No. WR-75,015-01
No. WR-75,015-02

In the

COURT OF CRIMINAL APPEALS OF TEXAS

In re THE STATE OF TEXAS
EX REL. PATRICIA R. LYKOS

Relator,

v.

HON. KEVIN FINE, PRESIDING JUDGE,
177TH DISTRICT COURT OF TEXAS,

Respondent.

REAL PARTY IN INTEREST JOHN EDWARD GREEN'S BRIEF IN OPPOSITION TO REQUEST FOR RECONSIDERATION ON COURT'S OWN INITIATIVE PURSUANT TO RULE 72.2 OF THIS COURT'S DENIAL OF WRIT OF PROHIBITION AND WRIT OF MANDAMUS

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Counsel for Real Party in Interest, John Edward Green

The District Attorney of Harris County asks the Court to reconsider on its own motion the Court's refusal on November 29, 2010, to grant leave to file the District Attorney's Petition for Writ of Prohibition and Petition for Writ of Mandamus. This motion should be denied. The only thing that has happened since this Court's order of November 29 is that the hearing on Mr. Green's Amended Motion to Declare Article 37.071, § 2 of the Texas Code of Criminal Procedure Unconstitutional as Applied has commenced. The opening argument by defense counsel and the initial evidence presented by the defense demonstrate beyond reasonable dispute that the claim being heard by the trial court is not foreclosed by any previous decision of this Court or any other court.

The following affidavit by undersigned counsel, attached as Appendix 1, demonstrates that the presentation by the defense cannot be subject to prohibition or mandamus:

> 1. I am one of the attorneys for John Edward Green in *State v. John E. Green*, No. 1170853 (177th District Court, Harris County).
>
> 2. I provide this affidavit in response to the affidavit provided by Assistant District Attorney Carolyn Allen, which is attached as Exhibit B to the District Attorney's Request for Reconsideration on Court's Own Initiative Pursuant to Rule 72.2 of this Court's Denial of Writ of Prohibition and Writ of Mandamus.
>
> 3. I was present for and participated in the first day of the hearing, December 6, 2010, on behalf of Mr. Green. There is no transcript yet of this proceeding, so I am responding by affidavit to Ms. Allen's affidavit.
>
> 4. Ms. Allen says, "[D]efense counsel argued that it would show that the defendant was at risk of being subject to a wrongful conviction by way of looking at other wrongful convictions which had components similar to evidence which could be offered against Mr. Green." Allen Affidavit, at 1 (un-numbered 3rd paragraph). Ms. Allen goes on to say:
>
> > The defendant, through his attorney, then called Richard Dieter to the witness stand. Mr. Dieter stated that he is the Executive

> Director of the Death Penalty Information Center (hereafter the "DPIC"). Mr. Dieter then testified the purpose of the DPIC is to educate the public about the problems with the death penalty. He offered no testimony related to the defendant's case. The defendant then called Sandra Thompson, a member of the Timothy Cole Advisory Panel to testify about inadequacies of certain types of evidence, but none of the evidence related directly to the defendant.

Id. at 2 (final paragraph).

5. Ms. Allen's affidavit is incomplete and inaccurately recounts the argument and evidence Mr. Green proposed to present and began to present on the first day of the hearing.

6. Mr. Green's counsel argued that his claim was based on the Eighth Amendment's requirement that every aspect of a capital trial, including the determination of guilt and innocence, meet standards of heightened reliability. Counsel then argued that the determination of Mr. Green's guilt is at risk of being unreliable – and that he is at risk of being wrongfully convicted – for the following reasons:

- Mr. Green is and has always maintained his innocence.

- The prosecution's case against him rests entirely on three kinds of evidence – eyewitness identification, informant statements and testimony, and a fingerprint comparison.

- These three kinds of evidence have been identified in studies of the cases of people known to have been wrongfully convicted to have been the most common causes of wrongful conviction.

- Mr. Green is thus at substantial risk of being wrongfully convicted.

