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 ON SECOND REMAND

Presently pending before this Court is Applicant's Subsequent Habeas Application for a Writ of Habeas Corpus, which the Court of Criminal Appeals remanded to this Court for additional consideration and findings.

Consistent with the original remand order by the Court of Criminal Appeals which instructed the District Court to hold an evidentiary hearing, both Applicant and the State were given an opportunity to present witnesses and evidence.

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.

Having considered the entire record and the applicable legal authorities pursuant to Article 11.071 of the Texas Code of Criminal Procedure, the Court agrees with counsel for both Applicant and the State that Applicant's constitutional rights were violated. Accordingly, this Court finds that habeas relief should be granted to Applicant.

PROCEDURAL HISTORY

Applicant Randy Ethan 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. 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).

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

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

In late 2005, Judge Cunningham resigned his judicial seat to run for Dallas County District Attorney. After two changes of presiding judges, 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. The CCA then adopted the trial court's findings and conclusions and denied relief on March 20, 2013. *Ex parte Halprin*, Nos. WR-77,175-0104, 2013 WL 1150018 (Tex. Crim. App. Mar. 20, 2013).

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.). 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). 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).

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*. 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.

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. 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.

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. WR77,175-05, 2019 WL 4932930 (Tex. Crim. App. Oct. 4, 2019).

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.).

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.

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

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.

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. 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.

On June 14, 2021, this Court heard oral argument from both parties regarding Halprin's judicial bias claim. The Court accepted the parties' exhibits into evidence and took judicial notice of the Reporter's Record and exhibits of the trial of conviction. After proposed findings of fact and conclusions of law were filed by the parties, this Court found the facts as alleged, found an intolerably high risk of bias in the case. This Court recommended that the Court of Criminal Appeals grant relief.

On May 11, 2022, the Court of Criminal Appeals remanded the case a second time. The Court of Criminal Appeals found that a live hearing was necessary to consider testimony.

This Court held scheduling and status conferences on June 30 and July 18, 2022. Pursuant to this Court's order, on July 18, 2022, the parties filed lists of their witnesses and exhibits. On August 2, 2022, the State filed objections to Applicant's witnesses and exhibits. Applicant filed a response on August 10, 2022. On August 8, 2022, Applicant filed objections to the State's witnesses. On August 10, 2022, the Court held a hearing on the parties' objections.

On August 11, 2022, Applicant filed an unopposed motion to permit one of his expert witnesses to testify remotely via Zoom. On August 16, 2022, the Court held a brief hearing to announce its rulings on the parties' objections and to consider other matters.

On August 23, 2022, Applicant filed an unopposed motion for a protective order. Applicant sought to close the courtroom during the testimony of a witness and to seal that witness's testimony. Applicant averred that the witness risked retaliation if the witness's identity and information were made public.

On August 25, 2022, Applicant served a supplemental witness list. On August 28, 2022, Applicant filed a second motion for a protective order seeking to keep the identity of a second witness out of the public record.

At the start of the hearing on August 28, 2022, this Court heard argument and testimony relevant to Applicant's two motions for a protective order. Based on the argument and testimony, this Court found the interests of two witnesses in avoiding retaliation and exposure of intimate personal information outweighed the public interest in identifying those witnesses. Applicant testified that he understood and waived his interest in having those witnesses testify in public. Based on the foregoing, the Court ordered that the two witnesses would be identified by the pseudonyms CS and PC, and the transcripts of their testimony would be sealed.

On August 29, 30, and 31, 2022, a live evidentiary hearing was conducted. This Court took judicial notice of the Clerk's Record of the underlying conviction, the Reporter's Record of the trial, and accepted into evidence all the exhibits filed by

Applicant. Applicant called five fact witnesses and three expert witnesses. The State called three fact witnesses.

On September 27, 2022, the State submitted proposed findings of fact and conclusions of law that recommended that Applicant be granted relief under his subsequent application for a writ of habeas corpus. On October 12, 2022, Applicant submitted his proposed findings of fact and conclusions of law recommending that relief be granted.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court makes the following findings of fact and conclusions of law as directed by Article 11.071, § 8.

1. Applicant's first witness, CS, gave credible testimony about Judge Cunningham's longstanding racism. CS testified that Judge Cunningham is anti-Semitic, routinely referred to his younger brother, Bill Cunningham, as "Nigger Bill," and used the phrase "TND," or typical nigger deal to refer to cases involving Black defendants. CS's credible testimony left no doubt that Judge Cunningham lied when he denied to the *Dallas Morning News* that he had ever used the n-word. CS's credible testimony also countered the incredible testimony of Randall Isenberg that Judge Cunningham was not bigoted towards Jews or people who are not White.
2. Applicant's second witness, PC, gave credible testimony that Judge Cunningham used the n-word and other racial slurs like "jigaboo," and "sand nigger," prejudged Applicant's guilt and sentence, and improperly viewed his public office as a means to advance his racist ideas, personal interests, and political aspirations. PC's testimony

added to the evidence that Judge Cunningham falsely denied using the n-word and falsely claimed to be a fair-minded public servant.

