No. _____

In The
Supreme Court of the United States

DAVID LEONARD WOOD,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

DAVID WOOD IS SCHEDULED TO BE EXECUTED ON MARCH 13, 2025.

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CAPITAL CASE

QUESTION PRESENTED

On his campaign website seeking election to the Texas Court of Criminal Appeals, a judge provided a link to a news story praising his ruling that David Wood, the notorious "Desert Killer," had failed to prove that he is intellectually disabled and, therefore, ineligible for execution under *Atkins v. Virginia*, 536 U.S. 304 (2002). The judge continued to preside over a second issue pending in the case—whether David Wood was entitled to forensic DNA testing. The judge eventually denied the motions seeking DNA testing. Does the Due Process Clause of the Fourteenth Amendment require judicial disqualification under these circumstances?

PARTIES TO THE PROCEEDINGS BELOW

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

LIST OF RELATED CASES

State of Texas v. David Leonard Wood, No. 58,486, 171st District Court, El Paso County, Texas. Judgment entered Mar. 3, 2022.

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INTRODUCTION

The Honorable Robert "Bert" Richardson used his postconviction ruling in convicted serial killer David Wood's case to further his judicial election campaign. Judge Richardson ruled that David Wood is not intellectually disabled, allowing his execution to move forward. Judge Richardson then publicized that ruling in a link on his campaign website to appeal to voters in his quest to win election to the Texas Court of Criminal Appeals (TCCA). The link took potential voters to a television news story featuring a victim's mother praising Judge Richardson's decision that brought the mother one step closer to seeing her daughter's killer executed.

In a proceeding separate from the intellectual disability issue, David Wood sought DNA testing to prove his innocence. The police collected hundreds of pieces of evidence from the six different crime scenes. The crime took place in 1987, before DNA testing became an effective investigative tool. The prosecution subjected only three items to DNA testing before the trial. The results on all three items were inconclusive. When David Wood sought re-testing of those items nearly 20 years later using more advanced techniques, a partial profile containing male DNA was found on a blood stain on the clothing of one of the victims. David Wood was definitively excluded as the donor of the male DNA. David Wood then sought DNA testing of over one hundred additional pieces of evidence. The State of Texas steadfastly opposed the testing, and, culminating a decade of litigation, Judge Richardson denied David Wood's motions for DNA testing without making a single finding of fact to support his decision.

David Wood is not arguing that Judge Richardson was actually biased against him, or that Judge Richardson actually allowed political pressure to affect his decisions in David Wood's DNA testing case. But these circumstances "would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true" in David Wood's DNA proceedings. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 878 (2009). That is the standard this Court set in *Caperton*—a standard based on the objective probability of bias under a realistic appraisal of human weakness.

In the opinion below, the TCCA refused to apply that standard or even acknowledge it. Instead, the TCCA made up its own standard—misinterpreting this Court's precedent to claim that only two rigidly defined situations require disqualification: (1) a substantial, non-remote financial interest; or (2) a conflict of interest from prior participation in a proceeding. By rejecting this Court's standard and inventing its own, the TCCA defied binding precedent. This Court should grant certiorari to correct the TCCA's open defiance of its precedent.

Besides applying the wrong standard, the opinion below refused to acknowledge the hard truth that election campaigns put political pressure on judges in high profile death penalty cases. Studies show that judges face political pressure in elections and that that pressure can affect their decisions. To assess whether the circumstances would offer a possible temptation to the average person in Judge Richardson's position not to hold the balance nice, clear, and true, the TCCA needed to recognize the uncomfortable relationship between death penalty decisions and

judicial election campaigns. The TCCA ignored that context in favor of applying more comforting assumptions with no basis in fact.

OPINIONS BELOW

The opinion of the TCCA under review is reported at *Wood v. State*, 693 S.W.3d 308 (Tex. Crim. App. 2024) (App. A). The trial court's decisions rejecting David Wood's DNA testing motions consist of a single word—"denied"—handwritten next to Judge Richardson's signature on the three proposed orders drafted by David Wood's counsel. App. B; App. C[1]; App. D.

JURISDICTION

The TCCA entered its judgment on May 22, 2024. App. A. It denied rehearing on August 21, 2024. App. E. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law...." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A. The Trial

During the summer of 1987, six teenage girls and young women in El Paso disappeared. Between September 1987, and March 1988, the bodies of the six victims were discovered buried in shallow graves in the desert northeast of the city. The

[1] Judge Richardson inadvertently appended an incorrect first page to the proposed order accompanying David Wood's Motion for Forensic DNA Testing under Amended Chapter 64.

condition of the bodies made it virtually impossible for the police to determine the cause of death. The indictment listed a cause of death—stabbing with a sharp instrument—only for the first named victim, Ivy Williams, and provided no cause of death for the other five victims. To convict David Wood of capital murder, the jury had to find that he intentionally killed Ivy Williams and at least one of the other five named victims, in different transactions, pursuant to the same scheme and course of conduct. *See* Tex. Penal Code §19.03(a)(7)(B). The prosecution's theory was that a single person—David Wood—committed all six murders. Without biological or eyewitness evidence tying David Wood to the murders, the prosecution relied on four pieces of evidence:

- Testimony from witnesses who claimed to have seen some of the victims with David Wood, or a man fitting the description of David Wood, or accepting a ride from a man with either a red motorcycle or a beige pickup truck, similar to vehicles that David Wood owned.
- Orange acrylic fibers found at one of the crime scenes that were chemically consistent with fibers taken from a vacuum cleaner found at an apartment where David Wood lived.
- A witness's testimony about an extraneous criminal offense committed by David Wood that the prosecution introduced under Rule 404(b) to prove identity and *modus operandi*.
- Two jailhouse informants who testified that David Wood had confessed to them that he was the "Desert Serial Killer."

The testimony of witnesses who claimed to have seen one of the victims with David Wood or someone resembling him or accepting a ride in vehicles similar to ones he owned was weak at best, and irrelevant or misleading at worst. For example, no one ever reported Ivy Williams missing. One witness testified that she saw David Wood with Williams *nine or ten days before* the State alleged David Wood killed her.

Another witness did not tell the police that she had seen Desiree Wheatley get into David Wood's truck until the police had interrogated her more than 20 times—alone, and without her parents, even though she was only 15 years old. A witness questioned about the disappearance of a third victim was unable to identify David Wood from a photographic line-up or a live line-up.

