WRIT NO. W-01-00327-T (B)

EX PARTE	**§**	**IN THE DISTRICT COURT**
RANDY HALPRIN	**§**	**283RD JUDICIAL DISTRICT**
APPPLICANT	**§**	**DALLAS COUNTY, TEXAS**

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON APPLICATION FOR WRIT OF HABEAS CORPUS

The Court, having considered Applicant's Subsequent Habeas Application for Writ of Habeas Corpus ("Application"), filed on July 16, 2019, in accordance with Article 11.071, § 5 of the Texas Code of Criminal Procedure, the State's Response, as well as the evidence provided by Halprin, attached to his Application and previously offered and admitted into evidence, makes the following Findings of Fact and Conclusions of Law, as directed by Article 11.071, § 8.

Halprin's claim, as authorized by the Texas Court of Criminal Appeals under Article 11.071, § 5, alleges that Halprin's trial judge, Vickers ("Vic") Cunningham, harbored a racial and ethnic animus and bias against Halprin because he is Jewish, which in turn violated (1) Halprin's right to a fair trial before a fair and impartial tribunal as guaranteed by the Due Process Clause of the Fourteenth Amendment, (2) Halprin's First Amendment right to the free exercise of religion, and (3) equal protection under the Fourteenth Amendment.

The State takes the position that, even assuming as true all the facts alleged by the application and its supporting affidavits, [Halprin] has not established a violation of the Due Process Clause, and relief must be denied. Consequently, the facts underlying Halprin's claim are not controverted.

Introduction

The facts now before us are extreme by any measure. On these extreme facts the probability of actual bias rises to an unconstitutional level. The introduction of Exhibits 9, 17, 19 and 40 place a chilling effect on the overall ability of Judge Victor Cunningham to fairly oversee this case. The testimony of Tammy McKinney, Amanda Tackett and Michael Samuels leads the Court to conclude that inbred bias was thoroughly situated into the conscious mind of Judge Cunningham and it is too much to ignore.

Implicit bias can be defined as social behavior that is influenced by unconscious associations and judgments. Specifically, implicit bias refers to attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious way, making them difficult to control. Implicit bias is evident in different domains of society and can manifest itself in daily interactions. Implicit biases can become an explicit bias. This occurs when you become consciously aware of the prejudices and beliefs you possess. That is, they surface in your conscious mind, leading you to choose whether to act on or against them.

There are far too many examples cited herein that prove Judge Vic Cunningham may not have been able to stand as the sole judicial arbiter. Too often we have become desensitized or learned to accept and endure the existence of implicit and unconscious bias.

To further make this point, the Court would humbly offer a few illustrations.

1. Former Alabama Governor and presidential candidate George Wallace was explicit in his brand of racism that vowed "Segregation NOW, Segregation TOMORROW, Segregation FOREVER."
2. Television personalities Archie Bunker and Fred Sanford were explicit in their racist, homophobic and paternalistic views.
3. The homeowner association president who holds angst against his new Hispanic neighbors is a victim of his own implicit or unconscious bias.
4. The nonracist business man who is married to an Asian woman and would never use a pejorative to describe anyone non-white, but shudders at the idea of having a black female dentist perform oral surgery must come to grips with the fact that the stereotypes he has ingested over the years reek of unconscious bias.
5. The college professor who explains his worst fears to his wife that although their daughter's boyfriend is well-educated, well-paid, and well-spoken, he is afraid of what their grandchildren may face as a consequence of their "mixed-race" status.

6. Judge Vic Cunningham was as explicit as any one person could be when he made the following remark relative to his family estate as reported by the Dallas Morning News on March 22, 2018: "I *strongly* support traditional family values," Cunningham said. "If you marry a person of the opposite sex that's Caucasian, that's Christian, they will get a distribution."

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. A right to a trial free from a judge's religious and racial bias secures these fundamental principles of equality and religious liberty.

Legal Standard

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). Due process requires a fair trial before a judge without actual bias against the defendant. *Tumey v. Ohio*, 273 U.S. 510 (1927). A biased judge can impact an entire proceeding in clear, subtle, or even unseen ways. 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. Fulminate*, 499 U.S. 279, 310 (1991).

Even if there is no showing of actual bias in the tribunal, due process is denied by circumstances that create the likelihood or the appearance of bias. *Peters v. Kiff*, 407 U.S. 493, 502 (972). 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.'" *Caperton v. A.T. Massey* Coal Co., 556 U.S. 868, 872 (2009) (quoting *Withrow v. Larking*, 421 U.S. 35, 47. (1975)).

The Due Process clause "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.'" *Murchison*, 349 U.S. at 136; *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986). Under Supreme Court precedents, there are circumstances "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." Withrow, 421 U.S. at 47. Not only is a biased decisionmaker constitutionally unacceptable, but "our system of law has always endeavored to prevent even the probability of unfairness." *Murchison,* 349 U.S. at 136. Avoiding bias is also necessary to ensure public confidence in the courts.

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).

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 v. Ohio*, 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 v. Pennsylvania*, 136 S. Ct. 1899, 1902 (2016). It is impossible to catalog the many ways a biased trial judge may have affected the proceedings. The Supreme Court has recognized a biased judged as an example of structural error. *Ex parte Fierro*, 934 S.W.2d 370, 372 (Tex. Crim. App. 1996)

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. Bahsok*, 520 U.S. 641, 647 (1997)).

Materials Considered and Credibility Determinations

The Court has considered the following in making its findings:

1. the trial record;
2. Halprin's Application filed July 16, 2019, and the thirty-nine (39) exhibits attached to the Application;

3. Halprin's Supplemental Exhibits (40, 41, and 42);
4. Halprin's Second Supplemental Exhibit (43),
5. the Brief of Prominent Jewish Members of the State Bar of Texas, the American Jewish Committee, the Union of Reform Judaism, the Central Conference of American Rabbis, and Men of Reform Judaism as Amici Curiae;
6. the decision of the Court of Criminal Appeals rendered on October 4, 2019;
7. all filings related to the recusal of the Criminal District Attorney of Dallas County;
8. the State's Response;
9. the arguments of counsel presented at oral argument; and
10. each party's Proposed Findings of Fact and Conclusions of Law.

Halprin submitted 43 exhibits. During the hearing held July 14, 2021, Halprin offered them into evidence. The State did not object. This Court agreed to consider them. Among Halprin's evidence are sworn declarations from Tammy McKinney ("McKinney Decl.", Exhibit 9), Amanda Tackett ("Tackett Decl.", Exhibit 17), and ("Tackett Supplemental Decl.", Exhibit 43), and Michael Samuels ("Samuels Decl.", Exhibit 19). Halprin has also provided two news articles from the *Dallas Morning News*, one dated June 10, 2003 (Exhibit 14) and one dated May 18, 2018 (Exhibit 21). Additionally, Halprin has provided the video recording of an interview given by Vic Cunningham to the *Dallas Morning News* prior to the publication of the May 2018 article (Exhibit 22), and a public statement made soon after (Exhibit 25).

In its Response, the State accepts as true "all facts as alleged" by Halprin's Exhibits 9, 14, 17, 19, 21, 22, 25, and 43. At oral argument, Halprin's counsel argued the State's Response urged this Court to review the Application and exhibits as though on summary judgment, i.e., by viewing the facts in the light most favorable to the Applicant and deciding whether they fail as a matter of law. The State did not dispute or disagree with that characterization. The Court independently finds the State's written and oral submissions do not controvert any issue of material fact.

