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 AND MOTION FOR STAY OF EXECUTION

THIS IS A DEATH PENALTY CASE.

MR. HOOD IS SCHEDULED TO BE EXECUTED ON SEPTEMBER 10, 2008.

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Applicant Charles Dean Hood has alleged that, during his capital murder trial, the Hon. Verla Sue Holland, the presiding judge, was involved in a secret long-term intimate relationship with Thomas S. O'Connell, Jr., the elected District Attorney of Collin County, who took an active role in the courtroom prosecuting the case. These concrete allegations of fact, if proven true, would indisputably entitle Mr. Hood to a new trial. However, he is trapped in a bizarre process evocative of Kafka and Heller. Mr. Hood has attempted to obtain evidence from witnesses with personal knowledge of the affair so that this Court may conclude that he has presented sufficient specific facts requiring a stay of execution and a

remand to the trial court for further evidentiary proceedings. As one would expect, the principals' efforts to keep the relationship secret has made this task daunting.

Of course, Mr. Hood knows the names of two witnesses who would have first-hand information about the existence of the relationship. Judge Holland and Mr. O'Connell have yet to break their silence and dismiss the allegations as baseless and frivolous. The District Attorney's Office has not responded to Mr. Hood's Notice of Discovery. The convicting court has refused to entertain any motions pertaining to this case, including a motion for disclosure of *Brady* evidence regarding the relationship (as well as a routine motion to examine the trial exhibits). Although a civil court ordered a hearing on whether Mr. Hood should be permitted to depose Judge Holland and O'Connell under Texas Rule of Civil Procedure 202, that court capriciously set the hearing two days ***after*** his scheduled execution, reasoning that Mr. Hood should not benefit from any collateral challenges to the criminal judgment that such depositions could produce. After presiding over the case for 15 days and making several substantive rulings, the judge recused himself one week before the scheduled execution, citing his previous business relationship with Earl Holland, Judge Holland's ex-husband.

No court has yet been willing to provide the process that all agree would

resolve the issue: ordering Judge Holland and O'Connell to answer questions under oath about the affair. Without requiring them to answer detailed questions about the relationship, Mr. Hood will be unable to obtain the kind of first-hand knowledge that will convince this Court to order them to answer detailed questions about the relationship. In short, Mr. Hood is ensnared in a lethal Catch-22.

In a final effort to avoid the same fate as Josef K., Mr. Hood undertook a monumental task. He attempted to examine every decision this Court issued in Collin County cases during Judge Holland's tenure. The results are astounding. Judge Holland recused herself from nearly 80% of the cases coming from Collin County while she served on this Court from 1997 to 2001. In contrast, Judges Price and Keasler, who – like Judge Holland – served on the district court bench for years before they were elected to this Court, recused themselves during the same length of time from well less than one percent of the cases coming from Dallas County, where they previously sat. Judge Holland's recusing herself at a rate nearly ***160 times*** more than her fellow jurists cries out for an explanation, especially in light of the evidence Mr. Hood has previously presented in support of his judicial bias claim. The simplest explanation is the most plausible one: Judge Holland recused herself at such an off-the-charts rate, because she had previously

been romantically involved with the then-current District Attorney of Collin County when cases from his office reached this Court.

The Court should find that the current statistical evidence could not have been previously ascertained through the exercise of reasonable diligence, stay Mr. Hood's execution scheduled for September 10, 2008, and order the trial court to compel Judge Holland and O'Connell to answer questions under oath about the nature of their relationship. At the very least, the Court should file and set the case for full briefing and oral argument.

CLAIMS FOR RELIEF

I.

JUDGE HOLLAND'S INTIMATE 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.

A. 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 Hon. 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, 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.[1] He conducted the cross-examination of the defense witnesses at both the guilt-innocence and punishment 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 persuaded the court to overrule Mr. Hood's *Penry I* objection to the former special issues. 54 RR 1594-96. During punishment phase closing arguments, 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

[1] *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 __."

next day. 2 CR 381-84 (Ex. 1);[2] 56 RR 1676-77.

