No. _____

In The
Supreme Court of the United States

ERIC WILLIAMS,
Petitioner,

v.

TEXAS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

OFFICE OF CAPITAL AND FORENSIC WRITS
Benjamin B. Wolff, Director
Ashley Steele
ashley.steele@ocfw.texas.gov
Sarah Cathryn Brandon*
sarah.brandon@ocfw.texas.gov
1700 N. Congress Ave., Ste. 460
Austin, Texas 78701
(512) 463-8600

* *Counsel of Record*
Members, Supreme Court Bar

Counsel for Mr. Williams

QUESTIONS PRESENTED

After the shooting deaths of the Kaufman County District Attorney ("DA"), his wife, and the First Assistant DA, a Kaufman County prosecutor drafted a motion to recuse the DA's office from investigating and prosecuting the case due to the conflict of interest. The trial court judge granted the motion for good cause. That same prosecutor was a co-worker and friend of the decedents, a fact witness interviewed by the FBI, and expressed personal hatred toward Eric Williams, the man eventually charged with the murders. The conflicted prosecutor admitted that her perspective was "skewed" when it came to Mr. Williams, who she wanted to "get the needle."

Prosecutors *pro tem* were appointed to investigate and prosecute the case. The conflicted prosecutor, however, secretly helped. The DA *Pro Tem* referred to her as his "legal phone a friend." Indeed, she drafted the arrest warrant, the indictments, and motions for him. The conflicted prosecutor attended meetings with the prosecutors *pro tem* and identified witnesses for them to use. The DA *Pro Tem* took her advice on which of the murders to prosecute, and shared secret, sensitive case information about the investigation with her. When the conflicted prosecutor's secret involvement came to light after trial, Mr. Williams argued that her participation violated his due process rights.

This Court, relying on its supervisory authority, held that it was improper for a criminal defendant to be prosecuted by a conflicted prosecutor. *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 809 (1987). Many jurisdictions infer that this prohibition is grounded in due process, but are split on whether the participation of a conflicted prosecutor results in structural error. The state court held that the prosecutor's involvement was harmless because she was not conflicted and did not act as a prosecutor on the case. Because this Court has not affirmatively decided whether there is a due process right to be tried by a disinterested prosecutor, the state court decision is an outlier among other courts that have held otherwise. Mr. Williams asks this Court to resolve these fundamental issues:

(1) Does the participation of a conflicted and recused prosecutor in a death penalty trial violate due process?

(2) Does the undisclosed participation of a conflicted prosecutor result in structural error that is "so fundamental and pervasive that [it] require[s] reversal without regard to the facts or circumstances of the particular case"? *Young*, 481 U.S. at 809-10.

PARTIES TO THE PROCEEDINGS BELOW

Eric Williams, petitioner here, was the state habeas applicant below.

The State of Texas, respondent here, was the respondent below.

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Eric Williams respectfully petitions for a writ of certiorari to review the Texas Court of Criminal Appeals ("CCA") judgment in this case.

OPINIONS BELOW

The CCA's unpublished order denying the application for writ of habeas corpus application is attached as Appendix A and cited as "App.A." The habeas court's findings of fact and conclusions of law are attached as Appendix B and cited as "App.B."

JURISDICTION

This Court has jurisdiction to review these orders pursuant to its authority to issue writs of certiorari. 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Trial Proceedings

On January 31, 2013, Mark Hasse, the First Assistant DA of Kaufman County, a small Texas county that sits just over thirty miles east of Dallas, was shot and killed near the county's courthouse. Sue Korioth, who comprised the entire appellate division in the Kaufman County DA's office, advised the elected DA, Michael McLelland, to recuse the office from investigating and prosecuting any suspect arrested for Hasse's murder. 6 SHRR 71-72.[1] Korioth drafted the motion and suggested that Dallas attorney Bill Wirskye be appointed as Kaufman County DA *Pro*

[1] "SHRR" refers to the State Habeas Reporter's Record from Mr. Williams's post-conviction hearing held on August 12-16, 2019; "SHR" refers to the State Habeas Record. "CR" refers to the Clerk's Record and "Supp.CR" refers to the Supplemental Clerk's Record from Mr. William's 2014 capital trial; "RR" refers to the Reporter's Record from Mr. William's 2014 capital trial.

Tem to lead the investigation and any resulting prosecution. *Id*. at 72.[2] The motion recusing the office was granted, and Wirskye was appointed as the prosecutor *pro tem*. 2 Supp.CR 6.

On March 30, 2013, DA Michael McLelland and his wife, Cynthia, were killed in their home. Within days, the DA's office again sought to recuse itself from participating in the murder investigation and resulting prosecution. Korioth drafted that motion as well, stating that the office sought to recuse itself "in order to avoid any conflict of interest or appearance of impropriety which might result from the investigation and prosecution by this office of the murder of its elected leader." *Id*. at 12-13. The court again took Korioth's suggestion and appointed Bill Wirskye as the prosecutor *pro tem*, and Toby Shook as an assistant prosecutor *pro tem*. *Id*. at 10-11.

On June 27, 2013, a grand jury indicted Eric Williams, a local attorney and elected Kaufman County Justice of the Peace, for capital murder for the deaths of Michael and Cynthia McLelland. 44 RR 73-76; 1 CR 32. On December 4, 2013, a jury convicted Mr. Williams of capital murder. At the sentencing phase, the State introduced evidence implicating Mr. Williams in the murder of First Assistant DA

[2] In Texas, there is a distinction between the terms "attorney *pro tem*" and "special prosecutor." While a special prosecutor assists a district attorney in case they are asked to help with, the district attorney *pro tem* "stands in the place of the regular attorney for the state and performs all the duties the state attorney would have performed under the terms of the appointment." *Coleman v. State*, 246 S.W.3d 76, 81 (Tex. Crim. App. 2008).

Marc Hasse. After ten days of evidence, on December 17, 2014, the jury returned a verdict sentencing Mr. Williams to death. 55 RR 6.

