No. 12-7649

In The
Supreme Court of the United States

EDGARDO RAFAEL CUBAS,

***Petitioner*,**

v.

RICK THALER, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE ETHICS BUREAU AT YALE IN SUPPORT OF THE PETITIONER

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Questions Presented

Whether jurists of reason could debate whether the trial judge violated Mr. Cubas's due process rights by continuing to serve as a Harris County prosecutor in another capital case while presiding over Harris County's capital prosecution of Mr. Cubas.

Whether appellate courts must conduct a full appellate review when confronted with objective, uncontradicted evidence of violations of the Code of Judicial Conduct and the Due Process Clause that demonstrates both bias and the appearance of impropriety in a criminal trial.

Table of Contents

Page

Table of Authorities

Page(s)

Cases

Constitutional Provisions

Rules

Other Authorities

I. Interest of *Amicus Curiae*[1]

The Ethics Bureau at Yale, a clinic composed of eight law school students supervised by an experienced practicing lawyer/lecturer, drafts amicus briefs in cases concerning professional responsibility; assists defense counsel with ineffective assistance of counsel claims relating to professional responsibility matters; and offers ethics advice and counsel on a pro bono basis to not-for-profit legal service providers, courts, and law schools.

The Ethics Bureau at Yale respectfully submits this brief as amicus curiae for two reasons. First, it has an abiding interest in ensuring that the Due Process Clause of the Fourteenth Amendment and the Model Code of Judicial Conduct preserve the right of every criminal defendant to an impartial and disinterested adjudicator. Second, it believes that when judges are biased or give the appearance of bias, they not only damage the integrity of the proceedings at issue, but also undermine public confidence in the fairness of the legal system.

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[1] Pursuant to Rule 37.2 of the Rules of this Court, Petitioner and Respondent have consented to the filing of this brief. The letters granting consent are filed herewith. This brief was not written in whole or in part by counsel for any party, and no person or entity other than amicus and its counsel has made a monetary contribution to the preparation and submission of this brief.

II. Introduction

An independent, impartial, and competent judiciary is essential to the effective functioning of our legal system. So fundamental is this standard that it is considered a basic requirement of due process under the Fourteenth Amendment. *See*, *e.g.*, *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases."); *In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."). Over the years, this Court has "jealously guarded" this right by mandating judicial recusal in cases in which a judge might appear to be biased against a party. *Marshall*, 446 U.S. at 242

Beyond this constitutional requirement, the American Bar Association ("ABA") promulgates the Model Code of Judicial Conduct ("the Code") to maintain and enhance public confidence in those tasked with administering justice. Model Code of Judicial Conduct Preamble (2011); *see* Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned*," 14 Geo. J. Legal Ethics 55, 55 (2000). Forty-nine states and the federal judiciary have adopted the Code, which establishes standards for the ethical conduct of judges and judicial candidates. *Id*.

It is a longstanding principle that judges who wear "two hats" at the same time violate the requirement of judicial impartiality. *Mistretta v.*

United States, 488 U.S. 361, 404 (1989). Particularly egregious is when a sitting judge continues to wear a prosecutor's hat. *See Gay v. United States*, 411 U.S. 974, 975 (1973) (Douglas, J., dissenting) ("[It is a] basic concept of due process of law that a person should not serve as both prosecutor and judge.").

Yet, while presiding over a capital case in Harris County, Texas, District Court Judge Jan Krocker did just that. A former assistant district attorney, Judge Krocker took the extraordinary action of interjecting herself into the habeas appeal of Mr. Martin Draughon, an inmate whom she had sent to death row during her time as a prosecutor. Judge Krocker acted in an unbridled prosecutorial capacity to rebut the defendant's ineffective assistance of counsel claim, advising the Texas Attorney General's Office on its case strategy and interviewing witnesses for affidavits. Simultaneously, Judge Krocker presided over the capital murder trial of Mr. Edgardo Cubas, who was charged by the same prosecutor's office and had no knowledge of Judge Krocker's zealous intervention. Mr. Cubas's case resulted in a guilty verdict, and he now sits on death row.

Judge Krocker's conduct may reflect a wider problem. Critics of the Harris County criminal justice system have protested that the relationship between judges and prosecutors is too "chummy;" of the twenty-two criminal district court judges in the county in 2005, eighteen were former prosecutors in the District Attorney's Office. Steve McVicker, *Experts Question Judge's Ethics*, Hous. Chron., Feb. 13, 2005,

http://www.chron.com/CDA/archives/archive.mpl/2005 _3843892/experts-question-judge-s-ethics-they-say-a-line-wa.html.

