IN THE DISTRICT COURT OF MIDLAND COUNTY, TEXAS
385TH JUDICIAL DISTRICT

AND

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

CAUSE NO. 27-181

EX PARTE
CLINTON LEE YOUNG,

APPLICANT

APPLICATION FOR A WRIT OF HABEAS CORPUS SEEKING RELIEF FROM A JUDGMENT OF DEATH

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APPLICATION FOR A WRIT OF HABEAS CORPUS IN A CAPITAL CASE

"'Were the power of judging joined ... to the executive power, the judge might behave with all the violence of the oppressor.'"

-- James Madison, *The Federalist No. 47*, (quoting Montesquieu).

I. INTRODUCTION

This Application is premised on an irrefutable fact: The trial judge overseeing Petitioner Clinton Young's conviction and death sentence employed a Midland County prosecutor to be a judicial clerk while that prosecutor was representing the State at Young's trial. The trial court ultimately paid this prosecutor, Ralph Petty, thousands of dollars for his work as a judicial clerk, including for work on Young's case, even while Petty was prosecuting Young and defending that conviction. The result was a biased tribunal that shattered any semblance of due process or an impartial proceeding.

Petty's long-standing dual role as a judicial clerk and prosecutor was not revealed to Young until after this Court had already stayed his execution to resolve

a pending *Chabot*[1] claim. On August 16, 2019, just two weeks before an evidentiary hearing was scheduled to begin, Young's counsel received a telephone call. It was Midland Assistant District Attorney Eric Kalenak, the prosecutor assigned to Young's post-conviction case. Kalenak informed counsel of a startling revelation: District Attorney Laura Nodolf just that day discovered that former Assistant District Attorney Ralph Petty was being paid by Midland District Court judges as a "de facto law clerk" on cases in which he also had appeared as the prosecutor, including on Young's case. Kalenak was purportedly blindsided by the discovery of these payments.

A week later, on August 22, 2019, the Midland District Attorney's Office moved to recuse itself from Young's case, citing the court's arrangement with Petty as a "direct violation" of various ethical cannons. The trial court granted the recusal request the same day.

Meanwhile, Young immediately began fact-finding efforts to uncover the full scope of Petty's dual-role as prosecutor and court law-clerk. What Young uncovered through documents obtained from the Midland Treasurer and Auditor was startling: for approximately 17 years, Deputy District Attorney Ralph Petty

[1] A claim under *Ex parte Chabot*, 300 S.W. 3d 768 (Tex. Crim. App. 2009) alleges that unknowing but material false testimony was introduced at trial.

had billed the trial court and other Midland Judges for tens of thousands of dollars for work as a judicial clerk, all while he was working as a prosecutor appearing in these courts, sometimes on the same cases he was working on as a judicial clerk.

The information Young obtained informally is merely the tip of the iceberg. Young requested leave of the trial court to conduct depositions and issue subpoenas to more fully develop the factual basis of Petty's unethical dual-role, but his motion for discovery was denied on the grounds that the district court did not have jurisdiction to order discovery prior to authorization by this Court. Regardless, the records DA Nodolf and Young had already uncovered demonstrate that Young's trial proceeding was structurally broken, lacking any semblance of impartiality. The trial court's long-standing arrangement with the prosecutor, with the court paying Petty thousands of dollars to work as a law clerk while Petty was also appearing (and filing briefs) in Young's case as a prosecutor, amounts to blatant judicial bias and a violation of the separation of powers. The trial judge should have been disqualified from this case.

Texas Rule of Appellate Procedure 78.3 allows this Court to issue "any [ ] appropriate order required by the law and the nature of the case." Here, the only appropriate remedy is a new, impartial, and fair trial for Young. The facts upon which this Application is based are irrefutable and establish that the very structure

of Young's capital trial—premised on an adversarial system with an impartial tribunal and fair-dealing prosecution—broke down. At the very least this Application satisfies Section 5 of Article 11.071's requirement for authorization.

The fundamental defects and violations infecting all stages of Young's case, from trial, to the motion for new trial, through direct appeal, and continuing into Young's initial and subsequent writ applications, continue to mount.[2] Indeed, as this Court considers this Application, a claim that the prosecution presented false testimony is pending in the convicting court. It was authorized as Young was scheduled to be executed and while the Midland District Attorney withheld a tape of the main prosecution witness admitting that his testimony was false. With this latest disclosure of defects impacting Young's conviction and sentence, the necessity of vacating Young's conviction—and providing him a new, fair, trial—is manifest. At this point, the proceedings stemming from Young's manifestly unfair trial and habeas proceedings, where Ralph Petty was literally being paid by the trial court to dispense with Young's post-conviction applications while he opposed

[2] Young will be filing a suggestion to reopen Young's prior appellate and habeas proceedings in the Court of Criminal Appeals upon this Application's transfer to the Court of Criminal Appeals.

those applications as a prosecutor, cannot be salvaged. A reset is needed; a new trial is required.

II. STATEMENT OF THE CASE

The following timeline is based upon the facts known to Young at this time. Sources include (1) the trial and post-conviction record, (2) the invoices Petty submitted to the Midland County Courts, (3) IRS records of the Midland County District Attorney's Office ("Midland DA"), and (4) declarations of counsel. These documents were obtained in 2019 through disclosure by the Midland DA and though public records requests.

Young has not had the benefit of discovery or depositions. Furthermore, Judge Hyde is deceased and Ralph Petty has refused counsel's request for an interview. Authorization and a new trial are warranted based on the irrefutable documentation submitted with this petition; however, Young requests the opportunity to amend these allegations if this Court authorizes this claim and remands the case to the trial court for further proceedings.

A. Ralph Petty became a full-time prosecutor in 2001 and yet continued to work as a judicial clerk.

Ralph Weldon Petty has been licensed to practice law in Texas since 1973. By the year 2000, and possibly earlier, he served as law clerk to various Midland

County judges on individual cases. Judge Hyde (the trial judge would later preside over Young's trial and initial writ application) was one of these judges.

In 2001, Petty was hired as a full-time prosecutor for the Midland DA. (Ex. 1, IRS form response.) According to Former Midland DA Teresa Clingman, "[w]hen [Petty] came back to work as a full-time prosecutor, he still worked after hours for the judges as [he did] before." *Id*. His work included "responding to writs of habeas corpus, [and] post conviction [sic]." (*Id*. at 9.) Petty did his work as a prosecutor at the office but "works for the judges at his home." (*Id*. at 10.)

Texas Code of Civil Procedure, Article 2.08 prohibits any district attorney from serving as "counsel adverse[ ] to the State in any case[.]" Yet, the trial court employed Petty to work as a judicial clerk, in a role where Petty would have been obligated to be impartial, even after it knew of Petty's full-time role as a prosecutor and his resulting inability to take positions adverse to the state. It is no surprise that Petty's dual role gave the State an unfair advantage and made the trial court a biased tribunal.

///

B. In 2002, County Counsel issued an advisory opinion that Petty should not work as a law clerk on cases in which he appears as a DA

In 2002, Judge Hyde, perhaps realizing the inherent problems with employing Petty as a judicial officer, sought an advisory opinion from Russell Malm, the Midland County Attorney, on "whether Ralph Petty may receive pay for the work he renders to the District Judges on post-conviction writs, in addition to his salary as an Assistant District Attorney." (Ex. 2, Aug. 14, 2002 Opinion by Russell Malm to Hon. Judge Hyde). Malm's opinion was based on the understanding that Petty would not undertake a dual role in any case:

> When a post-conviction writ is assigned to Mr. Petty by a Judge, Mr. Petty reviews the file, performs any necessary research and submits a recommendation and proposed order to the Judge. He does not act as a representative of the District Attorney's office in doing so and his boss, Mr. Schorre, does not require Mr. Petty to do this work.

