No. _____

IN THE

Supreme Court of the United States

MOHSIN SYED

Petitioner,

v.

THE STATE OF TEXAS

Respondent.

On Petition for a Writ of Certiorari to the Texas Court of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court should grant certiorari to resolve the conflicts engendered by the *Caperton* case concerning the due process right to an impartial judge.

PARTIES TO THE PROCEEDINGS

Petitioner Mohsin Syed was Defendant in the district court and Appellant in the court of appeals.

Respondent State of Texas was the prosecution in the district court and Appellee in the court of appeals.

RELATED PROCEEDINGS

State of Texas v. Mohsin Mazhar Syed, Criminal Cause Nos. Cr49672-B, Cr49872-B, & Cr49396-B (238th District Court, Midland County Tx, May 10, 2018)

Ex Parte Mohsin Mazhar Syed, Recommended Dismissal of Application For Writs Of Habeas Corpus In Cause Nos. Cr49672-B, Cr49872-B, & Cr49396-B (238th District Court, Midland County Tx, Feb. 2, 2023)

In re Mohsin Syed, Nos. WR-90,618-04, WR-90,618-05 & WR-90,618-06 (Tex. Ct. Crim. App. Mar.15, 2023), is reprinted at Pet App. 1A.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals.

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JURISDICTION

The Texas Court of Criminal Appeals issued its decision in this case on March 23, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 and U.S. Const. Art. I, Sec. 9, cl. 2.

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the U.S. Constitution which provides:

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.

U.S. Const. Amend. XIV

INTRODUCTION

The issue presented by this case goes to the heart of this Court's role in the American system: the standard by which we assess the impartiality of the judges who oversee our criminal trials. The confusion in the lower courts is already profound and getting more so. It is one of this Court's primary roles to sort out such confusion.

STATEMENT OF FACTS

There are few areas where the justice system stands to lose credibility more rapidly than where it appears that a judge's misconduct is being covered up by her fellow judges. Unfortunately, such is the case here. The facts of this case are rather extraordinary, yet the facts present legal issues that arise all too often in the lower courts.

1. THE MISCONDUCT BY JUDGES AND PROSECUTORS IN MIDLAND COUNTY, HIDDEN FROM DEFENSE COUNSEL IN THIS AND OTHER CASES, WAS FIRST EXPOSED IN THE CAPITAL CASE OF CLINTON YOUNG

Judge Hyde had presided over the capital trial of Clinton Young. Some years later, in 2019, the District Attorney belatedly revealed to his counsel that Ralph Petty, an Assistant District Attorney, had been the paid law clerk for Judge Hyde throughout the time his office had been seeking Mr. Young's execution.

For example, on January 22, 2007, Ralph Petty invoiced the District Courts of Midland County,

> "For legal work performed by Weldon Ralph Petty, Jr., in connection with: Post conviction writ of habeas corpus.
> Defendant: Clinton Lee Young – capital murder
> Cause number: CR 27,181-A, 385th District Court, Midland County, Texas
> Date: January 8, 2007."[1]

This was signed and approved by Judge John G. Hyde.[2]

When the issue came before the Texas Court of Criminal Appeals, the Court found as follows:

> The evidence also establishes that from 2001 through 2014 and again in 2017 and 2018, Petty was paid by the Midland County district court judges—including Judge Hyde—for "legal work" performed in connection with postconviction writs of habeas corpus. When a habeas application was filed, the judge of the convicting court assigned the writ to Petty. He then reviewed the file, performed any necessary research, and submitted a recommendation and a proposed order with findings of facts and conclusions of law to the assigning judge.

Ex Parte Young, No. WR-65,137-05, Slip Op. at 4-5 (Tex. Ct. Crim. App. Sept. 22, 2021) (Unpublished). The records showed that "Judge Hyde paid Petty $7,500 while he was presiding over Applicant's capital murder trial proceedings." *Id.* at 7.

The Court disposed of the case succinctly:

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[1] *Petty invoice for work on Clinton Young case* (Jan. 22, 2007).

[2] *Petty invoice for work on Clinton Young case* (Jan. 22, 2007).

> "The evidence presented in this case supports only one legal conclusion: that Applicant was deprived of his due process rights to a fair trial and an impartial judge."

Id. at 11.