- This risk is heightened by the following procedures associated with the trial of his case:

  - There will be no full disclosure by the District Attorney of all investigative work they or the police have done on the case – thus hiding the flaws in their evidence and the sources of doubt in their case.

- The jury that will be selected to hear Mr. Green's case may well be an all-white jury, due to the history of the Harris County District Attorney's use of peremptory strikes to eliminate minority jurors, with only seldom recrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986) – the consequences of which are that the non-diverse juries are less accurate in finding the facts.

- The death qualification process used to select the jury will leave the jury biased toward conviction.

7. Further, Mr. Green's counsel argued that the constitutionally unacceptable risk he suffered of wrongful conviction would not be ameliorated by the safety nets of state habeas corpus proceedings and clemency, because the standard for showing actual innocence in post-conviction proceedings is impossible for anyone to meet who, like Mr. Green, has no DNA-based evidence in his or her case.

8. Finally, Mr. Green's counsel argued that they would demonstrate that the prejudice Mr. Green would suffer from a wrongful conviction was irremediable by showing that wrongfully convicted people have been executed.

9. Mr. Green argued to the court that he would present evidence to demonstrate how all of these factors give rise to the unacceptable risk that Mr. Green will be wrongfully convicted.

10. Mr. Green then began his evidentiary showing with the testimony of Richard Dieter, whose organization maintains data about people who have been convicted of capital murder and sentenced to death, and then exonerated. The purpose of Mr. Dieter's testimony was to demonstrate that 138 death-sentenced people have been exonerated, and that the causes for the wrongful conviction of these people were similar to the evidentiary risk factors in Mr. Green's case.

11. Mr. Green next called University of Houston law professor Sandra Thompson, a national expert on the role that eyewitness misidentification plays in wrongful convictions and a member of the Timothy Cole Advisory Panel on Wrongful Convictions established by the Texas legislature. Professor Thompson explained how eyewitness identifications are often mistaken yet nevertheless relied on by juries to convict defendants, what procedures can be put in place to lessen the risk of mistaken identification, and how Texas has none of these procedures in place. Professor Thompson also discussed the work of the Cole Advisory Panel in recommending that Texas implement these procedures. Finally, Professor Thompson addressed how the prosecution's use of informants and the lack of adequate discovery for the defense leads to mistaken convictions,

how the risks of wrongful conviction associated with these factors can be minimized, and the work of the work of the Cole Advisory Panel in addressing these matters.

12. Finally, Mr. Green called the two defense investigators who have been working on his behalf to explain that the discovery provided by the prosecution shows that the prosecution's case is based entirely on an eyewitness identification, informant statements, and fingerprint comparison.

The District Attorney reiterates, over and over, in her newest pleading the same fundamental mischaracterization that she relied on in her Petition for Writ of Prohibition and Petition for Writ of Mandamus: that Mr. Green is relying on evidence of "third-party innocence" – *i.e.*, evidence that someone else was wrongfully convicted and executed – to establish his claim. As undersigned counsel's declaration makes clear, this is not what Mr. Green is doing. The District Attorney's repetitively saying that this is what Mr. Green is doing does not make it so.

To be sure, in addressing why eyewitness identification evidence, informant statements, fingerprint evidence, the lack of full discovery, racially-based jury selection, and death qualification increase the risk of wrongful conviction for Mr. Green, Mr. Green's witnesses will necessarily rely on evidence that these factors have led to wrongful convictions in other people's cases. There is no other way to prove that Mr. Green suffers an unacceptable risk of wrongful conviction. To suggest otherwise is the same as suggesting, for example, that data drawn from the health histories of thousands of smokers demonstrating that smoking three packs of cigarettes per day increases the risk of lung cancer is irrelevant to determining whether a particular smoker suffers a heightened risk of developing lung cancer. Clearly, such evidence is highly relevant to determining whether a particular smoker suffers a heightened risk of developing lung cancer.