When Judge Krocker acted in a prosecutorial capacity, she violated both the Due Process Clause and the Code. The Fifth Circuit's denial of Mr. Cubas's application for a Certificate of Appealability is incomprehensible in light of the incontrovertible record of Judge Krocker's substantial advocacy on behalf of the same agency that was prosecuting Mr. Cubas. Leaving in place the lower court's assessment that Mr. Cubas's complaint is practically frivolous will gravely erode public confidence in the judiciary by sending the message that judges are not subject to fundamental ethical standards. This Court therefore should grant Mr. Cubas's petition for writ of certiorari.

III. Statement of Relevant Facts

In denying Mr. Cubas's application for a Certificate of Appealability, the Fifth Circuit provided only a bare-bones, far-too-expurgated set of facts minimizing Judge Krocker's uncontradicted and well-documented intervention in the *Draughon* matter. [2] In doing so, the court trivialized and

[2] The following are the limited facts—omitting material matters—provided by the Fifth Circuit: "Judge Jan Krocker, presiding judge of the 184th District Court for Harris County, Texas, presided over Cubas's trial. Judge Krocker was a former assistant district attorney with the Harris County District Attorney's Office. While an assistant district attorney, Judge Krocker prosecuted a capital murder case against Martin Allen Draughon in 1987. . . . In 1995, Judge Krocker took the bench. During Cubas's trial, Draughon was in the midst of seeking

mischaracterized Judge Krocker's interference and failed to address critical details of her role that call into question the ethics of her conduct. The following are additional facts that the court below should have taken into account but instead ignored.

Before her election to the bench, Judge Krocker served as an assistant district attorney in Harris County from 1981 to 1991. Pet'r Br. Supp. Appl. Certificate of Appealability 11. In 1987, Judge Krocker prosecuted the capital murder case against Mr. Draughon. *Id*. After receiving a death sentence, Mr. Draughon petitioned the federal district court for habeas corpus relief, alleging a substantial, and ultimately successful, ineffective assistance of trial counsel claim based on counsel's failure to secure the assistance of a ballistics expert. Independent ballistics testing confirmed that the victim had been killed by a ricocheted bullet, and thus supported Mr. Draughon's theory that the shooting was unintentional. *Id*. at 13-14. Mr. Draughon also claimed that the prosecution suppressed *Brady v. Maryland*, 373 U.S. 83 (1963) evidence and that the prosecutor's arguments before the jury amounted to misconduct. *Id*. at 11-12; *see Brady v. Maryland*, 373 U.S. 83 (1963).

Judge Krocker used the *Brady* claim as a toehold to insert herself into Mr. Draughon's case

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federal habeas corpus relief. Judge Krocker sought to file an affidavit in Draughon's case to show that she had not committed prosecutorial misconduct before the state trial court. Cubas's trial counsel was unaware of Judge Krocker's participation in Draughon's federal habeas case." *Cubas v. Thaler*, 2012 U.S. App. LEXIS 12214, at *2 (5th Cir. Tex. June 15, 2012).

and rebut his ineffective assistance of counsel claim. First, she expressed her displeasure with the Texas Attorney General Office's case strategy in two long, detailed letters to the office. Pet. Writ Habeas Corpus 13. In the first of those letters, she began by stating that she was "writing as the prosecutor who represented the State in the . . . trial of Martin Draughon." Ex. Volume Appl. Post-Conviction Writ Habeas Corpus 9. She proceeded to assert that the "primary issue in the hearing" was the defendant's ineffective assistance of counsel claim, discussing that issue at length and only mentioning the *Brady* issue as an afterthought. *Id.* at 9-12. After the district court scheduled an evidentiary hearing, Judge Krocker also filed an unprecedented motion to intervene as a party. Pet'r Br. Supp. Appl. Certificate of Appealability 12. Even in this motion, she discussed the ineffective assistance of counsel claim as part of her interest in intervening. Ex. Volume Appl. Post-Conviction Writ Habeas Corpus 6.