2. ASSISTANT DISTRICT ATTORNEY RALPH PETTY

As the involvement of Ralph Petty as a law clerk to most of the judges in Midland County came to light, the Office of the District Attorney made some rather extraordinary (but necessary) concessions in the *Young* case. The State relied on the seminal *Hall* decision to concede:

> "Petty's habeas work arrangement with Judge Hyde established a relationship of mutual trust and reliance. *See Hall v. Small Bus. Admin.*, 695 F.2d 175, 179 (5th Cir. 1983) ("[Law clerks] are sounding boards for tentative opinions and legal researchers who seek the authorities that affect decision. Clerks are privy to the judge's thoughts in a way that neither parties to the lawsuit nor his most intimate family members may be."). *** Petty's dual role as prosecutor and judicial advisor in Applicant's prior habeas cases is obvious misconduct and thus supports the factual inference that Petty served in the same level of dual and competing capacities during Applicant's trial."[3]

[3] *State's Motion to Hold Proceedings in Abeyance*, State v. Young, Cause No. WR-65,137-05 & Cause No. 27,181, at 11 (Tex. Ct. Crim. App. March 22, 2021).

Meanwhile Petty, through counsel, stated that he would assert his Fifth Amendment privilege against self-incrimination at any hearing,[4] indicating his own fear that he had actually committed a criminal offence: what his crime was his lawyers did not say, but certainly he and the judges he worked with could have been seen to have been perverting the course of justice. He was subsequently disbarred.[5] In its order of disbarment, the Texas Supreme Court "deem[ed] the professional misconduct detailed in the Response conclusively established for all purposes."[6]

When it came time for Petitioner in this case to raise the same issue, it became clear that Petty had been working for Judge Leonard throughout the period of his prosecution.[7] Yet the Texas courts that reviewed his case refused to apply the proper standard, and denied him relief.

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[4] *States's Motion to Hold Proceedings in Abeyance*, State v. Young, Cause No. WR-65,137-05 & Cause No. 27,181, at 2 n. 1 (Tex. Ct. Crim. App. March 22, 2021).

[5] *Response to Motion for Acceptance of Resignation as Attorney and Counselor at Law of Weldon Ralph Petty, Jr.* (March 18, 2021), a copy of which was served upon Mr. Petty through his attorney via email on March 18, 2021.

[6] *In The Matter Of Weldon Ralph Petty, Jr.,* Misc. Docket No. 21-9033 (Sup. Ct. Tex. April 13, 2021).

[7] There was a dispute as to whether Ralph Petty should be deemed formally to be the judge's clerk in this case, though his relationship with each judge went beyond individual invoices. He does not appear to have been formally paid as a law clerk on this case, since no invoice existed. However, Petty appeared in court to advise the court on legal issues and was all along working behind the scenes as her clerk on various other matters.

3. JUDGE ELIZABETH BYER LEONARD

In the *Young* case, the state admitted that "Judge Hyde's partiality was questionable in Applicant's prior habeas proceedings in which Petty served as his legal advisor…"[8]

It is difficult to see how Judge Leonard was any less involved in the misconduct at stake in this case. Following law school, she worked as a prosecutor for over 10 years; first as the juvenile prosecutor in Ector County and then as a felony prosecutor in Midland County before becoming a judge in 2008. Thus she actually worked with Petty in Midland at the time when he was working on both sides of the fence.

Indeed, as ADA Elizabeth Byer (her maiden name), she prosecuted a number of defendants – at least 21 – where her colleague Ralph Petty was (unknown to the defendants) acting as law clerk to Judges Hyde, Rucker, Dubose and Darr. In these cases, Petty was drafting orders that moved the case towards the prosecution's (ADA Leonard's) desired goal.

There has been no suggestion that Judge Leonard did not know what was going on. Indeed, when Judge Elizabeth Byer Leonard became a judge in 2012, taking over from the recently deceased Judge Hyde, forthwith she hired Petty as law clerk herself. She was re-elected without opposition in 2014 for a four-year term that

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[8] *States's Motion to Hold Proceedings in Abeyance*, State v. Young, Cause No. WR-65,137-05 & Cause No. 27,181, at 8 (Tex. Ct. Crim. App. March 22, 2021).

expired on December 31, 2018.[9] The events in this case took place shortly before the 2018 election where she again retained her judicial office.

The invoices identified thus far by Petitioner reflect 33 cases before and spanning the entirety of Petitioner's case where Petty billed the county for law clerk work he was doing for Judge Leonard.

Petitioner, a doctor from a minority background who faced with Midland justice, was convicted by a jury on one count and then was encouraged to accept a plea agreement on others so that his sentence would run concurrent with other untried indictments. Judge Leonard was the judge in his case, presiding over his trial and then imposing a sentence of twelve years in prison.

STATEMENT OF THE CASE

1. The Trial Court.

Petitioner Mohsin Syed was indicted on May 18, 2017, for allegedly sexually exploiting three of his patients' emotional dependence upon him. Each patient was a separate indictment. He proceeded to trial on one case, and after being convicted he was advised to accept a sentence and plead in two other cases to run concurrent. He was sentenced on May 10, 2018, to 12 years in prison.

As part of the plea to the sentence, he had to waive his right to appeal. However, he could not waive that

[9] *Texas Secretary of State*, "2014 March Primary Election Candidate Filings by County (A-L)".

which had been hidden from him by the State, and issues began to come to light.