The suspicious circumstances in which the police recovered the orange acrylic fibers from the Wheatley crime scene undermined their inculpatory value. A police detective falsely testified that he returned to the scene the day after the discovery of Wheatley's body to sift the sand. The detective eventually admitted that the Wheatley crime scene remained open and unguarded from October 20 until October 29, 1987. During the interim, on October 24, David Wood was arrested and his pickup truck impounded and searched. The police vacuumed fibers from the truck. *State v. Wood*, 828 S.W.2d 471, 472–73 (Tex. App. –El Paso 1992). Not until October 29, did the police return to the Wheatley crime scene and allegedly find the fibers. In addition to the timing of the discovery of the fibers, the failure of the police to find acrylic fibers at any of the other crime scenes raises suspicion. According to the State's theory of the case, David Wood's *modus operandi* included his use of a burnt orange blanket that he kept in his pickup truck and used during the sexual assault of all his victims.

In closing arguments, defense counsel called the admission of testimony about the extraneous criminal offense "the most wicked thing that happened in this trial." 69 RR 7516. Over counsel's objections, the court allowed the witness, Judith Brown Kelling, to testify about a sexual assault that she accused David Wood of committing.

Kelling's testimony revealed that the location, time, and circumstances of the sexual assault were remarkably similar to what happened to the murder victims (as described by the jailhouse snitches).

Judith Brown Kelling had a criminal record that included delivery of heroin, burglary of a habitation, and prostitution. She testified that she made her living as a prostitute, and "worked the street" to "feed" her heroin addiction. She had track marks on both arms from injecting heroin. Kelling admitted that she had used heroin on the same day of the extraneous offense because she was suffering from withdrawal. At the time of her testimony, she was in jail where she was awaiting possible revocation of her parole for possession of cocaine. And Kelling waited months before telling the police about the sexual assault.

The highly suspect and incentivized testimony of jailhouse snitches Randy Wells and James Carl Sweeney raised serious questions about their credibility.[2]

[2] The canary in the coal mine of wrongful convictions, the use of jailhouse snitches is nearly always a sign of serious problems with the prosecution's ability to prove its case. Jailhouse informant testimony is perhaps the most unreliable form of evidence that can be introduced at a criminal trial. *See*, *e.g.*, *Banks v. Dretke*, 540 U.S. 668, 701 (2004) ("This Court has long recognized the serious questions of credibility informers pose.") (citation and internal quotation marks omitted); *Hoffa v. United States*, 385 U.S. 293, 320 (1966) (Warren, C.J., dissenting) (noting that the incentivized testimony of informants has "a serious potential for undermining the integrity of the truth-finding process in the federal courts"). The link between jailhouse snitch testimony and wrongful convictions has only become clearer based on the number of DNA exonerations over the past few decades. Jailhouse snitch testimony has been identified as *the* leading cause of wrongful convictions in death penalty cases. Almost half of all wrongful convictions in such cases were due to false informant testimony. Rob Warden, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row*, Center on Wrongful Convictions, Northwestern University School of Law (2007), available at https://www.aclu.org/other/snitch-system-how-snitch-testimony-sent-randy-steidl-and-other-innocent-americans-death-row (last visited Nov. 12, 2024).

Wells testified that he had made a deal with the District Attorney in another county: that he testify against his two co-defendants in their first-degree murder trials[3] and

[3] In September 1991, one year before David Wood's capital murder trial, Wells testified against his co-defendant Shirley Hennington in her first-degree murder trial. Shirley Hennington's trial ended in a hung jury. *See* Maybelle Trout, *Mistrial Declared in Eastland County Murder Trial*, Abilene Reporter-News (Sept. 20, 1991) ("'In all honesty, I think that woman is innocent,' said juror James Keeling after the trial. 'I just couldn't believe that lying Wells.'"). Shirley Hennington was never retried. The DA eventually dismissed the murder charge against her.

In the trial of Jerry Hennington, the second co-defendant, Wells again testified for the State. *Defense counsel called the prosecuting attorney as a witness* and the following testimony ensued:

> Q. [Y]ou admit Mr. Randy Wells is a liar?
> A. I do.
> Q. You admit he's capable of lying to officers?
> A. I do.
> Q. You admit he has lied to officers?
> A. Yes.
> Q. You admit he lies to officers on many occasions?
> A. Yes.
> Q. You admit that he would lie under oath?
> A. Yes.
> Q. You admit he in fact did lie under oath?
> A. It's my belief he has, yes.
> Q. You admit that he is capable of and would in fact lie under oath if it suits his needs or if he perceives it would help him?
> A. Yes.
> Q. You admit that Randy Wells lied in Jerry's first trial?
> A. My opinion today, yes.
> Q. You admit that Randy Wells lied in Shirley's trial?
> A. Yes.
> Q. And you admit then lying under oath wouldn't bother Randy at all?
> A. I agree with that, no.
> Q. Would you agree then that Randy Wells would lie then to a jury under oath the same as he would lie to law enforcement under oath?
> A. Certainly.
> Q. And in fact has done that?
> A. I believe so.
> Q. You've heard [the Texas Ranger] I think make a statement he believed Randy Wells would lie in any statement he made, do you agree with that?
> A. If it would suit his purpose, yes, that's the way I remember it, yes.
> Q. You admit that Randy Wells has now lied in this trial?

that he testify in David Wood's capital murder trial; in exchange the DA would dismiss the first-degree murder charge against Wells, and Wells would plead guilty to forgery and receive a 15-year sentence.[4]

The other jailhouse informant, Sweeney, testified that he did not know about the $25,000 reward until after he appeared before the grand jury. Defense counsel questioned Sweeney about the reward for information leading to the arrest and conviction of the person responsible for the desert serial murders:

> Q. You would like to pick up 25 grand off this case, wouldn't you?
>
> A. No.
>
> Q. You are telling this jury that you don't want the money? Look at the jury and tell them you don't want the money.
>
> A. I do not want the money.
>
> * * * *

> A. I'll admit he had to either lie in this one or the other one in reference to Shirley Hennington, yes.
> Q. Do you recall Mr. Wells in this trial stating he never said Shirley shot?
> A. Right, that's what I mean.
> Q. And of course, that's a lie isn't it?
> A. As compared to his testimony at the last trial, yes, sir.

State v. Thomas (Jerry) Hennington, No. 11-97-00240-CR, 10 RR 614–16 (Testimony of Eastland County ADA William C. Dowell). An Eastland County grand jury later indicted Wells for aggravated perjury based on his materially inconsistent testimony in the trials of Shirley Hennington and Jerry Hennington.

[4] Wells testified that, during their time as cellmates, David Wood confessed to the desert murders. He said David Wood "always" used "a little brown pickup" when he abducted the girls. 65 RR 6968. But David Wood's pickup truck had collided with a car in a traffic accident on July 27, 1987. The truck was badly damaged and towed to an auto salvage yard where it remained until September 5, 1987. The State alleged that three of the murder victims disappeared in August. Notably, the State argued on direct appeal that "[e]specially important" to the Rule 403 balancing analysis (for the admission of Kelling's extraneous offense testimony) "are the admissions reported by Randy Wells that appellant always used the pickup truck to take the girls into the desert area…." Appellee's Brief, No. 71,594 at 16.

