No. _____

In the Supreme Court of the United States
October Term, 2019

RANDY ETHAN HALPRIN,
Petitioner,

v.

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITIONER'S APPENDIX

THIS IS A CAPITAL CASE WITH A SCHEDULED EXECUTION OF OCTOBER 10, 2019

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
September 23, 2019
Lyle W. Cayce
Clerk

No. 19-70016

Consolidated with 19-70017

RANDY ETHAN HALPRIN,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeals from the United States District Court
for the Northern District of Texas
USDC No. 3:13-CV-1535
USDC No. 3:19-CV-1203

Before SMITH, DENNIS, and HAYNES, Circuit Judges.

PER CURIAM:*

Randy Halprin has filed an appeal of the district court's transfer to this court of his application for habeas relief. We have jurisdiction over such an appeal. *Bradford v. Tamez*, 660 F.3d 226, 230 (5th Cir. 2011). For the reasons

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

set forth in our opinion on Halprin's petition for authorization to file a successive habeas application, *In re Halprin*, Case No. 19-10960 (5th Cir. Sept. 23, 2019), we conclude that the district court properly transferred the petition to our court. That decision is, therefore, AFFIRMED.

Certified as a true copy and issued as the mandate on Sep 23, 2019

Attest: Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
September 23, 2019
Lyle W. Cayce
Clerk

No. 19-10960

Consolidated with 19-10970

In re: RANDY ETHAN HALPRIN,

Movant

Motions for an order authorizing
the United States District Court
for the Northern District of Texas to consider
a successive 28 U.S.C. § 2254 application
USDC No. 3:19-CV-1203
USDC No. 3:13-CV-1535

Before SMITH, DENNIS, and HAYNES, Circuit Judges.

PER CURIAM:*

While protesting the district court's conclusion that his application is a "second or successive" habeas application within the meaning of 28 U.S.C. § 2244(b)(3)(A), Randy Halprin petitions this court for permission to present a successive habeas application to the district court raising claims of bigotry-based bias by the judge who tried his case. We DENY the application.

The underlying facts of Halprin's case are discussed in our recent opinion denying his certificate of appealability challenging the district court's decision

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

in his initial federal habeas proceeding. *Halprin v. Davis*, 911 F.3d 247, 252–54 (5th Cir. 2018), *petition for cert. filed*, Case No. 18-9676 (U.S. June 14, 2019); *see also Halprin v. State*, 170 S.W.3d 111, 113 (Tex. Crim. App. 2005) (affirming conviction and sentence on direct appeal). Thus, we do not repeat them here. Suffice it to say that Halprin was convicted and sentenced to death as one of the "Texas Seven" who escaped from prison and then shot and killed an Irving police officer while they were trying to rob a store.

Relevant here, in his 2003 trial, Halprin's trial judge was Vickers Cunningham, who was then the judge of the 283rd District Court of Dallas County.[1] Some 15 years later, Cunningham was a runoff candidate in the Dallas County Republican primary seeking a position on the Dallas County Commissioners Court (the elected body that runs Dallas County). During that election, allegations were made that Cunningham had racist and anti-Semitic views (among others).[2] Halprin, who is Jewish, alleges that, until this time, he had been unaware of any bigotry on the part of Cunningham. His 2018 investigation found further evidence, including affidavits from people who were insiders with Cunningham to the effect that he had used anti-Semitic language to describe Halprin. Halprin filed a habeas application in federal district court and simultaneous state proceedings, which state proceedings are still pending.

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[1] By the time of Halprin's state habeas proceeding, Cunningham had left the bench to make an ultimately unsuccessful bid to be the District Attorney in Dallas County. Halprin's state habeas proceeding is reported at *Ex Parte Halprin*, No. WR-77,175-01, 2013 WL 1150018 (Tex. Crim. App. Mar. 20, 2013) (per curiam).

[2] Cunningham has denied some of the allegations, but we will take them as true, given the procedural posture of this case. Assuming the allegations to be true, Cunningham's racism and bigotry are horrible and completely inappropriate for a judge.

The district court concluded that Halprin's application was a "second or successive" application under § 2244 and, therefore, transferred it to this court to determine whether to grant permission to file such an application. *See* 28 U.S.C. § 2244(b)(3). Halprin has appealed the transfer under Case Nos. 19-70016 and 19-70017. At the same time, he made the present application for permission to file a successive habeas application in the event that his appeal of the transfer order was unsuccessful.

