No. 20-7251

IN THE
SUPREME COURT OF THE UNITED STATES

ERIC LYLE WILLIAMS,
Petitioner,
v.

THE STATE OF TEXAS,
Respondent.

(CAPITAL CASE)

On Petition for Writ of Certiorari from the
Court of Criminal Appeals of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Petitioner, Eric Lyle Williams, presents two questions for review. First, he asks whether the participation of "a conflicted and recused prosecutor" violates due process. Second, he asks whether "the undisclosed participation of a conflicted prosecutor" amounts to structural error not amenable to a harm analysis.

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The State files this brief in opposition to Williams' petition for certiorari review.

STATEMENT OF THE CASE

Procedural History

Williams was sentenced to death for the capital murder of Cynthia and Mike McLelland. His conviction and sentence were affirmed on direct appeal. *Williams v. State*, No. AP-77,053, 2017 WL 4946865 (Tex. Crim. App. Nov. 1, 2017) (not designated for publication). Williams then filed an application for habeas relief under state law. The trial court conducted a lengthy hearing on the habeas claims at which both sides presented live testimony, affidavits, and other evidence. Afterward, the court issued fact findings and recommended the denial of relief. The Texas Court of Criminal Appeals adopted the trial court's findings and denied relief. *Ex parte Williams*, No. WR-85,942-01, 2020 WL 5540714 (Tex. Crim. App. Sept. 16, 2020) (not designated for publication). Williams seeks certiorari review of the Court of Criminal Appeals' decision. His petition rests solely on the court's rejection of his claim that his right to due process was violated by "a recused and conflicted" prosecutor's participation in his prosecution.

Factual Summary

On January 31, 2013, Mark Hasse, an Assistant District Attorney for Kaufman

County, Texas, was shot to death outside the courthouse. (Finding 277).[1] Two months later, the elected DA of Kaufman County, Mike McLelland, and his wife, Cynthia, were shot to death in their home. (Finding 293).

The murders – a patent attack on the criminal justice system – rocked the Kaufman County DA's Office. In addition to the emotional impact, they crippled the office's day to day operations. (Findings 325, 332; 8 WRR 64).[2] The office employed only thirteen prosecutors, Hasse being the one with the most felony trial experience. (Findings 271-72, 275). Overwhelmed, McLelland, and later his first assistant, voluntarily recused the office from the investigation and prosecution of the cases. (Findings 278, 281, 288, 294-95, 396). Two prosecutors pro tem – Bill Wirskye and Toby Shook – were appointed to take over. Both were well-known former prosecutors with significant experience prosecuting murders. (Findings 282-83, 286, 289). Together, Wirskye and Shook spearheaded an unprecedented

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[1] "Findings" references the trial court's findings of fact and conclusions of law which the Texas Court of Criminal Appeals subsequently adopted. The findings accompany Williams' petition as Appendix B.

[2] Kaufman District Attorney Pro Tem Bill Wirskye testified:

> It was PTSD. They were very emotional. You know, that office took a gut punch after Hasse was, Mark Hasse was murdered. After the McLellands were murdered, it was completely decapitated, and those prosecutors were just a shell of themselves. And we had concerns whether that office was going to continue to exist as a viable prosecutor's office and make their docket calls and whether criminal justice was actually going to continue on in the days after the murders.

investigation that culminated in Williams' apprehension, conviction, and death sentence. They were assisted by eighteen investigative agencies, both state and federal, and they received resources from multiple DA's offices, including office equipment, work space, and manpower. (Findings 290, 325-30; 8 WRR 71-72, 90-91, 111-12).