(*Id*. at 16.)

Most importantly, Malm stated that "Mr. Petty's duties as an Assistant District Attorney do not include work on post-conviction writs." (*Id.*) If a writ "progresses to the stage that the involvement of the District Attorney's Office is necessary, another attorney within the Department handles the case." (*Id.*) Based upon this understanding of the facts, Malm concluded that Petty "may receive

additional compensation for work he performs for District Judges related to post-conviction writs." (*Id.* at 17.)

As shown below, the trial court disregarded Malm's advice. Petty did serve as a dual role as a judicial clerk in cases where he was the prosecutor, including work on Young's case. And Petty's role as a prosecutor did include work on post-conviction writs, contradicting Malm's understanding of Petty's work.

C. Petty worked as a law clerk during Young's trial while also appearing as one of Young's prosecutors.

Young was arraigned on February 12, 2002 in the 238th Judicial District, before the Honorable John G. Hyde. (2 RR 4.) Judge Hyde presided over Young's entire case, including the pre-trial proceedings, the trial, and the litigation of the motion for new trial. Voir dire began in January of 2003 (16 RR 4), opening statements began on March 17, 2003 (21 RR 16), the jury announced its verdict on April 11, 2003 (37 RR 27), and the motion for new trial was heard on June 19, 2003 (38 RR 6).

During the foregoing timeframes, Petty also worked for Judge Hyde as a judicial clerk. As illustrated in the chart below, just during Young's trial proceeding Petty was paid for his work for Judge Hyde on approximately 20 other criminal cases for which he was paid $300-600 per case. He earned $7,200 total during this period.

Payments Authorized by Judge Hyde to Ralph Petty During Young's Trial Proceeding				
Date of Invoice	**Defendant**	**Case No(s)**	**Source[3]**	**Amount**
2002-02-22; 2002-11-07	Ramirez, Robert	CR16631-A	A, O	$300 $300
2002-03-04	Epting, Garland	CR14546	A, O	$300
2002-04-16	Miller, Edward D.	CR26586-A	A, O	$300
2002-05-20	Berry, Robert E.	CR27263-A	A, O	$300
2002-06-03	Walker, James	CRA18458-B	A, O	$300
2002-06-20	Lopez, Marcelo	CR23070	A, O	$300
2002-08-12	Luna, David M.	CR24415	A, O	$300
2002-08-30	Rodriguez, Manuel	CR18392	A, O	$300
2002-09-10	Woods, Newton	CR14933	A, O	$300
2002-09-23	Sheppard, David	CR13164	A, O	$300
2002-10-23	Pennington, Jerry Allen	CR19379-A	A,O	$300
2002-11-07	Stringer, Sammy	CR14274-A	A, O	$300
2003-01-17	Pickle, David	CR8517-A	I	$300
2003-01-21	Sauls, Gerald Lynn	CRB14434-A	I, A	$600
2003-03-10	Diltz, Gary	CR23342-A	I, A, O	$400
2003-04-21	Bowden, Timothy Leon	CR24248	I, A, O	$400

[3] The sources of data for this chart are identified as follow: "A" are Auditor's Records, *see* Ex. 4; "O" are Orders of the Court (written by Petty), *see* Ex. 3; and "I" are Invoices from Ralph Petty to the County Auditor, *see* Ex. 5.

2003-04-23	Lerma, Martin	CR24760-A	I, A, O	$400
2003-04-28	Holmes, James Edgar	CR23201-B	I, A	$400
2003-04-28	Walker, Willie Gene	CR27505-A	I, A, O	$400
2003-07-14	Johnson, Fredrick	CR19077-B	A, I	$400
TOTAL				**$7,200**

As shown above (documented in Exhibits 3 and 4), Petty was paid thousands of dollars for his work on the foregoing cases. This work was not just as an advisor; the orders issued in the foregoing cases during Young's trial proceeding—including their distinctive format and caption page unique to Petty's work product—indicates that Petty was drafting documents in these cases. (Ex. 3; *see Infra* at 33-34.) Young's case, however, is the only ***capital*** case for which Petty worked for both the court and the prosecutor.

At the same time Petty was working for the trial court, Petty was appearing as a prosecutor against Young. In addition to strategizing behind-the-scenes preparation and investigation, Petty appeared as a representative of the State in the trial court, for which he was working as a judicial clerk, on the following matters:

- Examining witnesses at a January 2, 2003 pretrial hearing (RR vol. 12);
- Drafting the state's Motion to Amend Indictment (4 CR 713; see also 4 CR 752 (order));

- Arguing the state's motion to amend in court (RR vol. 13);
- Arguing the state's proposed jury charge and opposing Young's counsel's objections to it, (RR vol. 28);
- Examining witnesses at the hearing on Young's motion for new trial (RR vol. 38 and 39).

Petty's unique and extensive relationship with Judge Hyde as a trusted judicial clerk during Young's trial shattered the partiality Judge Hyde was required to impart when resolving the foregoing litigation. Moreover, Judge Hyde and Petty were surely discussing aspects of Young's trial in chambers. Thus, in his capacity as the trial court's clerk during Young's, Petty was working, advising, or, at the very least, influencing the trial court on Young's case, even while Petty was duty bound to represent the interests of the State. (*See* Tex. Code. Civ. Pro., Art. 2.08.)

D. The trial court hired Petty to work as a law clerk on Young's initial writ application, while Petty was the assigned DA opposing that application.

On April 22, 2005, attorney Gary Taylor timely filed Young's original application for postconviction writ of habeas corpus. (CR 1-162.) Taylor subsequently withdrew as counsel for Young, and the Court appointed attorney Ori White to represent Young in his place. On January 17, 2006, White filed his "supplement" to the original application for postconviction writ of habeas corpus

in the 385th District Court of Midland County, Texas. The trial court sent all of the claims raised by White and Taylor to this Court, which determined that the supplemental claims constituted Young's first subsequent application for writ of habeas corpus.

Judge Hyde set the matter for an evidentiary hearing in 2006. Petty was the prosecutor assigned by the Midland DA to represent the State and defend Young's conviction during the 2006 writ proceeding. (*See* Ex. 34, Cover Page of State's Suggested Order, June 1, 2006.) While Young's writ application was pending before Judge Hyde, Petty authored the State's pleadings opposing Young's application and appeared, in-person, as the prosecutor at the 2006 evidentiary hearing. (Ex. 6.)

While Petty was appearing in person and in briefs as the prosecutor, Petty was simultaneously contracting with Judge Hyde to serve as Hyde's judicial advisor *on Young's application*. In contrast to Petty's typical payment of $300-400 per case, Petty received a total of $1500 for work on Young's case. (*Compare* Ex. 7 [chart] *with* Ex. 5, at 189, 2006 Invoice for Young's Case). This amount is more than Petty's typical payment and could reflect Petty's ongoing work on Young's case during Young's trial through his initial writ proceeding.