We begin, as we must, with the question of whether Halprin's claim is a successive application because, if it is not, there is nothing to decide on this appeal. We conclude that the application is successive.

The Supreme Court has "declined to interpret 'second or successive' as referring to all § 2254 applications." *Panetti v. Quarterman*, 551 U.S. 930, 944 (2007). However, the Court's determination that a "second in time" application was not successive has occurred in only two situations, neither applicable here. *See In re Coley*, 871 F.3d 455, 457 (6th Cir. 2017) (per curiam). "The first is where ripeness prevented, or would have prevented, a court from adjudicating the claim in an earlier petition," such as request for relief on a *Ford*-based incompetency claim. *Id.* (citing *Stewart v. Martinez-Villareal*, 523 U.S. 637, 645 (1998)); *see also Panetti*, 551 U.S. at 944–45. "The second is where a federal court dismissed an earlier petition because it contained exhausted and unexhausted claims and in doing so never passed on the merits." *Coley*, 871 F.3d at 457 (citing *Slack v. McDaniel*, 529 U.S. 473, 485–86 (2000)). Our precedent is clear that "a later petition is successive when it: 1) raises a claim challenging the petitioner's conviction or sentence that was or could have been raised in an earlier petition; or 2) otherwise constitutes an abuse of the writ." *In re Cain*, 137 F.3d 234, 235 (5th Cir. 1998).

Although Halprin asserts that he did not know about Cunningham's bigotry until recently, that is not the same thing as a claim's being unripe.[3] The current claim, of course, is that Cunningham was bigoted all along: now and during the original Halprin trial. Thus, the claim was ripe in 2003, even if unknown to Halprin at the time. That fact contrasts with the situations in *Panetti* and *Stewart*, which Halprin cites in support of his contention. In *Panetti* and *Stewart*, the incompetency claim was not available to the defendants until after their initial habeas petitions because they were not incompetent until the later date. *Panetti*, 551 U.S. at 944; *Stewart*, 523 U.S. at 639, 643. A party can be competent to stand trial and then become incompetent thereafter. Here, however, Cunningham either was or was not biased during the trial, and the trial took place more than 15 years ago. Therefore, Halprin's application is successive.

Turning to whether we should grant permission to proceed, § 2244 provides only two bases for us to permit a successive habeas application, which can be summarized as either a new rule of law or a new factual predicate (with additional requirements discussed below). Halprin claims he prevails under both.

Examining the first one, § 2244(b)(2)(A), Halprin clearly fails to meet this standard: "the applicant [must show] that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A); *see Tyler v. Cain*, 533 U.S. 656, 662 (2001) (explaining these requirements). Halprin's claim does not rely on a *new* rule of constitutional law; instead, he

[3] Indeed, if "new facts" were enough to vitiate the need for permission to file a successive habeas application, there would be no need for § 2244(b)(2)(B).

relies on a rule that is nearly a century old. His judicial bias claim is based on *Tumey v. Ohio*, a Supreme Court case decided in 1927. 273 U.S. 510 (1927). *Tumey* is not a "new rule" within the meaning of § 2244(b)(2)(A). Indeed, Halprin does not contest this point.

Second, Halprin's argument that his judicial bias claim was "previously unavailable" within the meaning of § 2244(b)(2)(A) also fails. Halprin cites our decisions in *In re Cathey*, 857 F.3d 221 (5th Cir. 2017) (per curiam), and *In re Johnson*, Nos. 19-20552 & 19-70013, 2019 WL 3814384 (5th Cir. Aug. 14, 2019), *as revised* (Aug. 15, 2019), for the proposition that newly discovered evidence can support a claim under subsection (b)(2)(A). But both *Cathey* and *Johnson* involved changes in diagnostic standards for intellectual disabilities, which then altered the *legal* standards for granting relief on *Atkins*[4] intellectual disability claims. *See Johnson*, 2019 WL 3814384, at *5–6 (discussing and applying *Cathey*). Halprin does not argue that his judicial bias claim under *Tumey* was *legally* unavailable when he filed his first petition. Instead, he asserts that his claim was *factually* unavailable because he was unaware of evidence of Cunningham's judicial bias. But Halprin incorrectly conflates the "previously unavailable" requirement of subsection (b)(2)(A) with the new "factual predicate" standard found in subsection (b)(2)(B)(i). Halprin has not satisfied § 2244(b)(2)(A).

