Cause No. 27,181

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

ORDER SETTING FORTH FINDINGS OF FACT AND CONCLUSIONS OF LAW ON APPLICANT'S FOURTH SUBSEQUENT WRIT APPLICATION

Pursuant to Article 11.071, § 9 of the Code of Criminal Procedure, the Court hereby sets forth its findings of fact and conclusions of law regarding Applicant Clinton Young's Fourth Subsequent Writ Application.

I. PROCEDURAL HISTORY

A. Mr. Young's Capital Trial

Mr. 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 Mr. Young's entire case, including the pre-trial proceedings, the trial, and the motion for new trial. Voir dire began in January of 2003 (16 RR 4) and opening statements began on March 17, 2003 (21 RR 16.) The jury found Young guilty of causing the deaths of Doyle Douglas and Samuel Petrey, and convicted him of capital murder. (29 RR 72-73.) On April 11, 2003, the jury returned its death verdict. (36.RR.134, 138; 37.RR.5, 27.) Young's motion for new trial took place on June 19, 2003 and was denied by Judge Hyde. (38 RR 6.)

B. Mr. Young's Direct Appeal and Prior State Habeas Proceedings

Mr. Young's conviction was affirmed on direct appeal in *Clinton Lee Young v. State of Texas*, No. AP-74,643 (Tex. Crim. App. Sept. 28, 2005) (not designated for publication), *cert. denied, Young v. Texas*, 547 U.S. 1056 (2006).

Mr. Young's first Application for Writ of Habeas Corpus was filed on April 22, 20005, and was denied by the Court of Criminal Appeals ("CCA") after a hearing. *Ex parte Clinton Lee Young*, No. WR-65137-01, WR-65137-02 (Tex. Crim. App. Dec. 20, 2006) (order not designated for publication).

Mr. Young's second (first subsequent) Application for Writ of Habeas Corpus contained additional claims submitted by Mr. Young during the pendency of his first Application for Writ of Habeas Corpus, which was designated by the Court of Criminal Appeals as, "*in toto*, a subsequent application" and dismissed as an abuse of the writ. *Ex parte Clinton Lee Young*, No. WR-65,137-01, WR-65,137-02 (Tex. Crim. App. Dec. 20, 2006) (order not designated for publication).

Mr. Young's third (second subsequent) Application for Writ of Habeas Corpus was filed on March 25, 2009. The Court of Criminal Appeals determined that two of the claims in the Application, Claims 1 and 2, satisfied the requirements for consideration of a subsequent application under Texas Code of Criminal Procedure Article 11.071, section 5, and dismissed Mr. Young's remaining claims. *Ex parte Clinton Lee Young*, WR-65,137-03 (Tex. Crim. App. June 3, 2009) (order not designated for publication). After a hearing was held in the 385th Judicial District, the Court of Criminal Appeals denied relief on Claim 1 and dismissed Claim 2. *Ex parte Clinton Lee Young*, WR-65,137-03 (Tex. Crim. App. June 20, 2012) (order not designated for publication).

C. The Pending *Chabot* Writ Application and Recusal of the Midland County District Attorney's Office

Mr. Young's fourth (third subsequent) Application for Writ of Habeas Corpus was filed on October 2, 2017. The Court of Criminal Appeals determined that one claim in the Application, Claim 1, satisfied the requirements for consideration of a subsequent application under Texas Code of Criminal Procedure Article 11.071, section 5, and remanded it to the trial court for resolution. *Ex parte Clinton Lee Young*, WR-65,137-04 (Tex. Crim. App. Oct. 18, 2017). Claim 1 alleged that prosecution witness David Page testified falsely at Mr. Young's trial regarding several issues. On April 24, 2018, the trial court found there was a single controverted, previously-unresolved factual issue material to Claim 1: "Whether David Page provided false testimony at Applicant's trial within the meaning of *Ex parte Chabot*, 300 S.W. 3d 768 (Tex. Crim. App. 2009)." The trial court designated that factual question for resolution under Article 11.071, section 9(a) of the Texas Code of Criminal Procedure, and ordered that it would be resolved at an evidentiary hearing.

On August 22, 2019, before the scheduled evidentiary hearing on the claim, the Midland District Attorney's Office ("Midland DA") moved to recuse itself from Mr.

Young's case. (Ex. 14.)[1] There were two bases for the recusal motion. First, the recusal motion cited the fact that members of the Midland DA may be witnesses to the withholding of an interview of David Page by the Midland District Attorney Laura Nodolf. (*Id.* at ¶¶ 1-8.) Ms. Nodolf interviewed David Page after the trial court had issued an execution warrant for Mr. Young and before the CCA stayed that execution. (*See* Ex. 22A.) In that interview, Page recounted facts that differed from his trial testimony. *Id.* Yet, the Midland DA did not disclose the interview to Mr. Young until October 25, 2017, after the CCA authorized Mr. Young's claim that Page testified falsely at trial and stayed Mr. Young's execution. (Ex. 40.)

Second, the Midland DA moved to recuse itself because of Nodolf's discovery of Mr. Petty's long-standing role as a judicial advisor for Midland County judges. On August 16, 2019, while researching unrelated matters with the county treasurer, Laura Nodolf, the District Attorney, discovered that Ralph Petty had been billing the District Court judges for work on post-conviction writ cases, while he was still employed as a Midland County prosecutor. The District Attorney's Office had reason to believe this included work he performed on this case (Ex. 14 at ¶ 10.) Citing the ethical violations of Mr. Petty's relationship with the courts, the Midland DA asked to recuse itself. (*Id.*) The Honorable Brad Underwood, presiding at that time as the trial judge in this case, granted the Midland DA's recusal motion and appointed Philip Mack Furlow as Attorney Pro Tem to act for the State in this matter. (Ex. 25.) Upon Judge Underwood's passing, Mr. Young's case was assigned to this honorable Court.

D. The Fourth Subsequent Writ Application regarding Mr. Petty's Dual-Employment

On August 14, 2020, Mr. Young filed his fifth (fourth subsequent) writ application in the trial court, which was transferred to the CCA per the procedures in Article 11.071. The application was based on the disclosure of Mr. Petty's role with the Midland Judges

[1] Citations to Exhibits refer to exhibits that were admitted at the January 25, 2021 evidentiary hearing unless otherwise indicated in the citation.

by the Midland DA and from documentation provided to Mr. Young by Midland County Counsel Russel Malm pursuant to a public records act request. (See Exs. 26, 31.)