Although the district court denied Judge Krocker's motion, it allowed her to volunteer information she believed relevant. Pet'r Br. Supp. Appl. Certificate of Appealability 13. Judge Krocker then voluntarily attended Mr. Draughon's evidentiary hearing, to which she had neither been subpoenaed nor invited, and requested a copy of the transcript. She then launched her own independent investigation into the ineffective assistance of

counsel issue and secured over ten affidavits.[3] *Id*. at 28-29. Some of these affidavits had nothing whatsoever to do with the *Brady* claim. For example, the affidavit of Dr. Dwayne Wolf addressed whether the victim was killed by a ricocheted bullet—evidence that was only relevant to Mr. Draughon's ineffective assistance of counsel claim. *See* Ex. Volume Appl. Post-Conviction Writ Habeas Corpus 24-25.

The district court ultimately found that Mr. Draughon's *Brady* claim lacked merit, but granted relief on the ground that new expert testimony effectively undermined the trial testimony of former prosecutor Krocker's ballistic expert. Pet'r Br. Supp. Appl. Certificate of Appealability 13-14. By engaging in blatant advocacy against Mr. Draughon's ineffective assistance of counsel claim, Judge Krocker went far beyond what would have been her proper role—making herself available as a witness on the issues that involved her conduct—and inserted herself into an issue that did not concern her in any way. She thus served in an active and entirely inappropriate prosecutorial capacity while she was simultaneously a sitting judge, regularly presiding over cases brought by the *same* prosecutor's office.

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[3] Of particular importance, one of the affidavits Judge Krocker obtained in her crusade against Mr. Draughon was from Dr. Dwayne Wolf of the Harris County Medical Examiner's Office. Pet. Writ Habeas Corpus 13. When Dr. Wolf appeared to testify at Mr. Cubas's trial, the court's silence shielded from Mr. Cubas information to which he was entitled about Judge Krocker's contemporaneous lawyer/judicial relationship with this key witness. *Id*.

One of those cases was Mr. Cubas's trial. And as corrupting and impartiality-destroying as that prosecutorial intervention was, the transgression was compounded by the fact that Judge Krocker failed to disclose to Mr. Cubas that she was moonlighting as a Harris County prosecutor during his trial. As a result, Mr. Cubas remained blissfully ignorant of the due process violation that infected his entire trial. Judge Krocker's simultaneous prosecutorial and judicial roles resulted in both a fundamental lack of impartiality as well as a grave appearance of bias, running afoul of the Due Process Clause and the Model Code of Judicial Conduct.

IV. Summary of Argument

While presiding over Mr. Cubas's capital murder trial, Judge Krocker simultaneously acted as a prosecutor for the same county prosecuting Mr. Cubas. Unbeknownst to Mr. Cubas, she actively intervened in an effort to defeat a death-sentenced prisoner's petition for habeas corpus relief based on ineffective assistance of trial counsel and prosecutorial misconduct. The court below failed to acknowledge or even mention the extensive record evidence of the trial judge's substantial role as a state's advocate in the other capital habeas case.

It is a longstanding principle that judges cannot serve dual prosecutorial and judicial functions. Through her conduct, Judge Krocker denied Mr. Cubas his Fourteenth Amendment right to due process, as her behavior destroyed any possibility that she could act as an unbiased and impartial decision maker. In addition, Judge

Krocker violated the ethical standards required of her under the ABA Model Code of Judicial Conduct. She failed to uphold the independence, integrity, and impartiality of the judiciary, and her actions created a strong appearance of impropriety. Mr. Cubas bore the costs of Judge Krocker's misconduct and did not receive a fair trial.

Approaching these issues from a professional responsibility perspective will not only correct the miscarriage of justice in Mr. Cubas's case, but will prevent public confidence in the judiciary from being undermined and enable courts to properly adjudicate future judicial misconduct situations. As the supervisor of the lower courts and final arbiter of standards of care, this Court should address the issues raised in this case and grant this petition.

V. Argument

To be both effective and fair, our legal system relies upon the independence, integrity, and impartiality of the judiciary. The Due Process Clause of the Fourteenth Amendment protects this interest by requiring the recusal of judges who might have bias towards a party in the case. Beyond this "constitutional floor," "the professional standards of the bench and bar" provide guidance on how judges must conduct themselves to uphold these important values. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Judge Krocker ignored her ethical obligations under both the Due Process Clause and the Model Code of Judicial Conduct when she acted as a *de facto* arm of the prosecution in Mr. Draughon's case while presiding over Mr. Cubas's trial.

A. Judge Krocker violated Mr. Cubas's Fourteenth Amendment right to due process because her behavior created a constitutionally unacceptable possibility of bias.