Q. When this is all over, do you intend to make a claim for the $25,000?

A. No.

Q. So what you are telling this Court and this jury under oath, and you are telling the commissioners of El Paso County, is that you are waiving any right whatsoever today to any claim on that money?

A. No, I didn't say that....

Q. Do you intend to file a claim for the money?

A. I don't know. I don't know at this time. I'm not concerned about the reward at this time.

* * * *

Q. Are you going to file a claim for the money? It's a simple answer, yes or no?

A. I do not know at this time what I'm going to do.

65 RR 7062–81.[5]

On direct appeal of the conviction, the State argued that Judith Brown Kelling's testimony about the extraneous criminal offense was "extremely important" to the prosecution's case:

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[5] After David Wood was sentenced to death, Sweeney began writing letters to numerous El Paso County officials demanding the reward. In a letter to one of the prosecuting attorneys, Sweeney wrote:

> Its [sic] sad that things have turned as they have, particularly in a case such as this one. In 1989, El Paso Law Enforcement Officers had numerous unsolved murders on their hands. In 1990, these cases were finally connected to Mr. Wood. From there, I believe you know the rest of the story.

James Carl Sweeney letter to ADA Debra Morgan (July 10, 1993). When Sweeney's letter-writing campaign ultimately proved fruitless, he sued the city of El Paso and numerous government officials. In January 1994, a little over a year after David Wood was sentenced to death, Sweeney settled the lawsuit and received a check from El Paso County for $13,000—exactly half of the total reward offered. *See* Diana Washington Valdez, *Ex-Cellmate of David Leonard Wood Collected $13K Reward*, El Paso Times (Sept. 16, 2009).

> The primary evidence that the State had available to establish the identity of appellant was purely circumstantial…. This circumstantial evidence was strengthened by the testimony by two of appellant's cellmates as to admissions made to them of his participation in these crimes. However, the cross-examination of these two witnesses attacked their credibility by showing their numerous prior convictions of felonies, suggesting that they were attempting to recover a reward, and illustrating that the witness Wells was receiving a very favorable plea bargain for his testimony. With the weaknesses of the circumstantial evidence and the attack upon the credibility of the witnesses who testified to appellant's admissions, it is obvious that the testimony of [Kelling] was extremely important to the State's case in establishing appellant's identity and in establishing that he committed these murders pursuant to the same scheme or course of conduct. Appellant's identity and the fact that he acted in the scheme or course of conduct in committing these murders was certainly in dispute throughout this trial.

Appellee's Brief, *Wood v. State*, No. 71,594, at 21–22.

The TCCA agreed, noting that Kelling's testimony revealed that the "location, time, and circumstances of the assault" upon her were "strikingly similar" to the unique pattern of the six murders in the capital case. *Wood v. State*, No. 71,594, at 2 (Tex. Crim. App. Dec. 13, 1995) (unpublished) (App. F). To admit extraneous evidence under a theory of *modus operandi*—the defendant's "distinctive and idiosyncratic" manner of committing criminal acts—the proponent must show that the extraneous offense was nearly identical to the charged offense." *Id.* at 6. The TCCA found "obvious similarities" between the sexual assault of Kelling and the murders. *Id.*

The TCCA then rejected the claim that the prejudicial effect of the extraneous evidence substantially outweighed its probative value. *Id.* The court explained that the Rule 403 balancing is more forgiving when the proponent has no other compelling

or undisputed evidence to establish the proposition that the extraneous evidence is intended to prove. *Id.* at 8. Like the State, the TCCA concluded that Kelling's evidence was "extremely important" to the prosecution's case:

> The identity of the murderer was a disputed issue at trial, obviously critical to both sides. Other evidence linking appellant to the murders consisted of the testimony of his former cellmates, circumstantial evidence and witness testimony placing appellant with one of the victims on the night of her disappearance. But appellant impeached his former cellmates with their lengthy criminal history and vigorously attacked their testimony as the product of deal-making with the State. *The remaining evidence was not so compelling or undisputed as to render unnecessary the extraneous offense evidence.* Under these circumstances the State's need for the evidence was great.

Id. (emphasis added).

B. The DNA Testing Motions

Following major improvements in DNA testing capabilities since his conviction, David Wood has sought additional DNA testing to prove his innocence. Initially, the State did not oppose David Wood's motion for DNA testing. In 2010, a trial court found good cause and ordered DNA testing on the same three pieces of evidence tested before David Wood's trial in 1992. Two of those tests again proved inconclusive. But the testing on the third item, a blood stain on the yellow terry cloth sunsuit of the victim Dawn Smith, revealed male DNA. A partial DNA profile definitively excluded David Wood as the contributor of that male DNA. After obtaining this exculpatory result, David Wood sought testing of over one hundred additional items of physical evidence. He also moved for the creation of a DNA profile from biological samples taken from an alternative suspect so that the profile could be

compared to the partial DNA profile found on the yellow sunsuit. If DNA from any of the other crime scenes matched the male DNA profile from the sunsuit, then the person with that profile would likely be the actual killer, not David Wood.

Despite its non-opposition to David Wood's initial request for DNA testing, the State strenuously opposed any further testing. In 2011, Judge Robert Richardson was assigned to hear all matters in David Wood's case, including both the DNA testing proceedings and the separate *Atkins* proceedings. Without making a single finding of fact, Judge Richardson inexplicably denied all of David Wood's motions for DNA testing. But before Judge Richardson addressed the DNA motions, he ruled in the *Atkins* proceeding that David Wood was not intellectually disabled.

C. The *Atkins* Ruling

In the *Atkins* proceeding, David Wood argued that the Eighth and Fourteenth Amendments prohibited his execution because he is intellectually disabled. Judge Richardson rejected that argument, holding that David Wood is not intellectually disabled and that his execution could therefore move forward. On appeal, the TCCA upheld Judge Richardson's holding. *Ex parte Wood*, 568 S.W.3d 678 (Tex. Crim. App. 2018). This Court denied certiorari. The merits of Judge Richardson's *Atkins* decision are no longer at issue. But, relevant to the judicial disqualification issue here, Judge Richardson used his *Atkins* ruling to further his election campaign.