3. Bill Cunningham, Judge Cunningham's younger brother, gave credible testimony about Judge Cunningham's personal interest in and desire to preside over the Texas 7 trials, Judge Cunningham's animus towards Applicant at the time of trial because he is a Jew, and Judge Cunningham's lifelong bigotry towards members of racial, ethnic, or religious groups different than his own. In particular, Mr. Cunningham's credible testimony established that Vickers Cunningham's anti-Semitism was fully formed by the time he was old enough to drive and that the elder Cunningham took pleasure in disparaging Jews and abusing people of color throughout his life.
4. Tammy McKinney gave credible testimony that Vickers Cunningham is a lifelong bigot who, after the trial, referred to Applicant as a "kike." Ms. McKinney's credible testimony added to the evidence that bigotry was a major feature of Vickers Cunningham's personality and his interactions with people before and after Applicant's trial.
5. Amanda Tackett gave credible testimony that Judge Cunningham repeatedly used antiSemitic slurs to refer to Applicant while Judge Cunningham was running for District Attorney in 2006. Ms. Tackett's credible testimony added to the evidence that Judge Cunningham viewed the Texas 7 trials as a means of advancing his political career and agenda which included asserting White supremacy over Blacks and Latinos in Dallas County.

6. Professor Bryan Stone gave credible testimony about the bigoted nature of Judge Cunningham's references to Jews. The Court accepted Professor Stone as an expert on the history of Jews in Texas. Professor Stone's credible testimony added to the evidence that Judge Cunningham was deeply anti-Semitic from childhood through his time on the bench until, at least, his 2006 campaign for District Attorney. Professor Stone added to the lay witness testimony that described Judge Cunningham's bigotry as unusually strident.
7. Professor Jonathan Judaken gave credible testimony that Judge Cunningham's antiSemitic views are deeply rooted in his own religious beliefs and political agenda. The Court accepted Professor Judaken as an expert on racism and anti-Semitism. Professor Judaken's credible testimony added to Judge Cunningham's own account of his anti-Black and antiJewish biases being rooted in a specific strain of Christian theology and explained that those beliefs are not only personal hatreds, but part of the political agenda known as White Christian Nationalism.
8. Professor Jeffrey Rachlinski has a Ph.D. in psychology and a J.D. from Stanford University. He teaches at the Cornell Law School and has spent twenty-three years studying cognitive bias in judicial decision-making. In that time, Dr. Rachlinski has studied hundreds of sitting judges, and has been invited to speak at 115 judicial conferences, including ten in the State of Texas. Without objection from the State, the Court accepted him as an expert in the field of cognitive bias in judicial decision-making. Dr. Rachlinski gave credible testimony that a judge who expressed the anti-Semitic bias that Judge Cunningham expressed, and who was not motivated to curb his biases, would

exhibit those biases in his judicial decision-making. Professor Rachlinski's credible testimony added to the evidence that Judge Cunningham's actual, subjective anti-Semitic bias was operating on his judicial decision-making during Applicant's trial and constituted a condition that rendered him constitutionally unfit under *Tumey* and *Ward* to preside over the capital trial of a Jewish defendant accused of murdering a White Dallas police officer.

9. The State presented testimony from Attorney Randall Isenberg that Judge Cunningham did not harbor anti-Semitic or racist views. Mr. Isenberg's testimony about Judge Cunningham and Bill Cunningham was not credible. His demeanor and manner of answering questions, especially those to which an objection had been made or sustained, demonstrated that he was intent upon defending his friend Vickers Cunningham and was not a reliable or objective source of information about the matters before this Court. On questioning from the Court, Mr. Isenberg revealed that his views are too close to Judge Cunningham's for his opinions to have objective value. However, he did vouch for the credibility of CS.

10. Attorney Edwin "Bubba" King gave credible testimony for the State that he did not see signs of Judge Cunningham's bias. But Mr. King also candidly acknowledged that he lacked the training or skills to reliably discern whether Judge Cunningham was acting out of bias. Mr. King also credibly testified that if he had been aware of the information presented to this Court, he would have moved to disqualify Judge Cunningham for bias. Mr. King's testimony had little probative value.

11. Brian Cook, a former court bailiff, gave credible testimony for the State that he did not observe bias from Judge Cunningham while he was on the bench. However, Mr. Cook also testified that he did not consider whether Judge Cunningham was making biased decisions and lacked the responsibility, training, or knowledge to identify signs of bias. Therefore, this Court finds Mr. Cook's testimony had no probative value.

12. As the State has conceded, Applicant presented sufficient credible direct evidence to establish that Judge Cunningham was biased against him at the time of trial based on Applicant's Jewish identity.

13. As the State has conceded, at the time of Applicant's trial, Judge Cunningham referred to the Texas 7 defendants he would try as "the Mexican, the queer, and the Jew."

14. Judge Cunningham's statement to his brother Bill referring to Applicant as "the Jew" in the Texas 7 case was made around the time Judge Cunningham was appointed to this Court.

15. Judge Cunningham's reference to Applicant as "the Jew" among the Texas 7 did not occur in isolation. Viewing Judge Cunningham's reference to Applicant as "the Jew" in isolation would be inconsistent with the overwhelming weight of the evidence that showed Vickers Cunningham had a lifelong habit of degrading people or asserting superiority over them by labeling them according to their race or ethnicity. The evidence does not permit an interpretation in which Judge Cunningham was innocently using "the Jew" to refer to Applicant because he forgot

Applicant's name, or to explain that he was not speaking about one of the other co-defendants, for example.

16. Although Dr. Stone explained that one could use "the Jew" in a way that is not derogatory or pejorative, an innocuous interpretation of Judge Cunningham's use of the phrase is inconsistent with the overwhelming weight of the evidence.