While Judge Holland was presiding over Mr. Hood's trial, she was involved in a long-term intimate relationship with O'Connell. A former assistant district attorney who worked in the office at that time stated that, in 1987, "[i]t was common knowledge in the District Attorney's Office, and the Collin County Bar, in general, that the District Attorney, Mr. Tom O'Connell, and the Presiding Judge of the 296th District Court, Judge Verla Sue Holland, had a romantic relationship." Ex. 3 (Affidavit of Matthew Goeller). The former assistant district attorney said that the relationship continued through Mr. Hood's 1990 capital murder trial and that it ended around 1993. *Id.* Mr. Goeller's affidavit marked the first time that a former employee of the District Attorney's Office was willing to speak on the record and under oath about the relationship. His affidavit contains several indicia of reliability. First, Mr. Hood's trial took place while Mr. Goeller was employed at the District Attorney's Office. Second, Mr. Goeller worked with O'Connell for a lengthy period of time, from 1987 until 1996. Third, Mr. Goeller was not associated with Mr. Hood's defense. Fourth, Mr. Goeller knew that the

[2] Exhibits 1-5 referred to in this application were appended to Mr. Hood's previous application. He incorporates them by reference here. To avoid confusion, the new exhibits appended to the current application are numbered sequentially starting from the last exhibit attached to the previous application. Mr. Hood will provide the Court with additional copies of the exhibits from his previous application, if the Court should need them.

relationship was in existence when he arrived at the District Attorney's Office in 1987, continued during Mr. Hood's trial in 1990, and ended around 1993 – statements all indicating that Mr. Goeller relied on something more than rumor or speculation as the source for these specific details. Finally, Mr. Goeller was unafraid to voice his belief that Judge Holland may have violated various canons of the Code of Judicial Conduct.

Several other persons associated with the legal profession in Collin County also stated that they had heard about the relationship. *See* Ex. 4 at 1 (Declaration of David Haynes) ("At the time of the trial, I was aware of rumors concerning a romantic relationship between the trial judge, Verla Sue Holland, and the Collin County District Attorney, Tom O'Connell."); Ex. 5 at 1-3 (Affidavit of Tena S. Francis) (recounting conversations with Judge Holland's ex-husband and defense paralegal Janet Heitmiller about rumors of the relationship).

By the time of Mr. Hood's trial, both Judge Holland and O'Connell were divorced from their spouses.[3] However, neither Judge Holland nor O'Connell chose to make the relationship public. Instead, they made a calculated decision to

[3] O'Connell filed for divorce in 1985. His divorce from Patricia O'Connell was finalized in 1986. Judge Holland and Earl Holland divorced in 1987. Earl Holland told friends that Judge Holland's affair with O'Connell "was the precipitating factor in his decision to file for divorce." Alan Berlow, *Ardor in the Court*, Salon.com News, June 24, 2005, located at http://dir.salon.com/story/news/feature/2005/06/24/ texas_court_affair/index.html (last viewed on Sept. 3, 2008).

keep it secret, engaging in various subterfuges to dispel any suspicion. *See*, *e.g.*, *id.* at 3 (recounting conversation with local attorney who said Judge Holland and O'Connell would often take her bailiff to lunch with them so that "the lunch would not appear to be romantic in nature"); *id.* (stating that O'Connell's son would drop him off at Judge Holland's house so that he would not have to leave his car in her driveway).

Several examples of Judge Holland's behavior indicate favoritism toward O'Connell. Judge Holland appointed O'Connell to an inordinate number of high-fee *guardian ad litem* cases. *Id.* at 3-4. Judge Holland also appointed O'Connell to a number of civil cases from 1983-86, a period when O'Connell had lost his bid for re-election as district attorney. *Id.* at 4. Finally, Judge Holland served as an informal advisor on O'Connell's campaign steering committee and urged him to switch his party affiliation from Democrat to Republican to increase his chances of returning to office. *Id.*