The degree of similarity between people who are known to be at risk for something and a particular person whose risk level is being assessed is always highly relevant. That is all Mr. Green is doing in this hearing. The wrongful execution of someone else in and of itself does not establish a risk that Mr. Green will be wrongfully executed. It means something only if the reasons that led to another person's wrongful execution are also factors in Mr. Green's case. The hearing in Mr. Green's case is the only way he can show that he shares so much in common with others who were wrongfully convicted that he is at such a risk for wrongful conviction that the risk is intolerable under the Eighth Amendment.

Finally, no case decided by the Supreme Court or this Court – as we demonstrated in the brief opposing the petition for writ of prohibition and petition for writ of mandamus that we filed November 23, 2010 – forecloses, or has even addressed, this claim. Yet, the District Attorney in the first day of the hearing on this novel and gravely serious claim, refused to participate in the hearing, repeatedly stating through her assistants when called upon by the trial court for a response or for cross-examination of a witness, that the state is "standing mute." *See* Appendix 2. This disdain for the judicial process, particularly when the District Attorney's legal argument finds no support in the law or the evidence, should not be countenanced by this Court.

The District Attorney's Request for Reconsideration on Court's Own Initiative Pursuant to Rule 72.2 of this Court's Denial of Writ of Prohibition and Writ of Mandamus should be denied.

Respectfully submitted,

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By

Counsel for Real Party in Interest, John Edward Green

Certificate of Service

I hereby certify that the foregoing pleading was served by delivery to counsel for Relator, **Allen Curry**, Assistant District Attorney, 1201 Franklin Street, Ste 600, Houston, TX 77002; by delivery to Respondent, **Honorable Kevin Fine**, Presiding Judge, 177th District Court, 1201 Franklin Street, Ste 1900, Houston, TX 77002; and by mail to **Greg Abbott**, Office of the Attorney General, PO Box 12548, Austin, TX 78711, and **Jeffrey Van Horn**, State Prosecuting Attorney, PO Box 12405, Austin, TX 78711, this 7th day of December 2010.

Counsel for Real Party in Interest John Edward Green

Appendix 1

State of Texas)
) ss:
County of Harris)

AFFIDAVIT OF RICHARD BURR

Richard Burr, having been duly sworn according to law, deposes as follows:

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2. I provide this affidavit in response to the affidavit provided by Assistant District Attorney Carolyn Allen, which is attached as Exhibit B to the District Attorney's Request for Reconsideration on Court's Own Initiative Pursuant to Rule 72.2 of this Court's Denial of Writ of Prohibition and Writ of Mandamus.

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Richard Burr

Subscribed and sworn to before me
this 6th day of December, 2010.

MATTHEW SILVERMAN
Notary Public, State of Texas
My Commission Expires
February 01, 2012

Notary Public
Harris County
State of Texas

Appendix 2

Bold move by DA

DA tells her prosecutors to stay silent during judge's inquiry

By BRIAN ROGERS
HOUSTON CHRONICLE

Dec. 6, 2010, 11:44PM

THE GREEN CASE

John Edward Green, 25, is accused in the slaying of Huong Thien Nguyen, a 34-year-old mother of two, who was robbed and fatally shot on June 16, 2008 in Houston. Her sister also was shot, but survived.

Attorneys for Green say at least three pieces of key evidence are flawed. Prosecutors believe a partial palm print found on Nguyen's car belongs to Green, but his attorneys say the print can not be identified.

Informants trading information with the police fingered Green for the crime, which his attorneys say is self-serving snitching.

Nguyen's sister also identified Green in a photo lineup after he was arrested, but his lawyers said the original description of her assailant did not match Green.

Harris County **District Attorney** Pat Lykos on Monday ordered prosecutors in her office to "stand mute" during a rare hearing to determine whether the **death penalty** in Texas is unconstitutional.

The last-ditch strategy to end state District Judge Kevin Fine's judicial inquiry into the procedures surrounding the state's death penalty statute makes an observer out of the largest district attorney's office in Texas.

