WR-77,175-05
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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IN THE COURT OF CRIMINAL APPEALS OF TEXAS
IN AUSTIN, TEXAS

EX PARTE RANDY HALPRIN,	§	
	§	CAUSE NO. WR-77,175-05
APPLICANT	§	

MOTION FOR STAY OF EXECUTION PENDING CONSIDERATION AND DISPOSITION OF APPLICATION FOR A WRIT OF HABEAS CORPUS

Applicant Randy Ethan Halprin moves this Court to stay his execution pending the consideration and disposition of the subsequent application for a writ of habeas corpus filed in the 283rd District Court of Dallas County, Texas on July 16, 2019. **The execution is currently scheduled for October 10, 2019.** This motion is based on the files and records in this case and incorporates by this specific reference the averments and evidence proffered with Mr. Halprin's § 5 application, as if fully set forth herein.

Mr. Halprin's application raises two claims: (1) judicial bias denied him his fundamental right to due process, and (2) the future-dangerousness special issue in Texas death penalty scheme is unconstitutionally vague. The first claim presents newly uncovered evidence that trial judge Vickers Cunningham referred to Mr. Halprin as a "goddamn kike" and "fuckin' Jew," and to his Latino co-defendants as "wetbacks,"

when the judge bragged about his role in convicting and sentencing to death the Jewish and Latino members of the Texas 7. The evidence of Judge Cunningham's bias comes primarily from first-hand accounts of disinterested witnesses to his prejudiced statements about Mr.Halprin. Pet. Exs. 9 & 17. That testimony is corroborated and strengthened by Judge Cunningham's admitted creation of an anti-miscegenation clause in a living trust, Pet. Exs. 21 & 22, related testimony of other witnesses, *e.g.*, Pet. Exs. 19 & 36, expert analysis of Cunningham's statements and actions, Pet. Exs. 27 & 37, and Judge Cunningham's lifelong association with racist and anti-Semitic role models, *see* Pet. Exs. 7, 11, 12 & 27.

Compared with cases in which the U.S. Supreme Court has found at least a prima facie case of a constitutional violation, the extra-record evidence Mr. Halprin presents is more than sufficient to constitute a prima facie showing that Judge Cunningham was biased, or, at a minimum, that his anti-Semitic views of Mr. Halprin created an unconstitutional risk of bias.*

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* *See Rippo v. Baker*, 137 S. Ct. 905, 906-907 (2017) (remanding to state court for further proceedings after finding potential for unconstitutional bias where district attorney was investigating judge for bribery during defendant's trial); *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1906-07 (2016) (Constitution required recusal "where a judge had a direct, personal role in the defendant's prosecution"); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009) ("We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."); *Bracy v. Gramley*, 520 U.S. 899, 905, 909 (1997) (finding allegations of bias sufficient to state prima facie case where petitioner's "quite speculative" evidence showed that judge who was convicted of taking bribes in some criminal cases engaged in a "sort of compensatory bias" in petitioner's

Because the Supreme Court has held that a biased judge is structural error, *Ex parte Fierro*, 934 S.W.2d 370, 372 (Tex. Crim. App. 1966) (citing *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991)), the evidence of bias, in and of itself, is more than sufficient to invalidate the conviction and sentence. "The entire conduct of the trial from beginning to end is obviously affected . . . by the presence on the bench of a judge who is not impartial." *Fulminante*, 499 U.S. at 309-10. A biased judge constitutes a basic defect in the "whole adjudicatory framework" of the trial. *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1902 (2016). In such cases, prejudice is presumed, because there has been a "pervasive undermining of the systemic requirements of a fair and open judicial process." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017). Consequently, a "'criminal defendant tried by a biased judge is entitled to have his conviction set aside, no matter how strong the evidence against him.'" *Buntion v. Quarterman*, 524 F.3d 664, 672 (5th Cir. 2008) (quoting *Edwards v. Balisok*, 520 U.S. 641, 647 (1997)).

"'[R]espect for the basic ingredient of due process, namely, an opportunity to be allowed to substantiate a claim before it is rejected,'" *Ford v. Wainwright*, 477 U.S. 399, 414 (1986) (quoting *Solesbee v. Balkcom*, 399 U.S. 9, 23 (1950) (Frankfurter, J.,

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case); *In re Murchison*, 349 U.S. 133, 137 (1955) (finding due process does not "permit[] a judge to act as a grand jury and then try the very persons accused as a result of his investigations"); *Tumey v. Ohio*, 273 U.S. 510, 532-34 (1927) (finding due process violated where judge had small pecuniary interest in case and could raise funds for his community—and improve his electoral position—by imposing higher fines).

dissenting)), requires that a movant facing an execution date have a fair opportunity to seek a stay in order to litigate well-founded, previously unavailable claims under the United States Constitution. Fairness includes notice that conveys required information and an opportunity to be heard. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314-15 (1950). Although Mr. Halprin lacks such notice, the evidence proffered with his application would meet any test for a stay of execution that satisfies due process.

In addition, the timeliness of Mr. Halprin's claim should not be in dispute. In the case of Mr. Halprin's co-defendant, Joseph Garcia, the State conceded that "information regarding Judge Cunningham's alleged bias is newly available evidence." Mot. Dismiss 22, *Ex parte Joseph Garcia*, No. WR-64,582-03 (filed Nov. 27, 2018). It is indisputable that Judge Cunningham concealed his bias at the time of trial by failing to disqualify or recuse himself, and that Mr. Halprin could have discovered it only after the judge's brother and friends publicly exposed him as a bigot in May 2018. *See Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (noting "presumption of honesty and integrity in those serving as adjudicators"); *Bracy v. Gramley*, 520 U.S. 899, 909 (1997) (same). In addition, there are compelling policy reasons for holding that newly available evidence of judicial bias is not an abuse of the writ:

> [B]oth litigants and attorneys should be able to rely upon judges to comply with their own Canons of Ethics. A contrary rule would presume that litigants and counsel cannot rely upon an unbiased judi-

> ciary, and that counsel, in discharging their Sixth Amendment obligation to provide their clients effective professional assistance, must investigate the impartiality of the judges before whom they appear. Such investigations, of course, would undermine public confidence in the judiciary and hinder, if not disrupt, the judicial process—all to the detriment of the fair administration of justice.

Porter v. Singletary, 49 F.3d 1483, 1489 (11th Cir. 1995).

This case is readily distinguished from *Garcia* where, as the State observed, the applicant presented no evidence that Judge Cunningham's racist views "existed at the time of his trial in 2003," or otherwise came to bear in the case. Mot. Dismiss 22, *Ex parte Joseph Garcia*, No. WR-64,582-03 (filed Nov. 27, 2018). Mr. Halprin provides first-hand accounts of Judge Cunningham using anti-Semitic slurs to refer to Mr. Halprin while Judge Cunningham was describing his role in Mr. Halprin's conviction and sentence. And, Mr. Halprin provides evidence that Judge Cunningham's bias was a predominant and lifelong feature of his character, worldview, and, critically, his reasons for seeking public office. In addition, the State's constitutional analysis in *Garcia* was contrary to the Supreme Court law cited here and in Mr. Halprin's application.

A stay of execution must be granted to permit consideration of the merits of Mr. Halprin's claim in due course. "[I]f the Constitution renders the fact or timing of his execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being." *Ford*, 477 U.S. at 411. Mr. Halprin has presented more than a prima facie case of a previously unavailable claim that the judgment against him

is invalid due to a biased judge presiding over the trial. *Cf. Bracy*, 520 U.S. at 908-909 (describing weaker case as presenting facts that, if fully developed, may entitle petitioner to relief). A stay of execution will permit this Court to file and set the case for further briefing and/or to consider in due course issues relating to whether the application satisfies the requirements of Texas Code of Criminal Procedure Article 11.071, § 5.

The equities are in Mr. Halprin's favor. Mr. Halprin acted with extraordinary diligence by investigating the possibility of Judge Cunningham having anti-Semitic bias when the only information available showed bigotry towards people of color, not necessarily Jews. Mr. Halprin filed his claim in federal court first in order to comply with the federal statute of limitations and because this Court's two-forums rule precluded consideration of the claim while Mr. Halprin was seeking Supreme Court review of his initial federal habeas claims. *See* Mot. Ex. A at 2-3; *id.* at 38-43. Even before he filed in federal court, Mr. Halprin advised State counsel that he would be filing. Mot. Ex. B (email from Tivon Schardl to Kathleen Childs and Brian Higginbotham dated May 8, 2019). As soon as practicable, Mr. Halprin filed a motion in the U.S. district court seeking a stay of the federal proceedings so that he could seek review in this Court, Mot. Ex. C, and he provided State counsel notice of the same, Mot. Ex. D.

The equities are not in the State's favor. The Attorney General sought to delay consideration of Mr. Halprin's federal stay/abeyance motion, *see* Mot. Ex. E, on the

same day the District Attorney sought the execution date, Mot. Ex. F, after consulting with the Attorney General, Mot. Ex. B (email from Brian Higginbotham to Tivon Schardl & Tim Gumkowski dated May 17, 2019). The Attorney General then relied upon the execution date in the State's opposition to a stay of the federal proceedings, Mot. Ex. G at 6, which could have the effect of delaying review in this Court. The State took those actions almost one month after Mr. Halprin served notice of his intention to file the judicial bias claim, three weeks after he filed in federal court, and two weeks after he sought to stay the federal proceedings in order to file in this Court as quickly as possible.

At the same time, the State has conceded that "the details of [Judge] Cunningham's [anti-miscegenation] living trust and the accounts of those who knew Cunningham regarding his bigoted statements and beliefs are troubling to say the least." Mot. Ex. H at 23.

The denial of Mr. Halprin's motion under the circumstances presented here would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The denial of this motion would be arbitrary in violation of the Equal Protection Clause of the Fourteenth Amendment such that each movant for a stay is a class of one. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564-65 (2000).

///

CONCLUSION

The Court should stay Mr. Halprin's execution in order to give due consideration to previously unavailable evidence showing trial judge Vickers Cunningham was biased against Mr. Halprin and his Latino co-defendants.

Respectfully submitted,

/s/ *Paul E. Mansur*

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DATED: August 22, 2019.

CERTIFICATE OF SERVICE

I hereby certify that on the 22st day of August 2019, I filed the foregoing Motion using the efile.tx.gov system.

/s/ *Paul E. Mansur*

Paul E. Mansur

Exhibit A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RANDY ETHAN HALPRIN,	§	
	§	
Petitioner,	§	
	§	
v.	§	CAUSE NO. 3:19-CV-1203
	§	
	§	
LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division,	§	CASE INVOLVING THE DEATH PENALTY
	§	
	§	
Respondent.	§	

PETITION FOR WRIT OF HABEAS CORPUS SUPPORTED BY POINTS AND AUTHORITIES

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INTRODUCTION

The Honorable Vickers Cunningham, the presiding judge at Mr. Halprin's capital trial, is a racist and anti-Semitic bigot who described Mr. Halprin as "that fuckin' Jew" and a "goddamn kike." That judge—who decided all pretrial motions, challenges during jury selection, and all objections during the taking of evidence—believed that Jews "needed to be shut down because they controlled all the money and all the power." He referred to the Latino defendants as "wetbacks." In general, Judge Cunningham said about his service on the bench, "any 'nigger' or 'wetback' walking into his courtroom knew they were going to go down." Judge Cunningham's prejudices, bias, and animus towards Jews precluded him from the being the impartial judge the Due Process Clause of the Constitution requires. His central role in the trial from start to finish constitutes a structural defect, and requires that the judgment of conviction and sentence of death be vacated.

Anti-Semitic bias ranks as "humanity's greatest hatred." Dennis Prager & Joseph Telushkin, *Why the Jews?: The Reason for Antisemitism* 17 (1985). Judge Cunningham's participation in Mr. Halprin's trial despite his anti-Semitic animus offends basic concepts of fairness and religious equality and violates the Constitution's guarantee of due process of law. Like reliance on invidious racial stereotypes, a judge's religious animus represents "a disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are." *Buck v. Davis*, 137 S. Ct. 759, 778 (2017).

Just as a federal court must take extraordinary action to correct racial prejudice in the criminal justice system, it must act swiftly and decisively to remove the taint of anti-Semitic bias, or else risk the loss of public confidence in an impartial judiciary. *See Buck*, 137 S. Ct. at 778; *Buntion v. Quarterman*, 524 F.3d 664, 672 (5th Cir. 2008) (A "criminal defendant tried by a biased judge is entitled to have his conviction set aside, no matter how strong the evidence against him." (internal quotation marks and citation omitted)).

Whether Mr. Halprin should receive relief on these facts is a straightforward question. Where and when Mr. Halprin can secure relief from his constitutionally infirm conviction is a complex question, given the procedural posture of the case. As presented in the arguments in the Procedural Arguments below, this Court can review Mr. Halprin's petition despite seeming obstacles.[1] The Anti-Terrorism and Effective Death Penalty Act (AEDPA)'s bar on "second or successive" applications was not intended to apply to Mr. Halprin's fundamental claim of trial error, diligently raised in a second petition only because of a state actor's interference. *See Panetti v. Quarterman*, 551 U.S. 930, 945 (2007) (concluding 28 U.S.C. 2244(b) does not apply to second-in-time petition raising new claim of competency to be executed); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643 (1998).

Even though this Court may *eventually* review Mr. Halprin's claim, it should stay this matter pending the completion of Supreme Court *certiorari* review of Mr. Halprin's *initial* federal habeas proceedings, which may moot this claim, and exhaustion in state court, which is ordinarily a prerequisite to federal review. Mr. Halprin presents his claim first to this court in a *protective* petition, filed in order to satisfy the statute of limitations (28 U.S.C. § 2244(d)(1)), even though his claim has not yet been exhausted in state court (28 U.S.C. § 2254(b)(1)). *Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005) (authorizing a habeas petitioner to "fil[e] a 'protective' petition in federal court and ask[] the federal court to stay and abey the federal habeas proceedings until state remedies are exhausted." (citing *Rhines v. Weber*, 544 U.S. 269, 278 (2005)). Because of the operation of Texas's "two-forum rule," which bars state habeas review while federal habeas proceedings are not stayed,

[1] The arguments made below would also support relief from judgment pursuant to Federal Rule of Civil Procedure 60(b).

Mr. Halprin may not even bring his claim in state court until review of his initial federal habeas proceedings is completed in the Supreme Court and his proceedings are stayed in this Court.

STATEMENT OF FACTS

Mr. Halprin was convicted of capital murder and sentenced to death as a party in connection with the killing of Irving police officer Aubrey Hawkins in the course of a Christmas Eve robbery of a sporting goods store. Judge Vickers Cunningham presided over Mr. Halprin's trial and sentenced him to death.

A. Randy Halprin's Crime and Judge Vickers Cunningham's Appointment

In December 2000, Halprin and six other men participated in a notorious escape from the Connally Unit, a Texas Department of Criminal Justice ("TDCJ") prison, in Kenedy, Texas. The escape, Officer Hawkins's murder on Christmas Eve, and the manhunt for the escapees—the so-called "Texas Seven"—drew extensive media coverage.

Even before his arrest, news stories began to document Mr. Halprin's Jewish identity in connection to the events. On January 7, the *Fort Worth Star-Telegram* reported that Mr. Halprin and another escapee, Michael Rodriguez, had applied to attend Jewish worship services less than a year before the escape, which "granted the privilege of worshipping with a rabbi." Miles Moffeit, *Chaplain: Escapees tricked guards; Senior minister says workers at Connally prison were beaten viciously, bound and locked up*, Ft. Worth Star-Telegram, Jan. 7, 2001 (Exhibit 1). A prison chaplain speculated Halprin and Rodriguez were "playing a game . . . of changing their faith so they could exploit worship for extra privileges" and doubted they were "really Jewish." *Id.*

The escapees were captured in a Colorado trailer park in late January 2001, where they had been impersonating devout Christian conventioneers. Michael Janofsky, *Texas Fugitives Fit In at Trailer Park, Neighbors Say*, N.Y. Times, Jan. 24, 2001 (Exhibit 2) ("They told people they were

here to attend a religious convention," one neighbor said. "Whenever they would go outside to work on a vehicle, they would play religious music."). (One escapee took his own life before capture.)

Soon after his arrest, the *Dallas Morning News* reported that Halprin had recruited Rodriguez "because he was Jewish" when the two men attended Jewish religious services at the Connally Unit. *See* Todd Bensman, *Rodriguez invited into plot for getaway car, Halprin says*, Dallas Morning News, Feb. 4, 2001 (Exhibit 3). The article also reported that Mr. Halprin had driven past his childhood synagogue when the escapees were passing through Arlington, Texas, and had spoken with a rabbi in the Colorado jail where he was being held. *Id.*

Early news reports also delved into Mr. Halprin's Jewish background. According to a January 2001 *Dallas Morning News* report,

> By early adolescence, the boy was flunking out of school and mapping sites where he thought space aliens would pick him up. Yet he also showed great ability on another front, mastering the lessons for his bar mitzvah at North Arlington's Congregation Beth Shalom synagogue.
>
> "Here's this kid reading Hebrew and leading the congregation and doing it well," said Chief Waybourn, who attended the coming-of-age ceremony.
>
> Mr. Halprin didn't stick with religious studies, said Janet Aaronson, the synagogue's executive director. The rabbi from that time "remembered that he was a bright kid," she said, "but a troubled kid."

Brook Egerton, *Halprin endured abuse, other hardships as youth*, Dallas Morning News, Jan. 14, 2001 (Exhibit 4).

Mr. Halprin's case, like those of the other members of the Texas Seven, was assigned to Judge Molly Francis of the 283rd Judicial District Court in Dallas. Judge Francis presided over the trial of the leader of the escape, George Rivas, who received a death sentence in August 2001.

Then, in September, in the middle of jury selection for Donald Newbury's trial, Governor Rick Perry appointed Judge Francis to fill a vacant seat on the Fifth District Court of Appeals in

Dallas. *See* Press Release, Office of the Governor, *Governor Announces Appointment of Francis as a Justice of the 5th Court of Appeals*, Sept. 5, 2001 (Exhibit 5).

A month later, Governor Perry appointed Judge Vickers Cunningham to fill Judge Francis's seat on the 283rd District Court. *See* Press Release, Office of *Governor Appoints Cunningham as Judge, 283rd Judicial District*, Oct. 11, 2001 (Exhibit 6). From his appointment, Judge Cunningham knew his principal task would be overseeing the capital trials of the remaining members of the Texas Seven, including Mr. Halprin. Holly Becka, *New judge ready for escapees' trials; Appointee will take over death-penalty cases next month*, Dallas Morning News, Oct. 12, 2011 (Exhibit 7). He told a local magazine that he "wanted the challenge." *Two Woodrow Wilson grads help decide the Texas 7's fate*, Advocate: Lakewood/East Dallas, Aug. 1, 2002, https://lakewood.advocatemag.com/2002/08/01/men-of-the-law/ (Exhibit 8).

Judge Cunningham was a Dallasite, born and bred. He was raised in the Lakewood neighborhood, and was a graduate of Dallas schools and Southern Methodist University. *Id.* His parents Bill "Bulldog" Cunningham and Mina Sue Cunningham were well-connected and active in Republican politics. *See* Declaration of Tammy McKinney ¶ 2 (Exhibit 9) (describing church, country club, and social activities Cunninghams were involved in); Rep. Jeb Hensarling, *Honoring the late Bill 'Bulldog' Cunningham*, The Constituent Register, May 16, 2016, https://the-constituent.com/honoring-mr-bill-bulldog-cunningham-by-representative-jeb-hensarling/speech/69756 (Exhibit 10) ("Bulldog was an active political volunteer, along with his wife, Mina.").

Judge Cunningham was a congregant and admirer of segregationist Pastor W. A. Criswell who led the church Cunningham attended and officiated at Cunningham's wedding. Jim Jones and Mary McKee, *Baptists eulogize Criswell ministry*, Ft. Worth Star-Telegram, Jan. 17, 2002 (Exhibit 11).

From a young age, Cunningham believed it was his "destiny" to serve as a judge. Exh. 8, *Two Wilson Grads*. He took his inspiration from the judges and prosecutors who lived in Lakewood, especially the long-serving Dallas District Attorney Henry Wade, Sr. Cunningham later explained, "I was Henry Wade's paperboy, and I went to school with his daughter . . . . I was so impressed with Henry Wade and his legend." Gromer Jeffers, *The late Henry Wade stirs emotions of DA candidates*, Dallas Morning News, Jan. 24, 2006 (Exhibit 12). After five years as a Dallas County prosecutor, Judge Cunningham was elected to a seat on the Dallas County Criminal Court in 1995, where he sat until his appointment to the district court. Exh. 7, Becka, *New judge ready for escapees' trials*.

In the year and a half following his appointment, Judge Cunningham presided over the trials of Texas Seven defendants Donald Newbury, Michael Rodriguez, and Joseph Garcia, each of whom he sentenced to death. In that time, he also was elected to his district court seat in a contested election in November 2002. *See* Mark Donald, *Life After Lotto; Whatever Happened to the Dallas Public Defenders Who Won the Lottery?*, Texas Lawyer (online), July 19, 2004 (Exhibit 13) (describing 2002 election challenger King Solomon).

B. Mr. Halprin's Trial

Randy Halprin was the second to last defendant scheduled for trial. By June 2003, when the trial began, "the killing was pretty old news" and there were "far fewer reporters and spectators than in the earlier trials." Jacquielynn Floyd, *We Shouldn't Be Dulled to the Brutality*, Dallas Morning News, June 10, 2003 (Exhibit 14).

During the trial, Judge Cunningham presided over the questioning and selection of jurors, made critical pre-trial rulings, ruled on the admissibility of evidence relevant to Mr. Halprin's guilt and punishment, instructed the jury, and sentenced Mr. Halprin to death based on the jury's answers to the special issues.

Mr. Halprin was indicted and tried for capital murder under Texas's "law of parties." 1 CR 65. Under the law of parties, the State did not need to prove that Mr. Halprin actually killed or intended to kill. Tex. Penal Code § 7.02. Then, the State could only sentence Mr. Halprin to death if the "actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken." Tex. Code Crim. Proc. art. 37.071, § 2(b)(2). As a result, in both phases of his trial, Mr. Halprin's relative culpability and credibility in explaining his role were central issues.

Mr. Halprin testified during the guilt phase of trial that he did not shoot Officer Hawkins, nor did he ever discharge his weapon during the Oshman's robbery. 47 RR 98; 48 RR 24, 55, 102.[2] Halprin testified that during the escape, he did not physically strike anyone, 47 RR 99, and he had essentially no role in planning the escape, and played a minor role in the actual escape. 48 RR 4, 7. He said that after they escaped, the group robbed two other places before Oshman's, but he was only involved in one of those robberies. 48 RR 8, 9. As to Oshman's, Halprin told the jury,

> You know, I, before the robbery, I even told them, I'm not going to go in and carry a gun and there was a little argument and they made it very clear that, you know, it was, you know, their way or the highway. And so I told them I wasn't going to pull a gun and they said, fine, just gather clothes, grab a shopping cart, and gather clothes.

48 RR 14; *id.* at 136. When the shooting began, he "freaked out" and ran off. 48 RR 23.

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[2] During his testimony, Mr. Halprin pleaded with Judge Cunningham:

> THE DEFENDANT: Your Honor can you please tell them to stop staring at me like that The DAs
>
> THE COURT: They're just listening to the testimony
>
> THE DEFENDANT: I understand but they're making strange faces and things like that and its making me uncomfortable and nervous.

47 RR 117-18. When the jury recessed, Judge Cunningham spoke sternly to Mr. Halprin: "Mr. Halprin, you put me in a very bad position. I don't really want to respond to your request in front of the jury. You should have waited until now." 47 RR 119-20.

The trial court repeatedly rebuffed Mr. Halprin's attempts to introduce a prison "ranking document" that rated the escapees' leadership qualities and showed Mr. Halprin "never exhibited leadership qualities," was "[v]ery submissive," and was the "weakest" of the members. *Halprin v. State*, 170 S.W.3d 111, 114-15 (Tex. Crim. App. 2005).

From its opening statement on, the prosecution tried to erase any distinction between Halprin and the other escapees. *E.g.*, 41 RR 38 (referring to "their goal" and "their target"). The State argued at the close of the guilt phase that Mr. Halprin may not "look bad" but "you know he's deceitful" and "different than us," that he could not help but show his "true colors" and "true nature" when he testified. 50 RR 15.