17. Applicant established through the credible testimony of Dr. Stone that a determination of whether Judge Cunningham's use of "the Jew" was innocuous or malicious must be made in the context the other terms he used at the same time, and at other times.

18. Judge Cunningham's use of "the Mexican, the queer, and the Jew," was one example of his lifelong habit of using race or membership in another group when referring to people. Numerous witnesses testified to this habit. *E.g.*, (CS testifying that Vickers Cunningham used "Nigger Bill" to refer to his brother Bill and to Bill's husband as "boy"); (PC testifying that Vickers Cunningham used racial slurs "almost all the time" over many years including "nigger," "sand nigger," and "jigaboo"); (Bill Cunningham testifying about his brother's "routine of racist, misogynist, anti-Semitic, bigoted comments"); (Tammy McKinney testifying that Vickers Cunningham used racial slurs "All the time" in adolescence and afterwards); (Amanda Tackett explaining that the use of racial slurs is "just how he talks. It's who he is.").

19. Bill Cunningham credibly described his brother Vickers's longstanding anti-Semitism and pejorative use of "the Jew," beginning with his use of "Jew" to refer

to Stanley Marcus. 20. The Cunninghams lived in the same neighborhood as Marcus who was a revered figure in Dallas in part because of his family's success in building the Neiman Marcus brand of department stores. Mr. Marcus was Jewish and was a major civil leader. He was "as widely admired as a person could be" in Dallas society, a "civic titan."

21. Vickers and Bill Cunningham delivered newspapers to Marcus's house. Bill testified that when Vickers was in high school, he taught the younger Bill how to remember a paper route by telling Bill to throw papers to some houses and skip others. Vickers would say, "throw two, skip two, throw one, for instance."

22. Despite Stanley Marcus's position in the Dallas community at the time, Vickers taught his younger brother to deliver a newspaper to him by saying "throw to Jew," rhyming it with "throw two" that he used for other neighbors.

23. Vickers explained his feelings about Jews to his younger brother by telling him that Jews "own the banking system, [and] hav[e] all the money."

24. Tammy McKinney credibly testified that she had known Vickers Cunningham since the day he was born. From her perspective, his expressions of anti-Semitism started "when he got into the legal system and was dealing with all kinds of people."

25. Judge Cunningham trusted Ms. McKinney. She babysat his children. When he became a judge, he asked Ms. McKinney to be his court coordinator because he believed she would protect him with her life.

26. While he was a judge, Ms. McKinney remembers her friend Vickers started speaking about "the GD Jews," meaning "goddamn Jews," and referring to "filthy Jews" and "fucking Jews."

27. The observations of Bill Cunningham and Tammy McKinney, independently and together with the context provided by Dr. Stone, demonstrate that long before Applicant's trial Vickers Cunningham used "the Jew" and other slurs when referring to Jews who had done nothing wrong, who had done nothing harmful to Vickers personally, and who, in one instance, was a pillar of the Dallas community.

28. The observations of Bill Cunningham and Tammy McKinney rebut the State's previous argument that Vickers Cunningham could have been spurred to use anti-Semitic language about Applicant after the trial because of the things Applicant did, as opposed to who he is. The Court finds that Vickers Cunningham's use of "the Jew" to refer to Applicant at the time of trial was an expression of anti-Semitic bias against Applicant, and not a reflection of negativity based on anything Applicant did or was accused of doing.

29. As Dr. Judaken testified, Judge Cunningham's use of "the Jew" to refer to Applicant showed he was "looking at an individual and seeing a category," and "attributing qualities … on the basis of that connection." In other words, Judge Cunningham's use of "the Jew" was an expression of bias; it was an expression of Judge Cunningham's view that Applicant deserved only to be identified and treated as a Jew, and not as an individual.

30. Dr. Rachlinski added other dimensions to the lay witness observations of Judge

Cunningham's anti-Semitic statements prior to and during the time of Applicant's trial. Dr. Rachlinski explained that research on people who are explicit about their biases, as Judge Cunningham was, shows they are conscious of their biases and embrace them.

31. Dr. Rachlinski primarily studies implicit biases—"associations or habits of mind that people have that … influence how they judge [other] people." When these studies look at people with explicit bias, those subjects "come out … on the extreme end of implicit bias" scales.

32. Dr. Rachlinski described extensive empirical evidence that a judge who has an implicit bias "built up over a lifetime" may be able to overcome that bias while on the bench but doing so would "take an enormous degree of effort and conscious thought." Changing such habits of mind "takes years of effort."

33. This Court agrees with Dr. Rachlinski that Judge Cunningham "is an individual that has expressed … a degree of animus towards multiple different ethnicities, but explicitly towards Jewish individuals." Dr. Rachlinski's "research suggests it's simply impossible" for that judge "to check [his] bias at the door."

34. This Court finds the overwhelming weight of the credible evidence supports the conclusion that Judge Cunningham did not have the desire or the interest in making the effort or taking the time to curb his anti-Semitic bias in his judicial decision-making between the time he called Applicant "the Jew" and his presiding over Applicant's trial.

35. As the State has conceded, Judge Cunningham's statement in November 2001 that he would "get them all the death penalty," referring to the upcoming trials of the Texas 7 co-defendants, is direct evidence of bias at the time of trial.