D. Judge Richardson's Judicial Election Campaign

On July 20, 2013, while presiding over the *Atkins* and DNA proceedings in David Wood's case, Judge Richardson publicly announced that he was seeking the

Republican nomination for the Place 3 judgeship on the TCCA. He created a Facebook page and posted a campaign advertisement promoting his candidacy. On September 24, 2013, Judge Richardson registered the domain name "electjudgerichardson.com." On October 2, 2013, Judge Richardson formally declared his intention to enter the race for the Republican nominee for Place 3 on the TCCA. Two days later, Judge Richardson ruled that David Wood is not intellectually disabled and denied David Wood's *Atkins* claim. Less than a month before the March 2014 Republican primary election for the TCCA, Judge Richardson posted on his campaign website a handful of links to news stories about cases he had presided over as a visiting senior district court judge. One of the links he posted was entitled, "Judge says El Paso's 'Desert Killer' not mentally retarded."

Clicking on the campaign website link would take a visitor to the website of KVIA-TV, El Paso's local ABC News affiliate, and a video of the story that ran live on the evening news on October 4, 2013, the same day Judge Richardson issued his *Atkins* ruling. As the news piece begins, the reporter explains Judge Richardson's decision over video footage of David Wood in prison and from his arrest and trial. A caption at the bottom of the screen reads, "JUDGE: WOOD NOT RETARDED." The reporter says that the mother of fifteen-year-old murder victim Desiree Wheatley called Judge Richardson's decision "great news." As photographs of the teenage victim's smiling face fill the entire screen, the reporter interviews Desiree's mother. At the end of the piece, the reporter notes that David Wood's execution could take place within the next year, and that Desiree Wheatley's mother would attend the execution, "however long it takes." The complete transcript of the news story is set out below.

> **Anchor:**
>
> Well, it's been more than a quarter century since he's been convicted of raping and killing six girls in Northeast El Paso, but "Desert Killer" David Leonard Wood is a step closer to execution tonight. A San Antonio judge issued an opinion that he is not mentally retarded. ABC 7's Darren Hunt spoke with the mother of one of his victim's today. Darren?
>
> **Darren Hunt:**
>
> Rick, I've known Marcia Fulton, the mother of Desiree Wheatley, one of Wood's six victims, for several years now. Three years ago, we were both in Huntsville, awaiting his execution, when Wood received a last-minute stay after his attorneys claimed he is mentally retarded.
>
> Now, the now 57-year-old Wood returned to El Paso last year for several hearings, where a San Antonio judge was appointed to give a recommendation on the mental retardation claim. The opinion from Judge Bert Richardson, who was assigned to the case, states that Wood

> failed to prove by a preponderance of the evidence that he has significantly sub-average intellectual functioning.
>
> Fulton, whose daughter Desiree was just fifteen when she was murdered in 1987, called the recommendation from Judge Richardson, quote, "great news," today. "Just another obstacle," she said, in 26 years of them that she has already endured. Bringing Wood another step closer to a potential execution date, something she has been waiting for since learning of her daughter's death.
>
> **Marcia Fulton:**
>
> They do not call this the "Criminal Justice System" for nothing. They are the ones who get all the justice and all the breaks. And that's fine, because, again, people say, "Well, we don't want to convict the wrong man." Neither do I. I want the man who killed my daughter. I don't want a man. I want the man. And, in my opinion, that man is David Leonard Wood.
>
> **Darren Hunt:**
>
> Now, Fulton says she plans to travel to Austin again to witness the execution, which she thinks could take place now in the next year. But only if an appellate court judge accepts Richardson's recommendation and after more than a hundred pieces of evidence undergo another round of DNA testing that has been ordered. But, however long it takes, Fulton said she will be there. Rick?
>
> **Anchor:**
>
> Alright, it's been a long wait for her. Darren, thank you.

On March 4, 2014, less than one month after posting the link on his campaign website, Judge Richardson won the Republican primary for Place 3 on the TCCA. On November 4, 2014, Judge Richardson won the general election. Three weeks later, the TCCA adopted Judge Richardson's findings and recommendation denying David Wood's *Atkins* claim. *Ex parte Wood*, WR-45,746-02 (Tex. Crim. App. Nov. 26, 2014) (unpublished).

On January 7, 2015, Judge Richardson was formally sworn in and took the bench on the TCCA to begin serving a six-year term. Nevertheless, Judge Richardson continued to preside over David Wood's DNA testing proceedings in the trial court. At no time did Judge Richardson notify David Wood, his counsel, or the State that he had posted a link on his campaign website to a television news report entitled "Judge says El Paso's 'Desert Killer' not mentally retarded."

During the DNA proceedings in the trial court, David Wood filed a motion to disqualify Judge Richardson. The State filed a response in opposition. The Honorable Stephen B. Ables, Presiding Judge of the Sixth Administrative Judicial Region, denied the motion to disqualify in a one-page order, finding "nothing in the Motion that would constitute a ground for disqualification under Texas law." Ex. G.

E. The DNA Testing Decision and David Wood's Appeal

In 2022, after more than a decade of litigation over requests for additional DNA testing, Judge Richardson denied each of David Wood's motions by simply writing "denied" next to his signature on the proposed orders drafted by David Wood's counsel. App. B; App. C; App. D. Judge Richardson did not make any findings of fact or provide any explanation for his decision to deny DNA testing.

On appeal, David Wood argued that the trial court erred in denying additional DNA testing; that Judge Richardson was required to make findings of fact under Texas law; and that the State should mitigate the harm to David Wood caused by its destruction or loss of DNA evidence. *Wood v. State*, 693 S.W.3d 308 (Tex. Crim. App. 2024) (App. A). The TCCA ruled against David Wood on every issue, finding that his

motions for DNA testing were merely a tactic to unreasonably delay his execution. *Id.* at 312. And the TCCA rejected David Wood's argument that Judge Richardson was constitutionally disqualified in the DNA proceedings. *Id.* at 316–20.

HOW THE ISSUES WERE DECIDED BELOW

The TCCA dedicated four pages to whether Judge Richardson was disqualified from the trial proceedings under either the Texas Constitution or the Due Process Clause of the Fourteenth Amendment. *Wood*, 693 S.W.3d at 316–20. The TCCA's analysis jumps between the Texas and federal standards, making it hard to tell at times which standard the TCCA was applying. *See id.* Much of the analysis applies the Texas Constitutional standard, which, according to the TCCA, requires a direct, real, and certain personal or pecuniary interest in the subject matter of the litigation. *Id.* at 316.