B. State Post-Conviction Proceedings

The trial court appointed the Office of Capital and Forensic Writs ("OCFW") to represent Mr. Williams in his state habeas corpus proceedings. CR 4355. OCFW filed Mr. Williams's application for writ of habeas corpus on March 8, 2018. On August 12-16, 2019, an evidentiary hearing was held on, *inter alia*, the claim that Korioth was a conflicted prosecutor who secretly participated in prosecuting him.

Post-conviction counsel uncovered over 500 pages of email exchanges between DA *Pro Tem* Bill Wirskye and Kaufman County recused-prosecutor Sue Korioth that indicated Korioth significantly participated in the investigation and Mr. Williams's prosecution after her office was recused, and thus prohibited, from prosecuting the case. 26-27 SHRR. Those hundreds of emails spanned the entire case and related to significant aspects of the prosecutors' *pro tem* investigation, trial strategy, and trial preparation. *See, e.g.*, 3 SHR 1603-1607 (Wirskye seeking Korioth's advice regarding a motion in limine filed by Mr. Williams's defense counsel in July 2014 email; Korioth providing strategic insight into evidence Wirskye should present at the sentencing trial in August 2014 email; Korioth providing legal research for Wirskye in September 2014 email; Wirskye sending eliciting thoughts regarding Mr. Williams's defense team's request for a *Daubert* hearing in October 2013 email). Korioth's involvement was not discovered until after Mr. Williams was sentenced to death—his trial counsel did not know about Korioth's involvement in the prosecution, and were thus unable to object to it at trial. *See, e.g.*, 5 SHRR 25.

Post-conviction investigation also revealed circumstances that would have conflicted Korioth from personally prosecuting Mr. Williams's case.[3] ADA Korioth had intimate, firsthand knowledge of the circumstances into Hasse's and the McLellands' deaths, not as a prosecutor or investigator, but as a fact witness to the cases. Prior to working with Marc Hasse at the twelve- or thirteen-attorney Kaufman County DA's office, Korioth worked with him at the Dallas County DA's office. 6 SHRR 59, 67. Korioth and Hasse were close friends. 8 SHRR 115.

Korioth and her colleagues feared for their lives, believing that they too might be murdered. 6 SHRR 76-78. A SWAT team from Dallas provided security at Korioth's house from the day of the McLellands' murder until Mr. Williams was arrested, following her out anytime she traveled to Kaufman for nearly three weeks. *Id.* at 76-77. Korioth described feeling "shook up" afterwards, and that it was a "very insecure situation for" her and her co-workers. *Id.* Erleigh Wiley, who was appointed to become the Kaufman County DA after McLelland's murder, described stepping into an office that was experiencing post-traumatic stress. *Id.* at 159. Wirskye similarly testified that the DA's Office was "decapitated," and he was unsure if it would "continue to exist as a viable prosecutor's office[.]" 8 SHRR 64.

As a potential victim and fact witness, Korioth was interviewed as part of the investigation. On April 1, 2013, an FBI agent and a sergeant from the Kaufman

[3] A prosecutor working under a conflict of interest is responsible for recusing herself pursuant to Texas Code of Criminal Procedure Article 2.07(a). *State ex rel. Eidson v. Edwards*, 793 S.W.2d 1, 6 (Tex. Crim. App. 1990).

County Sherriff's Office interviewed Korioth as a witness in the murder investigation. Korioth pointed the investigators to Eric Williams. 3 SHR 1608-1610. She informed them that McLelland was immediately convinced that Mr. Williams was responsible for Hasse's death and had wanted him arrested. *Id.*; 6 SHRR 69-72, 131-32. Mr. Williams was not yet a suspect at that point. 6 SHRR 134.

Korioth also exhibited personal hatred toward Mr. Williams. 6 SHRR 86-88 (calling Mr. Williams a "motherf***er" and expressing her commitment that he get "the needle"). Korioth testified that she knew Mr. Williams from their time working in the courthouse and discussed rumors about him before Mr. McLelland's death. 6 SHRR 71. Even years later, Korioth emailed the post-conviction prosecutor and referred to Mr. Williams as a "sniveling little bastard" and stated that she was still "pissed off" that he allegedly stole Westlaw services from the county. 28 SHRR 47.

Korioth recognized the conflict inherent in her office investigating and prosecuting whoever would be accused of her bosses' murders and filed motions to recuse her office. Korioth admitted she "couldn't represent the State here," 6 SHRR 141, yet acknowledged her function on Mr. Williams's *pro tem* prosecution team as, in part, "research, library, and paralegal," *id.* at 93. She called herself a "research attorney" but acknowledged that she "played a variety of roles during this case." *Id.* at 144-45. DA *Pro Tem* Wirskye described Korioth as his "legal phone a friend" and that he regularly sought out her legal advice. 8 SHRR 66, 126.

Wirskye and the other prosecutors *pro tem* embraced an explicit understanding that Korioth was a member of their team. *See, e.g.*, 3 SHR 1603-04 (Korioth

telling Wirskye that "***we*** have to have argument available because the prior trial is the crux of motive, and Mark's murder, the contents of the storage unit, and the whole course of EW's revenge conspiracies with Kim are critical to proving that he was acting on the motive and to prove ID") (emphasis added). After Mr. Williams's conviction, Korioth wrote an email that she had "some serious worries about turning the case over wholesale to the [Texas Attorneys' General] office," noting that she wanted "***us*** have some editorial control[.]" 28 SHRR 107 (emphasis added).

Korioth's and Wirskye's emails exposed Korioth's involvement on the prosecution team throughout the entire case. Korioth drafted a motion and order to hold Mr. Williams's appeal bond insufficient while she drafted his arrest warrant for capital murder. 6 SHRR 96-97; 28 SHRR 55. She reviewed Wirskye's draft notice of intent to seek the death penalty. 6 SHRR 102-03; 28 SHRR 59. Wirskye gave Korioth a list of assignments as a member of the prosecution team. *See* 24 SHRR 85*; see also* 8 SHRR 124. Her tasks included investigating potential witnesses who could provide affidavits in response to Mr. Williams's motion for change of venue. 6 SHRR 106-07; 28 SHRR 63-65. Korioth edited the State's proposed culpability phase charge. 28 SHRR 88. In the email she sent with her edits, Korioth wrote, "*it is really strange to be trying to work on a capital when you're also -- when you also are kind of in the middle of it. Really skews perspective, even after a year and a half*." *Id.* (emphasis added).