The invoice (pictured below) shows that Petty was paid by Judge Hyde "[f]or legal work" on Young's case:

000442
100-14-00-4032

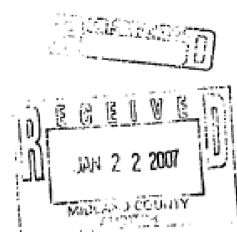
Weldon Ralph Petty, Jr. Voice: [redacted]
Attorney at Law
[redacted]
[redacted] [redacted] [redacted]

INVOICE TO

The District Courts of Midland County, Texas
Midland County Courthouse
200 West Wall Street
Midland, Texas 79701

For legal work performed by Weldon Ralph Petty, Jr. in connection with:

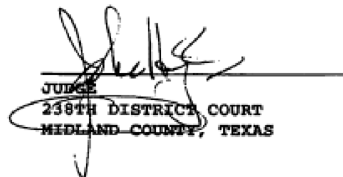
Postconviction writ of habeas corpus
Defendant: Clinton Lee Young - capital murder
Cause number: CR 27,181-A
385th District Court
Midland County, Texas
Date: January 8, 2007



Amount: $1,500

WELDON RALPH PETTY JR.
SSI # [redacted]

APPROVED:



JUDGE
238TH DISTRICT COURT
MIDLAND COUNTY, TEXAS

Not surprisingly, Judge Hyde issued an order denying Young's writ applications on December 20, 2006. (*See Ex Parte Clinton Lee Young*, cause nos. WR-65,137-01 and WR-65,137-02, 2006 WL 3735395 (Dec. 20, 2006).

E. The IRS audited the Midland County DA in 2008 over Petty's dual-employment

As part of its review of the 2006 tax year filings, the Federal Internal Revenue Service (IRS) had questions about Petty receiving paid compensation from both the Midland District Attorney's Office (documented through an IRS W-2 tax form) and the Midland District Courts (documented through an IRS 1099 tax form). As a result, the IRS required the Midland District Attorney to submit a 4564 Form to explain Petty's compensation from both entities. (Ex. 1, Form 4564.) On July 3, 2008, Midland District Attorney Teresa Clingman, who was one of the lead prosecutors at Young's trial, submitted the form. In it, she describes what she knew of the details surrounding Petty's dual employment by Midland judges and the Midland District Attorney's Office.

Clingman wrote to the IRS that Petty, while serving as "a full time prosecutor," also "work[ed] at the discretion of various judges responding to writs of habeas corpus, post conviction [sic]." (*Id*. at 9.) Clingman explained that "State law requires the judges to answer the write [sic]. (*Id*. at 9.) They hire Ralph [Petty] to do it." In other words, "[i]f a writ of habeas corpus is filed, per conversation, he responds to it for the judges at their discretion or assignment." (*Id*. at 10.) Young is unaware of whether the IRS took any further action. The DA's office did not

disclose information concerning Petty's dual-employment to Young's counsel during this time period.

F. Petty worked as a law clerk on Young's 2009 writ application, even though Petty was the assigned DA

On March 25, 2009, Mr. Young filed a second subsequent application for postconviction writ of habeas corpus in the 385th District Court of Midland County, Texas. That second subsequent application was transmitted to this Court, as required by Article 11.071 Section 5 of the Texas Code of Criminal Procedure. On June 3, 2009, this Court remanded some of the claims to the trial court for consideration. *Ex Parte Clinton Lee Young*, cause number WR-65137-03, 2009 WL 1546625 (Tex. Crim. App. June 3, 2009).

The trial court, Judge Robert Moore presiding, held an evidentiary hearing in January and July of 2010. Petty, again, was the prosecutor representing the state at the hearing. (Ex. 9, Index of 2010 hearing transcript.) Petty was also paid by Judge Moore for work as a judicial clerk. (Ex. 10, Invoices from Judge Moore.)

Petty submitted to Judge Moore a "suggested order" dismissing each of Young's authorized claims. (*See* Ex.11, Cover and Table of Contents of State's Suggested Order.) Judge Moore adopted Petty's suggested order verbatim. *Compare* Ex. 12, Cover and Table of Contents of Moore's Order *with* Ex. 11.) This Court, relying on Moore's findings, denied relief on Young's claims in 2012. Ex

Parte Clinton Lee Young, Court of Criminal Appeals cause number WR-65,137-03 (June 20, 2012).

Following the conclusion of the state proceeding, the Texas Attorney General's Office represented the State as Young pursued his federal habeas corpus remedies. During that time, Petty consulted with and/or advised the Attorney General's Office about Young's case.

G. Petty represented the State in Young's subsequent proceedings, including the 2017 execution warrant.

On May 1, 2017, the Midland DA moved the trial court, Judge Robert Moore presiding, to issue a warrant for Young's execution. Judge Moore issued the warrant and set an execution date of October 26, 2017. (Ex. 13, Execution Warrant.) Petty "was primarily responsible for handling [Young's] post-conviction writ litigation until October 17, 2017," which was one day before this Court authorized Young's *Chabot* claim and stayed his execution. (Ex. 14, State's Mot. To Determine Grounds for Recusal, at ¶ 6.) Indeed, when the Midland DA sought an execution warrant, Petty, in his capacity as an assistant DA, filed a 150-page "summary of the evidence" for the Court. No such pleading is required or typical in such a proceeding.

On August 28, 2017, Young moved Judge Moore to modify or withdraw the October 26, 2017 execution date pursuant to Code of Criminal Procedure, Article

43.141(d) and (e). Judge Moore set a hearing on that motion was set for October 16, 2017. (*See* Ex. 15, Sept. 15, 2017 Order Granting Hearing.)

On October 3, 2017, two weeks before the hearing, Young's counsel read an internet article from the Midland Reporter-Telegram that stated that witness David Page (the subject of Young's *Chabot* claim) was scheduled to testify and had been granted use-immunity for the hearing. (Ex. 16, Motion to Rescind.) Unbeknownst to Young or his counsel, on September 15, 2017, Petty moved Judge Moore for orders (1) granting use-immunity to Page and (2) appointing him counsel for purposes of taking his testimony at the hearing. (*See* Ex 17, Mot. to Grant Page Use Immunity; Ex. 18, Mot. to Appoint Page Counsel.) Two days before the motions were formally filed, on September 13, 2017, Judge Moore signed orders granting both of Petty's motions. (Ex. 19, Order Granting Use Immunity; Ex. 20, Order Appointing Counsel.) Young's counsel was not served with the motions or the orders granting the motions.

Upon learning of the *ex parte* contact by Petty and the Court's orders, Young moved to rescind the hearing on the basis that Judge Moore was not permitted to hear witness testimony and engage in factfinding before this Court authorized Young's claims under Article 11.071, section 5. The hearing with Page as a witness did not take place, but Page had already been moved to the Midland

County jail after the Midland DA obtained a bench warrant. (Ex. 21, Bench Warrant.) This was done without Young's knowledge. Instead, Petty appeared in person to argue for Young's execution warrant and oppose his motion to modify the execution date and conduct additional gunshot residue testing.

On September 29, 2017, Young filed a subsequent postconviction application for writ of habeas corpus, which was transferred to this Court. That application alleged, *inter alia*, that under *Ex Parte Chabot*, 300 S.W.3d 768, Young was entitled to a new trial based on the state's unknowing presentation of David Page's false testimony that Young kidnapped and shot Petrey.

On October 4, 2017, Midland District Attorney Laura Nodolf interviewed Page in Midland, Texas. (Ex. 22, Oct. 4, 2017 DA Interview of Page; Ex. 23, M. Farrand Decl., at ¶ 9.) In that interview, Page admitted that (1) he, not Young, kidnapped Samuel Petrey at gunpoint, (2) Young never suggested to slit Petrey's throat, (3) he testified falsely at trial when denying he bought a pair of gloves hours before Petrey was shot. *Id*.

Despite the fact that Nodolf's interview with Page was exculpatory for Young and confirmed the allegations presented to this Court (that Page testified falsely), Petty and the Midland DA's Office kept Nodolf's interview of Page secret, not even telling Page's newly-appointed attorney. (Ex. 24, W. Leverett

Decl., ¶¶ 5-6.) A day after Page's interview, October 5, 2017, the court held a telephonic hearing at which both parties appeared, and Petty made no mention of the interview at all.