Initially, the suspect pool was quite large. Hasse, a pugnacious personality who began his career in the Dallas DA's Office decades before, had prosecuted hundreds of felons over the years. (Findings 279, 291). That pool shrank considerably after Mike McLelland's murder, however. There existed one obvious common denominator between the two murdered prosecutors – Williams. (Finding 296). A few months before the murders, Hasse and McLelland had successfully prosecuted Williams – a Kaufman County Justice of the Peace – for burglary. Williams turned down Hasse's plea bargain offer, and a reputedly contentious trial followed. In the end, Williams' sentence was probated. But as a result of his conviction, he lost his bench and his bar license, leaving him without income or health insurance. (Finding 276; Findings "Background Facts" at 8, 13, 19).

The Kaufman County DA's Office voluntarily recused[3] itself from the

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(8 WRR 64).

[3] Texas statutory law provides prosecutors who are not disqualified a vehicle for voluntarily removing themselves from a case. Thus, a prosecutor without an actual conflict

McLellands' murder case, and Wirskye and Shook were appointed. (Findings 294-95, 396). In the months following the McLellands' murders, Wirskye, Shook, and a multitude of law enforcement officers doggedly pursued and accrued a mountain of evidence inculpating Williams in the murders. Most notably, they linked him to: the weapon used to kill Mark Hasse, the casings found at the scene of the McLellands' murders, the Crime Stoppers tips claiming credit for the murders and containing information known only to the killer, and a storage unit containing a cache of weaponry, police gear. Also found was a surplus police vehicle that had been video-recorded leaving and returning to the unit the morning of the McLellands' murders. (Findings 325-28; Findings "Background Facts" at 8-18). In addition, Williams' wife, Kim Williams, cooperated and turned State's witness, admitting she helped Williams plan and execute the murders as revenge for his burglary prosecution. (Finding 480; Findings "Background Facts" at 18-24).

Armed with this evidence, Wirskye and Shook tried Williams for the capital murder of Cynthia and Mike McLelland. (Findings "Procedural History" at 45). Several prosecutors from other DA's offices assisted them, including Sue Korioth, the appellate prosecutor in the Kaufman County DA's Office. (Finding 347). It is Korioth's involvement on which Williams bases his due process claim. (Findings

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of interest may nonetheless remove himself from a case based on "good cause." Tex. Code Crim. Proc. art. 2.07(b-1) ("An attorney for the state who is not disqualified to act may request the court to permit the attorney's recusal in a case for good cause, and on approval

263-64).

On state habeas review, Williams argued Korioth had a conflict of interest that was imputed to Wirskye and, thus, deprived him of a disinterested prosecutor. (Findings 263-64, 321). Williams seeks certiorari review to revisit the issue, but he presents no valid basis for doing so.

ARGUMENT

Williams argues the state court's ruling on his due process claim is predicated on "unsupported, inconsistent findings that the record patently contradicts." (Petition at 23). This is untrue. The state court rationally rejected Williams' claim based on facts firmly founded in the record, and Williams' petition disregards and misrepresents facts seminal to that ruling. Furthermore, disposition of Williams' claim does not turn on this Court recognizing a due process right to a disinterested prosecutor. The state court recognized that constitutional right. It simply found no violation of it in Williams' case. For these reasons, further review by this Court is unwarranted.

Findings Rejecting Due Process Claim

The state court rejected Williams' due process claim because he failed to prove Korioth had an actual conflict of interest that could be imputed to Wirskye. (Findings 266-68). Specifically, the court found Korioth was not a fact witness and

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of the court, the attorney is disqualified.").

had no personal ax to grind against [Williams]." (Findings 423, 424, 447). Consequently, the court found Williams failed to prove "Korioth was partial or 'interested' or that she had an actual conflict of interest in the case." (Finding 460). Moreover, the court found Williams presented no evidence that Korioth influenced the investigation, and no evidence indicated that she swayed the investigation to focus on him. (Finding 343). In fact, the court found Williams "overstate[d] Korioth's level of participation and influence." (Finding 368). And the court found there was no evidence that Wirskye or Shook abdicated their decision-making responsibilities to Korioth. (Finding 370, 391). In short, the court found Williams was tried by disinterested prosecutors. The court based these findings on evidence presented during the writ proceedings, including testimony from Korioth and Wirskye and emails reflecting contributions made by Korioth.