Korioth maintained frequent contact with DA *Pro Tem* Bill Wirskye by phone, email, and in person, and with assistant prosecutors *pro tem* Toby Shook

and John Rolater. 6 SHRR 93, 104-105. Korioth was also in contact with various members of law enforcement investigating the case. *Id.* at 89. She attended multiple meetings with the prosecution and law enforcement teams. 6 SHRR 104-05; 8 SHRR 122-23. Wirskye asked Korioth to take calls from people in Kaufman wanting information about the case investigation, and she agreed to field the thirty or forty calls per day. 6 SHRR 80-81.

Wirskye frequently called Korioth late at night to decompress and vent about the case after a long day. 6 SHRR 88-89; 8 SHRR 125-26. Wirskye told Korioth information about the investigation in confidence. *See* 6 SHRR 82, 140; 8 SHRR 126. For example, Wirskye shared with Korioth that he believed DA Wiley was on a hit list, information she could not share with her new boss, DA Wiley. *Id.* at 82-84. In an email to the *pro tem* team about an upcoming meeting with Mr. Williams's defense team, Wirskye, aware that Korioth's under-the-table involvement was proscribed, noted that she would "have to sit that one out." 28 SHRR 77. After Mr. Williams's trial, Wirskye acknowledged that Korioth was a member of their team. 24 SHRR 86. He personally thanked Korioth and told her "we couldn't have gotten this [death sentence] except for your help." 28 SHRR 109; 8 SHRR 130.

In its findings, the habeas court found that Mr. Williams failed to show that Korioth had an actual conflict of interest, that Korioth was not a decision-making member of the prosecution team or otherwise influenced Wirskye such that he was not making his own independent decisions, App.B, 90, and that Mr. Williams was not actually prejudiced by Korioth's involvement in the case, *id.* at 110. The CCA

Order reveals no independent analysis of Mr. Williams's claim that he was prosecuted by a conflicted prosecutor. App.A, 3, 5. Instead, the CCA, in one sentence, adopted the habeas court's findings and denied relief. *Id.* at 5.[4]

REASONS FOR GRANTING THE WRIT

I. MR. WILLIAMS'S CASE PRESENTS THE OPPORTUNITY TO CONFIRM THE DUE PROCESS RIGHT TO A DISINTERESTED PROSECUTOR, WHICH IS WELL-ESTABLISHED BY LOWER COURTS

Although this Court did not reach the constitutional question in *Young*, it undoubtedly would have arrived at the same inevitable conclusion that numerous lower courts have held: that due process necessarily encompasses the right to be tried by a disinterested prosecutor. *See Young*, 481 U.S. at 809 & n.21; *see also Marshall v. Jerrico, Inc.*, 446 U.S. 238, 250 (1980) ("In this case, we need not say with precision what limits there may be on a financial or personal interest of one who performs a prosecutorial function, for here the influence alleged to impose bias is exceptionally remote."). State and federal courts faced with prosecutorial conflicts of interest have repeatedly held that to ensure a fair trial, due process mandates a disinterested prosecutor. Yet, the CCA in Mr. Williams's case held otherwise, a po-

[4] This Court can therefore look to the rationale of the habeas court and presume the CCA adopted it in denying relief to Mr. Williams. *See Wilson v. Sellers*, 138 S.Ct. 1188, 1192 (2018) (holding that a "federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale" and then "presume that the unexplained decision adopted the same reasoning").

sition inconsistent with most lower courts and this Court's due process jurisprudence. Mr. Williams's case presents such an opportunity to conclusively establish that a fair trial requires a disinterested prosecutor.

A. To Ensure the Right to a Fair Trial, Due Process Must Encompass the Right to a Disinterested Prosecutor

Overwhelmingly, the jurisdictions that have addressed the issue have arrived at the conclusion that due process prohibits a prosecutor working under a conflict of interest. Indeed, this Court's prior cases provide the framework to mandate such a holding. Mr. Williams's case is thus at odds with the reasoning of this Court and other lower courts, an inconsistency this Court should rectify.

1. Lower Courts Hold that Due Process Requires a Disinterested Prosecutor

Although this Court's opinion in *Young* did not reach the constitutional issue, other lower state and federal courts have done so and found that a fair trial requires the prosecutor to be disinterested. The Supreme Court of Virginia has held that when a private prosecutor holds a civil interest in the outcome of the criminal case being prosecuted, the possibility exists that "private vengeance has been substituted for impartial application of the criminal law," and that the due process violation "cannot be held harmless error." *Cantrell v. Virginia*, 329 S.E.2d 22 (Va. 1985). Similarly, due process was violated when special prosecutors represented the victim in a Tennessee civil case arising from the same incident giving rise to the criminal prosecution. *State v. Eldridge*, 951 S.W.2d 775 (Tenn. Crim. App. 1997); *see also Davenport v. State*, 278 S.E.2d 440 (1981) (holding that defendant denied fair trial by participation of prosecutor in her prosecution where prosecutor had represented

husband in pending divorce proceedings). The Tennessee Court of Criminal Appeals held that the appointment of an interested prosecutor is "plain error affecting the very integrity of our system of justice to the extent that a new trial is the only remedy." *Eldridge*, 951 S.W.2d at 784. Courts of appeals in California, Arizona, and Pennsylvania have come to similar conclusions. *See People v. Dekraai*, 5 Cal. App. 5th 1110, 210 Cal. Rptr. 3d 523 (2016), *as modified* (Dec. 14, 2016) (finding conflict of interest between sheriff's office and district attorney's office violated due process rights of defendant); *Villalpando v. Reagan*, 121 P.3d 172, 175 (Ct. App. 2005) (acknowledging that "prosecutorial conflicts may implicate due-process concerns"); *Commonwealth v. Balenger*, 704 A.2d 1385, 1386 (Pa. Super. 1997) (granting a new trial where the prosecutor was involved in a romantic relationship with the defendant's wife).