On October 17, 2017, just nine days before Young was scheduled to die, in its response to Young's writ application filed in this Court, the Midland DA's Office, via Petty, again omitted any mention of Page's recent interview by Ms. Nodolf wherein he admitted to lying during his testimony. In fact, despite knowing about this interview, the Midland DA actually argued that Page's testimony at trial was truthful. It appears that this is the approximate time that Petty's lead role on this case ended.

On October 18, 2017, this Court authorized Young's *Chabot* claim and stayed his execution. On October 25, 2017, a newly-assigned Midland DA, Eric Kalenak, finally e-mailed Young's counsel disclosing Nodolf's taped interview of Page for the first time. (Ex. 23, Attachment A (e-mail from DA Kalenak).)

H. Midland County DA moved to recuse itself in 2019 after disclosing Petty's dual-employment to Young for the first time.

On August 16, 2019, while purportedly researching unrelated matters with the county treasurer, Laura Nodolf, the District Attorney, claimed to have discovered that Ralph Petty had been billing the District Court judges for work he had been performing for the District Attorney's Office as its primary lawyer in

post-conviction writ of habeas corpus cases. The District Attorney's Office believes that this included work he performed on this case (Ex. 14, DA Motion to Recuse.)

The DA characterized Petty's work "as a *de facto* law clerk for the judges presiding in this case—indeed, apparently on this case—while he was representing the State in these same matters." *Id*. The DA acknowledged that this would be "in direct violation" of Rule 1.11(a) and (c), Rule 3.05(b), and Rule 3.08 of the Texas Disciplinary Rules of Professional Conduct. As a result, the DA asked to recuse itself "[g]iven the deep entwinement of the attorneys currently working in the District Attorney's Office in matters that may be the subject of future litigation in this case[.]" (*Id*.)

Following the Midland DA's recusal, on September 4, 2019, Philip Mack Furlow, the Dawson County District Attorney, was appointed "as Attorney Pro Tem to act for the State in this matter." (Ex. 25, Order Appointing Attorney Pro Tem.)

III. THIS APPLICATION IS TIMELY AND BASED ON FACTS THAT WERE NOT REASONABLY AVAILABLE TO YOUNG DURING HIS PRIOR WRIT PROCEEDINGS

Article 11.071, Section 5(a)(1) permits this Court from considering the merits of this Subsequent Application so long as "the current claims and issues

have been and could not have been presented previously . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application."

Here, Young had no way of knowing about the factual basis of this claim until the Midland District Attorney discovered Petty's dual role and Assistant District Attorney Kalenak informed Young's counsel. Indeed, they purportedly did not know of Petty's and the District Court's ethical violations until August 16, 2019, when District Attorney Nodolf discovered the court's payments to Petty. Accordingly, the factual basis of this claim was not available before that date, including when Young filed his previous Applications.

Young did not delay bringing the instant application to this Court. Upon learning of Petty's dual role, the Midland District Attorney filed a motion to recuse itself on August 22, 2019. (Ex. 14, Mot. to Recuse.) On September 4, 2019, a new prosecuting office, the Dawson County District Attorney, was appointed to represent the State in Young's pending *Chabot* proceeding.

At the same time as the Midland DA was removing itself from the case, Young diligently sought to obtain documents to understand the scope of Petty's dual role. On August 30, 2019, eleven days after first learning of Petty's dual role by Assistant District Attorney Kalenak, Young's counsel submitted an open-

records request for all records pertaining to Petty's employment with the courts and the prosecutor's office. (Ex. 26, Letter to County Counsel.) Responsive materials were provided to Young on October 15, 2019. (Ex. 28, E-mail & Disclosures from Malm.) These materials included invoices from the Midland County Auditor and Midland County Treasurer, results from an audit by the IRS regarding Petty's work, and County Counsel Russel Malm's opinion about Petty's dual role in 2001.

Young's counsel also attempted to interview or voluntarily depose pertinent witnesses to Petty's dual role, including District Attorney Laura Nodolf and Assistant District Attorney Eric Kalenak. For example, on October 2, 2019, Young's counsel e-mailed Midland County Counsel Russel Malm to request interviews with Nodolf and others. (Ex. 27, E-mail to Malm.) Previously, Young's counsel had been informed that any communication with Nodolf or others at the Midland District Attorney's Office had to go through Malm. (*Id.*)

Malm informed Young's counsel that any informal requests for depositions or interviews had to go to the new prosecutor (the Dawson County District Attorney's Office). (Ex. 27, E-mail to Malm.). Less than two weeks after the new District Attorney's Office was appointed, on September 16, 2019, Young filed a motion for discovery related to Petty's dual role, so that Young could develop a

more complete factual basis to raise the instant claim in this Court. (Ex. 31, Mot. for Discovery.)

The resolution of that discovery motion was delayed, however, because of the unexpected death of Judge Brad Underwood, presiding over Young's case. A new judge, the Honorable Sid Harle, was appointed on October 17, 2019. (Ex. 29, Appt. Order.) Judge Harle denied Young's discovery motion on January 22, 2020 at an in-person status conference, citing a lack of jurisdiction and inviting Young to seek authorization in this Court. That denial prompted Young to seek authorization from this Court, even if the full scope of facts has not been uncovered. The filing of this Application is not unreasonable delay given counsel's simultaneous obligation to prepare for the *Chabot* evidentiary hearing and the practical limitations created by circumstances surrounding the COVID-19 pandemic, associated school closings, and stay-at-home orders in counsels' jurisdiction. Should this Court seek further information about the personal and practical limitations imposed because of the pandemic and the associated response, Counsel can provide them upon request.

IV. CLAIMS FOR RELIEF

CLAIM ONE: THE JUDICIAL BIAS AND STUCTURAL DEFECT FROM THE TRIAL COURT'S HIRING OF A PROSECUTOR AS A PAID JUDICIAL CLERK DURING YOUNG'S TRIAL VIOLATES DUE PROCESS AND THE SEPARATION OF POWERS.

Young's trial judge had been paying Assistant District Attorney Ralph Petty for work as a law clerk, before, during and after Young's trial. Petty was one of the prosecutors at Young's trial. Petty's dual role with the Court and the prosecutor was not disclosed to Young until August of 2019. The trial court's improper contact and arrangement with a prosecutor who was representing the State at Young's trial violates Young's due process rights, the Texas and United States Constitution's requirement of Separation of Powers, and the Texas Constitution's requirement of an unbiased trial judge.

A. The Judicial Bias from Petty's simultaneous role as a judicial clerk and prosecutor during Young's trial violated Young's due process rights.

The Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 1, § 19 of the Texas Constitution guarantee a fair trial as necessary to due process under the law. In other words, "the right to a fair and

impartial judge is fundamental to our system of justice." *Abdygapparova v. State*, 243 S.W. 3d 191, 206 (Tex. App. 2007); *see also Bracy v. Gramley*, 520 U.S. 899, 904 (1997) ("[T]he floor established by the Due Process Clause clearly requires a fair trial in a fair tribunal.") And because "'[d]eference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges,'" judges must avoid even the appearance of partiality. *United States v. Microsoft Corp*., 253 F.3d 34, 115 (D.C. Cir. 2001) (quoting Code of Conduct for United States Judges, Canon 1 cmt. (2000)).

The trial court's arrangement with Petty, whereby he hired Petty as a law clerk while Petty was also a prosecutor during Young's trial, violated Young's due process rights by resulting in impermissible *ex parte* contact and creating judicial bias—both actual and implied.

1. Petty's role as judicial clerk to Judge Hyde during Young's trial resulted in prohibited *ex parte* contact between the trial court and prosecutor.

