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

APPLICATION FOR STAY OF EXECUTION

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

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To the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

The State of Texas has scheduled the execution of Randy Ethan Halprin for **Thursday, October 10, 2019.** Mr. Halprin requests a stay of execution pending the consideration and disposition of the petition for writ of certiorari that he is filing simultaneously with this application.

GROUNDS

I. GOVERNING LAW

Randy Ethan Halprin, pursuant to Supreme Court Rule 23 and 28 U.S.C. § 2101(f), respectfully requests that this Court stay his execution pending consideration of his concurrently filed petition for writ of certiorari. *See Barefoot v. Estelle*, 463 U.S. 880, 889 (1983) ("Approving the execution of a defendant before his [petition] is decided on the merits would clearly be improper."); *see also Lonchar v. Thomas*, 517 U.S. 314, 320 (1996) (holding that a court may stay an execution if needed to resolve issues raised in initial petition).

"[A] stay of execution is an equitable remedy." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). In the context of an appeal, a motion for a stay of execution is analyzed according to the following four factors:

(1) whether the applicant has made a strong showing that he is likely to succeed on the merits;

(2) whether the applicant will be irreparably injured absent a stay;

(3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and

(4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 434 (2009) (internal citations and quotations omitted).

II. APPLICATION OF THE LAW TO THE FACTS OF THIS CASE

A. The Equities Support a Stay

In this case there is *no* "'strong equitable presumption against the grant of a stay'" because Mr. Halprin brought his claim "'at such a time as to allow consideration of the merits without requiring entry of a stay.'" *Hill*, 547 U.S. at 584 (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)). State counsel exercised their discretion to seek the execution date while Mr. Halprin was preparing a petition for writ of certiorari related to his initial federal habeas petition, and almost one month after Mr. Halprin's counsel informed the State that litigation related to his judicial bias claim could not be concluded before the planned execution date.[1] *See generally* ROA.1284-1309. However, after the date-setting enabled Mr. Halprin to file his claim in state court, and

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[1] Mr. Halprin opposed the motion to set the execution date on grounds that the courts could not resolve his judicial bias claim before the scheduled execution date. *See generally* ROA.1438-1471 (oppositions at ROA.1450-1456 & 1466-1468). All ROA references are to the electronic record on appeal below in Nos. 19-70016 and 19-70017.

he sought a stay of execution there, the State decided not to file oppositions, and to "stand[] silent" on his requests for relief in state court. Notice of Non-Opposition & Submission of Matter for Decision at 5, *Ex parte Randy Halprin*, No. WR-77,175-05 (Tex. Crim. App. Sept. 5, 2019). Mr. Halprin's state court stay motion has been pending since August 22, 2019. *See id.* at 1.

The evidence and the applicable law show Mr. Halprin has been diligent, and the equities are in his favor. Texas law required Judge Vickers Cunningham to disqualify himself from Mr. Halprin's case because he harbored anti-Semitic bias against Mr. Halprin.[2] Instead, Judge Cunningham presided over the trial and the beginning of post-conviction proceedings. By not recusing himself, Judge Cunningham concealed his bias behind the "presumption of honesty and integrity in those serving as adjudicators."[3] Mr. Halprin was entitled to rely on that presumption.[4]

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

[3] *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). *See also Bracy v. Gramley*, 520 U.S. 899, 909 (1997) (stating that although "we presume that public officials have properly discharged their official duties ... presumption has been soundly rebutted" in case of judge "shown to be thoroughly steeped in corruption") (internal quotation marks and citations omitted).

[4] *Porter v. Singletary*, 49 F.3d 1483, 1489 (11th Cir. 1995) ("litigants and attorneys should be able to rely upon judges to comply with their own Canons of Ethics"). *See also*

On May 18, 2018, the *Dallas Morning News* exposed Judge Cunningham as a bigot based on an anti-miscegenation clause in a trust he created for his children, and accounts of family and one associate of his use of the n-word and other actions showing animus toward people of color. Pet. Ex. 21; ROA.1117-1127. The article did not mention Mr. Halprin, the Texas Seven, or Judge Cunningham's feelings about Jews. Therefore, the article was insufficient to support a due process claim.[5]

Nevertheless, Mr. Halprin investigated and discovered that Judge Cunningham's anti-Semitism began long before Mr. Halprin's trial, and that in private conversations he took special pride in sentencing Mr. Halprin to death because he was a "goddamn kike" and "fuckin' Jew," and about sentencing his Latino co-defendants to death because they were "wetbacks." ROA.1062-1066 & 1098-1102.

Mr. Halprin was preparing to file his judicial bias claim in May 2019 when the State notified him it planned to seek an execution date. *See* ROA.1307. Mr. Halprin timely filed his claim in federal court on May 17, 2019, and, on May 22, 2019, moved

Banks v. Dretke, 540 U.S. 668, 696-698 (2004) (explaining, based on presumption of official good conduct, that habeas petitioner was not required to prove the falsity prosecutor's representations about meeting discovery obligations; rather, he was entitled to rely on those representations).