The Fourth Circuit Court of Appeals overturned an assault conviction in which the prosecutor represented the defendant's wife in a divorce action based on the assault and offered to drop the criminal charges in exchange for a favorable settlement in the divorce proceedings. *Ganger v. Peyton*, 379 F.2d 709 (4th Cir. 1967). In cases where the complainant hires a private attorney who commits misconduct or effectively controls prosecutorial decisions, United States Courts of Appeals have held that due process is violated. *East v. Scott*, 55 F.3d 996, 1001 (5th Cir. 1995) (finding that allegations that complainant's private attorney's control over the prosecution established a prima facie due process violation); *Stumbo v. Seabold*, 704 F.2d 910 (6th Cir. 1983) (holding that misconduct at trial by private

prosecutor hired by the victim violated due process); *Erikson v. Pawnee Cty. Bd. of Cty. Comm'rs*, 263 F.3d 1151, 1154 (10th Cir. 2001) (acknowledging a due process claim exists when a private attorney effectively controls prosecutorial decisions); *Hughes v. Bowers*, 711 F. Supp. 1574, 1583 (N.D. Ga. 1989), *aff'd*, 896 F.2d 558 (11th Cir. 1990) (due process violated by prosecutor with conflict of interest when petitioner shows either that "the district attorney failed to retain control and management over the case" or "evidence of specific misbehavior on the part of the prosecutor which prejudiced the defendant").

There are few Texas cases regarding prosecutorial conflicts. Some lower Texas courts recognize the potential for a prosecutor's conflict of interest to rise to the level of a due process violation. *See, e.g.*, *In re Guerra*, 235 S.W.3d 392, 431 (Tex. App—Corpus Christi, 2007) (holding that a prosecutor's "direct personal interest in the results of the criminal investigation" potentially conflicted with his duty to seek justice, "ris[ing] to the level of a due process violation"). Texas's high court for criminal matters, on the other hand, has refused to go so far. To date, the CCA has merely advised that prosecutors must voluntarily recuse when there is a conflict of interest, and the failure to recuse *may* constitute a violation of due process. *State ex rel. Eidson v. Edwards*, 793 S.W.2d 1, 6 (Tex. Crim. App. 1990). Otherwise, the CCA has only recognized prosecutorial conflict of interest in very narrow circumstances—when the prosecutor previously represented the defendant in the *same* criminal case being prosecuted. *See id.*; *see also Ex parte Morgan*, 616 S.W.2d 625,

626 (Tex. Crim. App. 1981) (finding that a prosecutor's conflict of interest constituted a violation of due process when the prosecutor, who filed the State's motion to revoke probation, had previously represented the defendant when he was granted probation); *Ex parte Spain*, 589 S.W.2d 132 (Tex. Crim. App. 1979) (holding that prosecutor's conflict of interest violated due process when prosecutor who sought probation revocation was the defendant's prior attorney in the same criminal case).

In Mr. Williams's case, the CCA declined once again to adopt the right that so many other jurisdictions have recognized—the unfettered right to be tried by a disinterested prosecutor. But the Fourteenth Amendment must carry the same protections in Texas as it does in other states. *See Mooney v. Holohan*, 294 U.S. 103, 113 (1935) ("Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution."). Here, the court ignored the authority of the due process jurisprudence of the Courts of Appeals and the courts of other states, relying instead on a single article from an in-state law review which disregarded *Young* as merely persuasive authority. App.B, 111 (citing Edward L. Wilkinson, *Conflicts of Interest in Texas Criminal Cases*, 54 BAYLOR L. REV. 171, 187 (2002)).

2. This Court's Fourteenth Amendment Jurisprudence Finds Intolerable the Risk of Prosecutor Bias, Personal Interests, Vindictiveness, or Bad Faith Infecting Criminal Prosecutions

Due Process and this Court's precedent hold prosecutors to a high standard of conduct. *See, e.g.*, *United States v. Agurs*, 427 U.S. 97, 110-11 (1976) ("[T]hough the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that justice shall

be done."); *see In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases."). Our system of law endeavors "to prevent even the probability of unfairness." *Offutt v. United States*, 348 U.S. 11, 14 (1954). As such, due process is violated when a prosecutor who has motives other than justice prosecutes a defendant.

This Court presumes that a public prosecutor's motivation is the public interest, rather than personal interests. *Town of Newton v. Rumery*, 480 U.S. 386, 395 n.5 (1987) ("[T]he constituency of an elected prosecutor is the public, and such a prosecutor is likely to be influenced primarily by the general public interest."). Although prosecutors need not be completely neutral and detached, their motivations should not go beyond the interests of the State and the people. *See Marshall*, 446 U.S. at 248-50 ("A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.").

Because the duty of the prosecutor is to seek justice, when other factors drive criminal prosecutions, due process is offended. This Court has held that it is a due process violation "of the most basic sort" when a prosecutor is motivated to increase a criminal charge based on retaliation for doing what the law allows or vindictiveness. *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978); *see also Blackledge v. Perry*, 417 U.S. 21, 27 (1974) (finding that the Due Process Clause is offended by increasing

possible punishment upon retrial after appeal when there is a likelihood of prosecutorial vindictiveness). For instance, when a prosecutor *knowingly* acts in bad faith to obtain a conviction, "[i]t can often make even more intolerable errors which demand correction in this Court. *Burgett v. Texas*, 389 U.S. 109, 117 (1967) (Warren, C.J., concurring) (citing *Miller v. Pate*, 386 U.S. 1 (1967) (prosecutor in murder case knowingly mischaracterizing red paint stain as blood); *Napue v. Illinois*, 360 U.S. 264 (1959) (prosecutor promised consideration in exchange for witness testimony and did not correct witness's false testimony); *Mooney*, 294 U.S. 103 (deliberate suppression of impeachment evidence and knowing use of false testimony)); *see also Alcorta v. Texas*, 355 U.S. 28, 31 (1957); *Brady v. Maryland*, 373 U.S. 83 (1963).