On August 25, 2020, the State submitted its response to Mr. Young's fourth subsequent writ application. In that response, the State stated that the latest writ "presents an issue of substantial merit, and as such could possibly be outcome determinative of whether Applicant should grant relief." The State, therefore, requested that the CCA hold the prior writ application—concerning David Page's false testimony—in abeyance, and that the CCA issue a writ so that Mr. Young's allegations regarding Ralph Petty could be resolved through an evidentiary hearing.

On December 16, 2020, the CCA authorized three claims raised by Mr. Young in the fourth subsequent writ application. These three claims alleged judicial bias, judicial disqualification, and prosecutorial misconduct related to Mr. Petty's relationship with the Midland County judges and the failure of the Midland DA to disclose that relationship to Mr. Young, consistent with a pattern of similar withholding of exculpatory information. *See Ex Parte Clinton Lee Young*, Case Nos. WR-65,137-04 and WR-65,137-05 (Tex. Crim. App. Dec. 15, 2020) (order not designated for publication).

On January 25, 2021, an evidentiary hearing was held via video on the Petty writ. Pursuant to a stipulation by the parties, Exhibit Numbers 1-6, 7-409, 7-410, 9-21, 22A, 25, 26, 29, 31, 34, 35, 37 and 38 were admitted. Exhibit numbers 7, 8, 39-41, and 43 were also admitted even though they were not included in the stipulation. Witnesses Russel Malm, Laura Nodolf, Eric Kalenak, and Paul Williams testified at the evidentiary hearing. Their testimony and the admitted exhibits form the basis of this Court's fact finding, set forth below.

II. FINDINGS OF FACT

These findings of fact are based on the documents and records admitted as exhibits at the January 25, 2021 evidentiary hearing, the testimony adduced at that hearing, the existing record at trial and on appeal, and all other evidence submitted to the Court.

1. Mr. Petty's testimony is unavailable due to his invocation of his Fifth Amendment right to not provide testimony that may be incriminating. On March 5, 2021, Daniel Hurley, who represents Mr. Petty in matters related to the facts surrounding the Fourth Subsequent Writ Application, sent a letter to Mr. Young's counsel. (Ex. 44.)[2] Mr. Hurley's letter states he and Brian Carney, who both represent Mr. Petty, "advised Mr. Petty that he should not testify any further in the Clint Young case. If called to testify, he would invoke his 5th Amendment Privilege[.]" (*Id.*) As a result, this Court finds that Mr. Petty is unavailable to testify as a witness concerning Mr. Young's Fourth Subsequent Writ Application.

A. Ralph Petty appeared at Mr. Young's trial as a prosecutor

2. As recounted in the procedural history above, Mr. Young's trial proceeding began in February 2002 with his arraignment and concluded on April 11, 2003 when the jury returned a death verdict. (37 RR 27.) Judge John Hyde of the 238th Judicial District presided over all of Mr. Young's trial proceedings.

3. Ralph Petty was an assistant district attorney for Midland County at the time of Mr. Young's trial. (Ex. 37.)

4. While initially hired as a part-time prosecutor in 2001, he became a full-time prosecutor that same year. (Ex. 1; Ex. 37.)

5. Mr. Petty was one of the prosecutors who appeared at Mr. Young's trial. According to Assistant District Attorney Eric Kalenak, who was the "appellate chief" for the Midland DA at the time of Mr. Young's trial, Mr. Petty was the "legal advisor" to the team prosecuting Mr. Young. (2 WRR 83.)[3]

6. Mr. Young's trial counsel, Paul Williams, also recalls Mr. Petty appearing at Mr. Young's trial as a prosecutor. (2 WRR 72.)

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[2] An application to admit Mr. Hurley's March 5, 2021 letter as an exhibit is concurrently filed with these proposed findings of fact and conclusions of law.

[3] The "WRR" are the Reporter's Record of the instant writ proceeding, which includes the transcript of the January 25, 2021 evidentiary hearing.

7. Mr. Petty appeared as a representative of the State in Judge Hyde's courtroom and in written pleadings on at least these matters: examining witnesses at a January 2, 2003 pretrial hearing on Mr. Young's request for an expert, (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 Mr. Young's counsel's objections to it, (RR vol. 28); and examining witnesses at the hearing on Mr. Young's motion for new trial, (RR vol. 38 and 39).

B. The trial court employed Ralph Petty as a de facto law clerk during Mr. Young's trial and throughout Mr. Young's postconviction proceedings.

8. The documentary exhibits and testimony adduced at the January 25, 2021 evidentiary hearing establish that Assistant District Attorney Ralph Petty worked for various Midland County judges, including the trial judge overseeing Mr. Young's capital trial, as a paid law clerk/advisor before, during and after Mr. Young's trial proceeding. Judge Hyde continued employing Mr. Petty as a law clerk during Mr. Young's direct appeal and initial post-conviction proceedings. Throughout this entire time, Mr. Petty was simultaneously representing the state as a Midland County prosecutor in Mr. Young's trial, appellate and post-conviction proceedings.

1. Ralph Petty received assignments from Judge Hyde throughout Mr. Young's trial proceeding.

9. Ralph Petty regularly received assignments from Midland County Judges before, during, and after Mr. Young's trial. Based on records from the Midland County Auditors, it appears Mr. Petty began receiving payments from Midland County for his work for Midland District Court judges in March of 2000. (*See* Ex. 8.)

10. His employment contract with the Midland DA, signed on February 12, 2001, states that Mr. Petty "shall be permitted to continue the performance of legal services for the District Judges of Midland County, Texas and perform such work for the

said District Judges as they shall desire and be paid for the same as ordered by the District Judges." (Ex. 37 at ¶ 4.)

11. Mr. Petty's worked for Midland District Court judges every year from 2000 through 2014. (Exs. 4, 5, 8.) He resumed billing judges for work on cases again in 2017 and 2018. (*Id.*)

12. Mr. Petty's work for the judges involved advising them on writs of habeas corpus and even in drafting orders for the judges to sign. (*See* Ex. 1 at 1-14 (explaining that Mr. Petty "performed his work for the judges under his and their names.")

13. As Assistant District Attorney Eric Kalenak testified, Mr. Petty's arrangement with Judge Hyde and other Midland County judges while he was a full-time prosecutor essentially meant that Mr. Petty was "serv[ing] two masters[.]" (2 WRR 88.)

