CASE NO. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

JOHN LEZELL BALENTINE,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to
The Texas Court of Criminal Appeals

EXECUTION SCHEDULED FOR FEBRUARY 8, 2023

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

CAPITAL CASE

The Texas Court of Criminal Appeals (CCA) denied Petitioner's claim, concerning a juror who harbored long-standing racial prejudice and lied about his background in order to be selected for the jury, as an abuse of the writ under Article 11.071, § 5. In applying section 5, the CCA reviews both whether there is a prima facie showing that the claim has merit, and whether the claim was factually or legally unavailable at the time of any prior filings by the applicant. Both prongs require the CCA to assess the state of federal law as it applies to the claim raised.

Abuse-of-the-writ analysis under Texas law is therefore frequently intertwined with questions of federal constitutional law. Here, however, and in many other cases, the CCA simply stated its conclusion that Petitioner had abused the writ, without providing any reasoning to explain to what extent its decision was based on a review of the merits of the federal claim or the state of federal law.

This Court has granted certiorari and is currently considering comparable issues in *Cruz v. Arizona*, No. 21-846. The questions presented here are:

1. Whether the CCA's otherwise unexplained ruling that abuse of the writ under Article 11.071, § 5, precluded post-conviction relief is an adequate and independent state-law ground for the judgment, where the CCA's application of abuse of the writ is interwoven with federal law?

2. Whether this case should be held pending this Court's decision in *Cruz v. Arizona*?

3. Whether this Court should remand this case to the Texas courts with instructions to consider the merits of the claims of a juror's racial bias and misconduct?

RELATED PROCEEDINGS

Ex Parte Balentine, No. WR-54, 071-04 (Texas Court of Criminal Appeals) (order dismissing application for writ of habeas corpus, filed February 8, 2023)

Balentine v. Lumpkin, No. 18-70035 (United States Court of Appeals for the Fifth Circuit) (opinion affirming the district court's judgment filed August 3, 2021)

Balentine v. Davis, No. 18-70035 (United States Court of Appeals for the Fifth Circuit) (order granting a certificate of appealability on the district court's denial of the Rule 60(b)(6) motion filed February 26, 2020)

Balentine v. Davis, No. 2:03-CV-039-D (United States District Court for the Northern District of Texas, Amarillo Division) (order adopting the magistrate court's report and recommendation and denying motion for relief from judgment filed May 21, 2018)

Balentine v. Davis, No. 2:03-CV-39-J-BB (United States District Court for the Northern District of Texas, Amarillo Division) (report and recommendation denying relief from judgment pursuant to Rule 60(b)(6) filed September 29, 2017)

Balentine v. Stephens, No. 2:03-CV-00039 (United States District Court for the Northern District of Texas, Amarillo Division) (Opinion and Order for evidentiary hearing in the District Court, Northern District of Texas, filed April 1, 2016)

Balentine v. Stephens, No. 12-70023 (United States Court of Appeals for the Fifth Circuit) (Opinion remanding to the district court to conduct further proceedings filed January 30, 2014)

Balentine v. Thaler, No. 12-5906 (United States Supreme Court) (order granting petition for writ of certiorari and remanding to the United States Court of Appeals for the Fifth Circuit filed June 3, 2013)

Balentine v. Thaler, No. 12-70023 (United States Court of Appeals for the Fifth Circuit) (order denying motion for rehearing en banc filed August 21, 2012)

Balentine v. Thaler, No. 12-70023 (United States Court of Appeals for the Fifth Circuit) (order denying motion for stay of execution and affirming district court's denial of Rule 60(b) motion filed August 17, 2012)

Balentine v. Thaler, No. 2:03-CV-039-J (United States District Court for the Northern District of Texas, Amarillo Division) (order accepting and adopting report and recommendation of the United States Magistrate Judge, denying motion for

relief from judgment under Rule 60(b), denying stay of execution, and granting request for a certificate of appealability filed August 10, 2012)

Balentine v. Thaler, No. 2:03-CV-00039 (United States District Court for the Northern District of Texas, Amarillo Division) (report and recommendation to deny motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b) filed July 30, 2012)

Balentine v. Texas, No. 10-11036 (United States Supreme Court) (order denying petition for writ of certiorari filed March 26, 2012)

Balentine v. Texas, No. 10-11036 (United States Supreme Court) (Order granting stay of execution pending disposition of petition for writ of certiorari filed June 15, 2011)

Balentine v. Texas, No. 09-5128 (United States Supreme Court) (order denying stay of execution filed June 15, 2011)

Ex Parte Balentine, No. WR-54,071-03 (Texas Court of Criminal Appeals) (order denying relief of third state habeas application filed June 14, 2011)