2. State Postconviction Proceedings. Mohsin Syed filed a first state petition for post-conviction relief on May 1, 2019, prior to the issue concerning Midland County Prosecutor Ralph Petty came to light. After that writ was denied, Syed then filed a subsequent writ based on the grounds that Ralph Petty had been simultaneously working for the District Attorney to put him in prison, and moonlighting for the judge to keep him there.

Petitioner presented three related grounds concerning the issue presented here. One was stated as follows:

> The appearance of judicial bias and structural error from the assistant district attorney Weldon Ralph Petty's work as a law clerk for the district judges of Midland County while representing the State of Texas gave the State an unfair advantage, which violated the separation of powers and denied Applicant substantive and procedural due process.

A second was:

> The Midland County district judges were required to disqualify themselves after hiring assistant district attorney Weldon Ralph Petty, who appeared on behalf of the State in Applicant's trial, as a judicial clerk, rendering the trial court's judgment void and a nullity.

And the third was:

> Assistant district attorney Weldon Ralph Petty's pervasive prosecutorial misconduct by not disclosing his work as a law clerk for the district judges of Midland County while representing the State of Texas deprived Applicant of substantive and procedural due process and requires a new trial.

The State's proposed findings include the following:

> Any improper service by Mr. Petty as a judicial habeas advisor in other unrelated habeas proceedings before Judge Leonard during Applicant's trial does not factually prove the arrangement contributed to rulings by Judge Leonard that were either favorable to the State or adverse to Applicant during Applicant's trial.

State's Proposed Findings of Fact and Conclusions of Law, at paras. 10-11 (Dec. 16, 2022). This reflects a legal standard requiring *actual bias* for the recusal of a judge, which conflicted with prior precedent from the U.S. Supreme Court.

The trial court entered three similar orders in the three cases he had brought. In each case, the trial court recommended denial of relief, in part, because Petitioner had not shown prejudice – that Judge Leonard had been swayed by her relationship with Petty[10] - or that his plea had been involuntary.[11]

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[10] Order Recommending Denial of Relief in CR49396-B (Midland County, Feb. 2, 2023), *Findings of Fact*, ¶11.

[11] *Id* at ¶12.

The Court of Criminal Appeals ruled as follows:

> After a review of the record, we find that Applicant's claims regarding judicial bias, a disqualified judge, and separation of powers are without merit.

Ex Parte Mohsin Mazhar Syed, Nos. WR-90,618-04, WR-90,618-05 & WR-90,618-06, Order of March 15, 2023).[12]

REASON FOR GRANTING THE PETITION

This Court should grant certiorari to resolve the following question:

I.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICTS ENGENDERED BY THE *CAPERTON* CASE CONCERNING THE DUE PROCESS RIGHT TO AN IMPARTIAL JUDGE

A. The *Caperton* Case Has Left The Lower Courts In A State Of Confusion

We are now 14 years on from this Court's decision in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 129 S. Ct. 2252, 173 L.Ed.2d 1208 (2009). *Caperton* was a 5-4 decision written by Justice Kennedy. *Caperton* was not, from the start, a model of clarity. Justice Kennedy admitted that it was not easy to set out a defined standard, and then went on to state a number of "rules" for recusal, each vaguer than the last. One is where there are:

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[12] Importantly, the Court ruled on the merits, rejecting the State's suggestion that the issue was procedurally barred.

> circumstances "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."

Caperton, 556 U.S. at 877, quoting *Withrow v. Larkin,* 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). A second is where the situation:

> "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."

Caperton, 556 U.S. at 884, quoting *Withrow,* 421 U.S., at 47, 95 S.Ct. 1456. And a third requires an

> inquiry into whether the contributor's influence on the election under all the circumstances "would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true."

Caperton, 556 U.S. at 885, quoting *Tumey v. Ohio,* 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749 (1927).

There were four dissenting justices, led by the Chief Justice, who opined that the new rule would create chaos in the lower courts:

> Today, however, the Court enlists the Due Process Clause to overturn a judge's failure to recuse because of a "probability of bias." Unlike the established grounds for disqualification, a "probability of bias" cannot be defined in any

> limited way. The Court's new "rule" provides no guidance to judges and litigants about when recusal will be constitutionally required. This will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be. The end result will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case.

Id. at 890-91 (Roberts, C.J., dissenting).

The issue of judicial fairness is vital to the public perception of the integrity of the legal system, as is well illustrated by this case. How was it that an issue that was so clear to the court in the *Young* case could be summarily dismissed here? Indeed, Petitioner's treatment in the lower courts presents an opportunity to reevaluate *Caperton* in a case where the judicial bias is patently clear, but where this Court can identify a Due Process rule that is readily applied.