B. THE NEW EVIDENCE

Mr. Hood examined all the Hand Down Lists this Court issued during Judge Holland's tenure, from January 1, 1997, until September 2, 2001. For comparison purposes, he also examined all the Hand Down Lists issued during the first five years of Judge Price's tenure and Judge Keasler's tenure. The recusal rates for

Judge Price and Judge Keasler are important, because they, like Judge Holland, had served as district court judges immediately before winning their seats on this Court.[4]

The evidence shows that Judge Holland recused herself from Collin County cases at a conspicuously high rate that dwarfed the recusal rates of Judge Price and Judge Keasler in Dallas County cases:

JUDGE	TOTAL CASES	RECUSALS	RATE
Price, J.	**6,641**	**28**	**0.42%**
Keasler, J.	**7,396**	**37**	**0.50%**
Holland, J.	**485**	**381**	**78.6%**

See Ex. 6 (Judge Holland recusal data); Ex. 7 (Judge Price recusal data); Ex. 8 (Judge Keasler recusal data).

Mr. Hood's review of a significant number of the Collin County cases during Judge Holland's tenure slams the door shut on two rationales judges typically use in deciding to recuse themselves from large numbers of cases:

[4] Judge Holland served as the presiding judge of the 296th Judicial District Court of Collin County for fifteen years, from September 1, 1981, until December 31, 1996. *See* http://www.texasjudge.com/courts/history.html (last visited on Sept. 1, 2008). Judge Price served as the presiding judge of the 282nd Judicial District Court of Dallas County from 1986 through 1996. Judge Keasler served as the presiding judge of the 292nd Judicial District Court of Dallas County for over seventeen years. *See* http://www.cca.courts.state.tx.us/court/justices.asp (last visited on Sept. 1, 2008).

- **Judge Holland recused herself from the vast majority of Collin County cases, because she previously worked in the District Attorney's Office there.**

FALSE. Although Mr. Hood has not been able to verify the precise years Judge Holland worked in the Collin County District Attorney's Office, his research suggests that, before she became a district court judge in 1981, Holland worked for O'Connell in the late 1970's. *See Norman v. State*, 588 S.W.2d 340, 342 (Tex. Crim. App. 1979) (listing Holland and O'Connell as counsel of record for the State); *Jewell v. State*, 583 S.W.2d 314, 314 (Tex. Crim. App. 1978) (same); *Smith v. State*, 571 S.W.2d 917, 917 (Tex. Crim. App. 1978) (same); *Howell v. State*, 563 S.W.2d 933, 934 (Tex. Crim. App. 1978) (same). Any cases reaching this Court from the years when Judge Holland served as a prosecuting attorney would have been nearly twenty years old. Moreover, if Judge Holland had ethical qualms about reviewing any Collin County cases because she long-ago worked in the District Attorney's Office and knew people there, then certainly she would have recused herself from such cases when they came before her as a district court judge from 1981 to 1996. She did no such thing – even though much less time had elapsed since she left the District Attorney's Office.

- **Judge Holland recused herself from the vast majority of Collin County cases, because she previously presided over them as district court judge.**

FALSE. At the time Judge Holland rose to this Court, Collin County had five judicial district courts (the 199th, the 219th, the 296th, the 366th, and the 380th), and added a sixth judicial district court in 2000 (the 401st), while Judge Holland still served on this Court. *See* http://www.texasjudge.com, *supra*, n.4. A small sample of Mr. Hood's research reveals that Judge Holland recused herself from a number of cases coming from district courts in Collin County other than the 296th, her former court. *See*, *e.g.*, *Blanco v. State*, 18 S.W.3d 218 (Tex. Crim. App. 2000) (tried in 380th District Court); *State v. Lee*, 15 S.W.3d 921 (Tex. Crim. App. 2000) (tried in 199th District Court); *Saldano v. State*, No. 72,556 (Tex. Crim. App. Sept. 15, 1999) (unpublished) (tried in 199th District Court); *Ex parte Moody*, 991 S.W.2d 856 (Tex. Crim. App. 1999) (tried in 219th District Court); *Bingham v. State*, 987 S.W.2d 54 (Tex. Crim. App. 1999) (tried in 219th District Court); *State v. Condran*, 977 S.W.2d 144 (Tex. Crim. App. 1998) (tried in 366th District Court); *Twine v. State*, 970 S.W.2d 18 (Tex. Crim. App. 1998) (tried in Collin County Court at Law); *Feagin v. State*, 967 S.W.2d 417 (Tex. Crim. App. 1998) (tried in 219th District Court).

