No. 20-7251

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

REPLY BRIEF

CAPITAL CASE

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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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In support of his petition for writ of certiorari to review the Texas Court of Criminal Appeals ("CCA") judgment, Eric Williams respectfully files this reply to the State's Brief in Opposition ("BIO").

ARGUMENT

I. TEXAS HAS NOT RECOGNIZED THE DUE PROCESS RIGHT TO A DISINTERESTED PROSECUTOR

In its BIO, the State incorrectly claims Mr. Williams misrepresented the state court's position on the law, and insinuates that the state court has already

acknowledged a due process right to a disinterested prosecutor. BIO at 13 ("He argues . . . the Texas Court of Criminal Appeals refused to recognize the right [to a disinterested prosecutor] in his case."). The State then recites the court's findings regarding the current law in Texas: "It is intolerable per se for a prosecutor to prosecute someone he previously represented in the same case. *But if the conflict arises from some other cause, it must cause the defendant actual prejudice to be intolerable*." *Id*. at 14 (internal citations omitted) (emphasis added); *see also* Amended FFCL at 88-89. Mr. Williams does not dispute that this is the current state of the law. The distinction Mr. Williams seeks to make, however, is that the Texas Court of Criminal Appeals ("TCCA") has never held that there is a *per se* due process right to be tried by a disinterested prosecutor, and that there is no articulated standard from this Court to apply.

To support its claim that Texas *already* "recognized [the] due process right" to a disinterested prosecutor, the State cites unpublished TCCA case, *Ex parte Reposa*, 2009 WL 3478455 (Tex. Crim. App. 2009) (not designated for publication). BIO at 13; *see also* App.B, 89. But *Reposa* did not hold that a defendant has the *per se* right to be tried by a disinterested prosecutor. In *Reposa*, the TCCA reiterated its that where "the district attorney prosecuted a defendant whom he had previously represented in a separate case," there exists "an obvious conflict on its face, which merits automatic disqualification." *Reposa*, 2009 WL 3478455, at *10. That situation is the only time the TCCA acknowledges a *per se* prosecutor conflict of interest.

See Petition at 12-13 (citing *Ex parte Morgan*, 616 S.W.2d 625, 626 (Tex. Crim. App. 1981); *Ex parte Spain*, 589 S.W.2d 132 (Tex. Crim. App. 1979)).

Reposa alleged his prosecutor had a personal bias against him. *Reposa*, 2009 WL 3478455, at *8-12. Yet the TCCA pointed out that unless the prosecutor previously represented him, "the applicant must demonstrate that an actual conflict of interest existed which prejudiced him[.]" *Id.* at *10. The court also noted that this Court in *Marshall v. Jerrico* "declined to specify what the limits on a prosecutor's personal interest might be." *Id.* at *11 (citing *Marshall v. Jerrico*, 446 U.S. 238, 250, (1980). The TCCA then determined that the prosecutor in *Reposa* was not biased against the defendant, a factual scenario far different from Korioth's participation in Mr. Williams's case. *Id.* at *12 ("The bulk of the applicant's claim that Leavitt was not a 'disinterested prosecutor' seems to turn on alleged prosecutorial overreaching and overly zealous prosecution, including introducing extraneous evidence.").

The TCCA concluded its analysis after determining the prosecutor was not biased. The court never adopted or even acknowledged any due process right to be tried by a disinterested prosecutor exists. In dicta, the court cited *Young* but stopped short of recognizing the due process right to a disinterested prosecutor, suggested in this Court's plurality opinion. *Id.* at *10, 12. Therefore, the TCCA has acknowledged only one, narrow class of prosecutorial conflicts that constitute *per se* due process violations, when a prosecutor used to be the defendant's attorney. The court casts all other prosecutorial conflict claims in a category of "other," to be brought on

a case-by-case basis and proven only if the defendant can show prejudice from the outset. The State acknowledges as much and would have this Court endorse this standard. BIO at 19 ("But if the conflict arises from some other cause [than prior representation], it must cause the defendant actual prejudice to be intolerable.").

To date, the TCCA has never held that a defendant has the due process right to be tried by a disinterested prosecutor. But prosecution by a disinterested prosecutor must be a necessary component of a fair trial. That this fundamental right is cast into a miscellaneous category by Texas courts should be remedied by this Court.[1]

II. THE STATE'S INSINUATION THAT CERTAIN TYPES OF DISINTERESTED PROSECUTOR INVOLVEMENT ARE NOT ERROR MERITS RESOLUTION BY THIS COURT

In its BIO, the State insinuates that scenarios exist in which an interested prosecutor may assist the appointed disinterested prosecutor, citing footnote 17 in *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 806 n.17 (1987) in support. The State uses that footnote to argue that Korioth's substantial involvement in Mr. William's prosecution was proper and should be condoned by this Court. BIO at 16 ("Thus, not surprisingly, this Court has expressly recognized that an interested

[1] Further, while incorrectly arguing that Texas recognizes the right to be tried by a disinterested prosecutor, the State also misconstrues Mr. Williams's legal position. The State incorrectly asserts that Mr. Williams asked this Court to "disavow the requirement of an actual conflict." BIO at 20. That has never been Mr. Williams's argument; he argues Korioth's *actual* conflict was obvious. A prosecutor must be biased, *i.e.*, not disinterested, for a due process violation to occur.

party's knowledge and familiarity with a case "may be put to use in *assisting* a disinterested prosecutor.") (citing *Young*, 481 U.S. at 806 n. 17) (emphasis in original). In Mr. Williams's case, had Korioth remained in her role as a fact witness, her "assistance" in that role, as a person with "familiarity" with the facts, may have been above board. However, when the interested party's assistance crosses the line into performing prosecutorial functions, as Korioth's did, that assistance creates a conflict in violation of due process. The State's reliance on *Young* to say otherwise warrants resolution and an articulated standard by this Court.