While the central question here is the confusion in the lower courts engendered by *Caperton*, the issue may usefully be analyzed in the context of *Hall v. Small Business Association*, 695 F.2d 175 (5th Cir. 1983), where the Fifth Circuit addressed an issue similar to – but not as extreme as – this case, where the judge's law clerk had been in discussions with a party concerning employment. Forty years ago, the Fifth Circuit stated the rule governing recusal of judges:

> The Code of Judicial Conduct, adopted by the Judicial Conference of the United States, states: "A judge shall disqualify himself in a proceeding

> in which his impartiality might reasonably be questioned...." Code of Judicial Conduct, Canon 3(C)(1), reprinted in 69 F.R.D. 273, 277 (1975). By statute adopted in 1974 that ethical standard was converted into mandate: every justice, judge and magistrate is required to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. Sec. 455 (1976 & Supp. IV 1980).

Id. at 178.

Hall sets out a standard of recusal based on federal *statutory* law – where the judge's "impartiality might reasonably be questioned." *Hall* is a federal appeal of a federal case, so one question that inevitably arises is the extent to which the *federal constitutional* claim (which would be applicable to the Texas state court) been seen as contiguous with, or different from, the *federal statutory* claim (derived from the Code of Judicial Conduct).

B. This Court should revisit the degree to which Caperton expanded the definition of the Due Process right to a fair judge

Among the conflicts in the lower courts, first there is the question of whether *Caperton* really created a dramatically different constitutional scheme to what existed before. This has divided the lower courts.

The *Caperton* dissent suggests that there had, hitherto, only been two areas where a federal constitutional right to recusal had been recognized (a financial interest and certain contempt issues, 556 U.S. 890), and the dissent also noted as follows:

> Our decisions in this area have also emphasized when the Due Process Clause does *not* require recusal: "All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion."

Caperton, 556 U.S. at 892 (dissenting opinion), quoting *Tumey,* at 523, 47 S.Ct. 437; see also *Aetna Life Ins. v. Lavoie,* 475 U.S. 813, 820, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986)

The significant issue in this case, recognized in federal law as fundamental for at least the 40 years since *Hall*, falls outside this listing, so perhaps the scope of the constitutional right to recusal was slightly broader than the dissent suggested. Indeed, lower courts have applied the theory of *Hall* for four decades. See, e.g., *Pope v. State*, 256 Ga. 195, 345 S.E.2d 831 (Ga. 1986) (remand for a hearing where the judge's law clerk was in negotiations for a job with the Office of the District Attorney while working on a capital case, relying on *Hall* as stating a constitutional rule).

Certainly the theory of cases emanating from this Court suggest that the theory of *Hall* has long since been approved. *Williams v. Pennsylvania*, 136 S. Ct. 1899, 195 L. Ed. 2d 132 (2016) ("Of particular relevance to the instant case, the Court has determined that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case.").

Some lower courts therefore suggest that little was changed by the *Caperton* case.[13] Other courts have held that after *Caperton* the constitutional right to recusal remains the extreme exception rather than the norm.[14]

Meanwhile, a divided Ninth Circuit has characterised the *Caperton* case as significantly reducing the burden on the litigant. *Hurles v. Ryan*, 752 F.3d 768, 792 (9th

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[13] *Wash. Dep't of Soc. & Health Servs. v. Goheen-Rengo*, No. 79206-7-I, Slip Op. at 5 (Wash. App. 2019) ("Only in four factual categories has the United States Supreme Court found an unconstitutional potential for bias in violation of the Due Process Clause"); *In re Personal Restraint of Knox* No. 52971-8-II, Slip Op. at 25 (Wash. App. 2020) ("Through our country's significant history of litigation, only three circumstances have been found to create unconstitutional judicial bias") (citing *Caperton*, 556 U.S. at 877-84).

[14] *St. Clair v. Cadles of Grassy Meadows II, L.L.C.* 15-CV-4413(ADS), Slip Op. at 14 (E.D. N.Y. 2016) ("In that regard, the Supreme Court has found matters relating to judicial bias to impinge upon a party's right to a fair trial in only extreme circumstances generally involving the clear appearance of a conflict of interest and a high probability of actual bias on the part of the judge in question."); *Powers v. Turner Cnty. Bd. of Adjustment*, 2022 S.D. 77 (S.D. 2022) ("*Caperton* expanded the reach of the Due Process Clause for fairness in judicial proceedings" but "reaffirmed that the standard for disqualification of a judicial officer is extremely high and should only be applied in 'extraordinary situation[s] where the Constitution requires recusal.'"); *No Laporte Gravel Corp. v. Bd. of County Commrs*, 2022 COA 6, Slip Op. at 5 (Colo. App. 2022) ("the Supreme Court noted that the Due Process Clause provides only the outer limits for judicial disqualifications and that most disputes over disqualifications should be resolved by application of statutes, ordinances, or codes of conduct. Id. at 889-90. The Caperton Court emphasized that recusal was required in that case because the facts were "rare," "exceptional," and "extreme." Id. at 884, 887, 890.").