The Due Process Clause of the Fourteenth Amendment entitles all parties in a case, especially criminal defendants, to "an impartial and disinterested tribunal." *Marshall*, 446 U.S. at 242; *see also In re Murchison*, 349 U.S. at 136 ("A fair trial in a fair tribunal is a basic requirement of due process."). This Court has "jealously guarded" this important right in its decisions about the circumstances under which a judge must recuse him or herself. *Marshall*, 446 U.S. at 242. In making these decisions, "[t]he 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.'" *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 881(2009); *see also*, *e.g.*, *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) ("[S]ituations have been identified 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."); *In re Murchison*, 349 U.S. at 136 ("[O]ur system of law has always endeavored to prevent even the probability of unfairness."); *Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927) ("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.").

This Court has reserved mandatory recusal for a narrow range of cases whose "extreme facts" put judicial impartiality at serious risk. *Caperton*, 556 U.S. at 887. A judge's financial interest in the outcome requires disqualification. *Id.* at 877; *see*, *e.g.*, *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (holding that a judge who upheld a punitive damages award against an insurance company had to be disqualified because he was the lead plaintiff in an identical suit); *Tumey*, 273 U.S. 510 (holding that a mayor who served as a judge had to be disqualified because criminal fines paid for his judicial service and went into the village treasury).

Yet financial incentives are not the only reason that a judge must be disqualified. *Caperton*, 556 U.S. at 880; *see*, *e.g.*, *id.* (holding that a judge who had received over $3 million in campaign contributions from the president and CEO of a corporation appearing before him should have recused himself); *In re Murchison*, 349 U.S. 133 (holding that the same judge who sat as a one-man grand jury before which witnesses had testified could not preside over contempt hearings for the witnesses' conduct in that grand jury hearing). As this Court importantly observed in *Caperton*, "As new problems have emerged that were not discussed at common law, . . . the Court has identified additional instances which, as an objective matter, require recusal." 556 U.S. at 877.

The present case fits comfortably into this lineage because of the exceptional manner and extent to which the judge destroyed any possibility of unbiased decision making. While she was presiding

over Mr. Cubas's trial, Judge Krocker acted as an unofficial member of the prosecution team in Mr. Draughon's federal habeas appeal. She wrote to the Texas Attorney General's office in an effort to direct the State of Texas's strategy in Mr. Draughon's case. Ex. Volume Appl. Post-Conviction Writ Habeas Corpus 9-12. Dissatisfied with the Attorney General's representation of the State, Judge Krocker moved to intervene in the case *as a party*. She then performed extensive investigation and submitted evidence from numerous witnesses in effort to defeat Mr. Draughon's ineffective assistance of counsel and prosecutorial misconduct claims. Judge Krocker's involvement was not, as depicted by the court below, limited to merely that of a former lawyer turned judge. Rather, she voluntarily added herself as a lawyer to the prosecution team on behalf of the same office that was simultaneously prosecuting Mr. Cubas.

By serving dual prosecutorial and judicial functions, Judge Krocker violated a fundamental tenet of our adversarial system, which purposefully separates these two roles. As the Model Penal Code notes, "clear institutional and professional differences exist between the roles of judges and prosecutors" in order to maintain the "indispensable premise of the adversarial process . . . that a neutral decisionmaker will pass ultimate judgment in criminal cases." Model Penal Code § 6.06 cmt. d (Tentative Draft 2011).

"The entrance of a judge into the litigation arena in aid of a combatant impacts not only the outcome of that conflict but the very idea of judicial

impartiality." *Joachim, et al., Relators v. Hon. Eugene Chambers*, 815 S.W.2d 234, 239 (Tex. 1991). In breaching the divide between the judiciary and the prosecution, Judge Krocker put those fundamental values in jeopardy. Indeed, her prosecutorial intervention posed a greater risk to the judiciary's impartiality than in cases where this Court has required recusal.

B. Judge Krocker failed to meet the ethical standards required of her under the ABA Model Code of Judicial Conduct.

Just as Judge Krocker failed to meet her obligations under the Due Process Clause of the Fourteenth Amendment, she also ignored her ethical duties under the ABA Model Code of Judicial Conduct. The Code consists of four Canons, Model Code of Judicial Conduct Preamble cmt. 1 (2011), which together "state overarching principles of judicial ethics that all judges must observe," *Id.* at Preamble cmt. 2. Each Canon is further distilled into Rules, the violation of which should result in discipline for the offending judge. *Id.* The Rules are accompanied by Comments that provide guidance on the application of the Rules, *Id.* at Preamble cmt. 3, and identify "aspirational goals" for the ethical conduct of judges, *Id.* at Preamble cmt. 4. Taken together, these parts of the Code provide a basic framework of judicial ethics principles.