The TCCA described the federal due process standard as requiring disqualification only if the judge has (1) a substantial financial interest in the case, or (2) a conflict of interest from prior participation. *Id.* at 316–17.[6] These two

[6] Presiding Judge Keller, who wrote the opinion below, recently explained her understanding of the federal standard in *Ex parte Halprin*, No. WR-77,175-05, 2024 WL 4702377, at *15 (Tex. Crim. App. Nov. 6, 2024) (Keller, P.J., dissenting, joined by Keel and Slaughter, JJ.). In Presiding Judge Keller's understanding, financial interests and conflicts of interest are the two types of "inferred bias[.]" *Id.* Presiding Judge Keller distinguishes inferred bias, which is disqualifying, from personal bias, which is not disqualifying. *Id.* Applying this framework in *Halprin*, Presiding Judge Keller concluded that the judge's undisputed antisemitism was merely personal bias and did not require disqualification because the Jewish defendant could not prove that the judge's antisemitism actually influenced his decision. *Id.* at 15, 28. Justice Yeary took issue:

categories formed the core of the TCCA's due process analysis. Instead of assessing whether the circumstances would offer a possible temptation that might tempt the average person in Judge Richardson's position to disregard neutrality, *see Caperton*, 868 U.S. at 878, the TCCA considered only whether Judge Richardson had a substantial financial interest or prior participation conflict.

The TCCA held that Judge Richardson did not have a "substantial financial, non-remote interest" in denying David Wood's motions for DNA testing because the

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> Presiding Judge Keller seems to argue that, pursuant to *Caperton*, relief is only appropriate in "two instances." . . . But this reading of *Caperton* seems mistaken to me; it appears to align more with the views espoused in a dissenting opinion in that case. *See Caperton*, 556 U.S. at 890 (Roberts, C.J., dissenting) ("*Until today*, we have recognized exactly two situations in which the Federal Due Process Clause requires disqualification of a judge: when the judge has a financial interest in the outcome of the case, and when the judge is trying a defendant for certain criminal contempts.") (emphasis added). Indeed, *Caperton*'s only limiting principle was that the decision addressed "an extraordinary situation" and that the standard would be "confined to rare instances." *Id.* at 887, 890; *see id.* at 891 (Roberts, C.J., dissenting) ("The Court's new 'rule' provides no guidance to judges and litigants about when recusal will be constitutionally required.").

Id. at *12 n.2 (Yeary, J., concurring). Presiding Judge Keller responded:

> Judge Yeary believes that the Supreme Court created a new basis for granting due process relief in *Caperton*, the only limiting principle of which is the existence of "an extraordinary situation," that is "confined to rare instances." But in *Caperton*, the Supreme Court itself said, "In this case we do nothing more than what the Court has done before." 556 U.S. at 888. Contrary to Judge Yeary's understanding of *Caperton*, the Supreme Court did not create a broad new amorphous standard that upends traditional standards for disqualification. It merely broadened the definition of "financial interest." *See id.* at 882, 884.

Id. at *15 n.8 (Keller, P.J., dissenting).

election ended before Judge Richardson ruled on the DNA motions. *Id.* at 317.[7] And the TCCA held that Judge Richardson had no prior participation conflict because "[t]he placement of the link could be seen as a reaffirmation of the correctness of the trial judge's decision, but that is not unusual or unexpected and does [not] create a conflict between the proceedings." *Id.* at 318.[8] The opinion emphasized that Judge Richardson's decision against David Wood "was only a part of the judge's record linked on his website" and that "no money changed hands[.]" *Id.* The TCCA also found that the intellectual disability and DNA proceedings had different "political implications" since voters would understand their "widely divergent inquiries[.]" *Id.* Further, in a paragraph quoting the State's brief, the TCCA found that David Wood's reasoning could "apply to any judge who ran on his record." *Id.*

Finally, the TCCA held that due process does not require disqualification "where a judge *appears* likely to be tempted to rule a certain way due to external factors." *Id.* at 319 (emphasis in original). The TCCA never considered whether the circumstances created an appearance or probability of bias, stating only that it saw no actual impropriety in Judge Richardson's actions. *Id.* at 320.

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[7] The TCCA did not distinguish *Caperton* where this Court found Justice Benjamin disqualified by the circumstances of his campaign even after the election was over. *See Caperton*, 556 U.S. at 882.

[8] The opinion actually says that the placement of the link "*does* create a conflict between the proceedings" but the context indicates this was not the TCCA's intended meaning. *Id.* (emphasis added).

REASONS FOR GRANTING THE WRIT

The death penalty is "profoundly different from all other penalties[.]" *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). That is why, "[w]hen a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976).[9] Here, the safeguards failed. The TCCA applied its own rigid categorical test in place of this Court's objective due process standard. And the TCCA ignored the real political pressure that bubbles up where judicial elections and high profile death penalty decisions intersect. This Court should grant certiorari (1) to address the TCCA's open defiance of binding precedent; and (2) to correct the TCCA's failure to acknowledge uncomfortable truths.

A. The TCCA defied binding precedent by rejecting this Court's standard and inventing its own.

In *Caperton*, this Court held that due process requires removal when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." 556 U.S. at 877 (quoting *Withrow v. Larkin,* 421 U.S. 35, 47 (1975). This Court has made clear:

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[9] *See also Kyles v. Whitley*, 514 U.S. 419, 455–56 (1995) (Stevens, J., concurring) (internal quotation marks omitted):

> Our duty to administer justice occasionally requires busy judges to engage in a detailed review of the particular facts of a case, even though our labors may not provide posterity with a newly minted rule of law. The current popularity of capital punishment makes this generalizable principle, especially important. . . . I wish such review were unnecessary, but I cannot agree that our position in the judicial hierarchy makes it inappropriate. Sometimes the performance of an unpleasant duty conveys a message more significant than even the most penetrating legal analysis.

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.

Caperton, 556 U.S. at 878 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)). This standard reflects this Court's concern with a "general concept of interests that tempt adjudicators to disregard neutrality." *Caperton*, 556 U.S. at 878.

The disqualification standard is objective—it does not require any finding of actual bias. *Id.* at 881. "The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Id.* Some judges could no doubt set aside their interests or biases and rule impartially even in circumstances that would tempt the average person in their position. But the demands of due process are "not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." *Tumey*, 273 U.S. at 532. The core question is whether the specific circumstances, "under a realistic appraisal of psychological tendencies and human weakness," "would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear, and true[.]" *Caperton*, 556 U.S. at 878, 883 (quoting *Tumey*, 273 U.S. at 532). "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." *In re Murchison*, 349 U.S. 133, 136 (1955). But "justice

must satisfy the appearance of justice" and "prevent even the probability of unfairness." *Id.*

No rigid categorical formula could capture the full range of situations that would create an unconstitutional risk of bias. *See Cafeteria & Rest. Workers Union, Loc. 473, AFL-CIO v. McElroy*, 367 U.S. 886, 895 (1961) ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162–63 (1951) (Frankfurter, J., concurring) ("'[D]ue process' cannot be imprisoned within the treacherous limits of any formula."); *Lassiter v. Dep't of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 24–25 (1981). "[W]hat degree or kind of interest is sufficient to disqualify a judge from sitting 'cannot be defined with precision.'" *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986) (quoting *Murchison*, 349 U.S. at 136); *see also Caperton*, 556 U.S. at 887. Therefore, courts must carefully "consider the specific circumstances presented" by each individual case, *Caperton*, 556 U.S. at 881, to assess whether the specific "[c]ircumstances and relationships" at issue "would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true[.]" *Murchison*, 349 U.S. at 136. Given this fact-intensive standard, this Court's cases are "illustrative" and do not constitute an exhaustive catalog of every situation where due process requires disqualification. *Caperton*, 556 U.S. at 887.

