NO. _____

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

In re

CHARLES DEAN HOOD,

Relator-Petitioner

ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS OR, IN THE ALTERNATIVE, ORIGINAL PETITION FOR WRIT OF PROHIBITION, AND MOTION FOR STAY OF EXECUTION

THIS IS A DEATH PENALTY CASE.

MR. HOOD IS SCHEDULED TO BE EXECUTED ON JUNE 17, 2008.

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IDENTIFICATION OF PARTIES AND COUNSEL

Pursuant to Tex. R. App. P. 52.3(a), undersigned counsel sets out a list of all parties, and the names and addresses of all counsel.

Nathaniel Quarterman, Director of the Texas Department of Criminal Justice, Institutional Corrections Division. Respondent.

Edward L. Marshall, Chief, Postconviction Litigation Division, Office of the Attorney General, 330 W. 15th Street, 8th Floor, William P. Clements Building, Austin, Texas 78701. Counsel for Respondent.

John Roach, Sr., Criminal District Attorney, Collin County, Texas. **Jeffrey Garon**, Assistant District Attorney, Collin County District Attorney's Office, 201 S. McDonald, Suite 324, McKinney, Texas 75069.

Charles Dean Hood, No. 000982, Texas Department of Criminal Justice, Death Row, Polunsky Unit, 3872 F.M. 350 South, Livingston, Texas 77351. Relator-Petitioner.

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A. Richard Ellis, 75 Magee Avenue, Mill Valley, California 94941. Counsel for Relator-Petitioner.

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Exhibit 4: Declaration of David K. Haynes (June 5, 2008).

Exhibit 5: Affidavit of Tena S. Francis (June 5, 2008).

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During the capital murder trial of Petitioner-Relator Charles Dean Hood, Presiding Judge Verla Sue Holland was involved in a long-term intimate relationship with the Collin County District Attorney, Tom O'Connell, who took an active role in the courtroom prosecuting Mr. Hood. Neither Judge Holland nor District Attorney O'Connell disclosed the existence of this relationship before, during, or after the trial. Judge Holland never moved to recuse herself. Under Article V, § 11 of the Texas Constitution, Judge Holland was absolutely disqualified from presiding over the trial. Because the court lacked jurisdiction,

the judgment of conviction and sentence against Mr. Hood is null and void. Judge Holland's participation in the case also violated the Eighth and Fourteenth Amendments to the Federal Constitution. The absence of an impartial judge is a structural defect in the trial proceedings, and reversal of Mr. Hood's conviction and sentence is automatic, without consideration of harmless error. Accordingly, the Court should issue a writ of habeas corpus and grant Mr. Hood relief from his unconstitutional conviction and sentence.

In the alternative, the Court should issue a writ of prohibition barring Nathaniel Quarterman, Director of the Texas Department of Criminal Justice, Institutional Corrections Division, and his agents from carrying out Mr. Hood's execution scheduled for June 17, 2008. Because Judge Holland's unconstitutional participation in Mr. Hood's capital murder trial rendered his conviction and sentence null and void, the State of Texas is without authority to execute Mr. Hood.[1]

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[1] If this Court should have any doubt as to the appropriate relief in this case, it is not limited by the denomination of Mr. Hood's current petition. *See State ex. rel. Wade v. Mays*, 689 S.W.2d 893, 897 (Tex. Crim. App. 1985) ("In determining the specific nature of the extraordinary relief sought, this Court will not be limited by the denomination of petitioner's pleadings, but will look to the essence of the pleadings, including the prayers, as well as the record before us."). Mr. Hood has filed, simultaneously with this Original Petition, an Application for Writ of Habeas Corpus pursuant to Article 11.071. The claims raised in the Article 11.071 application are based on the same allegations he brings here.