Cir. 2014) ("Hurles does not face the daunting task of proving actual bias in order to establish a due process violation"), citing *Lavoie*, 475 U.S. at 825, 106 S.Ct. 1580. *cf. id.* at 794 (Ikuta, J., dissenting) ("Because this opinion misreads the law, distorts the record, and casts off AEDPA deference on the basis of a non-existent fact-finding flaw, I dissent."); *Echavarria v. Filson*, 896 F.3d 1118 (9th Cir. 2018) (the rule "reaches "[e]very procedure which would offer a possible temptation to the average ... judge to forget the burden of proof ... or which might lead him not to hold the balance nice, clear and true between the State and the accused.'").

Some courts have disagreed vigorously over the meaning of *Caperton*. See, e.g., *State v. Allen*, 778 N.W.2d 863, 2010 WI 10, 322 Wis.2d 372 (Wis. 2010) ("Our three colleagues give *Caperton* short shrift—two brief paragraphs. They announce at ¶ 222 that "*Caperton* has no relevance here." They devote a single brief paragraph to *Caperton* at ¶ 238. Our colleagues just don't seem to get it. All state courts are bound by the teachings of *Caperton*, and *Caperton* is generally viewed as a major case involving more than campaign contributions and affecting court practice across the country. *** *Caperton* explicitly announced the need for objective review to recusal challenges to a judge. A judge's own inquiry into actual bias is not adequate for due process purposes. *Caperton*, 129 S.Ct. at 2265, declares that "[t]he failure to consider objective standards requiring recusal is not consistent with the imperatives of due process.'").

While it would seem reasonable that the constitutional recusal standard is narrower than statutory provisions, in the Second Circuit the standards appear to be equated. *Neroni v. Grannis*, No. 3:11-CV-1485 Slip Op. at 5-6(N.D. N.Y. 2016) ("The due process requirement for recusal is "identical to that considered under § 455(a)," *Coccoma*, 2014 WL 2532482, at *4 n.12, therefore the Court need not separately address Plaintiff's due process argument.")

C. Lower courts differ on whether the standard involves the reasonable/average judge or the reasonable/average person

A dispute has also arisen over how best to interpret this Court's purportedly "new" rule – does it look to the views of an average judge now, rather than an average person? The earlier cases suggested the latter. *Levitt v. University of Texas at El Paso*, 847 F.2d 221 (5th Cir.1988) ("disqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality."); *Rutland v. Pridgen*, 493 So.2d 952 (Miss. 1986) ("However, *Hall* does give a workable test to determine when a judge should disqualify himself under this provision: A judge is required to disqualify himself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality. We adopt this objective test."); *Stanton v. State*, 2020 Ark. 418, 613 S.W.3d 368 (Ark. 2020) ("Claims of an "appearance of impropriety" are assessed under an objective standard and turn on the perception of a reasonable person.") (citing cases).

But more recently the courts have queried whether the "reasonable judge" standard now applies. *Caliste v. Cantrell*, 937 F.3d 525, 529 (5th Cir. 2019) (noting that the Supreme Court's "most recent conflict-of-interest opinion uses both "average judge" and "average man" without indicating a difference between the two."), citing *Caperton* v, 556 U.S. at 878; *Gacho v. Wills*, 986 F.3d 1067 (7th Cir. 2021) ("Constitutional claims of judicial bias also have an objective component: the reviewing court must determine whether the judge's conflict of interest created a constitutionally unacceptable likelihood of bias for an average person sitting as judge.").

This confusion appears to arise from the question of whether an average person must assess the impact on the average judge. *Hurles v. Ryan*, 752 F.3d 768, 792 (9th Cir. 2014) ("to consider fairly the potential for bias, we must consider the average reasonable judge in the particular circumstances in which Judge Hilliard found herself."); see also *OneWest Bank v. Walsh*, 2013 IL App (1st) 120111, ¶15 (Ill. App. 2013) ("A claim for recusal based on constitutional bias uses an objective test to determine whether the average judge in the challenged judge's position is likely to be neutral or whether there is an unconstitutional potential for bias."), citing *Caperton*, 556 U.S. at 881; *State v. Blizzard*, 195 Wash.App. 717, 725, 381 P.3d 1241, 1245 (Wash. App. 2016) ("Due process generally involves an objective analysis. We ask "not whether a judge harbors an actual, subjective bias, but instead whether as an objective matter, the average judge in his position is likely to be neutral or whether there is an unconstitutional potential for bias."") (citations omitted).

Due to perennial suggestions that judges have a special capacity for putting their personal feelings aside, this issue carries more weight than might be hoped.