C. ADDITIONAL SOURCES OF EVIDENCE

Mr. Hood is involved in ongoing efforts to obtain further evidence about the relationship between Judge Holland and O'Connell. The Court should take this into account when considering whether to stay the execution so Mr. Hood may have an opportunity to supplement this petition if he uncovers additional facts.

1. The Rule 202 Proceedings

On August 19, 2008, Mr. Hood filed a petition, pursuant to Texas Rule of Civil Procedure 202, 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 from the Governor. Mr. Hood made it clear in his petition that simply because the depositions might also yield evidence pertinent to a potential habeas corpus 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 Hon. Robert T. Dry, Jr., of the 199th Judicial District Court of Collin County was assigned to the case. On August 22, 2008, the Collin County District Attorney's Office inserted itself into these civil proceedings and filed a Motion to Correct Misnomer of Pleadings and File as Subsequent Habeas Petition. The very same day, Judge Dry deferred to the District Attorney's arguments, "severed" the Rule 202 petition, and sent the "criminal" portion of it to Judge John Nelms, the judge assigned to preside over the habeas corpus proceedings in the 296th Judicial District Court. Ex. 9 (Letter-Order of Judge Dry). Judge Dry then set the hearing for the civil portion of the petition to take place on September 12, 2008, two days ***after*** Mr. Hood's scheduled execution. Judge Dry also provided a copy of his letter-order to the District Attorney and the Texas 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.* A lawyer from the Attorney General's Office entered a Notice of Appearance on behalf of Judge Holland in the Rule 202 proceedings. Finally, Judge Dry mentioned that he knew Judge Holland and O'Connell and said that he would consider a motion to recuse from Mr. Hood.

In a motion to reconsider Judge Dry's decision setting the Rule 202 hearing after the scheduled execution, Mr. Hood argued that any proceeding designed to obtain the "historic 'fail-safe' remedy" of executive clemency, *Herrera v. Collins*, 506 U.S. 390, 415 (1993), would not impermissibly invade the exclusive post-conviction jurisdiction of this Court in death penalty cases under Article 11.071, and would not improperly interfere with the order of the trial court setting the execution. Accordingly, he asked Judge Dry to set the hearing for September 3, 2008, exactly 15 days after Judge Holland and O'Connell received notice of the request to take depositions. Having no additional information about the nature of Judge Dry's relationship with Judge Holland and O'Connell, Mr. Hood did not file a motion to recuse. However, Mr. Hood wrote that he assumed that the Court, based on its review of the quality of its acquaintanceship with the witnesses sought to be deposed and the nature of the allegations Mr. Hood wished to investigate, would adequately consider whether to recuse itself.

On September 3, 2008, Judge Dry 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. 4, 2008). 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)).

Clearly, Judge Dry should have recused himself the moment the Rule 202 Petition landed on his desk. It is unconscionable for a judge to make substantive

rulings in a case when that judge knows that he must recuse himself based on previous dealings and current relationships with material witnesses to the conduct being investigated. Mr. Hood filed his Rule 202 petition well in advance of his scheduled execution. Judge Dry's inexcusable delay in recusing himself deprived Mr. Hood of adequate time to meaningfully litigate his petition.