The Texas Supreme Court has "held that the Texas Disciplinary Rules of Professional Conduct may be used to determine whether counsel is disqualified in a particular case." *Joachim*, 815

S.W.2d 234, 239 (Tex. 1991); *see Ayres v. Canales*, 790 S.W.2d 554, 556 n.2 (Tex. 1990). The Code of Judicial Conduct can be applied similarly to determine whether a judge's misconduct rises to the level requiring recusal or, if the infected proceeding has already occurred, whether the case should be remanded. *See Joachim*, 815 S.W.2d 234 (applying the Canons of Judicial Conduct in a case involving a retired district judge in Harris County and finding that the retiree—who continued to serve as a judicial officer by assignment—could not testify as an expert witness in pending litigation).

Through her involvement in Mr. Draughon's habeas appeal while simultaneously presiding over Mr. Cubas's case, Judge Krocker failed to meet the standard of conduct demanded by at least three of the Canons and their underlying Rules. Judge Krocker's complete deviation from the conduct outlined in the Code warrants redress. More importantly, it cries out for a clarion call from this Court that such violations will not be tolerated and that results thereby obtained will be reversed.

1. Judge Krocker's behavior violated Canon 1 of the Code because she did not uphold and promote the independence, integrity, and impartiality of the judiciary; rather, she gave the appearance of impropriety.

Canon 1 of the 2011 ABA Model Code of Judicial Conduct provides that "[a] judge shall uphold and promote the independence, integrity, and

impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Model Code of Judicial Conduct Canon 1 (2011). Judge Krocker's behavior in this case violated the principles outlined in this Canon and the Rules associated with it.

For instance, Rule 1.2 mandates that "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." *Id.* at R. 1.2. The importance of this prohibition on both the substance and the appearance of impropriety has been reaffirmed in recent years. The 1990 precursor to the current Code contained this provision. Model Code of Judicial Conduct Canon 2 (1990) ("Judges should avoid impropriety and the appearance of impropriety in all their activities."). In 2004, however, the ABA circulated a proposed draft of new Canons that curtailed the appearance of impropriety standard significantly, noting that judges whose behavior gave the appearance of impropriety would not usually be subject to professional discipline unless they also violated other Rules. This proposal sparked widespread public outcry. *See*, *e.g.*, *Weakening the Rules for Judges*, N.Y. Times, May 22, 2004, http://www.nytimes.com/2004/05/22/opinion/weakening-the-rules-for-judges.html (railing against the proposal for "water[ing the standard] down," thereby "significantly diminish[ing] its moral force and deterrence value"). Counsel for amicus even wrote an article explaining that both the appearance and reality of propriety, independence, and integrity are

essential standards to be expected of the judiciary. Lawrence J. Fox, *I Did Not Sleep with that Vice President*, 15 Prof. Law., no. 2, 2004, at 1.

At the end of this debate, the ABA House of Delegates unanimously agreed that the appearance of impropriety standard should remain in the Code, just as it does in parallel state codes, including the Texas Code of Judicial Conduct. *See* Texas Code of Judicial Conduct Canon 2. Indeed, "[t]o hold judges to the highest standards of ethical conduct, a code of judicial conduct must cover not just the clear and obvious improprieties but indirect, disguised, or careless conduct that looks like an impropriety to an observer who is neither overly suspicious nor unusually gullible." Cynthia Gray, *Avoiding the Appearance of Impropriety: With Great Power Comes Great Responsibility*, 89 Judicature 35, 35 (2005).

Prohibiting the appearance of impropriety is essential because the public cannot maintain confidence in the courts—the most crucial component of the rule of law—if it does not believe the courts to be models of independence, integrity, and impartiality. The comments to Rule 1.2 emphasize that public confidence is tied to judicial conduct, both personal and professional. Model Code of Judicial Conduct R. 1.2 cmt. 1 (2011). And the test for determining whether the appearance of impropriety could hurt this confidence is if reasonable people might see the conduct and believe it reflects adversely on the judge. *Id.* at R. 1.2 cmt. 5. Thus, it is essential to examine not only whether a

judge has conducted him or herself in conformance with these standards, but also whether, to an outside observer, it *appears* that the judge has behaved appropriately.