Mr. Halprin's Jewish identity was a recurring subject during Mr. Halprin's trial. For example, when Mr. Halprin testified, he spoke about being "picked on" in prison because he was Jewish:

> [DEFENSE COUNSEL]: Q. Let me show you what has been marked as 954, which was the letter that was introduced by the State. And, once again, this is a letter you wrote; is that correct?
>
> [Halprin]: A. Yes, sir.
>
> Q. You wrote it to Dawn and in here it says - you talking about being in prison and being scared and in regard to the Blacks and the Mexicans and, "The just pick the jews [sic] to blame everything on. They never tried that crap with me. I had a lot of respect from one of the leaders of one of the Arian [sic] gangs over there named Batman who didn't really like me, so to speak, and I didn't like him. *He knew I didn't put up with that antisemitic* [sic] *crap.*
>
> So you might have been picked on because you were jewish [sic], but you at least tried to stand up for yourself being jewish [sic]?
>
> A. Yes, sir.

49 RR 46-47. Out of necessity Halprin formed alliances with Aryan Brotherhood gang members, but belonged to no gang. 49 RR 35-36.

In the punishment phase, the defense presented evidence that Mr. Halprin's life was shaped by his search for a Jewish identity and his desire to please his Jewish father. Mr. Halprin

worked hard to become *bar mitzvah*, an important Jewish rite of passage for adolescent boys. *See* 52 RR 9-11 (Mindi Sternblitz); 52 RR 53-55 (Terri Goldberg). The defense called as witnesses Mr. Halprin's childhood friends, who themselves identified as Jewish. This evidence supported Mr. Halprin's plea for the jury to find "a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment" in his "character or background." *See* Tex. Code Crim. Proc. art. 37.071 § 2(e).

The State, in turn, elicited the fact that Mr. Halprin professed to "hat[ing] Christians with a passion" and "despising everything dealing with Jesus" after he was shipped off to a Christian boarding school in middle school:

> Q. Looking at this exhibit again, do you remember him telling you that, "I think boarding school messed Wesley and I both up. You know, after I was locked up, I really started to hate Christians, I mean with a passion. I guess I blamed a lot of things on that school at first, so I just ended up despising everything dealing with Jesus. I'm not that way, now, though I still don't trust many Christians these days, either."
>
> Did you ever talk to him about that?
>
> A. Not specifically that statement. I know that you know he was raised being Jewish and then all of a sudden he was having to attend these religious services that is contradicting you know what he was raised this whole time. So I can understand that animosity was built up.

52 RR 28 (quoting SX 975 (Letter from Randy Halprin to Mindi Sternblitz, Oct. 4, 2001)).

In a critical ruling, Judge Cunningham denied Mr. Halprin the ability to present mitigating evidence gathered by clinical psychologist Dr. Kelly Goodness. Judge Cunningham held a hearing prior to Dr. Goodness's testimony. 52 RR 88. The State objected to the doctor's report and to the doctor testifying as to hearsay used in forming her opinion. 53 RR 3. The State argued that, pursuant to Texas Rule of Evidence 705, it was "highly prejudicial and unfair to the State" to allow the testimony. 53 RR 3. According to the State, Halprin had to show that the hearsay statements were "otherwise admissible in court" before they could be elicited from

the witness, "[i]f they are not, then it's within this Court's discretion to exclude them." 53 RR 5. Judge Cunningham ruled that Dr. Goodness could testify to her opinion and the sources she used to form that opinion, but could not testify to any specific information contained within those sources. 53 RR 6; 8; 11-12. In rote application of the hearsay rule, the court excluded all details underlying Dr. Goodness's opinions including her conclusion that Halprin's biological parents were drug addicts, 53 RR 30, and an explanation of his expulsion from boarding school, 53 RR 39.

Judge Cunningham also denied Mr. Halprin's motion challenging the constitutionality of the special "law of parties" instruction for the punishment phase as applied to his case. 1 CR 158-171 (arguing Tex. Code Crim. Proc. art. 37.071, § 2(b)(2) fails to satisfy Supreme Court precedent). At the close of the evidence, Halprin's counsel renewed his previous motions, including those attacking § 2(b)(2). 53 RR 73.

At the close of the punishment phase, the prosecution argued that Halprin was a "liar" who "manipulates people," and who was "trying to manipulate one or two of you, hopefully." 53 RR 83. The State went on to argue that Halprin "uses people," and "blames people." 53 RR 84. The prosecution attacked Halprin's assertion and testimony that he was not really a member of this "gang," arguing that Halprin "was not just being drug along or anything." 53 RR 127. The prosecution repeatedly grouped the all of the escapees' actions and intent together, and attributed "their" actions and intent specifically to Halprin. 53 RR 126-128; 135-136; 139. The State contended that Halprin was "as actively involved as the others." 53 RR 128. The State directly challenged Halprin's assertion that "he wants to present himself as the follower, the person who doesn't want to be there, that's reluctant, that doesn't want to go along." 53 RR 128. "He tries to distance himself. I was a follower. I didn't want to be there. That they had to have someone watch me. Don't buy it for a second, folks.

He was in it all the way." 53 RR 133. The prosecution triumphantly proclaimed in the absence of excluded evidence that there was no "significant mitigating evidence." 53 RR 138.

During its six hours of deliberations over the appropriate punishment, the jury indicated through a note that its answer to the second, anti-parties, special issue turned on the difference between whether Halprin "'anticipated that a human life would be taken' and 'should have anticipated.'" 1 CR 45. Up to that point, this was the longest time any Texas Seven jury had deliberated. *See* Robert Tharp, *Jury in escapee trial is still out; Panel sequestered after 5 hours, no agreement on killer's punishment*, Dallas Morning News, June 12, 2003 (Exhibit 15).

C. Judge Cunningham's Extensive History of Prejudice on the Basis of Religion, Race, Ethnicity, and Sexuality

Before, during, and after Randy Halprin's trial, Judge Cunningham harbored deep-seated animus towards and prejudices about non-white, non-Christian people. He expressed these views frequently in private and they informed his thinking about his public service in the law.

Tammy McKinney grew up with Vic Cunningham and knew him intimately. Cunningham and McKinney's parents were close friends, ran in the same social circles, went to the same church, and were members of the same clubs. *See* Exh. 9, McKinney Decl. ¶¶ 2-5. McKinney and Cunningham were friendly and "Vic really trusted" McKinney. *Id.* ¶ 6. When he became a judge, Cunningham even offered McKinney the position of court coordinator. *Id.*

But Judge Cunningham's bigotry prevented McKinney and Vic from ever becoming "truly good friends." *Id.* ¶ 8. Cunningham "did not like anyone not of his race, religion or creed, and he was very vocal about his disapproval." *Id.* For example, Cunningham belittled his brother Bill by calling him "nigger Bill" "for as long as [McKinney] can remember." *Id.* ¶ 16. He was "always []like this," but "his level of hatred" seemed to grow with age. *Id.* ¶ 8. By the time McKinney and Cunningham were around thirty—long before Judge Cunningham presided over Mr. Halprin's trial—

McKinney found Cunningham "so hateful." *Id.* ¶ 5. She remembers that "[h]e would regularly use offensive" language "such as 'nigger,' 'wetback,' 'spic,' 'kike,' 'the fuckin' Jews.'" *Id.*

Judge Cunningham "would often use race or ethnicity to refer to people . . . who were members of groups he did not like. . . . If someone were actually African-American, he would call them 'Nigger' and their first name. It was his signature way of talking about people of color. For Jewish people, he would say a 'fuckin' Jew' or a 'goddamn kike.'" *Id.* ¶ 16.

After the Texas Seven trials, Judge Cunningham would "tout with pride his role." *Id.* ¶ 7. When he discussed the cases, he would "often" make "extremely hateful comments" and always mention the defendants' "race, ethnicity or religion." *Id.* According to McKinney, Judge Cunningham "took special pride in the death sentences because they included Latinos and a Jew." *Id.* Judge Cunningham would call Mr. Halprin a "goddamn kike" and "that fuckin' Jew." *Id.* ¶ 13. He also used the term "'wetback' to describe some of the Texas 7 defendants." *Id.* ¶ 8. On at least one occasion, McKinney remembers Cunningham saying, "From the wetback to the Jew, they knew they were going to die." *Id.* ¶ 12. When Judge Cunningham "los[t] inhibitions" and aired his prejudices at parties, he would often return to discussing the Texas Seven. *Id.* ¶ 8. Speaking of his judgeship, "Vic said any 'nigger' or 'wetback' walking into his courtroom knew they were going to go down." *Id.* ¶ 12.

D. Judge Cunningham's 2006 Campaign for District Attorney

In late 2005, Judge Cunningham resigned his judicial seat in order to run for Dallas district attorney in the Republican primary. Publicly, Judge Cunningham ran as an efficient administrator, who was tough but fair. *See Id.* ¶ 12; Editorial, *Dallas District Attorney: Cunningham offers GOP a breath of fresh air*, Dallas Morning News, Jan. 21, 2006 (Exhibit 16) (editorial board endorsement of Judge Cunningham for "administrative skill" and experience as prosecutor and judge). Privately, Judge Cunningham "said that he was running for DA so that he could return Dallas to a Henry-

Wade style of justice where we did not have to worry about 'niggers,' Jews, 'wetbacks,' and Catholics." Declaration of Amanda Tackett ¶ 7 (Exhibit 17); Exh. 9, McKinney Decl. ¶ 10 (Cunningham said "he wanted to run for office so that he could save Dallas from 'niggers,' 'wetbacks,' Jews, and dirty Catholics"). He said, "My job is to prevent niggers from running wild again." Exh. 17, Tackett Decl. ¶ 13.

Dallas District Attorney Henry Wade's office had become publicly notorious for its institutional practice of discrimination in jury selection. The Supreme Court recognized that at least until 1976 (and likely into the mid-1980s), "the District Attorney's Office had adopted a formal policy to exclude minorities from jury service." *Miller-El v. Cockrell*, 537 U.S. 322, 334-35 (2003). A policy document instructed prosecutors: "'Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated.'" *Id.* at 335.

One of Judge Cunningham's Republican-primary opponents suggested Cunningham carried the same "racial baggage" from Wade's tenure. Gromer Jeffers, *DA race reflects changing county: Gradual uptick in Democratic support alters campaign tactics*, Dallas Morning News, Feb. 12, 2006 (Exhibit 18). As a Dallas prosecutor, Cunningham had intentionally removed all black prospective jurors during jury selection for a 1992 murder trial. *Id.* Judge Cunningham acknowledged what he had done, but defended the strikes by claiming it was the prospective jurors' Democratic party affiliation, not their race, that triggered the strikes. *Id.*

During the 2006 campaign, Judge Cunningham continued to tout his role in sentencing the Texas Seven to death. A campaign advertisement at that time described how Judge Cunningham had "looked each of the Texas 7 in the eye when he sentenced them to death."[3] Judge Cunningham

[3] *Pleeeeaaaazzzze*, Liberally Lean from the Land of Dairy Queen, Feb. 21, 2006, www.liberallylean.com/2006/02/pleeeeaaaazzzze (Exhibit 29).

privately confided he believed God had chosen him to preside over those trials and said that he was "entitled to be" the district attorney because he had presided over the Texas Seven trials. Exh. 17, Tackett Decl. ¶ 6.

In the campaign office and at campaign events, Judge Cunningham resorted to the same bigoted statements that McKinney heard him make his entire life. *Id.* ¶ 9. This was news to campaign volunteer Amanda Tackett, who was enlisted to help by her friend and Judge Cunningham's brother and campaign manager Bill Cunningham. *Id.* ¶ 5. Tackett personally heard Vic refer to Mexicans as "wetbacks," Catholics as "idol-worshippers," Jews as "dirty," and African-Americans as "niggers." *Id.* ¶ 9.

Like McKinney, Tackett heard Judge Cunningham discuss the Texas Seven cases using racial and religious epithets. At a Lakewood campaign event, Tackett recalls hearing Cunningham refer to Mr. Halprin as "the Jew" and others in the Texas 7 as "wetbacks." *Id.* ¶ 15. Cunningham "then launched into his campaign speech about immigration and the importance of White people in the Dallas community." *Id.*

Discussing criminal cases in Dallas, Judge Cunningham would use the phrase "T.N.D."—that is, "typical nigger deals"—as "shorthand for criminal cases involving African-Americans":

> The term referred to the system of justice African-Americans were subjected to. Vic routinely used the phrase "TND" to describe the goings-on around the courthouse. It was a no muss no fuss type of justice. If a case involved a Black person, he'd say, "It's just a nigger doing what niggers do." There was a more extreme connotation when a White was assaulted or killed by a Black.

Id. ¶ 11.

On the topic of investigations into wrongful convictions by renowned defense attorney Barry Scheck, Cunningham privately complained that the "'filthy Jew' . . . was going to come in and free

all these 'niggers.'" *Id.* ¶ 13.[4] Judge Cunningham believed the convicted men "should not have the benefit of DNA testing" because "the cases were all TNDs anyhow" and "they are all on death row for a reason." *Id.*

Judge Cunningham also confidentially expressed racial and religious stereotypes about black and Jewish donors and lawyers, even as he publicly courted their contributions and endorsements. Judge Cunningham conceded that "some Jews were good attorneys," but "as far as Jews in general, they needed to be shut down because they controlled all the money and all the power." *Id.* ¶ 9. He referred to Democratic nominee and eventual Dallas district attorney Craig Watkins as "nigger Watkins." *Id.* ¶ 19. Judge Cunningham put on what he called his "nigger tie" when going to a campaign event at a charitable foundation run by African-Americans. *Id.* ¶14.

Judge Cunningham's own mother believed that her son's "biggest burden was his bigotry," Exh. 9, McKinney Decl. ¶ 17, and it would be his "downfall," Exh. 17, Tackett Decl. ¶ 17. Judge Cunningham lost the Republican primary.

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[4] Barry Scheck, co-founder of the Innocence Project, was interviewed on the PBS program "Frontline" regarding his organization's role in several DNA exonerations in Texas. Transcript, *Burden of Innocence*, https://www.pbs.org/wgbh/pages/frontline/shows/burden/etc/script.html (last visited May 17, 2019). The episode aired on May 1, 2003, a month before Mr. Halprin's trial.

Between the years 2001 and 2006, 10 men convicted in Dallas County were exonerated as a result of DNA testing. *Tenth Dallas County Man in Just Years Is Proven Innocent Through DNA Evidence*, Innocence Project, https://www.innocenceproject.org/tenth-dallas-county-man-in-just-five-years-is-proven-innocent-through-dna-evidence-larry-fuller-set-to-be-released-today/ (last visited May 17, 2019). Since the formation of the Conviction Integrity Unity within the Dallas County District Attorney's Office, 28 Dallas County convictions have been overturned on the basis of DNA evidence. The National Registry of Exonerations, http://www.law.umich.edu/special/exoneration ("search database for 'Texas' 'Dallas County'") (last visited May 17, 2019).

Between 2006 and 2018, Judge Cunningham did not seek elected office. His views did not appear to change, however. In 2008 or 2009, Tackett remembers Judge Cunningham wearing a stereotypical banker's outfit—green visor and suspenders—and declaring that he would be her "Jew banker" at a casino-themed party. *Id.* ¶ 21.

McKinney and Tackett both were aware of a 2014 incident in which Judge Cunningham "interfered with his daughter's . . . relationship with a young Jewish man she dated when she was in college at Texas A&M." Exh. 9, McKinney Decl. ¶ 14; Exh. 8, Tackett Decl. ¶ 21. Tackett recalls Cunningham instructing his daughter to break up with "that Jew boy" when referring to her then-boyfriend. Exh. 17, Tackett Decl. ¶ 21.

That Jewish young man, Michael Samuels, confirmed the incident. *See* Declaration of Michael Samuels (Exhibit 19). He confirmed that he dated Cunningham's daughter Suzy for about two and a half years. He tried to meet Cunningham several times when he returned to Texas, but Cunningham "never made an effort to meet me." *Id.* ¶ 2. Suzy often said that her father was "very opinionated." *Id.* Samuels "began to understand that [Cunningham] did not want to meet with [him] because [he is] Jewish." *Id.* Suzy abruptly and unexpectedly broke up with Samuels in 2014. She eventually explained "that her father did not like [Samuels] because [he] was Jewish" and her father threatened not to pay for her law school tuition unless she broke up with Samuels. *Id.* ¶ 3. Samuels's uncle posted on Facebook about the incident and relayed the same information to McKinney. *Id.* ¶ 14.

E. Judge Cunningham's 2018 Campaign for County Commissioner and the May 18, 2018 *Dallas Morning News* Exposé

In 2018, Vickers Cunningham again sought office, this time as a county commissioner. Still running as "Judge Cunningham," and still citing the fact that he had "presided over the 'Texas 7' capital murder death penalty trials," he bragged that he "has put more criminals on Death Row than

almost any judge in the nation." *See* "You Know Judge Vic (Ret.)," Judge Vic for Commissioner, http://judgevicforcommissioner.com/about/ (cached May 23, 2018) (Exhibit 20).[5]

Cunningham made it to a run-off election for the Republican nomination. Less than one week before the run-off, the *Dallas Morning News* issued a lengthy story about Judge Cunningham's racism. Naomi Martin, *White, straight, and Christian: Dallas County candidate admits rewarding his kids if they marry within race*, Dallas Morning News, May 18, 2018, https://www.dallasnews.com/news/dallascounty/2018/05/18/marry-white-straight-christian-dallas-county-politician-admits-rewarding-kids-within-traditional-family-values (Exhibit 21). In a videotaped interview for the piece—an excerpt of which was posted with the article (*see* Exhibit 22, video capture of interview on compact disc)—Cunningham revealed his racially prejudiced attitudes. *Id.* Cunningham acknowledged that he had created a living trust for his children that withheld distributions if they opted to marry a nonwhite, non-Christian person. Cunningham explained he was motivated by "my faith of being a Christian"; he "wanted to support my faith" and "traditional family values." *Id.*

Beyond exposing Cunningham's creation of an anti-miscegenation trust fund for his children, the *Dallas Morning News* also reported that people close to Cunningham—including his mother, brother, and a former political aide—knew him to be "a longtime bigot." *Id.*

The article reported, "the former judge repeatedly use[d] the N-word to insult black people behind their backs" and "described criminal cases involving black people as T.N.D.s, short for Typical [N-word] Deals.'" *Id.* The story reported Amanda Tackett's account of another racist incident when Cunningham in 2010 or 2011, had said of "former District Attorney Craig Watkins, who is black, [and] had helped secure exonerations of wrongly convicted men: 'Did you see what

[5] The website has since been taken down.

[N-word] Watkins is doing, setting all those [N-words] free?'" *Id.* Cunningham continued, "'He'll never lose an election because all the [N-words] want their baby daddy out of jail.'" *Id.* Tackett summarized: "Vic believes on some level all black people have done something that warrants putting them in jail." *Id.*

When asked about his use of the word "nigger," "Cunningham paused for nine seconds. He asked if the question referred to using the word in court. Told the question referred to use in everyday life, he then said no." *Id.* Cunningham's brother, Bill, reported that Cunningham routinely referred to Bill's husband, a black man, as "your boy," and refused Bill's husband entry into his home. Exh. 22, Martin, *White, straight and Christian.* (And Bill Cunningham confirmed that Vic called him "[N-word] Bill" his entire life. *Id.*) Meanwhile, a text message authored by Cunningham's son further revealed that Cunningham's racial bigotry extended not only to African Americans, but to nonwhite people in general:

> I am making my father except [sic] interracial relationships starting with me and my relationship with my Vietnamese girlfriend. It's a slow process but [] i have faith in him turning around. And if he doesn't he will have one less person at his dinner table.

Id. Confronted with the evidence and allegations pointing to his racist attitudes, Cunningham denied their veracity. *Id.* And although "[a]s a judge in [Dallas] county for 10 years, he sent scores of black and Hispanic people to prison," Cunningham claimed that "his views on his children marrying outside their race never translated into unfairness on the bench or discrimination in any way." *Id.*

The *Morning News* story was shared widely and garnered national attention. The *Dallas Morning News* editorial page retracted their endorsement. Editorial, *We withdraw Vickers Cunningham recommendation in GOP runoff for Dallas County Commissioners Court Precinct 2*, Dallas Morning News, May 19, 2018 (Exhibit 23). The local Republican party condemned his

statements. Naomi Martin, *Dallas County GOP slams one of its own candidates for alleged 'racist language and behavior*,' Dallas Morning News, May 19, 2018 (Exhibit 24).

Judge Cunningham took to his campaign website to post a "personal note from Vic Cunningham." "A Personal Note from Judge Vic Cunningham," http://judgevicforcommissioner.com/about/ (cached May 23, 2018) (Exhibit 25). The judge admitted he set up the trust and stated that his "views on interracial marriage have evolved since [he] set-up the irrevocable trust in 2010." *Id.* He categorically denied ever using the word "nigger," attacked his brother's motives, and pointed out that Tackett's story was "without collaboration [sic: corroboration]." *Id.* Judge Cunningham lost the run-off election by 25 votes. Naomi Martin, *Dallas candidate who promised to reward kids for marrying white loses by 25 votes*, Dallas Morning News, May 22, 2018 (Exhibit 26).

JURISDICTIONAL ALLEGATIONS

Mr. Halprin is a Texas prisoner in the custody of Respondent Lorie Davis in the Polunsky Unit in Livingston, Texas.

Mr. Halprin pleaded not guilty to a charge of capital murder entered in the 283rd District Court, Dallas County, Texas in Cause No. F01-00237-T. Following a jury trial before Judge Vickers Cunningham, the jury found Mr. Halprin guilty on June 9, and returned a sentence of death on June 12, 2003.

Mr. Halprin had an automatic appeal to the Texas Court of Criminal Appeals ("TCCA") in Cause No. AP-74,721. The TCCA affirmed on June 29, 2005. *Halprin v. State*, 170 S.W.3d 111 (Tex. Crim. App. 2005). On appeal, Mr. Halprin raised nineteen points of error.[6] *Id.* Mr. Halprin did not seek a writ of certiorari from the Supreme Court of the United States.

[6] Mr. Halprin raised two points of error related to the trial court's exclusion of mitigation evidence; ten points of error regarding the trial court's rulings during jury selection from the primary panel;

On April 6, 2005, Mr. Halprin timely filed an application for writ of habeas corpus in the TCCA which was given Cause No. WR-77-174-01. As described in the Statement of Facts, in late 2005, Judge Cunningham resigned his judicial seat in order to run for Dallas District Attorney in the Republican primary. After two changes of presiding judge, the trial court adopted the State's proposed findings of fact and conclusions of law with minimal alterations. The TCCA adopted the trial court's findings and conclusions and denied relief on March 20, 2013. *Ex parte Halprin*, 2013 WL 1150018. In his application, Mr. Halprin raised thirty-one allegations challenging his conviction and sentence. *Id.* at *1.

On March 20, 2014, Mr. Halprin filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, in this Court. *Halprin v. Davis*, 3:13-cv-01535-L, ECF No. 5. He then filed an amended petition on June 17, 2014. ECF No. 15. On September 27, 2017, the Court issued a memorandum opinion and order denying relief, ECF No. 49, and a judgment which dismissed Mr. Halprin's petition with prejudice. ECF No. 50.

Mr. Halprin moved for a Certificate of Appealability ("COA") in the Fifth Circuit. His motion was denied on December 17, 2018, *Halprin v. Davis*, 911 F.3d 247 (5th Cir. 2018), as were his subsequent petitions for rehearing, *see* Order Denying Petition for Panel Rehearing and Rehearing En Banc, *Halprin v. Davis*, No. 17-70026 (5th Cir. Jan. 29, 2019).

On April 9, Justice Alito granted Mr. Halprin's motion to extend the time to file a petition for writ of certiorari until May 29, 2019. On May 13, 2019, the Supreme Court extended Mr. Halprin's time to file to June 12, 2019. *See Halprin v. Davis*, No. 18A1032 (U.S.).

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three points of error regarding the trial court's rulings during the alternate jury selection process; and four points of error related to the prosecution's questioning during jury selection. *Halprin v. State*, 170 S.W.3d at 113-18.