The TCCA failed to comply with this Court's due process standard. First, the TCCA defied precedent by rejecting *Caperton*'s objective standard and refusing to

apply it. Second, the TCCA invented its own rigid two-category test inconsistent with this Court's precedent. This Court should grant certiorari to address the TCCA's open defiance of binding precedent.

1. The TCCA rejected this Court's objective standard.

Caperton made clear that the disqualification standard depends on the objective probability that the average person as judge would be tempted to rule a certain way. *Caperton*, 556 U.S. at 881. This Court has expressed this objective standard in slightly varying language: as a "*probability* of actual bias[,]" "a *possible* temptation to the average man as a judge . . . which might lead him not to hold the balance nice clear and true[,]" and "whether the average judge in his position is '*likely*' to be neutral, or whether there is an unconstitutional '*potential* for bias[.]'" *Id.* at 872, 877, 878, 879, 881 (emphases added). But all these different wordings connote the same central standard of objectivity. *Caperton* requires that courts consider the individual circumstances of each case to determine the objective likelihood that an average person in the judge's position would be tempted to rule a certain way due to circumstances outside the facts of the case.

The TCCA rejected *Caperton*'s objective disqualification standard. It held that due process does not require disqualification "where a judge *appears likely* to be tempted to rule a certain way due to external factors." *Wood*, 693 S.W.3d at 319 (first emphasis in original, second emphasis added). While the TCCA did not expressly state that it was defying binding precedent, its opinion cannot support any other conclusion. The TCCA did not so much as acknowledge *Caperton*'s central holding

that disqualification is required where the circumstances create an unconstitutionally high probability of actual bias. *See Caperton*, 556 U.S. at 872. Instead, the TCCA falsely represented that *Caperton* did not create a standard based on objective probability but merely "recognized recusal statutes and rules eliminating the appearance of impropriety to be something to 'take into account' when considering the reach of the Due Process Clause[.]" *Wood*, 693 S.W.3d at 319.[10] And because the TCCA refused to even acknowledge *Caperton*'s objective disqualification standard, it is unsurprising that the TCCA did not apply it to the facts of this case.

The opinion below never addressed the central inquiry of whether the circumstances of this case "would offer a possible temptation to the average man [in Judge Richardson's position] which might lead him not to hold the balance nice, clear and true between the State and the accused[.]" *Caperton*, 556 U.S. at 878, 883 (quoting *Tumey*, 273 U.S. at 532). Nothing in the TCCA's opinion considers the objective probability of bias. *Wood*, 693 S.W.3d at 316–20. At one point in the opinion, the TCCA came close to addressing whether Judge Richardson's remaining on the case created an "appearance of impropriety[.]" *Id.* at 319. But it found that "any appearance of impropriety that is not based on a substantial and non-remote interest" is irrelevant to disqualification. *Id.* Ultimately, the TCCA declined to address whether there was an appearance of impropriety, saying only that it found no actual

[10] In *Halprin*, Presiding Judge Keller elaborated on her view that *Caperton* did not create an objective standard but "merely broadened the definition of 'financial interest.'" 2024 WL 4702377, at *15 n.8 (Keller, P.J., dissenting).

impropriety in Judge Richardson's actions. *Id.* at 320. The TCCA's analysis entirely refused to acknowledge or apply the binding standard from *Caperton*. Whether or not the TCCA agrees with it, *Caperton*'s objective probability standard remains binding law, and the TCCA had a duty to apply that standard here. But not only did the TCCA reject this Court's standard. It substituted its own very different standard—irreconcilable with this Court's precedent.

2. The TCCA invented its own rigid categorical test inconsistent with precedent.

Instead of applying the objective test demanded by *Caperton*, the TCCA invented its own standard, asserting that due process requires removal only in two precisely defined situations: (1) a substantial non-remote financial interest; or (2) a conflict of interest from prior participation. *Wood*, 693 S.W.3d at 316–17. This rigid categorical standard is the foundation of the TCCA's due process analysis.

The TCCA subordinated *Caperton*'s objective test to its own inflexible test. The only time the opinion below acknowledged language from *Caperton*'s objective test, it implanted its own test as a necessary precondition for *Caperton*'s "possible temptation" analysis:

> *Under due process, a judge is subject to removal on the basis of a financial interest or a conflict of interest. . . . Whether a financial interest or a conflict of interest is at issue,* due process forbids a judge from presiding over a case if doing so "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."

Wood, 693 S.W.3d at 316–17 (quoting *Caperton*, 556 U.S. at 878) (emphasis added). Compare that to the full sentence in *Caperton*:

> *Every procedure* which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.

Caperton, 556 U.S. at 878 (quoting *Tumey*, 273 U.S. at 532) (emphasis added). By making its own rigid test a necessary precondition for *Caperton*'s objective analysis, the TCCA set itself up to disregard *Caperton*. Under the TCCA's framing of the standard, if it found no substantial financial interest or prior participation conflict, it would not need to objectively assess the probability of bias under the specific circumstances of the case. And that is exactly how the TCCA proceeded.

The opinion below assessed only whether Judge Richardson had a substantial financial interest or a prior participation conflict, not whether his continued participation in the case after posting the link on his campaign website created a probability of actual bias. First, the TCCA concluded that Judge Richardson had no substantial non-remote financial interest in the case because "any interest attributable to Judge Richardson was at most indirect and insubstantial." *Wood*, 693 S.W.3d at 317–18. Second, the TCCA concluded that Judge Richardson had no conflict of interest flowing from prior participation in David Wood's proceedings. *Id.* After concluding that Judge Richardson had neither a substantial financial interest nor a prior participation conflict, the TCCA held that Judge Richardson was not constitutionally disqualified—without ever considering whether the circumstances created an unconstitutional probability of bias.

The TCCA's rigid categorical test cannot be reconciled with this Court's due process precedent. "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *McElroy*, 367 U.S. at 895. "'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment[.]" *McGrath*, 341 U.S. at 162–63 (Frankfurter, J., concurring); *see also Lassiter*, 452 U.S. at 24–25 (1981). The TCCA's rigid test defies the very nature of due process and shirks the responsibility of judgment, bypassing any inquiry into the fundamental fairness of the circumstances. But the TCCA's rigid standard is not just at odds with the basic requirements of due process. It is contradicted by the very source that the TCCA claims it comes from.