In the absence of any objection to Halprin's proffered exhibits, the State's affirmative assertion that the Court should take all Halprin's alleged facts as true, the Court has weighed the credibility of Halprin's witnesses solely on the facts contained in their affidavits. The Court finds each of the witnesses presented by Halprin to be credible based on their sworn declarations.

FINDINGS OF FACT

Procedural History

1. Halprin pleaded not guilty to a charge of capital murder entered in the 283rd District Court, Dallas County, Texas in Cause No. F01-00327-T. Following a jury trial before Judge Vickers Cunningham, the jury found Halprin guilty on June 9, 2003, and returned a sentence of death on June 12, 2003.

2. Halprin had an automatic appeal to the Court of Criminal Appeals ("CCA") in Cause No. AP-74,721. The CCA affirmed on June 29, 2005. *Halprin v. State*, 170 S.W.3d 111 (Tex. Crim. App. 2005).

3. On appeal, Halprin raised nineteen points of error.[1] *Id.* Halprin did not seek review from the Supreme Court of the United States.

4. On April 6, 2005, Halprin timely filed an application for writ of habeas corpus in this Court. *Ex parte Halprin*, W01-00327-S(A).

5. In late 2005, Judge Cunningham resigned his judicial seat to run for Dallas County District Attorney in the Republican primary. After two changes of presiding judge, the trial court ultimately adopted the State's proposed findings of fact and conclusions of law and recommended that the relief Halprin sought be denied.

6. The CCA then adopted the trial court's findings and conclusions and denied relief on March 20, 2013. *Ex parte Halprin*, Nos. WR-77,175-01--04, 2013 WL 1150018 (Tex. Crim. App. Mar. 20, 2013).

7. In his application, Halprin raised thirty-one allegations challenging his conviction and sentence. *Id.* at *1.

8. On March 20, 2014, Halprin filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, in federal court. *Halprin v. Davis*, 3:13-cv-01535-L (N.D. Tex.).

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[1] 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; 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*, 170 S.W.3d at 113-18.

9. On September 27, 2017, the federal district court issued a memorandum opinion and order denying relief, and a judgment which dismissed Halprin's petition with prejudice. *Halprin v. Davis*, No. 3:13-cv-01535-L, 2017 WL 4286042 (N.D. Tex. Sept. 27, 2017).

10. The United States Court of Appeals for the Fifth Circuit denied Halprin's request to certify an appeal of his claims. *Halprin v. Davis*, 911 F.3d 247 (5th Cir. 2018).

11. On June 12, 2019, Halprin filed a petition for writ of certiorari with the Supreme Court of the United States contesting the Fifth Circuit's decision. *See Halprin v. Davis*, No. 18-9676 (U.S.). This petition was denied on October 7, 2019. *Id*.

12. On May 17, 2019, Halprin filed a separate federal habeas petition in the United States District Court for the Northern District of Texas raising the same judicial bias claim he raises here. *Halprin v. Davis*, Nos. 3:13-cv-1535-L; 3:19-cv-1203-L.

13. On June 6, 2019, with Halprin's judicial bias allegations submitted to the federal court, the State sought an order from this Court setting an execution date for Halprin. This Court entered an order on July 3, 2019, setting Halprin's execution date for October 10, 2019.

14. Halprin then filed the current application with this Court on July 16, 2019, and sought a stay of execution from the CCA on August 22, 2019. Pursuant to Art. 11.071, § 5, this Court forwarded Halprin's application to the CCA.

15. On October 4, 2019, the CCA concluded that Halprin's judicial bias claim satisfied the requirements of Art. 11.071, § 5; remanded the claim to this Court for review; and stayed Halprin's execution pending resolution of his claim. *Ex parte Halprin*, No. WR-77,175-05, 2019 WL 4932930 (Tex. Crim. App. Oct. 4, 2019). In determining that Halprin's claim satisfied Art. 11.071, § 5, the CCA necessarily found that: "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).

16. While Halprin's Application was before the CCA, the U.S. District Court and Fifth Circuit decided that the federal habeas corpus statute did not permit consideration of Halprin's judicial bias claim. *See In re Halprin*, 788 Fed. App'x 941 (5th Cir. Sept. 23, 2019). Halprin sought review of that decision in the U.S. Supreme Court. On April 6, 2020, the Supreme Court denied review. *Halprin v. Davis*, 589 U.S. ___, 140 S. Ct. 1200 (2020) (mem.).

17. Justice Sotomayor issued a separate statement in which she explained she did not dissent from the denial of certiorari in part because "state-court proceedings are underway to address—and, if appropriate, to remedy—Halprin's assertion that insidious racial and religious bias infected his trial." 140 S. Ct. at 1201. Noting that "the Due Process Clause clearly requires a 'fair trial in a fair tribuna[l]' before a judge with no actual bias against the defendant," *Bracy v.*

Gramley, 520 U.S. 899, 904–905 (1997) (citation omitted), Justice Sotomayor declared her "trust that the Texas courts considering Halprin's case are more than capable of guarding this fundamental guarantee." 140 S. Ct. at 1202.

18. On January 15, 2020, Dallas County District Attorney, John Creuzot, filed a motion to recuse himself and his office pursuant to Article 2.07(b-1) of the Texas Code of Criminal Procedure. In his motion, Mr. Creuzot alleged conflicts of interest related to Halprin's claim, as the basis for his recusal. This Court denied the motion without prejudice on January 29, 2020.

19. On March 5, 2020, Mr. Creuzot filed a second motion to recuse. This Court granted Mr. Creuzot's second motion on July 27, 2020.

20. On September 18, 2020, this Court signed an order finding that the Dallas County District Attorney's Office was "disqualified from acting" in this case and appointing Sharen Wilson, the Tarrant County Criminal District Attorney and any assistant district attorneys assigned by her, as attorney pro tem for the prosecution of this cause.

21. On January 15, 2021, Halprin moved to have the Court withdraw Ms. Wilson's appointment due to conflicts of interest, and to appoint conflict-free counsel as attorney pro tem. On April 16, 2021, the Court denied Halprin's motion.

22. On April 22, 2021, the Court ordered the State to file a response no later than May 28, 2021. The State filed a "Response in Opposition to Writ of Habeas Corpus" on May 6, 2021.

23. On June 14, 2021, this Court heard oral argument from both parties regarding Halprin's judicial bias claim.

24. At the conclusion of the argument, the Court directed both sides to prepare proposed findings of fact and conclusions of law for the Court's review. The parties agreed to this procedure but Halprin expressly reserved the right to a hearing should this Court conclude the evidence before it was insufficient to prove his entitlement to relief. As set out below, this Court finds Halprin's evidence establishes by a preponderance of the evidence, at least, that Judge Vickers Cunningham was biased against Halprin because Halprin is a Jew, that Cunningham's bias against Jews was longstanding before Halprin's trial and remained steadfast through at least 2018, that Cunningham's anti-Semitic bias motivated his actions, including his desire to hold positions of power and influence in the criminal justice system, and that, even assuming Judge Cunningham was not actually biased against Halprin, Halprin has shown that Cunningham's anti-Semitic motivations created an unconstitutionally intolerable risk of bias in this case.