GROUND FOR RELIEF

CLAIM 1. Trial Judge Vickers Cunningham's Bias Against Defendant Randy Halprin Because He Is Jewish Violated Mr. Halprin's Fourteenth Amendment Right to Due Process of Law.

A. Legal Standard

The U.S. Constitution forbids the participation of a judge in a criminal trial who harbors an actual bias or an objectively intolerable risk of bias at trial. Due process of law, as guaranteed by the Fourteenth Amendment, requires "[a] fair trial in a fair tribunal." *In re Murchison*, 349 U.S. 133, 136 (1955); U.S. Const. amend. XIV.

Objectively Intolerable Risk of Bias. The constitutional right to an impartial judge does not merely require the "absence of actual bias." *Murchison*, 349 U.S. at 136. "[O]ur system of law has always endeavored to prevent even the probability of unfairness," because "justice must satisfy the appearance of justice." *Id.* Any "possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

Thus, a judge's participation in a criminal trial offends due process when an objective observer, "considering all the circumstances alleged," would conclude "the risk of bias was too high to be constitutionally tolerable." *Rippo v. Baker*, 137 S. Ct. 905, 907 (2017); *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016) ("The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009))).

Structural Error. The violation of a defendant's right to a fair tribunal is a structural constitutional error and so is not subject to harmless error review. *Tumey*, 273 U.S. at 535. That is because a biased judge presiding over a criminal trial is a basic defect in the "whole adjudicatory

framework." *Williams*, 136 S. Ct. at 1902. It is impossible to catalog the many ways a biased trial judge may have affected the proceedings: "The entire conduct of the trial from beginning to end is obviously affected . . . by the presence on the bench of a judge who is not impartial." *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991).

Moreover, a reviewing court may not be able to detect a biased judge's influence. Courts "cannot review a trial transcript to determine whether the presiding judge, despite his actual bias, was fair: 'The record does not reflect the tone of voice of the judge, his facial expressions, or his unspoken attitudes and mannerisms, all of which, as well as his statements and rulings of record, might have adversely influenced the jury and affected its verdict.'" *Norris v. United States*, 820 F.3d 1261, 1266 (11th Cir. 2016) (quoting *United States v. Brown*, 539 F.2d 467, 469 (5th Cir. 1976)). A judge's "lightest word or intimation is received [by jurors] with deference, and may prove controlling." *Starr v. United States*, 153 U.S. 614, 626 (1894). Therefore, a "'criminal defendant tried by a biased judge is entitled to have his conviction set aside, no matter how strong the evidence against him.'" *Buntion v. Quarterman*, 524 F.3d 664, 672 (5th Cir. 2008) (quoting *Edwards v. Balisok*, 520 U.S. 641, 647 (1997)).

Nature of the Bias. The nature of the bias at issue in Mr. Halprin's case is different and more pernicious than the kind presented in previous cases the Supreme Court has identified as mandating recusal.

The Court has previously found a judge's participation unconstitutional where he had "earlier significant, personal involvement as a prosecutor in a critical decision in the defendant's case." *Williams*, 136 S. Ct. at 1910 (judge authorized decision to seek death sentence); *see also Murchison*, 349 U.S. at 134 (judge may not serve as both a "one-man grand jury" and as the trier of contempt charges that he initiated). And the Constitution requires that a judge must recuse herself where she has a slight financial interest in the outcome of the case. *See Tumey*, 273 U.S. at 520

(mayor-judge received a salary supplement only for convictions); *Ward v. Vill. of Monroeville*, 409 U.S. 57, 60 (1972) (similar); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 823-24 (1986) (disqualification required where state supreme court justice was plaintiff in almost identical insurance case in lower state court). Recusal may also be constitutionally necessary as a result of events involving judicial elections, where a litigant's campaign contributions have a "significant and disproportionate influence" in placing a judge on a specific case. *Caperton*, 556 U.S. at 884, 887. As with all these circumstances, a judge's religious and racial bias makes it intolerably likely that a defendant—who is a member of the disfavored race or religion—will be tried by a court "predisposed to find against him." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

When a judge expresses religious and racial bias and presides over a *capital* trial, it represents "a disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are." *Buck v. Davis*, 137 S. Ct. 759, 778 (2017). As the Texas Supreme Court stated 130 years ago, "Cases ought to be tried in a court of justice upon the facts proved; and whether a party be Jew or gentile, white or black is a matter of indifference." *Moss v. Sanger*, 12 S.W. 619, 620 (Tex. 1889) (reversing civil judgment where attorney made derogatory remarks about Jewish party).

The "basic premise" not to punish people for *who they are* finds expression not just in the Constitution's guarantee of a fair tribunal, but in other fundamental constitutional rights, protecting religious liberty and equal protection under the law. *See* U.S. Const. amend. I, XIV.

"The clearest command of the Establishment Clause is that one religious denomination"—or one religion—"cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). It follows that judges, as state actors, may not "denigrate . . . religious minorities" through their practices. *Town of Greece v. Galloway*, 572 U.S. 565, 583 (2014). The Free Exercise Clause likewise preserves religious conscience from state persecution. It "protects against governmental

hostility which is masked, as well as overt," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993), and outlaws even "'subtle departures from neutrality' on matters of religion," *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540 (1993)).

The Equal Protection Clause provides yet another mandate to root out religious, racial, and ethnic prejudice.[7] The Fourteenth Amendment reflects an "imperative to purge racial prejudice from the administration of justice." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017). Racial bias differs in kind from other forms of bias like a pro-defendant bias or a relationship to a witness. *Id.* Racial bias is "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Id.* For this reason, the Court mandated a constitutional exception to a well-established state rule barring impeachment of jurors with their statements at least "where a juror made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict." *Id.* at 869.

In *Buck v. Davis*, Chief Justice Roberts condemned even the slightest injection of racial stereotypes into a capital trial. 137 S. Ct. at 778. Explicit racial stereotypes were "toxi[c]"—"deadly [even] in small doses." *Id.* at 777. The toxin poisons not just the defendant's trial, but "'poisons public confidence' in the judicial process," and undermines the legitimacy of "the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts." *Id.* at 778 (quoting *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015), and *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)).

[7] Hatred of Jews has sometimes been characterized as a racial or ethnic prejudice, not only a religious one. *See* Prager & Telushkin, *Why the Jews?* 151-154 (discussing Nazi anti-Semitic racism). In discussing prejudice against Latinos, the Supreme Court has used both the language of race and of ethnicity. *See Pena-Rodriguez*, 137 S.Ct. at 863.

Equal administration of justice for religious minorities is no less important. "The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 728 (1994) (Kennedy, J., concurring in the judgment); *see also Murphy v. Collier*, No. 18A985, 2019 WL 2078111, at *2 (U.S. May 13, 2019) (statement of Kavanaugh, J., joined by Roberts, C.J., respecting grant of application for stay of execution) (discussing "the Constitution's guarantee of religious equality").

In sum, a judge's religious and racial prejudices are uniquely offensive to the Constitution and the legitimacy of the criminal justice system. Even the slightest influence of racial and religious stereotypes will make a trial fundamentally unfair.[8] A right to a trial free from a judge's religious and racial bias secures these fundamental principles of equality and religious liberty.

Finally, the Eighth Amendment demands especially stringent review of a judge's impartiality in a death-penalty trial. As the D.C. Circuit recently observed in vacating three years' of capital proceedings before a biased Guantanamo military commission: "in no proceeding is the need for an impartial judge more acute than one that may end in death." *In re Al-Nashiri*, 921 F.3d 224, 231 (D.C. Cir. 2019); *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion) ("[T]he [Supreme] Court has been particularly sensitive to ensure that every safeguard is observed."). From jury selection through the penalty-phase verdict, proceedings in a capital case are structured to culminate in an individualized assessment of the defendant and his crime.

> [A]s *Woodson v. North Carolina*, 428 U.S. 280 (1976), made clear, "in capital cases the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the

[8] *See also United States v. Conforte*, 624 F.2d 869, 881 (9th Cir. 1980) (when an extrajudicial bias or prejudice is "somehow related to a suspect or invidious motive," "only the slightest indication of the appearance or fact of bias or prejudice arising from these sources would be sufficient to disqualify.").

> circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.* at 304 (plurality opinion).

Penry v. Lynaugh, 392 U.S. 302, 316 (1989). A judge's reliance on pernicious group-based stereotypes is anathema to this cornerstone Eighth Amendment precept.

B. Judge Cunningham's Animus Against Mr. Halprin as a Jewish Person Introduced an Objectively Intolerable Risk of Bias into Mr. Halprin's Capital Trial.

Judge Vickers Cunningham's anti-Semitic prejudice against Mr. Halprin violated Mr. Halprin's right to a fair trial in a fair tribunal.

1. Judge Cunningham's Prejudiced Comments About Mr. Halprin

According to two independent sources, Judge Cunningham referred to Mr. Halprin using hateful epithets when discussing his case. *See* Exh. 9, McKinney Decl. ¶ 7 (calling Mr. Halprin "fucking Jew"); *id.* at ¶ 13 (calling Mr. Halprin "that fuckin' Jew" and "goddamn kike"); Exh. 17, Tackett Decl. ¶ 15. When he spoke about his role in the Texas Seven cases, he "took special pride in the death sentences because they included Latinos and a Jew." Exh. 9, McKinney Decl. ¶ 7. McKinney remembers Cunningham saying, "From the wetback to the Jew, they knew they were going to die." ¶ 12.

These statements disclose far more than an unmistakable bias against Jewish people generally. The statements identify Mr. Halprin himself, evince a specific animus against Mr. Halprin because of his Jewish identity, and indicate that Judge Cunningham took satisfaction from his role in Mr. Halprin's death sentence *because* he is a *"fucking Jew"* and a "goddamn kike." *Cf. Moss*, 12 S.W. at 620 ("Cases ought to be tried in a court of justice upon the facts proved; and whether a party be Jew or gentile, white or black is a matter of indifference."); *Buck*, 137 S. Ct. at 778 ("Our law punishes people for what they do, not who they are.").

Judge Cunningham's use of racial and religious slurs to describe Mr. Halprin and the other Texas Seven defendants serves as *direct* evidence of his animus. "[R]outine use of racial slurs constitutes direct evidence that racial animus was a motivating factor" for the decision-maker. *Brown v. E. Mississippi Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993) (use of "nigger" was direct evidence of employers discrimination in Title VII case). The terms "the Jew," "fucking Jew," and "goddamn kike"—all of which Judge Cunningham called Mr. Halprin—are slurs, plain and simple.

So is the term "wetback." *Ugalde v. W.A. McKenzie Asphalt Co.*, 990 F.2d 239, 243 (5th Cir. 1993) (term is "ethnic slur"); *Ex parte Guzmon*, 730 S.W.2d 724, 733 (Tex. Crim. App. 1987) (counsel's repeated use of slur in death-penalty trial to describe defendant was "particularly harmful" because it exacerbated the jury's "doubts that such an illegal alien was entitled to all the protections United States citizens are afforded").[9]

The term "*the* Jew" is pejorative as Judge Cunningham used it. As Professor Bryan Stone explains, the use of the term "the Jew" has a long historical lineage and, when applied to an individual, "diminishes the individuality and humanity of a single person by attaching to them the perceived attributes of the group of which they are a member." Report of Professor Brian Stone, Ph.D.[10] at 18 (Exhibit 28). This suggests to the listener that "the individual has no qualities other

[9] For summaries of the history of the term and the injury it causes, see Marisa Gerber, For Latinos, a Spanish Word Loaded with Meaning, L.A. Times (Apr. 1, 2013), http://articles.latimes.com/2013/apr/01/local/la-me-latino-labels-20130402; Gregory Korte, Mexican Slur Has Long History in American Politics, USA Today (Mar. 29, 2013, 6:30 PM), http://www.usatoday.com/story/news/politics/2013/03/29/mexican-immigration-slurhistory/2036329/.

[10] Bryan Stone is Professor of History at Del Mar College in Corpus Christi, Texas, and the author or editor of two books about Texas Jews, including *The Chosen Folks: Jews on the Frontiers of Texas* (2010), the first scholarly narrative history of the Texas-Jewish community. *See* Exh. 27, Stone Report at 2 (credentials); Curriculum Vitae, Bryan Stone (Exhibit 29).

than those shared with the mass, that they are nothing more than the class they are a part of." *Id.* The term reduces the individual to "their supposedly debased inherited traits." *Id.*

Judge Cunningham's use of "the Jew" as pejorative is consistent with his anti-Semitic mindset about Jewish people and his pattern of anti-Semitic epithets. For example, in another incident, Ms. Tackett recalls Judge Cunningham wearing a stereotypical banker's outfit and declare that he would be her "Jew banker" at a casino-themed party. Exh. 17, Tackett Decl. ¶ 21. The phrase invokes the anti-Semitic character Shylock from Shakespeare's *Merchant of Venice* and other pejoratives like "*to jew*, *to jew down*, *jewed*, or *jewing*—meaning to bargain with, haggle, or cheat—[and] derives from ancient canards about Jewish corruption and greed." Exh. 27, Stone Rpt. at 17. Professor Stone, quoting the *Dictionary of Jewish Usage*, writes, "As an adjective . . . *Jew* is now considered derogatory. Usages like 'a Jew lawyer' or 'a Jew holiday' are offensive to Jews, and sensitive non-Jews avoid using them." *Id.* at 17.

Tackett also recalls Cunningham instructing his daughter to break up with "that Jew boy" when referring to her then-boyfriend. Exh. 17, Tackett Decl. ¶ 21. Drawing on his own research, Prof. Stone reports the term "Jewboy" is a belittling term. Exh. 27, Stone Report at 19.

Judge Cunningham also employs negative stereotypes and tropes about Jewish people. He professes to believe that Jews "need[] to be shut down because they control[] all the money and all the power." Exh. 17, Tackett Decl. ¶ 9. Judge Cunningham also stated that Jews were "dirty." These are common Jewish tropes. Professor Stone explains that although the "dirty" trope is "ancient," Exh. 27, Stone Report at 18, it was used in an anti-Semitic speech by Judge Cunningham's late pastor, *id.* at 13, and "it was common for European anti-Semites, most conspicuously the Nazis, to describe Jews not only as 'dirty' or 'filthy' but as 'parasites,' 'rodents,' 'bacteria,' or 'scum,'" *id.* at 18. The idea that Jewish people control the world's finances and pull the levers of power is also an old anti-Jewish canard, expressed in conspiracy theories like the *Protocols of the Elders of Zion*. *See* Prager &

Telushkin, *Why the Jews?* 42, 202 n.3 (describing *Protocols* as forgery which "claims to outline the program of a Jewish world conspiracy").

These statements reflect lifelong prejudices. It is implausible that Judge Cunningham only acquired his animosity toward Jews in the not-quite three years between the conclusion of Randy Halprin's trial in June 2003 and 2006 when Amanda Tackett recalls hearing these statements. As Tammy McKinney states, Judge Cunningham has "always" been bigoted and has a long history—pre-dating the trial—of making offensive and derogatory remarks about Jewish people and other racial and religious minorities. *See* Exh. 9, McKinney Decl. ¶ 5 ("always been like this"), ¶ 8 (by the age of thirty), ¶ 16 (calling brother "nigger Bill" as long as she can remember). And his brother Bill says Judge Cunningham has been using the word "nigger" to mock him "his entire life." Exh. 21, Martin, *White, Straight, and Christian*.

Judge Cunningham must have been aware of Mr. Halprin's Jewish identity no later than the beginning of trial. He certainly was aware that Mr. Halprin is Jewish before the close of evidence in the guilt phase. *See* 49 RR 46-47 (Halprin's testimony about getting "picked on" for being Jewish).

Given his lifelong views, Judge Cunningham must have been aware that he was required to recuse himself given his bias. Texas law mandated his recusal even without a motion. *See* Tex. Civ. R. 18b(a), (b)(1)-(2))("[a] judge must recuse" whose "impartiality might reasonably be questioned" and who "has a personal bias or prejudice concerning . . . a party"); *McClenan v. State*, 661 S.W.2d 108, 109 (Tex. Crim. App. 1983) (finding "bias as a ground for [judicial] disqualification [where] bias is shown to be of such a nature and to such an extent as to deny a defendant due process of law."), *overruled in part on other grounds by De Leon v. Aguilar*, 127 S.W.3d 1 (Tex. Crim. App. 2004); *see* 48B Robert Schuwerk & Lillian Hardwick, *Texas Practice Series: Handbook of Texas Lawyer and Judicial Ethics* § 40:44 ("a judge may err by

not recusing *sua sponte*" on a record indicating bias). Judge Cunningham's failure to do so only provides a further inference that he was acting pursuant to his bias. (If, on the other hand, no Texas law mandated Judge Cunningham's recusal or disqualification *sua sponte*, then Texas law's failure to so mandate would itself be constitutionally problematic under due process.)

Like the case of the "many dishonest judges exposed and convicted through 'Operation Greylord,' a labyrinthine federal investigation of judicial corruption in Chicago," *Bracy v. Gramley*, 520 U.S. 899, 901 (1997), Judge Cunningham's overt, unremitting racial and religious prejudice is shocking and "happily, not the stuff of typical judicial-disqualification disputes." *Id.* at 905. Amanda Tackett herself describes Judge Cunningham as an outlandish figure, more akin to a racist villain in a movie like "Mississippi Burning" than a real-life judge. *See* Exh. 17, Tackett Decl. ¶ 19; Exh. 21, Martin, *White, Straight, and Christian*.[11] But the evidence presented here is of a piece with Judge Cunningham's recorded statements and acknowledged conduct. Judge Cunningham asserted that "my faith" as a Christian gave him reasons for creating a financial incentive for his children to marry only white, Christian, heterosexuals.[12] Exh. 22 (video); *see also* Exh. 21, Martin, *White, straight and Christian*. He made that trust in 2010 and only later said his views had changed. *See* Exh. 26, "A

[11] But it should come as no surprise that Judge Cunningham hid his biases from public view for so long. As historian Bryan Stone reports, "the relative success and general tolerance Jews have enjoyed in Dallas may have had the perverse effect of driving anti-Semitic attitudes and speech from public into private spaces." Exh. 27, Stone Report at 1. In places like exclusive, private clubs, "where the presence of Jews (not to mention of African Americans, Latinos, and often women) could be strictly regulated, members of the city's white, male, gentile elite could be themselves." *Id.* at 10. Thus, it is quite unremarkable that anti-Semitic views like Judge Cunningham's could occur unabashedly, and without the threat of public stigma.

[12] As the late Justice Scalia wrote, when a judge's religious beliefs conflict with his oath and duty to apply the law, "the choice ... is resignation." Antonin Scalia, *God's Justice and Ours: the Morality of Judicial Participation in the Death Penalty, in Religion and the Death Penalty: A Call for Reckoning* 234 (Owens, et al., eds., 2004).

Personal Note from Vic Cunningham." But in 2014 he used payment for his daughter's legal education to induce her to break up with her longtime boyfriend because he was Jewish.

Judge Cunningham expressed beliefs against racial mixing on the basis of race and religion. Historically, reasons for anti-miscegenation are grounded in a belief in the inferiority of other races and an effort to "maintain White Supremacy." *Loving v. Virginia*, 388 U.S. 1, 11 (1967) ("The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy."). Viewed through the lens of history, Cunningham's opposition to interracial marriage, and his invocation of "my faith of being a Christian" to justify this belief, reflect his endorsement of white supremacy and his attendant belief in the social and biological inferiority of non-white persons.

Judge Cunningham was a protégé of Rev. W.A. Criswell, whose segregationist views were notorious, *see* Jones & McKee, *Baptists eulogize Criswell ministry*:

> "Criswell became one of the pulpit's most visible defenders of segregation." In a speech in South Carolina, "Criswell demanded separation not just of the races, but of religions as well. Invoking images of filth and dirt frequently used in depictions of African Americans and Mexican Americans, Criswell called integration the work of 'outsiders' (by implication Jews) in 'their dirty shirts.'" If not stopped, he continued, they would "get in your family." Christians, he said, had to resist this amalgamation and "stick to their own kind." Views like Criswell's were common in Dallas, Phillips says, but "Criswell's vitriol still stood out in an age of widespread demagoguery and garnered national headlines."

Exh. 27, Stone Report at 13 (quoting Michael Phillips, *White Metropolis: Race, Ethnicity, And Religion in Dallas, 1841–2001* 133–34 (2006)).

Judge Cunningham's confessed anti-miscegenation attitudes dovetail precisely with the reports of declarants that Judge Cunningham sought to further white supremacy in his role as judge and would-be district attorney. Tackett reports that Judge Cunningham made the slurs about the Jewish and Latino Texas Seven defendants shortly before "launch[ing] into a campaign speech

about immigration and the importance of White people in the Dallas community." Exh. 17, Tackett Decl. ¶ 15. Judge Cunningham spoke admiringly of a "style of justice where we didn't have to worry about niggers, Jews, wetbacks, or Catholics." *Id.* ¶ 7.[13] He also believed that "my job is to prevent niggers from running wild again." *Id.* ¶ 13.

McKinney also heard Judge Cunningham say "that he could save Dallas from 'niggers, wetbacks, Jews, and dirty Catholics.'" Exh. 9, McKinney Decl. ¶ 10. Again, Judge Cunningham not only thinks in racial stereotypes, he equates Mr. Halprin's group and Catholics of any ethnicity with the non-whites he denigrates.

Judge Cunningham expressed odious group-based beliefs about criminality and just desert regarding black defendants. Judge Cunningham's repeatedly used the term "T.N.D." to characterize the sentences that black defendants received. *See* Exh. 17, Tackett Decl. ¶ 11. This reflects group-based stereotypes about black criminality and the view that non-white defendants deserve punishment that white defendants would not deserve. Even if Judge Cunningham had not spoken

[13] Judge Cunningham's ideology parallels the historic rhetoric of the early twentieth century Ku Klux Klan. As Professor Stone explains,

> Whereas the Reconstruction-era organization focused its wrath almost entirely on freed African Americans, the Second Klan was more purposeful in its effort to build a dues-paying membership, and it played to the nation's broadest and deepest prejudices against blacks, Catholics, immigrants, socialists, and Jews. "[Simmons] would warn that 'degenerative' forces were destroying the American way of life," explains historian Linda Gordon. "These were not only black people but also Jews, Catholics, and immigrants. Only a fusion of racial purity and evangelical Christian morality could save the country."

Exh. 27, Stone Report at 6 (quoting Linda Gordon, *The Second Coming of the KKK: The Ku Klux Klan of the 1920s and the American Political Tradition* (New York, 2017)). This "second" incarnation of the Klan was especially successful in Dallas, which was considered a "Klan town." *Id.* at 6-7.

directly about Mr. Halprin's trial and used pejorative language that bespeaks his anti-Semitic bias, numerous other pieces of evidence would establish his bias.

Based on her lifelong association with Judge Cunningham, McKinney believes that he sought out positions of power so that he could hurt people from different races and religions. Exh. 9, McKinney Decl. ¶ 9. Judge Cunningham asserted publicly that he "wanted the challenge" of presiding over the Texas Seven trials and believed it was his "destiny" to be a judge. Exh. 7, *Two Wilson Grads*. Those public statements are consistent with the statements and views attributed to him by Tackett, specifically, "he was anointed by God and chosen by God to preside over the Texas 7 trials." McKinney Decl. ¶ 6. In 2018, he still proudly boasted that he "has put more criminals on Death Row than almost any judge in the nation." Exh. 20, "You Know Judge Vic."

Even setting aside the evidence of anti-Semitic animus Judge Cunningham expressed against Mr. Halprin, there is yet another reason that Judge Cunningham likely was biased against him—the fact that Mr. Halprin participated in the escape and robberies with Latino men whom he called "wetback" or "spic." Exh. 9, McKinney Decl. ¶¶ 5, 8, 10, 12; Exh. 17, Tackett Decl. ¶¶ 7, 9, 15. This association may itself have caused an intolerable risk of bias. And Mr. Halprin's close coordination with the Latino men was centrally at issue in trial. *See* 53 RR 126-128; 135-136, 139.

2. In Light of All the Facts and Circumstances, an Objective Observer Would Find the Risk of Bias Intolerably High

An objective observer would conclude that Judge Cunningham could not prevent his personal prejudice against Jewish people from affecting his treatment of Mr. Halprin, whom he knew to be Jewish. This Court should find that Judge Cunningham had an intolerably high risk of bias in violation of the Constitution.