36. As the State has conceded, the contemporaneous statements that Judge Cunningham viewed the Texas 7 co-defendants as "the Mexican, the queer, and the Jew," and that he vowed to "get them all the death penalty," establishes that Judge Cunningham was actually, subjectively biased against Applicant at the time of trial because Applicant is Jewish.

37. Accordingly, this Court finds Applicant established by a preponderance of the evidence that Judge Vickers Cunningham was actually biased against him at the time of trial because Applicant is Jewish.

38. In addition to evidence of bias before and at the time of Applicant's trial, the Court received extensive credible testimony of anti-Semitic bias against Applicant and other Jews after the trial. The evidence of post-trial statements overwhelmingly supports the inference that Judge Cunningham harbored bias at the time of trial.

39. The testimony of PC, CS, Bill Cunningham, Tammy McKinney, and Amanda Tackett established that Judge Cunningham routinely, throughout his life, used racial or ethnic descriptors for people and that these terms were most often used in a derogatory or disparaging way. In the context of the evidence as a whole, Judge Cunningham's description of the Texas 7 defendants as "the Mexican, the queer, and the Jew" was an expression of disdain or contempt, at best.

40. In 2006, during Judge Cunningham's campaign for district attorney, Amanda Tackett told Judge Cunningham that she considered Stanley Marcus "wonderful." Judge Cunningham responded to Ms. Tackett by asking if "Stanley the Jew had Jewed [my] dad and [General Electric] down on the price of the light fixtures" that her father installed in the Neiman Marcus stores. In the presence of Ms. Tackett, he referred to Jews as "greedy, money hungry, money obsessed."

41. Judge Cunningham referred to Mr. Marcus's wife as the "Jewess."

42. Judge Cunningham referred to Applicant as "Jew Halprin" in Ms. Tackett's presence.

43. When talking with Ms. Tackett, Judge Cunningham referred to Applicant and his codefendants as "wetbacks, spicks," "white niggers and—and then there was Randy the Jew."

44. When Judge Cunningham received a campaign donation from a Jewish person, he would return to the campaign office where he "gleefully sa[id], well, look at this … greedy or filthy Jew writing me a check." He made such a comment about Mr. Isenberg.

45. Similarly, Judge Cunningham spoke of Barry Scheck, of the Innocence Project, as "Barry the Jew, the Jew Scheck," and described him as "a filthy Jew," "lying Jew," and "greedy Jew."

46. Ms. Tackett attended a social event at the home of Judge Cunningham's brother Greg. Judge Cunningham appeared in costume wearing "garters on his sleeves like the old west kind of thing, and a little visor on." Judge Cunningham was playing the role of

"banker" at the casino-themed event. He told Ms. Tackett that he was going to be the "greedy Jew banker for the day."

47. Ms. McKinney recalled learning the word "kike" from Judge Cunningham after the conclusion of the Texas 7 trials. She was attending a Super Bowl party at Greg Cunningham's house in Dallas in 2011. Judge Cunningham began talking about the Texas 7. Ms. McKinney thought she heard him say "Goddamn Tyke," referring to McKinney's sister, whose name is Tyke. When Ms. McKinney asked what her sister had to do with the Texas 7, Judge Cunningham explained that he said "kike." Judge Cunningham described the Texas 7 as "a lot of wetbacks … and a Jew."

48. CS credibly testified that Judge Cunningham harbored anti-Semitic bias in 2014.

49. CS and Bill Cunningham also credibly testified that Judge Cunningham used "TND," which stood for "typical nigger deal" to refer to cases involving black defendants.

50. Judge Cunningham did not single out Applicant's Jewish identity as the only member of the Texas 7 he referred to by ethnicity. At other times, Judge Cunningham used "wetback" to refer to Mexicans and "kike" to refer to Applicant. Applicant established through the testimony of Dr. Judaken that "the N-word is to anti-black racism what the term Kike is to anti-Jewish racism, what Wetback is to anti-Hispanic xenophobia." Dr. Judaken described these terms as "the single worst slurs that have emerged in—in the history of the traditions of besmirching these other groups."

51. Dr. Rachlinski testified that Judge Cunningham's use of these terms indicated he was "an extremely biased individual." It would be "extremely difficult, if not impossible,

to set aside that bias when thinking about all of the things that a trial judge has to do to manage a case."

52. The evidence shows Judge Cunningham would not exert the extreme effort necessary to curb his biases when he was on the bench. Judge Cunningham "used that language in order to denigrate and establish a power relationship" over other people, as when he used "Nigger Bill" to address his younger brother, or when he used "TND" to refer to cases involving Black defendants. Judge Cunningham used these phrases, as he used "the Jew" to refer to Applicant, to communicate his view that the litigants before him were merely doing what Cunningham expected of all members of their kind.

53. PC credibly illustrated Vickers Cunningham's disparaging references to litigants when PC testified that PC overheard him "boast[ing] … that he ripped off some 'N' word … and that's how he acquired the lake house" where he resided during one of the Texas 7 trials. This occurred in the early 1990s.

54. Amanda Tackett testified that TND did not refer only to the crime or case before Judge Cunningham but the process he would use to decide the case.

55. Judge Cunningham explained TND to mean that the person appearing before him in court "had done something throughout the course of their life that they deserved to be jailed for, so it might as well be him that convicted them," even if they were not guilty of the crime they were accused of committing.

56. Judge Cunningham did not limit TNDs to cases involving Black defendants. It could be used to describe any case involving a minority defendant.

