W01-00327-T(B)
[Trial Cause No. F01-00327-T]

IN THE 283RD JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS

EX PARTE

RANDY ETHAN HALPRIN,

Applicant

On Application for a Writ of Habeas Corpus Pursuant to Tex. Code Crim. Proc. Art. 11.071

STATE'S SUPPLEMENTAL RESPONSE TO APPLICATION FOR WRIT OF HABEAS CORPUS

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TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the State of Texas, by and through the Criminal District Attorney of Tarrant County, Texas, attorney pro tem, and in a Supplemental Response to the Application for Writ of Habeas Corpus respectfully states the following to the Court based on her information and belief:

PRELIMINARY STATEMENT

RANDY ETHAN HALPRIN ("Applicant") seeks habeas relief from a judgment of conviction and sentence entered June 12, 2003, by the 283rd District Court, Dallas County, Texas, Vickers L. Cunningham, presiding. By that judgment, Applicant was found guilty, upon a jury's verdict, of the capital murder of Officer Aubrey Hawkins and sentenced to death. CR 48.[1]

PROCEDURAL HISTORY

The Procedural History set forth in the State's initial response to the writ filed May 6, 2021, is incorporated by reference herein.

[1] Numbers preceded by "CR" refer to pages of the Clerk's Record. Numbers and letters preceded by "WR" refer to volumes and pages of the transcript of the live evidentiary hearing conducted on August 29, 30, and 31, 2022.

APPLICANT'S WRIT APPLICATION AND THE STATE'S INITIAL RESPONSE

By the remanded claim, Applicant alleged that his trial judge, Vickers Cunningham (hereinafter "Cunningham"), "harbored deep-seated animus towards and prejudices about non-white, non-Christian people," before, during, and after Applicant's trial, and that those views "informed his thinking about his public service in the law." *See* Application at 15-16. Based on those allegations, Applicant contended that Cunningham's views create an objectively intolerable risk of bias in violation of Applicant's due process rights. *Id*. at 29-30, 54.

By its initial response, the State took the position that even assuming as true all the facts alleged by the application and its supporting affidavits, Applicant had not established a violation of the Due Process Clause, and relief must be denied. That was because Applicant's argument for relief conflated the standard for showing a constitutional due process violation with the type of personal bias that does not, without a demonstration of prejudice to the defense, support such a claim. *See* Application at 29-30, 54.

To clarify that distinction, the State discussed the law of judicial bias and recognized that: "Due process guarantees 'an absence of actual bias' on the part of a judge." *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016), *quoting In re Murchison*, 349 U.S. 133, 136 (1955). Under the Due Process Clause, a criminal defendant is guaranteed the right to a fair trial before an impartial tribunal, that is, "before a judge

with no actual bias against the defendant or interest in the outcome of his particular case." *Bracy v. Gramley*, 520 U.S. 899, 905 (1997); *see also Richardson v. Quarterman*, 537 F.3d 466 (5th Cir. 2008); *Brumit v. State*, 206 S.W.3d 639 (Tex. Crim. App. 2006).

The State further acknowledged that violation of that right to 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 process itself," which defies harmless-error analysis. *Arizona v. Fulminante*, 499 U.S. 279, 309–10 (1991); *see also De Leon v. Aguilar*, 127 S.W.3d 1, 7 (Tex. Crim. App. 2004) (heard on mandamus from denial of recusal motion: judicial bias is "a structural error not subject to harm analysis").

However, Applicant's argument for relief as presented by his application was based on a novel theory of presumptive bias that was contrary to longstanding law. Contrary to Applicant's arguments, to establish a Due Process Clause violation based on the structural error of judicial bias, either **actual bias** on the part of the judge, or **presumptive bias**, also described as an "intolerably high probability of bias" must be shown. Presumptive bias may be grounded in the judge's personal interest in the outcome of the case, personal abuse of the judge by the defendant, or a dual role by the judge of investigating and adjudicating the issue at hand. *Williams*, 579 U.S. at 8-9; *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 881 (2009);

Buntion v. Quarterman, 524 F.3d 664, 672 (5th Cir. 2008). In cases involving only a judge's personal biases and prejudices, the law presumes that the judge will set aside such prejudices when presiding over a particular case. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820-21 (1986).

Thus, the State opposed relief because Applicant had not established by his application and exhibits either actual bias or an objective circumstance indicative of presumptive bias. Any statements attributed to Cunningham about Applicant **were not made at the time of trial**, were made years later, and even then, did not admit that Cunningham had harbored any feelings of actual bias toward Applicant at or before the time of trial. Accordingly, they did not establish actual bias against Applicant so as to warrant a new trial.