Turning to the "factual predicate" claim, the rule requires that the applicant prove that

> (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be

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

> sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2)(B). The district court questioned whether Halprin met the first subsection, given some indications that information about Cunningham's bigotry was available years ago. We conclude that it is unnecessary to address whether the factual predicate "could not have been discovered previously" because we conclude that Halprin fails to meet the second subsection in any event.

Halprin fails to present any evidence in his motion showing that Cunningham's bias against him would establish by clear and convincing evidence that, absent such bias, no reasonable factfinder would have found Halprin guilty of the underlying offense. He argues that structural error, such as judicial bias, does not have to meet this standard. But our authority to grant the right to file a successive application for habeas relief stems only from this statute, the Antiterrorism and Effective Death Penalty Act ("AEDPA"), and it is very specific. Indeed, structural error is a type of constitutional error. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006). As AEDPA clearly states that the clear and convincing evidentiary requirement applies to "constitutional error," we see nothing to suggest that structural error is under a different, unstated standard. In line with this reasoning, the Ninth Circuit has held that a complaint about the presiding judge's racial bias "does not add to or subtract from the evidence of [a defendant's] guilt" as it "does not demonstrate, by clear and convincing evidence, that [the defendant] is actually

innocent of the crime for which he stands convicted." *Villafuerte v. Stewart*, 142 F.3d 1124, 1126 (9th Cir. 1998).[5]

Second, Congress enacted AEDPA, "at least in part, to ensure comity, finality, and deference to state court habeas determinations by limiting the scope of collateral review and raising the standard for federal habeas relief." *Robertson v. Cain*, 324 F.3d 297, 306 (5th Cir. 2003). In that regard, permitting a defendant to file a successive petition is "an exception that may be invoked only when the demanding standard set by Congress is met." *Pizzuto v. Blades*, 673 F.3d 1003, 1007 (9th Cir. 2012) (quoting *Bible v. Schriro*, 651 F.3d 1060, 1063 (9th Cir. 2011) (per curiam)). Congress set the demanding standard in § 2244(b)(3)(C)—"[t]he court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." *See In re Raby*, 925 F.3d 749, 754 (5th Cir. 2019) ("We permit the filing of a successive petition only if we conclude that [the petitioner's] application makes a prima facie showing that it satisfies the strict requirements in § 2244(b)"). Thus, Congress's intent in enacting AEDPA supports applying the statute as written, which requires a prima facie showing of clear and convincing evidence that, absent constitutional error, no reasonable factfinder would have otherwise found Halprin guilty of the underlying offense. Nothing close to such a showing was presented here.

In sum, as reprehensible as Cunningham's remarks are, we are bound to apply the law as written. It provides no basis for us to grant relief here in the

[5] We note that the facts in that case were different, as no evidence of direct bias against the defendant was presented. *Id.* at 1125–26.

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No. 19-10970

form of allowing a successive habeas application to proceed. Accordingly, the application to file a successive habeas application is DENIED.

Certified as a true copy and issued as the mandate on Sep 23, 2019

Attest: Tyke W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

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

RANDY ETHAN HALPRIN, TDCJ No. 999453,	§	
	§	
Petitioner,	§	
	§	
v.	§	
	§	Civil Action No. **3:13-CV-1535-L**
LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division,	§	
	§	
Respondent.	§	

ORDER TRANSFERRING POTENTIALLY SUCCESSIVE PETITION

Before the court is a document styled "Petition for Writ of Habeas Corpus" ("Petition") (Doc. 58), which Petitioner Randy Ethan Halprin ("Halprin" or "Petitioner") filed on May 17, 2019, to challenge his 2003 conviction for capital murder and sentence of death. Also before the court are a number of related motions and requests for relief (Docs. 59, 62, 64, 66, 68, 72). For the reasons herein explained, the court determines that Halprin's May 17, 2019 Petition should be transferred to the Fifth Circuit, as it lacks subject matter jurisdiction to entertain the Petition. The court, therefore, **directs** the clerk of the court to **transfer** the Petition (Doc. 58) to the Fifth Circuit, in accordance with 28 U.S.C. §§ 1631 & 2244(b), for determination of whether it should be allowed to proceed. Except for Respondent's Motion for Substitution of Counsel (Doc. 59), which is **granted**, the court **denies as moot** the remaining motions pending in this case (Docs. 62, 64, 66, 68, 72).