14. In 2008, Midland County District Attorney Teresa Clingman described Mr. Petty's work for the courts in response to an Internal Revenue Service (IRS) audit. Clingman explained that Mr. Petty's "work for the judges is on his own time," and when "a writ of habeas corpus is filed, post-conviction, he responds to it for the judges, at their discretion or assignment." (Ex. 1 at 1-010.) According to Clingman, no prosecutors other than Mr. Petty, worked in their off hours for the judges. (*Id.* at 1-009.)

15. Judge Hyde—the judge presiding over Mr. Young's trial—routinely employed Mr. Petty for work on individual cases. In 2002, Judge Hyde asked Midland County Counsel Russel Malm "whether or not Mr. Petty could receive additional pay in addition to his district attorney salary for doing work for the District Judges on habeas corpus cases." (2 WRR 20.)

16. In an opinion dated August 14, 2002, Malm opined that Mr. Petty could "be paid for this additional work." (Ex. 2.)

17. Judge Hyde did not ask Malm for an opinion about whether Mr. Petty could continue appearing as a prosecutor in criminal trials while he was acting as a law clerk. (2 WRR 22.) Nor did Judge Hyde ask for Malm's opinion on whether Mr. Petty's arrangement with the judges created an ethical conflict of interest. (2 WRR 22-23.)

18. During Mr. Young's trial proceeding—from February 2002 through July 2003—Judge Hyde employed Mr. Petty for work on at least twenty cases. (Ex. 7.)

19. Mr. Petty was paid approximately $6,900 for his work for Judge Hyde during this time. (Ex. 4, 5, 7.) Accordingly, during Mr. Young's trial Mr. Petty was having *ex parte* contact with, and serving as a *de facto* law clerk for, Judge Hyde.

2. Ralph Petty's role a *de facto* law clerk for Judge Hyde resulted in *ex parte* communications with Judge Hyde and contributed to orders adverse to Mr. Young.

20. Mr. Petty's role as a paid law clerk for Judge Hyde entailed *ex parte* contact with Judge Hyde during Mr. Young's trial proceeding. A preponderance of the evidence establishes that this *ex parte* relationship with the trial court, at the very least, contributed to rulings favorable to the State, particularly on matters Mr. Petty was handling as a prosecutor.

21. Mr. Petty examined witnesses at a January 2, 2003 pretrial hearing to oppose Mr. Young's request for a statistician. (RR Vol. 12.) Judge Hyde denied Mr. Young's request for a statistician. (4 CR 599.)

22. Mr. Petty drafted the state's Motion to Amend Indictment (4 CR 713). Mr. Young moved to quash that indictment, (*see* 4 CR 749), but Judge Hyde granted the State's motion to amend. (4 CR 752.)

23. Mr. Petty also argued the State's proposed jury charge and opposed Mr. Young's counsel's objections to it, (RR vol. 28), and Judge Hyde granted Mr. Petty's proposed jury charges and denied Mr. Young's objections. (5 CR 803-34 (guilt); 5 CR 858-65 (punishment).)

24. Mr. Petty also, as a prosecutor, examined witnesses at a hearing on Mr. Young's motion for new trial. (*See* RR vols. 38, 39.) Judge Hyde denied Mr. Young's new trial motion. (5 CR 922.)

25. A review of the trial record further establishes by a preponderance of the evidence that Judge Hyde adopted orders drafted by Mr. Petty. Documents known to be

drafted by Mr. Petty, while he was serving as a prosecutor, show his documents have a distinct format and style. The font on briefs written by Petty differ from other documents prepared by the Court and other members of the Midland DA. (*See, e.g.*, Ex. 14 (prepared by Mr. Kalenak *and* 3 CRR 470 (Order by Judge Hyde setting a hearing). For example, documents attributed to or signed by Mr. Petty include a unique font and use of asterisks ("*") on the caption page. (*See, e.g.*, Ex. 11, November 9, 2010 Suggested Order; Ex. 34, June 1, 2006 State's Suggested Order for the Court.)

26. This distinctive format and style—not seen in other documents filed by the Midland DA or prepared by the trial court where Mr. Petty was not involved, (*see, e.g.*, Ex. 14, Motion to Recuse; 3 CRR 470 (Order from Judge Hyde))—can also be seen in Mr. Petty's recent letter to counsel *pro tem* for the State. (Ex. 38.)

27. The record shows that multiple orders signed by Judge Hyde are drafted in Mr. Petty's distinctive format and style, including (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); (4) Commitment to the Institutional Division of the Texas Department of Criminal Justice, (5 CR 872); the order denying Mr. Young's motion for a new trial, (5 CR 922); and the order relieving trial counsel and appointing Mr. Young appellate counsel. (5 CR 873.) Indeed, in the other cases in which Judge Hyde paid Mr. Petty for his as a law clerk, Judge Hyde's orders appear to be drafted by Mr. Petty using Mr. Petty's distinctive formatting. (*See* Ex. 3.)

28. Notably, the distinctive format, font and style of pleadings unique to Mr. Petty-authored pleadings appears to be due to Mr. Petty using his own personal computer and printer. This fact is established by former Midland District Attorney Teresa Clingman. In a 2008 written interview to the Internal Revenue Service, discussed in more detail below, she explains that Mr. Petty used "his own computer and printer for which he was not reimbursed, but he bought it for his off work hours and writing for the judges." (Ex. 1 at 1-013.)

3. Ralph Petty was paid by Judge Hyde for work as a law clerk on Mr. Young's initial postconviction case, which Mr. Petty opposed in his role as a prosecutor.

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

30. Judge Hyde set the matter for an evidentiary hearing in 2006. Mr. Petty was the prosecutor assigned by the Midland DA to represent the State and defend Mr. Young's conviction during the 2006 writ proceeding. (*See* Ex. 34, Cover Page of State's Suggested Order, June 1, 2006.)

31. While Mr. Young's writ application was pending before Judge Hyde, Mr. Petty authored the State's pleadings opposing Mr. Young's application and appeared, in-person, as the prosecutor at the 2006 evidentiary hearing. (Ex. 6.)

32. A preponderance of the evidence establishes that Mr. Petty was employed by Judge Hyde to serve as Hyde's judicial advisor on Mr. Young's application, while Mr. Petty was also serving as the primary prosecutor opposing that application. This is documented in an invoice Mr. Petty submitted, which sought $1,500 for his work on Mr. Young's case for Judge Hyde. (Exs. 7-409, 7-410.)