While the TCCA cited pages 876 to 881 of *Caperton* to support its rigid categorical test, *Caperton* plainly contradicts the TCCA's standard. The *Caperton* pages cited by the TCCA describe specific pre-*Caperton* cases where this Court held a judge disqualified, including cases with financial interests and prior participation conflicts. *Caperton*, 556 U.S. at 876–81. But *Caperton* emphasized that "[t]his Court's recusal cases are illustrative[,]" not an exhaustive catalog of every set of circumstances that could disqualify a judge. *Id.* at 887. In the same pages of *Caperton* cited by the TCCA to support the rule it created, this Court described over and over how courts must always assess the objective probability of bias under the specific

circumstances of each case.[11] And the irreconcilability of the TCCA's standard with *Caperton* is further demonstrated by applying it to the facts in *Caperton*.

If this Court had applied the TCCA's rigid categorical test in *Caperton*, it would have found that Justice Benjamin was not disqualified. Justice Benjamin had no substantial financial incentive because he had already won reelection and did not stand to gain or lose any money depending on the outcome of the case. *See id.* at 872–75. And Justice Benjamin had no prior-participation conflict since he was not involved with the case before it reached the West Virginia Supreme Court. *Id.* But considering the specific circumstances of *Caperton*, this Court nonetheless concluded that due process required disqualification because there was an unconstitutional probability of bias because Justice Benjamin might "feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected." *Id.* at 882.

[11] *Caperton*, 556 U.S. at 877 ("These are 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.'") (quoting *Withrow*, 556 U.S. at 47); *id.* at 878 ("Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.") (quoting *Tumey*, 273 U.S. at 532); *id.* at 879 ("The Court underscored that what degree or kind of interest is sufficient to disqualify a judge from sitting cannot be defined with precision.") (quoting *Lavoie*, 475 U.S. at 822) (internal quotation marks omitted); *id.* at 881 ("Again, the Court considered the specific circumstances presented by the case. . . . The inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'").

While the TCCA's analysis cannot be reconciled with *Caperton*'s binding majority opinion, it closely tracks the reasoning of *Caperton*'s dissenting opinion,[12] which itself emphasizes that this view cannot be reconciled with the Court's holding:

> *Until today*, we have recognized exactly two situations in which the Federal Due Process Clause requires disqualification of a judge: when the judge has a financial interest in the outcome of the case, and when the judge is trying a defendant for certain criminal contempts. . . . *Today, however*, the Court enlists the Due Process Clause to overturn a judge's failure to recuse because of a 'probability of bias.'

Id. at 890 (Roberts, C.J., dissenting) (emphasis added). But while the TCCA may agree with *Caperton*'s dissenters that *Caperton* should have been decided differently, it is bound to faithfully apply this Court's decision.

3. This Court should grant certiorari to address the TCCA's defiance of binding precedent.

Whether or not the TCCA agrees with this Court's decision, *Caperton* remains binding law, and its objective probability test remains the standard for disqualification under the Due Process Clause of the Fourteenth Amendment. This Court's interpretation of the U.S. Constitution binds all state courts. *Henry v. City of Rock Hill*, 376 U.S. 776, 777 n.1 (1964). The TCCA had a duty to faithfully apply *Caperton*'s objective standard to determine whether Judge Richardson was disqualified. *See Halprin*, 2024 WL 4702377, at *11 n.3 (Yeary, J., concurring). But not even the most generous interpretation could reconcile the opinion below with

[12] *See Halprin,* 2024 WL 4702377, at *11 n.2 (Yeary, J., concurring) ("Presiding Judge Keller seems to argue that, pursuant to *Caperton*, relief is only appropriate in 'two instances.' . . . But this reading of *Caperton* seems mistaken to me; it appears to align more with the views espoused in a dissenting opinion in that case.").

Caperton's standard. In open defiance of binding precedent, the TCCA expressly rejected this Court's objective probability standard and replaced it with a rigid categorical test of its own invention.[13] The TCCA may think that *Caperton* should have been decided differently. And some of this Court's Justices share that view. *See Caperton*, 556 U.S. at 890 (Roberts, C.J., dissenting) (joined by Thomas and Alito, JJ.). But while this Court has the authority to overrule *Caperton*, the TCCA does not. *See Halprin*, 2024 WL 4702377, at *11 n.3 (Yeary, J., concurring). As long as *Caperton* stands, David Wood has the right for a court to determine whether Judge Richardson was disqualified under its binding standard. The TCCA failed to do so. To address the TCCA's open defiance of binding precedent, this Court should grant certiorari.

B. The TCCA's findings ignore uncomfortable truths.

Courts must analyze whether a judge is disqualified "under a realistic appraisal of psychological tendencies and human weakness[.]" *Caperton*, 556 U.S. at 890 (quoting *Withrow*, 421 U.S. at 47). That sometimes requires judges to face hard truths. Judges' decisions in high profile death penalty cases can be used as campaign fodder to affect their election prospects—and that can put political pressure on their

[13] This is not the first time that the TCCA has openly defied this Court:

> [P]utting aside the difficulties of applying *Moore* in other cases, it is easy to see that the Texas Court of Criminal Appeals misapplied it here. On remand, the court repeated the same errors that this Court previously condemned—if not quite *in haec verba*, certainly in substance. . . . That did not pass muster under this Court's analysis last time. It still doesn't.

Moore v. Texas, 586 U.S. 133, 143 (2019) (Roberts, C.J., concurring).

decisions in those cases.[14] That political pressure formed the context for Judge Richardson's decision to use his *Atkins* ruling in his election campaign. Without recognizing the underlying reality of political pressure when high profile death penalty cases intersect with judicial elections, the TCCA could not meaningfully consider whether Judge Richardson was disqualified under the circumstances in this case.

Decisions that prevent imposition of the death sentence provide easy campaign fodder for opponents. Stephen B. Wright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. Rev. 759, 760 (1995). According to former Mississippi Supreme Court Justice Oliver Diaz, "[j]udges who are running for reelection do keep in mind what the next 30-second ad is going to look like." Kate Berry, *How Judicial Elections Impact Criminal Cases*, Brennan Center for Justice, 7 (2015). "An opponent can seize upon a judge's ruling in one case and, by focusing on the facts of the crime and completely ignoring the legal issue, make even the toughest judge appear 'soft on crime.'" Wright & Keenan, *Judges and the Politics of Death*, *supra*, at 785. The constitutional basis for the decision becomes politically irrelevant because "[t]he focus in these campaigns has been almost entirely on the gruesome facts of particular murders, not the reason for the judicial decisions." *Id.* at 760. As a result, "[w]hen

[14] *Harris v. Alabama*, 513 U.S. 504, 521 (1995) (Stevens, J., dissenting) ("Not surprisingly, given the political pressures they face, judges are far more likely than juries to impose the death penalty.").

presiding over a highly publicized capital case, a judge who . . . insists on upholding the Bill of Rights, may thereby sign his own political death warrant. *Id.* at 765.