STATEMENT OF THE CASE

Mr. Hood, the Relator-Petitioner, was convicted of capital murder and sentenced to death in 1990 by the Hon. Verla Sue Holland of the 296th Judicial District Court of Collin County, Texas. 2 CR 381-84 (Ex. 1); 56 RR 1676-77.[2] On April 16, 2008, the Hon. Curt B. Henderson of the 219th Judicial District Court, sitting in the 296th Judicial District Court, signed an order setting Mr. Hood's execution for June 17, 2008. Ex. 2. Mr. Hood is currently confined on Death Row in the Polunsky Unit of the Institutional Corrections Division of the Texas Department of Criminal Justice, located in Livingston, Texas. Respondent Nathaniel Quarterman is the Director of the Institutional Corrections Division of the Texas Department of Criminal Justice. Mr. Hood seeks a writ of habeas corpus ordering Mr. Quarterman to release him from the unconstitutional restraint on his liberty. In the alternative, Mr. Hood seeks a writ of prohibition barring Mr. Quarterman and his agents from carrying out Mr. Hood's execution on June 17, 2008, because the judgment of conviction and sentence entered by the Hon. Verla Sue Holland, the former presiding judge of the 296th Judicial District Court, is null and void.

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[2] Citations to the reporter's record of the capital murder trial are noted as "__ RR __." Citations to the clerk's record of the trial are designated as "__ CR __."

STATEMENT OF JURISDICTION

This Court has original habeas corpus jurisdiction under Article V, § 5 of the Texas Constitution and Article 4.04 of the Texas Code of Criminal Procedure. Disqualification on constitutional grounds may be raised in a collateral attack, even after the judgment is beyond appeal. *Fry v. Tucker*, 202 S.W.2d 218, 221-22 (Tex. 1947); *In re Gonzalez*, 115 S.W.3d 36, 39 (Tex. App. 2003); *Zarate v. Sun Operating, Ltd, Inc.*, 40 S.W.3d 617, 621 (Tex. App. 2001). No statute limits the authority or jurisdiction of this Court to consider an original habeas application. *See ex rel. Wilson v. Briggs*, 351 S.W.2d 892, 894 (Tex. Crim. App. 1961) ("The original jurisdiction of this court to issue writs of habeas corpus is unlimited.").

This Court has original jurisdiction to issue a writ of prohibition under Article V, § 5 of the Texas Constitution and Article 4.04 of the Texas Code of Criminal Procedure. Because this Court may issue a writ of mandamus to correct an order that a judge had no power to render and that was, therefore, void, *Urbish v. 127th Judicial Dist. Court*, 708 S.W.2d 429, 431 (Tex. 1986), it has similar authority to issue a writ of prohibition to bar a respondent from carrying out an act based on a null and void judgment. If an order is void, then a relator need not show that he did not have an adequate appellate remedy. *In re Dickason*, 987 S.W.2d 570, 571 (Tex. 1998); *In re Union Pacific Resources Co.*, 969 S.W.2d

427, 428 (Tex. 1998).

ISSUES PRESENTED

This Original Petition presents two issues for the Court's review:

1. Was Judge Holland disqualified under Article V, § 11 of the Texas Constitution from presiding over Mr. Hood's capital murder trial?

2. Did Judge Holland's participation in Mr. Hood's trial deprive him of his right to a fair and impartial tribunal under the Eighth and Fourteenth Amendments to the United States Constitution?

STATEMENT OF FACTS

In 1990, Mr. Hood was convicted of capital murder and sentenced to death for killing Ronald Williamson and Tracie Lynn Wallace in the same criminal transaction. His trial took place before the Hon. Verla Sue Holland of the 296th Judicial District Court of Collin County, Texas. Tom O'Connell, the elected District Attorney of Collin County actively participated in the prosecution of Mr. Hood. Paired with assistant district attorney John Schomburger, O'Connell addressed panels of venirepersons in general voir dire and individually questioned numerous potential jurors, including every venireperson who eventually served on Mr. Hood's jury.[3] He conducted the cross-examination of the defense witnesses at

[3] *See* 16 RR 182 (voir dire of Juror Huff); 17 RR 388 (voir dire of Juror Ensminger); 18 RR 447 (voir dire of Juror Thompson); 18 RR 520 (voir dire of Juror Van Duren); 20 RR 806 (voir dire of Juror Kerin); 20 RR 833 (voir dire of Juror Baker); 24 RR 1273 (voir dire of Juror Mathews);