D. Some courts differ on whether the standard is an objective rather than subjective one

One issue that one would think clear from *Caperton* was that the focus must be on an *objective* standard. *Scott v. United States*, 559 A.2d 745 (D.C. 1989) (citing *Liljeberg* holds that an "objective standard is required in the interests of ensuring justice in the individual case and maintaining public confidence in the integrity of the judicial process"); *In re Continental Airlines Corp.*, 901 F.2d 1259 (5th Cir. 1990) ("recusal may be mandated even though no actual partiality exists."); *People v. Suazo*, 2014 NY Slip Op 6114, 120 A.D.3d 1270, 992 N.Y.S.2d 138, 139 (N.Y. App. Div. 2014) ("The marital relationship between Detective Wilkerson and the hearing Justice's law clerk created, at a minimum, the appearance that the hearing Justice could not be impartial in assessing Detective Wilkerson's credibility."); *State v. Lamb*, 384 Wis.2d 414, 921 N.W.2d 522 (Table), at ¶10 (Wis. App. 2018) ("the Due Process Clause has been implemented by objective standards that do not require proof of actual bias."), citing *Caperton*, 556 U.S. at 883; *Ex parte Sanders*, 659 So.2d 1036, 1038 (Ala. Crim. App. 1995).

However, some courts have reached precisely the opposite conclusion. *In re Estate of Ann Wilson*, 238 Ill.2d 519, 939 N.E.2d 426, 345 Ill. Dec. 583, 619 (Ill. 2010) (Freeman, J., concurring) ("Today's decision discourages conscientiousness and rewards expediency. In the wake of the United States Supreme Court's decision in *Caperton* … [t]he court's decision today indicates that actual bias is the standard to be used and apparently answers at least one of the questions at issue in O'Brien.").

Yet the issue of subjectivity has crept into lower court decisions in a number of less direct ways. Even if there is an objective standard based on the knowledge the judge has, some courts have required proof of the subjective knowledge on the part of the judge. *Petzold v. Kessler Homes, Inc.*, No. 2008-SC-000106-DG (Ky. 2010) ("Thus, the relevant inquiry is whether a reasonable person with knowledge of all of the relevant circumstances relating to the unknown conflict would expect the judge to have actual knowledge of the claimed conflicting interest or bias.").

An even more serious issue comes in the application of a "harmless error" standard, which is the functional equivalent of a subjective standard. Despite its otherwise liberal interpretation of *Caperton*, the Ninth Circuit applied a harmless error standard, finding actual bias. *Rodriguez v. Copenhaver*, 823 F.3d 1238 (9th Cir. 2016) ("In this case, Chief Judge Moreno, a colleague of an alleged victim of Rodriguez's crimes, strongly recommended "severe[ ] sanction[s]" and the denial of the *nunc pro tunc* designation to avoid "insult" to his colleague. *** there is no way that this error can be deemed harmless in as much as the Bureau specifically cited and relied on the Moreno letter in denying Rodriguez's application."); *Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury*, 686 F.3d 965 n.16 (9th Cir. 2012) ("where OFAC would have arrived at the same determination even with adequate notice, any error is harmless."). See also *Pyatt v. State*, 784 S.E.2d 759, 298 Ga. 742 (Ga. 2016) ("due process is concerned with actual bias, see *Caperton*, 556 U.S. at 883")

The Fourth and Eleventh Circuits directly disagree with the Ninth. *Norris v. United States*, 820 F.3d 1261, 1286 (11th Cir. 2016) ("Contrary to the ruling of the district court, structural error occurs when a judge with actual bias against a defendant presides at his trial. *** we cannot review a trial transcript to determine whether the presiding judge, despite his actual bias, was fair: "The record does not reflect the tone of voice of the judge, his facial expressions, or his unspoken attitudes and mannerisms, all of which, as well as his statements and rulings of record, might have adversely influenced the jury and affected its verdict.") (citation omitted); *United States v. Richardson,* No. 17-4760 Slip Op. at 9 (4th Cir. 2019) (unpublished) ("An unconstitutional failure to recuse is structural error and thus not amenable to harmless-error review."); accord *Tierney v. Four H Land Co. Ltd. P'ship*, 281 Neb. 658, 798 N.W.2d 586, 596 (Neb. 2011); *State v. Sawyer*, 297 Kan. 902, 305 P.3d 608, 612 (Kan. 2013).

The Seventh Circuit has taken a different view, albeit before *Caperton*. *United States v. Murphy*, 768 F.2d 1518, 1541 (7th Cir. 1985) ("Judicial acts taken before the motion may not later be set aside unless the litigant shows actual impropriety or actual prejudice; appearance of impropriety is not enough to poison the prior acts."), citing *Barry v. United States*, 528 F.2d 1094, 1100 (7th Cir.), cert. denied, 429 U.S. 826, 97 S.Ct. 81, 50 L.Ed.2d 88 (1976) (when the trial is "impeccably fair and just" an erroneous failure to recuse is harmless error).")