"*Ex parte* communications are prohibited because they are inconsistent with the right of every litigant to be heard and with maintaining an impartial judiciary" and "to ensure equal treatment of all parties." *Abdygapparova*, 243 S.W. 3d at 207-08 (quoting *In re Thoma*, 873 S.W.2d 477, 496 (Tex. Rev. Trib. 1994)). Due process is violated by *ex parte* contact that erodes the appearance of impartiality

and jeopardizes the fairness of the proceeding. For example, a capital murder conviction was vacated and a new trial ordered when the trial judge "improperly engaged in *ex parte* communications with the prosecutor in violation of [the applicant's] due process rights." *Abdygapparova*, 243 S.W. 3d at 206. These due process concerns are reflected in the Texas Code of Judicial Conduct, which consequently prohibits judges from initiating, permitting or considering *ex parte* communications concerning the merits of a proceeding. Tex. Code Jud. Conduct, Cannon 3(B)(8). Similarly, Texas's code of professional conduct prohibits lawyers from engaging in *ex parte* contact with the judiciary. *See* Tex. Disciplinary Rules Prof'l Conduct 3.05(b).

In *Abdygapparova*, the prosecutor and trial court exchanged "notes" during voir dire commenting on the defendant's ability to talk with counsel, the hairstyle of one of the prospective jurors, the performance of the lawyers, and other non-case related matters. *Id*. at 206-07. A new trial was warranted because the "secretive nature and content of the *ex parte* notes show a bias on the part of the trial court . . . [who] became an advocate for the State, and an opponent of the defense[.]" *Id*. at 209. Specifically, the communications with the prosecutor suggested that there was a "'chumminess' between the prosecutor and the trial court from which the jury could interpret that the trial court was 'taking sides.'" *Id*.

at 210. As a result, the "entire trial process" robbed "Abdygapparova of her basic protections and undermin[ed] the ability of the criminal trial to reliably serve its function as a vehicle for the determination of guilt or innocence." *Id*.

Here, Petty acting as a paid law clerk for the trial court while Petty was also acting as a prosecutor during Young's trial amounted to a far more egregious and intolerable risk of *ex parte* communications than what occurred in *Abdygapparova*. Paid thousands of dollars for legal work on dozens of cases, Petty was a trusted confidant on legal issues for Judge Hyde. As a paid law clerk to Judge Hyde, Petty necessarily had access to and communication with the trial court that neither party—neither the defense nor the prosecution—enjoyed. Yet, at the same time Petty was acting as a law clerk, he was also appearing as a prosecutor in Young's case, signing and arguing motions and advocating for the State. Young and defense counsel had no idea that this prosecutor had a secret relationship with the trial court as the court's paid clerk, preventing Young from objecting or seeking a fairer tribunal. Moreover, the hidden arrangement left Young with no way to know what issues Petty discussed with Judge Hyde in his "secret chambers" during Young's trial. *In re Murchison*, 349 U.S. 133, 138 (1955).

It is a foundational concept that "it is simply not fair to require an accused to appear before a tribunal where the [accused's] prosecutor is also acting as legal

counsel to the tribunal." *Whitehead*, 878 P.2d at 920. In other words, the risk of a fundamentally unfair proceeding resulting from a trial judge employing a prosecutor as a judicial clerk, while that prosecutor is still representing the state in that Judge's courtroom, is so inherently violative of due process that there is scant precedent discussing it. This blatantly improper arrangement between a prosecutor and judge is so rare that it warrants this Court's authorization, a new trial or, at the very least, a remand for fact finding and a hearing.

The risk of *ex parte* contact resulting from Petty's special relationship with Judge Hyde is not just speculative. Indeed, there are instances where the Midland DA learned confidential information that was submitted by Young's defense to Judge Hyde *ex parte* and *in camera*, creating at least a reasonable inference that Petty was conveying information he learned from his role as a Judge Hyde's clerk to the Midland DA (where Petty worked full time). For example, on April 23, 2002, Judge Hyde issued an *ex parte* order appointing a Gerald Byington as a defense mitigation investigation. (Ex. 32, Order Apptng. Byington). On May 1, 2002, Young's counsel submitted a confidential invoice for $5,033 to Judge Hyde. (Ex. 32, pp. 570-574.) Somehow, the Midland DA learned of Byington's appointment by Judge Hyde, and even had a copy of Byington's confidential billing records. (Ex. 30, G. Byington Decl., at ¶ 12.) Midland DA Al Schorre used

that information to submit a complaint to the Texas Commission on Private Security asserting that Byington was engaging in unlicensed activity, which was later dismissed as meritless. (8 RR 14-39; Ex.33, Oct. 17, 2002 letter by Dan Meador.)

Schorre's knowledge of Byington's appointment raises at least a prima facie inference that Petty was conveying information that he learned from serving in the special role of Judge Hyde's judicial clerk to the Midland DA Al Schorre, who was simultaneously employing Petty as a full-time prosecutor. It would be shocking if Petty did *not* discuss Young's case with Judge Hyde during Young's trial, given the extensive work Petty was doing for Hyde as a judicial clerk during that time. Accordingly, the inherent and actualized risk of extreme *ex parte* contact where Young's prosecutor was also acting as a judicial clerk to the trial court necessitates authorization, a new trial before an impartial tribunal or, at the very least, a remand for fact finding and a hearing.

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2. The trial court harbored actual bias against Young, and the state gained unfair benefits, because of Petty's arrangement with the trial court.

For Young, the risk of an unfair trial resulting from Petty's dual role as prosecutor and judicial clerk is not speculative. The existing record already shows ample evidence that Petty's role as a judicial clerk (while he was also one of Young's prosecutors) resulted in actual bias against Young at his trial.

As explained in Section II.C above, Petty appeared as a prosecutor during Young's trial proceedings. For example, Petty handled the following tasks in Judge Hyde's court as a prosecutor:

- Examined witnesses at a January 2, 2003 pretrial hearing on Young's request for a statistician (RR vol. 12);
- Drafted the state's Motion to Amend Indictment (4 CR 713; see also 4 CR 752 (order));
- Argued the state's motion to amend in court (RR vol. 13);
- Argued the state's proposed jury charge and opposing Young's counsel's objections to it, (RR vol. 28); and
- Engaged in other prosecutorial tasks, strategizing, or consulting that Young is presently unaware of absent authorization, subpoena and discovery power

to question the individuals employed by the Midland District Attorney's Office and participating in Young's trial.[4]

Not surprisingly, the matters Petty handled as a prosecutor in Judge Hyde's courtroom received favorable rulings from the trial court, for whom Petty was also working. Judge Hyde denied Young's request for a statistician (4 CR 599); granted Petty's motion to amend the indictment and denied the defense motion to quash the indictment (4 CR 752, 749); and granted Petty's proposed jury charge and denied Young's objections to it (5 CR 808-34 (guilt); 5 CR 858-65 (punishment)). Petty's trusted status with Judge Hyde—as Judge Hyde's "*de facto* law clerk"—resulted in, or at least bolstered, the State's successes at trial.

Indeed, Petty drafted additional court-issued documents in Young's trial in his capacity as a judicial law clerk. The documents include: (1) the Charge of the Court to the Jury (Jury Instructions), (5 CR 808); (2) the Jury Verdict Forms (5 CR 835-865); (3) the Judgment of Capital Murder and Sentence of Death (5 CR 866); and (4) Commitment to the Institutional Division of the Texas Department of Criminal Justice (5 CR 872).

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[4] Young attempted to interview or depose multiple former and current members of the Midland District Attorney's office. (*See* Ex. 23, M. Farrand Decl., at ¶¶ 13, 15, 17-18.)