33. Mr. Young's case is the only capital case Mr. Petty has worked on. (2 CRR 55.) The amount of money billed by Mr. Petty to the Court for his work on Mr. Young's case ($1,500) as a judicial advisor was substantially more than the typical amount Judge Hyde paid him for his work on other cases. (*Compare* Ex. 7 *with* Ex. 7-410.)

C. The Midland County District Attorney knew or should have known of Mr. Petty's arrangement with the trial court and did not disclose it to Mr. Young during trial and throughout Mr. Young's initial postconviction proceedings.

34. A preponderance of the evidence establishes that the Midland DA knew of Mr. Petty's relationship with the Midland District Court Judges at the time of Mr. Young's trial. This conclusion is supported by Mr. Petty's 2001 employment contract, signed just one year before Mr. Young's trial proceeding commended. The contract states that Mr. Petty "shall be permitted to continue the performance of legal services for the District Judges of Midland County, Texas and perform such work for the said District Judges as they shall desire and be paid for the same as ordered by the District Judges." (Ex. 37.)

35. Midland County Counsel Russel Malm confirmed that the Midland DA was aware of Mr. Petty's work for the courts, including with Judge Hyde, at the time of Mr. Young's trial. At the request of Judge Hyde, Malm authored a 2002 opinion about Mr. Petty's work for the judges.

36. That opinion indicates that Midland District Attorney Al Schorre "does not require Mr. Petty" to do work for the courts. (Ex. 2.) The implication of this statement is that Malm spoke to Schorre about Mr. Petty's role with the court.

37. Malm confirmed in his evidentiary-hearing testimony this information "probably came from a conversation with Al Schorre" and that he "probably talked to Mr. Schorre to just verify that." (2 CRR 31.)

38. Schorre and First Assistant District Attorney Teresa Clingman were the lead prosecutors at Mr. Young's trial. (2 CRR 71-72.)

39. Additional evidence confirms the Midland DA's knowledge of Mr. Petty's work as a *de facto* law clerk for Midland District Court judges before the disclosure of it to Mr. Young's counsel in 2019. In 2008, Ms. Clingman provided a written "interview"

to the Internal Revenue Service discussing Mr. Petty's income from Court. (*See* Ex. 1 at 1-009 (noting Clingman as the interviewee).)

40. Ms. Clingman explains in her written interview to the IRS that Mr. Petty "is a full time prosecutor for Midland County," and that during "his off hours, he works at the discretion of various judges responding to writs of habeas corpus, post-conviction [sic]." (*Id.*) Accordingly, Ms. Clingman knew of Mr. Petty's role as a judicial advisor to the Courts by at least 2008.

41. A preponderance of the evidence establishes that the Midland DA did not disclose to Mr. Young or his counsel the nature of Mr. Petty's relationship with Judge Hyde or other judges in Midland County until 2019.

42. Mr. Young's trial counsel Paul Williams testified that at the time of Mr. Young's trial he did not know that Mr. Petty was doing paid post-conviction writ work for the Midland County Judges. (2 CRR 73.)

43. Rather, he purports to have only discovered Mr. Petty's role with the courts through "courthouse gossip" somewhere between 2014 and 2017. (2 CRR 73.) He may have even heard about it from Mr. Petty himself, but Mr. Williams doesn't remember. (*Id.* at 73.)

44. Mr. Williams did not know when Mr. Petty's work for the court began, or which cases Mr. Petty worked on. (*Id.* at 74.)

45. Further support that the Midland DA—at the time of trial—failed to disclose Petty's relationship with the Midland Courts comes from Midland District Attorney Laura Nodolf and Assistant District Attorney Erik Kalenak. Ms. Nodolf took office as the elected District Attorney of Midland County in 2017. She began working for the Midland DA in 2003. (2 CRR 38-39.)

46. Yet, although her predecessors Al Schorre and Teresa Clingman knew of Petty's status as a *de facto* paid clerk for the courts, she did not discover that fact until August 16, 2019, when she requested documents from the county treasurer on unrelated matters. (2 CRR 43.)

47. Similarly, Mr. Kalenak testified that at the time of Mr. Young's trial and during Mr. Young's initial postconviction proceeding, he was unaware of Mr. Petty's paid status as a judicial clerk. (2 CRR 85-86.)

48. The fact neither Mr. Schorre nor Ms. Clingman informed two prominent members of the Midland DA of Petty's role with the courts confirms that Petty's role was also not disclosed to Mr. Young or his defense team.

49. In response to discovering Mr. Petty's role as a paid clerk for Midland County Judges, Ms. Nodolf moved to recuse her office in August 2019. (2 CRR 55; Ex. 14.)

50. In 2020, Ms. Nodolf sent "batches" of letters to defendants impacted by Mr. Petty's dual role. These letters—notifying multiple defendants of Mr. Petty's dual role—provides additional support for the factual finding that Mr. Petty's dual role was not disclosed to Mr. Young until August of 2019. Mr. Young received one of these letters. (2 CRR 57-59; Ex. 43.)

D. Mr. Young would have moved to recuse or disqualify the trial court had Mr. Young been made aware of Mr. Petty's relationship with the Court.

51. A preponderance of the evidence shows that if Mr. Petty's dual role had been disclosed during trial, Mr. Young would have moved to recuse or disqualify Judge Hyde.

52. At the evidentiary hearing, Mr. Williams testified that if he has known in 2002 and 2003 that Mr. Petty was working as a paid law clerk for the trial judge, he would have had a legal basis to move for the judge's recusal and disqualification. (2 WRR 74.)

53. On cross-examination, Mr. Williams stated he was not sure he would have done so, given that Judge Hyde was "a pretty fair judge." (*Id.* at 76.) But Mr. Williams admitted "in hindsight, I think it—it just looks horrible. If Ralph was writing opinions for the judge, I think it just looks awful." (*Id.* at 77.)

54. Later, Mr. Williams said "[a]ny time a prosecutor is writing opinions for a judge, I mean especially in a capital case, I think that's certainly potentially prejudicial, absolutely." (*Id.* at 77.)

55. Mr. Williams also admitted he would have told Mr. Young about Mr. Petty's dual-employment had it been known during trial. (2 WRR 79.)