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

While Judge Holland was presiding over Mr. Hood's trial, she was involved in a long-term intimate relationship with District Attorney O'Connell. A former assistant district attorney who worked in the office at that time stated that, in 1987, "[i]t was common knowledge in the District Attorney's Office, and the Collin County Bar, in general, that the District Attorney, Mr. Tom O'Connell, and the Presiding Judge of the 296th District Court, Judge Verla Sue Holland, had a

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24 RR 1317 (voir dire of Juror Epstein); 26 RR 1559 (voir dire of Juror K. Smith); 26 RR 1599 (voir dire of Juror Balthis); 28 RR 1854 (voir dire of Juror L. Smith); 34 RR 2535 (voir dire of Juror St. John).

romantic relationship." Ex. 3 (Affidavit of Matthew Goeller). The former assistant district attorney said that the relationship continued through Mr. Hood's 1990 capital murder trial and that it ended around 1993. *Id.* Several other persons associated with the legal profession in Collin County stated that they had heard about the relationship. *See* Ex. 4 at 1 (Declaration of David Haynes) ("At the time of the trial, I was aware of rumors concerning a romantic relationship between the trial judge, Verla Sue Holland, and the Collin County District Attorney, Tom O'Connell."); Ex. 5 at 1-3 (Affidavit of Tena S. Francis) (recounting conversations with Judge Holland's ex-husband and defense paralegal Janet Heitmiller about rumors of the relationship).

By the time of Mr. Hood's trial, both Judge Holland and District Attorney O'Connell were divorced from their spouses.[4] However, neither Judge Holland nor District Attorney O'Connell chose to make the relationship public. Instead, they made a calculated decision to keep it secret, engaging in various subterfuges to dispel any suspicion. *See*, *e.g.*, *id.* at 3 (recounting conversation with local attorney who said Judge Holland and District Attorney O'Connell would often

[4] District Attorney O'Connell filed for divorce in 1985. His divorce from Patricia O'Connell was finalized in 1986. Judge Holland and Earl Holland were divorced in 1987. Earl Holland told friends that Judge Holland's affair with District Attorney O'Connell "was the precipitating factor in his decision to file for divorce." Alan Berlow, *Ardor in the Court*, Salon.com News, June 24, 2005, located at www.salon.com/news/feature/2005/06/24/texas_court_affair/index.html.

take her bailiff to lunch with them so that "the lunch would not appear to be romantic in nature"); *id.* (stating that District Attorney O'Connell's son would drop him off at Judge Holland's house so that he would not have to leave his car in her driveway).

Several examples of Judge Holland's behavior indicate favoritism toward District Attorney O'Connell. Judge Holland appointed O'Connell to an inordinate number of high-fee *guardian ad litem* cases. *Id.* at 3-4. Judge Holland also appointed O'Connell to a number of civil cases from 1983-86, a period when O'Connell had lost his bid for re-election as district attorney. *Id.* at 4.[5] Finally, Judge Holland served as an informal advisor on O'Connell's campaign steering committee and urged him to switch his party affiliation from Democrat to Republican to increase his chances of returning to office. *Id.*[6]

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[5] Before she became a district court judge in 1981, Holland worked as an assistant district attorney for O'Connell. *See Norman v. State*, 588 S.W.2d 340, 342 (Tex. Crim. App. 1979) (listing Holland and O'Connell as counsel of record for the State); *Jewell v. State*, 583 S.W.2d 314, 314 (Tex. Crim. App. 1978) (same); *Smith v. State*, 571 S.W.2d 917, 917 (Tex. Crim. App. 1978) (same); *Howell v. State*, 563 S.W.2d 933, 934 (Tex. Crim. App. 1978) (same).

[6] Judge Holland did not preside over Mr. Hood's habeas corpus proceedings. She left the 296th District Court in 1996 after she was elected to the Court of Criminal Appeals of Texas. She served on this Court from 1997 until 2001.