Judge Cunningham's participation in Mr. Halprin's case threatens the public's confidence in the criminal justice system. Those that know Judge Cunningham's bias best—including his own

mother—believe that it defined him. He could not have ruled impartially in Mr. Halprin's case. Average citizens doubted his ability to rule fairly just by reading the facts unearthed in the *Dallas Morning News* story—a mere subset of the total evidence alleged here. And courts and judicial conduct tribunals around the country have found similar overt statements of racial bias prevent a judge from satisfying the appearance of impartiality.

There can be nothing more offensive to constitutional commitments to racial and religious equality than Judge Cunningham's comments. Judge Cunningham's bias in Mr. Halprin's proceedings harms not only Mr. Halprin, but undermines the public's confidence that criminal justice has been—and will be—dispensed. *See Williams*, 136 S. Ct. at 1909 ("[T]he appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself."); *Buck*, 137 S. Ct. at 778 (relying on racist stereotypes "poisons public confidence in the judicial process," and undermines the legitimacy of "the law as an institution, the community at large, and the democratic ideal reflected in the processes of our courts." (cleaned up)); *Pena-Rodriguez*, 137 S. Ct. at 869 (finding constitutional remedy for juror's racial bias is "necessary to prevent a systemic loss of confidence in jury verdicts").

The Fifth Circuit has found a judge was not impartial on similarly egregious facts. In *United States v. Brown*, 539 F.2d 467 (5th Cir. 1976), a judge met an attorney at a motel swimming pool during a bar association convention. *Id.* at 468. The judge told the attorney that "he was going to preside at [Brown's] trial and 'that he was going to get that nigger.'" *Id.* Citing *Murchison*, 349 U.S. at 136, and the "fair trial concept," the Fifth Circuit found "the judge's statement did not comport with the appearance of justice, and it cannot be said from the record alone that appellant received a fair trial." *Id.* at 470.

Judicial conduct tribunals have also found that making private, bigoted comments threatens the court's appearance of impartiality, even where there was no direct comment on a criminal defendant in a proceeding before the judge.

- *In re Stevens,* 645 P.2d 99, 99-100 (Cal. 1982): In California, a superior court judge continually referred to black litigants as "coons," "jigs," "niggers," and to Latinos as "Mexican jumping beans" and "spics" in statements to "friends," court personnel, court clerks, and in "private." His discipline was public censure.
- *In re Complaint of Judicial Misconduct*, 751 F.3d 611 (U.S. Comm. on Judicial Conduct and Disability 2014): Misconduct included "hundreds of inappropriate email messages that were received and forwarded from [District Judge] Cebull's court email account," including "race-related emails that 'showed disdain and disrespect for African Americans and Hispanics, especially those who are not in the United States legally'; 'emails related to religion [that] showed disdain for certain faiths'; 'emails concern[ing] women and/or sexual topics and were disparaging of women'; 'emails contain[ing] inappropriate jokes relating to sexual orientation'...." *Id.* at 616. The Committee adopted the Ninth Circuit Judicial Council's conclusion that Judge Cebull's "email practices create a substantial possibility that his neutrality could be questioned" and ordered training in order "[t]o restore the public's confidence that any possible conscious or unconscious prejudice will not affect future decisions." *Id.* at 624.
- *In re Eakin*, 150 A.3d 1042, 1058 (Pa. Ct. Jud. Disc. 2016): Based on its review of the stipulated evidence—hundreds of those emails are offensive on the basis of race, gender, sexual orientation, religion, class or ethnicity--the Court of Judicial Discipline determined that the Judicial Conduct Board had established by clear and convincing

> evidence that Pennsylvania Supreme Court Justice Eakin's conduct violated Canon 2A of the Code of Judicial Conduct - failure to conduct himself in a manner that promotes confidence in the integrity and impartiality of the judiciary.

Those who knew best Judge Cunningham's prejudiced beliefs doubt his ability to perform his judicial duties impartially. Judge Cunningham's own mother considered his bigotry his "biggest burden," Exh. 9, McKinney Decl. ¶ 17, and predicted his bigotry would be "his downfall." *Id.*; Exh. 17, Tackett Decl. ¶ 17. Amanda Tackett believes that Judge Cunningham could not set aside his biases when he was a judge. Exh. 17, Tackett Decl. ¶ 23. Tammy McKinney, drawing on her "personal and intimate knowledge of [Judge Cunningham]," "do[es] not believe for one second that Vic could be impartial in any of the Texas Seven cases, or any of the other cases that involved Jewish people, or people of color, in his courtroom." She bases her view on the total picture of Judge Cunningham's prejudice:

> [their] long association as family friends, how openly and honestly he has constantly expressed his prejudices and bigotry, how much he has used his role in the Texas 7 case to promote himself, [] how he talked with certainty about the outcome of the Texas 7 cases, and the way he has repeatedly referred to Latinos as "wetbacks" and Jewish peoples as "goddamn kikes."

Exh. 9, McKinney Decl. ¶ 18.

Finally, recent empirical research on explicit and implicit biases in criminal sentencing appears to confirm common sense: that a judge who harbors these explicit negative stereotypes about groups would not judge individuals from those groups fairly. Even many judges who disclaim any conscious bias against Jewish people—and who take an oath to judge impartially—still exhibit implicit biases in judging Jewish people. A study of actual judges surveyed the judges' explicit attitudes toward Asians and Jews, tested them for implicit associations that revealed bias, and asked them to perform a mock sentencing task involving a Jewish or Asian defendant. Both "[f]ederal and state judges displayed strong to moderate implicit bias against Jews (relative to Christians) on the stereotype

[implicit association test], such that Jews were associated with negative moral stereotypes (e.g., greedy, dishonest, scheming), and Christians were associated with positive moral stereotypes (e.g., trustworthy, honest, generous)." Justin D. Levinson, Hon. Mark Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 Fla. L. Rev. 63, 105 (2017). Strikingly, the results showed federal judges were more likely to sentence a Jewish defendant to a longer sentence than an otherwise identical Christian defendant. *Id.* at 104, 105 Fig. 1, 110-11.

Another study of racial bias among jurors in capital sentencing makes an even more striking finding. Mock juror-participants who had "a higher self-reported[14] racial bias score" were more likely to "giv[e] the death penalty when the victim of the murder was White." Justin D. Levinson, Robert J. Smith, Danielle Young, *Devaluing Death*, 89 N.Y.U. L. Rev. 513, 562 (2014). In other words, explicitly biased jurors acted on those biases in their sentencing. These studies suggest, at a minimum, that judges who harbor explicit negative stereotypes about Jewish people—whether they intend to or not—likely introduce their biases into the courtroom.

For all these reasons, Judge Cunningham's participation violated Mr. Halprin's right to due process of law. Mr. Halprin's conviction and sentence must be vacated so he can be tried before an impartial tribunal.

[14] Participants were given the "Modern Racism Scale" which "asks participants to rate their agreement or disagreement with a series of statements, such as "Discrimination against blacks is no longer a problem in the United States." Levinson, *supra*, at 556.

PROCEDURAL ISSUES

I. STATEMENT OF EXHAUSTION AND STAY PENDING SUPREME COURT REVIEW

Like the habeas petitioner in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), Mr. Halprin has filed a "protective" petition to raise an unexhausted claim that he must present in federal court before the statute of limitations expires. *See* 28 U.S.C. § 2244(d)(1). Here, the fact that Judge Cunningham is a bigot—at least, that he is biased against African-Americans—came to light on May 18, 2018, when the *Dallas Morning News* published an article stating that he referred to criminal cases he presided over as "T.N.D.s" which stood for "typical nigger deals." Exhs. 21, 22. Follow-up investigation revealed Judge Cunningham's anti-Semitism, and showed the extent to which that hatred infected his thinking about Mr. Halprin.

Ordinarily, Mr. Halprin would seek a stay to exhaust his claim. *See Pace*, 544 U.S. at 416 (authorizing a habeas petitioner to "fil[e] a 'protective' petition in federal court and ask[] the federal court to stay and abey the federal habeas proceedings until state remedies are exhausted." (citing *Rhines v. Weber*, 544 U.S. 269, 278 (2005)).

But by operation of Texas post-conviction law, Mr. Halprin may not yet return to state court. Under the Texas Court of Criminal Appeals' ("TCCA") "two-forums rule," the state court will not consider Mr. Halprin's application under Texas Code of Criminal Procedure art. 11.071, § 5 because his initial federal habeas corpus proceedings are ongoing. *Ex parte Soffar*, 143 S.W.3d 804, 804 (Tex. Crim. App. 2004) (stating rule); *Ex parte Kunkle*, No. 20,574-03, 2004 WL 7330932, at *1 (Tex. Crim. App. Sept. 15, 2004) (applying rule to dismiss subsequent application pending while petition for certiorari was pending in U.S. Supreme Court, *see Kunkle v. Dretke*, 543 U.S. 835 (Oct. 4, 2004) (mem.)).

Mr. Halprin's petition for a writ of certiorari to review the decision of the Fifth Circuit Court of Appeals is due June 12, 2019. *Halprin v. Davis*, No. 18A1032 (U.S. May 13, 2019) (application granted by Justice Alito extending time to file until June 12, 2019).

At this time, the exhaustion requirement is in a form of suspended animation: one of the statutory exceptions applies because, due to the two-forums rule, "there is an absence of available State corrective process," 28 U.S.C. § 2254(b)(1)(B)(i), but that condition is temporary. *See In re Lewis*, 484 F.3d 793, 798 (5th Cir. 2004) ("Texas two-forum rule temporarily postponed Lewis's ability to file his *Atkins* claim in state court"). Either the Supreme Court will grant review, or it will deny it. But until the Supreme Court disposes of Mr. Halprin's petition, stay and abeyance in this Court will have no effect on the availability of the Texas post-conviction review process.

The obverse also is true: the absence of an available state corrective process due to the two-forums rule means Mr. Halprin cannot toll the statute of limitations by properly filing an application for review in state court, or, at least, that there is uncertainty regarding (a) whether an application dismissed under the two-forums rule was properly filed, and (b) how long such an application would remain pending, if at all. *See* 28 U.S.C. § 2244(d)(2) (providing that limitations period is tolled during pendency of "properly filed application for State post-conviction or other collateral review"); *Pace*, 544 U.S. at 416 ("A petitioner's reasonable confusion about whether a state filing would be timely will ordinarily constitute 'good cause' for him to file in federal court."). But for the two-forums rule, Mr. Halprin could have filed an application in state court under § 5 of Article 11.071 and relied upon that to toll the federal statute of limitations. *Mathis v. Thaler*, 616 F.3d 461, 472 (5th Cir. 2010) (application under § 5 is properly filed even if state court ultimately denies review under § 5(a)). However, as the Fifth Circuit has recognized, the *potential* application of the two-forums rule creates sufficient problems to constitute grounds for equitably tolling the statute of limitations in some

circumstances. *See In re Hearn*, 389 F.3d 122, 123 (5th Cir. 2004).[15] Until the resolution of Mr. Halprin's initial federal habeas proceedings, there is not good cause for this Court to stay and abate these proceedings because there is no state court remedy available for exhaustion. (But, as stated in the introduction and the accompanying motion, the *certiorari* petition *is* good cause for staying this matter.)

Second, similar to the petitioner in *Hearn*, Mr. Halprin is without counsel to litigate his claim in state court. Neither the Federal Public Defender nor private appointed counsel can appear under this Court's appointment in a state habeas proceeding for purposes of exhaustion absent an order from this Court authorizing that appearance. *Harbison v. Bell*, 556 U.S. 180, 190 n.7 (2009) ("Pursuant to [18 U.S.C.] § 3599(e)'s provision that counsel may represent her client in 'other appropriate motions and procedures,' a district court may determine on a case-by-case basis that it is appropriate for federal counsel to exhaust a claim in the course of her federal habeas representation."). Although Mr. Mansur could file the § 5 application *pro bono publico*, Mr. Halprin would need additional counsel to litigate the matter.

In sum, Mr. Halprin's claim is now timely filed. By separate motion, Mr. Halprin will seek a stay of these proceedings pending resolution of his petition for *certiorari*, to be filed on June 12.

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[15] The Fifth Circuit has said "Texas has overturned" its two-forums rule. *Hearn*, 389 F.3d at 123; *In re Wilson*, 442 F.3d 872, 876 (5th Cir. 2006). That is not correct. The TCCA has explained, "we *modified* our so-called "two-forums" rule in such a way that it should no longer pose a potential statute of limitations problem for federal habeas applicants raising *Atkins* claims under the provisions of the Antiterrorism and Effective Death Penalty Act." *Ex parte Blue*, 230 S.W.3d 151, 156 n.21 (Tex. Crim. App. 2007) (emphasis added). But that modification—an allowance for the federal courts' stay-abeyance procedure for petitioners who went to state court *first*, *Ex parte Soffar*, 143 S.W.3d 804 (Tex. Crim. App. 2004), was not available to Mr. Halprin who was already in the Fifth Circuit when he first could have learned about Judge Cunningham's bias. The rule remains in effect. *See, e.g.*, *Ex parte Acker*, No. WR-56,841-05, 2014 WL 2002200, at *1 (Tex. Crim. App. May 14, 2014) (dismissing under *Soffar* while case was in federal district court); *Ex parte Pondexter*, No. WR-39,706-02, 2008 WL 748393, at *1 (Tex. Crim. App. Mar. 19, 2008) (dismissing under *Soffar* while case was in Fifth Circuit).

Then, at the conclusion of his Supreme Court proceedings, Mr. Halprin will have grounds for a *Rhines* stay, so he may exhaust his claim in state court under Texas's modified two-forums rule.

II. THE PETITION IS TIMELY

In compliance with the one-year statute of limitations, Mr. Halprin is filing this petition less than one year after due diligence could have led to the discovery of Judge Cunningham's biases and prejudices. 28 U.S.C. § 2244(d)(1)(D). The limitations period ran "from . . . . the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." *Id.* Mr. Halprin's claims are predicated on the bias and prejudice that trial judge Vickers Cunningham felt towards him because he is a Jew and because he was a follower of two Latino men against whom Judge Cunningham also was prejudiced because of their ethnicity.

The earliest date on which due diligence might have triggered an investigation into Judge Cunningham's bias was May 18, 2018. On that date, the *Dallas Morning News* published an article online and posted an accompanying video revealing that former Judge Cunningham is a racist. *See* Exh. 21, Martin, *White, straight, and Christian*. In the video interview, Judge Cunningham confirmed that he set up a trust fund for his children with the condition each child would receive a distribution upon the child's marriage but only if the child married a person who was white, Christian, and of the opposite sex. Exh. 22. Judge Cunningham explained that he opposed inter-racial marriage on the basis of "my faith" and "as a Christian." *Id.* The *Morning News* asked Judge Cunningham whether he ever used the word "nigger." Judge Cunningham paused for nine seconds before asking whether the *Morning News* meant to ask whether he ever used the word in court. *Id.* Then he denied using it at all. *Id.* Judge Cunningham's brother Bill Cunningham and Bill's friend Amanda Tackett told the *Morning News* that the judge did use the word, including that he referred to court cases he presided over as "TNDs" which stood for "typical nigger deals." Bill's husband, who is Black, also

reported that Judge Cunningham referred to him as "boy." Exh. 21, Martin, *White, straight, and Christian*.

The *Morning News* focused on Judge Cunningham's prejudice against black people. None of the so-called "Texas Seven" co-defendants was black, and, therefore, due diligence did not require Mr. Halprin to investigate whether Judge Cunningham was biased against him because he is Jewish. In an abundance of caution, Mr. Halprin investigated whether Judge Cunningham's opposition to his children marrying non-Christians might be based on a bias against Jews.

That investigation produced evidence of Judge Cunningham's deep-seated prejudices and their influence on his desire to be a prosecutor and judge, and his actions in those roles. Among other things, the investigation produced evidence that Judge Cunningham was prejudiced against Jews, that he referred to his daughter's Jewish boyfriend as "Jew boy" before compelling her to end her relationship with him, that Judge Cunningham used stereotypes and anti-Semitic tropes like "Jew banker" when speaking of Jews, and that when describing his role in the Texas Seven trials, he referred to Mr. Halprin as the "goddamn kike," and "the fuckin' Jew," and to his Latino co-defendants as "wetbacks." Mr. Halprin also learned about the actions Judge Cunningham would take in order to conceal his bigotry, for example, by donning a tie he thought would be appealing to an African-American audience but that he referred to as his "nigger tie" behind their backs. Mr. Halprin also learned that Judge Cunningham's prejudices motivated him to seek public office, for example, that he ran for public office in order to "save Dallas from niggers, wetbacks, Jews, and dirty Catholics."

Before the *Morning News* exposed Judge Cunningham's bigotry on May 18, 2018, and even afterwards, no investigation was called for under the due diligence standard. There is "a presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). The Supreme Court has said that presumption operates in the specific context of an inquiry into a

claim of judicial bias. *Bracy v. Gramley*, 520 U.S. 899, 909 (1997) (considering whether discovery should be made available to capital habeas petitioner alleging judicial bias: "Ordinarily, we presume that public officials have properly discharged their official duties.") (internal quotation marks and citations omitted). That is, Mr. Halprin and his counsel were entitled to presume that Judge Cunningham was not biased or prejudiced against Jews and Latinos even after the *Morning News* exposed his bigotry towards blacks and homosexuals. They investigated anyway and discovered the evidence presented here less than one year later.

III. THE PETITION IS NOT A "SECOND OR SUCCESSIVE" PETITION

This case presents a threshold issue: how to interpret § 2244(b)(2)'s triggering phrase "second or successive" when the habeas petitioner presents a constitutional claim that meets the statutory criteria for timeliness but "does not fit within either of subsection (b)(2)'s exceptions." *Stewart v. Martinez-Villareal*, 523 U.S. 637, 642 (1998). Section 2244(b)(2)[16] only applies to "second or successive" petitions, but "that phrase does not simply 'refe[r] to all § 2254 applications filed second or successively in time.'" *Magwood v. Patterson*, 561 U.S. 320, 332 (2010) (quoting *Panetti v.*

[16] Section 2244(b)(2) serves a "gatekeeping provision" for habeas petitions filed in federal court. *Felker v. Turpin*, 518 U.S. 651, 657 (1996). As relevant here, it instructs that,

> [a] claim presented in a *second or successive habeas corpus application* under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> (A) the applicant shows that the claim relies on a new rule of constitutional, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b) (emphasis added).

Quarterman, 551 U.S. 930, 940 (2007)). As the Supreme Court has done in less compelling circumstances, this Court should not treat Mr. Halprin's judicial bias claim as "second or successive" for the purpose of triggering § 2244(b) by taking into account (1) the recognized purposes of the abuse-of-writ statute, (2) the practical effects of requiring compliance with § 2244(b), (3) Congress' intent in passing the law, and (4) the parties' equitable positions under Supreme Court law.

This case has two features in common with *Panetti* and *Martinez-Villareal*—the two cases in which the court concluded § 2244(b) should not apply to a second-in-time petition. First, the factual predicate for Mr. Halprin's claim was not previously available. *See also* 28 U.S.C. § 2244(b)(2)(B)(i) (codifying Congress' desire that only previously unavailable claims be considered after initial habeas review). Second, as applied to Mr. Halprin, the statute purports to withdraw jurisdiction over a timely filed petition raising a fundamental and long-established constitutional right, the right to an impartial trial judge. *Cf.* 28 U.S.C. § 2244(b)(2)(B)(ii). Judicial bias claims, like the competency-to-be-executed claims raised in *Panetti* and *Martinez-Villareal*, are incompatible with the statute because they do not depend on the factfinders' assessment of guilt.[17] *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) ("No matter what the evidence was against him, he had the right to have an impartial judge"). In *Panetti* and *Martinez-Villareal*, the Supreme Court held *Ford* [18] claims were not "second and successive" *because* the statute's exceptions failed to recognize them, *see Panetti*, 551 U.S. at 943-46, not despite it. This Court should do the same.

[17] Mr. Halprin *can* show that he is actually innocent of the death penalty because his culpability is constitutionally insufficient to subject him to capital punishment under *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987). Were Mr. Halprin attempting to get review of a procedurally defaulted claim, or to present an initial petition outside the statutory limitations period, his freestanding showing of innocence would suffice. *See Sawyer v. Whitley*, 505 U.S. 333 (1992); *McQuiggin v. Perkins*, 569 U.S. 383, 392-93 (2013).

[18] *Ford v. Wainwright*, 477 U.S. 399 (1986).

Mr. Halprin's claim is far more compelling than those in *Panetti* and *Martinez-Villareal*, because his evidence shows the entire trial was fundamentally unfair. Like other structural errors, a judicial bias claim is a "structural defect[] in the constitution of the trial mechanism" and "the presence on the bench of a judge who is not impartial" "obviously" affects "the entire conduct of the trial from beginning to end." *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991). By contrast, a *Ford* claim questions only the *timing* of a lawfully imposed death sentence. If a petition challenging only the timing of an execution is cause to find a petition is not "second or successive," then it would be an anomalous and perverse result to hold the statute permissibly withdraws jurisdiction over a petition that challenges a structural defect in the entire trial. *See Panetti*, 551 U.S. at 943.

The Supreme Court has made clear that AEDPA should be interpreted in light of its "practical effects." *Panetti*, 551 U.S. at 945. "This is particularly so when petitioners 'run the risk' under the proposed interpretation of 'forever losing their opportunity for any federal review of their unexhausted claims.'" *Id.* at 945-46 (quoting *Rhines v. Weber*, 544 U.S. 269, 275 (2005)). Because "'closing the door to'" petitioners raising newly-discovered claims of judicial bias leads to grave problems, "'troublesome results,'" and "'procedural anomalies,'" this Court should avoid that interpretation of AEDPA unless it has "'clear indication that such was Congress' intent.'" *Id.* at 946 (quoting *Castro v. United States*, 540 U.S. 375, 380, 381 (2007)).

A. Supreme Court Precedent Forecloses Automatically Treating this Petition as "Second or Successive."

"It is well settled that the phrase 'second or successive' does not simply 'refer to all § 2254 applications filed second or successively in time.'" *Magwood*, 561 U.S. at 332 (internal quotation marks, citation, and alterations omitted). Because the phrase is "not self-defining," "[i]t takes its full meaning from [Supreme Court] case law, including decisions predating the enactment of [AEDPA]." *Panetti*, 551 U.S. at 943-44. Accordingly, the Court "has declined to interpret 'second or successive'

as referring to all § 2254 applications filed second or successive in time, even when the later filings address a state-court judgment already challenged in prior § 2254 application." *Id.* at 944.

In both *Panetti* and *Martinez-Villareal*, the Court considered the practical effects of its holdings and rejected an interpretation that would exclude any federal review of those claims because "the implications for habeas practice would be far reaching and seemingly perverse." *Martinez-Villareal*, 523 U.S. at 644; *see also Panetti*, 551 U.S. at 943-46. With those considerations in mind, the Court "create[d] an 'exception' to § 2244(b) for a second application raising a claim that would have been unripe had the petitioner presented it in his first application." *Magwood*, 561 U.S. at 332.

In *Panetti*, the State of Texas argued that, to avoid application of § 2244(b), and certain dismissal of his claim, Mr. Panetti should have filed his *Ford* claim in his first petition. 551 U.S. at 943. But the Court rejected this contention in part because of "the results it would produce." *Id.* A prisoner would either have to forgo the opportunity to raise such a claim in federal court, or raise the claim in a first petition, even though it was premature. *Id.* This "dilemma would apply not only to prisoners with mental conditions indicative of incompetency," who might contemplate a future *Ford* claim, "but also to those with no early signs of mental illness," who may have no reason to believe that such a claim would become applicable. *Id.* The State's demand for premature claims "would add to the burden imposed on courts, applicants, and the States, with no clear advantage to any." *Id.* In order to avoid that result, the Court concluded that "Congress did not intend the provisions of AEDPA addressing 'second or successive' petitions to govern a filing in the unusual posture" presented in Mr. Panetti's case. *Id.* at 945. The fact that Congress has not further amended AEDPA in the 21 years since *Martinez-Villareal*, or the 12 years since *Panetti*, indicates the Supreme Court was correct that Congress did not intend to foreclose claims that have no bearing on guilt or innocence.