Judge Vickers Cunningham and the Trials of the "Texas Seven"

25. Halprin's case, like those of his co-defendants, 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. In September 2001, in the middle of jury selection for co-defendant Donald Newbury's trial, Governor Rick Perry appointed Judge

Francis to fill a vacant seat on the Fifth District Court of Appeals in Dallas. A month later, Governor Perry appointed Judge Vickers Cunningham to fill Judge Francis' seat on the 283rd District Court.

26. At the time of his appointment, Judge Cunningham knew his principal task would be overseeing the capital trials of the remaining co-defendants, including Halprin. Together, the defendants had become known in the media and to the public at large as the Texas Seven and gained considerable notoriety.

27. Cunningham told a local magazine that he "wanted the challenge" of presiding over these very high-profile and complex capital cases. *Two Woodrow Wilson grads help decide the Texas 7's fate*, Advocate: Lakewood/East Dallas, Aug. 1, 2002 (Exhibit 8).

28. Vic Cunningham learned from his parents' example, and the example of his neighbor, Henry Wade, the long serving Dallas County District Attorney whom he idolized,[2] and from his pastor, Rev. W. A. Criswell, the virtues of participating in the central activities of his community, including his church and local politics. *See* Declaration of Tammy McKinney ¶ 2 (Exhibit 9) (describing church, country club, and social activities the Cunninghams were involved in); Rep. Jeb Hensarling, *Honoring the late Bill 'Bulldog' Cunningham,* The Constituent Register, May 16, 20163 (Exhibit 10) ("Bulldog was an active political volunteer, along with his wife, Mina.").

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[2] Gromer Jeffers, *The late Henry Wade stirs emotions of DA candidates*, Dallas Morning News, Jan. 24, 2006 (Exhibit 12) (quoting Cunningham).

29. 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 the Lakewood neighborhood of Dallas, where he had grown up, especially Henry Wade. Gromer Jeffers, *The late Henry Wade stirs emotions of DA candidates*, Dallas Morning News, Jan. 24, 2006 (Exhibit 12).

30. 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*.

31. 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).

Halprin's Trial and Sentencing

32. Randy Halprin was the second-to-last defendant scheduled for trial. By this time, Halprin's Jewish identity was well-documented. It had been reported in the press even before the escapees were captured. *See* 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); Todd Bensman, *Rodriguez invited into plot for getaway car, Halprin says*, Dallas Morning News, Feb. 4, 2001 (Exhibit 3). According to a January 2001 *Dallas Morning News* report, though he was a troubled youth who struggled in school, Halprin "showed great ability[,] . . . mastering the lessons for his bar mitzvah at North Arlington's Congregation Beth Shalom synagogue." Brook Egerton, *Halprin endured abuse, other hardships as youth*, Dallas Morning News, Jan. 14, 2001 (Exhibit 4). "'Here's this kid reading Hebrew and leading the congregation and doing it well,' said Chief Waybourn, who attended the coming-of-age ceremony." *Id.*

33. Halprin was indicted and tried for capital murder under Texas's "law of parties," 1 CR 65, which meant the State was not required to prove that Halprin actually killed or intended to kill. Tex. Penal Code § 7.02. Because Halprin was charged as a party, he could be sentenced to death only if the jury found he "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, Halprin's relative culpability was a central issue. Halprin testified about his role, and therefore, his credibility also was a central issue.

34. Halprin testified during the liability phase of the trial that he played only a minor role in the Oshman's robbery, that he did not want to carry a gun at all, that he did not shoot Officer Hawkins, or ever discharge his weapon during the

robbery. 47 RR 98; 48 RR 24, 55, 102. With respect to the escape, Halprin stated that he did not physically strike anyone, 47 RR 99, that he had essentially no role in planning the escape, and that he 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 and did not carry a gun during that crime. 48 RR 8, 9.

35. 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.

36. When the shooting began, Halprin said he "freaked out" and ran off. 48 RR 23.

37. 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").

38. Halprin attempted to rebut the prosecution's theme of joint culpability with his own testimony about taking direction from others, and through a "ranking document" produced by the Texas Department of Criminal Justice that rated the escapees' leadership qualities. The ranking document stated that Halprin "never exhibited leadership qualities," was "[v]ery submissive," and was the "weakest" of the members. *Halprin*, 170 S.W.3d at 114-15.

39. Judge Cunningham repeatedly rejected Halprin's attempts to introduce the ranking document.

40. Halprin's Jewish identity was a recurring subject during his trial. For instance, during his testimony, Halprin spoke about being "picked on" in prison because he was Jewish. 49 RR 36-37.

41. The State argued at the close of the guilt phase that 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.

42. In the punishment phase, the defense presented evidence that Halprin's life was shaped by his search for a Jewish identity and his desire to please his Jewish father. Halprin worked hard to become a worthy 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 Halprin's childhood friends, who themselves identified as Jewish. This evidence supported 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).

43. The State, in turn, elicited the fact that 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. Halprin's longtime friend Mindi Sternblitz explained that Halprin's feelings grew out of being "raised ... 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." 52 RR 26-27. That testimony indicated Halprin, as a young teenager, developed animosity towards evangelical Christians like Judge Cunningham because of their evangelist activities. *See* Jim Jones and Mary McKee, *Baptists eulogize Criswell ministry*, Ft. Worth Star-Telegram, Jan. 17, 2002 (Exhibit 11).

44. Judge Cunningham presided over a portion of the questioning and selection of Halprin's jurors, made critical pre-trial rulings, ruled on the admissibility of evidence relevant to Halprin's guilt and punishment, rejected a defense request for an anti-parties instruction, instructed the jury, and sentenced Halprin to death based on the jury's answers to the special issues.

45. In a critical ruling, Judge Cunningham denied Halprin's attempts to introduce the "ranking document." Jurors could have found the ranking document corroborated Halprin's testimony about his subordinate role in the group of escapees, testimony the prosecution urged the jury not to believe. 53 RR 83-84; *id*. at 126-128, 135-136, 139. Judge Cunningham relied on his discretion to deny Halprin's repeated attempts to have his expert witness testify concerning the facts underlying her opinions. 52 RR 88; 53 RR. 3-12, 30, 39. Finally, the trial court denied Halprin's requested charge concerning the law of parties. 53 RR 73; 1 CR 158-71.

46. One or more of these rulings could have made a difference in the jury's deliberations. Jurors deliberated over Halprin's punishment for more than six hours. *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). Through a note they sent out during deliberations, the jury indicated its response to the second 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* Exh. 15.[3]

Judge Cunningham's Extensive History of Prejudice and Bias

47. Before, during, and after Halprin's capital murder trial, Judge Cunningham harbored deep-seated animus towards non-white and non-Christian people and deep-seated racial, ethnic, and religious prejudices.

48. Although he obviously had to conceal his biases from the public, Judge Cunningham expressed his prejudices in private, and told people close to him that his views on Black people, Latinos, and Jews informed his thinking about his public service in the law.

49. Tammy McKinney grew up with Vic Cunningham and knew him intimately. Cunningham's and McKinney's parents were close friends, moved 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.*

[3] The record does not include Judge Cunningham's response to the note.