Conducting that examination of the present case, amicus concludes that Judge Krocker's unnecessary interjection in the *Draughon* matter created both an impropriety and an appearance of impropriety so manifest as to taint Mr. Cubas's proceedings before her court. When a judge practices law while donning a black robe, he or she acts with impropriety and without integrity, and, at the same time, gives the appearance of impropriety to the public. For this reason, the ABA has noted that judges should not allow their former firms to retain their names, *see* ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 143 (1935), should not receive a percentage of a contingency fee for the work they did on a case while employed at a firm, *see* ABA Comm. on Prof'l Ethics, Informal Op. C-676 (1963), and should not receive a fee for referring a case to a firm, *see* ABA Comm. on Prof'l Ethics, Informal Op. 433 (1961). If a judge's more limited interactions with his or her former practice might give the public the impression that some impropriety is afoot, Judge Krocker's involvement in Mr. Draughon's case did far more than that.

Amicus does not dispute that Judge Krocker was entitled to make herself available as a witness and provide limited evidence to rebut Mr. Draughon's *Brady* claim. But Judge Krocker went above and beyond what was necessary to dispute Mr. Draughon's allegations against her. She actively

sought to defeat the Sixth Amendment claim, writing letters to the prosecution analyzing its strategy and attempting to intervene in the case. Pet'r Br. Supp. Appl. Certificate of Appealability 12. When that attempt proved unsuccessful, the district court allowed her to submit information via affidavit. *Id*. at 13. Judge Krocker then amassed a great deal of evidence and submitted *numerous* affidavits discussing the ineffective assistance of counsel claim. *Id*. This extensive involvement, hardly of a nominal nature and stretching way beyond simply being a witness, can only give the public an impression of impropriety.

Beyond the appearance of impropriety, Judge Krocker's behavior engendered uncertainty about the judicial branch's integrity. As the comments to Rule 1.2 note, judicial integrity is key to maintaining public confidence in the court system. *See* Model Code of Judicial Conduct R. 1.2 cmt. 3 (2011). Judge Krocker did not behave with integrity when she failed to inform Mr. Cubas and his counsel of her prosecutorial role in Mr. Draughon's case in a timely manner. It was not until *after* Mr. Cubas's trial and guilty verdict that the critical information concerning Judge Krocker's involvement in the *Draughon* matter surfaced, and even then it was not through the allegedly impartial judge. Pet'r Br. Supp. Appl. Certificate of Appealability 26-27. If Judge Krocker had fully disclosed her involvement, Mr. Cubas would have had the opportunity to object to her continuing judicial role. Misleading the defendant in this manner was not only inconsistent with Judge Krocker's obligation to act with integrity,

but also ran afoul of the duty of the tribunal to be candid with litigants.

Additionally, Judge Krocker flouted the requirements of Rule 1.3, which provides, in relevant part, that "[a] judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others." Model Code of Judicial Conduct R. 1.3 (2011). Contrary to this Rule, Judge Krocker involved herself in Mr. Draughon's case to advance her own personal interests. She apparently feared that if the prosecutor's office did not handle Mr. Draughon's *Brady* claim appropriately, her reputation might suffer, or she might be subject to civil liability or professional sanctions. Pet'r Br. Supp. Appl. Certificate of Appealability 12; Ex. Volume Appl. Post-Conviction Writ Habeas Corpus 6. But, not bound by that one issue, Judge Krocker launched a crusade against Mr. Draughon, trying to defeat claims irrelevant to Judge Krocker's own conduct.

Not only did Judge Krocker involve herself in the case to advance her personal interests, she abused the prestige of her judicial office while doing so. As the comments to Rule 1.3 reflect, judges should not use judicial letterhead for personal reasons so as to avoid "gain[ing] personal advantage or deferential treatment." Model Code of Judicial Conduct R. 1.3 cmt. 1 (2011); *see In the Matter of Mosley*, 102 P.3d 555 (Nev. 2004). In Mr. Draughon's case, Judge Krocker flamboyantly employed her judicial letterhead in the two letters she wrote the Texas Attorney General's office. Ex. Volume Appl. Post-Conviction Writ Habeas Corpus 9-21. By so

doing, Judge Krocker abused the prestige of her office for her own personal interests, thereby destroying judicial impartiality and tearing down the fabric of our criminal justice system in the process.

2. Judge Krocker did not perform her judicial duties impartially, competently, or diligently as required by Canon 2 of the Code.

Canon 2 of the ABA Model Code of Judicial Conduct provides that "[a] judge shall perform the duties of judicial office impartially, competently, and diligently." Model Code of Judicial Conduct Canon 2 (2011). As with Canon 1, Judge Krocker did not come close to meeting the requirements of this Canon and its underlying Rules.