57. Dr. Rachlinski explained that the process Judge Cunningham described as TND was the kind of quick, intuitive decision-making that is most likely to be affected by bias. Judge Cunningham was "apparently delighted" with his TND system, and there was no evidence of motivation to avoid bias in his rulings.

58. Just as he used TND to refer to cases involving Black defendants, the qualities that Judge Cunningham attributed to Jews were almost entirely negative. Applicant established through the credible testimony of Dr. Judaken that Judge Cunningham expressed "core stereotypes" of Jews including the "association of Jews and money, Jews' love of money, Jews and—and power."

59. Applicant established through the credible testimony of Dr. Judaken that Judge Cunningham's use of "the Jew" was not merely an expression of bias, but racist. Dr. Judaken explained that for a statement to be racist it must be both an expression of group identification, and that the expression must be used in a way that seeks to diminish or harm the person being described.

60. The evidence was overwhelming that Vickers Cunningham, throughout his life, has used racial or ethnic slurs to assert his superiority or dominance over other people. In addition to using "Nigger Bill" to assert his dominance over and superiority to his younger brother, he used "Jos-A" and "Jos-B" to assert his dominance and superiority over the Latino men he hired as day laborers in his sprinkler business. He expressed his sense of superiority over District Attorney Craig Watkins by calling him "Nigger Watkins."

61. Judge Cunningham used Applicant's Jewish identity as a reason to show disdain for him. For Judge Cunningham, what was important about Applicant and his co-defendants was not what they were accused of doing, but who they were: a Mexican, a "queer" and a Jew. As a judge with the power to influence the trials, Judge Cunningham's use of these terms to refer to the co-defendants was racist because it combined the attribution of group characteristics with the exercise of power over them.

62. Judge Cunningham's use of "the Jew" to refer to Applicant at the time of trial is consistent with his use of "TND" at the time of trial to describe the cases of Black defendants who appeared before him: both indicate a biased predisposition. Bill Cunningham credibly testified that at the time of Applicant's trial, when he would call Judge Cunningham and ask what his brother was doing, Judge Cunningham "would say something, like, locking n*****s up." If Bill asked his brother Vic what kind of case he was working on, Judge Cunningham would sometimes say, "'Oh, it's just a TND.'"

63. Judge Cunningham's use of TND was corroborated by other credible witnesses including CS. CS's demeanor and manner of testifying left this Court with no doubt that she testified honestly. CS had no motivation to lie and showed no signs of misremembering. On the contrary, the State's main witness, Randall Isenberg, testified that CS was an honest person.

64. Although the foregoing amounts to more than a preponderance of the evidence, other testimony from Dr. Judaken added to the weight of circumstantial evidence that Judge

Cunningham not only harbored anti-Semitic bias at the time of trial, but that he did not or could not curb the influence of that bias in his judicial decision-making during Applicant's proceedings. The first is Dr. Judaken's testimony about the relationship between Judge Cunningham's anti-Semitism and his religious beliefs. When the *Dallas Morning News* asked Judge Cunningham why he opposed interracial and interfaith marriages, his first response was that his beliefs as a Christian forbade it.

65. The evidence supports the inference that Vickers Cunningham received this view of Christian teaching from his childhood pastor who was an avowed segregationist. Bill Cunningham described his older brother as being "indoctrinated … in the fire and brimstone" and so "impressed by the dogma" of their childhood preacher, that he became the preacher's "follower."

66. Dr. Judaken testified about the line of Christian teaching into which Judge Cunningham was indoctrinated based on Cunningham's use of specific tropes and stereotypes about Jews. Judge Cunningham's statements to Amanda Tackett and others were "core stereotypes that have a long history" within the Christian school of thought that his childhood preacher represented.

67. Judge Cunningham's statement that his anti-miscegenation trust was motivated by his Christian faith, and his use of anti-Semitic tropes that have a long history in the Christian tradition he belongs to, add to the weight of evidence that he did not and could not exert sufficient effort on the bench to overcome the anti-Semitic bias he had before he took the bench.

68. The second connection Dr. Judaken made was between Judge Cunningham's use of racial and ethnic slurs and his stated political agenda. Judge Cunningham said that TND— a term he used while serving as a judge, referred to the idea that Blacks "couldn't stay out of trouble, they were running wild in the street, and they were guilty of something and they deserved to go to jail." Judge Cunningham told Amanda Tackett that he wanted to be district attorney in order to "bring back Henry Wade-style of justice, [meaning] he was gonna get the niggers and the wetbacks under control."

69. Dr. Judaken explained that Judge Cunningham's views of Jews, Latinos, and Blacks, and type of judicial process that was their due, was consistent with the political philosophy of White Christian Nationalism, except that in Judge Cunningham's case, Dallas County took the place of the nation.

70. Dr. Judaken explained that Judge Cunningham's White Christian Nationalism is a racist ideology because it has as a goal disadvantaging the individual members of the groups to which he is opposed.

71. Judge Cunningham's avowal of a White Christian Nationalist ideology adds to the weight of evidence that he was unable and unwilling to suppress his anti-Semitic bias while presiding over Applicant's capital murder trial.