56. When asked if he would have consulted an ethics expert, Mr. Williams replied "[p]robably, yes." (*Id.* at 79.) If an ethics expert had advised Mr. Williams that Mr. Young's due process rights were violated by Mr. Petty's work for the judge, Mr. Williams would have "absolutely" considered moving for recusal or disqualification. (*Id.*)

III. CONCLUSIONS OF LAW

Based on the findings of fact set forth above, this Court concludes that Applicant Clinton Young's federal and state due process rights were violated by the both the trial court's use of prosecutor Ralph Petty's services as a paid law clerk during Mr. Young's trial (Claims One and Two), and the prosecution's withholding of that arrangement, which prevented Mr. Young from moving to recuse or disqualify the trial judge and/or the Midland DA (Claim Three).

A. Claim 1: The trial court's employment of Ralph Petty's role as a *de facto* law clerk while he was a prosecutor at Mr. Young's trial violated Mr. Young's due process rights.

1. Due process is violated where a trial judge harbors actual or presumptive bias.

1. 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. A fair trial requires a fair and impartial tribunal. *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."); *Abdygapparova v. State*, 243 S.W. 3d 191, 206 (Tex. App. 2007) ("The right to a fair and impartial judge is fundamental to our system of justice.")

2. A fair trial in a fair tribunal, at minimum, means that the trial judge harbors no presumptive or actual bias for or against either party. *Bracy*, 520 U.S. at 904-05; *Richardson v. Quarterman*, 537 F.3d 466, 45 (5th Cir. 2008) ("In general, the Supreme Court has recognized 'presumptive bias' as the one type of judicial bias other than actual bias that requires recusal under the Due Process Clause."); *Buntion v. Quarterman*, 524 F.3d 664, 672 (5th Cir. 2008) ("Generally, the Supreme Court has recognized two kinds of judicial bias: actual bias and presumptive bias."). Due process "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *In re Murchison*, 349 U.S. 133, 136 (1955). A judge is presumptively biased when he "may not actually be biased, but has the appearance of bias such that 'the possibility of actual bias . . . is too high to be constitutionally tolerable." *Richardson*, 537 F.3d at 475, quoting *Buntion*, 524 F.3d at 672.

3. Texas has recognized the importance of due process and a fair trial in its criminal statutes. Texas Code of Criminal Procedure, Article 2.03(b) places a duty on all parties—"the trial court, the attorney representing the accused, [and] the attorney representing the state"—to "conduct themselves as to insure a fair trial for both the state and the defendant[.]" Permitting a prosecutor, Ralph Petty, to work for the trial court while he was appearing as a prosecutor at Mr. Young's trial, neglected that duty for the reasons set forth below.

2. Judge Hyde's use of Mr. Petty—a prosecutor who appeared for the State and was acting as counsel for the party adverse to Mr. Young—as a paid law clerk resulted in a constitutionally intolerable risk of bias against Mr. Young.

4. Whether a judge is presumptively biased is an objective question and the inquiry is "whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 881 (2009). Only five years ago, the United States Supreme Court held that

"under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case." *Williams v. Pennsylvania*, 136 S.Ct. 1889, 1910 (2016). The Supreme Court was clear: a defendant has a constitutional right "to 'a proceeding in which he may present his case with assurance' that no member of the court is 'predisposed to find against him.'" *Id.*, citing *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

5. The risk of bias is not from a judge's *prior* relationship with opposing counsel, but stems from an *ongoing* and *present* relationship between the judge and opposing counsel. Making this situation more violative of due process than what occurred in *Williams*, Judge Hyde employed Mr. Petty as a law clerk at the same time that Mr. Petty was representing the State against Mr. Young. Judge Hyde authorized Mr. Petty to be paid thousands of dollars for work on at least twenty cases just during Mr. Young's trial. This means that Judge Hyde viewed Mr. Petty as a trusted source of legal advice and—for purposes of the assignments Judge Hyde provided to Mr. Petty—a *de facto* member of the judiciary paid to assist the court in disposing cases. No reasonable jurist, even with the best of intentions, could set aside such a long-standing relationship merely because Mr. Petty wore the hat of a prosecutor during the day, even as Mr. Petty performed trusted and confidential work for the judge at night. No reasonable defendant who had Mr. Petty as opposing counsel in Judge Hyde's courtroom—knowing that Judge Hyde was employing Mr. Petty as a law clerk during trial—could avoid the impression that Judge Hyde was biased in favor of Mr. Petty and the party he represented. The risk of bias by Judge Hyde from this relationship was, accordingly, too intolerable to be constitutionally sound.

6. Increasing the risk of constitutionally intolerable bias is the *ex parte* contact that necessarily occurred between Judge Hyde and Mr. Petty during Mr. Young's trial. *Ex parte* contact between a party and the trial judge violates due process because it erodes the appearance of impartiality and jeopardizes the fairness of the proceeding.

Abdygapparova, 243 S.W.3d at 206; *see also Id.* at 207-08 ("*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.") These due process concerns are reflected in the Texas Code of Judicial Conduct, which 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).

7. 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.

8. Mr. Petty's role as a paid law clerk undermined the appearance of impartiality more than what occurred in *Abdygapparova*. Paid by Judge Hyde as a law clerk on dozens of cases just while Mr. Young's trial was underway, Mr. Petty was at that time a trusted confidant on legal issues for Judge Hyde. He necessarily had access to and communication with Judge Hyde that neither Mr. Young nor his counsel enjoyed. And while Mr. Petty had that access to Judge Hyde's "secret chambers," *Murchison*, 349 U.S.

at 138, he was simultaneously appearing as a prosecutor in Mr. Young's case, arguing motions, examining witnesses, and advocating for the State.

9. The risk of Judge Hyde's actual bias is not speculative. There is sufficient evidence upon which to conclude Judge Hyde—by having Mr. Petty serving as his paid law clerk during Mr. Young's trial—harbored actual bias. As recounted in the factual findings above, it is at least more probable than not that Mr. Petty's role as a judicial advisor directly contributed to adverse rulings against Mr. Young. This is shown by Judge Hyde granting Mr. Petty's motion to amend Mr. Young's indictment and denied Mr. Young's objections to it, (4 CR 749, 752), adopted the jury charges for which Mr. Petty argued and to which Mr. Young's defense objected. (5 CR 808-34 (guilt); 5 CR 858-65 (punishment)), and denied Mr. Young's request for an expert that Mr. Petty opposed as a prosecutor. (4 CR 599.) This bias was even more manifest at Mr. Young's hearing for a new trial, where Mr. Petty was the primary prosecutor examining witnesses. (RR vol. 38 and 39.) Judge Hyde not only sided with Mr. Petty by denying Mr. Young's new-trial motion; it appears—by at least a preponderance of the evidence—that Mr. Petty actually drafted the order the Judge Hyde signed denying it. (5 CR 922.)