50. But Judge Cunningham's bigotry prevented McKinney and Cunningham from ever becoming "truly good friends." *Id.* ¶ 8. McKinney observed that Judge Cunningham "did not like anyone not of his race, religion or creed, and he was very vocal about his disapproval." *Id.*

51. For as long as she could remember, McKinney observed that Cunningham would belittle his brother Bill by calling him "n****r Bill."[4] *Id.* ¶ 16. Although he was "always like this," "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 Halprin's trial—McKinney found Cunningham "so hateful." *Id.* ¶ 5. She remembers that "[h]e would regularly use offensive" language "such as 'n****r,' 'we****k,' 'spic,' 'k*k*,' 'the fuckin' Jews.'" *Id.*

52. 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 'N****r' 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 k*k*.'" *Id.* ¶ 16.

53. After the "Texas Seven" trials, Judge Cunningham would "tout with pride his role." *Id.* ¶ 7. When he discussed the cases, he would "often" make

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[4] In order to file a document suitable for public reading, the Court replaces the racial, ethnic, and anti-Semitic language Judge Cunningham actually used with asterisks. The Court notes, however, that Judge Cunningham used harsh and offensive language, and the edits used here should not detract from the visceral impact such language inherently has.

"extremely hateful comments" and always mention the defendants' "race, ethnicity or religion." *Id.*

54. According to McKinney, Judge Cunningham "took special pride in the death sentences because they included Latinos and a Jew." *Id.* That is, his pride was based on the defendants' ethnicities and Jewish identity, and not, as the State has argued, on anything he learned in the course of the trial. Again, Judge Cunningham acquired and expressed his animosity towards Latinos and Jews before he presided over Halprin's trial.

55. McKinney credibly recalled Cunningham calling Halprin a "goddamn k*k*" and "that fuckin' Jew." *Id.* ¶ 13.

56. He also used the term "'we****k' to describe some of the Texas 7 defendants." *Id.* ¶ 8.

57. On at least one occasion, McKinney remembers Cunningham saying, "From the we****k to the Jew, they knew they were going to die." *Id.* ¶ 12.

58. When Judge Cunningham "los[t] inhibitions" and aired his prejudices at parties, he would often return to discussing the Texas Seven. *Id.* ¶ 8.

59. Speaking of his judgeship, "Vic said any 'n****r' or 'we****k' walking into his courtroom knew they were going to go down." *Id.* ¶ 12.

60. In late 2005, Judge Cunningham resigned his judicial seat to run for Dallas County district attorney in the Republican primary.

61. Publicly, Judge Cunningham ran as an efficient administrator, who was tough but fair. *See* Exh. 9, McKinney Decl. ¶ 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).

62. Judge Cunningham asked his friend Amanda Tackett to help with his campaign. Tackett recalls that in private Judge Cunningham said a darker purpose than good administration informed his work in the criminal justice system. Declaration of Amanda Tackett, ¶ 5 (Exhibit 17). 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 'n****rs,' Jews, 'we****ks,' and Catholics." *Id.* at ¶ 7. McKinney confirmed these sentiments. *See* Exh. 9, McKinney Decl. ¶ 10 (Cunningham said "he wanted to run for office so that he could save Dallas from 'n****rs,' 'we****ks,' Jews, and dirty Catholics"). Judge Cunningham made this statement in his campaign office. Exh. 43, ¶ 3. He chose other private moments and locations to express racist views. *Id.*, ¶¶ 4, 7.

63. Cunningham also said of his prospective role as Criminal District Attorney, "My job is to prevent n****rs from running wild again." Exh. 17, Tackett Decl. ¶ 13.

64. Dallas District Attorney Henry Wade's office had become publicly notorious for its institutional practice of discrimination in jury selection. Before Cunningham expressed admiration for Wade's "style of justice," the Supreme Court had 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).

65. 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. The statements Tackett and McKinney heard Judge Cunningham make indicate he held views that were consistent with these instructions to prosecutors to illegally exclude people from juries.

66. McKinney and Tackett were not alone in observing Judge Cunningham's affinity with the illegal discriminatory practices of Mr. Wade's office. 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).

67. As a Dallas prosecutor, Cunningham intentionally removed all black prospective jurors during jury selection for a 1992 murder trial. *Id.* Judge Cunningham acknowledged what he had done, but he defended his strikes by claiming the prospective jurors' Democratic party affiliation, not their race, triggered actions. *Id.*

68. During the campaign, Judge Cunningham continued to tout his role in sentencing the Texas Seven defendants to death. One of his campaign advertisements described how Judge Cunningham engaged with the escapees by "look[ing] each of the Texas 7 in the eye when he sentenced them to death." Exh.

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

69. 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.

70. Likewise, Tackett personally heard Cunningham refer to Mexicans as "we****ks," Catholics as "idol-worshippers," Jews as "dirty," and African-Americans as "n****rs." *Id.* ¶ 9.

71. Like McKinney, Tackett heard Judge Cunningham discuss the Texas Seven cases using racial and religious epithets.

72. At a Lakewood campaign event, Tackett recalls hearing Cunningham refer to Halprin as "the Jew" and others in the Texas Seven as "we****ks." *Id.* ¶ 15. Cunningham "then launched into his campaign speech about immigration and the importance of White people in the Dallas community." *Id.*; Exh. 43, ¶ 4.

73. Discussing criminal cases in Dallas, Judge Cunningham would use the phrase "T.N.D."—that is, "typical n****r 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 n****r doing what n****rs do." There was a more extreme connotation when a White was assaulted or killed by a Black.

Id. ¶ 11.

74. 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 'n****rs.'" *Id.* ¶ 13.

75. 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.*

76. 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.

77. 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.

78. Cunningham referred to Democratic nominee and eventual Dallas County District Attorney Craig Watkins as "n****r Watkins." *Id.* ¶ 19.

79. Judge Cunningham put on what he called his "n****r tie" when going to a campaign event at a charitable foundation run by African-Americans. *Id.* ¶14.

80. 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.

81. Judge Cunningham lost the Republican primary for District Attorney.

82. Between 2006 and 2018, Judge Cunningham did not seek elected office, but he continued to communicate racist and anti-Semitic views. 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. Exh. 17, ¶ 21.

83. 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, ¶ 14; Exh. 17, ¶ 21.

84. Tackett recalls Cunningham instructing his daughter to break up with "that Jew boy" when referring to her then-boyfriend. Exh. 17, ¶ 21.

85. That Jewish young man, Michael Samuels, confirmed the incident. *See* Declaration of Michael Samuels (Exhibit 19).

86. Samuels confirmed that he dated Cunningham's daughter Suzy for about two and a half years. He tried to meet Cunningham several times, but Cunningham "never made an effort to meet me." *Id.* ¶ 2. Suzy explained to him that her father was "very opinionated." *Id.* Eventually, 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 told him "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

him. *Id.* ¶ 3. Samuels's uncle posted on Facebook about the incident and relayed the same information to McKinney. *Id.* ¶ 14.