ARGUMENT

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

A. TEXAS CONSTITUTIONAL GROUNDS

The Texas Constitution sets out the grounds for judicial disqualification:

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

Tex. Const. Art. V, § 11. If a judge is constitutionally disqualified, he or she lacks jurisdiction to hear the case and, therefore, any judgment rendered is void and a nullity. *Davis v. State*, 956 S.W.2d 555, 558 (Tex. Crim. App. 1997); *Buckholts Indep. Sch. Dist. v. Glaser*, 632 S.W.2d 146, 148 (Tex. 1982); *Fry*, 202 S.W.2d at 220. The rule applies in criminal, as well as civil, cases. A criminal conviction is void if the judge was constitutionally disqualified. *Ex parte Vivier*, 699 S.W.2d 862, 863-64 (Tex. Crim. App. 1985) (*per curiam*). Moreover, a party cannot waive, even by consent, the issue of constitutional disqualification. *Gamez v. State*, 737 S.W.2d 315, 318 (Tex. Crim. App. 1987); *Lee v. State*, 555 S.W.2d 121, 124 (Tex. Crim. App. 1977). It is a matter that can be raised at any time, by any

party, including on the court's own motion. *Fry*, 202 S.W.2d at 222.

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

The Texas Constitution calls for the mandatory disqualification of a judge "in any case wherein the judge may be interested." Tex. Const. Art. V, § 11. To be disqualifying, a judge's interest in the result of the litigation "must necessarily affect him to his personal or pecuniary loss or gain." *Ex parte Kelly*, 10 S.W.2d 728, 729 (Tex. Crim. App. 1928); *see Cameron v. Greenhill*, 582 S.W.2d 775, 776 (Tex. 1979) ("It is a settled principle of law that the interest which disqualifies a judge is that interest, however small, which rests upon a direct pecuniary or personal interest in the result of the case presented to the judge or court."). The interest must be "direct, real, and certain, not merely incidental, remote, contingent, or possible." *Kelly*, 10 S.W.2d at 729. If any doubt exists about a judge's interest, a court should resolve that doubt in favor of disqualification. *Gulf Maritime Warehouse Co. v. Towers*, 858 S.W.2d 556, 559 (Tex. App. 1993). The constitutional disqualification provision rests upon the notion that "[a]n independent, unbiased, disinterested, fearless judiciary is one of the bulwarks of American liberty, and nothing should be suffered to exist that would cast a doubt or shadow of suspicion upon its fairness and integrity." *Cotulla State Bank v.*

Herron, 202 S.W. 797, 798 (Tex. App. 1918).[7]

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

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

[7] Moreover, the Texas Constitution's use of the term "may be interested" suggests that disqualification is called for even if the judge's interest cannot be precisely or definitively determined. *Gulf Maritime*, 858 S.W.2d at 559.

for him personally to try an important case like Mr. Hood's and lose. On the other hand, obtaining a death verdict would enhance his credentials and those of his office. His tenure in office – his professional livelihood – depended on successful outcomes, especially in death penalty cases.

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

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

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

assessing judicial bias in this context is whether the allegation of lack of impartiality is grounded on facts that would create doubts concerning the judge's impartiality – ***not*** in the mind of the judge herself, or even, necessarily, in the mind of the party filing the motion, but rather in the mind of a reasonable person with knowledge of all the circumstances involved. *Kemp v. State*, 846 S.W.2d 289, 305 (Tex. Crim. App. 1992) (citing *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1165 (5th Cir. 1982)); *see McClenan*, 661 S.W.2d at 109 (same).

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

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

> bias, prejudice, or favoritism undermine the integrity of the courts, breed skepticism and mistrust, and thwart the very principles on which the judicial system is based. The judiciary must be extremely diligent in avoiding any appearance of impropriety and must hold itself to exacting standards lest it lose its legitimacy and suffer a loss of public confidence.