Balentine v. Thaler, No. 10-9758, (United States Supreme Court) (order denying the petition for writ of certiorari filed June 13, 2011)

Balentine v. Thaler, No. 09-70026 (United States Court of Appeals for the Fifth Circuit) (order denying rehearing en banc filed December 29, 2010)

Balentine v. Thaler, No. 09-70026 (United States Court of Appeals for the Fifth Circuit) (Judgment on rehearing that the panel opinion of June 18, 2010, is withdrawn and affirming judgment of the district court filed on November 17, 2010)

Balentine v. Thaler, No. 09-70026 (United States Court of Appeals for the Fifth Circuit) (Opinion reversing denial of habeas corpus relief and remanding filed on June 18, 2010)

Balentine v. Texas, No. 09-6704 (United States Supreme Court) (order denying petition for writ of certiorari filed November 2, 2009)

Balentine v. Thaler, No. 09-5128 (United States Supreme Court) (order denying petition for writ of certiorari filed October 20, 2009)

Balentine v. Thaler, No. 09-70026 (United States Court of Appeals for the Fifth Circuit) (Order granting stay of execution scheduled September 30, 2009, filed September 29, 2009)

Balentine v. Thaler, No. 09-70026 (United States District Court for the Northern District of Texas, Amarillo Division) (Order denying motion for relief pursuant to Federal Rule of Civil Procedure 60(b) but granting a certificate of appealability filed on September 28, 2009)

Ex Parte Balentine, Nos. WR-54,071-01 and WR-54,071-02 (Texas Court of Criminal Appeals) (Order denying first subsequent application for writ of habeas corpus and denying request to consider initial application filed September 22, 2009)

Balentine v. Quarterman, No. 08-70014 (United States Court of Appeals for the Fifth Circuit) (Opinion denying the motion to expand the certificate of appealability and affirming the district court's denial of habeas petition filed April 13, 2009)

Balentine v. Quarterman, No. 2:03-CV-00039 (United States District Court for the Northern District of Texas, Amarillo Division) (order overruling objections and adopting report and recommendation of the United States Magistrate Judge on the motion for certificate of appealability filed May 30, 2008)

Balentine v. Quarterman, No. 2:03-CV-00039 (United States District Court for the Northern District of Texas, Amarillo Division) (Opinion granting certificate of appealability on grounds one and two and denying certificate of appealability on the remaining claims filed May 2, 2008)

Balentine v. Quarterman, No. 2:03-CV-00039 (United States District Court for the Northern District of Texas, Amarillo Division) (order overruling objections and adopting recommendations of magistrate judge filed March 31, 2008)

Balentine v. Quarterman, No. 2:03-CV-00039 (United States District Court for the Northern District of Texas, Amarillo Division) (report and recommendation to deny petition for a writ of habeas corpus filed September 27, 2007)

Ex Parte John Lezell Balentine, No. 54, 071-01 (Texas Court of Criminal Appeals) (order adopting the trial judge's findings and conclusions and denying application for writ of habeas corpus filed December 4, 2002)

State v. Balentine, No. 39,532-D (District Court of Potter County, Texas) (findings of fact and conclusions of law recommending denial of application for writ of habeas corpus filed October 18, 2002)

Balentine v. State, No. 73,490 (Texas Court of Criminal Appeals) (opinion affirming conviction and sentence on direct appeal filed April 3, 2002)
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PETITION FOR A WRIT OF CERTIORARI

Petitioner John Lezell Balentine respectfully requests that a writ of certiorari issue to review the Texas Court of Criminal Appeals' dismissal of Mr. Balentine's application for a writ of habeas corpus.

OPINIONS BELOW

The February 8, 2023, order of the Texas Court of Criminal Appeals (hereinafter "CCA") is unpublished and appears in the Appendix at App. 1.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The judgment of the CCA was entered on February 8, 2023. App. 1.

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the U.S. Constitution provides, in part: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

The Fourteenth Amendment to the U.S. Constitution provides, in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

INTRODUCTION

This case raises important procedural issues arising from the Texas Court of Criminal Appeals' unexplained application of the abuse-of-the-writ doctrine. The issues presented are comparable to those currently pending before this Court in *Cruz v. Arizona*, No. 21-846 (argued November 1, 2022). The questions here are likewise worthy of this Court's review as they arise repeatedly in Texas cases. At a minimum, this Court should hold this case pending its decision in *Cruz*.

The Texas court did not address the merits of the underlying claim, which presents disturbing issues of a juror's racial bias and lies and omissions about his background during jury selection. The harm here was magnified by the divisive racial atmosphere surrounding the crime – the killing of three white teenagers by a Black man. The crime exposed racial divisions in the community; consistent with those divisions, the prosecutor struck all potential Black jurors during jury selection. Defense counsel's own racial biases were exposed by the discovery of a note in their file in which they referred to the capital sentencing process as a "justifiable lynching."