Judge Brewer of the 366th Judicial District Court was assigned to the case and promptly set a hearing for Monday, September 8, 2008, to consider Mr. Hood's request to take depositions. On Thursday, September 4, 2008, the Attorney General of Texas informed the Collin County District Attorney that he would be filing an amicus brief the next day with Judge Brewer, writing that "the unique issues in this case, which involve the impartiality and fairness of the trial, warrant thorough review before his sentence is carried out." Ex. 10 (Letter of Attorney General Greg Abbott). The Attorney General stated in his amicus brief that:

> In light of the unique and extraordinary circumstances concerning the trial of this case, a closer review by this Court is warranted. The Court could consider an inquiry into the defendant's allegations and the legal precedents that apply. The Court could also evaluate whether the appropriate inquiry and legal analysis can be completed within the current timetable for the scheduled execution.
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> * * * *
>
> The unique allegations presented here may warrant unique disposition by this Court.

Ex. 11 at 2 (Brief of the Attorney General of Texas as Amicus Curiae). Later that same day, the Attorney General filed a motion to withdraw as Judge Holland's counsel, citing "the potential for conflict."

If he should grant Mr. Hood's Rule 202 petition on Monday, Judge Brewer has ordered the witnesses to be present so that the depositions can be taken at the courthouse immediately following the hearing.

2. Anonymous Source

An article appearing in the on-line magazine *Salon* relied on an anonymous source to confirm the romantic relationship between Judge Holland and O'Connell. *See* Alan Berlow, *Ardor in the Court*, Salon.com News, June 24, 2005, supra, n.3. The article states:

> "I am 100 percent sure that there was an affair," said one woman who refused to be named. This source recounted having listened to tape recordings Earl Holland obtained of conversations between the judge and O'Connell that provided irrefutable evidence that the two were intimately involved. Earl Holland had collected an entire "shoe box" of these recordings, she said, but she did not know how he obtained them.

Id. Having listened to these tape recordings, the unnamed source has direct evidence supporting Mr. Hood's allegations.

D. <u>THE SECTION 5 REQUIREMENTS</u>

Obtaining the recusal rate evidence was a monumental undertaking.

Because the overwhelming majority of this Court's decisions are unpublished and, therefore, unable to be accessed electronically, the payoff for such a comprehensive research project was unknown. Counsel's decision to collect and distill the information from hundreds of Hand Down Lists and case files in the Court's archives demanded more than the exercise of reasonable diligence. It required the exercise of extraordinary diligence. Consequently, the recusal rate data constitutes a new factual basis for the claim that "was not ascertainable through the exercise of ***reasonable*** diligence" at the time Mr. Hood filed the previous petition. *See* Tex. Code. Crim. P. art 11.071, § 5(e) (emphasis added).

Mr. Hood filed his previous petition on June 12, 2008.[5] In July 2008, counsel for Mr. Hood obtained the services of several unpaid interns. Beginning in early August, these interns spent four weeks reviewing orders lists and case files at the Court, photocopying pertinent documents, and compiling data. They examined the 204 Hand Down Lists the Court issued during Judge Holland's

[5] On September 5, 2008, this Court dismissed Mr. Hood's Rule 202 Petition as a subsequent application that did not meet the requirements of Section 5 of Article 11.071. *Ex parte Hood*, No. WR-41,168-09 (Tex. Crim. App. Sept. 5, 2008) (unpublished). In the alternative, the Court held that, "[t]o the extent the filing is not, and never was intended to be, a subsequent writ application, it is not properly before this Court." *Id.* at 3. Mr. Hood never intended that the Rule 202 Petition be filed as a subsequent application. Judge Dry set off this Palsgraffian chain of events by making several questionable substantive rulings before his epiphanic decision to recuse himself. He "severed" Mr. Hood's Rule 202 Petition and sent the "criminal portion" to Judge Nelms, who promptly forwarded it to this Court as a subsequent application. This "purported" subsequent application should not be considered Mr. Hood's previous application.

tenure. They also examined 220 Hand Down Lists issued during Judge Price's first five years on the bench, and 223 Hand Down Lists issued during Judge Keasler's first five years on the Court. They reviewed over 160 Collin County case files, in both cases where Judge Holland recused herself and those where she participated. In addition, by seeking every case file involving the recusal of Judge Price or Judge Keasler during their first five years on the bench, the interns attempted to discern the reasons for those judges' decisions not to participate. After reviewing the Hand Down Lists and case files, the interns collated the data in spreadsheets, setting out the date of decision, the case number, the defendant's name, and any facts that might explain the reasons for recusal or participation. In total, the volunteer interns dedicated over 275 hours to the project, and counsel spent nearly $500 photocopying documents at the Court.