10. Texas Code of Criminal Procedure, Article 2.08(a) further evidences the judicial bias resulting from the employment of a prosecutor, Ralph Petty, as a paid law clerk. That statue precludes any prosecutor from serving as "counsel adverse[ ] to the State in any case[.]" Tex. Code Crim. Proc. art. 2.08(a). Thus, Mr. Petty was obligated to serve as counsel only in a capacity that furthered, rather than contradicted, the interests of the Midland County District Attorney's Office. This means it was necessarily impossible—and impermissible—for him to simultaneously work for the trial court, an entity required to be impartial and that might rule against positions taken by the Midland DA, and for Mr. Young if the law requires it. Petty's dual role gave the State an unfair advantage and made the trial court a biased tribunal.

3. The trial court's employment of Mr. Petty as a law clerk created a structural defect that does not require a showing of prejudice.

11. "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, citing *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991); *Chapman v. California*, 386 U.S. 18. 23 & n. 8 (1967); and *Tumey v. Ohio*, 273 U.S. 510 (1927); *see also Casas v. State*, 524 S.W.3d 921, 924 (Tex. App. 2017) ("the lack of an impartial trial judge is a structural error that violates due process and is not subject to a harm analysis") Mr. Petty's simultaneous role as a judicial clerk to the trial judge and a prosecutor in that judge's courtroom is flagrant distortion of the basic adversarial system and separation of powers necessary to basic federal and state due process rights.

12. Although these facts are problematic, there is scant precedent discussing the structural implication of such an arrangement. But the Nevada Supreme Court's decision in *Whitehead v. Nevada Com'n on Judicial Discipline Eyeglasses*, 878 P.2d 913 (1994) is instructive. 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.

13. 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.*

14. Second, the Nevada Supreme Court held that the Attorney General's dual role violated the basic structure of a fair trial—the separation of judicial and executive

(investigative) powers—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 Nevada Supreme Court did not require a showing that the arrangement resulted in specific prejudice to any party.

15. The structural violation of Mr. Young's trial proceeding is even more apparent in this case. Mr. Young's conviction and death sentence cannot stand where Mr. Young, the accused, appeared before Judge Hyde while one of Mr. Young's prosecutors was simultaneously acting as a legal advisor to Judge Hyde. In *Whitehead*, 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, Mr. Petty, who was simultaneously working as a judicial and prosecution employee on Mr. Young's case during the trial. Such an arrangement *may* run afoul of the Texas Constitution, prohibiting 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), *see* Tex. Const. art. II, § 1.[4] Regardless, it violated Mr. Young's structural due process right to an impartial tribunal and fair adversarial proceeding for which no showing of harm is necessary for relief to be warranted.

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[4] 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. While technically county and district attorneys are included within the judicial branch, *see* Tex. Const. art. V, § 21, "some duties of the county and district attorneys might more accurately be characterized as executive in nature[.]" *Meshell v. State*, 739 S.W.2d 246, 253 n.9 (Tex. Crim. App. 1987). Here, Ralph Petty as a prosecutor was essentially performing an executive function while he was simultaneous acting as a member of the judiciary. This Court need not, however, address the novel question of whether this arrangement technically violates the Texas Constitution's requirement of a separation of powers because it so plainly violates Mr. Young's due process right to a fair proceeding.

B. Claim 2: The trial court's use of a prosecutor a *de facto* law clerk during Mr. Young's trial should have resulted in its recusal or disqualification from Mr. Young's case.

16. There is scant precedent defining what constitutes an "actual" or "presumptive" bias of a degree that violates a defendant's due process rights. *See Bracy*, 520 U.S. at 905 ("The facts of this case are, happily, not the stuff of typical judicial-disqualification disputes.") But that is because of the established rules that exist to ensure judges recuse or are disqualified *before* any due process violation takes place. The Texas Constitution, Article V., § 11, Chapter 30.01 of the Criminal Code, and Rule of Civil Procedure 18 all exist to ensure that judges are recused or disqualified[5] in circumstances that would amount to a due process violation.

17. 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. The Texas Code of Criminal Procedure, Article 30.01, which also provides grounds for disqualification, states "[n]o judge . . . shall sit in any case . . . where he has been counsel for the State or the accused." *See also Whitehead v. State*, 273 S.W.3d 285, 288 (Tex. Crim. App. 2008) (Article 30.01 is "intended to ensure that criminal justice was administered free from bias or the appearance of bias.") Finally, Texas Rule of Civil Procedure 18b, (which also applies in criminal proceedings[6]) sets for grounds for which a judge *must* disqualify or recuse him or herself. One such ground is when "the judge has served as a lawyer in the matter in controversy, or a

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[5] "Disqualification" and "recusal" are "often used interchangeably [but] such use a grievous error." *Gulf Maritime Warehouse Co. v Towers*, 858 S.W.2d 556, 559 (Tex. App.--Beaumont 1993) (internal citations omitted). "If a judge is disqualified under the Constitution, he is absolutely without jurisdiction in the case, and any judgment rendered by him is void, without effect, and subject to collateral attack." (*Id.*) Recusal, however, "normally leaves orders entered by that judge prior to the filing of the motion to recuse in full force and effect." (Ex. 39-793.)

[6] *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).

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). 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).

18. Recusal, on the other hand, is warranted 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). Under such circumstances, recusal is "mandatory," not discretionary. *Id.* This is because "[p]ublic policy demands that the judge who sits in a case act with absolute impartiality." *Sun Exploration and Production Co. v. Jackson*, 783 S.W.2d 202, 206 (Tex. 1989) (Spears, J., concurring) "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. *Id.* (emphasis in original). "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. *Id.*

1. The trial court should have been disqualified because the bias created by his employment of Mr. Petty resulted in bias that deprived Mr. Young due process of law.

