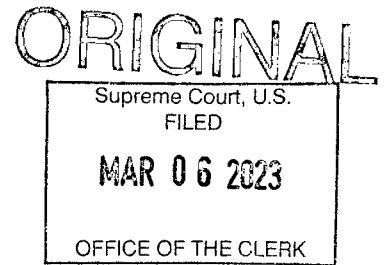


No. 22-7327



IN THE

SUPREME COURT OF THE UNITED STATES

JOHN EDWARD HOLMES— PETITIONER

VS.

THE STATE OF TEXAS — RESPONDENT

On petition for writ of certiorari to
the Court of Criminal Appeals of Texas

PETITION FOR WRIT OF CERTIORARI

John Edward Holmes, TDCJ # 01933182
William P. Clements Unit
9601 Spur 591
Amarillo, TX 79107
806-381-7080
(petitioner)

QUESTION PRESENTED

Did the Court of Criminal Appeals of Texas deprive petitioner of his due process right to a fair consideration of his initial application for a writ of habeas corpus?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

None.

TABLE OF CONTENTS

OPINION BELOW.....7

JURISDICTION.....7

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....8

STATEMENT OF THE CASE.....9

REASONS FOR GRANTING THE PETITION.....11

CONCLUSION.....15

INDEX TO APPENDIX

APPENDIX: *Per curiam* Order of the Court of Criminal Appeals of Texas

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<i>Bracy v. Gramley</i> , 520 U.S. 899 (1997).....	12
<i>Coleman v. Thompson</i> , 501 U.S. 722 (1991).....	11
<i>Ex parte Young</i> , 2021 WL 4302528 (Tex. Crim. App., delivered Sept. 22, 2021).....	9,10
<i>Fay v. Noia</i> , 372 U.S. 391 (1963).....	11,12
<i>Gardner v. California</i> , 393 U.S. 367 (1969).....	14
<i>Harris v. Nelson</i> , 394 U.S. 286 (1969).....	11
<i>In re Murchison</i> , 349 U.S. 133 (1955).....	13
<i>In re Weldon Ralph Petty, Jr.</i> , Misc. Docket No. 21-9033 (Order of the Supreme Court of Texas).....	9
<i>Jefferson v. Upton</i> , 560 U.S. 284 (2010).....	13
<i>Long v. District Court of Iowa</i> , 385 U.S. 192 (1966).....	14
<i>Offutt v. United States</i> , 348 U.S. 11.....	12
<i>Pennsylvania ex rel. Herman v. Claudy</i> , 350 U.S. 116 (1956).....	14
<i>Pennsylvania v. Finley</i> , 481 U.S. 551 (1987).....	13
<i>Preiser v. Rodriguez</i> , 411 U.S. 475 (1973).....	12
<i>Rippo v. Baker</i> , 137 S.Ct. 905 (2017).....	12
<i>Smith v. Bennett</i> , 365 U.S. 708 (1961).....	15
<i>Tumey v. Ohio</i> , 273 U.S. 510 (1927).....	12

<i>Wainwright v. Sykes</i> , 433 U.S. 72 (1997).....	11
<i>Wilde v. Wyoming</i> , 362 U.S. 607 (1960).....	15
<i>Williams v. Pennsylvania</i> , 579 U.S. 1 (2016).....	13

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Article I, Section 9, Clause 2.....	8,11
--	------

STATUTES

28 U.S.C. § 1257(a).....	7
--------------------------	---

RULES

Texas Rule of Appellate Procedure 79.2(d).....	7
--	---

**IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI**

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The *per curiam* order of the Court of Criminal Appeals of Texas (the highest state court to review the merits) appears in the Appendix to the petition and is unpublished.

JURISDICTION

The date on which the Court of Criminal Appeals of Texas decided my case was December 14, 2022. No petition for rehearing was filed in my case because none is allowed.¹ The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

¹ See Texas Rule of Appellate Procedure 79.2(d) (“A motion for rehearing an order that denies habeas corpus relief or dismisses a habeas corpus application under Code of Criminal Procedure, articles 11.07 and 11.071, may not be filed. The Court may on its own initiative reconsider the case.”).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Article I, Section 9, Clause 2:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless in Cases of Rebellion or Invasion the public Safety may require it.