Clearly, counsel for Mr. Hood cannot be faulted for failing to develop the recusal rate evidence earlier. The task required significant time, coordination, personnel, and resources. Counsel 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 Mr. Hood's judicial bias claim meets the requirements of Section

5 of Article 11.071 and remand the case for further proceedings.

E. THE CONSTITUTIONAL VIOLATIONS

1. 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).

a. 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*, 858 S.W.2d at 559. 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 relationship with 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.

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 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 O'Connell a galling defeat in such a highly visible case. Her role in his election campaigns made her attuned to his professional and personal interests. Her long-term, intimate relationship with him made these 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.

b. Public confidence in the integrity of the judiciary is severely eroded by an extended intimate 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 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 is involved in a long-term intimate relationship

with an attorney who is appearing before her, the judge's impartiality is certainly suspect, even without evidence that the relationship actually resulted in any impropriety.

An intimate relationship like the one shared between Judge Holland and 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 lengthy duration of the relationship, the numerous opportunities for *ex parte* communications during these contacts, Judge Holland's sense of personal obligation to O'Connell, and her desire to support and advance his professional interests. Moreover, Judge Holland's failure to disclose the relationship – in fact, her strenuous 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 substantially-out-of-the-ordinary relationship between Judge Holland and O'Connell gives rise to a reasonable question about the judge's impartiality. This is not a case of personal 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 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 a prosecuting attorney, because the relationship created appearance of partiality). In short, an objective onlooker would be extremely troubled by what happened in this case.

2. 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 relationship with 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 refusing 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.

II.

THE STATE'S PLANNED EXECUTION OF MR. HOOD WILL VIOLATE HIS RIGHT TO REMAIN FREE FROM BEING TWICE PUT IN JEOPARDY OF HIS LIFE FOR THE SAME OFFENSE.

The Fifth Amendment provides that no person shall be subject "for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. This guarantee is applicable to the States through the Fourteenth Amendment. *See Benton v. Maryland*, 395 U.S. 784 (1969). The double jeopardy guarantee is applicable not only to trials, but extends to any proceeding that results in the imposition of punishment for criminal conduct. *See*, *e.g.*, *Deptartment of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994); *United States v. Halper*, 490 U.S. 435 (1989).

Mr. Hood was scheduled to be put to death on June 17, 2008. This

scheduled execution put Mr. Hood "in jeopardy of life." *See Morrow v. F.B.I.*, 2 F.3d 642, 645 (5th Cir. 1993) (Wiener, J., concurring) (describing death warrant as "jeopardy"). The offense for which he will be placed in jeopardy on September 10, 2008, is the "same offense" for which he was placed in jeopardy on June 17, 2008. Thus, Mr. Hood will be twice placed in jeopardy for the same offense, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

In this case, it is the execution proceeding and death-preparation process that is at issue. This process has already taken place. Mr. Hood was put in jeopardy, and that jeopardy was terminated by expiration of the death warrant. Compelling Mr. Hood to undergo this proceeding a second time would, therefore, subject him to repeated proceedings for the same offense in violation of the constitutional protection against persons being put twice in jeopardy of their lives.

It may be contended that, while Mr. Hood will be placed in jeopardy of his life on September 10, 2008, for the same offense, this jeopardy is but a continuation of his original death sentence. *See Ball v. United States*, 163 U.S. 662 (1896); *see also United States v. Scott*, 437 U.S. 82, 91 (1978) (holding that retrial after defendant successfully appealed is no "act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect").