[5] *See Bracy*, 520 U.S. at 909 (emphasizing that petitioner presented a prima facie case of judicial bias "by pointing not only to [his judge]'s conviction for bribe taking in other cases, but also to additional evidence . . . that lends support to his claim that [the judge] was actually biased *in petitioner's own case*") (emphasis in original).

the district court to stay and abate the proceedings so that he could exhaust his claim in state court. ROA.1221-1244.

At the time Mr. Halprin learned of Judge Cunningham's anti-Semitic bias, the state courts would not have entertained his claim. The Texas Court of Criminal Appeals abstains from considering a subsequent habeas application while the applicant is pursuing federal habeas relief from the same judgment, as Mr. Halprin was.[6] But, as State counsel were aware, the Texas Court of Criminal Appeals does not apply its abstention rule after an execution date has been set. *See* ROA.1340 at n.4.

On June 5, 2019, the State moved the trial court to set Mr. Halprin's execution for October 10, 2019. In response to Mr. Halprin's motion for stay/abeyance in the District Court, the State indicated its understanding that its actions, not Mr. Halprin's, threatened the ability of a court to adequately review the judicial bias claim. The State said,

> The State has moved to set Halprin's execution for October 8, 2019.[7] A stay of this Court's proceedings to await the Supreme Court's resolution of Halprin's certiorari petition would leave little time remaining before October 8, 2019, to file a subsequent state habeas application and for that application to be resolved. While the timeline

[6] *Ex parte Soffar*, 143 S.W.3d 804, 804 (Tex. Crim. App. 2004) (stating rule); *Ex parte Kunkle*, No. 20,574-03, 2004 WL 7330932, at *1 (Tex. Crim. App. Sept. 15, 2004) (applying rule to dismiss subsequent application pending while petition for certiorari was pending in U.S. Supreme Court, *see Kunkle v. Dretke*, 543 U.S. 835 (Oct. 4, 2004) (mem.)).

[7] The State got the date wrong. The State's motion for an execution date also misidentified Mr. Halprin as his co-defendant, Patrick Murphy. ROA.1300-1301.

> Halprin proposes may not have been suggested for the purpose of delay, its impact would almost certainly create such delay.

ROA.1342. Although the State disputed the timeliness of Mr. Halprin's petition in the Fifth Circuit, it did not do so in the district court, nor has it asserted in the Texas Court of Criminal Appeals that Mr. Halprin's claim was previously available, and the Fifth Circuit declined to adopt the State's theory. Slip op. at 6.

Significantly, the State took a different position regarding timeliness in co-defendant Joseph Garcia's case. After the State set Mr. Garcia's execution date, he filed a subsequent state habeas petition raising several claims, including a judicial bias claim based on the *Dallas Morning News* exposure of Judge Cunningham's bigotry. ROA.1371-1395. The State moved to dismiss the application under Tex. Code Crim. Proc. art. 11.071, § 5(a). *Ex parte Joseph C. Garcia*, WR-64,582-03 States Motion to Dismiss Subsequent Application for Writ of Habeas Corpus. *But not on timeliness grounds*. The State conceded that "information regarding Judge Cunningham's alleged bias is newly available." *Id.* at 22. The State argued Mr. Garcia's application should be dismissed because, without any evidence of bias at the time of trial or against Mr. Garcia in particular, he failed to state a prima facie case of a constitutional violation. *Id.* at 22-24.

Unlike Mr. Garcia, Mr. Halprin presented the state court with evidence of Judge Cunningham's bias against him at the time of trial. In light of the State's position on timeliness in *Garcia*, and Mr. Halprin's far more substantial claim, the

State's decision to "stand[] silent" in state court is understandable. *Cf. Berger v. United States*, 295 U.S. 78, 88 (1935) (as "representative ... of a sovereign whose obligation to govern *impartially* is as compelling as its obligation to govern at all," prosecutor office's "interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done") (emphasis added).

On July 3, 2019, the trial court entered the order scheduling Mr. Halprin's execution. ROA.1470-1471. That was almost one month after the State moved to set the date, and one week before that motion would have been mooted by operation of law.[8] Mr. Halprin filed his subsequent state habeas application on July 16, 2019, thirteen days after the execution date lifted the two-forums rule and made state-court review possible.

On August 22, 2019, Mr. Halprin moved the Texas Court of Criminal Appeals to stay the execution. Sometime after that, the State notified the Texas Court of Criminal Appeals that it would not file an opposition to the stay. *See* Notice of Non-Opposition & Submission of Matter for Decision, *Ex parte Randy Halprin*, No. WR-77,175-05. As of this date of filing, the state court has taken no action on the application or motion.

[8] *See* Tex. Code Crim. Proc. art. 44.141, § (c) ("An execution date may not be earlier than the 91st day after the date the convicting court enters the order setting the execution date.").