In light of this highly charged atmosphere, the CCA's unwillingness to address issues of bias and misconduct by the juror who became the foreman of the jury, and who bullied people favoring a life sentence into voting for death, is all the more problematic. This Court should address the issues arising from the CCA's application of the abuse of the writ doctrine, and remand this case with instructions to consider the merits of Petitioner's claims.

STATEMENT OF THE CASE

Relevant Procedural Background

John Balentine was convicted and sentenced to death in the 320th Judicial District Court of Potter County, Texas, in 1999. *State v. Balentine*, No. 39,532-D, 1999 WL 34866401 (320th Dist. Ct., Potter Co., Tex. Apr. 21, 1999). The CCA affirmed the convictions and sentences on direct appeal, *Balentine v. State*, 71 S.W.3d 763, 766 (Tex. Crim. App. 2002), and an initial state-habeas appeal, *Ex parte Balentine*, No. WR-54,071-01 (Tex. Crim. App. Dec. 4, 2002).

Mr. Balentine filed a subsequent state-habeas appeal, which was denied. *Ex parte Balentine*, Nos. WR-54,071-01, WR-54,071-02, 2009 WL 3042425, at *1 (Tex. Crim. App. Sept. 22, 2009). This Court denied his petition for writ of certiorari. *Balentine v. Texas*, 558 U.S. 1003 (2009).

Mr. Balentine filed a second subsequent state-habeas appeal, which the CCA dismissed. *Ex parte Balentine*, No. WR-54,071-03, 2011 WL 13213991, at *1 (Tex. Crim. App. June 14, 2011). This Court granted a motion for stay of execution, *Balentine v. Texas*, 564 U.S. 1014 (2011), which expired upon its denial of certiorari, *Balentine v. Texas*, 566 U.S. 904 (2012).

Mr. Balentine timely sought federal habeas relief, which the district court denied. *Balentine v. Quarterman*, No. 2:03-CV-00039, 2008 WL 862992, at *1 (N.D. Tex. Mar. 31, 2008). The Fifth Circuit Court of Appeals affirmed. *Balentine v. Quarterman*, 324 F. App'x 304, 305 (5th Cir. 2009). This Court denied his petition for writ of certiorari, *Balentine v. Thaler*, 558 U.S. 971 (2009).

Mr. Balentine's subsequent efforts to reopen his federal habeas proceedings were ultimately unsuccessful. *See Balentine v. Thaler*, 626 F.3d 842, 844 (5th Cir. 2010); *Balentine v. Lumpkin*, No. 18-70035, 2021 WL 3376528, at *11 (5th Cir. Aug. 3, 2021). This Court denied a petition for certiorari. *Balentine v. Lumpkin*, 142 S. Ct. 2818 (2022).

Based on newly obtained evidence of a juror's misconduct and racial bias, Petitioner filed a petition for habeas corpus relief in the Texas state courts on January 30, 2023. On February 8, 2023, the CCA dismissed that petition, without addressing the ultimate merit of his claims. Petitioner seeks review of that decision.

Relevant Factual Background

Mr. Balentine was accused, and ultimately convicted, of shooting and killing three teenagers on January 21, 1998. The homicides were the result of conflict over an interracial relationship between John Balentine, a Black man, and Misty Caylor, a white woman. Mark Caylor, Misty's brother, openly disapproved of their relationship, using racist slurs to refer to Mr. Balentine. Things hit a boiling point when Mark, who had recently been released from a juvenile boot camp for shooting up a house, stole another gun and made it known to numerous people that he was coming for Mr. Balentine. Investigators recovered from the crime scene a note from Mark stating he was going to "187" (meaning "kill") the "neger," followed by reference to Mark's own gang affiliation.[1]

[1] Note of Mark Caylor, attached as App. 2.

Mr. Balentine was also the object of racial slurs and taunts from some of the victims. Christopher Caylor, Mark's brother, testified that, as a threat to Mr. Balentine, he placed a note referencing the KKK on the front door of a house where Mr. Balentine was staying.[2] The jurors also heard that Mr. Balentine had another interracial relationship with a woman named April Ryan.

Shortly after his arrest, Mr. Balentine confessed to the murders. The jury, without hearing any evidence of mitigation, sentenced him to death.

1. The jury foreman held racist beliefs

Dory Carson England, Sr., was the jury foreman. His signed declaration[3] demonstrates that his long-standing racial prejudices skewed his role as a juror and impacted the jury's deliberations.