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

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

An intimate relationship like the one shared between Judge Holland and District Attorney O'Connell not only implies a special willingness of the judge to accept the prosecutor's representations and arguments, but also suggests extensive personal contacts beyond the confines of the courtroom. The reasonable onlooker would have grave concerns about the frequency and nature of these contacts, the

lengthy duration of the relationship, the numerous opportunities for *ex parte* communications during these contacts, Judge Holland's sense of personal obligation to District Attorney O'Connell, and her desire to support and advance his professional interests. Moreover, Judge Holland's failure to disclose the relationship – in fact, her strenuous efforts to conceal it – strongly indicates to the objective observer that the relationship did, indeed, affect her impartiality. *See In re Gerard*, 631 N.W.2d 271, 280 (Iowa 2001). It certainly demonstrates that ***she*** believed reasonable persons would find the existence of the relationship troubling. The substantially-out-of-the-ordinary relationship between Judge Holland and District Attorney O'Connell gives rise to a reasonable question about the judge's impartiality. This is not a case of personal acquaintanceship or a strictly professional friendship between a judge and an attorney who practices in her courtroom.

It is fair to conclude that the average person on the street, when confronted with these circumstances, would reasonably conclude that Judge Holland's participation in the case seriously undermined the public's confidence in the integrity of the courts. Identifying instances of actual prejudice is irrelevant when the public perceives Mr. Hood may not have received a fair trial because of the judge's intimate relationship with the prosecuting attorney. A reviewing court

might believe a judge in this situation and be satisfied that no impropriety occurred – but a court lacks the power to impose that conclusion on members of the public by judicial fiat. The relationship creates an indelible appearance of partiality. *See*, *e.g.*, *In re Chrzanowski*, 636 N.W.2d 758, 764 (Mich. 2001) (finding that, although no evidence existed that judge's disproportionate number of indigent defense appointments to attorney with whom she was having an intimate relationship resulted in any actual prejudice, "such conduct did have a negative effect on the appearance of propriety in judicial decision making and the integrity of the judicial office in general"); *Gerard*, 631 N.W.2d at 278 (holding that it was "immaterial" that judge's intimate relationship with county attorney may not have had a detrimental impact on defendants, because "once the public learned of the judge's relationship with the State's attorney who appeared before him daily, the appearance of bias was very real"); *United States v. Berman*, 28 M.J. 615, 618 (U.S.A.F. 1989) (disqualifying from six cases judge who had intimate, sexual relationship with a prosecuting attorney, because the relationship creates appearance of partiality). In short, an objective onlooker would be extremely troubled by what happened in this case.

B. FEDERAL CONSTITUTIONAL GROUNDS

In addition to violating the Texas Constitution, Judge Holland's participation in Mr. Hood's case violated his Eighth and Fourteenth Amendment rights under the United States Constitution. A defendant's right to be tried by an impartial tribunal is sacrosanct, regardless of the evidence against him. *Tumey v. Ohio*, 273 U.S. 510, 535 (1927). In *Tumey*, the Supreme Court held that "[e]very procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." 273 U.S. at 532. In *In re Murchison*, the Supreme Court recognized that *Tumey*'s "stringent rule" may sometimes result in the disqualification of judges who have no actual bias, because due process demands avoidance of "even the probability of unfairness." 349 U.S. 133, 136 (1955). To satisfy this requirement, the Court explained that:

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

Id. *Murchison* concluded that "to perform its high function in the best way, justice must satisfy the appearance of justice." *Id.* (internal quotation marks omitted). Elaborating on *Murchison*, the Supreme Court later found that a judge "not only

must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150 (1968). Due process requires disqualification when the circumstances "***might*** create an impression of ***possible*** bias." *Id.* at 149 (emphases added). In short, due process does not require a showing that a judge is biased in fact. Rather, due process is concerned with the "average" judge's ability to be – and appear to be – impartial. Finally, because the entire conduct of the trial from beginning to end is affected by the presence of a biased judge, a violation of this due process right constitutes a structural defect in the trial mechanism and reversal is required without consideration of the harmless error doctrine. *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991).