And Congress did not intend § 2244(b) to govern a filing in the unusual posture presented here: a § 2254 petition raising a judicial bias that could only have become available later, by happenstance. It makes no more practical sense to require the pleading of judicial bias claims without a factual predicate than to require the pleading of incompetency claims without a factual predicate.

What is more, just as a "State . . . may properly presume that [a] petitioner remains sane at the time sentence is to be carried out," *Ford*, 477 U.S. at 426 (Powell, J., concurring), there is "a presumption of honesty and integrity in those serving as adjudicators." *Withrow*, 421 U.S. at 47; *accord Bracy*, 520 U.S. at 909. The Supreme Court has repeatedly held that habeas petitioners are entitled to rely upon presumptions of official integrity such that diligence imposes no duty to investigate where there is no evidence official wrongdoing. *See Banks v. Dretke*, 540 U.S. 668, 694 (2004) ("it was . . . appropriate for Banks to assume that his prosecutors would not stoop to improper litigation conduct") (citing *Strickler v. Green*, 527 U.S. 263, 285-89 (1999)).

This Court should follow *Martinez-Villareal* and *Panetti* because like the "unusual posture presented" in *Panetti*, 551 U.S. at 945, "[t]he facts of this case are, happily, not the stuff of typical judicial disqualification disputes," *Bracy*, 520 U.S. at 905, and the evidence of a structural defect in the state court judgment was not previously available through diligent inquiry. Congress could not account for every potential claim that might come to light after an initial petition. It is reasonable to conclude Congress simply assumed something as rare as a racially biased judge would not require specific mention in the Act.[19]

[19] Since its enactment, AEDPA has required an unusual amount of judicial construction and interpretation and has produced extraordinary divisions among judges over its meaning and application. There are many reasons. One "is that in a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting." *Lindh v. Murphy*, 521 U.S. 320, 336 (1997).

B. Dismissing Mr. Halprin's Judicial Bias Claim Would Have Far-Reaching and Perverse Implications

Congress could not have intended for § 2244(b) to deprive a petitioner in Mr. Halprin's situation of a federal habeas remedy, given its overarching commitment to retaining a remedy for claims impacting the fundamental fairness of a criminal trial. "Congress has recognized that federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty." *McFarland v. Scott*, 512 U.S. 849, 859 (1994), *quoted in Christeson v. Roper*, 135 S. Ct. 891, 894 (2015). *Martinez-Villareal* and *Panetti* are in line with other cases preserving federal habeas review for claims that impact the fundamental fairness of a death sentence. *See, e.g.*, *Teague v. Lane*, 489 U.S. 288, 312 (1989) (explaining exception to rule against retroactive application of new rules for claims that "implicate the fundamental fairness of the trial"); *O'Dell v. Netherland*, 521 U.S. 151, 157 (1997) (discussing role of fundamental fairness in second *Teague* exception). *Martinez-Villareal*'s construction of AEDPA also promotes the federal courts' proper role in ensuring "the 'laws, rules, and remedies' created by Congress" comport with the Constitution's demand for a remedy. *Chapman v. California*, 386 U.S. 18, 47 (1967) (Harlan, J., dissenting).

Indeed, one of the intellectual architects of § 2244(b)(2)(B)'s innocence exception, Judge Henry Friendly, argued that an innocence requirement should not apply in cases where "the criminal process itself has broken down; the defendant has not had the kind of trial the Constitution guarantees." Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 151 (1970); *see also id.* (arguing that another structural error, racial discrimination in jury selection, should not be subject to innocence requirement). Like the claims excluded by Judge Friendly, Mr. Halprin's judicial bias claim concerns "the very basis of the criminal

process," such that collateral attack would be appropriate "regardless of the defendant's guilt." *Id.* at 152.

Given Congress's consistent focus on fundamental fairness, Mr. Halprin has a far stronger claim to federal habeas review than the petitioners in *Martinez-Villareal* and *Panetti* had, because his claim so directly implicates the structural integrity of his trial.

The right to be tried by an impartial judge is among those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman*, 386 U.S. at 23 & n.8 (citing *Tumey*, 273 U.S. 510). Even Justice Harlan, who dissented in *Chapman*, said, in words that carry greater importance in the present case, that he considered judicial bias among those "certain types of official misbehavior [that] require reversal simply because *society cannot tolerate giving final effect to a judgment tainted with such intentional misconduct*." 386 U.S. at 56 & n.7 (Harlan, J., dissenting) (emphasis added). "Since fundamental fairness is the central concern of the writ of habeas corpus," *Strickland v. Washington*, 466 U.S. 668, 697 (1984), the exclusion of Mr. Halprin's claim from federal review would have more far reaching and perverse implications than the exclusionary application of § 2244(b) that was rejected in *Panetti* and *Martinez-Villareal*.

The claim at issue in *Panetti* and *Martinez-Villareal*, while substantial, was not as weighty as Mr. Halprin's judicial bias claim. As Justice Powell observed when considering how much process was due to one claiming incompetence for execution, a *Ford* incompetency-for-execution claim concerns only the timing of the execution, not whether it may happen at all. *Ford*, 477 U.S. at 425 ("This question [of when the execution may take place] is important, but it is not comparable to the antecedent question whether the petitioner should be executed at all.") (Powell, J., concurring). Nothing could implicate the fundamental fairness of the trial more than evidence that an anti-Semitic judge harbored animus against a Jewish defendant in his capital trial.

Mr. Halprin's claim is at least as serious as the claim presented in *Buck v. Davis*, 137 S. Ct. 759 (2017). *Buck* reaffirmed the role of federal habeas courts in eliminating racial prejudice from the administration of justice, and doing so long after the entry of final judgment in an initial federal habeas petition challenging a Texas death sentence. *Id.* at 778.

In *Buck*, defense counsel unreasonably elicited from his penalty-phase expert the opinion that there was a "connection between Buck's race and the likelihood of future violence," specifically, that his race meant there was an "[i]ncreased probability" that he would commit future acts of violence. *Buck*, 137 S. Ct. at 775. The Supreme Court held the testimony was prejudicial in part because "the focus of the proceeding was on the first question" presented to the jury: future dangerousness. *Id.* at 776. Although Buck "had committed acts of terrible violence," they "occurred outside of prison, and within the context of romantic relationships with women." *Id.* So the question was whether the change in setting if he were sentenced to life imprisonment "would minimize the prospect of future dangerousness." *Id.* The expert's testimony was prejudicial in large part because it focused on "one thing would never change: the color of Buck's skin." *Id.* As the Supreme Court said, that claim is far from "*de minimis*," as the district court had held it was. *Id.* at 777.

From jury selection, and the life- and death-qualifying of jurors,[20] through ruling on objections and other informal responses to testimony and argument in the courtroom, the purpose of judging in a capital trial is to ensure that if and when the time comes, jurors will be able "to make a 'highly subjective, unique, and individualized judgment'" on the right sentence. *Turner v. Murray*, 476 U.S. 28, 33-34 (1986). The potential for improper influence in those circumstances by a judge who could

[20] *See Morgan v. Illinois*, 504 U.S. 719, 728-29 (1992) (explaining life-qualification); *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (explaining death-qualification).

not himself view the defendant as Randy Halprin, unique human being, but only "the fuckin' Jew" or "goddamn kike," is incalculable.

It would have far reaching implications and would be truly perverse to dismiss Mr. Halprin's evidence that the trial judge considered him a "goddamn kike" and "that fuckin' Jew" after the Supreme Court permitted the *Ford* claim to proceed in *Panetti*, and granted relief on Buck's ineffective-assistance-of-counsel claim that involved a single witness testifying to a racial stereotype. As the Supreme Court recently observed, "the public legitimacy of our justice system relies on procedures that . . . provide for error correction," *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018). Correcting constitutional error is not just a matter of reputation, it is a matter of efficacy.

> Legitimacy may be measured by the quality of decision making or the quality of treatment of defendants. More specifically, procedures are legitimate when they are neutral, accurate, consistent, trustworthy, and fair—when they provide opportunities for error correction and for interested parties to be heard. Legal authorities are legitimate when they act impartially, honestly, transparently, respectfully, ethically, and equitably. The criminal justice system that optimally expresses these values is not only morally defensible but also quite probably stable and effective.

Bowers & Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 Wake Forest L. Rev. 211, 215–216 (2012), *cited in Rosales-Mireles*, 138 S. Ct. at 1908. Mr. Halprin's judicial bias claim raises precisely these practical concerns.

As evidence that public confidence has already been shaken by reports of Judge Cunningham's racist values, one need only read the reactions of readers to the May 18, 2018, *Dallas Morning News* report. In response to a tweet linking to the article on Twitter, dozens of users commented that Cunningham's conduct caused them to question his ability to preside over cases fairly. See Twitter Comments to *Dallas Morning News* Tweet of May 18 Article (Exhibit 30). Emblematic was @BeBraveNStuff who said, "I cannot be the only person wondering how many people of color this unashamed bigot had before him in a court room. Every case this man judged

should be under scrutiny." Exh. 30, https://twitter.com/BeBraveNStuff/status/997657752968327168 (liked 58 times).

This Court should avoid the troublesome, anomalous, and review-foreclosing interpretation of § 2244(b) that would preclude consideration of a claim attacking the integrity of the trial process at its foundation, where less serious claims would get consideration under similar circumstances.

C. Equity Provides the Appropriate Remedy

Section 2244(b) imposes "a restraint on what is called in habeas corpus practice 'abuse of the writ.'" *Felker v. Turpin*, 518 U.S. 651, 664 (1996). In *Felker*, the Supreme Court found the statute was "within the compass of" that doctrine that, in turn, was "'a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions.'" *Id.* (quoting *McClesky v. Zant*, 499 U.S. 467, 489 (1991)). *Panetti* and *Martinez-Villareal* are further steps in that evolutionary process. Mr. Halprin proposes this Court find that consideration of his judicial bias claim is on the path from *McClesky* to AEDPA to *Panetti*. For the reasons stated in the previous section, Mr. Halprin's claim does not require this Court to go beyond *Panetti*, but rather to find that because review was required for a *Ford* claim, which does not concern the structural integrity of the trial, it is necessarily required for a bias claim, which does show a lack of structural integrity.

Section 2244(b) does not impair this Court's equitable power to decide a case in a manner consistent with *Panetti*. "[E]quitable principles have traditionally governed the substantive law of habeas corpus," and the Supreme Court "will not construe a statute to displace courts' traditional equitable authority absent the clearest command." *Holland v. Florida*, 560 U.S. 631, 646 (2010). The text of § 2244(b) contains no clear command countering the courts' equitable authority to permit review of a claim of judicial bias, the factual basis of which was not available until after May 18, 2018.

"In habeas, equity recognizes that 'a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.'" *McClesky*, 499 U.S. at 490 (quoting *Sanders v. United States*, 473 U.S. 1, 17 (1963)). The Supreme Court also has held that when a federal court decides whether to apply the procedural default doctrine, it is appropriate to consider whether *the State's* conduct diminishes its ability to rely upon that habeas defense. *Davila v. Davis*, 137 S. Ct. 2058, 2065 (2017) (explaining that *Martinez v. Ryan*, 566 U.S. 1 (2012) "announced a narrow[] 'equitable . . . qualification' of" the procedural default rule); *id.* at 2068 ("*Martinez* . . . was responding to an equitable consideration" raised by state law). The *Martinez* Court held in part that the State's deliberate choice regarding the manner of review of federal claim was "'not without consequences for the State's ability to assert a procedural default' in subsequent federal habeas proceedings." *Id.* at 2068 (quoting *Martinez*, 566 U.S. at 13).

Because "[t]he doctrines of procedural default and abuse of the writ implicate nearly identical concerns flowing from the significant costs of federal habeas corpus review," *McClesky*, 499 U.S. at 490-91, "the same standard used to determine whether to excuse state procedural defaults should govern the determination of inexcusable neglect in the abuse-of-the-writ context," *id.* at 490. In the procedural default context, the cause inquiry parallels the due-diligence requirement under § 2244(b)(2). It focuses on "objective factors external to the defense" in order to distinguish the circumstances that can constitute cause from "a 'tactical' or 'intentional' decision to forgo a procedural opportunity" to raise a federal claim because such a decision "normally cannot constitute cause." *Amadeo v. Zant*, 486 U.S. 214, 221-22 (1988) (quoting *Reed v. Ross*, 468 U.S. 1, 14 (1984)). In *Amadeo,* the Court found cause where local officials concealed the factual basis for the petitioner's claim. *Id.* at 222.

As shown above, the law recognizes a presumption of honesty and integrity for both prosecutors and judges, and would-be claimants like Mr. Halprin are entitled to rely on those

presumptions. When evidence shows that prosecutors failed to live up to the presumption of integrity, by suppressing evidence and claiming that they disclosed it, the prisoner has cause for his failure to raise a *Brady* claim in state court. *Banks*, *supra*, 540 U.S. at 692-93, discussing *Strickler*, *supra*, 527 U.S. at 276-289. The same principle should apply here.

Judge Cunningham had a duty not to preside over a case in which he considered the defendant a "kike" and "fucking Jew," and whose co-defendants he thought of as "wetbacks." *See* Claim 1.B.1, *supra*, at 29 (discussing Texas authority for duty to recuse). By remaining on the case, and not disqualifying himself, Judge Cunningham, like the prosecutors in *Banks* and *Strickler*, violated Mr. Halprin's right to due process and concealed the factual basis for asserting that his rights were violated.

Section 2244(b), like the Supreme Court's abuse-of-the-writ cases, attempts to relieve the burden imposed when "a State must defend its conviction in a second or subsequent habeas proceeding on grounds not even raised in the first petition." *McClesky*, 499 U.S. at 492. But as the Court held in *Martinez*, albeit in different circumstances, that concern has no weight, or the State is not entitled to press its concern, when, as in *Banks* and *Strickler*, a state actor—here a judge specially appointed to preside over the Texas Seven trials—suppressed or concealed the relevant information and thereby prevented his conduct from being challenged earlier and thereby caused the constitutional claim to be filed in a second petition.

AEDPA, as interpreted in *Panetti*, does not require that the State's interest in finality be given weight here, and equity forbids it. Public confidence in the legitimacy and integrity of the criminal justice system requires federal habeas review as a means of correction for this capital trial tainted by

a racist judge who had actual anti-Semitic and anti-Latino bias against the defendants. Accordingly, this Court should hold this petition is not subject to § 2244(b)'s restrictions.[21]

REQUEST FOR PROCEDURES AVAILABLE UNDER STATUTES AND RULES

The habeas statutes and rules, and the cases applying them, "reduce uncertainty, avoid unfair surprise, minimize disparate treatment of similar cases, and thereby help all litigants, including the State, whose interests in 'finality' such rules often further." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996). That is, the statutes and rules provide for due process in habeas proceedings. Ad hoc departures from those processes for purposes of expediency may violate due process. *See id.* at 320-22. Mr. Halprin requests this Court afford him the procedures set forth in 28 U.S.C. § 2243, paragraphs 6 and 7, and Habeas Rules 5(e), 6, 7, and 8. Filing the traverse or reply under § 2243 and Habeas Rule 5(e) completes the pleading stage, *Walker v. Johnston*, 312 U.S. 275, 284 (1941) ("petition and traverse ... should be [treated] as together constituting the application for the writ"),[22] and this Court will be able to determine whether discovery is required because Mr. Halprin has placed specific allegations before the Court that may entitle him to relief if they are fully developed. *Bracy v. Gramley*, 520 U.S. 899, 908-909 (1997). After that determination, the Court will be in a position to determine whether the record should be expanded, Habeas Rule 7(a), after which point Habeas Rule 8(a) requires a habeas court to consider whether, in light of "any materials submitted under Rule 7 ... an evidentiary hearing is warranted." *See Wellons v. Hall*, 558 U.S. 220, 226 (2010)

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[21] These equitable and practical reasons would also support relief from the judgment under Federal Rule of Civil Procedure 60(b). Rule 60(b) serves as "a grand reservoir of equitable power to do justice in a particular case that may be tapped by the district court in the sound exercise of its discretion, and within the strictures inherent in the underlying objectives of the rule." *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981) (internal quotations and citations omitted). Moreover, "there can be little doubt that Rule 60(b) vests in the district courts power 'adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.'" *Id.* at 401 (quoting *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949)).

[22] *See also* 28 U.S.C. § 2248; Habeas Rule 8(a).

(per curiam); *Townsend v. Sain*, 372 U.S. 293, 312-19 (1963), *overruled in part on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5 (1992); *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007).

To the extent this Court may find the State met its pleading burden related to procedural defenses such as non-exhaustion, the application of 28 U.S.C. § 2254(d)(1) or (d)(2) to specific items of evidence, or procedural default, this Court should grant a hearing so that Mr. Halprin can present evidence in support of avoidance, traverse, or exceptions to those defenses. *See Jenkins v. Anderson*, 447 U.S. 231, 234 n.1 (1980); *see also Trevino v. Thaler*, 569 U.S. 413, 428-29 (2013); *Schlup v. Delo*, 513 U.S. 298, 332 (1995); *Gallow v. Cooper*, 570 U.S. 933 (June 27, 2013) (Breyer, J.) (statement regarding denial of *certiorari*).

Although the State has the right to answer, and Mr. Halprin has a right to complete his application by way of reply and traverse, the allegations here are sufficient to trigger the fact-development procedures in Habeas Rules 6, 7, and 8.

PRAYER FOR RELIEF

For the foregoing reasons, Petitioner respectfully prays that this Court:

a. Stay these proceedings and hold them in abeyance pending Supreme Court review of Petitioner's initial federal habeas proceedings;

b. Under 28 U.S.C. § 2243, ¶ 5, issue an order to have him brought before it, to the end that he may be discharged from the unconstitutional confinement and restraint on the bases set forth in this Petition;

c. Under § 2243, ¶ 1, or Habeas Rule 4, direct the State to answer or show cause why relief should not be granted;

d. Under § 2243, ¶ 6, and Habeas Rule 5(e), allow Petitioner to deny or allege additional facts, and respond to any procedural defenses, by way of traverse or reply;

e. Under Habeas Rule 6, allow Petitioner an opportunity to file a motion for discovery, and, under § 2243, ¶ 7, and Fed. R. Civ. P. 15(a)(2), permit Petitioner an opportunity to seek leave to amend with any newly discovered evidence;

f. Under Habeas Rule 7, allow Petitioner an opportunity to suggest that the record be expanded;

g. Under Habeas Rule 8, conduct an evidentiary hearing at an appropriately scheduled time where proof may be offered and argument advanced concerning the allegations set forth in his Petition;

h. Allow Petitioner to brief the precedential and statutory law relevant to his case in light of the record and the allegations raised by his Petition;

i. Direct the parties to brief and argue any issues that may arise in the course of the litigation;

j. Grant such other relief as may be necessary and appropriate.

DATED: May 17, 2019

Respectfully submitted,

MAUREEN FRANCO
Federal Public Defender
Western District of Texas

s/ Tivon Schardl
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Chief, Capital Habeas Unit
Florida Bar No. 73016
s/ Timothy Gumkowski
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Counsel for Randy Ethan Halprin

VERIFICATION BY ATTORNEY

I, the undersigned, am the attorney appointed by this Court under 18 U.S.C. § 3599 to represent Petitioner Randy Ethan Halprin in these proceedings. Under that appointment, I have met with Mr. Halprin on several occasions, consulted with his co-counsel, Paul Mansur, and retained and directed experts and investigators to inquire into the circumstances surrounding judgments of conviction and death imposed on Mr. Halprin by the State of Texas. It is in that capacity that I verify this Petition. I declare under penalty of perjury that the foregoing allegations in this Petition are true and correct and that this Petition for Writ of Habeas Corpus is being filed using this Court's CM/ECF system on May 17, 2019.

Subscribed to by me this 17th day of May 2019 in Miami, Florida.

/s/ Tivon Schardl

Tivon Schardl

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of May, 2019, I electronically filed the foregoing Petition for Writ of Habeas Corpus Supported by Points and Authorities with the Clerk of Court using the CM/ECF system which will effect service on all counsel of record.

/s/ Timothy Gumkowski
TIMOTHY P. GUMKOWSKI

Exhibit B

From:	Tim Gumkowski
To:	Brian Higginbotham; Tivon Schardl; Paul Mansur (paul@paulmansurlaw.com)
Cc:	Kathleen Childs; Jennifer Balido; Shelly Yeatts
Subject:	RE: Meeting with District Attorney Creuzot
Date:	Monday, May 20, 2019 11:40:12 AM
Attachments:	petition filed 5.17.19.pdf Exhibits for petition filed 5.17.19.pdf Notice of related case file 5.17.19.pdf

Mr. Higginbotham,

Thank you for the response and for your office's consideration of the litigation. Please find attached the habeas petition that was filed on Friday evening. As you will see, our research indicates there will be a conflict with the October 10, 2019, date you propose. Mr. Halprin requests a hearing on the setting of that date so that he can show the trial court the petition and so that he can address the unique and complex procedural issues that the statues and case law create.

The earliest the CCA would be willing to entertain Mr. Halprin's Section 5 application would be after the federal courts resolve the initial federal habeas proceedings, including the petition for certiorari. *See*, *e.g.*, *Ex parte Kunkle*, No. 20,574-03, 2004 WL 7330932, at *1 (Tex. Crim. App. Sept. 15, 2004) (applying rule to dismiss subsequent application pending while petition for certiorari was pending in U.S. Supreme Court, *see Kunkle v. Dretke*, 543 U.S. 835 (Oct. 4, 2004) (mem.)).

Mr. Halprin intends to file in the CCA as soon as the court will entertain his application. Additionally, we will be asking the U.S. District Court to stay its proceedings so they will not interfere with either the certiorari petition or the Section 5 application.

Best-
Tim

From: Brian Higginbotham <Brian.Higginbotham@dallascounty.org>
Sent: Friday, May 17, 2019 8:46 AM
To: Tivon Schardl <Tivon_Schardl@fd.org>; Tim Gumkowski <Tim_Gumkowski@fd.org>
Cc: Kathleen Childs <Kathleen.Childs@dallascounty.org>; Jennifer Balido <Jennifer.Balido@dallascounty.org>; Shelly Yeatts <Shelly.Yeatts@dallascounty.org>
Subject: RE: Meeting with District Attorney Creuzot

Tivon and Tim,

Mr. Creuzot has asked me to circle back with you and to respond to the request below.

After giving Halprin's situation some thought, Mr. Creuzot has decided to pursue a later execution date for Halprin. After consulting with the AG's Office and the Hawkins family, our Office intends to file a motion to set Halprin's execution date for ***Thursday, October 10, 2019***.

This will, of course, give you a larger window of time to litigate Halprin's claims. And that being the case, Mr. Creuzot does not plan to schedule a meeting to discuss Halprin's execution date at this time.

Please advise if you have a scheduling conflict with this date.

Best,

Brian Higginbotham
Assistant District Attorney, Appellate Division
Dallas County District Attorney's Office
133 N. Riverfront Blvd., LB 19
Dallas, Texas 75207-4399
Phone: 214-653-3625
Fax: 214-653-5774

From: Tivon Schardl <Tivon_Schardl@fd.org>
Sent: Wednesday, May 8, 2019 9:06 AM
To: Kathleen Childs <Kathleen.Childs@dallascounty.org>
Cc: Brian Higginbotham <Brian.Higginbotham@dallascounty.org>
Subject: Meeting with District Attorney Creuzot

Dear Ms. Childs:

Last evening I spoke with Mr. Creuzot about a meeting to discuss plans to set an execution date for Randy Halprin. Mr. Creuzot instructed me to email you and the attorney assigned to the case, Brian Higginbotham, to arrange a time for that meeting. We will work to accommodate Mr. Creuzot's schedule. At this time my only scheduling conflict is next Thursday and Friday, when I will be out of state on business. We have been planning to file a petition in the case on May 17.

Thank you for your help with this matter. Please let me know if I can be of any assistance. Until then, take good care.