87. In 2018, Vic Cunningham again sought office, this time as a county commissioner. He presented himself as "Judge Cunningham," reminded the public that he had "presided over the 'Texas 7' capital murder death penalty trials," and bragged that he "has put more criminals on Death Row than almost any judge in the nation." The slogan Cunningham chose—"You Know Judge Vic (Ret.)"—shows he wanted people to be certain that the Cunningham they saw campaigning in 2018 was the same person they voted for as a district judge. *See* "You Know Judge Vic (Ret.)," Judge Vic for Commissioner, http://judgevicforcommissioner.com/about/ (cached May 23, 2018) (Exhibit 20).[5]

88. Cunningham made it to a run-off election for the Republican nomination. Less than one week before the run-off, the *Dallas Morning News* printed 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 (Exhibit 21).

89. 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.*

[5] The website has since been taken down.

90. Cunningham acknowledged that he had created a living trust for his children that withheld distributions from any child who chose to marry a nonwhite, non-Christian person.

91. Cunningham explained he was motivated by "my faith of being a Christian"; he said he "wanted to support my faith" and "traditional family values." *Id.*

92. Beyond exposing Cunningham's creation of an anti-miscegenation trust 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.*

93. 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.*

94. 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 [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.*

95. When asked about his use of the word "n****r," rather than proffering an unequivocal denial, "Cunningham paused for nine seconds . . . and asked if the question referred to using the word in court." *Id.* When told the question referred to use in everyday life, "he then said no." *Id.* This Court, having viewed Cunningham's delay and demeanor, and having considered the uncontested statements of Tackett, McKinney, and Sanders, finds Cunningham's denial is not credible.

96. 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*.

97. Additionally, Bill Cunningham confirmed that Vic called him "[N-word] Bill" his entire life. *Id.*

98. Moreover, Cunningham's son revealed in a text message 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.

99. 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.* Again, having considered Cunningham's demeanor in the video, and the totality of the evidence presented in this case, this Court finds Cunningham's denials are not credible.

100. The *Dallas Morning News* story was shared widely and garnered national attention. It provoked responses on social media, including a tweet from longtime Lakewood resident Kyle Raines who wrote that he heard Judge Cunningham say the N-word when the judge "used it very malevolently against a black friend of mine." Exh. 36.

101. The *Dallas Morning News* editorial page did not find Cunningham's denials credible, either. The paper retracted their endorsement of Cunningham after his interview. Editorial, *We withdraw Vickers Cunningham recommendation in GOP runoff for Dallas County Commissioners Court Precinct 2*, Dallas Morning News, May 19, 2018 (Exhibit 23).

102. Similarly, 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).

103. 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).

104. In it, Cunningham 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.*

105. Cunningham categorically denied ever using the word "n****r," attacked his brother's motives, and pointed out that Tackett's story was "without collaboration [sic: corroboration]." *Id.* This Court has been presented with corroboration of Tackett's statements and finds Tackett credible and Cunningham not credible in his denials.

106. 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).

Context of Judge Cunningham's Anti-Semitic Statements and Actions

107. Although the credible accounts of Judge Cunningham speaking and acting with anti-Semitic bias are sufficient to establish that his presiding over Halprin's trial made that trial fundamentally unfair, Halprin and amici supporting him have presented evidence and argument that places Cunningham's statements in the context of anti-Semitism historically, and in Dallas County.

108. Halprin presented the report of Bryan Stone, 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).

109. Professor Stone explains that the term "*the* Jew," as Judge Cunningham used it, is pejorative. 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." Exh. 28 at 18. This suggests to the listener that "the individual has no qualities other 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.*

110. 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, 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, ¶ 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 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.

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

112. 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, ¶ 9. Judge Cunningham also stated that Jews were "dirty." These are common anti-Semitic tropes. Professor Stone explains that although the "dirty" trope is "ancient," Exh. 27 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").

113. 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. "[A

> Klansman] 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 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)).

114. Judge Cunningham's statements and actions reflect lifelong prejudices and beliefs in stereotypes about Jews that are identical to those cited as motivations for discrimination against Jews for centuries, and that were used to motivate and rationalize the mass murders of Jews in Europe in the Twentieth Century.

115. The evidence before this Court shows it is far more likely that Judge Cunningham held deep-seated animosity and prejudice toward Jewish people, that he acquired this animosity before Halprin's trial, and that he used anti-Semitic slurs when referring to Halprin because he identified Halprin as a Jew, and not because of evidence presented at trial about Halprin's crimes. 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, ¶ 5 ("always been like this"), ¶ 8 (by the age of thirty), ¶ 16 (calling brother "n****r Bill" as long as she can remember). And his brother Bill says Judge Cunningham has been using the word "n****r" to mock him "his entire life." Exh. 21, Martin, *White, Straight, and Christian*.

116. Judge Cunningham's expression of anti-Semitic tropes, his reference to attorney Barry Scheck as a "filthy Jew," his refusal to meet his daughter's Jewish

boyfriend, and his use of financial incentives to deter his adult children from marrying Jews cannot be explained based on what he learned about Halprin during the trial.

CONCLUSIONS OF LAW

1. Halprin has raised a claim of judicial bias, alleging that his trial judge, Vickers Cunningham, was biased against him because Halprin is Jewish. Halprin asserts that this violated due process, equal protection, and his right to the free exercise of religion.

2. The United States Constitution forbids the participation of a judge in a criminal trial who harbors an actual bias or an objectively intolerable risk of bias. 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.

3. A violation of the right to a fair trial before an impartial judge constitutes a structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial itself. *See Tumey v. Ohio*, 273 U.S. 510, 535 (1927); *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1902 (2016); *see also* Appl. 31, Resp. 13.

4. Whenever a structural defect "cause[d] fundamental unfairness, *either* to the defendant in the specific case *or* by pervasive undermining of the systemic requirements of a fair and open judicial process," prejudice is presumed, and the conviction must be set aside. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911

(2017) (emphasis added). The presence of a biased judge is such a structural defect.

5. 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)).

6. The Due Process Clause clearly requires a fair trial, "before a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Bracy*, 520 U.S. at 904-05 (citations omitted).

7. "Actual bias is 'bias in fact'—the existence of a state of mind that leads to an inference that the person will not act with entire impartiality." *United States v. Torres*, 128 F.3d 38, 43 (2d Cir. 1997) (citing *United States v. Wood*, 299 U.S. 123, 133 (1936), and discussing "actual bias" in the context of jurors).

8. However, 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 . . . which might lead him not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." *Tumey*, 273 U.S. at 532.

9. Accordingly, 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) (per curiam); *Williams*, 136 S. Ct. at 1905 ("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)).

10. The Supreme Court has explained that there are circumstances, aside from actual bias, which, as an objective matter, may require recusal under the due process clause. *See Caperton*, 556 U.S. at 877. The Supreme Court has described those circumstances as ones "in which experience teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable." *Id.* (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)) (internal quotation omitted).

11. The Supreme Court has stated that there are "various situations" where the probability of actual bias on the part of the judge "is too high to be constitutionally tolerable." *Withrow*, 421 U.S. at 47.

12. The Court has found the probability of actual bias was too high in various situations. For example, the risk was held to be constitutionally intolerable where "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," *Caperton*, 556 U.S. at 884; and when the adjudicator "has been the target of

personal abuse or criticism from the party before him." *Withrow*, 421 U.S. at 47. The Court also found an unconstitutional risk where the adjudicator took on the dual role of investigator and adjudicator. *Murchison*, 349 U.S. at 139.