19. Judge Hyde should have been disqualified under the Texas Constitution, the Texas Code of Criminal Procedure, and Texas Rule of Civil Procedure 18.[7] Mr. Petty was "connected with the judge . . . by affinity" and so there would have been a constitutional basis for disqualification. Tex. Const. Art. V, § 11. Likewise, Judge Hyde

[7] As Amicus points out, Mr. Young could have moved to disqualify Mr. Petty (and by extension, the entire Midland County District Attorney's Office) due to various violations of the Texas Disciplinary Rules of Professional Conduct ("TDRPC"). (Ex. 39-796.)

should have been disqualified under Tex. Code of Crim. P. Art. 30.01 when he employed Mr. Petty, who was also "counsel for the State," in a pending case.[8]

20. Rule 18(a)(1) also required Judge Hyde's disqualification 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.) In this case, the violation is worse: Judge Hyde "practiced law" with Ralph Petty, *i.e.*, employed Petty as a *de facto* law clerk, while Mr. Petty was simultaneously representing the State at Mr. Young's trial proceeding.

21. These facts are more compelling than in another Midland case where the Court of Criminal Appeals required disqualification. In *Metts v. State*, 510 S.W.3d 1, 3 (2016), the court held that a Midland County judge should have been disqualified from the defendant's case in 2013 because she had appeared as the prosecutor at a single hearing in 2005. That prior hearing lasted three minutes; she made only a single comment on the record and her only official act was to sign the jury waiver. *Id.* at 3-4. The court emphasized that disqualification is required even when the judge no longer remembers the role she played in the defendant's prosecution. *Id.* at 8. This is because the disqualification statute "act[s] as a safeguard against not only judicial bias, but even the appearance of judicial bias." *Whitehead v. State*, 273 S.W.3d 285, 288 (Tex. Crim. App. 2008). A judge who previously appeared for the State cannot later appear as a judge because "the appearance of impropriety is palpable." *Metts*, 510 S.W.3d at 8.

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[8] Mr. Petty's dual-employment also violated the ethical rules that apply to judiciary staff. "Law 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, 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).) As an extended arm of the judiciary, law clerks are prohibited 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.

22. The appearance of impropriety in Mr. Young's case is clear. Judge Hyde was, as a matter of law, disqualified from Mr. Young's case because the court's law clerk was also the prosecutor for the State. Because Judge Hyde was disqualified, all judgments entered at trial null and void.

2. The trial court should have recused itself at the beginning of the trial.

23. For the same reasons discussed above, Judge Hyde was required to recuse himself at the earliest opportunity. Due to his employment of Mr. Petty, Judge Hyde's "impartiality might reasonably be questioned" under Tex. R. Civ. P. 18b(b). Likewise, Mr. Petty's dual-employment should be imputed to Judge Hyde, such that "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). Recusal under either section was mandatory. *Id.* Because the basis for recusal existed at the beginning of Mr. Young's trial, Judge Hyde should have recused himself. Because of his failure to do, Mr Young is entitled to habeas relief.

C. Claim 3: The Midland DA's failure to disclose the extent of Mr. Petty's financial arrangement with the trial court to Mr. Young and his defense separately violated Mr. Young's due process rights.

24. Claims 1 and 2 allege that the trial court violated Mr. Young's due process rights by employing Mr. Petty and by failing to disqualify or recuse itself. But the prosecution had a separate duty to protect Mr. Young's due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963). Texas Code of Criminal Procedure, Article 2.03(b) also requires the prosecution (as well as the trial court and defense counsel) to act in a way that will "insure a fair trial for both the state and the defendant[.]"

25. The Midland DA's violated its statutory and constitutional obligations to protect Mr. Young's due process right to a fair trial by failing to disclose Mr. Petty's dual-role to Mr. Young or his counsel during trial, and by keeping secret Mr. Petty's dual role through Mr. Young's new-trial proceeding, direct appeal, and initial postconviction

proceedings. Failing to disclose Mr. Petty's arrangement with the Court prevented Mr. Young from (1) objecting to Mr. Petty's continued involvement in trial proceedings, (2) moving to disqualify and/or recuse Judge Hyde and obtain an impartial tribunal, or (3) moving to disqualify the Midland DA as the prosecuting agency given the conflict arising from Mr. Petty's status as a paid clerk for the court.

26. As the findings of fact demonstrate, at least three prosecutors—Mr. Petty, Teresa Clingman, and Al Schorre—knew (or should have known) Mr. Petty's status as a paid law clerk for Judge Hyde at the time of trial. Mr. Schorre, who was the lead prosecutor at Mr. Young's trial, at the very least should have known of Mr. Petty's dual role because he was the District Attorney of Midland County in 2001, when Mr. Petty signed his employment contract with that office. Mr. Petty's contract explicitly permitted him to "continue" working for the courts while he was employed as a prosecutor. (Ex. 37 at ¶ 4.) Ms. Clingman, who was also a lead prosecutor at Mr. Young's trial, knew of Mr. Petty's dual role at least by 2008, when she was interviewed by the IRS about it. (Ex. 1.) She did not inform her successor, Laura Nodolf, of Mr. Petty's dual role, or Mr. Young and his counsel. Finally, even if Mr. Schorre and Ms. Clingman turned a blind eye toward Mr. Petty's role with the court, Mr. Petty knew of his own arrangement with Judge Hyde and, as a prosecutor, his decision to keep his role with the court secret is imputed to the Midland DA. *See Ex parte Richardson*, 70 S.W.3d 865, 871–73 (Tex.Crim.App.2002) (duty under *Brady* applied despite prosecutor's lack of personal knowledge of favorable information in office files); *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case").

27. The Midland DA had a duty to disclose Mr. Petty's arrangement because evidence of that arrangement was "favorable" to Mr. Young. Knowledge of Mr. Petty's dual role would have permitted Mr. Young to protect his fundamental right to a fair trial. Any belief by Mr. Schorre, Ms. Clingman or Mr. Petty that there was nothing wrong with Mr. Petty's dual role, and that it did not need to be disclosed, was unreasonable. This is

why upon learning of Mr. Petty's dual role, District Attorney Laura Nodolf "was furious." (2 CRR 52.) She "recognized Mr. Petty's billing for what it was and knew the right thing to do would be to recuse and to step away from it." (2 CRR 53.) Assistant District Attorney Eric Kalenak similarly recognized that "it was, you know, unethical and wrong for [Mr. Petty] to get paid by the judges to do work on a case that he was, you know, working on us for." (2 CRR 87.) Mr. Kalenak succinctly described the problem with Mr. Petty's dual role: "You can't serve two masters . . . you [can] either be an impartial person that the judges are consulting, or you [can] be a, you known, an advocate with the District Attorney's Office. You can't -- you can't do both . . . that's like Professional Responsibility 101." (2 CRR 88.)