T

Tivon Schardl
Capital Habeas Unit Chief
Federal Defender for the Western District of Texas
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Exhibit C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RANDY ETHAN HALPRIN, Petitioner, v. LORIE DAVIS, Director, Texas Department of Criminal Justice, Institutions Division, Respondent.	§ § § § § § § § § § §	CAUSE NO. 3:19-CV-01203-L CASE INVOLVING THE DEATH PENALTY

OPPOSED MOTION TO STAY AND ABATE PROCEEDINGS AND BRIEF IN SUPPORT

TO THE HONORABLE SAM A. LINDSAY, UNITED STATES DISTRICT JUDGE:

Petitioner Randy Ethan Halprin, by and through his undersigned counsel, and pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), and *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), hereby moves this Court to stay these proceedings and hold them in abeyance pending exhaustion of state court remedies. Due to Texas's "two-forums rule," that return to state court must follow the conclusion of review in Mr. Halprin's initial federal habeas proceedings, and any ongoing consideration of the issues raised in Mr. Halprin's second federal petition. This Motion is based on the files and records in this case and the points and authorities contained in the accompanying brief.

///

Respectfully submitted,

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/s/Timothy Gumkowski
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Attorneys for Petitioner

DATED: May 22, 2019

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RANDY ETHAN HALPRIN, Petitioner, v. LORIE DAVIS, Director, Texas Department of Criminal Justice, Institutions Division, Respondent.	§ § § § § § § § § § §	CAUSE NO. 3:19-CV-01203-L CASE INVOLVING THE DEATH PENALTY

BRIEF IN SUPPORT OF MOTION TO STAY AND ABATE PROCEEDINGS

I. INTRODUCTION

Petitioner Randy Ethan Halprin has filed a second petition for writ of habeas corpus[1] asserting a structural defect in his trial: the trial judge harbored anti-Semitic bias against Mr. Halprin and anti-Hispanic bias against other so-called Texas Seven defendants. *See generally* Second Petition ("2d Pet."), ECF No. 1 at 21-37. Mr. Halprin's claim is timely but unexhausted. Ordinarily, these circumstances would give rise to a straightforward application of *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), and *Rhines v. Weber*, 544 U.S. 269 (2005), pursuant to which this Court would (most likely) stay these proceedings and hold them in abeyance provided Mr. Halprin files his habeas application in state court within 30 days. But

[1] Out of an abundance of caution, Mr. Halprin has filed his petition in a new docket, 3:19-CV-1203, and in the docket Mr. Halprin was assigned for his initial federal habeas proceedings, 3:13-CV-1535-L.

Mr. Halprin's initial federal proceedings are ongoing; his petition for Supreme Court review of the Fifth Circuit's denial of a certificate of appealability is due June 12, 2019. And, under the so-called two-forums rule, the Texas courts will not entertain Mr. Halprin's application for state habeas review while either the *certiorari* proceeding is ongoing or this Court is considering the procedural questions posed by Mr. Halprin's second federal petition. Under these unusual circumstances, the most efficient and expeditious process is for this Court to enter an order staying these proceedings, directing Mr. Halprin to file his state habeas application within 20 days of the conclusion of any review that follows from the *certiorari* petition, and directing the Clerk to abate (that is, administratively close) these proceedings upon Mr. Halprin filing a notice that he timely filed his application to the Texas Court of Criminal Appeals.

II. RELEVANT BACKGROUND & SUMMARY OF ARGUMENT

In June 2003, Mr. Halprin was convicted and sentenced to death in the 283rd District Court in Dallas, for what the State argued was his role in the Christmas eve shooting death of Irving police officer Aubrey Hawkins. Following the conclusion of direct review[2] and state habeas review,[3] Mr. Halprin timely sought federal habeas relief in this Court. *See Halprin v. Davis*, No. 3:13-cv-01535-L. In September 2017, this Court denied the petition. *Id.*, ECF No. 49. In December 2018, the Fifth Circuit denied a certificate of appealability, and, in January 2019, rehearing. *See Halprin v. Davis*, 911 F.3d 247 (5th Cir. 2018).

[2] *See Halprin v. State*, 170 S.W.3d 111 (Tex. Crim. App. 2005).
[3] *See Ex parte Halprin*, No. WR-77,174-01, 2013 WL 1150018 (Tex. Crim. App. Mar. 20, 2013).

While Mr. Halprin's federal habeas appeal and application for certificate of appealability were pending in the Fifth Circuit, evidence came to light that trial judge Vickers Cunningham is, and was at the time of trial, a racist, at least towards black people. *See* 2d Pet. Exhs. 21 & 22 (Naomi Martin, *White, straight, and Christian*, Dallas Morning News, May 18, 2018 & video interview). Mr. Halprin investigated whether Judge Cunningham also held anti-Semitic or anti-Hispanic views that might have caused him to be biased against any of the Texas Seven defendants. That investigation produced evidence that Judge Cunningham considered Mr. Halprin a "goddamn kike" and thought of his Latino co-defendants as "wetbacks." *See* 2d Pet. Exhs. 9 (Decl. Tammy McKinney), 17 (Decl. Amanda Tackett), 19 (Decl. Michael Samuels).

Mr. Halprin has petitioned this Court for habeas corpus relief based on Judge Cunningham's bias. Conflicting state and federal procedural rules regarding the consideration of his claim create compelling and unique reasons for this Court to stay proceedings on that petition. Specifically, Mr. Halprin has been placed in an unusual bind as a result of these four procedural rules:

(1) ***The Statute of Limitations:*** Evidence that the trial judge is a racist first came to light on March 18, 2018. *See* 2d Pet. at 16-18 & 2d Pet. Exhs. 21 & 22. That is the earliest "date on which the factual predicate of the claim or claims presented [in the petition] could have been discovered through the exercise of due diligence."[4] 28 U.S.C. § 2244(d)(1)(D). In order to satisfy the statute of limitations,

[4] Due diligence did not require that Mr. Halprin investigate whether Judge Cunningham was biased against him based on the May 18, 2018, article. That article revealed that Judge Cunningham has

Mr. Halprin filed his claims less than one year from that arguable triggering event. *See* 28 U.S.C. § 2244(d)(1). A stay is appropriate when, as here, a petitioner filed a "protective" petition to comply with the limitations period, but has not yet exhausted the petition's claims. *See Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005) (authorizing a habeas petitioner to "fil[e] a 'protective' petition in federal court and ask[] the federal court to stay and abey the federal habeas proceedings until state remedies are exhausted." (citing *Rhines v. Weber*, 544 U.S. 269, 278 (2005)).

(2) ***Ongoing review of Mr. Halprin's initial federal habeas petition:*** This Court denied Mr. Halprin's initial federal habeas petition in 2017. In December 2018, the Fifth Circuit denied a certificate of appealability. *See Halprin v. Davis*, 911 F.3d 247 (5th Cir. 2018). Mr. Halprin is preparing a petition for writ of *certiorari* to seek Supreme Court review of the Fifth Circuit's decision. Mr. Halprin received two extensions to file that *cert.* petition and it is now due on June 12, 2019. *Halprin v. Davis*, No. 18A1032 (U.S. May 13, 2019) (Application granted by Justice Alito extending time to file until June 12, 2019). At that time the Supreme Court will be in recess. The earliest the Court is likely to issue a ruling on Mr. Halprin's petition is the first Monday in October.

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racist views about African Americans, opposes marriage equality, and wants his children to marry people of the same faith. *See* 2d Pet. at 41-42. Standing alone, none of those things indicates he was biased against a white, heterosexual defendant who happens to be Jewish. That is, the article did not establish the specific anti-Semitic bias against Mr. Halprin on which his claim is predicated.

(3) ***Texas's two-forums rule:*** Texas courts refuse to entertain state post-conviction applications filed under Texas Code of Criminal Procedure Article 11.071 while there are un-stayed federal habeas proceedings concerning the same conviction and sentence. *Ex parte Soffar*, 143 S.W.3d 804, 804 (Tex. Crim. App. 2004) (stating rule); *Ex parte Kunkle*, No. 20,574-03, 2004 WL 7330932, at *1 (Tex. Crim. App. Sept. 15, 2004) (applying rule to dismiss subsequent application pending while petition for certiorari was pending in the Supreme Court, *see Kunkle v. Dretke*, 543 U.S. 835 (Oct. 4, 2004) (mem.)).

(4) ***Exhaustion:*** The exhaustion rule bars a habeas remedy for claims not first presented to state courts, except under certain circumstances. 28 U.S.C. § 2254(b)(1). Texas law provides a mechanism for Mr. Halprin to present his judicial bias claim in a subsequent habeas application. Tex. Code Crim. Proc. art. 11.071, § 5(a). Therefore, Mr. Halprin must present his claims in state court before they can be considered by this Court. But Mr. Halprin cannot *yet* go back to state court because two federal courts now have jurisdiction to grant relief: (1) this Court, by way of his second petition, and (2) the Supreme Court, by *cert.* review.

An immediate stay pending exhaustion in state court provides the fairest, most efficient, least disruptive solution to this procedural quagmire.

III. ARGUMENT

A. LEGAL STANDARD

Stay/abeyance plays a vital and well-recognized role in habeas proceedings. In *Rhines v. Weber*, 544 U.S. 269 (2005), the Supreme Court unanimously recognized that a petitioner should be able to stay federal habeas proceedings to exhaust claims in state court. The Court found this procedure promotes resolution of claims in a state forum without penalizing a petitioner with dismissal of the petition (and the forfeiture of federal review). *Id.* at 275. As a result, the Supreme Court has held that it likely "would be an abuse of discretion for a district court to deny a stay . . . if [1] the petitioner had good cause for his failure to exhaust, [2] his unexhausted claims are potentially meritorious, and [3] there is no indication that he engaged in intentionally dilatory litigation tactics." *Rhines*, 544 U.S. at 278; *accord Young v. Stephens*, 795 F.3d 484, 495 (5th Cir. 2015).

In *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), the Court found that "reasonable confusion" about whether a state post-conviction application would toll the federal statute of limitations would provide good cause for filing an unexhausted claim in federal court before asking to go back to state court. *Pace*, 544 U.S. at 416.

B. MR. HALPRIN SATISFIES THE *RHINES* STANDARD

1. Good Cause

Rhines did not require "good cause" in some "technical sense," but "rather intended the district court [to] find 'good cause' in the equitable sense." *Ruiz v. Quarterman*, 504 F.3d 523, 529 n.17 (5th Cir. 2007). The requirement focuses on the reason for not presenting a claim in the state post-conviction proceeding. Showing good cause requires "a reasonable

excuse, supported by evidence to justify a petitioner's failure to exhaust ...." *Blake v. Baker*, 745 F.3d 977, 982 (9th Cir. 2014) (citing *Pace*, 544 U.S. at 416). "Good cause for [a *Rhines* stay] should not require an extraordinary or unreasonable showing." *Lopez v. Stephens*, No. CV B-15-144, 2016 WL 4126014, at *4 (S.D. Tex. Apr. 25, 2016).

Mr. Halprin has good cause for arriving in federal court before exhausting his claim. Because of the absence of an available state corrective process due to the two-forums rule, Mr. Halprin cannot toll the statute of limitations by properly filing an application for review in state court. *See In re Lewis*, 484 F.3d 793, 798 (5th Cir. 2004) ("Texas two-forum rule temporarily postponed Lewis's ability to file his *Atkins* claim in state court"). Or, at least, there is uncertainty regarding (a) whether an application dismissed under the two-forums rule would have been "properly filed," and (b) how long such an application would remain pending, if at all. *See* 28 U.S.C. § 2244(d)(2) (providing that limitations period is tolled during pendency of "properly filed application for State post-conviction or other collateral review"); *Pace*, 544 U.S. at 416 ("A petitioner's reasonable confusion about whether a state filing would be timely will ordinarily constitute 'good cause' for him to file in federal court.").

But for the two-forum rule, Mr. Halprin would have filed an application in state court under § 5 and relied upon that to toll the federal statute of limitations. *Mathis v. Thaler*, 616 F.3d 461, 472 (5th Cir. 2010) (application under § 5 is properly filed even if state court ultimately denies review under § 5(a)). However, as the Fifth Circuit has recognized, the *potential* application of the two-forum rule creates sufficient problems to constitute grounds

for equitably tolling the statute of limitations in some circumstances. *See In re Hearn*, 389 F.3d 122, 123 (5th Cir. 2004).[5]

2. Potential Merit

a. The Substantive Law and the Evidence

Mr. Halprin has raised a meritorious claim of judicial bias. To obtain a *Rhines* stay, Mr. Halprin must make the very low showing that his unexhausted claim is "potentially meritorious." 544 U.S. at 277. A claim is "potentially meritorious" under *Rhines* as long as it is not "plainly meritless." *Id.*; *see also Miller v. Dretke*, 431 F.3d 241, 254 (5th Cir. 2005) (same).

A judge's participation in a criminal trial offends due process when an objective observer, "considering all the circumstances alleged," would conclude "the risk of bias was too high to be constitutionally tolerable." *Rippo v. Baker*, 137 S. Ct. 905, 907 (2017); *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016) ("The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential

[5] The Fifth Circuit has said "Texas has overturned" its two-forums rule. *Hearn*, 389 F.3d at 123; *In re Wilson*, 442 F.3d 872, 876 (5th Cir. 2006). That is not correct. The TCCA has explained, "we *modified* our so-called 'two-forums' rule in such a way that it should no longer pose a potential statute of limitations problem for federal habeas applicants raising *Atkins* claims under the provisions of the Antiterrorism and Effective Death Penalty Act." *Ex parte Blue*, 230 S.W.3d 151, 156 n.21 (Tex. Crim. App. 2007) (emphasis added). But that modification—an allowance for the federal courts' stay-abeyance procedure for petitioners who went to state court *first*, *Ex parte Soffar*, 143 S.W.3d 804 (Tex. Crim. App. 2004)—was not available to Mr. Halprin who was already in the Fifth Circuit when he first could have learned about Judge Cunningham's bias. The rule remains in effect. *See, e.g.*, *Ex parte Acker*, No. WR-56,841-05, 2014 WL 2002200, at *1 (Tex. Crim. App. May 14, 2014) (dismissing under *Soffar* while case was in federal district court); *Ex parte Pondexter*, No. WR-39,706-02, 2008 WL 748393, at *1 (Tex. Crim. App. Mar. 19, 2008) (dismissing under *Soffar* while case was in Fifth Circuit).

for bias.'" (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009))). Any "possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). Mr. Halprin easily meets this standard.

Mr. Halprin has demonstrated an ability to prove that Judge Cunningham harbored anti-Semitic and racial bias for many years. *See* 2d Pet. at 11-18 (describing extensive history of Judge Cunningham's bigotry). The evidence also shows that shortly after Mr. Halprin's trial, and while he was using his role in the Texas Seven case to run for district attorney, Judge Cunningham referred to Mr. Halprin as "that fucking Jew" and a "goddamn kike" and to his Hispanic codefendants as "wetbacks." *See id.* at 12-14; 2d Pet. Exhs. 9 (McKinney Decl.), 17 (Tackett Decl.). People who have known Judge Cunningham since before the trial—including his own mother—long recognized that his bigotry was a weakness. Judge Cunningham himself said he ran for public office in order to save Dallas from "niggers, wetbacks, Jews, and dirty Catholics." 2d Pet. Exh. 17 (Tackett Decl.) ¶ 7.

The violation of a defendant's right to a fair tribunal is a structural constitutional error and so is not subject to harmless error review. *Tumey*, 273 U.S. at 535. A "criminal defendant tried by a biased judge is entitled to have his conviction set aside, no matter how strong the evidence against him." *Buntion v. Quarterman*, 524 F.3d 664, 672 (5th Cir. 2008) (quoting *Edwards v. Balisok*, 520 U.S. 641, 647 (1997)).

The Supreme Court has found arguable merit in far weaker cases of judicial bias. In *Bracy v. Gramley*, 520 U.S. 899 (1997), the Supreme Court held a district court abused its discretion by denying a habeas petitioner discovery on a judicial bias claim even though his

"sort of compensatory bias" claim was "quite speculative," "only a theory at this point," and premised on facts that "might be equally likely" to support an inference contrary to the one the petitioner advanced. 520 U.S. at 905, 909. Bracy had no hard evidence that his trial judge was biased against him. *Id.* at 905. Nevertheless, the Supreme Court found Bracy's speculative theory constituted "'specific allegations [to] show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief . . . .'" *Id.*, 520 U.S. at 908-09 (quoting *Harris v. Nelson*, 394 U.S. 286, 299 (1969)). Here, Mr. Halprin has evidence of actual bias against him because he is a Jew and against his co-defendants because they were Latino.

b. The Procedural Law

(1) State Law

Under Fifth Circuit law on *Rhines*, a showing of merit refers not only to the constitutional violation asserted, but also to whether the return to state court is not futile. *See Neville v. Dretke*, 423 F.3d 474, 480 (5th Cir. 2005) (unexhausted claims are not potentially meritorious when they are procedurally defaulted under state law regarding successive petitions and do not fall within one of the statutory exceptions). Mr. Halprin only needs to show that it is *possible* that he can satisfy Section 5. *See Wilder v. Cockrell*, 274 F.3d 255, 262 (5th Cir. 2001) (Unless it is "entirely clear" that a state court will apply a procedural bar, "the State"—not this Court—"should be allowed to make the procedural, vel non, determination."). He can do so easily.

Texas law permits successive writs challenging the same conviction where the applicant's new "claims and issues have not been and could not have been presented

previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." Tex. Code. Crim. Proc. art. 11.071, § 5(a)(1). In order "to satisfy Art. 11.071, § 5(a)(1)[,] the factual or legal basis for an applicant's current claims must have been unavailable as to all of his previous applications; and 2) the specific facts alleged, if established, would constitute a constitutional violation that would likely require relief from either the conviction or sentence." *Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007). The factual basis of a claim is unavailable if "the factual basis was not ascertainable through the exercise of reasonable diligence on or before" the date the application was filed. Tex. Code Crim. Proc. art. 11.071, § (5)(e).

Mr. Halprin can show that the factual basis of his judicial bias claim was not, and could not, have been "previously presented." Mr. Halprin's initial state habeas application was filed on April 6, 2005. Mr. Halprin then filed additional documents in state court, through September 27, 2010, which the TCCA concluded were subsequent writs.[6] The present claim of judicial bias could not have been presented before those dates because Judge Cunningham was presumed to be fair and impartial, *Withrow v. Larkin*, 421 U.S. 35, 47 (1975), and only the revelations about his anti-miscegenation trust fund—which came to light in May 2018—indicated he harbored any form of bias.

[6] Three filings were determined to be subsequent writs, and dismissed for failing to satisfy Section 5: WR-77,175-02 (filed Oct. 7, 2005); WR-77,175-03 (filed Sept. 14, 2010); and WR-77,175-04 (filed Sept. 27, 2010). *See Ex parte Halprin*, 2013 WL 1150018, *1 (Tex. Crim. App. Mar. 20, 2013).

The declarations submitted with the Second Petition include evidence that Judge Cunningham concealed his bias. First, under Texas law, his failure to recuse or disqualify himself was an implicit denial of his bias. *See* Tex. Civ. R. 18b(a), (b)(1)-(2))("[a] judge must recuse" whose "impartiality might reasonably be questioned" and who "has a personal bias or prejudice concerning . . . a party"); *McClenan v. State*, 661 S.W.2d 108, 109 (Tex. Crim. App. 1983) (finding "bias as a ground for [judicial] disqualification [where] bias is shown to be of such a nature and to such an extent as to deny a defendant due process of law."), *overruled in part on other grounds by De Leon v. Aguilar*, 127 S.W.3d 1 (Tex. Crim. App. 2004); *see also* 48B Robert Schuwerk & Lillian Hardwick, *Texas Practice Series: Handbook of Texas Lawyer and Judicial Ethics* § 40:44 ("a judge may err by not recusing *sua sponte*" on a record indicating bias).

Second, Judge Cunningham would behave as though he did not have biased feelings towards people then reveal his bias only to close friends he trusted. *See* 2d Pet. Exh. 17 (Tackett Decl.) at ¶ 10; Exh. 9 (McKinney Decl.) at ¶ 11 ("He is most concerned with appearances, but he thinks he is entitled to having these [bigoted] attitudes and acts on them when it suits him."). People around him denied or dissembled about his bias. *See*, *e.g.*, 2d Pet. Exh. 17 (Tackett Decl.) ¶ 17 ("Despite all the denials from some members of his family, it's something they have known for a long time. The denials are just part of keeping it quiet."); Exh. 21 (Martin, *White, straight, Christian*) (brother Greg defended Judge Cunningham); Exh. 19 (Samuels Decl.) at ¶¶ 2-3 (Judge Cunningham's daughter initially did not tell boyfriend that father demanded she break up with him because he was Jewish; called father "very opinionated).

(2) Federal Law

Mr. Halprin acknowledges, as he did in the Second Petition, that there is a question whether this Court has jurisdiction to entertain his underlying claim. 2d Pet. at 43-55. The grounds presented there, which are incorporated herein by this specific reference, are more than sufficient to show Mr. Halprin's argument that his claim is non-successive is not futile. The Fifth Circuit has recognized that where a "purported defect did not arise ... until after the conclusion of the previous petition, the later petition based on that defect may be non-successive." *Leal Garcia v. Quarterman*, 573 F.3d 214, 222 (5th Cir. 2009).

It is black-letter law that a "court has jurisdiction to determine its own jurisdiction."[7] It is equally well-established that a district court has the "inherent" power to "control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."[8] "'[J]urisdiction is vital only if the court proposes . . . to issue a judgment on the merits.'"[9] There is no mandatory sequence for dealing with jurisdictional questions just so long as the court ensures it acts with jurisdiction by the time it adjudicates the merits.[10] Here, far from asking the court to reach the merits, Mr. Halprin seeks a stay to return to state court so the state court can review the merits. If the state court provides the relief Mr. Halprin seeks, there will be no need for federal-court resolution of the merits. Accordingly,

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[7] *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164, 169 (5th Cir. 2009); *Martin v. Halliburton*, 618 F.3d 476, 481 (5th Cir. 2010); *Cerveceria Cuauhtemoc Moctzuma S.A. de C.V. v. Mont. Bev. Co.*, 330 F.3d 284, 286 (5th Cir. 2003) (calling principle "universally recognized truism").

[8] *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936).

[9] *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (quoting *Intec USA, LLC v. Engle*, 467 F.3d 1038, 1041 (7th Cir. 2006)) (alterations in original).

[10] *Id.* (citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999)).

this Court has the discretion to stay these proceedings, or not[11]—subject to the limitations imposed by *Rhines* and *Pace*, and other habeas authorities.[12]

In addition to the foregoing principles, Mr. Halprin's argument for jurisdiction over the merits turns, in part, on the significance of his claim—for purposes of due process, access to habeas review, and equity—compared with the incompetence-for-execution claims for which the Supreme Court has established an exception to the successor bar in 28 U.S.C. § 2244(b). *See* 2d Pet. at 43-55. "It is firmly established ... that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the courts' statutory or constitutional *power* to adjudicate the case."[13] "Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." *Bell v. Hood*, 327 U.S. 678, 682 (1946),*quoted in Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998). This Court has jurisdiction "if 'the right of the petitioner[] to recover under [his] complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another,' *id.*, at 685, unless the claim 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.'" *Steel Co.*, 523 U.S. at 89 (quoting *Bell*, 327 U.S. at 682–83). For the reasons stated herein and in Mr. Halprin's Second Petition at 43-55, which are fully

[11] *Id.* at 254.
[12] *See generally Lonchar v. Thomas*, 517 U.S. 314, 316 (1996) (holding district court could not dismiss "first federal habeas petition for general 'equitable' reasons beyond those embodied in the relevant statutes, Federal Habeas Corpus Rules, and prior precedents").
[13] *Steel Co.*, 523 U.S. at 89 (emphasis in original).

incorporated herein by this specific reference, Mr. Halprin's claim clearly satisfies these criteria.

3. Not for Purpose of Delay

There is no indication of intentional delay in this case. Mr. Halprin seeks this stay less than a week after filing his Second Petition in this Court. His return to state court is to vindicate a very serious constitutional claim in an available forum. Moreover, as the attached Proposed Order makes clear, Mr. Halprin would do everything in his power to avoid unnecessary delay. He will file in state court within 20 days of the conclusion of any review that comes from his *certiorari* petition, provide this Court with periodic notices on the status of state court proceedings, and would promptly notify this Court of the disposition of state court proceedings so this Court could lift the stay, if necessary, as soon as possible.