STATEMENT OF THE CASE

On December the 14th, 2022, the Court of Criminal Appeals of Texas found the following facts in connection with Petitioner's first application (no. WR-86,764-01) for a writ of habeas corpus:

A jury convicted [Petitioner] of sexual assault and sentenced him to fifteen year's imprisonment. The appellate court affirmed. *Holmes v. State*, No. 11-14-00143-CR (Tex. App.—Eastland del. Aug. 21, 2015). On May 17, 2017, this Court denied [Petitioner's] initial habeas application (the -01 writ),² which attacked the merits of the conviction, based on the findings of the trial court without a hearing. [citation omitted]

On January 6, 2022, this Court received a second habeas application (the -02 writ).³ It alleged prosecutorial misconduct in the review of his initial habeas application. Indeed, it has been determined that former assistant district attorney Ralph Petty was paid by the district court judges of that county to work on habeas applications pending in the district courts, including [Petitioner's] -01 habeas application at the same time Petty was employed as an appellate prosecutor by the Midland County District Attorney's office.⁴ That

² Petitioner pleaded various claims of ineffective assistance of trial counsel.

³ Petitioner pleaded the following grounds in his second state application: (1) that he was denied his constitutional right to an impartial judge due to the collusion between the prosecutor and the judge; (2) that his constitutional right of due process in the form of a fair habeas corpus procedure was violated due to judicial misconduct; and (3) that his constitutional right of due process in the form of a fair habeas corpus procedure was violated due to prosecutorial misconduct.

⁴ On April 13, 2021, the Texas Supreme Court accepted Petty's resignation from the practice of law (in lieu of disciplinary action) and ordered him to surrender his law license and bar card. *In re Weldon Ralph Petty, Jr.*, Misc. Docket No. 21-9033 (Order of the Supreme Court of Texas) as reported in the *Texas Bar Journal* (June 2021) at page 545. At the evidentiary hearing in the *Young* case, Petty refused to appear and testify, invoking his Fifth Amendment privilege against self-incrimination. *Ex parte Young*, 2021 WL 4302528 at *2 (Tex. Crim. App., delivered Sept. 22, 2021).

dual employment was not disclosed to this Court or to [Petitioner] at the time his -01 habeas application was under consideration.

It does not appear that Petty's dual employment affected the pre-trial, trial, or appellate proceedings in [Petitioner's] case. However, the undisclosed employment relationship leads this Court to conclude that [Petitioner] was deprived of his due process rights to fair consideration of his claims in the initial -01 habeas application.

Therefore, this Court no reconsiders, on its own motion, the initial -01 habeas claims. After an independent review of the record, without consideration of the trial court's findings of fact and conclusions of law, this Court believes that [Petitioner's] claims are refused by the record.

Therefore, after reconsideration on this Court's own motion, relief is denied in cause number WR-86,764-01. [Petitioner's] subsequent habeas application, cause number WR-86,764-02, is dismissed.

Appendix at 1-2. The background facts of the collusion between Petty and the Midland County district judges were adequately developed as reported in *Ex parte Young*, 2021 WL 4302528 at *2-*3 (Tex. Crim. App., delivered Sept. 22, 2021).

REASONS FOR GRANTING THE PETITION

The writ of habeas corpus enjoys a prominent place in this Country's constitutional apparatus. See Constitution of the United States, Article I, Section 9, Clause 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless in Cases of Rebellion or Invasion the public Safety may require it."). This Court has said: "The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969). Further,

[t]he scope and flexibility of the writ—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.

Id. at 291. The writ provides a "prompt and efficacious remedy for whatever society deems to be intolerable restraints." *Fay v. Noia*, 372 U.S. 391, 401-02 (1963).⁵ "Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment[.]" *Id.* at 402. Moreover, "[t]here is no higher duty of a court, under our constitutional

⁵ *Fay v. Noia* has been overruled on other grounds by *Wainwright v. Sykes*, 433 U.S. 72 (1997) and *Coleman v. Thompson*, 501 U.S. 722 (1991).

system, than the careful processing and adjudication of petitions for writs of habeas corpus[.]” *Harris v. Nelson*, 394 U.S. at 292.