Misrepresentations and Omissions of Fact

In his petition, Williams portrays Korioth's motives and role in an altogether different light. In doing so, he misrepresents and omits facts found by the state court and supported by the evidence. And ultimately, he leaves a false picture of Korioth's intentions and her influence on the investigation and prosecution.

First, he misrepresents Toby Shook's role. According to Williams, Shook was appointed "as an assistant prosecutor pro tem." (Petition at 3). But the orders of appointment show undisputedly that Wirskye and Shook were both appointed as

District Attorneys pro tem.[4] (2nd Supp. CR 4-13). And the state court recognized the same throughout its findings. (Findings 289, 295, 324, 345, 370). These appointments gave both Wirskye and Shook all of the powers and duties of the elected DA in Williams' case. *Id*. Yet, notably, Williams focused his interested prosecutor claim in state court on Korioth's influence on Wirskye. He neither argued nor proved what, if any, influence she had on Shook. (Findings at p. 98, fn. 22). Now, in turn, he attempts to downplay Shook's role.

Second, Williams portrays Korioth as an influential playmaker who made significant contributions to the investigation and prosecution. He asserts "Korioth's involvement infected the entire framework of [his] trial such that her efforts [were] virtually inextricable from those of Prosecutor Pro Tem Wirskye." (Petition at 27). Also, he refers to Korioth as a member and an agent of the prosecution team who maintained frequent contact with Wirskye, Shook, and various law enforcement officers. (Petition at 6-8, 22).

The trial court found, however, that Williams "overstates Korioth's level of participation and influence." (Finding 368). The court determined Korioth was one of a plethora of people involved in the case, including officers from multiple state

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[4] Wirskye explained that "[p]rosecutors were dying"; so he and Shook were both fully empowered as the pro tem in case one of them was murdered in the course of the investigation and prosecution. Wirskye referred to this as a "built in redundancy." (6 WRR 69).

and federal law enforcement agencies and prosecutors from other DA's offices and the U.S. Attorney's Office for the Northern District of Texas. (Findings 325, 347). Korioth was peripherally involved in the investigation, serving largely as a liaison with the Kaufman County DA's Office. (Findings 330-35). Wirskye placed boundaries on their conversations, which Korioth respected, and he gave Korioth information "kind of on a need to know basis." (Finding 373, 375-79). And although Korioth gave Wirskye legal advice, it was akin to that of a researcher or paralegal. (Finding 336, 372, 380, 382-90). Korioth was a well-respected appellate attorney and friend who had provided Wirskye similar assistance in his private practice. (Findings 371-72). Wirskye and Korioth both expressly denied she was a member of the prosecution team or had any decision-making authority. (Findings 337, 348-49, 373, 378, 381).

Williams' portrayal of Korioth's involvement rests largely on the emails she was party to. (Petition 4, 7). But the court disagreed with Williams' take on these emails. The court found the emails show Korioth generally assisted Wirskye, but "[t]hey do not establish Korioth was a decision-making member of the team or otherwise influenced Wirskye such that he was not making his own independent decisions." (Finding 307). And while recognizing that the emails show Korioth offered her opinion on certain issues, the court found "the evidence does not show if, or to what extent, Wirskye adopted and applied those opinions." (Finding 308). The court also rejected Williams' claim that the number of emails demonstrates an inappropriate level of involvement. Placing the emails in proper context, the court

noted the wide-ranging and unique scope of the investigation and prosecution and the enormous amount of emails Wirskye exchanged with others throughout. At times, Wirskye was party to over 100 emails a day. (Findings 309, 350-51). He was also attending countless meetings with various investigative agencies. By comparison, Korioth attended very few meetings, a fact the emails do not contradict. (Findings 326-28, 337, 352-60).