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

an impression of possible bias. This structural defect in the trial mechanism requires automatic reversal of Mr. Hood's conviction and sentence.

C. DISQUALIFICATION SURVIVES SILENCE.

Mr. Hood would face a nearly impossible task if he had to break the wall of silence that has surrounded and protected Judge Holland and District Attorney O'Connell for nearly two decades now. Fortunately, he does not. Unlike recusal, disqualification does require any "procedural 'tip-toeing.'" *Gulf Maritime*, 858 S.W.2d 556, 560. "Disqualification . . . is a different creature in that it survives silence." *Id.* It may be raised at any time. *Buckholts*, 632 S.W.2d at 148. To avoid the prospect of declaring null and void convictions that long ago became final, the disqualification provision of the Texas Constitution places an affirmative duty on judges – not litigants – to make themselves aware of the consequences of their relationships and conduct. *See Gulf Maritime*, 858 S.W.2d at 562. In essence, a judge's duty of recusal is self-enforcing.

Placing that burden on a litigant like Mr. Hood is unreasonable and unfair. Who would better know of potentially disqualifying conduct than those engaged in the conduct themselves? Who would better know of a potential conflict of interest than the parties sharing that interest? Who was in the better position, long before trial, to be aware that the interest might be problematic? These concerns are

especially apt in Mr. Hood's case, where Judge Holland and District Attorney O'Connell took numerous precautions and engaged in various subterfuges to ensure that their relationship remained concealed. This behavior demonstrates a calculated nondisclosure. As the *Gulf Maritime* court explained: "Reason is over extended when we require parties to lawsuits to seek a back door, covert, indirect method of determining whether a trial judge is disqualified. That burden rests more fairly upon those with knowledge of potential impediment." 858 S.W.2d at 562. For this reason, whenever a party raises the issue of judicial disqualification, no matter how informally, a court should fully investigate the matter and refuse to sustain an objection merely to the form in which the party presents the challenge. *Pinchback v. Pinchback*, 341 S.W.2d 549, 553 (Tex. App. 1961). Judges should keep in mind the need to disclose unusual degrees of social affiliation. When circumstances arise that may lead a reasonable person to question a judge's impartiality in a particular matter, a judge has a constitutional obligation to put the potentially disqualifying facts on the record or recuse herself. Judge Holland did neither.[8]

[8] District Attorney O'Connell is not blameless in this matter. Separate from Judge Holland, he had a constitutional duty under *Brady* to disclose to the defense before trial the existence of his intimate relationship with her.

PRAYER FOR RELIEF

A fair and impartial tribunal is a bedrock requirement of due process. Judge Holland's long-term intimate relationship with the elected district attorney deprived Mr. Hood of this right. Judge Holland was constitutionally disqualified from presiding over his capital murder trial. Her participation rendered Mr. Hood's conviction and sentence null and void under the Texas Constitution, and deprived him of his due process right to a fair and impartial tribunal under the Federal Constitution.

ACCORDINGLY, Mr. Hood asks this Court to:

1. Stay his execution scheduled for June 17, 2008; and

2. Issue a writ of habeas corpus and grant him relief from his unconstitutional conviction and sentence; or

3. Remand the case to the convicting court for further proceedings.

In the alternative, Mr. Hood asks this Court to issue a writ of prohibition barring Respondent Nathaniel Quarterman and his agents from carrying out the execution of Mr. Hood on June 17, 2008. Finally, if the Court has any concerns about the relief requested, it should stay the execution and set and file the case for full briefing and oral argument.

Respectfully Submitted,

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Counsel for Charles Dean Hood

VERIFICATION

[*REPLACE THIS PAGE WITH NOTARIZED COPY***]**

CERTIFICATE OF SERVICE

On this 12th day of June 2008, I hereby certify that a true and correct copy of this pleading was sent to the following persons by placing it with Federal Express for overnight delivery:

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_____

EXHIBIT 1

EXHIBIT 2

EXHIBIT 3

EXHIBIT 4

EXHIBIT 5