I. Factual and Procedural Background

Halprin is currently set for execution on October 10, 2019, for the murder of Irving Police Officer Aubrey Hawkins. Halprin filed his original petition for federal habeas corpus relief in this

action on March 20, 2014 (Doc. 5), to challenge his 2003 Dallas County capital murder conviction and sentence of death, which he amended on June 17, 2014 (Doc. 15). After the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") denied a CoA on December 17, 2018, in *Halprin v. Davis*, 911 F.3d 247 (5th Cir. 2018), Halprin filed a petition for writ of certiorari on June 14, 2019 (no. 18-9676) with the United States Supreme Court. Thus, Halprin has already fully litigated one federal habeas corpus action in this court which, unlike his new Petition, did not include an assertion that he was denied due process because his state trial judge possessed disqualifying bias.

As noted, Halprin filed his current Petition on May 19, 2019. Shortly thereafter, on May 22, 2019, he moved to stay and abate the proceedings in this case so that he can return to state court and litigate a new claim accusing his state trial judge of disqualifying bias (Doc. 62). Respondent Lorie Davis, Director of the Texas Department of Criminal Justice Correctional Institutions Division ("Respondent"), opposes Halprin's Petition and request to stay and abate the proceeding in this case and moved on June 6, 2019, for an extension to respond to the motion to stay and abate (Doc. 64). On June 12, 2019 Respondent moved to dismiss, as successive, Halprin's Petition (Doc. 66) and filed a separate response opposing Halprin's motion to stay and abate further proceedings in this cause. Respondent contends that Halprin's Petition is impermissibly successive because it challenges the same judgment he previously challenged in this action, and his new due process claim based on judicial bias does not fall within the exception under 28 U.S.C. § 2244(b)(2). Respondent has also moved to substitute counsel (Doc. 59).

On July 17, 2019, Petitioner filed a motion for discovery (Doc. 72), which is opposed by Respondent. On August 21, 2019, Petitioner filed additional evidence in support of his new habeas claim that his state trial judge possessed disqualifying bias because he is now and was a

racist and Anti-Semite at the time of his murder trial (Doc. 76). Also pending is a Motion for Leave to File Amicus Brief in Support of Petition for Writ of Habeas Corpus (Doc. 68), which was filed June 19, 2019, by the Anti-Defamation League.

II. Discussion

Because this is not the first time Halpin has sought federal habeas corpus relief, his current Petition is governed by Title 28 U.S.C. § 2244(b)(2), which provides that a claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless either: (1) the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (2) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence and the facts underlying the claim, if proven and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable factfinder would have found the Petitioner guilty of the underlying offense.

This court is not the appropriate forum to litigate the issue of whether Petitioner's new claim is, in fact, barred by section 2244(b). In 28 U.S.C. § 2244(b)(3), Congress made the federal Circuit Courts of Appeals the exclusive arbiters of whether a new claim satisfies the standard set forth in section 2244(b)(2), by requiring a federal habeas petitioner, who is seeking to assert a new claim not presented in a prior federal habeas proceeding, to move in the appropriate court of appeals for an order authorizing the district court to consider the new application. Congress granted to the courts of appeals the sole authority to determine whether the petitioner may proceed. *See* 28 U.S.C. § 2244(b)(3)(C) ("The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that

the application satisfies the requirements of this subsection."). The court of appeals' grant or denial of authorization to file a second or successive application is not subject to further review by appeal, a petition for rehearing, or writ of certiorari. 28 U.S.C. § 2244(b)(3)(E). As a result, the Fifth Circuit is the sole and exclusive arbiter of whether Petitioner's new claim may be brought in this court, and the issue before this court is not whether to grant or deny Petitioner's motion to stay and abate his new Petition or whether this court should dismiss the Petition as successive but, rather, whether the new Petition should be transferred as a second or successive petition to the Fifth Circuit in accordance with 28 U.S.C. §§ 1631 & 2244(b).