Third, Williams states Korioth "exhibited a personal hatred toward" him and "remained involved in the case to fulfill her personal vendetta against" him. (Petition at 6, 18). This is a gross mischaracterization of Korioth's personal feelings about Williams.

The state court found Korioth had no personal ax to grind against Williams; nor did she have a deep resentment and animosity toward him on a personal level that was so intolerable as to create an actual conflict of interest. (Findings 446-47). As evidence of Korioth's animus toward him, Williams points to her profane references to him in emails and in a book Erleigh Wiley (the current Kaufman County DA) wrote about the murders. (Petition at 6, 18). Korioth did not deny making the statements. (Findings 440, 444, 458). But as she stated and Wirskye confirmed, she was known for her "foul mouth" and used such profanity with regularity. Thus, her remarks did not indicate an abnormal hostility toward Williams. (Findings 441-42, 455). Instead, as Korioth explained, any animus

reflected in her remarks stemmed from her disregard for someone who would kill three people and steal county property – not from some unrelated, personal dislike of Williams. (Findings 444, 458). Her sole motivation was to see the true murderer – whoever that was – caught and prosecuted so that the killing would stop. (Finding 456).

Indeed, Korioth had no grounds for personal animosity toward Williams. She had little dealings with him before the murders and was only minimally involved in his burglary trial. (Findings 448-53). In her words, she was not impressed by him because she was not impressed by small town JPs, but otherwise, she really had no opinion of him. (Findings 454-55). Moreover, Korioth did not have strong personal feelings for Hasse. Williams premises much of his argument on his assertion that "Korioth and Hasse were close friends." (Petition at 5). But this assertion was based solely on a statement from a law review article Wirskye wrote after trial, and the state court found it unreliable. (Finding 407). Korioth testified she and Hasse were not friends but "worked find together." (Finding 409). Korioth had only passing dealings with Hasse when they worked together in the Dallas County DA's Office. (Finding 275). They interacted more in the Kaufman County DA's Office, but their relationship remained strictly professional. (Findings 408-09). Korioth stated, "[W]e, to say things mildly, we saw things very differently in life; and we didn't, didn't socialize." (Finding 409). The state court found Korioth's testimony relevant and conclusive evidence of the true nature of the relationship. (Finding 410).

Fourth, Williams asserts that "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." (Petition at 5-6). According to him, Korioth provided "critical information" that pointed investigators to him before he was a suspect. (Petition at 6, 16). These assertions are patently false.

The court found Korioth was not a fact witness and that Williams overstated the significance of the information she gave investigators. (Findings 424, 430). The entire DA's Office was interviewed, and Korioth did not possess unique information. (Findings 425, 427). What she knew was, in large part, known by others, e.g., Williams' "hit list" and McLelland's focus on Williams after Hasse's murder. Plus, her statements about how the killer gained entry into the McLellands' home were mere speculation, not fact. (Findings 340, 428-29). Korioth was at home in Dallas at the time of all the murders. (Findings 277, 423).

Furthermore, unlike McLelland, Korioth was not hyper-focused on Williams for Hasse's murder. Hasse had been prosecuting for many years and likely made many enemies with his aggressive style. (Finding 279). Korioth thought there other possible suspects and felt McLelland had tunnel vision where Williams was concerned. (Findings 338, 341, 457, 477).

More importantly, Korioth had nothing to do with Williams becoming a suspect. Williams was a person of interest moments after Hasse was shot. (Finding

339). That very morning, the sheriff sent deputies to his house to investigate his whereabouts and possible connection to the crime. (Findings at p. 15). And despite the suspicions of many, the investigation did not just focus on Williams. (Findings 291, 342). Williams became the primary suspect only after the McLellands' murders; at that point, he was the common denominator between the murders. (Finding 296, 339).