On August 28, 2019, the District Court served its order transferring Mr. Halprin's petition to this Court. ROA.1621-1627. One week later, on September 6, 2019, per the Fifth Circuit's instructions, Mr. Halprin timely filed his motion for authorization to proceed in the district court. On September 10, 2019, Mr. Halprin timely filed his notice of appeal of the district court's transfer order. ROA.1628-1629. On September 18, 2019, Mr. Halprin timely filed his opening brief. On September 20, Mr. Halprin timely filed his reply to the State's opposition to authorization.

The Court of Appeals ruled against Mr. Halprin on September 23, 2019.

This record shows the equities favor Mr. Halprin. He diligently pursued what the State previously conceded was newly available evidence of Judge Cunningham's bigotry while his initial federal habeas proceedings were ongoing, and before he knew the State was planning to seek an execution date. The State conceded below that it could not argue Mr. Halprin's actions were for the purpose of delay.

B. Mr. Halprin prevails under the *Nken* factors.

1. Mr. Halprin has made a strong showing that he is likely to succeed on the merits.

Mr. Halprin has presented a well-supported claim of outrageous judicial bias that is likely to succeed. Indeed, both the facts and their legal implications were uncontested below. *See* ROA.1311-1323 (Respondent's Motion to Dismiss Successive Petition with Brief in Support); *In re Randy Ethan Halprin*, No. 19-10960

& 19-10970, Opposition to Motion for Authorization to File a Successive Habeas Petition.

Mr. Halprin has presented a substantial argument for holding his application raising a previously unavailable claim of judicial bias is not "second or successive" within the meaning of § 2244(b)(2). Mr. Halprin's petition for certiorari provides compelling grounds why the Fifth Circuit decision was wrong and failed to apply this Court's precedent. *See Panetti v. Quarterman*, 551 U.S. 930 (2007). His argument is supported by the interpretation of § 2244(b) endorsed by seven Members of this Court in *Magwood v. Patterson*, 561 U.S. 320 (2010). *Id.* at 343 (Breyer, J., concurring) (when a habeas petitioner is "challenging an undisturbed state-court judgment for the second time, abuse-of-the-writ principles ... apply, including *Panetti*'s holding that an 'application' containing a 'claim' that 'the petitioner had no fair opportunity to raise' in his first habeas petition is not a 'second or successive' application") (quoting *id.* at 345 (Kennedy, J., dissenting)).

What adds to the likelihood that Mr. Halprin will prevail on the merits of his claim is that the State of Texas itself has advocated for the rule Mr. Halprin seeks here: a petition is not "second or successive" when a petitioner has not had a "fair opportunity" to raise the claim. Brief for Respondents at 16, *Magwood v. Patterson*, 561 U.S. 320 (2010) (No. 09-158), 2010 WL 565216 ("Federal habeas petitioners are entitled to one, but only one, full and fair opportunity to litigate a claim."); *accord*

Brief of South Carolina and other States as Amici Curiae in Support of Respondents at 16, *ibid.*, 2010 WL 565215 (endorsing Respondents "'one opportunity' rule" as "a sensible and workable reading of Section 2244(b) . . . faithful to Congress' intent and the history of the abuse of the writ doctrine."). Halprin seeks no more than this.

The issues presented in this case are weighty enough that this Court should grant a stay of execution pending its decision on Mr. Halprin's motion.[9] *See McFarland v. Scott*, 512 U.S. 849, 858-59 (1994); *Barefoot*, 463 U.S. at 889.

2. Mr. Halprin will be irreparably injured absent a stay.

If the State is correct and the Texas Court of Criminal Appeals denies Mr. Halprin's habeas application and stay motion, Mr. Halprin will suffer irreparable harm absent a stay: he will be executed based on a judgment that is void for having been entered by a biased judge,[10] despite having presented substantial arguments for review in federal court. *See Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J. concurring) (irreparable harm "is necessarily present in capital cases").

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[9] Moreover, this stay request is filed in compliance with 5th Cir. Rule 8.10.

[10] "A judgment is not void merely because it is erroneous. It is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law." 11 Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, Federal Practice and Procedure § 2862 at 434–41 (2012). *See also United States v. Buck*, 281 F.3d 1336, 1344 (10th Cir. 2002) (same).

3. A stay will not substantially injure the other parties interested in the proceeding.

Mr. Halprin addressed this equitable consideration in § II.A, *supra*. The District Attorney, in whom state law places responsibility for deciding when to seek execution dates, decided not to file an opposition to Mr. Halprin's motion for a stay in the Texas Court of Criminal Appeals.

4. A stay is in the public interest.

The public has a strong interest in ensuring that the merits of Mr. Halprin's claim are heard. Judge Cunningham's participation in Mr. Halprin's case threatens the public's confidence in the criminal justice system. "[T]he appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909 (2016); *see also Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (relying on racist stereotypes "poisons public confidence in the judicial process," and undermines the legitimacy of "the law as an institution, the community at large, and the democratic ideal reflected in the processes of our courts" (with alterations)); *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017) (finding constitutional remedy for juror's racial bias is "necessary to prevent a systemic loss of confidence in jury verdicts").

III. CONCLUSION

For these reasons, Mr. Halprin requests that this Court enter an order staying his execution.

Dated: October 2, 2019 Respectfully submitted,

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