This Court's due process jurisprudence relating to prosecutorial conduct elucidates clear boundaries that the prosecution cannot cross. That is, when a prosecutor's efforts deviate, or even appear to deviate, from the public interest and the search for justice, due process is offended. To pass constitutional muster, criminal prosecutions must be free of the infection of the prosecutor's personal interests, actual bias, vindictiveness, and bad faith. It is axiomatic, then, that prosecutors must be disinterested to avoid the intolerable risk of an unfair trial.

B. Sue Korioth Had Multiple Conflicts of Interest that Should Have Prevented Her from Having Any Involvement in Mr. Williams's Prosecution

In *Young*, this Court acknowledged that a prosecutors' critical decisions must be made free from "compromising influences and loyalties." 481 U.S. at 804 n.14. Korioth, however, had a conflict of interest regarding Mr. Williams's case for several

reasons. As a fact witness to the murder investigations, as well as a friend and colleague to the decedents with a personal grudge against Mr. Williams, Korioth was conflicted multiple times over.

It is undisputed that, at a minimum, Korioth was a member of the office that was recused for good cause from prosecuting Mr. Williams's case and that she was someone Wirskye relied on for legal advice and research, drafting, editing, and guidance on strategy. At the state habeas hearing, Mr. Williams presented evidence that Korioth's conflict in this case was multifaceted—she was a fact witness to the investigation, worked with and was friends with the decedents, and had a personal "axe to grind" against Mr. Williams.

Despite this evidence, the habeas court found that Korioth was not a member of the prosecution team simply because she and Wirskye testified that she wasn't, App.B, 95, and that Korioth did not have an actual conflict of interest, *id.* at 90. In fact, the record is clear that Korioth had multiple conflicts of interest that would have prohibited her from openly representing the State in Mr. Williams's prosecution, a fact she acknowledged.

1. Korioth Was a Fact Witness to the Murder Investigations

On April 2, 2013, an FBI Agent and a sergeant from the Kaufman County Sherriff's Office went to the Kaufman County courthouse to conduct an interview with Korioth. *See* 3 SHR 1608-1610. She provided critical information pointing them to Mr. Williams, including that: "Mr. McLelland was convinced that Eric Williams was responsible for the murder of Mr. Hasse"; McLelland and Hasse carried guns on them when "the cases first started with Mr. Williams"; McLelland told her that

another judge advised him of a hit list that had Hasse's and McLelland's names on it, along with others; "Ms. McLelland was scared since the murder of Mr. Hasse and wouldn't let Mr. McLelland leave the house often." *Id.*

Korioth also shared that she was the attorney representing the State on Mr. Williams's appeal of his burglary conviction, that Mr. Williams's health insurance had been canceled because of his conviction, and that "McLelland made lots of people upset when dealing with them." *Id.* This statement provided law enforcement with an indicator of motive the State would later utilize at trial. *Id.* With this knowledge, Korioth could have testified as a fact witness for the State. This Court should hold that Korioth's role as an important fact witness rendered it a conflict for her to also be a prosecutor in Mr. Williams's case. *See Kalina v. Fletcher*, 522 U.S. 118, 130 (1997) ("Indeed, tradition, as well as the ethics of our profession, generally instruct counsel to avoid the risks associated with participating as both advocate and witness in the same proceeding."); *Brown v. State*, 921 S.W.2d 227 (Tex. Crim. App. 1996) (holding that it is "highly improper for a prosecutor to serve as a witness" in the same case).

2. Korioth Had an Axe to Grind with Mr. Williams

This Court has declared that a "scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Marshall*, 446 U.S. at 249-50. However, it left open "whether different considerations might be held to apply if the alleged biasing influence con-

tributed to prosecutions against particular persons, rather than to a general zealousness in the enforcement process." *Id.* at 250, n 12. The Second Circuit has held, however, that a prosecutor "is not disinterested if he has, or is under the influence of others who have, an axe to grind against the defendant, as distinguished from the appropriate interest that members of society have in bringing a defendant to justice with respect to the crime with which he is charged." *Wright v. United States*, 732 F.d 1048, 1056 (2d Cir. 1984).

Korioth admitted that "it is really strange trying to work on [Mr. Williams] capital . . . when you're also in the middle of it" and that it "[r]eally skews perspective." 6 SHRR 116-117; 28 SHRR 88. Despite this admission, she remained involved in the case to fulfill her personal vendetta against Mr. Williams. She knew Mr. Williams from their time working in the Kaufman County Courthouse and had heard McLelland talk openly at work about his suspicions that Mr. Williams was involved in Hasse's murder. 6 SHRR 71. She knew that McLelland and Hasse were "very good friends." *Id.* at 72. Wirskye similarly described Korioth and Hasse as "close friends." 8 SHRR 115. At the post-conviction evidentiary hearing, Korioth did not dispute calling Mr. Williams a "motherf***er" and telling DA Erleigh Wiley that in order for Mr. Williams to get "the needle," the office should remain recused to not create an appellate issue. *Id.* at 84-87.

C. Sue Korioth Prosecuted Mr. Williams

It does not matter that Korioth did not sign pleadings or stand up in court to announce herself on behalf of the State; she nevertheless acted as a prosecutor on Mr. Williams's case. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006)

("Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all.").[5] There are countless choices prosecutors must make behind the scenes that undeniably impact a defendant's case, and Korioth participated in all of them—deciding what evidence to present, witnesses to call, motions to file, legal theories to pursue, and avenues of investigation to take. Certainly, all of these decisions would be considered "integral part[s] of the judicial process." *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976) (holding that a prosecutor's "activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force"); *see also Buckley v. Fitzsimmons*, 506 U.S. 259, 272 (1993) (holding that prosecutors are entitled to absolute immunity, and therefore engaging in acts of prosecution, when they undertake acts "preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State").