28. In 2019, when seeking to be recused 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 and a violation of Rule 3.05(b), which prohibits *ex parte* communications "with a tribunal for the purpose of influencing that entity[.]" Yet, despite a duty to do so, neither Mr. Petty nor the elected District Attorneys of Midland County disclosed that Mr. Petty was a paid law clerk for Judge Hyde until sixteen years after Mr. Young's trial had ended. As a result, neither Mr. Young nor his defense counsel had any idea that one the prosecutors appearing in his case had a secret relationship with the trial court as the court's paid clerk. Nor did Mr. Young's defense team have any indication that Mr. Petty's role with the courts should be independently investigated.

29. There is a reasonably probability that the outcome of Mr. Young's trial would have been different "had the evidence [of Mr. Petty's dual role] been disclosed to the defense earlier." *Nelloms v. State*, 63 S.W.3d 887, 991 (Tex. App. 2001), citing *Wilson v. State*, 7 S.W.3d 136, 146 (Tex.Crim.App.1999). There are two specific ways the proceeding would have been different had Mr. Young's counsel been informed of Mr. Petty's dual role. First, as set forth in the foregoing discussion of Claim 2, Mr. Young would have had adequate grounds to move to disqualify or recuse Judge Hyde from

serving as the trial judge given his ongoing relationship with one of the prosecutors on the case. *See also* Tex. R. Civ. Pro. 18a and 18b.

30. Second, there is at least a reasonable probability that Mr. Young could have successfully moved to disqualify Mr. Petty and the entire Midland DA's office from any further involvement in the case had he known of Mr. Petty's status as a paid law clerk. This is because Mr. Petty's dual role directly violated several serious ethical rules. *See In re Murrin Bros. 1885, Ltd.*, 603 S.W.3d 53, 57 (Tex. 2020) (The Texas Disciplinary Rules of Professional Conduct "provide helpful guidance and suggest the relevant considerations" when seeking to disqualify counsel) (quoting *Nat'l Med'l Enters v. Godbey*, 924 S.W.2d 123, 132 (Tex. 1996) (orig. Proceeding)). There is, at least, a reasonable probability that Mr. Petty violated the following Rules of the Texas Disciplinary Rules of Professional Conduct:

- Rule 1.11(a) prohibiting a lawyer from representing "anyone in connection with a matter in which the lawyer has passed upon the merits . . . . as an adjudicatory official or law clerk;"
- Rule 3.05(b), prohibiting *ex parte* communications with a tribunal for purpose of influencing that entity concerning a pending matter;
- Rule 4.01(b), by Mr. Petty's failure to reveal the existence of his judicial clerk role; and
- Rule 8.04(a)(6), by knowingly assisting a judge or judicial officer in conduct that is in a violation of applicable rules or judicial conduct or other law."

31. It is also at least reasonably probable that the entire Midland DA should have been disqualified because of Mr. Petty's ethical breaches, due to Texas Disciplinary Rule of Professional Conduct Rule 1.06(f), which mandates firm-wide disqualification if an individual member of the firm is disqualified. Mr. Young could have moved for this disqualification had Mr. Petty's role with the courts been disclosed.

32. In sum, had Mr. Young known of Mr. Petty's secret dual role as a paid law clerk for Judge Hyde, there is a reasonable probability that Mr. Young could have raised the structural due process violation when it could have been minimized, if not eliminated. The continued withholding of that information prevented Mr. Young from preventing the structural due process violation and resulted in an unconstitutionally unfair tribunal.

33. Finally, due process is violated by misconduct committed by the prosecution that "shock[s] the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952). Mr. Petty's brazen violation of multiple ethical rules along with his failure to disclose it—in full view of the Midland District Attorney's Office and to the detriment of Mr. Young—amounts to shocking prosecutorial misconduct that destroyed any semblance of a fair trial. As ethics professor Robert Schuwerk stated in an amicus brief submitted in support of authorizing Mr. Young's application, Mr. Petty's dual role "represent[s] the most egregious undermining of a criminal defendant's right to a fair trial that [he] has ever encountered." (Ex. 39 at 39-772.) The adversarial system relies on a determination of guilt and innocence based on two sides who have no special advantage in presenting their cases before a judge who is required to render fair and impartial justice. Judge Hyde's use of Mr. Petty as a law clerk while Mr. Petty was helping to prosecute Mr. Young irrevocably destroyed that basic framework, and the failure to inform Mr. Young of the violation until 2019 prevented Mr. Young from taking the appropriate action to vindicate his rights.

34. The brazen misconduct by Mr. Petty—and the Midland DA for failing to disclose it—is, unfortunately, part of a larger pattern of prosecutorial misconduct that further evidences the deprivation of Mr. Young's due process rights. For example, on October 4, 2017, Ms. Nodolf interviewed prosecution witness David Page. (Ex. 14.) That interview took place while Mr. Young was under an execution warrant. (Ex. 13.) In that interview, Mr. Page disclosed facts that differed from his trial testimony. (2 CRR 92.) Ms. Nodolf knew that the interview needed to be disclosed. (2 CRR 62.) Yet, neither Mr. Petty nor anyone in the office disclosed that interview until after the Court of Criminal

Appeals stayed Mr. Young's execution when it authorized Mr. Young's claim that Mr. Page testified falsely at his trial. (2 CRR 64; 2 CRR 92; Ex. 40.) This, and other instances of prosecution misconduct referenced in Mr. Young's Fourth Subsequent Writ Application, indicates a troubling pattern of withholding favorable evidence. The withholding of Mr. Petty's dual role—by itself or considered as part of this pattern—demonstrates that Mr. Young's due process right to fair proceeding has been violated. A new, fair trial is the only remedy at this juncture.

RECCOMENDATION

WHEREFORE, based on the foregoing findings of fact and conclusions of law, this Court concludes that Applicant Clinton Young's structural due process rights were violated and recommends that Applicant's conviction and death sentence be vacated and a new trial ordered.

DATED: April 26, 2021

HON. SENIOR DISTRICT JUDGE SID HARLE
JUDGE PRESIDING BY ASSIGNMENT
385TH DISTRICT COURT
MIDLAND COUNTY, TEXAS

I hereby certify that copies of the foregoing instrument were delivered to:

DA - P Furlow
R E Dahlstrom
J Trigilio
Emailed

Alex Archuleta, District Clerk
By Deputy
IRENE OLGIN 4/29/2