III. THE STATE DOWNPLAYS THE INTERESTED PROSECUTOR'S INVOVLMENT IN MR. WILLIAMS'S CASE, UNDERSCORING THAT TRIAL BY A BIASED PROSECUTOR IS STRUCTURAL ERROR

The legitimacy of Mr. Williams's prosecution requires this Court to address the question of whether he must show he was actually harmed by Korioth's involvement. Mr. Williams maintains that being tried by a disinterested prosecutor amounts to structural error. The state court, however, required a showing of harm, and in doing so invented a requirement that the defendant prove an exacting correlation between the biased prosecutor's role and the nuanced decisions and strategy calls made by the lead prosecutor. *See* Amended FFCL at 98, finding 369 ("Applicant fails to present evidence that Korioth made critical, controlling prosecutorial decisions"). The State's advocacy of this standard and its attempts to downplay Korioth's involvement in Mr. Williams's case only underscore the difficulty in requiring defendants to prove harm in biased prosecutor cases.

In its effort to argue that a harm analysis should apply, the State would have this Court believe Korioth was simply a "party to" many emails. BIO at 8. But that

was not the extent of her involvement—she drafted important case documents like search warrants and indictments, participated in prosecution team meetings, and stayed up late on the phone to strategize with Prosecutor *Pro Tem* Wirskye. Creative language aside, the State nevertheless admits that Korioth was "involved in" the case as a "liaison," "researcher," and "paralegal." BIO at 7-8.[2]

The State attempts to further dilute Korioth's involvement by describing her as "party to" emails in which there were *two* lead attorneys. In the same vein, the State claims that Mr. Williams misrepresents Toby Shook's role. BIO at 6. In his Petition, Mr. Williams does describe Mr. Shook as an "assistant prosecutor pro tem," because that was his role. The testimony and the writ record make it patently clear Mr. Wirskye was the lead prosecutor. At Mr. Williams's evidentiary hearing, Mr. Wirskye was asked which prosecutors were the decision makers. Mr. Wirskye responded, "Primarily me, but Toby Shook to a lesser degree . . . Toby was worried about our law practice; and I told Toby, don't worry, I'll do the heavy lifting, and Toby pretty much held me to that." 8 EHRR 59.[3] Mr. Wirskye was also the one who

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[2] That the habeas court rejected Williams's "take on [the] emails" is precisely why Mr. Williams is before this Court now, and does not mean that Mr. Williams misconstrued the facts in any way. *See* BIO at 6-13. In truth, the state court rejected Mr. Williams's "take" by wholly disregarding the plain facts before it in order to deny him relief, based on a standard that does not and should not exist.

[3] Never before in any proceeding or pleading has the State taken the position that second-chair prosecutor Toby Shook was also *the* District Attorney. Instead, Mr. Shook's name appears—strategically—for the first time on the post-conviction pleadings in the State's proposed findings of fact and conclusions of law. Mr. Shook's

sought Korioth's advice, gave her assignments, and based decisions and strategy on her counsel. Mr. Shook may have been appointed as a *pro tem*, but Mr. Wirskye was doing the "heavy lifting," assisted in great part by Korioth.

The state court's manufactured standard that prosecutor conflict only matters if it impacted the lead prosecutor is so easily circumvented as to render due process meaningless. Under the State's logic, any one of Mr. Williams's ten other sworn prosecutors *pro tem* could have *actual* conflicts of interest, such as being prior complainants against the defendant or testifying trial witnesses, but as long as the State can prove the lead prosecutor's decision-making was not unduly influenced, it would not offend due process. Proving harm, according to the State's standard, would requiring knowledge of the internal thought processes of the lead prosecutor, a difficult, if not impossible, burden of proof to meet. That the State attempts to piecemeal, re-characterize, and downplay Korioth's role to show whether it impacted Mr. Wirskye only serves to reinforce this. Such a requirement incentivizes keeping misconduct secret and renders the safeguards of the Due Process Clause hollow.

Korioth's involvement in Mr. Williams's case certainly goes to whether error occurred. But when a biased prosecutor was involved in prosecuting a defendant, the resulting error is inherently harmful. The problems with requiring a defendant to prove harm, *see* Petition at 23-32, have prompted some jurisdictions to not require

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name does not even appear on the State's Answer to Mr. Williams's habeas application. At the evidentiary hearing, the State called Mr. Wirskye to testify to Korioth's involvement, not Mr. Shook. *See generally* 7 EHRR; 8 EHRR.

such proof, *ibid.* at n.7, but not all. Given the disparate treatment regarding the issue across jurisdictions, and that this Court remains split as to whether harm analysis applies in interested prosecutor cases, *Young*, 481 U.S. at 809-10, this Court should now affirmatively resolve whether a defendant prosecuted by a biased prosecutor must show he was harmed by that prosecutor's involvement in the case.

CONCLUSION

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

Respectfully submitted,

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