13. The State argues that the Constitution's prohibition on judges presiding over cases in which there is an intolerable risk of bias "applies *only* to the narrow classes of cases" in which the Supreme Court has already decided the risk was intolerable. Resp. 16 (citing *Bigby v. Dretke*, 402 F.3d 551, 559 (5th Cir. 2005)) (emphasis added). Neither the Supreme Court's cases nor the Fifth Circuit's non-binding decision in *Bigby* supports the State's position. In *Bigby*, the Fifth Circuit correctly "note[d]" that the Supreme Court has "consistently enforced the basic right to due process and *found* that decision makers are constitutionally unacceptable" in the three identified circumstances. 402 F.3d at 558-59 (emphasis added). But *Bigby* cites no language in the Supreme Court's cases—and this Court has found no such language—to suggest that by finding an intolerable risk in those circumstances the Court precluded the same finding in a case of racial or anti-Semitic bias. On the contrary, the Fifth Circuit has recognized that "language in some Supreme Court opinions implies that there may be presumptive bias when a trial judge appears to be biased in situations other than those listed above." *Richardson v. Quarterman*, 537 F.3d 466, 475 (5th Cir. 2008).

14. The Supreme Court has held that the test is whether the "situation is one 'which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'" *Aetna Life Ins. Co. v. Lavoie*, 475

U.S. 813, 822 (1986) (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)). The repeated use of that language, including the general term "situation," in cases involving a variety of circumstances, indicate the State is reading something into the cases that is not there.

15. Contrary to the State's argument that Supreme Court law immunizes racial and anti-Semitic bias from constitutional scrutiny, the Supreme Court has said its precedents require the court to ask "whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable." *Rippo*, 137 S. Ct. at 907.

16. The State's argument goes against the "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). If this Court were to accept the State's argument, it would find that the Constitution forbids a judge from presiding over a case in which he could receive $12.00 if he convicts the defendant, *Tumey*, 273 U.S. at 531-32, but permits a judge to preside over a capital case despite the judge thinking of the defendant as a "goddamn k*k*." Because the constitutional imperative 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, this Court rejects the State's argument.

17. As the CCA observed in referring Halprin's case to this Court, in addition to his Due Process Clause arguments, he relies upon the First

Amendment.[6] The First and Fourteenth Amendments protect capital defendants from an adjudication based on protected ideas or beliefs that played no role in his criminal conduct. *See Dawson v. Delaware*, 503 U.S. 159, 166-167 (1992). But "[t]he 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).

18. Judge Cunningham's decision to preside over the capital murder trial of a man he viewed as a "goddamn k*k*" and "fucking Jew," clearly denigrated Halprin as a religious minority.

19. 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.*, 508 U.S. at 540).

20. Judge Cunningham's decision to preside over Halprin's trial despite his hostility towards Halprin as a Jew manifested governmental hostility towards

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[6] The Court notes that the State's Response contains no argument regarding Halprin's First Amendment theory.

Halprin based on his religion, and violated the neutrality the Constitution demands of judges.

21. The Equal Protection Clause, on which Halprin also relies, provides yet another mandate to root out religious, racial, and ethnic prejudice. 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). The Supreme Court's observation that racial bias differs in kind from other forms of bias like a pro-defendant bias or a relationship to a witness, *id.*, further undermines the State's arguments.

22. Racial bias is structural error because it is "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Id.* For this reason, the Supreme Court mandated a constitutional exception to a well-established 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. The State would have this Court reach the opposite conclusion, that the Constitution creates an exception *for*, not *against*, ethnic bias.

23. Finally, the Eighth Amendment demands especially stringent review of a judge's impartiality in a death-penalty trial. *See In re Al-Nashiri,* 921 F.3d 224, 231 (D.C. Cir. 2019) ("in no proceeding is the need for an impartial judge more acute than one that may end in death"); *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.").

24. Capital cases raise the greatest possible risk that a judge's "lightest word or intimation [could be] received [by jurors] with deference and may prove controlling." *Starr v. United States*, 153 U.S. 614, 626 (1894).

25. The State argues this Court can or must ignore Judge Cunningham's expressions of anti-Semitic bias against Halprin unless the trial transcript evidences bias. Resp. 17; *id.* at 24; *id.* at 33. But in *Norris*, a case the State relies on, the court explained that 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)).

26. The State contradicts itself when it concedes Halprin's claim is one of "structural error, not subject to harmless error analysis." Writ Hr'g, 1 RR 19. As the Supreme Court has explained, structural error means there is a conclusive presumption that "[t]he 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).

27. The State also contradicts itself when it argues this Court is limited to the facts of the Supreme Court decisions when deciding what situations create an intolerable risk of bias, but then argues this Court must go beyond the facts and reasoning of those cases and examine the record for evidence that the judge's bias affected the proceedings. In each of the cases in which the Supreme Court found an intolerable risk of bias and vacated a judgment, the Court did not point to evidence in the record that the bias had an actual impact. *See Williams*, 136 S. Ct. at 1906-07 (Constitution required recusal solely because "a judge had a direct, personal role in the defendant's prosecution"); *Caperton*, 556 U.S. at 884; *Murchison*, 349 U.S. at 137; *Tumey*, 273 U.S. at 532-34; *see also Bracy*, 520 U.S. at 905, 909 (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 case).

Application of Law to Facts

28. Judge Vickers Cunningham possessed anti-Semitic prejudice against Halprin which violated Halprin's constitutional right to a trial in a fair tribunal equal protection, and free exercise of religion.

29. At the time of trial, Judge Cunningham possessed an actual bias against Halprin, because of Halprin's religious faith.[7]

[7] The State contends that Halprin "does not ground his claim for relief on the legal basis of actual basis." Resp. 27. This is not correct. It is clear from Halprin's

30. Due to the nature of anti-Semitic prejudices, the hatred of Jews as a people has 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 v. Colorado*, 137 S. Ct. 855 863 (2017). Judge Cunningham's statements about Jews in general, and the similar ways in which he spoke about Halprin as a Jew and other defendants who were Black or Latino, show that he was prejudiced against Halprin because he is a member of the Jewish people.

31. Judge Cunningham's strongly held and lifelong anti-Semitic bias was more than a "temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused." *Tumey*, 273 U.S. at 532. Even if Judge Cunningham were not actually biased against Halprin because of

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application that he is alleging that Cunningham possessed an actual bias against him because of Halprin's Jewish religion. *See* Appl. 29 (noting that the Constitution forbids the participation of a judge in a criminal trial who harbors "an actual bias" or an intolerable risk of bias); Appl. 32 ("The judge's bias was more direct and more pernicious than in cases where the Supreme Court found a violation of due process."); Appl. 38 ("The statements 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 'goddam k*k*.'").

In any event, the uncontested factual allegations Halprin presents are sufficient to establish an "actual bias." The State also seems to recognize the fragility of its contention, as it argues for several pages that Cunningham did not harbor an "actual bias" against Halprin. Resp. 27-31. *See also* Writ Hr'g, 1 RR 21 (State arguing Cunningham's anti-Semitic slurs "are not enough to support the inference that applicant is asking this Court to draw, that Cunningham, therefore, harbored an actual bias against Halprin at the time of trial").

the latter's Jewish identity, the judge's statements about saving Dallas from Jews, his statements subscribing to anti-Semitism stereotypes and tropes, his use of anti-Semitic slurs when referring to Halprin, and his use of anti-Latino slurs when referring to his codefendants, show that religious and ethnic bigotry provided more than enough temptation for him not to hold the balance nice, clear, and true between the State and Halprin.