Mr. England never considered a life sentence. As foreman, he told the other jurors that life was not an option and that sentencing Mr. Balentine to death was "biblically justified." He recounts that there were four jurors who wanted to vote for life during penalty-phase deliberations, but Mr. England would not let them. Describing himself as stubborn and aggressive, he told the jurors that life was not an option and that they needed to vote for death because, otherwise, Mr. Balentine would do it again. One juror even told prosecutors, who, after the verdict, asked about the deliberation, that "he [England] wouldn't let us."

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[2] Trial Testimony of Christopher Caylor, April 12, 1999, pp. 133–35, attached as App. 3.

[3] Declaration of Dory England, attached as App. 4.

When one juror wrote a note indicating that she did not want to sentence Mr. Balentine to death, Mr. England refused to have that note sent to the judge. Instead, he ripped it up, explaining that no notes could leave the room. Mr. England admitted to "at least one" mention of race in the deliberation room by other jurors, as other jurors confirmed.

Foreman England explained that he knew Mr. Balentine was a killer who needed to be put to death. Through his military service, Mr. England had seen, and had been the victim of, substantial violence. He was concerned that if others voted for life, Mr. Balentine could get paroled early. If that were to happen, Mr. England intended to personally hunt Mr. Balentine down and kill him. He would shoot Mr. Balentine if he ever saw him on the street. Foreman England also revealed a violent racial incident from his time doing security detail for the Marines in the 1970s, which he had omitted from his juror questionnaire: "Once, in Los Angeles, a black man rushed the limo we were in and I had stupidly left the window partially down and he got his arm in and stabbed me. I shot him and killed him."

Lola Perkins was Mr. England's future sister-in-law who helped care for him for several years when he was an adolescent and teenager. She explained to an investigator[4] that Mr. England had deep feelings of racial antagonism against Black people. While in school, he was arrested when he instigated a fight with a Black student. Mr. England explained that he started the fight because he did not like

[4] A declaration from investigator Cassandra Belter is attached as App. 5.

Black people, whom he referred to as "niggers." Ms. Perkins explains that such sentiments reflected how Mr. England was raised and how things were in Amarillo. Blacks and whites did not mix much. Accepting interracial relationships was particularly hard for Mr. England, even when, years later, his son became involved with a Black woman.

2. Foreman England lied about his background during jury selection

Foreman England misrepresented and failed to disclose critical information about his life experiences that, if disclosed, would have resulted in his dismissal from the jury for cause based on his apparent predisposition against Mr. Balentine and in favor of a death sentence. Moreover, Foreman England infected the deliberative process with this predisposition by intimidating jurors who did not want to vote in favor of a death sentence. Foreman England's history of involvement in multiple racially motivated assaults, some of which involved gun violence, also would have been grounds to excuse him, because those experiences resulted in his having a personal agenda to make sure Mr. Balentine was put to death.

In his juror questionnaire, Mr. England was asked whether he or any family members or friends were the victim of a violent crime, to which he falsely answered no. In the subsequent question, he was asked the same question as to any non-violent crime, and he admitted only that his car had been vandalized.[5] However,

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[5] *See* Juror Questionnaire of Dory England, p. 13, Ques. 52–53, attached as App. 6.

Mr. England failed to disclose that he was the victim of (and witness to) numerous violent crimes, including being shot and sexually molested. While working in a security detail, Mr. England was shot on two separate occasions and stabbed in a third incident. On all three occasions, he explained, he shot and killed the perpetrators.[6] Mr. England withheld the fact that, as a child, he was molested by one of his stepfathers and escaped the situation only with the help of his grandmother.[7] Mr. England also witnessed his brother being molested by their stepfather.[8]

In the jury questionnaire, prospective jurors were asked whether they had ever been arrested for a crime.[9] Despite being arrested as a juvenile, Mr. England lied and stated he had never been arrested. Mr. England has now admitted that he was arrested and placed in a juvenile detention facility for hitting his stepfather in the head with a hammer when he observed him molesting his brother.[10] The injuries were serious enough to cause brain damage. He later absconded from the juvenile facility.[11]

Mr. England also provided the court with false information about his military service. On question 23 of the juror questionnaire, Mr. England was asked whether

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[6] Dory England Decl. para. 10.
[7] *Id*. at para. 6.
[8] *Id*. at para. 7.
[9] Juror Questionnaire, p. 24, question 100.
[10] England Decl. para. 6.
[11] *Id*.