72. Although the State conceded after the evidentiary hearing that Judge Cunningham was subjectively biased against Applicant at the time of trial, during the hearing, the State sought to counter the circumstantial evidence of bias with testimony that Judge Cunningham did not exhibit bias from the bench. As indicated above, that attempt

failed in two ways. Mr. Isenberg's testimony that Vickers Cunningham was not bigoted was not credible. In addition to Mr. Isenberg's motivation to protect his friend, he was uninformed about Judge Cunningham's undisputed expressions of bias against Blacks and Jews.

73. The State also tried to dispel the significance of Judge Cunningham's many antiSemitic statements and actions through Mr. Isenberg's testimony that Judge Cunningham behaved respectfully at a synagogue and during a Passover Seder. This testimony was unpersuasive. As Drs. Judaken and Rachlinski testified, it is not unusual for a bigoted person to single out an individual they like and treat that person differently than other people from the same group. The State's contention that Judge Cunningham was not antiSemitic because he behaved respectfully when he was a guest of Mr. Isenberg is against the overwhelming weight of the evidence presented to this Court, refuted by the expert psychological observations of Dr. Rachlinski, pales against the history Dr. Judaken testified to, and flies in the face of common-sense and experience.

74. The testimony of Mr. King and Mr. Cook about whether Judge Cunningham exhibited signs of bias from the bench had little to no probative value. Dr. Rachlinski testified persuasively that any reliable assessment of bias based on observations of a judge in court would require examining hundreds or thousands of decisions. Without sufficient data, any audit of the judge's decisions would lack the statistical power necessary to determine whether decisions were influenced by bias. In addition, a reliable survey of a judge's incourt decisions would use multiple "highly trained people" and a set of

objective criteria. The observers themselves must be screened for implicit bias to ensure they are accurately assessing the judge's decisions.

75. Neither Mr. King nor Mr. Cook claimed to have a sufficient factual basis for determining whether Judge Cunningham's rulings were influenced by bias. In any event, the State's theory was that if these witnesses did not see Judge Cunningham make what they perceived as biased decisions, he made no biased decisions. As Dr. Rachlinski observed, that argument is fallacious: the absence of evidence is not evidence of absence, particularly when the means of detecting the evidence are unreliable or, as in the case of Mr. Cook, no effort at detecting evidence is even being made.

76. This Court agrees with Dr. Judaken that the evidence shows that Judge Cunningham's "views about Jews, about Blacks, about Latinos, about Catholics were intrinsic to his worldview," and with Dr. Rachlinski that it would be virtually impossible for Judge Cunningham to set aside those biases during the trial of a Jew accused of killing a White Dallas police officer.

77. Whether considered individually, or cumulatively, the lay and expert testimony before this Court establishes by more than a preponderance of the evidence that Judge Vickers Cunningham harbored actual, subjective bias against Applicant at the time of Applicant's trial because Applicant is Jewish.

78. Applicant presented credible direct evidence that Judge Cunningham planned to ensure convictions and death sentences for Applicant and the other Texas 7 co-defendants in order to advance his personal interests.

79. Applicant's case, like those of his co-defendants, was assigned to this 283rd Judicial District Court in Dallas. At that time, Judge Molly Francis presided over this Court. Judge Francis presided over the trial of the leader of the escape, George Rivas, who received a death sentence in August 2001.

80. 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.

81. A month later, Governor Perry appointed Judge Vickers Cunningham to fill Judge Francis' seat on the 283rd District Court.

82. Judge Cunningham had coveted the appointment, as did his family, for the political advantages the Texas 7 cases could provide. Judge Cunningham knew that if he were appointed to this Court, his principal task would be overseeing the capital trials of the remaining Texas 7 co-defendants, including Applicant. The case had considerable notoriety.

83. When Judge Cunningham spoke to his brother Bill about the potential appointment, he "seemed to be very pumped up about" handling the Texas 7 cases.

84. In 2002, Judge Cunningham told a local magazine that he "wanted the challenge" of presiding over these very high-profile and complex capital cases.

85. The appointment to handle the cases was seen as boost for the entire family's political aspirations. The Cunningham family was active in Republican party politics in Dallas County. Judge Cunningham's father had run for a seat in the legislature but bowed out

in favor of a candidate with more notoriety. His mother was active in Republican women's clubs. His brother Bill worked on Judge Cunningham's campaign, his father's campaign, and the campaign of the man who won the seat his father ran for. The parents also played an active role in Judge Cunningham's campaigns. The law firm that employed Judge Cunningham's younger brother Ross donated office space to Judge Cunningham's 2006 campaign for district attorney.

86. During the month between Judge Francis's appointment to the Court of Appeals and Judge Cunningham's appointment to this Court, the Cunninghams spoke with each other about their political connections and played "the parlour [*sic*] game of politics of … who's talking to who and who knows what."

87. The family exhibited delight over the appointment afterwards. During a Thanksgiving gathering at Judge Cunningham's house in 2001—before the start of any of the Texas 7 trials that Judge Cunningham presided over—"[t]here was a lot of excitement" about the appointment. Talk of the upcoming trials dominated the conversation. Judge Cunningham's brothers joked with him about it, "going between bragging … and teasing."

88. During that gathering, Judge Cunningham approached a younger family member and asked, "'do you know what I'm doing?'" Judge Cunningham bragged that his handling of the Texas 7 trials was significant "'because I'm going to get them all the death penalty, even the driver because he's guilty.'"