It is the practical role of any prosecutor to decide "which persons should be targets of investigation, what methods of investigation should be used, what infor-

[5] In fact, it not surprising that Korioth did not appear in any court proceedings. At the hearing, she testified that she avoids going into courtrooms whenever she can. 6 SHRR 128. Here, however, Korioth likely also did not sign pleadings or stand up in court for the same reason she did not attend meetings the prosecution team had with the defense team—because her work was done covertly. *See* 28 SHRR 77 (Wirskye stating in an email that Korioth would have to sit out a meeting with Mr. Williams's attorneys).

mation will be sought as evidence, which persons should be charged with what offenses, [and] which persons should be utilized as witnesses." *Young*, 481 U.S. at 807. Korioth was vital in each of these aspects of prosecution. She drafted the arrest warrant charging Mr. Williams with capital murder. 28 SHRR 55 (noting sarcastically in same email, "But what do I know, I'm recused . . ."); 6 SHRR 102-03; *see Kalina*, 522 U.S. at 130 (noting that a prosecutor's "determination that the evidence was sufficiently strong to justify a probable-cause finding, her decision to file charges, and her presentation of the information . . . involved the exercise of professional judgment," and "even the selection of the particular facts . . . to provide the evidentiary support for the finding of probable cause required the exercise of the judgment of the advocate"). She provided edits on Wirskye's draft notice of intent to seek the death penalty against Mr. Williams, 28 SHRR 59-60; 6 SHRR 102-03, as well as the State's proposed jury charge for the culpability phase, 6 SHRR 117.

Korioth assisted the prosecution's investigation by uncovering which LexisNexis account Mr. Williams allegedly used in planning the murders by interviewing people in the Kaufman County Courthouse and calling LexisNexis. 6 SHRR 46-47. When the defense team filed a motion for change of venue, Wirskye sent the motion directly to Korioth, who offered to Wirskye, "Let me know what you need from me." 6 SHRR 106-07. Korioth then investigated potential witnesses the State could call to provide controverting affidavits in response to Mr. Williams's motion for change of venue. 6 SHRR 106-07; 28 SHRR 63-65.

One of the more significant aspects of the case Wirskye sought Korioth's advice on was whether to introduce evidence of Hasse's death and Mr. Williams's prior burglary, which had been prosecuted by McLelland and Hasse, at the culpability phase or to hold it for the sentencing trial. 3 SHR 1603-05. In June 2014, Mr. Williams's defense team filed a motion in limine seeking to exclude evidence of the Hasse murder and the burglary conviction. This was a critical strategy call for the prosecution—whether to introduce an entirely different murder in their culpability phase presentation, and how that might impact the defense's ability to contest the capital murder the State was seeking a conviction on, and whether to introduce Mr. William's prior burglary conviction to show motivation for the murder. *See id.* at 1605.

Wirskye forwarded the motion to Korioth, who advised Wirskye, "We have to have argument available because the prior trial is the crux of motive, and Mark's murder, the contents of the storage unit, and the whole course of EW's revenge conspiracies with Kim are critical to proving that he was acting on the motive and to prove [identity]." *Id.* at 1603. Korioth concluded her email offering to help in any way. *Id.* On July 15, 2014 at almost 11:30pm, Wirskye emailed Korioth again eliciting her thoughts regarding whether to introduce evidence of Hasse's death at the culpability phase. *Id.* at 1605 ("More I think about Hasse and 404b, why not hold it?"). Korioth responded that "there was a certain charm" in holding back on the Hasse case and noted that doing so would "confound" the defense at trial. *Id.*

On this important issue, Korioth provided Wirskye with several aspects to consider—how it would surprise the defense, leaving them to consider whether to open the door themselves to the Hasse murder; whether to also bring in the burglary; whether Mr. Williams's wife/co-defendant's testimony would be sufficiently corroborated without the extraneous offenses; how the jury might react to the presentation of evidence. *Id.* Wirskye followed Korioth's consult, and ultimately introduced evidence that Mr. Williams was convicted of burglary by McLelland to show motive at the culpability phase, but waited to introduce Hasse's murder at the sentencing trial.

The habeas court determined that Mr. Williams failed to establish that "Korioth was a decision-making member of the prosecution team or otherwise influenced Wirskye such that he was not making his own independent decisions," a standard not found in any case law in Texas or in this Court's caselaw. App.B, 90.[6] By embracing the formalistic line-drawing by Korioth and Wirskye, 8 SHRR 78 ("Sue was never gonna be on the team."), the court ignored that Korioth was an agent of the prosecution by strategizing, conducting research and investigation, and drafting legal documents on Wirskye's behalf. *Cf. Massiah v. United States*, 377 U.S. 201, 204 (1964) (holding that interrogation by a third-party government agent violated due

[6] The lower court's requirement that Mr. Williams show that Korioth improperly influenced Wirskye's decision-making was legally unfounded and akin to requiring a harm showing. *See infra* Part II.

process and defendant's right to counsel); *see generally* AM. BAR ASSOC., *Crim. Justice Standards for the Prosecution Function* (2017) (applying rules to prosecutors and their "agents"). The CCA then adopted these unsupported, inconsistent findings that the record patently contradicts, without offering any reasoned opinion or rationale for their holding on this important constitutional right. *See* App.A., 2-3.

This Court should affirm the constitutional rule that lower courts have already recognized and this Court's precedent demands: that due process requires a criminal defendant be prosecuted by a disinterested prosecutor. Due process must include a prosecutor free from the inherent conflict in being a witness in that same case and any "biasing influence[s] contributed to prosecutions against *particular persons*, rather than to a general zealousness in the enforcement process." *Marshall*, 446 U.S. at 250, n.12 (emphasis added). In Mr. Williams's case, Korioth was not a disinterested prosecutor, and her significant involvement in Mr. Williams's prosecution violated due process.

