerns about the frequency and nature of these contacts, the duration of the relationship, the numerous opportunities for *ex parte* communications during these contacts, Judge Holland's sense of personal obligation to Mr. O'Connell, and her desire to support and advance his

professional interests. Moreover, Judge Holland's failure to disclose the relationship – in fact, her calculated efforts to conceal it – strongly indicates to the objective observer that the relationship did, indeed, affect her impartiality. *See In re Gerard*, 631 N.W.2d 271, 280 (Iowa 2001). It certainly demonstrates that ***she*** believed reasonable persons would find the existence of the relationship troubling. The totality of Judge Holland's relationship with Mr. O'Connell gives rise to a reasonable question about her impartiality. This is not a case of an acquaintanceship or a strictly professional friendship between a judge and an attorney who practices in her courtroom.

It is fair to conclude that the average person on the street, when confronted with these circumstances, would reasonably conclude that Judge Holland's participation in the case seriously undermined the public's confidence in the integrity of the courts. Identifying instances of actual prejudice is irrelevant when the public perceives Mr. Hood may not have received a fair trial because of the judge's intimate sexual relationship with the prosecuting attorney. A reviewing court might believe a judge in this situation and be satisfied that no impropriety occurred – but a court lacks the power to impose that conclusion on members of the public by judicial fiat. The relationship creates an indelible appearance of partiality. *See*, *e.g.*, *In re Chrzanowski*, 636 N.W.2d 758, 764 (Mich. 2001)

(finding that, although no evidence existed that judge's disproportionate number of indigent defense appointments to attorney with whom she was having an intimate relationship resulted in any actual prejudice, "such conduct did have a negative effect on the appearance of propriety in judicial decision making and the integrity of the judicial office in general"); *Gerard*, 631 N.W.2d at 278 (holding that it was "immaterial" that judge's intimate relationship with county attorney may not have had a detrimental impact on defendants, because "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"); *United States v. Berman*, 28 M.J. 615, 618 (U.S.A.F. 1989) (disqualifying from six cases judge who had intimate sexual relationship with prosecuting attorney, because the relationship created appearance of partiality). In short, an objective onlooker would be extremely troubled by what happened in this case.

B. The Federal Constitution

In addition to violating the Texas Constitution, Judge Holland's participation in Mr. Hood's case violated his Eighth and Fourteenth Amendment rights under the United States Constitution. A defendant's right to be tried by an impartial tribunal is sacrosanct, regardless of the evidence against him. *Tumey v. Ohio*, 273 U.S. 510, 535 (1927). In *Tumey*, the Supreme Court held that "[e]very

procedure which 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." 273 U.S. at 532. In *In re Murchison*, the Supreme Court recognized that *Tumey*'s "stringent rule" may sometimes result in the disqualification of judges who have no actual bias, because due process demands avoidance of "even the probability of unfairness." 349 U.S. 133, 136 (1955). To satisfy this requirement, the Court explained that:

> [N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered.

Id. *Murchison* concluded that "to perform its high function in the best way, justice must satisfy the appearance of justice." *Id.* (internal quotation marks omitted). Elaborating on *Murchison*, the Supreme Court later found that a judge "not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150 (1968). Due process requires disqualification when the circumstances "***might*** create an impression of ***possible*** bias." *Id.* at 149 (emphases added). In short, due process does not require a showing that a judge is biased in fact. Rather, due process is concerned with the "average" judge's ability to be – and appear to be –

impartial. Finally, because the entire conduct of the trial from beginning to end is affected by the presence of a biased judge, a violation of this due process right constitutes a structural defect in the trial mechanism and reversal is required without consideration of the harmless error doctrine. *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991).

Judge Holland's participation in Mr. Hood's case violated the Federal Constitution for the same reasons that it violated the Texas Constitution: First, her intimate sexual relationship and subsequent close friendship with Mr. O'Connell indicates bias in fact, because she had a direct and personal interest in the outcome of the case. Second, an "average" judge would be unable to resist the temptation, caused by the relationship, "not to hold the balance nice, clear, and true between the state and the accused." *Tumey*, 273 U.S. at 532. By presiding over Mr. Hood's trial and failing to recuse herself, Judge Holland created an appearance of impropriety and an impression of possible bias. This structural defect in the trial mechanism requires automatic reversal of Mr. Hood's conviction and sentence.

PRAYER FOR RELIEF

The wall of silence that has long surrounded Judge Holland and Mr. O'Connell has finally come crashing down. Mr. Hood has now presented to this Court firsthand evidence that indisputably proves his allegations. A fair and impartial tribunal is a bedrock requirement of due process. Judge Holland's intimate sexual relationship with the elected district attorney Tom O'Connell deprived Mr. Hood of this right under the Texas Constitution and the United States Constitution. Accordingly, Mr. Hood asks this Court to:

1. Grant him a new trial; or, in the alternative,

2. Remand the case to the convicting court for further proceedings; and

3. Grant any other relief that law and justice require.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

On this 25th day of September 2008, I hereby certify that a true and correct copy of this pleading was sent to the following persons by e-mail (if listed) and by placing it with Federal Express for priority overnight delivery:

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EXHIBIT 12

EXHIBIT 13