Rule 2.2 of the Code deals directly with impartiality, noting that "[a] judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." *Id.* at R. 2.2. The Comments to Rule 2.2 emphasize that "judge[s] must be objective and open-minded," *Id.* at R. 2.2 cmt. 1, not allowing their background experiences to color their legal interpretations, *Id.* at R. 2.2 cmt. 2. Yet, throughout Mr. Cubas's trial, there were indications that Judge Krocker allowed her legal interpretations to be colored by her bias against the defendant. These include: failing to inform potential jurors that capital murder requires a specific intent to kill; giving prospective jurors an incorrect definition for the requirement of "intentional" murder; failing to correct the prosecution when it gave prospective

jurors an example of capital murder that did not include the requirement of a specific intent to kill; discussing the mitigation issue in a manner that linked it to the future dangerousness issue; heightening the jury's expectations as to what evidence could be considered mitigating, thereby creating a burden of proof for the defendant that was not intended for this special issue; allowing prosecutors to discuss special issues in a manner that created the expectation that there must be a nexus between the mitigating evidence and the offense; misapplying the burden-shifting procedure for evaluating a *Batson v. Kentucky* claim; and interrupting trial counsel's questioning of Mr. Cubas's father so as to minimize its evidentiary impact. Pet'r Br. Supp. Appl. Certificate of Appealability 21-22. Viewed alone, each of these violations supports the conclusion that Judge Krocker's involvement in the *Draughon* matter influenced her impartiality during Mr. Cubas's trial. Viewed in the aggregate, these transgressions undeniably demonstrate Judge Krocker's underlying bias against the defendant in violation of Rule 2.2.

Additionally, Rule 2.4 of the Code focuses on the problems that can be created by external influences on a judge's behavior. It provides, in pertinent part: "(C) A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge." Model Code of Judicial Conduct R. 2.4 (2011). The Comments to Rule 2.4 highlight the fact that the public might develop a negative perception of the judicial branch if it believes that judges are beholden to outside interests. *Id.* at R. 2.4 cmt. 1. As

discussed previously, Judge Krocker attempted to serve as a member of the prosecution in Mr. Draughon's case by readily offering her advice on case strategy and involving herself as a lawyer in the case as much as possible. Pet'r Br. Supp. Appl. Certificate of Appealability 12-13. As a result, the public would be logically compelled to conclude that she was beholden to the interests of the prosecutor's office in her other simultaneous interactions with it, including during Mr. Cubas's trial.

Rule 2.11 addresses the issue of disqualification. The Code emphasizes the problems generated by even the possibility of bias. In relevant part, this Rule provides that a judge must disqualify him or herself if his or her "impartiality might reasonably be questioned." Model Code of Judicial Conduct R. 2.11(A). As discussed previously, a reasonable person would have no choice but to question Judge Krocker's impartiality given her close interactions with the prosecutor's office. *See* Pet'r Br. Supp. Appl. Certificate of Appealability 12-13.

3. Judge Krocker's interjection in the Draughon *matter conflicted with her obligations of judicial office and therefore violated Canon 3.*

Canon 3 of the Code provides, "A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office." Model Code of Judicial Conduct Canon 3 (2011). Judge Krocker's extensive

involvement in the *Draughon* matter not only violated the first two Canons of Judicial Conduct, but also contravened the rule that requires judges to avoid participating in activities that obstruct judicial performance. Rule 3.1 specifies, in relevant part, that "when engaging in extrajudicial activities, a judge shall not: (A) participate in activities that will interfere with the proper performance of the judge's judicial duties; . . . [or] (C) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality." *Id*. at R. 3.1.

Judge Krocker's zealous intervention in the *Draughon* matter constituted an extrajudicial activity; it was outside—way outside—the scope of her judicial obligations and responsibilities. For Judge Krocker, this activity took precedence over the cases over which she was presiding. Indeed, she voluntarily indicated to the judge handling Mr. Draughon's habeas corpus petition that she would readily reschedule her docket, including Mr. Cubas's case, as well as all of her travel arrangements, to deal with the petition. Pet. Writ Habeas Corpus 13.