Halprin argues that his May 17, 2019 Petition is not a "second or successive petition" because: (1) the factual predicate for his new claim was not previously available; and (2) his claim of judicial bias, like the competency-to-be-executed claims raised in *Panetti v. Quarterman*, 551 U.S. 930 (2007), and *Stewart v. Martinez-Villarreal*, 523 U.S. 637 (1998), does not depend on the factfinders' assessment of guilt. Petitioner fails to acknowledge, however, that the type of claims asserted by Panetti and Martinez-Villarreal, that is, claims that a convicted defendant facing a sentence of death lacked sufficient mental competence to be executed under the standard announced in *Ford v. Wainwright*, 477 U.S. 399 (1986), are quite different in nature from his claim of judicial bias based upon allegedly newly discovered evidence. As the Fifth Circuit has recently explained, claims based upon a convicted murderer's assertion that he is mentally incompetent to be executed are unique in their fluidity:

> [A] *Ford* incompetency-to-be-executed claim is not necessarily "successive" even if raised in a second or subsequent habeas application. A *Ford* claim can be raised in multiple proceedings and not be "successive." That is because mental incompetence to be executed is not categorically a permanent condition. Incompetence may occur at various points after conviction, and it may recede and later reoccur. A finding that an inmate is incompetent to be executed does not foreclose the possibility that she may become competent in the future and would no longer be constitutionally ineligible for the death penalty. By contrast,

> intellectual disability is by definition a permanent condition that must be manifested before the age of 18. A person who is found to be intellectually disabled is permanently ineligible to be executed, and the sentence of death is vacated.

Busby v. Davis, 925 F.3d 699, 713 (5th Cir. 2019) (footnotes omitted). Halprin's assertion that his trial judge possessed a disqualifying bias (at a discrete point in time) is far more analogous to Busby's assertion that he was intellectually disabled than to Panetti and Martinez-Villarreal's assertions that they were incompetent to be executed. Thus, the holdings in *Panetti* and *Martinez-Villarreal* addressing *Ford* claims, which are subject to transitory factors, do not govern Petitioner's assertion of judicial bias at a particular point in time, which in this case would be the time of his 2003 capital murder trial.

Moreover, while Halprin maintains that he has only recently discovered evidence of his trial judge's alleged anti-Semitic bias from a May 2018 newspaper article, the source material for that article, and the affidavits and other "new evidence" accompanying his latest Petition, include public statements allegedly made by the trial judge at or near the time of his 2003 capital murder trial. Specifically, the letter by the trial judge to the Governor of Texas was written in 2005, photographs in college and law school yearbooks were published almost four decades ago, and interviews and affidavits reflecting public statements allegedly made by the trial judge date as far back as thirty years ago. Additionally, in the materials accompanying Petitioner's latest Petition, multiple persons who claim to have known the trial judge as a young man recite alleged instances of public statements made by him reflecting racial or anti-Semitic bias. Because the trial judge's alleged anti-Semitic bias was a matter of public knowledge long before Halprin's capital murder trial, his own evidence raises issues regarding his diligence in bringing his latest claim. In other words, Petitioner waited, without explanation, until the last possible minute before coming forward

with his "new" evidence of alleged judicial bias in May 2019 to bring to the court's attention a newspaper article published in May 2018.

For the reasons discussed above, however, this court is not the proper forum to litigate whether Petitioner's evidence of alleged judicial bias truly qualifies as "newly discovered," whether his evidence of alleged judicial bias was unavailable before May 2018, or whether he exercised due diligence in asserting his latest claim, as the Fifth Circuit has exclusive jurisdiction to determine such matters. Absent authorization from the Fifth Circuit, the court lacks subject matter jurisdiction. The court will, therefore, transfer Halprin's Petition, pursuant to 28 U.S.C. § 1631, to the Fifth Circuit for a determination of whether his new claim satisfies the requirements of section 2244(b) for a second or successive petition and should be allowed to proceed.

III. Conclusion

For the reasons explained, the court **directs** the clerk of the court to **transfer** Petitioner's May 17, 2019 Petition (Doc. 58) to the Fifth Circuit, in accordance with 28 U.S.C. §§ 1631 & 2244(b), for determination of whether it should be allowed to proceed. The court also **grants** Respondent's motion for substitution of counsel (Doc. 59), **allows** Assistant Attorney General Gwendolyn S. Vindell to withdraw as lead counsel for Respondent, such that she is relieved of any further obligation to or representation of Respondent in this case, and **allows** Assistant Attorney General Jennifer W. Morris to substitute as counsel representing Respondent in this federal habeas corpus action. As the decision to transfer Halprin's Petition to the Fifth Circuit moots the other pending motions, the court **denies as moot** these motions (Docs. 62, 64, 66, 68, 72), and **directs** the clerk of the court to term the motions

.

It is so ordered this 27th day of August, 2019.

Sam A. Lindsay
United States District Judge