The hearing, stemming from a death penalty case before Fine's court, began Monday and is expected to last two weeks.

"It's arrogant, and it's contemptuous for the state to decide to not participate when they're trying to put my client to death," defense lawyer Casey Keirnan said in court.

Prosecutor Alan Curry told Fine he was ordered to answer that he is to remain mute instead of objecting, cross-examining or putting on witnesses at the hearing.

"I'm not allowing you to not participate," Fine said.

Curry said he and other prosecutors will remain seated at counsel tables, but that they will not speak.

Fine could have held the office in contempt for the move. Instead of deadlocking the proceedings, Fine allowed prosecutors to listen without objection to testimony from anti-death penalty experts, legal scholars and investigators.

Death penalty opponents and courthouse observers turned out in droves early Monday because the hearing is believed to be the first time a court will consider the constitutionality of the Texas death penalty in the context of analyzing whether there is a substantial risk of convicting the innocent.

Lawyer: Client 'at risk'

Defense lawyers for John Edward Green are arguing that Texas has executed two innocent defendants, and the procedures surrounding the death penalty in Texas are unconstitutional because there are not enough safeguards.

"He is at risk of being wrongfully convicted, wrongfully sentenced and wrongfully executed," said defense lawyer Richard Burr.

Green, 25, faces the death penalty, accused of a 2008 robbery and slaying in southwest Houston.

Burr said Green is innocent.

Before they staked their position, Curry and other prosecutors argued that the law surrounding the death penalty is well settled.

They also argued that Green has not been convicted of anything and therefore lacks standing to argue against the death penalty.

Curry said early Monday that hearing testimony or gathering evidence is unnecessary.

"This is a legal issue, not an evidentiary issue," Curry said.

"I believe I need to hear evidence," the judge answered.

Curry, the head of the appellate division of the district attorney's office, also lodged at least 19 other objections in writing.

'It's disrespectful'

Curry and other representatives of the office declined to comment on the hearing or their strategy Monday.

Defense lawyers watching the hearing collectively shook their heads after listening to the district attorney's position.

"It's disrespectful," said Mark Bennett, a past-president of the Harris County Criminal Lawyers Association. "This is the most serious matter in this man's life and the district attorney's office is playing a game. Pat Lykos is ordering her subordinates to play games."

Witnesses expected to testify in the hearing include former Texas Gov. Mark White, who last month spoke in Houston with New York lawyer **Barry Scheck** of the **Innocence Project**.

White has called for legislative changes citing problems with the capital cases of Claude Jones and **Cameron Willingham**, both of whom have been executed.

Ruling at March hearing

Scheck, who is expected to appear and call witnesses about those two cases, is seeking a moratorium on executions.

Scheck will try to convince the judge that Jones and Willingham were actually innocent and that Texas has almost certainly executed other innocents.

During a March hearing in Green's case, Fine declared the procedures surrounding the death penalty in Texas unconstitutional, then rescinded his ruling and asked attorneys on both sides to present more evidence.

Burr said three factors in Green's case — eyewitness identification, partial fingerprint evidence and information provided by informants — were also used to convict Jones and Willingham.

Because Fine has once ruled that the procedures surrounding the death penalty are unconstitutional saying that innocent people may have been executed, Fine is expected to rule the same way again.

Instead of trying to convince the judge, evidence presented at the hearing is destined for the **appellate courts**, which most observers say will overturn Fine's ruling.

'Judicial activism'

Attorneys for Green hope the tug-of-war will ultimately end the death penalty, although they parse their words carefully saying the system has flaws that create an unacceptable risk that innocent people, including Green, will be executed in the future.

Fine, a Democrat who took the bench in 2008, was accused of "judicial activism" by Lykos, Texas **Attorney General** Greg Abbott and Gov. **Rick Perry** after his initial ruling in March.

Lykos at that time said the constitutionality of the death penalty was well-settled law, one of the positions her office took Monday.