Finally, throughout his petition, Williams asserts that Korioth's assistance was covert and secret. (Petition at ii, 4, 19 n.5, 24, 26-28). He maintains Wirskye kept it from opposing counsel so they could not object to it. (Petition at 4). According to him, Korioth's involvement was discovered after trial in emails his writ counsel "uncovered." (Petition at 4). Williams never presented this fact issue to the state court for resolution, conveniently raising it for the first time in this Court. Still, Wirskye expressly refuted it during his testimony. According to him, "Everybody knew [about Korioth's assistance]. I mean it was never a secret." He also stated that the defense team was included on some of the emails which included Korioth. (8 WRR 80-81). Moreover, the record excerpt Williams relies on shows his trial counsel was aware of Korioth's presence during the proceedings, even if he was uncertain of the reason for it. (5 WRR 25).[5]

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[5] John Wright testified, "Sue Korioth was an assistant district attorney in Kaufman County. And I, I don't, I don't know if she had any official role in the prosecution or not. I, I saw her

Also, Williams' counsel did not unearth hidden emails. Williams obtained the emails in question because the State volunteered them. Before the writ application was filed, Wirskye opened his trial files, including work-product, to state habeas counsel. He did this in response to an informal request, not the formal discovery process. (Finding 299-301). Then, during the writ proceedings, Wirskye offered counsel hundreds of additional emails he later recovered from his email account and laptop. (Finding 302). Korioth's involvement in the case was not hidden from Williams.

Plainly put, Williams' petition rests on assertions of fact that were rejected by the state court based on substantial, credible record evidence. Thus, even if this Court were inclined to recognize a due process right to a disinterested prosecutor, the outcome of Williams' case would remain unchanged.

State Court Recognized Due Process Right

In addition to his inaccurate account of the facts, Williams misrepresents the state court's position on the law. He argues that while state and federal courts have recognized that due process mandates a disinterested prosecutor, the Texas Court of Criminal Appeals refused to recognize the right in his case. (Petition at 9-10). The court's findings reflect otherwise.

Based on this Court's precedent and state law interpreting the same, the state

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in the courtroom few times, but I don't know what her role was. She did not address the

court held that due process prohibits prosecution by a person with an actual conflict of interest. (Finding 314) (citing *Ex parte Reposa*, No. AP-75,965, 2009 WL 3478455 (Tex. Crim. App. Oct. 28, 2009) (orig. proceeding) (not designated for publication), *Landers v. State*, 256 S.W.3d 295 (Tex. Crim. App. 2008), and *Haywood v. State*, 344 S.W.3d 454 (Tex. App. – Dallas 2011, pet. ref'd)). The court determined that such a conflict exists if the "potential for misconduct is deemed intolerable." (Finding 315) (citing *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987)). It is intolerable per se for a prosecutor to prosecute someone he previously represented in the same case. (Finding 316) (citing *Reposa*). But if the conflict arises from some other cause, it must cause the defendant actual prejudice to be intolerable. (Findings 317-18) (citing *Reposa* and *Haywood*). Thus, a conflict premised on a prosecutor's personal bias or grudge against the defendant does not merit disqualification unless an actual conflict exists that prejudiced the defendant. (Finding 318) (citing *Marshall v. Jerrico, Inc*., 446 U.S. 238 (1980), *Reposa,* and *Haywood*).

This interpretation of the law is consistent with Eighth and Eleventh Circuit precedent. *See e.g.*, *United States v. Sigilito*, 759 F3d 913, 928 (8th Cir. 2014), *cert. denied*, 574 U.S. 1104 (2015) (interpreting *Young* to require a showing of an actual conflict of interest); *United States v. Scrushy*, 721 F.3d 1288, 1307-08 (11th Cir. 2013), *cert. denied*, 571 U.S. 1185 (2014) (interpreting *Young* to require a showing

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judge or the jury so far as I recall." (5 WRR 25).