However, the death warrant in Mr. Hood's case was not withdrawn, nor was any stay ever granted, nor was any gubernatorial reprieve ever issued – actions that could be analogized to the "continuing jeopardy" arising from an appellate reversal. Instead, the warrant expired by governmental acquiescence, thereby terminating the execution of judgment. *See Morrow*, 2 F.3d at 645 (Wiener, J., concurring) (death warrant "starts a 30-day countdown to execution – a countdown that can only be interrupted by the grant of an extraordinary writ or order from a state or federal court"). After midnight, on June 18, 2008, Mr. Hood was still alive, even though the death warrant had not been recalled and motions to stay his execution had been denied. When the warrant expired at that moment, jeopardy for his life was terminated in a way analogous to an acquittal. In this way, the federal double jeopardy provision ensures that a person may be subjected only once to an execution process carried to its completion through either the death of the inmate or the expiration of the death warrant.

No legal impediment existed to prevent the State from executing Mr. Hood. This circumstance distinguishes it from the grant of a stay. A stay raises the prospect that the inmate may never be executed and is a remedy affirmatively sought by the inmate himself. In this case, Mr. Hood's motions for stay were denied. He was, therefore, left in expectation of imminent execution in

accordance with the law, having exhausted his available and legally-recognized remedies to prevent the execution.

Preclusion of a second execution process in this case serves the values the double jeopardy provision was meant to vindicate. Among other interests, the double jeopardy preclusion serves a "constitutional policy of finality for the defendant's benefit." *United States v. Jorn*, 400 U.S. 470, 479 (1971). The death warrant expired with the approval of the State. A renewed effort to kill Mr. Hood is contrary to that policy of finality.

The double jeopardy value to citizens in harm's way is protection from repeated subjection "to embarrassment, expense and ordeal and compelling [them] to live in a continuing state of anxiety and insecurity . . . ." *Green v. United States*, 355 U.S. 184, 187-188 (1957). The ordeal in this case is worse than trial. Because it involves the very act of dying, it the most acute state of "anxiety and insecurity" that a human being can undergo. Camus described the pain the condemned experiences shortly before an execution:

> During the three quarters of an hour that separates him from his extinction, the certainty of his futile death overcomes everything: the fettered, utterly submissive creature experiences a hell that makes a mockery of the one with which he is threatened. . . . This doubtless explains the strange quality of submission that is so often observed in the condemned man at the moment of his execution. . . . Confronted with an inescapable death, a man, no matter what his convictions, is

> devastated throughout his entire system. . . . Two deaths are imposed, and the first is worse than the second. . . .

Albert Camus, *Reflections on the Guillotine* (Fridtjof Karla Publications 1959). For Mr. Hood, once should be enough.

Mr. Hood filed his previous application on June 12, 2008. The factual basis for his double jeopardy claim did not become available until the expiration of his death warrant at midnight on June 17, 2008. This claim clearly meets the requirements of Section 5(a)(1) of Article 11.071. The Court should remand the claim for further proceedings or file and set it for full briefing and oral argument.

PRAYER FOR RELIEF

The wall of silence that has long protected Judge Holland and Tom O'Connell must come down. Mr. Hood has presented new evidence that provides compelling support for his allegations and raises grave concerns about the reasons Judge Holland recused herself from the vast majority of Collin County cases while she served on this Court. A fair and impartial tribunal is a bedrock requirement of due process. Judge Holland's romantic relationship with the elected district attorney deprived Mr. Hood of this right under the Texas Constitution and the United States Constitution.

ACCORDINGLY, Mr. Hood asks this Court to:

1. Stay his execution scheduled for September 10, 2008;

2. Remand the case to the convicting court for further proceedings, including depositions or an evidentiary hearing where the Hon. Verla Sue Holland and Mr. Thomas S. O'Connell, Jr., will be placed under oath and subject to questioning; and

3. Any other relief that law and justice require.

In the alternative, Mr. Hood asks this Court to stay his execution and set and file the case for full briefing and oral argument.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

On this 6th day of September 2008, I hereby certify that a true and correct copy of this pleading was sent to the following persons by placing it with Federal Express for priority overnight delivery:

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EXHIBIT 6

EXHIBIT 7

EXHIBIT 8

EXHIBIT 9

EXHIBIT 10

EXHIBIT 11