89. The driver of the car used in the Oshman's robbery was Patrick Murphy. He was the last of the Texas 7 to be tried.

90. PC's account of Judge Cunningham's prejudgment was entirely credible. PC testified with solemnity. There was no hesitation or other sign of dissembling in PC's testimony. PC remembered details about the Thanksgiving gathering including that the walls in Judge Cunningham's dining room had been painted since the last time PC was there. The State did not cross-examine PC or present any evidence to contradict PC or to suggest that PC misremembered the event or had a motive to lie.

91. The credible testimony of Judge Cunningham's family members establishes that Judge Cunningham was determined "to get … the death penalty" for Applicant in part because he viewed Applicant as merely a Jew and in part because getting a death sentence for Applicant and his co-defendants would be politically advantageous for Judge Cunningham.

92. PC's credible testimony about Judge Cunningham declaring that the significance of his appointment was in "get[ting] them all the death penalty," is corroborated by Judge Cunningham's letter of resignation. In 2005, Judge Cunningham resigned from the bench to run for district attorney of Dallas County. His resignation letter to Governor Perry states that he was "honored to … insure [*sic*] that the guilty were punished."

93. The fact that Judge Cunningham believed that ensuring death sentences for the Texas 7 was important to his political interests is further corroborated by the testimony of Bill Cunningham, Amanda Tackett, and Tammy McKinney.

94. Shortly after writing his resignation letter, Judge Cunningham told Amanda Tackett that "the State appointed him to get convictions, and he got convictions."

95. Bill Cunningham testified that, for Judge Cunningham, becoming the district attorney for Dallas County "was the obvious goal all along."

96. That testimony is consistent with Judge Cunningham's statements of admiration for Henry Wade, an admiration that began in his childhood, and with his statement to Amanda Tackett that he was "a big fan" of former Dallas County District Attorney Henry Wade because "when Henry Wade was District Attorney … all the niggers and the wetbacks knew their place, they weren't out running the streets." Judge Cunningham stated that "when he was district attorney, he was gonna bring back Henry Wade-style of justice and he was gonna get the niggers and the wetbacks under control."

97. Ms. Tackett testified that Judge Cunningham told her that he was the one "that should get credit" for the outcomes, not the prosecutor who tried the cases, Toby Shook, who was Judge Cunningham's opponent in the Republican primary.

98. Ms. Tackett observed that "the convictions of the Texas 7" were how Judge Cunningham identified himself, and that he saw them as his "greatest achievement in life." Judge Cunningham viewed his role in the Texas 7 trials as "a springboard" into a "bigger political future."

99. Ms. Tackett based her testimony on her personal observations of Judge Cunningham during his campaign. She described how Judge Cunningham would "brag" to attendees at campaign events about how he "looked each [of the Texas 7 defendants] in the eye as I sentenced them to die."

100. Judge Cunningham took so much pleasure in this claim that it became his "tagline" for his campaign commercial. Ms. Tackett observed Judge Cunningham in his office preparing to shoot the ad by combing his moustache and rehearsing the line, "I looked each man in the eye as I sentenced him to die."

101. Judge Cunningham's view that the purpose of the criminal courts is to mete out punishments, as opposed to providing a fair adjudication of guilt or innocence, is further corroborated by Ms. Tackett's testimony about his reaction to news that District Attorney Craig Watkins was agreeing to the release of wrongly convicted inmates who had been exonerated by DNA evidence. Judge Cunningham said he was "sure glad that there's no blowback on me" from those releases. When Tackett asked why Judge Cunningham thought there would be "blowback" from the release of innocent men, Judge Cunningham responded with the non sequitur that he was "glad that there's no—you know, from Nigger Watkins, you know, that all those niggers think that's great."

102. Similar to Ms. Tackett, Ms. McKinney observed Judge Cunningham in social settings in which he would talk about the Texas 7 trials as "his claim to fame." Judge Cunningham would say, "'Every one of them knew when they stepped foot in my courtroom, from … the Jew to the wetback, they were going down.'"

103. Finally, Bill Cunningham testified that his brother Vickers "would use the law as a weapon against people." He provided the example of a Black man who broke into Judge Cunningham's garage and stole a battery charger. Judge Cunningham "went out

of his way and was very happy to report that he had gone and gotten enhanced charges."

104. Applicant proved by a preponderance of the evidence, at least, that Judge Cunningham was biased in that he determined "to get" Applicant the death penalty in order to further his personal interest in becoming District Attorney.

105. In addition to direct and indirect evidence from Judge Cunningham's statements that he was biased against Applicant at the time of trial, Applicant presented evidence in an attempt to prove that Judge Cunningham's situation satisfied the *Tumey* standard of implied bias.

106. Applicant demonstrated by a preponderance of the evidence, at least, that Judge Cunningham had such a personal interest in the Texas 7 defendants being convicted and sentenced to death that his interest qualified as "a possible temptation to the average man as a judge … which might lead him not to hold the balance nice, clear, and true between the state and the accused." *Tumey*, 273 U.S. at 532.

107. In addition to the evidence described above, Applicant pointed to evidence of four other lines of evidence as part of his contention that the judge's anti-Semitism satisfies the *Tumey* standard. Those lines of evidence include (1) that Judge Cunningham did not merely express personal animosity towards Jews based on their ethnicities, he expressed a desire to use his position in the law to take action against them; (2) that Judge Cunningham was extremely bigoted towards Jews, Blacks, and Latinos; (3) that Judge Cunningham said his desire not to have his children marry non-Whites or non-Christians grew out of his Christian faith, and that Judge Cunningham's anti-Semitic

slurs fit into a tradition of Christian anti-Semitism; (4) that psychological studies of judicial decision-making indicate that Judge Cunningham's explicit anti-Semitism and desire to take action against Jews mean he would be unable to curb his bias when making discretionary rulings in Applicant's case.