II. THE PARTICIPATION OF A CONFLICTED PROSECUTOR IN A DEATH PENALTY TRIAL IS STRUCTURAL ERROR

The habeas court acknowledged that this Court in *Young* "was split as to whether the conflict of interest was subject to harmless error analysis." App.B, 111. Without clear guidance otherwise, the court elected to reject the notion that "prosecution by an interested prosecutor is fundamental error not subject to harmless error analysis" and determined that Mr. Williams did "not show that he was actu-

ally prejudiced." *Id.* at 110. Indeed, because *Young* was a plurality decision, a majority of this Court has not yet confirmed that a person prosecuted by an interested prosecutor is a *per se* due process violation, not subject to harmless-error analysis.[7]

This Court should resolve that outstanding question. In doing so, this Court should consider the practical difficulties in assessing harm in these cases (especially in ones like Mr. Williams's where the conflicted prosecutor's participation was done secretively), that prosecution by a conflicted prosecutor amounts to a fundamentally unfair trial, and this Court's reasoning in its recent decision holding that judicial conflict was subject to structural error in *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016). Mr. Williams urges this Court to ultimately pronounce that a conflicted prosecutor's participation in a defendant's criminal trial constitutes structural error.

A. The Harm Caused by Korioth's Participation in Mr. Williams's Prosecution Is Virtually Impossible to Measure

It may be impossible for a defendant to prove that he was harmed by a conflicted prosecutor's involvement in his case, especially if it was done surreptitiously.

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[7] Many jurisdictions have decided on their own that a defendant need not show he was harmed because he was prosecuted by a conflicted prosecutor. *See, e.g.*, *United States v. Sigillito*, 759 F.3d 913, 928 (8th Cir. 2014) ("[T]he presence of an interested prosecutor is a fundamental error that 'undermines confidence in the integrity of the criminal proceeding.'") (citing *Young*, 481 U.S. at 810); *see also United States. v. Smith*, No. 87-1274, 1991 WL 113192, at *3 (9th Cir. June 24,1991) (deciding that "the decision in *Young* has foreclosed case-specific inquiry by characterizing appointment of an interested prosecutor as 'fundamental error'"). Others have pointed out that *Young* did not affirmatively settle whether being tried by a disinterested prosecutor is structural error. *See, e.g.*, *United States. v. Scrushy*, No. 2:05-cr-119-MEF, 2012 WL 204159, at *8 (M.D. Ala. Jan. 24, 2012), *aff'd*, 721 F.3d 1288, 1307-8 (11th Cir. 2013), *cert. denied*, 571 U.S. 1185.

This Court has recognized that some constitutional errors do not require a harm showing when the errors are "structural," *i.e.*, errors that "'affect the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.'" *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017) (citing *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). To determine whether an error is structural, a court can consider whether "the effects of the error are simply too hard to measure." *Id.*; *see also Gonzalez–Lopez*, 548 U.S., at 149, n. 4 (holding that a public-trial violation is structural error because of the "difficulty of assessing the effect of the error"); *Waller v. Georgia*, 467 U.S. 39, 49, n. 9 (1984). Here, because the "constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm." *Vasquez v. Hillery,* 474 U.S. 254, 263 (1986).

First, it is difficult to gauge the impact of Korioth's involvement in Mr. Williams's case due to the broad discretion enjoyed by prosecutors. *See Bordenkircher*, 434 U.S. at 365 ("There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse."). That such discretion involves decisions made outside the eye of the trial court was one of the animating concerns in a section of Justice Brennan's opinion that a seven-justice majority of justices joined in *Young*:

> A prosecutor exercises considerable discretion in matters such as the determination of which persons should be targets of investigation, what methods of investigation should be used, what information will

> be sought as evidence, which persons should be charged with what offenses, which persons should be utilized as witnesses, whether to enter into plea bargains and the terms on which they will be established, and whether any individuals should be granted immunity. *These decisions, critical to the conduct of a prosecution, are all made outside the supervision of the court*.

481 U.S. at 807 (emphasis added). Because "the reasons for a prosecutor's discretionary decisions rarely appear in the record, [] one often cannot know what different decisions a nonconflicted prosecutor would have made." *People v. Vasquez*, 137 P.3d 199 (Cal. 2006), *cert. denied*, 127 S. Ct. 1262 (2007).

Relatedly, the reasons and strategy behind exercising that discretion are often cloaked in work product or are never revealed to the defense. It is therefore impractical to put the onus on the defendant to uncover the myriad of ways in which the conflicted prosecutor was involved in the prosecution. That Mr. Williams was able to obtain the evidence he did of Korioth's involvement does not mean he uncovered all of it, or that any other criminal defendant in a similar position would be able to. Indeed, one of the reasons Korioth's impact on Mr. Williams's trial is impossible to assess with precision is because of the furtive nature of Korioth's involvement.

Just as the deprivation of the right to counsel of choice is a structural error because "[d]ifferent attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument," the same is true for prosecutorial decisions. *See Gonzalez-Lopez*, 548 U.S. at 150. It is "impossible to know what different choices the rejected counsel would have made,

and then to quantify the impact of those different choices on the outcome of the proceedings." *Id.* Here, it is indisputable that Korioth gave advice in nearly every aspect of Mr. Williams's case—she offered strategic voir dire advice, advised the lead prosecutor on presenting evidence during the culpability and sentencing trials, investigated several fact witnesses, and conducted legal research on issues surrounding the prosecution's star witness. 8 SHRR 67.

Korioth's involvement infected the entire framework of Mr. William's trial such that her efforts are virtually inextricable from those of Prosecutor *Pro Tem* Wirskye. It is impossible for Mr. Williams to know the details of every late-night phone call and meeting Wirskye and Korioth had, 6 SHRR 88-89; 8 SHRR 125-26, and how those discussions impacted Wirskye's decisions throughout the case. *See Marshall*, 446 U.S. at 249-50 (1980) ("A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions."). Engaging in retrospective conjecture as to what decisions Wirskye would have made without Korioth's advice just to attempt to assess the harm her participation caused to Mr. Williams "would be a speculative inquiry into what might have occurred in an alternate universe." *Gonzalez-Lopez*, 548 U.S. at 150.