As shown below, each of the foregoing documents appears in Petty's distinctive font and formatting style, including the font, use of asterisks ("*") in the caption, that are common to all the documents Petty is known to have drafted in this and other cases. The orders issued in other cases for which Petty worked as a judicial clerk mirror this similar distinctive style, indicating Petty's authorship. (Ex. 3.) Meanwhile, these orders differ from the format of other orders issued by the same judge. The facial similarities illustrated below at least raise a prima facie inference that Petty wrote the orders for Judge Hyde.

NO. CR 27,181

THE STATE OF TEXAS * IN THE DISTRICT COURT
V. * 385TH JUDICIAL DISTRICT
CLINTON LEE YOUNG * MIDLAND COUNTY, TEXAS

ORDER
OVERRULING MOTION FOR NEW TRIAL
AFTER EVIDENTIARY HEARING

On this day came on for consideration, the Defendant's Motion for New Trial in the above entitled and numbered cause, and the Defendant appeared in person and with his attorney of record and the State appeared by and through her District Attorney, and both parties announced ready for the hearing. Thereupon, the evidence was presented, and after considering the evidence and the Defendant's Motion for New Trial, the Court is of the opinion that the said motion is without merit and should be overruled.

It is accordingly **ORDERED** that the Defendant's Motion for New Trial in the above entitled and numbered cause be and is, hereby, **DENIED**.

Signed the 20th day of June, 2003.

JUDGE PRESIDING
385TH DISTRICT COURT
MIDLAND COUNTY, TEXAS

-DA
-Rusty Wall
-Ian Cantacuzene
-Paul Williams

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NO. CR 27,181

EX PARTE * IN THE DISTRICT COURT
* 385TH JUDICIAL DISTRICT
CLINTON LEE YOUNG * MIDLAND COUNTY, TEXAS

VOLUME I

STATE'S SUGGESTED ORDER
FOR THE COURT ON
APPLICANT'S APPLICATION FOR
POSTCONVICTION WRIT OF HABEAS CORPUS

*****

SUBMITTED BY

RALPH PETTY
ASSISTANT DISTRICT ATTORNEY
MIDLAND COUNTY, TEXAS

FOR

JOHN G. HYDE
JUDGE PRESIDING
385TH DISTRICT COURT
MIDLAND COUNTY, TEXAS
200 W. WALL STREET, SUITE 400
MIDLAND, TEXAS 79701

(*Compare* 5 CR 922 *with, e.g*., Ex. 34, June 1, 2006 State's Suggested Order for the Court on Applicant's [Initial] Application for Postconviction Writ of Habeas Corpus.)

The actual bias resulting from Petty's dual role as judicial clerk and prosecutor also manifested in proceedings following Young's conviction and death sentence. For example, Petty, as a prosecutor, examined witnesses at the hearing on Young's motion for new trial. (*See* RR vol. 38 and 39.) Simultaneously, as a judicial clerk, Petty drafted the Order denying Young's motion for a new trial. (5 CR 922.) Petty also drafted the court's order relieving trial counsel and appointing appellate counsel. (5 CR 873).

3. Even if Petty's dual role as judicial clerk and prosecutor did not result in actual judicial bias, it shattered the appearance of impartiality.

Even if Petty's dual role as Judge Hyde's law clerk and prosecutor at Young's trial did not result in actual bias, the arrangement eviscerated the appearance of impartiality in violation of Young's due process rights.

Due process requires that a trial judge not just be impartial, but that she avoids the *appearance* of partiality so that defendants and others in the courtroom can have an objective and reasonable faith that they are party to a fair proceeding. *United States v. Microsoft Corp*., 253 F.3d 34, 115 (D.C. Cir. 2001) "Such a stringent rule," to be sure, "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." *Murchison*, 349 U.S. at 136. But "'to perform its high function in the best way, justice must satisfy the appearance of justice.'" *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988) (quoting *In re Murchison*, 349 U.S. at 136). In other words, due process is violated when circumstances surrounding a trial court "might create an impression of possible bias." *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 149 (1968).

Here, any reasonable person with knowledge that Judge Hyde was employing one of Young's prosecutors as a law clerk *during Young's trial* would reasonably have the impression that Judge Hyde was biased in favor of the prosecution. Judge Hyde authorized payments to Petty totaling $7,200 just during Young's trial proceeding while Petty was acting as a law clerk for Judge Hyde on dozens of cases. This means that Petty had a special bond and relationship with Judge Hyde, who apparently trusted Petty to do work as a member of the judiciary. No reasonable jurist could set aside that long-standing relationship just because Petty was appearing as a prosecutor. Once aware of the trial court's relationship with the prosecutor, no defendant, litigant, or observer to the proceeding reasonably believe that the trial court could be impartial to both parties. Even the

lowest floor of due process protections demand more in order to consider a proceeding fundamentally fair. Accordingly, Young's conviction and death sentence resulting from such a patently partial and unfair proceeding cannot stand.

B. Petty's simultaneous role as a judicial clerk and prosecutor violated the state and federal separation of powers and the Texas Constitution.

In addition to the judicial bias and due process violations stemming from the trial court's arrangement with Petty, the state and federal requirement of a separation of powers between branches of government was uniquely devastated in this case.

In Texas, the government is divided into "three distinct departments" and "no person . . . being of one of these departments, shall exercise any power properly attached to either of the others, except in instances herein expressly permitted." Tex. Const. art. II, § 1. Here, Ralph Petty was working for the Executive Branch, as an Assistant District Attorney appearing as one of Young's prosecutors. At the same time, he was acting as a member of the Judicial Branch, with Judge Hyde authorizing payments to him for his work as a judicial advisor/law clerk during Young's trial. This arrangement vested to Ralph Petty the

simultaneous power of both the Judicial and Executive Branches, and it rendered Young's trial fundamentally unfair and a violation of the Separation of Powers.

Because the nature of Petty's dual role in this case is so extreme and unprecedented, case law discussing an arrangement as blatantly violative of the Separation of Powers as Petty's arrangement with the trial court is sparse. But an instructive, albeit less explicitly problematic, situation was addressed by the Nevada Supreme Court in *Whitehead v. Nevada Com'n on Judicial Discipline Eyeglasses,* 878 P.2d 913 (1994). There, the Nevada Supreme Court struck down an arrangement where the state's Attorney General's Office was assigned the role of legal advisor to a Judicial Commission tasked with adjudicating instances of judicial misconduct, while the same Attorney General's office simultaneously prosecuted individual judges accused of misconduct before the Commission.

First, the Nevada Supreme Court noted that the arrangement provided "the Attorney General access to confidential documents and proceedings of the Commission" because the "Attorney General [was] acting as legal advisor to the Commission (which is Petitioner Whitehead's judge and jury)[.]" *Id*. at 916. Simultaneously, the Attorney General was "prosecuting Whitehead before the tribunal to which the Attorney General has been giving legal advice and counsel." *Id*.

Second, the Nevada Supreme Court held that the Attorney General's dual role was a violation of the separation of powers at the core of the federal and Nevada Constitutions and amounted to a disqualifying conflict of interest. Expressing the obviousness of the violation, the Court stated that "[m]ost readers of this opinion should not have to be further convinced that it is simply not fair to require an accused [ ] to appear before a tribunal where the [accused's] prosecutor is also acting as legal counsel to the tribunal." *Id*. at 920. The violation is even more obvious in this case. Here, too, it is simply unfair to let Young's conviction and death sentence stand where Young, the accused, appeared before Judge Hyde while one of Young's prosecutors was simultaneously acting as a legal advisor to Judge Hyde.