he had ever worked for various law enforcement agencies, including the CIA, and he responded in the negative.[12] In fact, Mr. England had worked with the CIA during his time in the Marine Corps.[13] He also denied being in combat during his military service.[14] This too was false. During his time in combat and working for the CIA, he suffered numerous traumatic incidents including being sliced in the throat with a machete and losing consciousness for a lengthy period of time.[15] Mr. England explained that his undisclosed combat service directly impacted his view of Mr. Balentine's case and his decision to impose a sentence of death. He explained that he had been in combat and had come face to face with killers. He had "killed more people than I can recall." Mr. England believed that Mr. Balentine had to die and that, if he didn't get death, he "would have to hunt him down." England Decl. para. 5. Moreover, Mr. England's decision to sentence Mr. Balentine to death based on his experience with "killers" directly contradicted his promise to counsel during voir dire that he would make decisions based upon only actual evidence "rather than something that happened to you in your personal life or your personal feelings about the law." 12 RR 118.

3. Foreman England's impact on other jurors

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[12] Juror Questionnaire, p. 5, Question 23.
[13] England Decl. para. 9.
[14] Juror Questionnaire, p. 9, Question 37(e).
[15] England Decl. para. 9.

Mr. England, as the foreman, intimidated other jurors to get them to go along with his agenda. When a female juror wrote a note in the deliberation room stating that she did not want to give Mr. Balentine a death sentence, Mr. England confronted her, told her no notes could leave the room, and then ripped it up.[16] He explained that he made sure any opposition to a death sentence would not be tolerated:

> When we got into deliberations for the penalty verdict, four jurors did not want to give the death penalty. I am pretty stubborn and pretty aggressive. I don't play well with others. I made it clear that we were chosen to take care of this problem, and that the death penalty was the only answer. If we didn't, I told them Balentine would do it again.

England Decl. para. 11.

Mr. England's aggression towards jurors willing to impose a life sentence was corroborated by other jurors. Tara Smith recalled that there were jurors in favor of life during the penalty deliberations, and one of them was a woman. She recalled that the foreman "had a very strong personality," and she felt that some of those holdouts "couldn't express that they didn't want to sentence John to death."[17] Juror Edward Sisson remembered a female juror who was a holdout on the death sentence whom he described as crying and shaken up.[18] After the verdict, when the jurors met with the prosecutors, they were asked whether they were able to express their

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[16] England Decl. para. 13.
[17] Declaration of Tara Smith. para. 4, attached as App. 7.
[18] Declaration of Edward Sisson. para. 4, attached as App 8.

opinion during deliberations, and one of the women pointed at Mr. England and said, "He wouldn't let us!"[19]

Mr. England also inappropriately injected religion into the discussions regarding the penalty verdict. At the start of the deliberations, he informed the other jurors that they should not be emotional and that their decision was "biblically justified."[20] Juror Smith recalled that several of the jurors discussed their religion and how that affected their decision as to whether to impose a life or death sentence.[21] Mr. England, as foreman, did not report this to the court.

4. Race played a pernicious role in Mr. Balentine's trial and sentencing

Mr. Balentine's trial and sentencing were replete with racial divisiveness and concerns. The prosecutor, who made notes on the race of the prospective jurors, used the State's peremptory challenges to ensure that Mr. Balentine was tried by a jury with no Black people, having struck the only two potential Black jurors. As a result, Mr. Balentine was tried before an all-white jury, except for one juror of Hispanic descent. When defense counsel made a *Batson* challenge, the prosecutor relied on answers given to questions about how the jurors felt about the O.J. Simpson trial, itself reflective of a racially divided nation, to justify the strikes, though he did not strike white jurors who provided similar answers. 16 RR 26, 49.

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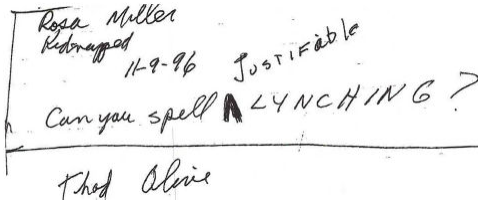
[19] England Decl. para. 16.
[20] England Decl. para. 4.
[21] Smith Decl. para. 4.

Mr. Balentine's trial counsel demonstrated racist animus towards Mr. Balentine. Counsel's documented racial hostility – reflected in a handwritten note between Mr. Balentine's two attorneys during the penalty phase – is stunning in its disgust for their client:[22]



Counsel's suggestion that Mr. Balentine deserved to be lynched is unconscionable. The reference to lynching conjures up images of our country at its worst: the racially motivated, lawless killing of Black people by a mob of angry white people. Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 Mich. L. Rev. 48, 55–57 (2000) ("[T]he purpose of a lynching usually was to ensure black subordination rather than to punish guilt."). "Today most Americans associate the term 'lynching' with racist mob violence directed against African Americans during the age of Jim Crow." Manfred Berg, *Popular Justice: History of Lynching in America* 117 (Rowman & Littlefield Publ'g. Grp., 2011). Trial counsel's reference to a justifiable lynching has no place in the lexicon of a capital defense attorney and is particularly disturbing in a case where the *only* Black person in the courtroom was Mr. Balentine. Counsel's racially inflammatory commentary reflects the racial tensions that were at the core of this case.