B. Prosecutors Working Under a Conflict of Interest Deprive Defendants of the Right to and the Public's Confidence in a Fundamentally Fair Trial

Korioth's participation in Mr. Williams's prosecution rendered his trial fundamentally unfair because she touched so many different aspects of his case, and

all in secret. This furtive participation of a recused, conflicted prosecutor would certainly undermine the public's confidence in the integrity of Mr. Williams's trial. The deprivation of Mr. Williams's right to a fair trial and the public's confidence in his proceedings also render the error structural. *Weaver*, 137 S. Ct. at 1908 (categorizing error as structural if it rendered the trial fundamentally unfair or "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest").

This Court recognizes that defendants' constitutional rights must be safeguarded, not just to protect the specific right itself, but to ensure a fair trial. *See, e.g.*, *United States v. Cronic*, 466 U.S. 648, 659 (1984) (noting that "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial"). The ways in which a conflicted prosecutor could impact a defendant's right to a fair trial are innumerable. This Court should recognize that there will be inherent constitutional concerns when a conflicted prosecutor participates in prosecuting a defendant, especially when that prosecutor has a personal axe to grind against a defendant in death penalty proceedings.

Further, the prosecutor's responsibilities are not just to protect the defendants they seek to convict, but also the public at large. A prosecutor's

> obligation is to secure a fair and impartial trial for the public and for the defendant. His obligation to the defendant in this regard is as great as is his obligation to the public. The district attorney is vital to the administration of justice and to the vindication of constitutional rights.

Commonwealth v. Tabor, 376 Mass. 811, 819 (1978). A prosecutor is a "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). A prosecutor has a "distinctive role" because the "'responsibility . . . differs from that of the usual advocate; his duty is to seek justice, not merely to convict." *Young*, 481 U.S. at 803 (citing AM. BAR ASSOC., *Model Code of Prof'l Responsibility*, Ethical Consideration (EC) 7–13 of Canon 7 (1982) . Certainly, a prosecutor "may prosecute with earnestness and vigor," but his or her job is "to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger*, 295 U.S. at 88.

These prosecutorial responsibilities also serve to protect jurors' expectations that they are participating in a fair, just process. *Id.*("It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed."). Consequently, prosecution by a conflicted prosecutor is structural error because it undermines the public's, including jurors', faith in the criminal justice system.

This Court holds sacred the public's faith that the criminal justice system is fair. *See, e.g.*, *Batson v. Kentucky*, 476 U.S. 79, 99 (1986) ("[P]ublic respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race."). A prosecutor's re-

sponsibility to maintain the fairness and integrity of the proceedings, and the public's confidence in them, should require that they be disinterested from trying the case at hand. Any violation of the State's obligation to prosecute in a disinterested fashion "creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general." *Young*, 481 U.S. at 811.

C. This Court's Reasoning for Identifying Structural Error When a Conflicted Judge Participates in a Capital Case Applies to Conflicted Prosecutors

This Court recently settled that a conflicted judge's participation in a criminal case constitutes structural error. *See Williams v. Pennsylvania*, 136 S. Ct at 1909. In *Williams v. Pennsylvania*, a defendant in a capital case was denied relief by his state supreme court. *Id.* at 1903. One of the justices on the state supreme court was the district attorney who gave his official approval to seek the death penalty in the case. *Id.* The questions this Court answered were whether the participation of the justice was a violation of due process and, if so, whether it constituted structural error. *Id.* at 1903, 1909.

This Court first noted that "[t]he deliberations of an appellate panel, as a general rule, are confidential. As a result, it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues during the decision-making process." *Id.* at 1909. As Justice Brennan observed in his *Lavoie* concurrence, "while the influence of any single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition." *Id.* (citing *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 831 (1986)).

The conflicted-prosecutor situation in Mr. Williams's case is highly analogous. While it may be impossible to know exactly how much influence Korioth wielded over Prosecutor *Pro Tem* Wirskye, there is no doubt her involvement shaped Wirskye's decision making. Wirskye admitted that they could not have gotten a death sentence against Mr. Williams's "except for [her] help." 8 SHRR 130. That it is difficult to know just how much, however, underscores why her participation constituted structural error.

Importantly, this Court in *Williams v. Pennsylvania* understood that "it does not matter whether the disqualified judge's vote was necessary to the disposition of the case. The fact that the interested judge's vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position." *Williams v. Pennsylvania*, 136 S. Ct. at 1909. Just as with the judge in *Williams v. Pennsylvania,* the prosecutor *pro tem* sought out Korioth's advice because he trusted her professional judgment and legal expertise, and she regularly persuaded Wirskye to "adopt . . . her position" in his decisions that influenced Mr. Williams's case. *Id.* Wirskye admitted that he relied on Korioth to "decide who [he] could trust, you know, make some decisions based on her input." 8 SHRR 66-67. Wirskye admitted that he "used [Korioth] for legal advice" and "legal support," noting she "was an expert in capital punishment." *Id.* at 126. And Wirskye clearly considered Korioth his right-hand legal mind, leaning on her countless times throughout the case's duration. *See* 8 SHRR 66 (Wirskye referring to Korioth as his "legal phone a friend."). Just as a conflicted judge's involvement cannot easily be

quantified to determine the harm, so too is a prosecutor's involvement throughout trial inextricable from the decisions, strategies, and actions of the rest of the prosecution team. This Court should therefore hold that the substantial involvement of a conflicted prosecutor, particularly in a death penalty case, is a structural error that is not subject to a harmless error analysis.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

OFFICE OF CAPITAL & FORENSIC WRITS

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/s/ Sarah Cathryn Brandon
Benjamin B. Wolff, Director
Ashley Steele
Sarah Cathryn Brandon,
Counsel of Record
1700 North Congress Avenue, Suite 460
Austin, Texas 78701
(512) 463-8600

Counsel for Petitioner,
Eric Williams