of a clear conflict of interest). Even some of the cases Williams cites recognize that there can be no violation of the right to a disinterested prosecutor without the existence of an actual conflict. *See e.g.*, *People v. Dekraai*, 5 Cal. App. 5th 1110, 210 Cal. Rptr. 3d 52 (Ct. App.), *modified*, No. G051696, 2016 Cal. App. LEXIS 1089 (Dec. 14, 2016) (upholding trial court's conclusion that "there was a genuine conflict of interest"); *Villalpando v. Reagan*, 121 P.3d 172, 175-77 (Ariz. Ct. App. 2005) (refusing to find due process violation based on the "mere appearance of impropriety"); *Commonwealth v. Balenger*, 704 A.2d 1385, 1390 (Pa. Super. 1997) (holding prosecution is barred where actual conflict of interest affecting prosecutor exists).

Yet, Williams would have this Court disavow the requirement of an actual conflict. He would hold prosecutors to the same level of disinterest demanded of judges. (Petition at 30-31). Under his terms, even the appearance of conflict would disqualify a prosecutor. (Petition at 12, 14, 15). This Court has already determined that this level of disinterest is not required of prosecutors.

In *Marshall v. Jericho*, this Court held that the rigid neutrality requirements applicable to the judiciary do not extend to prosecutors. 446 U.S. 238, 248 (1980). Unlike prosecutors, judges have a duty to "make the final decision and [their] impartiality serves as the ultimate guarantee of a fair and meaningful proceeding." *Id*. at 250. Thus, as this Court recently stated in *Williams v. Pennsylvania*, due process

demands a judge free of any "potential for bias." 136 S.Ct. 1899, 1905 (2020). Prosecutors, on the other hand, "need not be entirely neutral and detached.'" *Marshall v. Jericho*, 446 U.S. at 248-49. Although they are public officials who must serve the public interest, prosecutors are advocates and are "necessarily permitted to be zealous in their enforcement of the law." *Id*. at 248.

Thus, not surprisingly, this Court has expressly recognized that an interested party's knowledge and familiarity with a case "may be put to use in *assisting* a disinterested prosecutor." *Young*, 481 U.S. at 806 n. 17 (emphasis in original); *Person v. Miller*, 854 F.2d 656, 663 (4th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989) (noting that "the *Young* Court was at pains to point out that private counsel's greater familiarity with the case might properly 'be put to use in assisting a disinterested prosecutor'"). Moreover, this Court suggested the limits of such assistance, stating simply that the interested party must not "be in control of the prosecution." *Young*, 481 U.S. at 806 n. 17; *Person*, 854 F2d at 663.

Consistent with this Court's own suggestion, the state court examined Korioth's influence over and impact on Williams' case. After a thorough review of the record and extrinsic evidence, the court found Wirskye and Shook maintained control over the investigation and prosecution. Williams presents no authority or credible facts on which this Court could base a reversal of that ruling.

Williams' failure to demonstrate an actual conflict makes his case a poor vehicle for examining the viability of harm analyses in interested prosecutor claims.

Before deciding whether a conflicted prosecutor claim is amenable to a harm analysis, there must be some showing of an actual conflict. Without it, the issue of harm is moot.

In the end, Williams shows nothing more than his own discontent with the state court's assessment of the weight and credibility of the evidence pertaining to his due process claim. Therefore, his petition for certiorari review should be denied.

State Court's Opinion Is Unpublished

Finally, the fact that the Texas Court of Criminal Appeals issued an unpublished opinion on this matter further weighs against granting certiorari. Rule 77.3 of the Texas Rules of Appellate Procedure states that "unpublished opinions [of the Texas Court of Criminal Appeals] have no precedential value and must not be cited as authority by counsel or by a court." *See* Tex. R. App. P. 77.3. Therefore, certiorari is unnecessary because the opinion cannot be used to affect any future Texas defendants.

CONCLUSION

For the foregoing reasons, the State of Texas respectfully requests that the Court deny Williams' petition for writ of certiorari.

Respectfully submitted,

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