Just as judges understand that decisions preventing an execution make them politically vulnerable, they also recognize that decisions pushing an execution forward can bolster their "tough on crime" reputations with voters. In capital punishment states, judges "highlighting their imposition of the death penalty is a standard theme" in judicial campaigns. Berry, *Judicial Elections*, *supra*, at 7 (listing examples).

The Republican primary election for the TCCA is no stranger to this type of political pressure. Consider, for example:

> In the 1994 primary election for the Texas Court of Criminal Appeals, the incumbent presiding judge accused another member of the court of voting to grant relief for convicted defendants more often than other judges. Although a Republican candidate for the second seat on the court lamented what he called the "lynch mentality" of the campaign, two other candidates for the Republican nomination, both former prosecutors, indicated their willingness to treat defendants severely. One stated that the role of the court is to ensure justice, not to reverse convictions because of "technicalities" or "honest mistakes," while the other called the Court of Criminal Appeals a "citadel of technicality" that neglected the interests of crime victims and citizens at large. Two candidates for the third position on the court criticized the incumbent for granting a new trial to a man convicted of homicide. One challenger promised to bring a "common sense" approach to such cases.

Wright & Keenan, *Judges and the Politics of Death*, *supra*, at 785–86 (footnotes omitted). And this is not just empty rhetoric.

Studies show that judicial elections have real effects on the outcomes of criminal cases, particularly in high profile death penalty cases. Berry, *Judicial*

Elections, *supra*, at 9–11. One study "found that in states that renew judicial tenure through elections, a direct effect exists which encourages judges to affirm lower court punishments where the public is most supportive of capital punishment." *Id.* at 10 (omitting internal quotation marks). Another "found that greater electoral competition and more experience with electoral politics increase the probability that justices will uphold capitol sentences." *Id.* And a 2015 study, comparing 37 state supreme court decisions over 15 years, found that states with judicial elections reversed only 11% of death penalty sentences, compared to 26% in states with appointed justices. *Id.* at 10–11. That 15% difference surely indicates at least some cases where the temptation to win an election prevailed over an impartial application of the law. All this to say, the political pressure on elected judges in capital cases is real and substantial.

The facts of this case are wound up in the relationship between death penalty decisions and judicial elections. This political pressure is a real part of the circumstances and relationships that a court must consider in this case. *See Murchison*, 349 U.S. at 136. When Judge Richardson linked the news clip about his intellectual disability ruling on his campaign website, he surely understood it would appeal to voters who desired David Wood's execution. That action explicitly linked his campaign to his decisions in David Wood's cases. It created a "situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial[.]" *Ward v. Vill. of Monroeville*, 409 U.S. 57, 60 (1972). But without acknowledging the underlying reality, the TCCA could not have

truthfully assessed whether the circumstances "would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true between the State and the accused[.]" *Caperton*, 556 U.S. at 878.

The TCCA ignored the uncomfortable reality of death penalty politics in judicial elections in favor of a more comfortable fiction. In particular, two of the TCCA's statements exemplify this fiction underlying its analysis. First, the TCCA interpreted Judge Richardson's action as a mere reaffirmation of the legal correctness of his decision rather than an appeal to death penalty politics. Second, the TCCA held that the DNA and intellectual disability issues had different political implications because voters would distinguish between the legal issues involved. Both of these findings defy reality.

First, the TCCA interpreted Judge Richardson's posting the link on his campaign website as merely "a reaffirmation of the correctness of [his] decision"—not an appeal to voters who favored David Wood's execution. *Wood*, 693 S.W.3d at 318. This fiction is undercut by the content of the news clip itself. At no point does the grieving mother or the reporter discuss the legal merits of Judge Richardson's decision. Instead, the victim's mother expresses her relief that her daughter's killer will be executed, and the reporter expresses his sympathy for her long wait to see David Wood executed. Any communication that Judge Richardson intended to reaffirm the legal correctness of his decision would surely have discussed the decision's legal underpinnings.

The façade falls further away with a simple thought experiment. What if Judge Richardson had granted David Wood's *Atkins* motion, preventing his execution from moving forward? Would Judge Richardson still have posted a link about his decision on his campaign website? Because if not, the determinative factor in his choice to post the link was not the legal correctness of his decision but rather its appeal to potential voters. With this underlying fiction stripped away, the TCCA's finding that Judge Richardson's posting of the link "is not unusual or unexpected" cannot be supported. In posting that link to his campaign website, Judge Richardson gave in to the temptation to use his decision in David Wood's case for political gain.

Second, the TCCA held that the intellectual disability and DNA proceedings had different "political implications" because voters could distinguish between their "divergent inquiries[.]" *Wood*, 693 S.W.3d at 318. This holding ignores the reality that campaign ads do not focus on legal reasoning. When judges' capital decisions become campaign fodder in judicial election campaigns, the focus is "almost entirely on the gruesome facts of particular murders, not the reason for the judicial decisions." Wright & Keenan, *Judges and the Politics of Death*, supra, at 760. Consider this example:

> When the mother of a young daughter, who was brutally murdered and mutilated, complains in a television commercial about a judge vacating the killer's death sentence, the judge has little recourse. A judge can explain that a defendant's right was violated, which warrants a new trial, but the public, unfamiliar with constitutional law, sees only the grieving mother and a picture of the innocent victim.

Id. at 785. While the legal issues in the *Atkins* and DNA proceedings were different, their political implications were the same. A campaign ad accusing Judge Richardson

of letting the notorious "Desert Killer" escape execution would be equally effective regardless of the legal rationale underlying the decision. The TCCA's finding that voters would parse the legal nuances underlying capital decisions ignores the reality of how capital decisions work as campaign fodder in judicial elections.

This Court should grant certiorari to address the TCCA's refusal to acknowledge hard truths. This was a difficult case, requiring the TCCA to objectively consider the same political pressures the Judges sometimes face in their own careers. But the TCCA was required to analyze whether Judge Richardson was disqualified "under a realistic appraisal of psychological tendencies and human weakness[.]" *Caperton*, 556 U.S. at 890. By failing to acknowledge the political pressure underlying Judge Richardson's actions, the TCCA failed to consider the true circumstances and realities in this case.

CONCLUSION

For the reasons stated, this Court should grant the petition for writ of certiorari.

Respectfully Submitted,

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