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[22] James Durham Trial Notes, attached as App. 9.

Jurors were also affected by the racial tensions within the community, and by seeing Mr. Balentine in shackles. Juror Tara Cline Smith spoke of the impact of seeing Mr. Balentine cloaked in chains, alone, stripped of dignity, as she completed her jury questionnaire:

> The rest of us sat there and were given the juror questionnaires to take home and complete before coming back the next day. While I was sitting at one of those desks, I watched the sheriffs bring in this Black man covered in chains and shackles. It was a strange sight. It took me a while to piece together that this was who the case was about. They sat him down right where all of us were seated. Because of those chains, I realized he had to be the defendant, even though no one introduced him and he wasn't with lawyers. I have been on two other juries and I know someone isn't supposed to be chained up like that. They moved us to the courtroom days later in the process and there John was, seated at the defense table with his two lawyers. He may have been shackled in the courtroom, as well, but I mostly remember all those chains from the very first day.

Juror Smith also confirmed, "There was talk about racial aspects of this case during the deliberations."

In reflecting on how the jury deliberated, Juror Steven Wayne Fulton[23] pointed to the stark racial divisions in the Amarillo community:

> Race is a big issue in Amarillo, it's different than where I grew up in Kansas. It's very segregated here. I remember seeing them bring in this notebook at trial from the crime scene and it seemed like no one was making a big deal about the note those guys wrote about Balentine and the KKK and threatening him. I wanted to hear more about that because it concerned me.

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[23] Declaration of Steven Fulton, attached as App. 10.

In light of the racial tensions, Juror Fulton discussed apprehension about retaliation by the victim's family:

> We had given our full names as jurors and they were stated aloud in court. I wasn't just worried about Balentine, though. All due respect, the victims in this case were rough cut. Drugs, violence, and their families were in court. So in my mind, they could come after us if we didn't give death. I believe we brought up this concern with the court or prosecutors at some point but they said no one had our addresses so it should be fine. . . . One of the victims' dads had a cut off shirt on in court, and everyone could see his giant Confederate flag tattoo on his arm while we heard testimony. That was the undertone of this case and everyone seemed to ignore it.

Juror Edward Sisson reflected on the heightened racial tensions in the community around this case:

> It seemed like some people weren't happy about our decision, people from the community. Someone keyed the cars of 4 or 5 jurors one day in the parking lot across from the Civic Center. Then, I got back to work at the VA – I am a Navy Veteran and I did administrative work there – and this Black girl came up and said, "Glad you are back to work and done killing people." I was like, wow. That was the attitude I was getting from certain people.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD DECIDE IF TEXAS'S APPLICATION OF A STATUTORY BAR TO PRECLUDE CONSIDERATION OF FEDERAL CONSTITUTIONAL CLAIMS REGARDING A RACIST JUROR WHO BULLIED OTHER JURORS WANTING TO VOTE FOR LIFE INTO VOTING FOR DEATH WAS ADEQUATE AND INDEPENDENT.

In *Cruz v. Arizona*, this Court granted certiorari to decide "[w]hether the Arizona Supreme Court's holding that Arizona Rule of Criminal Procedure 32.1(g) precluded post-conviction relief is an adequate and independent state-law ground for the judgment." 142 S. Ct. 1412 (2022). In *Cruz*, the petitioner has argued, among other things, that Arizona applies Rule 32.1(g) in a manner that is interwoven with federal law but that purports to be procedural in order to avoid further review of a federal constitutional error. *See* Brief of Petitioner, *Cruz v. Arizona*, No. 21-846, 2022 WL 2181790, at *2–4, *15–17 (U.S. June 13, 2022).

Mr. Balentine's case raises procedural questions of at least equal importance to those in *Cruz*. As discussed, *infra*, Mr. Balentine raised claims alleging racial bias in the jury room coming from a racist juror, who lied during jury selection in order to get on the jury, and then used his position as foreman to coerce jurors into voting for death. The juror's lies during jury selection violated Mr. Balentine's constitutional rights to a fair and impartial jury, and his influence during sentencing deliberations led to a death sentence that was impermissibly influenced by racial bias, in violation of *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 225 (2017), and *Buck v. Davis*, 580 U.S. 100, 121, 124 (2017).