The remedy sought here is far more expeditious than the alternative. Proceeding on the Second Petition now will likely have the counterintuitive effect of delaying Mr. Halprin's return to state court. That is because the losing party to this Court's decision—whether to grant the petition, deny it, or dismiss it—would take an appeal from the judgment, which would continue to act as a bar to state court litigation on a subsequent application. *Soffar*, 143 S.W.3d at 807. That appeal—and the bar interposed by the two-forums rule—would extend long after the Supreme Court has concluded review of the initial habeas, and so only postpone the time when Mr. Halprin may finally return to state court.

IV. REQUEST FOR A HEARING

The issues raised here are unusual and complex. In the event the State disputes the facts or the law set forth here, or this Court finds its decision-making might otherwise benefit

from having the parties clarify or further explain their positions, Mr. Halprin respectfully requests this Court grant his counsel the opportunity to address the Court in person.

V. CONCLUSION

For the foregoing reasons, and those Mr. Halprin may present in a reply to the State's opposition, or in a hearing, this Court should enter the attached proposed order (1) immediately staying these proceedings; (2) directing Mr. Halprin to file his state habeas application within 20 days of the conclusion of review following his petition for writ of *certiorari*; (3) directing Mr. Halprin to file, within one day of his state-court filing, a notice in this Court that he has applied for relief in state court; (4) directing the Clerk to administratively close this case upon the timely filing of Mr. Halprin's notice; (5) directing Mr. Halprin to file monthly reports on the status of the state court application; (6) directing Mr. Halprin to return to this Court and file any amended petition within 30 days of the state court's disposition of his application.

Respectfully submitted,

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MAUREEN FRANCO
FEDERAL PUBLIC DEFENDER

/s/Tivon Schardl

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Federal Defender Office
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737-207-3007 (tel.)
512-499-1584 (fax)

Attorneys for Petitioner

DATED: May 22, 2019

CERTIFICATE OF CONFERENCE

On May 17, 2019, undersigned counsel for Petitioner conferred with counsel for Respondent, Assistant Attorney General Jennifer Wren Morris, who authorized Petitioner to state that Respondent Lorie Davis is opposed to the relief sought in this Motion.

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of May, 2019, I electronically filed the foregoing Petitioner's Motion to Stay and Abate Proceedings with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Jenniger Wren Morris
Assistant Attorney General
Office of the Attorney General of Texas Austin, TX 78701

/s/ Timothy Gumkowski
Timothy Gumkowski

EXHIBIT D

From:	Tim Gumkowski
To:	Brian Higginbotham
Subject:	Halprin v. Davis
Date:	Thursday, May 23, 2019 9:29:00 AM
Attachments:	05.22.19 STAY motion stamped 19-cv-1203.pdf image001.png

Good morning Mr. Higginbotham,

Attached, please find a copy of Mr. Halprin's Motion to Stay and Abate his federal proceedings, that was filed yesterday in the US District Court for the Northern District of Texas.

Thank you.

Timothy P. Gumkowski
Assistant Federal Defender
Federal Public Defender's Office
Western District of Texas
Capital Habeas Unit
919 Congress Ave., Suite 950
Austin, Texas 78701
Tel: 737.207.3009
Fax: 512.499.1584
Email: tim_gumkowski@fd.org

Exhibit E

From: Tivon Schardl
To: Morris, Jennifer
Cc: Tim Gumkowski; Paul Mansur (paul@paulmansurlaw.com)
Subject: Re: Halprin EOT
Date: Wednesday, June 5, 2019 6:13:33 PM

Jenny—

In light of the State's motion for an execution date and its contents I must withdraw Mr Halprin's non-opposition to your motion. Please advise the court that the State's actions have forced Mr Halprin into filing a response and to request an opportunity to be heard on the matter.

Thanks. Take good care.

T

Tivon Schardl
Capital Habeas Unit Chief
Federal Defender for the Western District of Texas
919 Congress, Suite 950
Austin, TX 78701
737-207-3008
tivon_schardl@fd.org

On Wed, Jun 5, 2019 at 2:44 PM -0500, "Morris, Jennifer" <Jennifer.Morris@oag.texas.gov> wrote:

> Thanks, Tivon.
>
> ---
>
> **From:** Tivon Schardl <Tivon_Schardl@fd.org>
> **Sent:** Wednesday, June 5, 2019 12:29:34 PM

To: Morris, Jennifer
Cc: Tim Gumkowski; paul@paulmansurlaw.com
Subject: Halprin EOT

Jenny—

Please inform the court that Mr. Halprin does not oppose your motion for a two-week extension of time to respond to the stay/abeyance motion.

Take care.

T

Tivon Schardl
Capital Habeas Unit Chief
Federal Defender for the Western District of Texas
919 Congress, Suite 950
Austin, TX 78701
737-207-3008
tivon_schardl@fd.org

Exhibit F

FILED
6/5/2019 3:40 PM
FELICIA PITRE
DISTRICT CLERK
DALLAS CO., TEXAS
LJ DEPUTY

F01-00327-T

THE STATE OF TEXAS	§	IN THE 283rd JUDICIAL
	§	
v.	§	DISTRICT COURT
	§	
RANDY ETHAN HALPRIN	§	DALLAS COUNTY, TEXAS

STATE'S MOTION TO SET EXECUTION DATE

THE STATE OF TEXAS, by and through the Criminal District Attorney of Dallas County, respectfully requests that this Court enter an order setting Thursday, October 10, 2019 as the execution date for Randy Ethan Halprin. In support, the State presents the following:

Factual History

Halprin is one of the Texas Seven. On December 13, 2000, he escaped from the Texas Department of Criminal Justice Connally Unit along with six other inmates: George Rivas, Larry Harper, Michael Rodriguez, Donald Newbury, Joseph Garcia, and Patrick Murphy. Together they stole firearms and ammunition from the prison and made their way to Irving, Texas, where they planned to commit the robbery of a sporting-goods store on Christmas Eve.

The robbery was planned meticulously. The day before the robbery, Halprin went inside the store to case it. On the day of the robbery, Halprin and three other escapees walked inside pretending to be customers; two escapees entered disguised

as security guards; and one escapee remained outside hidden in a vehicle to monitor police radio frequencies, to act as a lookout, and to keep the others updated via two-way radios. All were armed with stolen firearms.

The escapees inside the store ushered the employees at gunpoint to the break room where the men forced them to kneel, facing the wall. After binding the employees, the escapees stole the employees' personal belongings, more than $70,000 in cash, 44 firearms, ammunition, and other equipment.

A bystander in the parking lot noticed the commotion inside the store and contacted the police. Officer Hawkins was the first to arrive on the scene. The lookout soon radioed Halprin and the other escapees inside to warn them that a police squad car was driving through the parking lot. As the escapees were exiting through the back of the store, Officer Hawkins pulled in behind the escapees' getaway vehicle. And before Officer Hawkins could stop his car or unholster his firearm, the escapees opened fire on him. Officer Hawkins suffered 11 gunshot wounds fired by at least five different guns. The escapees then pulled Officer Hawkins from his patrol vehicle, left him on the pavement, and stole his firearm. Fleeing the scene, the escapees backed their getaway vehicle over Officer Hawkins and dragged him several feet. They again escaped before other officers arrived.

The escapees then rendezvoused and fled to Colorado. This offense and others led law enforcement to launch a nationwide manhunt for Halprin and his fellow

escapees. Posing as traveling missionaries, they traveled together to a motel and RV park in Woodland Park, Colorado, where they eventually drew suspicion. Law enforcement apprehended Halprin at the RV park, and arrested Rivas, Garcia, Rodriguez, Newbury, and Murphy at nearby locations. Harper committed suicide to avoid capture.

Shortly after, Halprin confessed to the robbery.

Procedural History

Halprin was indicted for the capital murder of Officer Hawkins, and a jury found him guilty as charged in the indictment. On June 12, 2003, in accordance with the jury's answers to the special issues, this Court sentenced Halprin to death.

Halprin appealed, and on June 29, 2005, the Court of Criminal Appeals affirmed this Court's judgment and sentence of death. *Halprin v. State*, 170 S.W.3d 111, 113 (Tex. Crim. App. 2005).

While Halprin's direct appeal was pending, he filed an application for writ of habeas corpus in this Court. This Court entered findings of fact and conclusions of law and recommended that habeas relief be denied. The Court of Criminal Appeals adopted this Court's findings and conclusions (with some limited exceptions) and denied habeas relief on March 20, 2013. *Ex parte Halprin*, WR-77,175-01, 2013 WL 1150018, at *1 (Tex. Crim. App. Mar. 20, 2013) (not designated for publication).

Halprin then filed a petition for writ of habeas corpus in the U.S. District Court for the Northern District of Texas, which denied relief on September 27, 2017. *Halprin v. Davis*, Civ. A. No. 3:13-CV-1535-L, 2017 WL 4286042, at *1 (N.D. Tex. Sept. 27, 2017). The Fifth Circuit Court of Appeals affirmed and denied a certificate of appealability on December 17, 2018. *Halprin v. Davis*, 911 F.3d 247, 252 (5th Cir. 2018). To date, Halprin has not filed a petition for writ of certiorari from that decision.

In the interim, however, Halprin filed a second petition for writ of habeas corpus in the U.S. District Court for the Northern District of Texas, and later still, Halprin filed a motion to stay and abate the proceedings related to his second federal petition.

Request

The State respectfully requests that this Court issue an order setting Halprin for execution on Thursday, October 10, 2019. *See generally* Tex. Code Crim. Proc. art. 43.141. Under Texas law, Murphy's execution may not be set earlier than 91 days after the date this Court enters the order setting the execution date. *See id.* art. 43.141(c). As of the date the State makes this request, the proposed execution date is 127 days away. This proposed execution date, then, accommodates the 91-day rule and allows Murphy a reasonable amount of time to investigate or litigate potential claims.

The State has informed Murphy's counsel, Timothy Gumkowski, of this potential execution date, and Mr. Gumkowski has expressed no scheduling conflicts specific to the date.

Conclusion

The State respectfully requests that this Court issue an order setting Halprin for execution on Thursday, October 10, 2019.

Respectfully submitted,

JOHN CREUZOT
Criminal District Attorney
Dallas County, Texas

BRIAN P. HIGGINBOTHAM
Assistant Criminal District Attorney
State Bar No. 24078665
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Certificate of Service

I certify that a true copy of this document was served on Timothy Gumkowski as counsel for Randy Ethan Halprin. Service was made via electronic service to tim_gumkowski@fd.org on June 5, 2019.

Brian P. Higginbotham

Exhibit G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RANDY ETHAN HALPRIN, Petitioner,	§ §	
v.	§ §	Civ. Act. Nos. 3:13-CV-1535-L 3:19-cv-1203
LORIE DAVIS, Director, Texas Department of Criminal Justice Correctional Institutions, Division, Respondent.	§ § § § §	*Death Penalty Case*

RESPONDENT'S OPPOSITION TO PETITIONER'S MOTION TO STAY AND ABATE PROCEEDINGS

Petitioner Randy Halprin was properly convicted and sentenced to die for the murder of Irving Police Officer Aubrey Hawkins. Halprin filed his federal habeas petition in 2014. Docket Entry (DE) 15. This Court denied the petition in 2017. DE 49, 50. The Fifth Circuit denied Halprin's application for a certificate of appealability (COA). *Halprin v. Davis*, 911 F.3d 247, 260 (5th Cir. 2018). Halprin's petition for a writ of certiorari is due to be filed with the Supreme Court by June 12, 2019. *Halprin v. Davis*, No. 18A1032. Halprin has now filed a successive habeas petition challenging his presumptively valid conviction and sentence pursuant to 28 U.S.C. § 2241 & 2254. DE 58. Halprin's successive petition raises one claim alleging judicial bias. DE 58 at 21–38.

As discussed in the Director's Motion to Dismiss, Halprin's petition is undoubtedly successive because the petition challenges the same state court

judgment he has unsuccessfully challenged in this Court, and his claim does not fall within an exception under 28 U.S.C. § 2244(b)(2). Halprin has also filed a motion seeking a stay of this Court's proceedings to await the Supreme Court's adjudication of his petition for a writ of certiorari and to permit him the opportunity to raise his judicial bias claim in state court. DE 62. For the reasons discussed in the Director's Motion to Dismiss and, as discussed below, the Director opposes Halprin's motion for a stay of this Court's proceedings.

ARGUMENT

I. The Standard Governing Stay Decisions

A "stay and abeyance should be available only in *limited* circumstances." *Rhines v. Weber*, 544 U.S. 269, 277 (2005) (emphasis added). Those "limited circumstances" exist when an inmate can prove (1) good cause for the failure to exhaust, (2) that the claim is not plainly meritless, and (3) that the request is not for purposes of delay. *Id*. at 277–78. A court should review such requests with caution because a stay and abeyance has the potential to "frustrate AEDPA's goal of finality by dragging out indefinitely . . . federal habeas review." *Id*. at 277.

II. Halprin Fails to Prove Good Cause for a Stay Because This Court Lacks Jurisdiction.

As discussed at length in the Director's Motion to Dismiss, this Court is without jurisdiction to consider Halprin's successive petition. This Court

denied Halprin's initial federal habeas petition in 2017, and the Fifth Circuit denied his application for a certificate of appealability—and mandate issued—more than six months ago. This Court is, consequently, also without jurisdiction to enter a stay. *See Howard v. Dretke*, 157 F. App'x 667, 672–73 (5th Cir. 2005); *Teague v. Johnson*, 151 F.3d 291 (5th Cir. 1998) (noting that, where the mandate has issued and the petitioner is seeking a stay pending the disposition of a writ of certiorari in the Supreme Court, the court lacks jurisdiction to enter a stay). And because this Court is without jurisdiction to consider Halprin's successive petition, he is not entitled to a stay of these proceedings to allow for exhaustion of a claim on which he necessarily cannot obtain relief in this Court.[1] *See Neville v. Dretke*, 423 F.3d 474, 479–80 (5th Cir. 2005) ("Moreover, even if a petitioner had good cause for [failing to exhaust his claims first in state court], the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless.") (quoting *Rhines*, 544 U.S. at 1535).

[1] Halprin asserts that his petition is non-successive because it alleges a "defect" that "did not arise . . . until after the conclusion of the previous petition." DE 61 at 13 (citing *Leal Garcia v. Quarterman*, 573 F.3d 214, 222 (5th Cir. 2009)). As discussed at length in the Director's Motion to Dismiss, such a reading of § 2244(b) is contrary to its plain text. Moreover, the type of "defects" referenced in *Leal Garcia* were defects that did not exist regarding the underlying conviction—i.e., a claim of incompetence to be executed or a challenge to the calculation of a petitioner's sentence. 573 F.3d at 222. A claim—like Halprin's—that challenged the underlying conviction is, however, squarely within § 2244(b)(2)(B).

Halprin argues this Court should stay its proceedings because he is currently unable to file in state court a subsequent state habeas application raising his judicial bias claim. DE 61 at 7–8. He argues that Texas's "two-forums rule" prevents him from filing a state habeas application because his petition for a writ of certiorari (in his initial federal habeas proceeding) is pending and because his successive petition is pending. DE 61 at 7–8. But the now-modified two-forums rule permits the Texas Court of Criminal Appeals (CCA) to consider "the merits of a subsequent writ . . . if the federal court *having jurisdiction over a parallel writ* enters an order staying all of its proceedings for the applicant to return to the appropriate Texas court to exhaust his state remedies." *Ex parte Soffar*, 143 S.W.3d 804, 807 (Tex. Crim. App. 2004). As discussed in the Director's Motion to Dismiss, this Court is without jurisdiction over Halprin's successive petition. And because the Fifth Circuit has issued mandate in Halprin's initial federal habeas proceedings, there is no jurisdictional overlap between the federal and state courts.[2] *See*

[2] The cases cited by Halprin are not to the contrary. DE 61 at 8 n.5. In none of the cases does it appear that the petitioner had filed a *successive* federal habeas petition or the pendency of the initial federal habeas proceedings *post-mandate* prompted the CCA to conclude it was without jurisdiction to concurrently consider a subsequent state habeas application. *Ex parte Acker*, 2014 WL 2002200, at *1 (Tex. Crim. App. 2014); *Ex parte Pondexter*, 2008 WL 748393, at *1 (Tex. Crim. App. 2008).

The CCA routinely considers and rules on subsequent habeas applications where certiorari petitions from initial federal proceedings are pending, especially during last-minute litigation in the days and weeks before an execution. This is because a petition for certiorari does not invoke the jurisdiction of any federal court.

Teague, 151 F.3d at 291. Consequently, this Court should deny Halprin's Motion.

II. Halprin's Claim Is Unexhausted and Procedurally Defaulted.

In his successive petition, Halprin raises a claim alleging that his trial judge, Vickers Cunningham, harbored racist and religiously-bigoted views. DE 58. The claim is unexhausted and would be procedurally barred if raised in a subsequent state habeas application. Tex. Code Crim. Proc. 11.071 § 5. Consequently, he is not entitled to a stay of this Court's proceedings. *See Neville*, 423 F.3d at 480. Notably, another member of the Texas Seven—Joseph Garcia—recently raised a judicial-bias claim in a subsequent state habeas application alleging that Cunningham's racist and bigoted views deprived him of his right to due process. *Ex parte Garcia*, No. 64,582-03, 2018 WL 6379949, at *1 (Tex. Crim. App. Nov. 30, 2018). The CCA dismissed Garcia's application "without reviewing the merits of the claims." *Id.* Therefore, Halprin cannot show an entitlement to a stay. *Neville*, 423 F.3d at 480.

III. The Effect of a Stay of This Court's Proceedings Would Likely Be Delay.

Halprin requests that this Court stay its proceedings and direct him to file a subsequent state habeas application within twenty days of the Supreme

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Certainly, the Supreme Court's granting of certiorari would confer jurisdiction, but such is extremely unlikely in most cases.

Court's ruling on his petition for a writ of certiorari regarding his initial federal habeas proceedings. DE 61 at 16. His petition for a writ of certiorari is currently due to be filed by June 12, 2019. *Halprin v. Davis*, No. 18A1032. The petition will almost surely not be resolved before the Supreme Court's current session ends. The Court's next session begins in October. The State has moved to set Halprin's execution for October 8, 2019. A stay of this Court's proceedings to await the Supreme Court's resolution of Halprin's certiorari petition would leave little time remaining before October 8, 2019, to file a subsequent state habeas application and for that application to be resolved. While the timeline Halprin proposes may not have been suggested for the purpose of delay, its impact would now almost certainly create such delay. Consequently, this Court should deny Halprin's motion for a stay and dismiss his successive petition.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the Court deny Halprin's motion for a stay.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

ADRIENNE McFARLAND
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

s/ Jennifer Wren Morris
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*Attorneys for Respondent

**Lead Counsel for Respondent*

CERTIFICATE OF SERVICE

I do hereby certify that on June 12, 2019, I electronically filed the foregoing pleading with the Clerk of the Court for the U.S. District Court, Southern District of Texas, using the electronic case-filing system of the Court. The electronic case-filing system sent a "Notice of Filing" to the following attorney of record, who consented in writing to accept this Notice as service of this document by electronic means.

Paul Mansur
P.O. Box 1300
Denver City, Texas 79323

Tivon Schardl
Timothy Gumkowski
Capital Habeas Unit
919 Congress, Suite 950
Austin, Texas 78701

s/ Jennifer Wren Morris
JENNIFER WREN MORRIS
Assistant Attorney General

Exhibit H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RANDY ETHAN HALPRIN, Petitioner,	§ §	
v.	§ §	Civ. Act. Nos. 3:13-CV-1535-L 3:19-cv-1203
LORIE DAVIS, Director, Texas Department of Criminal Justice Correctional Institutions, Division, Respondent.	§ § § § §	*Death Penalty Case*

RESPONDENT'S MOTION TO DISMISS SUCCESSIVE PETITION WITH BRIEF IN SUPPORT

Petitioner Randy Halprin was properly convicted and sentenced to die for the murder of Irving Police Officer Aubrey Hawkins. Halprin filed his federal habeas petition in 2014, which this Court denied in 2017. Docket Entry (DE) 15, 49, 50. The Fifth Circuit denied Halprin's application for a certificate of appealability (COA). *Halprin v. Davis*, 911 F.3d 247, 260 (5th Cir. 2018). Halprin's petition for a writ of certiorari is due to be filed with the Supreme Court by June 12, 2019. *Halprin v. Davis*, No. 18A1032. Halprin has now filed in this Court a successive habeas petition challenging the same presumptively valid conviction and sentence pursuant to 28 U.S.C. § 2241 & 2254. DE 58. Halprin's successive petition raises one claim alleging his right to due process was violated by judicial bias. DE 58 at 21–38.

Halprin's petition is successive because it challenges the same judgment he previously challenged in this Court, and his claim does not fall within an exception under 28 U.S.C. § 2244(b)(2). Accordingly, the Director respectfully requests that this Court grant the Director's Motion to Dismiss.

HALPRIN'S CLAIM

Halprin alleges that his right to due process was violated because his trial judge harbored anti-Semitic bias. As demonstrated below, Halprin's claim is impermissibly successive.

STATEMENT OF THE CASE

Halprin was convicted and sentenced to death for the murder of Officer Hawkins. I Clerk's Record (CR) 48–53, 65. The Texas Court of Criminal Appeals (CCA) affirmed Halprin's conviction and sentence on direct appeal. *Halprin v. State*, 170 S.W.3d 111 (Tex. Crim. App. 2005).

Halprin filed a state application for a writ of habeas corpus in the trial court raising thirty-one claims for relief. *Ex parte Halprin*, No. 77,175-01; I SHCR 2–274.[1] Following five evidentiary hearings, the trial court recommended relief be denied. VI SHCR 2558–723. The CCA adopted the trial court's findings and conclusions—with the exception of five findings and

[1] "SHCR" refers to the Clerk's Record of pleadings and documents filed with the state habeas court.

conclusions—and denied relief. *Ex parte Halprin*, No. 77,175-01 thru -04, 2013 WL 1150018 (Tex. Crim. App. March 20, 2013) (unpublished order).

Halprin then filed an initial—followed by an amended—federal habeas petition in this Court. DE 5, 15. This Court denied relief, an evidentiary hearing, and a COA. DE 49. The Fifth Circuit denied Halprin's application for a COA. *Halprin v. Davis*, 911 F.3d at 260. Following extensions of time, Halprin's petition for a writ of certiorari is due to be filed with the Supreme Court by June 12, 2019. *Halprin v. Davis*, No. 18A1032.

On May 17, 2019, Halprin filed in this Court a successive federal habeas petition and, later, a motion requesting a stay of this Court's proceedings.[2] DE 58, 62. The instant Motion to Dismiss follows.

STATEMENT OF FACTS

I. Facts of the Crime

On December 13, 2000, Halprin and six other inmates—George Rivas, Larry Harper, Joseph Garcia, Donald Newbury, Patrick Murphy, and Michael Rodriguez—escaped from TDCJ's Connally Unit near Kenedy, Texas. 44 RR 118–19.[3] The group—the Texas Seven—stole sixteen firearms and ammunition

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[2] The Director will separately respond to Halprin's motion seeking a stay of this Court's proceedings.

[3] "RR" refers to the Reporter's Record of transcribed trial proceedings and is preceded by volume number and followed by page numbers. "SX" refers to the State's

from the prison and fled to Dallas, committing armed robberies along the way to finance their flight. 44 RR 119–22; 48 RR 7–10. On Christmas Eve, the escapees robbed an Oshman's Supersports store in Irving, Texas. The group planned the robbery in meticulous detail, sending Halprin and Rodriguez to case the store the day before. 42 RR 38; SX 931. On the day of the Oshman's robbery, the escapees entered the store just before closing time. 42 RR 39; SX 931. Halprin, Garcia, Newbury, and Rodriguez pretended to be customers. 42 RR 39–40; 48 RR 10–11; SX 931. Rivas and Harper entered the store disguised as security officers investigating a string of thefts at another store. 41 RR 77–80; 42 RR 39; 48 RR 11; SX 931. Murphy stayed outside, monitoring the police frequencies and acting as a lookout. All the men were armed with stolen firearms. 41 RR 87, 118–19; 42 RR 40; 48 RR 13–14; SX 931.