THIS COURT'S 2021 FINDINGS OF FACT AND CONCLUSIONS OF LAW AND THE COURT OF CRIMINAL APPEALS' REMAND

On October 11, 2021, this Court issued Findings of Fact and Conclusions of Law recommending that the Court of Criminal Appeals grant Applicant a new trial. In its Findings of Fact and Conclusions of Law, the Court found that Cunningham had "harbored deep-seated animus towards non-white and non-Christian people and deep-seated racial, ethnic, and religious prejudices." *See* Findings of Fact ¶ 47. The Court found that the evidence "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 [years later] because he identified Halprin as a Jew, and not because of evidence presented at trial about Haprin's crimes." *See* Findings of Fact ¶ 115.

The Court concluded as a matter of law that those facts demonstrated an unconstitutionally high risk of bias (aka **presumptive bias**). *See* Conclusions of Law ¶¶ 1-15. The Court also found that by presiding over a trial of a person of the Jewish faith, Cunningham violated Applicant's rights under the Free Exercise Clause and the Equal Protection Clause of the United States Constitution. *See id.* ¶¶ 19-20. The Court further concluded that "at the time of trial, Judge Cunningham possessed an **actual bias** against Halprin, because of Halprin's religious faith." *See id.* ¶ 29. That conclusion was based on post-trial statements made by Cunningham using racial epithets to refer to Applicant. *See id.* at ¶¶ 32-39.

On May 11, 2022, the Court of Criminal Appeals remanded the case for an adversarial evidentiary hearing "to consider the testimony regarding whether Applicant's trial judge was biased against Applicant because Applicant is Jewish."

THE EVIDENCE AT THE WRIT HEARING AND THE STATE'S REVISED RESPONSE

An evidentiary hearing was conducted on August 29, 30, and 31, 2022. Applicant called five fact witnesses and three expert witnesses. The State called

three fact witnesses. For the sake of this Response, the State assumes all of the witnesses were found credible by the trial court.

In contrast to the evidence initially offered by the writ application, the testimony at the writ hearing demonstrated actual bias against Applicant at the time of trial. Specifically, Cunningham's brother, Bill Cunningham, testified to statements by Cunningham referring to Applicant and his co-defendants in the Texas 7 as "the Mexican, the queer, and the Jew." WR2(C) 24. Those statements were made from the time of Cunningham's appointment in the Fall of 2001, when the trials of the Texas 7 were underway, and continued as the trials were "ongoing." WR2(B) 61-64; WR2(C) 23-24.

The inference that actual bias is shown by Cunningham's referring to Applicant as "the Jew" is supported by post-trial statements by Cunningham in which he called Applicant "Randy the Jew," "Jew Halprin," and "the goddamn kike." WR2(C) 60, 110. Although those statements are probative of Cunningham's state of mind only at the time they were made, two or three years after the trial (Tex. R. Evid. 803(c)), they reflect strong anti-Semitic animus against Applicant. That being the case, those statements support the reasonable inference that Cunningham's state of mind when he described Applicant as "the Jew" before and during trial was one of actual bias.

As defense expert Brian Stone, Ph.D., explained, use of the phrase "the Jew" does not necessarily indicate anti-Semitic sentiment. WR3 33. But here, Stone opined, Cunningham's use of the phrase "the Jew" is "clearly derogatory" in the context of other clearly derogatory terms used for other ethnic groups. WR3 35. Thus, describing members of the Texas 7 as "every one of them from the wetback to the Jew" (WR2(C) 61), was concerning because Cunningham was "referring to one person among a group of people by that quality." WR3 35. Furthermore, Cunningham's use of "the Jew" must be considered in light of his use of other unambiguously derogatory terms on other occasions like "filthy Jew," "greedy Jew Banker," and "kike." WR2(C) 111, 121; WR3 37-41. For those reasons, Cunningham's description of Applicant before and during trial as "the Jew" indicates actual bias against Applicant because he is Jewish.

In short, the testimony at the writ hearing is sufficient to show, by a preponderance of the evidence, **actual bias** against Applicant at the time of trial because Applicant is Jewish.

Standing alone, Cunningham's actual bias violates the Due Process Clause and renders irrelevant whether Applicant received an objectively fair trial. Such a violation of the right to a fair and impartial tribunal constitutes a "structural defect affecting the framework within which the trial proceeds," which defies harmless-error analysis. *Fulminante*, 499 U.S. at 309–10; *De Leon*, 127 S.W.3d at 7. For that

reason, the State agrees that the writ should be granted on the ground of actual bias by the trial judge.

CONCLUSION

Based on the applicable law, official court records, and the hearing testimony, the relief Applicant requests in his application for a writ of habeas corpus should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true copy of this State's Supplemental Response to the Application for a Writ of Habeas Corpus has been e-served to opposing counsel, Paul E. Mansur, paul@paulmansurlaw.com, Tim Gumkowski Tim_Gumkowski@fd.org; and Tivon Schardl, Tivon_Schardl@fd.org on this, the 27th day of September, 2022.

/s/ ANNE GRADY
ANNE GRADY