The “essence” of the writ is an “attack” on the legality of a person’s custody, and its “function” is to “secure” the release of that person from illegal custody. *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973). It redresses denials of due process of law. *Fay v. Noia*, 372 U.S. at 402. In fact, “[v]indication of due process is precisely its historic office.” *Id.* Although the “standards” of due process have evolved over the centuries, the “nature” and “purpose” of the writ have remained “remarkably constant.” *Id.*

Due process clearly requires a fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of his particular case. *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997); and *Rippo v. Baker*, 137 S.Ct. 905, 907 (2017). This Court explained several decades ago:

[¶] 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. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that “Every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.” *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). Such a stringent rule may sometimes bar trial by judges who

have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way “justice must satisfy the appearance of justice.” *Offutt v. United States*, 348 U.S. 11, 14.

In re Murchison, 349 U.S. 133, 136 (1955). Moreover, an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case. *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) (holding that under the Due Process Clause there is an impermissible risk of actual bias when a state habeas judge earlier had significant, personal involvement as the state’s chief prosecutor in a critical decision to pursue the death penalty in the defendant’s case). Although the states have no obligation to provide for postconviction relief, *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) (holding that *Anders* requirements do not apply to court-appointed habeas counsel), these due-process principles apply equally to a state’s habeas corpus procedures. *Williams v. Pennsylvania*, 579 U.S. at 8.

Although Petitioner’s ultimate goal is to seek review of his conviction in constitutionally-compliant state habeas corpus proceeding, he seeks restoration of his right to a constitutionally fair state habeas corpus process presided over by an impartial habeas judge and a high state court that won’t merely “rubber stamp” a record created by the collusive efforts of the state trial court (habeas judge) and an appellate prosecutor (functioning as the habeas judge’s law clerk). See *Jefferson v.*

Upton, 560 U.S. 284, 292-94 (2010) (criticizing state habeas courts' *ex parte* practice of adopting the proposed findings drafted exclusively by states' attorneys).

In accordance with their *ex parte* arrangement, Petty drafted the state habeas judge's "Court's Designation of Issues to be Resolved and Manner of Resolution of Issues *etc.*" and "Order on Application for Postconviction Writ of Habeas Corpus" signed and filed on March 9, 2017, and April 25, 2017, respectively. The habeas record (assembled through the collaborative efforts of Petty and the state habeas judge) went up to the Court of Criminal Appeals. See "Order on Application for Postconviction Writ of Habeas Corpus" at 42-43. It was on that same record that the Court of Criminal Appeals denied relief once again: "After an independent review of the record, without consideration of the trial court's findings of fact and conclusions of law, this Court believes that [Petitioner's] claims are refuted by the record." Appendix at 2. The Court of Criminal Appeals reviewed the same habeas record tainted by scandal as it did back on May 17, 2017, when it first denied habeas corpus relief.

This Court has been receptive of claims in which a state's habeas corpus procedure lacked constitutional fairness. See *Long v. District Court of Iowa*, 385 U.S. 192 (1966) (improper denial Long's request for free transcript of uncounseled habeas corpus proceeding for use on appellate review); *Gardner v. California*, 393 U.S. 367 (1969) (improper denial of transcript at public expense in order to apply

for further habeas corpus review); *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116 (1956) (improper summary dismissal of Herman's claims on the basis of the state's response alone); *Smith v. Bennett*, 365 U.S. 708 (1961) (improper rejection of Smith's habeas corpus petition on the basis of his inability to afford the \$4 filing fee); and *Wilde v. Wyoming*, 362 U.S. 607 (1960) (improper denial of evidentiary hearing in order to develop habeas corpus claims). Petitioner requests that this Court take up his claim of constitutional unfairness in the manner in which the Court of Criminal Appeals of Texas handled his case.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

John E. Holmes

March 29, 2023

John Edward Holmes — Petitioner

Date: February ____, 2023