The Texas Court of Criminal Appeals relied upon Article 11.071, § 5, to refuse

to review the merits of Mr. Balentine's successor habeas petition. The CCA order contains no explanation for its ruling and provides no analysis about why or how the rule was applied to Mr. Balentine's petition. The order does not indicate whether the Texas court relied on federal or state law in applying section 5. Its reasoning is opaque. The only clear point of the order is that it refused to consider the important claims of racial bias and jury misconduct that Mr. Balentine had raised. As in *Cruz*, this Court should decide whether the refusal to address important constitutional claims was adequate and independent.

The petitioner in *Cruz* argues that Arizona's refusal to apply controlling federal law rendered its application of Rule 32.1(g) inadequate. He argues that the decision discriminates against federal rights and is intertwined with federal questions. And because the state-court ruling was intertwined with federal law, the state court should not be allowed to evade review of the federal questions before it. *See* Brief of Petitioner, *Cruz*, 2022 WL 2181790, at *2–4, *15–17.

The CCA's application of section 5 raises the same concerns. Here, the CCA ruled that Mr. Balentine had "failed to show that he satisfies the requirements of Article 11.071 § 5," App. 1 at 2, but did not specify in what respect Mr. Balentine had failed to satisfy the statute. This is significant because the CCA has interpreted Article 11.071, § 5(a)(1), the requirements of which Mr. Balentine alleged he satisfied, as containing two separate prongs: (1) one requiring a prima facie showing of "a federal constitutional claim that requires relief from the conviction or sentence"; and (2) an "unavailability" prong requiring a showing that the factual or

legal basis of the federal claim was unavailable at the time the initial application was filed. *Ex Parte Campbell,* 226 S.W.3d 418, 421 (Tex. Crim. App. 2007); *accord Ex Parte Staley,* 160 S.W.3d 56, 66 (Tex. Crim. App. 2005) (*per curiam*). An application does not satisfy section 5(a)(1) if it fails to satisfy *either* the merits prong or the unavailability prong. *Campbell,* 226 S.W.3d at 421.

Because the CCA did not indicate which prong Mr. Balentine had failed to satisfy, it could have relied on either or both. Yet both prongs are interwoven with federal questions. Where a state-law ground of decision "is so interwoven with" a federal-law ground of decision "as not to be an independent matter," this Court's "jurisdiction is plain." *Enter. Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917). In that situation, this Court has "jurisdiction and should decide the federal issue," because "if the state court erred in its understanding of [this Court's] cases," then the Court "should so declare." *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 568 (1977). Thus, if the ruling on the state-court ground is even "influenced by" a question of federal law, it is not independent. *See Foster v. Chatman*, 578 U.S. 488, 499 n.4 (2016) (citation omitted).

If the state court denied the writ based on a failure by Mr. Balentine to satisfy the prima-facie-showing prong of section 5(a)(1), its decision was not based on an independent state ground. This prong involves review of whether the applicant has made a prima facie showing of a federal constitutional violation. *See* Article 11.071, § 5(a)(1); *Campbell,* 226 S.W.3d at 422–25 (denying claim as abuse of writ based on lack of merit of claim); *Ex parte Cruz-Garcia*, No. WR-85,051-03, 2017

WL 4947132, at *2 (Tex. Crim. App. Nov. 1, 2017) (denying claim as abuse of writ based on failure to show materiality); *Ex parte Reed*, No. WR-50,961-07, 2017 WL 2138127, at *1 (Tex. Crim. App. May 17, 2017) (denying claim as abuse of writ based on failure to make prima facie showing on federal claims).

The Fifth Circuit has frequently recognized that such review, purportedly for purposes of deciding whether there was an abuse of the writ, is not independent of federal law. *See, e.g.*, *Rivera v. Quarterman,* 505 F.3d 349, 359 (5th Cir. 2007) (resolution of antecedent federal question was implicit in CCA's evaluation of "sufficient specific facts" for section 5(a) review for intellectual disability claim and decision that the claim "does not make a prima facie showing – and is, therefore, an abuse of the writ – is not an independent state law ground"); *accord Busby v. Davis*, 925 F.3d 699, 706–07 (5th Cir. 2019).