108. Through the evidence discussed above, Applicant demonstrated by a preponderance of the evidence that Judge Cunningham had such a personal interest in being racist that his interest qualified as "a possible temptation to the average man as a judge … which might lead him not to hold the balance nice, clear, and true between the state and the accused." *Tumey*, 273 U.S. at 532.

109. When the *Dallas Morning News* confronted Judge Cunningham with the evidence and allegations pointing to his racist attitudes, he denied their veracity. 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."

110. Judge Cunningham also denied that he ever used the word "nigger."

111. This Court has again considered Judge Cunningham's demeanor in the video, and the totality of the evidence presented in this case. Based on the testimony of the witnesses, their demeanor, their relationships to Vickers Cunningham, their manner of answering questions, and their potential sources of bias or motivations to testify falsely, this Court finds that Judge Cunningham's denials are not credible.

112. Judge Cunningham routinely used the n-word and other racial, ethnic, and religious slurs throughout his life.

113. The evidence is overwhelming that Judge Cunningham used the n-word regardless of anything the person he was speaking about might have done wrong or to offend Judge Cunningham. He referred to his brother Bill as Nigger Bill for decades, even addressing letters to him that way when Bill was a child at Camp Longhorn.

114. Judge Cunningham used the n-word to refer to District Attorneys Craig Watkins and John Creuzot. And he used the word when planning to seek campaign contributions from Black people in Dallas.

115. The evidence overwhelmingly establishes that Judge Cunningham routinely used racial and ethnic slurs for the purpose of proclaiming his superiority over them.

116. 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."

117. The evidence indicates that the *Dallas Morning News* editorial page did not find Cunningham's denials credible, either. The paper retracted their endorsement of Cunningham after his interview. Similarly, the local Republican party condemned his statements.

118. Judge Cunningham took to his campaign website to post a "personal note from Vic Cunningham."

119. 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."

120. Judge Cunningham categorically denied ever using the word "nigger," attacked his brother's motives, and pointed out that Tackett's story was "without collaboration [sic: corroboration]." This Court has been presented with corroboration and finds testifying witnesses were credible and Judge Cunningham was not credible in his denials.

121. The State indicated during a status conference that it contacted Judge Cunningham about his availability to testify.

122. 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.

123. 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).

124. 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).

125. 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)).

126. 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).

127. "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).

128. 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.

129. 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)).

130. 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 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).

131. 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.

132. 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.

133. 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)).

134. Supreme Court precedents require this 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.

135. The First and Fourteenth Amendments protect capital defendants from an adjudication based on protected ideas or beliefs that have no connection to the facts of the case. *See Dawson v. Delaware*, 503 U.S. 159, 166-167 (1992). "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).

136. 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).

137. The Equal Protection Clause 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.

138. 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 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.

139. 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.").

140. 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).

141. The evidence above established that Judge Vickers Cunningham possessed antisemitic prejudice against Applicant at the time of trial in violation of Applicant's constitutional right to a trial in a fair tribunal equal protection, and free exercise of religion.

142. The evidence discussed above established that Judge Cunningham had a personal interest in convicting Applicant and sentencing him to death and that Judge Cunningham decided "to get" those results long before Applicant's trial began. Judge Cunningham's prejudgment of Applicant's guilt and the appropriate punishment violated Applicant's constitutional right to a fair trial and equal protection of the laws.

143. 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.

144. 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. 141. 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.").

145. 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 Applicant'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.

146. 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.

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

148. 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 Applicant'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.

149. 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."

RECOMMENDATIONS

1. This Court recommends that the Court of Criminal Appeals find and conclude that Applicant was denied rights to the free exercise of religion, due process of the law, and equal protection of the laws as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

2. This Court further recommends that the Court of Criminal Appeals vacate the judgments of conviction and death that were entered against Applicant.

ORDER

This Court finds, concludes, and recommends that the relief sought in Applicant's Subsequent Application for Writ of Habeas Corpus be **GRANTED** as to Claim 1.

The Court orders and directs the Clerk of this Court to furnish a copy of the Court's Findings of Fact and Conclusions of Law to Applicant through his attorneys Paul E. Mansur at paul@paulmansurlaw.com, Tim Gumkowski at Tim_Gumkowski@fd.org; and Tivon Schardl at Tivon_Schardl@fd.org, and to the Post Conviction section of the Tarrant County Criminal District Attorney's Office at COAappellatealerts@tarrantcountytx.gov.

It is further ordered that the Clerk of this Court shall immediately prepare a transcript of papers in this cause and transmit to the Court of Criminal Appeals in Austin, Texas a copy of this order and the Findings of Fact and Conclusions of Law, including the judgment and indictment, all plea papers, if any, and the Court of Appeals opinion, if any, to the Court of Criminal Appeals as provided by TEX. CODE CRIM. PROC. ART. 11.071.

IT IS SO ORDERED.

SIGNED AND ENTERED this the 12th day of December, 2022.

Lela Lawrence Mays Digitally signed by Lela Lawrence Mays
Date: 2022.12.12 23:12:18 -06'00'

Judge Lela Lawrence Mays
283rd Judicial District Court