32. According to two independent sources, Vic Cunningham referred to Halprin using anti-Semitic epithets when discussing his case. *See* Exh. 9, McKinney Decl. ¶ 7 (calling Halprin "fucking Jew"); *id.* at ¶ 13 (calling Halprin "that fuckin' Jew" and "goddamn k*k*"); Exh. 17, Tackett Decl. ¶ 15.

33. The State has not contested the credibility of the two sources, nor has it contested the veracity of the sources' statements.

34. The Court finds the two witnesses (McKinney and Tackett) to be credible, and credits the statements made in their declarations.

35. Although Cunningham was speaking after the trial, as McKinney observed, he was speaking about himself at the time of his judgeship: "Vic said any 'n****r' or 'we****k' walking into his courtroom knew they were going to go down." *Id.* ¶ 12.

36. When Cunningham 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.

37. McKinney remembers Cunningham saying, "From the we****k to the Jew, they knew they were going to die." *Id.* ¶ 12.

38. These statements disclose far more than an unmistakable bias against Jewish people generally. The statements evince a specific animus against Halprin because of his Jewish identity and indicate that Judge Cunningham took satisfaction from his role in Halprin's death sentence because, to Cunningham, Halprin was a "fucking Jew" and a "goddamn k*k*." *Cf. Moss v. Sanger*, 12 S.W. 619, 620 (Tex. 1889) ("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.").

39. Judge Cunningham's use of ethnic and religious slurs to describe Halprin and his Latino co-defendants is direct evidence of his racial and ethnic prejudice and specific animus against Halprin and his co-defendants.

40. Judge Cunningham's statements about Halprin "reflect classic anti-Semitism." Exh. 37, ADL Letter-Brief at 4.

41. "[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 "n****r" was direct evidence of employer's discrimination in Title VII case). The terms "the Jew," "fucking Jew," and "goddamn k*k*"—all of which Judge Cunningham called Halprin—are slurs.

42. The term "we****k" is another ethnic slur. *Ugalde v. W.A. McKenzie Asphalt Co.*, 990 F.2d 239, 243 (5th Cir. 1993); *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").

43. Judge Cunningham used the phrase "the Jew" in its pejorative, dehumanizing sense to signal that "the individual has no qualities other than those shared with the mass, that they are nothing more than the class they are a part of." Exh. 27 at 18. Judge Cunningham's use of the phrase reduced the individual to whom he referred to "their supposedly debased inherited traits." *Id.*

44. Judge Cunningham's use of "the Jew" as pejorative is an issue about which "there can be no doubt." Exh. 37, ADL Letter-Brief at 4. "The longstanding opprobrium that Jews faced throughout history caused the term 'Jew' … to accrue some anti-Semitic connotations." *Id.*

45. Judge Cunningham's use is consistent with his anti-Semitic mindset about Jewish people and his pattern of anti-Semitic epithets. For example, 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 well-known the anti-Semitic characters from literature and vulgar speech. Exh. 27 at 17.

46. "[T]he fact that [Judge Cunningham] sometimes attaches an overt negative qualifier to the term 'Jew' (as in his repeated use of the term 'fuckin' Jew') underscores the fact that the animus that he expresses toward the individual person whom he is addressing at the moment is deeply enmeshed with the negative attitude he already feels toward the group as a whole." Exh. 37 at 4.

47. Judge Cunningham also employed negative stereotypes and tropes about Jewish people. He professed that Jews "need to be shut down because they control all the money and all the power." Exh. 17 ¶ 9.

48. "[A]llegations of Jewish control of ... industries and entities are intended to support the conspiratorial, anti-Semitic contention that Jews are attempting to enrich and empower themselves and manipulate non-Jews to render the non-Jewish population submissive and powerless to stop a poorly-defined Jewish agenda." Exh. 37 at 5.

49. Judge Cunningham also stated that Jews were "dirty." Professor Stone explains that although the "dirty" trope is "ancient," Exh. 27 at 18, "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").

50. "Taken as a whole, [Judge Cunningham's] repeated references to 'fuckin' Jews' and 'k*k*s,' his use of the term 'Jew' as a pejorative, and his apparent belief in the anti-Semitic conspiracy theory that Jews control money lead to the conclusion that he is an anti-Semite. The fact that he called Halprin a 'goddamn k*k*' and a 'fuckin' Jew' after the trial ended only reinforces this conclusion." Exh. 37, ADL Letter-Brief at 5 (internal citation omitted).

51. History shows the specific anti-Semitic beliefs that Judge Cunningham expressed are sufficiently motivating that they led to centuries of official discrimination and murder, including the state-sponsored murders of 6,000,000 Jews in Europe during World War II.

52. Contrary to the State's contention that Halprin has failed to prove that Cunningham exhibited bias only before and after Halprin's trial, it is an inescapable inference, based on the cumulative weight of the evidence before the Court, notably evidence that the State does not contest, that Cunningham's ethnic and religious bias against Halprin must have existed at the time of Halprin's capital murder trial.

53. The uncontested and credible evidence presented through Halprin's witnesses detailing (and quoting) Cunningham's bias 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 Halprin's trial in June 2003 and 2006 when Amanda Tackett recalls hearing these statements. *See United States v. Norris*, No. 1:05-Cr479, 2014 WL 7369735 at *4 (N.D. Ga. Dec. 29, 2014)

("racial bias rarely sprouts full grown late in life; most individuals who harbored racial bias in 2010 also harbored bias in 2007").

54. The State's reliance on *Norris v. United States*, 820 F.3d 1261, 1266 (11th Cir. 2016), is misplaced. Resp. 43 ("Decisions that have faulted a judge for failure to recuse despite known biases have involved far more direct expressions of the judge's conscious inability to set personal bias aside."); *Id.* ("In *Norris*, the judge made specific, *pretrial* statements of personal bias and expressed his doubt whether he would be able to set aside those biases against Norris.") (emphasis added); *see also* Writ Hr'g, 1 RR 20.

55. First, the reported decision cited by the State makes no mention or suggestion that the statements were made "pretrial." Based on the factual recitation in the opinion, it is likely that the relevant statements were made *after* trial. *See Norris*, 820 F.3d at 1263-64. And, in fact, the lower court's decision confirms just that. *See United States v. Norris*, No. 1:05-Cr-479, 2014 WL 7369735 at *4 (N.D. Ga. Dec. 29, 2014). Thus, in *Norris*, where the Eleventh Circuit found that "Norris sufficiently alleged that [the judge] was actually biased against him," the judge made specific comments about the defendant three years *after trial*, just like here.

56. Similarly, the post-trial statements by the judge included statements that the judge specifically disliked the defendant because of his race. *See Norris*, 820 F.3d at 1265-66. Like *Norris*, Halprin has "identifie[d] specific statements that imply that [Cunningham] could not set aside his prejudice against him." *Id.* at 1266.

57. As 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, ¶ 5 ("always been like this"), ¶ 8 (by the age of thirty), ¶ 16 (calling brother "n****r Bill" as long as she can remember).

58. Judge Cunningham was aware of Halprin's Jewish identity no later than the beginning of trial. He certainly was aware that Halprin was 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). Therefore, Judge Cunningham was aware of Halprin's Jewish identity before he excluded the ranking document from the penalty phase.