This distinction becomes very important in this case where all the state courts specifically relied on a supposed lack of prejudice from what the *Young* court had

held to be a clear constitutional violation. Equally, it becomes important to the application of §2254, where the federal court must assess whether the state court misstated the law. *Gacho v. Wills*, 986 F.3d 1067 (7th Cir. 2021) ("Constitutional claims of judicial bias also have an objective component: the reviewing court must determine whether the judge's conflict of interest created a constitutionally unacceptable likelihood of bias for an average person sitting as judge. *Caperton* v. A.T. Massey Coal Co., 556 U.S. 868, 878–86, 129 S. Ct. 2252, 173 L.Ed.2d 1208 (2009). The state court cited Caperton but ignored the objective test, holding that Gacho's failure to establish actual bias was fatal to his claim.").

Texas clearly took the position that actual prejudice needed to be shown in this case. Other courts have joined this view albeit in different ways. *Alvarez v. Black*, No. 15-cv-574-JPG-PMF, Slip Op. at 9 (S.D. Ill. 2015) (applying a variation of the harmless error rule where "Alvarez has not pointed to any caselaw clearly establishing that his constitutional rights were violated where Casey's vote was not decisive in the outcome of the 4-2 vote against him.").

Some courts seem to have misunderstood what this Court meant by "objective", rendering the test something very similar to an actual prejudice standard. *State v. Herrmann*, 364 Wis.2d 336, 348-49, 867 N.W.2d 772 (Wis. 2015) ("In determining whether a defendant's due process right to trial by an impartial and unbiased judge has been violated, Wisconsin courts have taken both subjective and objective approaches… Under the objective approach, courts have traditionally considered whether "there are objective

facts demonstrating ... the trial judge in fact treated [the defendant] unfairly.").

Finally, the D.C. District Court has viewed the issue as necessarily one where the clerk's views have directly influenced the judge, which comes very close to an actual prejudice standard. *Doe v. Cabrera*, 134 F. Supp. 3d 439 (D.D.C. 2015) ("One common theme emerges from Vaska and Hall—any bias of a law clerk is imputed to the Court only when the clerk substantively participates in a case where that bias can potentially manifest itself. [...] Otherwise, any alleged law clerk bias cannot be "advanced," Mot. at 18, because "a law clerk's views cannot be attributed to the judge for whom the clerk works").

E. The facts of this case would seem to mandate recusal under an objective test

It is clear that certain courts would not pause to order recusal of Judge Leonard given her lengthy association with Ralph Petty as her *employee* at the same time as he worked for the prosecution. *United States v. Berman*, 28 M.J. 615 (A.F.C.M.R. 1989) ("On the facts before us we conclude that Judge Miniclier was disqualified in all six trials that are the subject of this decision. While we are unable to parse the precise moment of Judge Miniclier's disqualification, the totality of his relationship with Captain Edgar creates an indelible appearance of partiality that legal arguments will not wash away."); *In re Kensington International Limited*, No. 03-4212 (3rd Cir. 2004) ("The same factors that required recusal in *Hall* apply here. Although Gross and Hamlin were not law clerks per se, they were in some respects the substantial equivalent of law clerks.

Hamlin, for example, drafted legal opinions in each of the Five Asbestos Cases for Judge Wolin. Thus, not only was Hamlin the "legal researcher[] who [sought] the authorities that affect[ed] the judge's decision," but he was also the scrivener who, in the first instance, tried his hand at crafting the decision that, if accepted by Judge Wolin, would dispose of an appeal taken from the Bankruptcy Court in one of the Five Asbestos Cases. Moreover, Gross and Hamlin held a special position of trust and influence because they, together with the other three Advisors, were perceived by Judge Wolin as being experts in the asbestos litigation field and depended on them to educate him on all the relevant issues."); *Hyundai Motor Am. v. Applewhite*, 319 So.3d 987 (Miss. 2021).

F. Some courts seem to think the error affects only the law clerk (here, the prosecutor)

Another issue that arises is whether the focus should be on the judge at all. *In re Chandler*, 97 BR 752 (Bankr. E.D. N.Y.1988) ("Furthermore, the movant's argument is predicated upon the alleged misconduct of the law clerk, and not the court. Even if this argument had any validity, then it is the law clerk, and not the judge, to whom recusal should be directed. If a clerk has a possible conflict of interest or where a reasonable person might question the law clerk's impartiality, then the clerk should be disqualified, and not the court.").