Moreover, Judge Krocker's behavior violated Rule 3.10's clear admonition that "[a] judge shall not practice law." Model Code of Judicial Conduct R. 3.10 (2011). This is a fundamental tenet of judicial ethics that both federal and state courts have long upheld. *See Prichard v. United States*, 181 F.2d 326 (6th Cir. 1950); *In re Fleischman*, 933 P.2d 563 (Ariz. 1997); *Judicial Discipline & Disability Comm'n v. Simes*, 354 S.W.3d 72 (Ark. 2009); *In re Edwards*, 694 N.E.2d 701 (Ind. 1998). According to the case

law, the "practice of law" is defined broadly, encompassing "those acts, whether performed in court or in the law office, which lawyers customarily have carried on from day to day through the centuries." *State Bar of Arizona v. Arizona Land Title & Trust Co.*, 366 P.2d 1, 14 (Ariz. 1961), *modified on other grounds*, 371 P.2d 1020 (Ariz. 1962). These acts include, but are not limited to, assisting or advising in the preparation of legal documents or writings, advising regarding legal rights or liabilities, representing another before a court or administrative agency, and "rendering to another any other advice or services which are and have been customarily given and performed from day to day in the ordinary practice of members of the legal profession." *Id.*

Judge Krocker's involvement in the *Draughon* matter—which included drafting letters, filing a motion to intervene, and gathering and submitting numerous affidavits and other pieces of evidence—clearly constituted the practice of law. Even worse, Judge Krocker used the prestige and credibility of her office to advance her personal interest in a case. *See supra* Section B.1. Such conduct flies in the face of Rule 3.10.

Further, Rule 3.3 prohibits a judge from "testify[ing] as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned." Model Code of Judicial Conduct R. 3.3 (2011). The Texas Supreme Court has noted that although this rule "specifically restricts judges only from testifying

as character witnesses, the underlying principles may apply to other judicial testimony, especially expert testimony." *Joachim*, 815 S.W.2d at 238.

Through her detailed letters to the Texas Attorney General's office and her own affidavit, Judge Krocker provided more than mere evidence. She injected "the prestige of [her] office into the proceeding," and her testimony could readily be "misunderstood to be an official testimonial." *Id*. "The risk of confusion of the roles of witness and judge when" one "acts as both can create an appearance of impropriety." *Id*. Judge Krocker's simultaneous prosecutorial involvement—of which Mr. Cubas and his counsel were wholly oblivious—represented an actual impropriety that contravened the Code and cannot be tolerated.

VI. Conclusion

Judges wield awesome power in our adversary system. With that power comes great responsibility. Judge Krocker's ethical transgressions ran contrary to the standards rightfully expected of her both under the Due Process Clause and the Model Code of Judicial Conduct. Through her ethical breaches, Judge Krocker not only denied Mr. Cubas the right to a fair trial, but also undermined public confidence in the judiciary. The only acceptable remedy is to prevent Mr. Cubas from bearing the costs of Judge Krocker's misconduct by granting his request for the writ of certiorari and then providing him with habeas corpus relief. To do otherwise would be an affront to the values of our justice system, tearing

down public confidence in the integrity, independence, and impartiality of the courts.

Most importantly, as the guardian of these fundamental judicial values, this Court should intervene to use this case as a vehicle for sending a clarion call to the nation's judiciary that the integrity, impartiality, and independence of the courts will be subject to challenge when wholesale judicial misconduct of this nature goes unremedied. Our system of justice is a fragile one; protecting it should be the judiciary's highest calling.

Respectfully Submitted,

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In the
Supreme Court of the United States

No. 12-7649

EDGARDO RAFAEL CUBAS,
***Petitioner*,**

v.

RICK THALER, Director, Texas Department of Criminal Justice, Correctional Institutions Division,
***Respondent*.**

AFFIDAVIT OF SERVICE

I, Wanda Cao, of lawful age, being duly sworn, upon my oath state that I did, on the 10th day of January, 2013, hand file with the Clerk's Office of the Supreme Court of the United States forty (40) copies of this Brief of *Amicus Curiae* The Ethics Bureau at Yale in Support of the Petitioner, and further sent, via U.S. Mail, postage pre-paid, three (3) copies of said Brief to:

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Dated: January 10, 2013

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AFFIDAVIT OF COMPLIANCE

This Brief of *Amicus Curiae* The Ethics Bureau at Yale in Support of Petitioner has been prepared using:

Microsoft Word 2007;

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As required by Supreme Court Rule 33.1(h), I certify that the Brief of *Amicus Curiae* The Ethics Bureau at Yale in Support of the Petitioner contains 5,959 words, excluding the parts of the Brief that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

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