59. Given his longstanding prejudices, Judge Cunningham must have been aware that he was required to recuse or disqualify himself on the basis of bias, or at least reveal his views so that the parties could decide whether to seek his removal. The failure to take any action that could result in his recusal is significant because Judge Cunningham's decision to preside over the case triggered "a presumption of honesty and integrity in those serving as adjudicators" that shielded his bias from scrutiny and correction. *Withrow*, 421 U.S. at 47. This allowed him to disguise the fact that he was biased and prejudiced against the very individuals whose lives were at stake. *See* Exh. 9, ¶ 9 (Judge Cunningham "took special pride in the death sentences because they included Latinos and a Jew"); *Id.* at ¶ 12 ("From the we****k to the Jew, they knew they were going to die.").

60. Justice Scalia wrote that 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). The Court has viewed the video of Judge Cunningham telling the *Dallas Morning News* that his religious beliefs motivated him to create the anti-miscegenation clause in the trust for his children.

61. 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.").

62. Although Judge Cunningham held anti-Semitic bias—the view that Jews are inferior and should be treated the same as Christians—at the time of Halprin's trial, he did not resign or reveal his views to the parties so that they could decide whether to seek his recusal or disqualification. Judge Cunningham's failure to reveal his views is consistent with Tackett's observation that he presented one version of himself in public and another in private. The failure to disclose his views also is consistent with a concern that revealing his views would result in his disqualification, *i.e.*, his concealment is consistent with a motivation to remain on the case. Judge Cunningham's subsequent, repeated uses of his service in the

Texas Seven trials to promote himself indicates he saw the value to himself and his ambitions of presiding over these highly publicized cases. Judge Cunningham's failure to disclose potentially disqualifying information about himself also is consistent with his professed desire to work in the criminal justice system so "that he could save Dallas from 'n****rs, we****ks, Jews, and dirty Catholics.'" Exh. 9, ¶ 10.

63. Taken together, the evidence shows Judge Cunningham was motivated to conceal his bias so that he could further his career and his goal of "saving" Dallas from people he believed were inferior. The evidence shows that Judge Cunningham's bias against people he deemed inferior or dangerous—including Jews—motivated him in his private life to use coercion to interfere in the lives of his children, including through the use of his legal training and knowledge to create an irrevocable trust, and motivated him to seek public office in the criminal justice system, first as a prosecutor, then as a judge, and then in his campaign to become the Criminal District Attorney of Dallas.

64. In light of all the evidence, this Court finds both that Judge Cunningham harbored actual, subjective bias again Halprin because Halprin is a Jew, and that Judge Cunningham's anti-Semitic prejudices created an objectively intolerable risk of bias.

65. The record provides no support for the State's assertion that Judge Cunningham's post-trial anti-Semitic statements were "well-deserved" because, by then, Halprin "'had been shown to be a thoroughly reprehensible person'" based

on the facts adduced at trial. Resp. 29 (quoting *Liteky v. United States*, 510 U.S. 540, 551 (1994)). The Court rejects the State's contention that the use of anti-Semitic slurs "was understandable" in light of the evidence presented at trial. Writ Hr'g, 1 RR 21 (State arguing Cunningham's use of anti-Semitic slurs after trial "was understandable").

66. Cunningham's statements were not that Halprin was a "cop killer" or "escaped convict murderer"; they were that he was a "fucking Jew," and a "goddamn k*k*." Judge Cunningham's hostility toward Halprin was based on his Jewish identity rather than his actions. Whatever *else* he may have felt about Halprin and his co-defendants, Judge Cunningham's use of religious and ethnic slurs reflect his belief that Halprin and his co-defendants were reprehensible because of their ethnicities and religious beliefs.

67. Further, as noted above, the evidence in Halprin's trial cannot explain why Judge Cunningham called Barry Scheck a "filthy Jew," why he objected to his daughter dating another Jewish man, why he dressed himself as a "Jew banker," and why he said he wanted to "save Dallas" from other Jews.

68. Accepting the State's arguments, or rejecting Halprin's claim for other reasons despite the overwhelming evidence of bias, threatens the public's confidence in the criminal justice system. Exh. 37 at 5.

69. As the Anti-Defamation League said in a brief Halprin filed with this Court, "Not only is having a fair and unbiased judge critical to the protection of a defendant's fundamental constitutional rights, it is essential to maintaining public

confidence in the criminal justice system as a whole."18 Exh. 37, ADL Letter-Brief at 5; *see also Ex parte Thuesen*, 546 S.W.3d 145, 151 (Tex. Crim. App. 2017) ("The manner in which our judicial system handles the recusal of judges affects public confidence in the judiciary, as it goes to the very heart of the promise of impartiality.") (internal quotation marks and citation omitted).

70. Judge Cunningham's bias towards Halprin not only harmed him, but it undermined the public's confidence that criminal justice has been—and will be—dispensed impartially. *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." (with alterations)); *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"). "Bigotry, even masked with code words, eats at the ties that make us a civil community. It divides and diminishes us as a people. We must reject it at all costs" . . . . Staff Editorial, "The Choice of Our Lives: Edwards for Governor," The New Orleans Times-Picayune, Nov. 10, 1991 (setting out case against gubernatorial candidacy of notorious former Grand Wizard of the Ku Klux Klan and neo-nazi, David Duke).

71. There could be nothing more offensive to constitutional commitments to racial and religious equality in the administration of the criminal law than to conclude that a judge's persistent use of ethnic and religious slurs to refer to defendants in a capital case represents less of a risk of bias than the professional or financial considerations at issue in *Tumey*, *Caperton*, and *Williams*.

72. The Supreme Court instructs that the assessment of constitutional risk must be made "'under a realistic appraisal of psychological tendencies and human weaknesses.'" *Caperton*, 556 U.S. at 883 (quoting *Withrow*, 421 U.S. at 47). Because "racial bias rarely sprouts full grown late in life," *Norris*, 2014 WL 7369735 at *4, and the evidence shows Judge Cunningham held anti-Semitic bias long before Halprin's trial, "experience teaches that the probability of actual bias on the part of [Judge Cunningham] [wa]s too high to be constitutionally tolerable." *Caperton*, 556 U.S. at 872.

73. Supreme Court precedent requires this Court to ask the question: "whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable." *Rippo*, 137 S. Ct. at 907. Here, the answer is "yes."

74. Halprin's right to a fair proceeding has been violated. A new fair trial is the only remedy.

WRIT NO. W-01-00327-T (B)

EX PARTE	**§**	**IN THE DISTRICT COURT**
RANDY HALPRIN	**§**	**283RD JUDICIAL DISTRICT**
APPPLICANT	**§**	**DALLAS COUNTY, TEXAS**

ORDER

ON THIS DATE came on to be heard Applicant's Application for Writ of Habeas Corpus. After considering Applicant's subsequent application for writ of habeas corpus, the State's answer, the record before the Court, all of the evidence presented in the case, and the argument of the parties, the Court is of the opinion that the motion should be granted. Based on the foregoing findings, this Court recommends that the Texas Court of Criminal Appeals grant relief accordingly.

SIGNED this 11th day of October, 2021.

Judge Lela Lawrence Mays

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JUDGE PRESIDING