Indeed the judicial recusal issue is closely linked to the disqualification of the prosecutor – an issue explicitly raised by Petitioner below. This renders this case an excellent vehicle to resolve the questions. For example,

Matter of John Doe, 801 F. Supp. 478 (D.N.M. 1992), involved an instance where the prosecutors showed "insolence" in asserting that they did not have to obey the rules of ethics. The court made the link between each element of the judicial process clear:

> Acknowledging the crucial role of the lawyer in our nation's fabric, we must understand ethical standards are not merely a guide for the lawyer's conduct, but are an integral part of the administration of justice. *** For this reason, some observe that our system of law is a "tripartite entity"; that the process requires contending lawyers and a neutral trier; that if any of these three supports is missing, the process fails; and, that if any "leg" is disproportionately weak, the structure as a whole is weakened.

Id. at 479-80.

Thus the other side of the coin, if the judge is not recused, presents the question of whether there is a presumption of prejudice when the prosecuting attorney takes on the role of clerk to the judge. Where there is a conflict of interest involving defense counsel there is a presumption of prejudice. *Strickland v. Washington*, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984). It would seem that the same *presumption* of prejudice applies for good reason in the context of judicial recusal, where there is a clear *appearance* of impropriety. *Hall* at 179 ("The term cannot, as suggested by counsel, extend to what happens in the judge's chambers or to his actual virtue because, were

that so, the test would be not the appearance of impartiality but the absence of actual prejudice."). Surely it must apply to the prosecutor with a conflict as well?

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 13, 2023

APPENDIX

INDEX OF APPENDICES

Appendix A
Decision of the Court Below

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOS. WR-90,618-04, WR-90,618-05 & WR-90,618-06

EX PARTE MOHSIN MAZHAR SYED, Applicant

ON APPLICATIONS FOR WRITS OF HABEAS CORPUS CAUSE NOS. CR49672-B, CR49872-B, & CR49396-B
IN THE 238TH DISTRICT COURT FROM MIDLAND COUNTY

Per curiam.

ORDER

Applicant was convicted of sexual assault and sentenced to twelve years' imprisonment in each of these cause numbers. Applicant filed these applications for writs of habeas corpus in the county of conviction, and the district clerk forwarded them to this Court. See TEX. CODE CRIM. PROC. art. 11.07.

After a review of the record, we find that Applicant's claims regarding judicial bias, a disqualified judge, and separation of powers are without merit. Therefore, we deny relief based on our own review of the record and the trial court's findings of fact.

Applicant's claim challenging his conviction on the grounds of a biased juror is dismissed pursuant to TEX. CODE CRIM. PRO. Art. 11.07 §4.

Delivered: March 15, 2023 Do not publish

Appendix 2
Cases Identified by Invoices
Where ADA Ralph Petty worked
For Judge Elizabeth Byer Leonard

	Name of Defendant	Case Number	Date of Invoice
1	Garrie Samuels	CR17775	2008/11/07
2	Telesforo Galan	CR37225	2014/01/15
3	Adriena Levell Perkins	CR37750	2014/03/07
4	Erneso Pena	CR26263	2014/04/10
5	Jose Duran	CR37862	2014/04/25
6	Alvin Leon Ryals, Jr.	CR41627	2014/05/16
7	Roman Rashard Goodley	CR40330-A CR35996-A CR35555-A CR35554-A	2014/06/05
8	Richard Benavides	CR38296-A	2014/06/11
9	Alfredo Cantu	CR36131-A	2014/06/13
10	Charles Edward Hall	CR42027-A	2014/09/16
11	Jose Duran	CR37861	2014/10/22
12	Benny Lee Montgomery	CR34858	2015/01/05
13	Norris Cornett, Jr.	CR33336	2015/04/10
14	Harold Wayne Mitchell	CR43869	2015/05/12
15	Fredrick Johnson	CR19077	2015/06/01
16	Harold Wayne Mitchell	CR43869	2015/07/10
17	Norris Cornett, Jr.	CR33336	2015/12/16

18	Harold Wayne Mitchell	CR43869	2016/01/04
19	Rafael Junior Provencio	CR45736 CR45131	2016/02/29
20	Henry Porras Rangel	CR28786	2016/04/01
21	Adam Joe Fuentes	CR34492	2016/04/06
22	Daniel Randolph, Jr.	CR22368	2016/04/06
23	Jose Duran	CR37862-E	2016/05/25
24	Arturo Mendoza (not signed)	CR39381-A	2016/08/26
25	Alfredo Cantu	CR36131	2016/10/18
26	Tony Macaluso Cichy	CR40041-A	2016/10/18
27	Jose Duran	CR37862-F	2017/03/09
28	Nicholas Loya	CR46605-A	2017/04/17
29	John Edward Holmes	CR39464-A	2017/04/25
30	Alan Otwell	CR45839-A	2017/06/29
31	Donnie Lee Moore	CR25945-A	2017/08/04
32	Samuel Rascon	CR47521-A	2017/10/31
33	Jose Duran	CR37861-G	2018/05/24