The escapees ushered the employees at gunpoint to the break room where the men forced them to kneel, facing the wall. 41 RR 91–94, 105; 42 RR 40; 48 RR 15–16; SX 931. After binding the employees, the escapees stole the employee's personal belongings, more than $70,000 in cash, forty-four firearms, miscellaneous ammunition, and other clothing and equipment. 41 RR 96–104, 120–23; 42 RR 40–41; SX 47–49, 931. An employee's girlfriend, who

exhibits followed by exhibit number and page numbers where applicable. "DX" refers to the Defense's exhibits, and again is followed by exhibit number and page numbers where applicable.

was parked outside the store, saw the commotion inside the store and eventually called the police. 42 RR 113–23. Four units were dispatched to the scene. 42 RR 56; SX 61, 756. Having just finished dinner with his wife, son, and mother at a restaurant across the highway from Oshman's, Irving Police Officer Aubrey Hawkins was the first officer to arrive at the scene. 41 RR 54–61; 48 RR 17–25.

Still acting as lookout, Murphy radioed Rivas to warn him there was a police squad car driving through the parking lot. 41 RR 107; 42 RR 40–41; 48 RR 17; SX 931. As the escapees were exiting the back of the store, Officer Hawkins pulled in behind the escapees' get-away vehicle. 41 RR 107; 42 RR 41; 48 RR 21-22; SX 931. Before Officer Hawkins could stop his car or unholster his firearm, the escapees opened fire on the police cruiser. 42 RR 41; 48 RR 21–25; SX 931. Officer Hawkins suffered eleven gunshot wounds fired by at least five different guns. 43 RR 5–7, 67–68; 46 RR 86–99; 48 RR 25–26. Officer Hawkins was then pulled from his patrol car and left on the pavement. Fleeing the scene, the men backed their Ford Explorer get-away vehicle over Officer Hawkins, dragging him several feet. 43 RR 41–60, 44 RR 65–66, 111–12; SX 174, 174B. The men fled before the other officers arrived at the scene. 41 RR 167–75.

Minutes later Officer Timothy Cassout arrived at the scene and unsuccessfully tried to revive Officer Hawkins. 41 RR 167–75. Police secured the area, interviewed the employees, and collected evidence. Later that night, several of the employees identified the Texas Seven from a photographic lineup. 41 RR 116–18. Police also found one of the firearms stolen from the Connally Unit on the ground by the loading dock. 41 RR 178; 42 RR 10, 27–28; 43 RR 63–64; SX 39, 178. Officer Hawkin's gun was missing from his holster. 42 RR 10.

The seven escapees regrouped at a local motel and then fled to Colorado, where they purchased an RV and a Jeep. 42 RR 42; 48 RR 31–37; SX 931. Posing as traveling missionaries, the escapees rented a space at the Coachlight Motel and RV Park in Woodland Park, Colorado. 42 RR 28–32; 44 RR 128–33. On January 21, 2001, almost a month after the robbery and murder, a resident of the RV park recognized Rivas and Rodriguez from the television show "America's Most Wanted" and alerted the authorities, who quickly converged on the area. 44 RR 142–54; 45 RR 6–13. The next day law enforcement officers captured five of the seven escapees. Rivas, Garcia, and Rodriguez were captured by a Colorado SWAT team when they left the RV park in the Jeep and stopped at a gas station just off the highway. 45 RR 13–14, 35, 47–60, 92–97. Other law enforcement officers surrounded the escapees' RV where Halprin

and Harper were waiting. 45 RR 14–19, 33; 48 RR 41–42. Halprin surrendered; Harper committed suicide by shooting himself twice in the chest. 45 RR 16–19, 36–41; 48 RR 42. Two days later, police captured the remaining two escapees, Murphy and Newbury, after a standoff at a Colorado Springs hotel. 42 RR 43.

A search of the escapees' RV and Jeep uncovered Officer Hawkin's handgun and the firearms stolen from the Oshman's and the Connally Unit. 45 RR 110; SX 62. The agents also recovered other evidence connected to the prison escape and the murder, including: personal belongings of Oshman's employees; thousands of dollars in cash; ammunition; smoke grenades; rifle scopes; and a receipt for four ballistic vests purchased just days before by Rivas. 46 RR 10–48, 73–77; 47 RR 46; 49 RR 17–18. Police also found two-way radios, scanners, and radio frequency guides for both Texas and Colorado. 46 RR 10–48, 73–77. The frequencies used by the Irving Police Department were marked. 46 RR 28–29.

When interviewed at the Teller County Jail in Colorado, Halprin, Rivas, Rodriguez, and Newbury confessed to the robbery. 42 RR 32–42; 47 RR 11–12; DX 25–27; SX 931. In his statement, Halprin admitted to voluntarily participating in the armed robbery, but claimed that he never fired his gun and was, therefore, less culpable than the rest of his accomplices. 42 RR 37–42; SX 931. Halprin's confession, as well as those of his accomplices, were admitted

into evidence at his trial. 42 RR 37, 84–85; DX 25–27; SX 931. At trial, the defense tried to minimize Halprin's culpability by presenting evidence that Halprin was the youngest and least intelligent of the escapees, had no past experience with guns or a history of robbery, and lacked leadership abilities. 47 RR 87–88; 51 RR 118, 126; DX 55, 56. Halprin also attempted to minimize his participation in the escape and robbery by testifying on his own behalf. 47 RR 97–98; 48 RR 39–40, 50–51. When pressed during cross-examination, however, Halprin admitted that he successfully manipulates people with his lies, continues to lie, and often lies for no reason at all. 48 RR 59–60, 74–75, 101–04, 108, 131; 51 RR 113.

II. Evidence Relating to Punishment

A. The State's case

In addition to the heinous nature of the crime, the jury also heard testimony at the guilt/innocence phase detailing Halprin's participation in the escape from the Connally Unit. When fellow prisoner George Rivas invited Halprin to join in his escape plan, Halprin readily agreed. 47 RR 111–17. During the escape, the men ambushed a total of fourteen jailers, civilian employees, and trustees in the prison maintenance shop. 48 RR 4; 49 RR 57–78, 151, 170. Halprin and the other men physically overcame the hostages, bound their hands, and locked them in a storage room. Some of the hostages

were severely injured. 48 RR 4, 112–13, 119–21; 49 RR 88-93, 122–23, 130, 149–50, 167–69, 171, 177–78. After overcoming a guard in a watchtower, the men escaped from the prison in a maintenance department van, taking numerous weapons with them. 48 RR 6–8. While at large, the escapees robbed a Radio Shack store and a Western Auto Parts store before robbing the Oshman's Superstore and killing Officer Hawkins. 48 RR 7–10.

During the punishment phase, the jury heard additional evidence concerning Halprin's violent disposition and potential for future dangerousness. Prior to the escape, Halprin had been serving a thirty-year sentence for the felony offense of injury to a child. 48 RR 53–54, 82–83; 50 RR 126–29; SX 948–49. In August 1996, Halprin had been dating a woman named Charity Smith and was babysitting her toddler son, Jarrod. 47 RR 105. Halprin savagely beat the toddler, fracturing his skull, legs, and arms. 47 RR 100–02, 108; 48 RR 78–81; 49 RR 197–98, 205; SX 941–47. Both the skull fracture and the right femoral fracture could have been life threatening to the toddler. 51 RR 18.

Halprin was charged with one count of injury to a child, to which he confessed, pled guilty, and received a thirty-year sentence. 48 RR 53–54; SX 948–49. Halprin's confession to Fort Worth detective Renee Camper was read to the jury:

> The first time I hit Jarrod he was sitting up on the bed and I hit him up side the left side of his head, just a slap. I hit him about five or six times. I didn't realize how hard I was hitting him. He laid back down and I pulled him back up and he was saying "mama." And I said, "Do you want to go to mama" and put him down. And then I kicked him on his real hurt knee and then he fell down. I got back up and I pushed him back down and he hit the floor real hard. I pulled him back up right hard by the wrist and I was telling him to stop crying. I didn't realize I was hurting him, but I think that I could have broken his arms then. I could have hurt his other leg when I was pushing him back down because he was trying to stay off his hurt leg and he was twisting, trying to get away, and I was shoving him back down. I guess I hurt his eye when I slapped him because I was slapping him hard enough to bruise his face. I wasn't aiming for any particular place. I was just slapping him. I got scared and I put him down on the bed and kept saying, "I'm sorry, I'm sorry."

50 RR 128–29.

B. Evidence presented by the Defense

In his defense, Halprin offered the testimony of several witnesses to garner the jury's sympathy and show that he would not be a future danger if sentenced to life imprisonment. The first witness was Thomas Warren from TDCJ's classification and records division, who testified that TDCJ had made changes to the way prisoners were classified after the escape of the Texas Seven. 51 RR 32. The defense then called former TDCJ Assistant Director S.O. Woods, who testified generally about the prison conditions Halprin would be in if sentenced to life imprisonment and described the prison while a videotape of the prison's layout played for the jury. 51 RR 72–94. Woods stated that

Halprin would be placed in administrative segregation if sentenced to life in prison, and that his life sentence would be stacked on top of the thirty-year sentence he was previously serving. 51 RR 65–67. Woods also stated that while Halprin did have four minor disciplinary violations prior to his escape, he did not have any major violations and was not affiliated with any gang. 51 RR 50–53. Greg Porter, a sergeant with the Dallas County Sheriff's Department, then added that there had only been one minor incident since Halprin was in custody during trial, and that was for refusing to eat a tray of food. 51 RR 126–27.

Mindi Sternblitz and Jason Goldberg were childhood friends of Halprin before he moved away to Kentucky in the seventh grade. 52 RR 5–13, 34–46. Both testified that Halprin had a good heart and did not get into any more trouble at school than any other young boy his age. 51 RR 5–8, 37–39. According to the friends, Halprin and his brother had a strained relationship with their adoptive father, Dan, and Halprin was always trying to please Dan any way he could. 51 RR 8–14, 37–42. Jason's mother, Terri Goldberg, agreed that Halprin had a strained relationship with his father, and testified that Halprin was a good and well-behaved person about whom she never had one single negative thing to say. 51 RR 54–68. On cross-examination, however, all

three admitted that Halprin's parents loved him, provided a loving home, and tried to be good parents. 51 RR 18–20, 48–49, 69–71.

Finally, the defense called Dr. Kelly Goodness, a clinical and forensic psychologist who interviewed Halprin and twelve of his acquaintances and gave Halprin a battery of psychological tests. 52 RR 4–72; 53 RR 16–62. Dr. Goodness testified that in her opinion, Halprin had a tumultuous childhood, a rigid adoptive father, untreated attention deficit disorder, avoidant personality disorder, and a predilection for drug abuse and depression. 52 RR 27–28, 30–34, 37, 39–41; 53 RR 28–41. She further stated that Halprin's disorders were not properly treated and that there was a complete absence of guidance from his parents that was necessary for a child with such special needs. 53 RR 37–39. Halprin's drug abuse was also a significant factor that helped him make bad decisions. 53 RR 39. But on cross-examination, Dr. Goodness conceded that Halprin was not insane and that he was capable of making a rational decision at the time of the murder. 53 RR 53–62.

STANDARD OF REVIEW

Prior to filing a successive federal habeas petition in district court, a petitioner must obtain authorization from the Fifth Circuit to do so. 28 U.S.C. § 2244(b)(3)(A). To establish that he is entitled to such authorization, Halprin must make a prima facie showing that his claim falls within an exception

under 28 U.S.C. § 2244(b). *In re Campbell*, 750 F.3D 523, 530 (5th Cir. 2014). That statute requires that

> (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless-
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> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)
>
> (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b). Under this standard, Halprin must make a sufficient showing of possible merit to warrant a fuller exploration by the district court. *Reyes-Requena v. United States*, 243 F.3d 893, 898–99 (5th Cir. 2001). The

Fifth Circuit may grant authorization to file a successive petition "[i]f in light of the documents submitted with the application it appears reasonably likely that the application satisfies the stringent requirement for the filing of a second or successive petition." *In re Morris*, 328 F.3d 739, 740 (5th Cir. 2003).

ARGUMENT

I. This Court Is Without Jurisdiction to Consider Halprin's Petition Because He Has Not Obtained Permission from the Fifth Circuit to File a Successive Petition.

Halprin's first federal habeas petition was denied with prejudice. DE 50. He has now filed a successive federal habeas petition raising a new claim alleging his right to due process was violated because his trial judge, Vickers Cunningham, harbored racist and religiously-bigoted views. DE 58. Halprin does not dispute that he has not requested or received authorization from the Fifth Circuit to file a successive habeas petition. Consequently, this Court is without jurisdiction to consider the merits of Halprin's petition. 28 U.S.C. § 2244(b)(3)(A).

Halprin argues that his petition is not successive because § 2244(b) does not—or should not—apply to his claim of judicial bias because the evidence supporting his claim could not have been discovered until May 2018 when media reports were published regarding Cunningham's bigoted views. DE 58 at 44–48. But the Fifth Circuit has stated plainly that "claims based on a

factual predicate not previously discoverable are successive." *Leal Garcia v. Quarterman*, 573 F.3d 214, 221 (5th Cir. 2009) (emphasis in original). Halprin's reading of § 2244(b) to render it inapplicable to claims that might not be discovered until after the initial federal habeas petition is denied "would permit an end-run around § 2244." *Id*. at 221. Indeed, the Fifth Circuit stated that AEDPA "forbids such a reading." *Id*. Consequently, this Court should dismiss Halprin's successive petition for want of jurisdiction. *See Burton v. Stewart*, 549 U.S. 147, 157 (2007) ("The long and short of it is that [the petitioner] neither sought nor received authorization from the Court of Appeals before filing his . . . petition, a 'second or successive' petition challenging his custody, and so the District Court was without jurisdiction to entertain it.").

Halprin also argues that his petition is not successive because it raises a claim that is similar in nature to a claim alleging incompetence to be executed—a claim that is not successive even if raised after the initial federal habeas petition is denied. *See Panetti v. Quartermani*, 551 U.S. 930, 945 (2007). He argues that his claim of judicial bias involves structural error, which, like competency to be executed, does not depend on the assessment of a petitioner's guilt. DE 58 at 44. Similarly, Halprin argues that the successiveness bar in § 2244(b) should not apply to claims of judicial bias for practical reasons and

because doing so would be contrary to congressional intent. DE 58 at 45–48. Halprin's argument is unsupportable.

First, as noted above, the fact that the factual basis of a claim is not discovered until after an initial federal habeas petition is denied is *not* a basis on which to conclude that § 2244(b) is inapplicable. *Leal Garcia*, 573 F.3d 221. Indeed, § 2244(b) explicitly contemplates petitioners discovering the predicate for a federal habeas claim after the conclusion of the initial proceedings. 28 U.S.C § 2244(b)(2)(B). In such a case, a petitioner must obtain authorization from the court of appeals to pursue such a claim in a successive petition and must meet the stringent requirements of the statute. 28 U.S.C. § 2244(b)(3)(A), (C); *see also In re Cathey*, 857 F.3d 221, 226 (5th Cir. 2017). That evidence of judicial bias might not be discovered until after the initial federal habeas petition is denied does not render AEDPA inapplicable. Halprin's effort to carve out an exception from § 2244(b) for claims that depend on facts that may be discovered after the initial habeas proceedings fails because the statute *explicitly* contemplates such an event and sets out the requirements for raising such a claim. DE 58 at 47.

Notably, § 2244(b)'s successiveness bar applies to claims the factual basis of which might not be initially discoverable. For example, claims alleging that the prosecution withheld exculpatory evidence are undoubtedly subject to

§ 2244(b). *Blackman v. Davis*, 909 F.3d 772, 778 (5th Cir. 2018); *see also In re Raby*, --- F.3d ---, 2019 WL 2353241, at *7–9 (5th Cir. 2019); *In re Davila*, 888 F.3d 179, 183–87 (5th Cir. 2018); *Johnson v. Dretke*, 442 F.3d 901, 911–12 (5th Cir. 2006). This is so even though evidence to support such a claim might not be discovered—due to suppression—until after a petitioner's initial federal habeas proceedings. In such a case, the statute requires a showing of diligence and that no reasonable factfinder would have found the petitioner guilty in light of the newly discovered evidence. 28 U.S.C. § 2244(b)(2)(B)(i), (ii). The nature of such a claim does not render § 2244(b) inapplicable.

Second, Halprin's claim of judicial bias is not similar to a claim that a petitioner is incompetent to be executed. In *Panetti*, the Supreme Court held that an allegation that the petitioner was incompetent to be executed was not successive. 551 U.S. at 947. The Court concluded that § 2244(b) does not render such a claim impermissibly successive because the claim does not become *ripe* until an execution date has been set. *Id*. at 945. The Court stated its holding plainly: "The statutory bar on 'second or successive' applications does not apply to [an incompetence-to-be-executed] claim brought in an application filed when the claim is first ripe." *Id*. at 947. Moreover, a claim alleging incompetence for execution challenges "some other species of legal error" that arises after the

underlying conviction—not the conviction itself. *See Leal Garcia*, 573 F.3d at 222.

Unlike an incompetence-to-be-executed claim, Halprin's judicial-bias claim explicitly argues his *conviction* occurred in violation of due process when Judge Cunningham failed to recuse himself because of a lifelong prejudice that existed at the time of trial. Such a claim did not become "ripe" only when he discovered evidence to support it. Rather, the legal claim that Halprin's trial judge was biased was always available; he simply discovered the factual predicate of the claim after his initial petition was denied. *See id.* Again, the statute explicitly contemplates petitioners discovering the predicate for a habeas claim after the initial habeas proceedings conclude. 28 U.S.C. § 2244(b)(2)(B).

Further, contrary to Halprin's assertion, the Court in *Panetti* did *not* conclude that § 2244(b) was inapplicable to claims of incompetence to be executed because such claims do not implicate a petitioner's guilt or innocence of the offense. DE 58 at 44, 46 (citing *Panetti*, 551 U.S. at 943–46). Rather, the Court held that such claims were not subject to the successiveness bar because

they may not be "ripe" when the initial federal habeas petition is filed. *Panetti*, 551 U.S. at 945–47.[4]

Halprin asks this Court to overlook *Panetti*'s rationale and to extend its exception to his claim because he cannot meet the statute's requirements. He suggests that his claim should be excepted from the statute because it is a "structural defect." DE 58 at 54. But *Penry*[5] and *Atkins*[6] claims are structural error claims, and both are subject to the statute's provisions. *See In re Webster*, 605 F.3d 256, 258 (5th Cir. 2010); *In re Kunkle*, 398 F.3d 683, 684–85 (5th Cir. 2005).

Halprin goes on to suggest that his claim should be excepted from the statute because it does not implicate his innocence of capital murder. But *Panetti* does not stand for the proposition that only innocence-implicating claims are subject to § 2244(b)'s stringent requirements. Nor does it stand for the inverse—that non-innocence claims are not subject to any limitation and can therefore be raised in petition after petition after petition. Not

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[4] A second federal habeas petition may also not be impermissibly successive where the initial petition was dismissed to allow for exhaustion of state-court remedies, *Slack v. McDaniel*, 529 U.S. 473, 478 (2000), or if the second petition attacks a separate judgment. *Magwood v. Patterson*, 561 U.S. 320, 332–34 (2010). This case implicates neither circumstance.

[5] *Penry v. Lynaugh*, 492 U.S. 302 (1989).

[6] *Atkins v. Virginia*, 536 U.S. 304 (2002).

surprisingly, other claims that do not contemplate a petitioner's innocence have been held subject to the statute. For example, § 2244(b)(2)(B) applies to claims alleging intellectual disability and ineffective assistance of trial counsel for failure to adequately investigate mitigating evidence *because* of—not in spite of—the fact that such claims do not implicate a petitioner's innocence of the offense. *See In re Garcia*, 756 F. App'x 391, 394 (5th Cir. 2018) ("As to [§ 2244(b)(2)(B)(ii)], Garcia's claim that federal habeas counsel was ineffective by not investigating further mitigating evidence that could have been brought at the punishment phase of trial does not, by its nature, affect whether a 'reasonable factfinder would have found [Garcia] *guilty of the underlying offense*.'") (emphasis in original) (citing *In re Rodriguez*, 885 F.3d 915, 918 (5th Cir. 2018)); *Turner v. Epps*, 460 F. App'x 322, 330 (5th Cir. 2012); *In re Webster*, 605 F.3d at 258 ("Had Congress wanted the provision to cover challenges to a sentence—even if only to a death sentence—it easily could have referenced sentences explicitly in that context."); *cf. Rocha v. Thaler*, 626 F.3d 815, 825–26 (5th Cir. 2010) ("The quality of mitigation evidence the petitioner would have introduced at sentencing has no bearing on his claim of actual innocence of the death penalty."). Such claims necessarily fail to satisfy § 2244(b)(2)(B). It does not follow that they are excepted from it.

But that is precisely what Halprin argues: that the statute does not apply because he cannot meet it. Under his logic, § 2244(b) would only bar a tiny fraction of claims in which petitioners allege their innocence, yet fail to establish it. For all the rest of the claims—which are many—petitioners would be entitled to endless rounds of litigation. Such an interpretation would gut the statute and the finality it was written to protect.

Moreover, application of § 2244(b) to Halprin's petition would not require, as he suggests, all petitioners to allege a claim of judicial bias in federal court to preserve such a potential claim. DE 58 at 47. Again, § 2244(b) lays out the requirements for raising a claim when its factual support is discovered after the initial habeas petition is denied. 28 U.S.C. § 2244(b)(2)(i), (ii). Simply put, Halprin does not justify *Panetti*'s extension—for the first time—to late discovered non-innocence claims.

The statute's provisions against successive petitions apply to Halprin's judicial bias claim. Because Halprin did not obtain authorization from the Fifth Circuit to file his successive petition, this Court does not have jurisdiction to consider it.

II. The Court Should Dismiss Halprin's Petition Because He Does Not Meet the Standards under 28 U.S.C. § 2244 for Filing a Successive Habeas Corpus Petition.

Even if this Court could consider Halprin's petition without authorization from the Fifth Circuit, the petition would be subject to dismissal because Halprin's claim does not meet the standards under § 2244 for filing a successive petition. Specifically, his claim that his trial judge harbored racist and religiously-bigoted views does not and cannot demonstrate that no reasonable factfinder would have found him guilty of capital murder but for the alleged constitutional error.[7] 28 U.S.C. § 2244(b)(2)(B). Consequently, Halprin's petition should be dismissed.

To obtain authorization to file a successive petition, Halprin must make a prima facie showing that he satisfies the prerequisites for a successive petition by showing that it is "reasonably likely that the application satisfies the stringent requirement for the filing of a second or successive petition." *In re Campbell*, 750 F.3d at 530; *see In re Morris*, 328 F.3d at 740-41; 28 U.S.C. § 2244(b)(3)(C). This requires Halprin to show that no reasonable factfinder would have found him guilty but for Cunningham's alleged judicial bias. 28 U.S.C. § 2244(b)(2)(B)(ii).

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[7] Halprin does not argue that his judicial bias claim relies on a new, retroactive rule of constitutional law. 28 U.S.C. § 2244(b)(2)(A).

To be clear, the details of Cunningham's living trust and the accounts of those who knew Cunningham regarding his bigoted statements and beliefs are troubling to say the least. The Attorney General's Office does not condone or excuse Cunningham's creation of his living trust, and the racist and religiously-bigoted statements he is alleged to have made are abhorrent. To obtain merits review of his successive petition, however, § 2244(b)(2)(B) requires that Halprin show that his new evidence demonstrate that, but for the alleged constitutional error, no reasonable factfinder would have found him guilty of capital murder. Halprin's claim of judicial bias does not make such a showing or even allege that Halprin is innocent of the offense.[8] Consequently, he fails to satisfy the stringent requirements of § 2244 and his petition should be dismissed as impermissibly successive.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court dismiss Halprin's petition for lack of jurisdiction.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

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[8] Halprin argues that he can show actual innocence of the death penalty. DE 58 at 44 n.17. That is wholly irrelevant to § 2244(b)(2)(B)(ii). Again, the successiveness bar requires a showing of actual innocence of the crime of conviction, not the sentence. *In re Webster*, 605 F.3d at 258.

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CERTIFICATE OF SERVICE

I do hereby certify that on June 12, 2019, I electronically filed the foregoing pleading with the Clerk of the Court for the U.S. District Court, Southern District of Texas, using the electronic case-filing system of the Court. The electronic case-filing system sent a "Notice of Filing" to the following attorney of record, who consented in writing to accept this Notice as service of this document by electronic means.

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