The separation of powers violation here is even more pronounced than in *Whitehead*. There, the conflict involved an entire office, allowing the Nevada Attorney General to at least attempt to wall-off or shield particular individuals working for the judicial branch from the work of others in the same office acting as prosecutors. But here, it was *one individual*, Ralph Petty, who was simultaneously working as a Judicial and Executive employee on Young's case during the trial.. Such an arrangement runs afoul of the Texas Constitution, which prohibits any *person* from exercising "any power" of one branch (such as the Judicial Branch)

while simultaneously exercising the power of another branch (like the Executive Branch). Tex. Const. art. II, § 1

C. The Due Process and Separation-of-Powers violations stemming from the trial court's arrangement with the prosecutor is a structural defect that warrants a new trial.

"The United States Supreme Court has repeatedly held that a violation of the right to an impartial judge is a structural error that defies harm analysis." *Abdygapparova*, 243 S.W. 3d at 209. This is because a biased trial judge affects the entire "framework within which the trial proceeds" and prevents the criminal trial from "reliably serv[ing] its function as a vehicle for determination of guilt or innocence." *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991); *see also Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997) (acknowledging structural errors recognized by *Fulminante*).

Accordingly, there is no harmless-error analysis necessary. Nor would it be feasible: Petty's ongoing proximity and status as a judicial clerk with Judge Hyde during Young's trial created untold and pervasive instances of *ex parte* strategizing, discussion, and contact, the prejudice from which is difficult to understate. From allowing Petty access to sealed and *ex parte* filings given to the trial court, to influencing the court to adopt Petty's positions and grant Petty's

motions as a prosecutor, the impact to Young's trial proceeding from Petty's dual role strikes at the heart of an adversarial proceeding guided by an impartial tribunal.

CLAIM TWO: JUDGE HYDE WAS REQUIRED TO DISQUALIFY HIMSELF AFTER HIRING ONE OF THE PROSECUTORS APPEARING AGAINST YOUNG AS A JUDICIAL CLERK, RENDERING THE TRIAL COURT'S JUDGMENT VOID AND A NULLITY.

During Young's trial proceeding, Judge Hyde hired prosecutor Ralph Petty to work for the court on at least twenty separate cases, for which Petty billed the court a total of $7,200. This arrangement, in the words of the Midland District Attorney's Office, made Petty "a *de facto* law clerk" of Judge Hyde during Young's trial. (Ex.14, DA Mot. to Recuse, at ¶ 11.) This arrangement required Judge Hyde's disqualification from Young's proceeding.

A. Grounds requiring disqualification under Texas law

The Texas Constitution requires judicial disqualification when "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.

Similarly, Texas Code of Criminal Procedure, Article 30.01 designates "causes which disqualify" a judge. It states that "[n]o judge . . . shall sit in any case

. . . where he has been counsel for the State or the accused." Tex. Code of Crim. Proc., Article 30.01.

Finally, Texas Rule of Civil Procedure 18b, applicable to criminal proceedings, *see Rhodes v. State*, 357 S.W.3d 796 (Tex. App. 2011); *DeBlanc v. State*, 799 S.W.2d 701 (Tex. Crim. App. 1990); *Arnold v. State*, 853 S.W.543 (Tex. Crim. App. 1993), sets forth grounds for which a judge *must* disqualify or recuse him or herself. Disqualification is required when, *inter alia*, "the judge has served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter," Tex. R. Civ. P. 18b(a)(1).[5]

B. Disqualification w required because Petty's role as a Judge Hyde's clerk meant the trial court was effectively acting as counsel for the State

Petty's role as Judge Hyde's "*de facto* law clerk" effectively imputed Petty's role as a prosecutor to Judge Hyde. As this Court is aware, "[l]aw clerks . . . are expected to uphold the integrity and *independence* of the judiciary, avoid impropriety and the appearance of impropriety in all Court activities . . . and avoid,

[5] Recusal is similarly mandatory when "the judge's impartiality might reasonably be questioned," or "the judge participated as counsel, adviser, or material witness in the matter in controversy . . . while acting as an attorney in government service[.]" Tex. R. Civ. P. 18b(b).

when engaging in outside activities, the risk of *conflict* with those duties." (Ex. 35, Preamble to Code of Conduct for Law Clerks and Staff Attorneys of the Supreme Court of Texas (2002) (emphasis added).)

Canons governing law clerks treat them as an extended arm of the judiciary, prohibiting them from assisting the Court, "in any manner," in cases "in which, if the law clerk or staff attorney were a judge, there would be grounds for disqualification or recusal[.]" Canon 7(e), Code of Conduct for Law Clerks and Staff Attorneys of the Supreme Court of Texas. These Canons, for example, prohibit a law clerk from working on matters in which a clerk's *former* employer is involved as legal counsel, and from participating in recruiting activity from *future* employers that "lend itself to an appearance of impropriety." Canons 5(a) and 7(b).[6]

Petty's work for Judge Hyde, therefore, required Judge Hyde's disqualification where Petty's conduct violated Texas law. For example, if Petty were a judge (as Canon 7 contemplates) he would have to be disqualified because "[n]o judge . . . shall sit in any case . . . where he has been counsel for the State or

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[6] While the Canons do not contemplate a *current* employee for a law firm (or prosecuting office) *simultaneously* working as a judicial law clerk, Petty's brazen arrangement with Judge Hyde to work as *a de facto* clerk as he appeared in Judge Hyde's courtroom as one of Young's prosecutors clearly violate these Canons.

the accused[.]" Tex. Code of Crim. Proc., Article 30.01; *see also* Tex. Const. Art. V, § 11. Here, Petty appeared in Court and in briefing as a prosecutor during Young's trial. He was thus acting as "counsel for the State" at the same time he was acting as a "*de facto* law clerk" for Judge Hyde.

It is of no consequence that Petty was paid by Judge Hyde to work on other cases while Petty was appearing as a prosecutor at Young's trial. Petty's role as a "*de facto* law clerk" allowed Petty unique access to Judge Hyde and his Chambers. There, Petty could discuss with Hyde a variety of topics, including Young's trial, as a member of the judicial branch, even while Petty's day job was as a prosecutor. In *Whitehead*, discussed in Section V.B.1 above, the Nevada Supreme Court warned that such an arrangement—where a prosecutor is simultaneously acting as an arm of the judiciary—gives "access to confidential documents and proceedings" of the trial court to the prosecution, because Petty was simultaneously "acting as legal advisor" for Judge Hyde. *Whitehead,* 878 P.2d at 916.

As also explained in Section V.A.2 above, the risk here was not theoretical. In fact, Petty had untold instances of *ex parte* contact with Judge Hyde as his law clerk and the Midland District Attorney's Office did learn of confidential information about Young's defense, presumably from Ralph Petty. And it appears

that Petty drafted numerous orders *in Young's case* that were signed by Judge Hyde, even as he was appearing as one of Young's prosecutors.

C. Disqualification is required because Petty was "practicing law" with Judge Hyde while Petty served as a lawyer at Young's trial.

Judge Hyde should be separately deemed disqualified as a judge in Young's proceeding because "a lawyer with whom the judge [currently] practice[s] law served during such association as a lawyer concerning the matter," Tex. R. Civ. P. 18b(a)(1). The rule is written in the past tense, disqualifying a trial judge from a proceeding where the judge's "*former*" colleague worked and continues to represent a party in that proceeding. *Id*. (emphasis added.) But here, the violation is worse: Judge Hyde "practiced law" with Ralph Petty, *i.e.*, employed Petty as a *de facto* law clerk, while Petty was *currently* representing the State at Young's trial proceeding. For the same reasons outlined above, this obvious ethical breach necessitates Judge Hyde's disqualification.

D. Judge Hyde's failure to disqualify himself renders the judgment against Young void and a nullity.

If a judge is (or should have been) 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 v. Tucker*, 202 S.W.2d 218, 220

(Tex. 1947). Applied here, Judge Hyde should have been disqualified, removing his jurisdiction to handle Young's capital trial. Each of Judge Hyde's rulings, the judgment, and Young's death sentence should, therefore, be vacated for a lack of jurisdiction.

CLAIM THREE: PERVASIVE PROSECUTORIAL MISCONDUCT—INCLUDING THE AUTHORIZATION OF A PROSECUTOR TO WORK FOR THE TRIAL COURT—WARRANTS A NEW TRIAL

Due process is violated by misconduct committed by the prosecution that "shock the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952). Here, Assistant District Attorney Ralph Petty's recently-disclosed arrangement with the trial court satisfies that standard. The facts and allegations set forth in Claims One and Two above are incorporated herein by reference.

Despite knowing of Petty's arrangement with the trial court at the time of Young's trial, neither District Attorney Al Schorre, who was the lead prosecutor at Young's trial, nor Midland District Attorney Teresa Clingman, who informed the IRS of Petty's dual role (*see* Ex. 1), disclosed to Young that Petty was working for the trial court. The fact that Midland District Attorneys Al Schorre and Teresa Clingman *knew* of Petty's simultaneous role of a prosecutor and judicial clerk, and yet kept it hidden from Young until 2019, demonstrates their indifference to Young's constitutional rights. Moreover, the withholding of this evidence is itself a

violation of Young's due process rights, *see Brady v. Maryland*, 373 U.S. 83 (1963), and continued through each stage of Young's trial, appellate, and post-conviction proceedings.

The prosecution's refusal to disclose Petty's arrangement with the trial court could not have been because the Midland District Attorney's Office believed there was nothing wrong with the arrangement. In 2019, when it recused itself from this case, the Midland District Attorney admitted that Petty's dual role was a "direct violation" of Rule 1.11(a) of the Texas Disciplinary Rules of Professional Conduct, as well as a violation of Rule 3.05(b), which prohibits ex parte communications "with a tribunal for the purpose of influencing that entity[.]" Petty's brazen violation of these rules—in full view of the Midland District Attorney's Office and to the detriment of Young—amounts to shocking prosecutorial misconduct that destroyed any semblance of a fair trial.

Moreover, this misconduct, *i.e.*, allowing Petty to serve a dual role and withholding it from the defense, should be considered cumulatively with the mounting revelations of misconduct through all stages of Young's trial, appellate and postconviction proceedings. For example, the Midland District Attorney's Office has, among other things:

- Made material misrepresentations of the trial court record to the appellate court;[7]
- Failed to disclose that the prosecution elicited statements from David Page, the subject of the pending *Chabot* hearing, before trial that contradicted his trial testimony, but did not disclose those statements to Young, thus resulting in the knowing presentation of false testimony in violation of *Ex Parte Ghahremani*, 332 S.W.3d 470 (Tex. Crim. App. 2011); (Ex. 36, Leverett's Notes);
- Withheld evidence of plea agreements, including that prosecutor Rick Berry, before Young's trial, conveyed to accomplice Mark Ray's attorney that "he probably would make [Ray] an offer that he could not refuse," which "could have constituted a motive or inducement on the part of Mary Ray for his testimony against Clinton Young. (*See Ex Parte Young*, Case No. 27,18, Order on Applicant's Second Subsequent Postconviction Writ of Habeas Corpus, at 63);
- Enlisted prosecution investigators to intimidate or fabricate the statements of witnesses, including witnesses related to Young's new-trial motion hearing

[7] At trial, the jury was instructed that Young, if not the actual shooter of Samuel Petrey, could be convicted under the law of parties only if he solicited, encouraged, directed or aided Page *in the shooting*, pursuant to Tex. Pen. Code § 7.02(a)(2). (5 CR 813-14.) It appears, however, that the State represented to the Court of Criminal Appeals that a different provision of the law of parties applies. This is because the opinion affirming Young's conviction relies on § 7.02(b)—more broadly imposing party liability when one is a conspirator to a felony and a co-conspirator commits another felony—to conclude that Young was convicted on sufficient evidence. Section 7.02(b) was not given to Young's jury and does not apply to this case.

and during Young's 2010 habeas proceeding with two witnesses who heard David Page confess he, not Young, was the shooter; and

- In 2017, withheld until after this Court stayed Young's execution a secret interview by District Attorney Laura Nodolf with David Page, which took place while Young was under an execution warrant. In that interview, Page admitted to facts demonstrating he testified falsely at Young's trial.

The foregoing examples, in addition to the multiple instances of misconduct briefed by Young in prior writ applications, evidences a pervasive pattern of misconduct for which the only remedy is a new trial. With the Midland District Attorney acknowledging its problematic role in this case and recusing itself, an objective and fair prosecuting office should handle a new trial.

V. AUTHORIZATION AND A NEW TRIAL ARE WARRANTED BASED ON THE DOCUMENTS PRESENTED IN THIS APPLICATION

For the foregoing reasons, Young respectfully requests this Court to expedite authorization of this Application. Understanding the procedure set forth in Article 11.071 sections 6-8 for subsequent applications, Young requests that this Court take extraordinary action under its inherent authority and, without the delay of further fact finding and hearings, vacate Young's conviction so that he can be tried before an impartial tribunal in accordance with Due Process and the Federal and Texas constitution. *See* Tex. R. App. P. 78.3 ("The Court of Criminal Appeals may make any other appropriate order required by the law and the nature of the case".)

The documents presented in this Application cannot be reasonably disputed. Indeed, the Midland District Attorney's Office admits the facts are true—both in its 2008 IRS disclosures and to Young in 2019 when it moved to recuse itself from this case. The documents provided by Midland County make clear what happened, and leave no room for the State to dispute the factual bases of Young's claims.

Moreover, soon, the convicting court will hear evidence that the main witness against him, David Page, testified falsely, confessed to kidnapping and shooting a victim to multiple people, and recanted his testimony—all while the Midland District Attorney's Office covered for Page's lies. This ongoing miscarriage of justice should not continue any longer and this Court should overturn Young's conviction and permit Young a new, fair trial.

//

Respectfully submitted,

CUAUHTEMOC ORTEGA
Interim Federal Public Defender

DATED: August 13, 2020 By: /s/ Joseph A. Trigilio

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Attorneys for Applicant
Clinton Lee Young

STATE OF TEXAS §
COUNTY OF MIDLAND §

VERIFICATION

BEFORE ME, the undersigned authority, on this day personally appeared Joseph Trigilio, who upon being duly sworn by me testified as follows:

1. I am a member of the State Bar of California in good standing.

2. I have been admitted to appear pro hac vice in the 385th Judicial District Court of Midland County, Texas.

3. I am the duly authorized attorney for Clinton Lee Young, having the authority to prepare and to verify Mr. Young's application for a writ of habeas corpus.

4. I have prepared and read the foregoing application and I believe all of the allegations in it to be true to the best of my knowledge.

Signed under penalty of perjury.

/s/ Joseph A. Trigilio
Joseph Trigilio

CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2020, I provided, a true and correct copy of the foregoing application titled **APPLICATION FOR A WRIT OF HABEAS CORPUS SEEKING RELIEF FROM A JUDGMENT OF DEATH** by the electronic filing of this case and by providing a non-conformed true and correct copy by email to philip.mack.furlow@co.dawson.tx.us.

/s/ Joseph A. Trigilio
Joseph Trigilio