The CCA's statement here that it did not review the merits of the claim does not mean that it did not review or rely on the prima-facie-showing prong. Indeed, the CCA has made clear that when it finds no prima facie showing, it does not consider itself to have reviewed "the merits" of the claim. *See, e.g.*, *Campbell*, 226 S.W.3d at 422–25; *Ex parte Davila*, No. WR-75,356-03, 2018 WL 1738210, at *1 (Tex. Crim. App. Apr. 9, 2018) ("Applicant has failed to make a prima facie showing of a Brady violation, . . . and he has failed to show that the law he claims renders the Texas scheme unconstitutional applies to the Texas scheme. . . . Accordingly, we dismiss this application as an abuse of the writ *without reviewing the merits of the claims raised*." (emphasis added)); *Ex parte Shore*, No. WR-78,133-

02, 2017 WL 4534734, at *1 (Tex. Crim. App. Oct. 10, 2017) ("After reviewing this application, we find that applicant has failed to make a prima facie showing that a person with brain damage, like an intellectually disabled person, should be categorically exempt from execution. . . . Accordingly, we dismiss this application as an abuse of the writ *without reviewing the merits of the claim raised*." (emphasis added)).

The unavailability prong may also be interwoven with federal questions. Under Texas law, the unavailability prong requires a showing that the "factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." Article 11.071, § 5(a)(1). Section 5(d) defines legal unavailability of a claim as follows:

> [The] legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.

Id., § 5(d).

The unavailability prong thus requires the court to review the state of federal law in order to determine if the legal basis of the claim was recognized by, or reasonably flowed from, a final decision of this Court or a federal court of appeals. This requires a review of federal law as it existed both at the time of the filing of a prior petition as well as at the time of the successor filing. The unavailability prong is thus not independent of federal law; it is dependent on the court's analysis of the state of federal law.

In any event, Mr. Balentine met the unavailability prong because his claim was legally unavailable at the time he filed his most recent prior application, i.e., June, 2011. Prior to *Pena-Rodriguez*, evidence of a racist juror who wanted to himself hunt Mr. Balentine down and kill him, who tore up a note by a juror who wanted to vote for life, and who bullied and coerced other jurors to vote for death, would not have been admissible to show that race had a pernicious effect on the jury's sentence. Such evidence would have been barred in Texas by the operation of Texas Rule of Evidence 606(b)(1). That rule barred receiving evidence of a juror's statement on matters concerning jury deliberations, "the effect of anything on that juror's or another juror's vote," or "any juror's mental processes" about the verdict, with no exception for racial bias. *Id.*; *see also* Tex. R. Civ. Pro. 327(b) (same).

In *Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 371 (Tex. 2000), the Texas Supreme Court rejected an argument that Rules 327(b) and 606(b) deprived a litigant of a constitutional right to a fair trial because of a juror's bias against product liability suits. The court held that evidence of juror "bias must come from a source other than a fellow juror's testimony about deliberations." *Id.* Juror testimony was thus limited to "issues of juror misconduct, communications to the jury, and erroneous answers on voir dire, provided such testimony does not require delving into deliberations." *Id.*

Thus, prior to *Pena-Rodriguez,* Mr. Balentine would not have had either a legal or a factual basis for raising his claim. If the CCA ruled otherwise, its ruling would not be adequate; a state-court default ruling is not adequate if the petitioner

did not actually violate the rule in question. *See Cone v. Bell*, 556 U.S. 449, 466 (2009) (no default where state-court default ruling "rested on a false premise"); *Lee v. Kemna*, 534 U.S. 362, 366–67, 385 (2002) (no default where petitioner "substantially complied" with applicable rule).

The problem illustrated here is that the CCA's ruling is opaque and provides no basis for determining its actual basis. *See Ruiz v. Quarterman*, 504 F.3d 523, 528 (5th Cir. 2007) ("The boilerplate dismissal by the CCA of an application for abuse of the writ is itself uncertain on this point, being unclear whether the CCA decision was based on the first element, a state-law question, or on the second element, a question of federal constitutional law.") (emphasis added). Here, as in *Ruiz*, it is impossible to tell whether the CCA relied on state or federal law. As the above cases exemplify, this is a recurring issue, as the CCA frequently avoids having to address the merits of federal claims by relying on the abuse-of-the-writ doctrine without any explanation of why or how that doctrine applies to a particular case. As such, its decision is not independent of federal law.

Finally, this Court has held that a state-court decision that fails to "follow the dictates of federal law" cannot be defended "as resting on adequate and independent state law grounds." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2262 (2020). For the reasons discussed below, the CCA decision fails to follow federal law that decries the presence of a racist juror who lied about his background during jury selection. *Pena-Rodriguez* made clear that "racial bias in the justice system must be addressed." 580 U.S. at 225. The CCA did not follow that mandate. For that reason

as well, this Court should review whether the application of section 5(a) was adequate.

As in *Cruz*, this Court should grant certiorari and determine if the CCA's application of state law was adequate and independent. At a minimum, this Court should hold this Petition pending a decision in *Cruz*.

II. THIS COURT SHOULD REMAND PETITIONER'S CLAIMS CONCERNING A JUROR'S RACIAL BIAS AND MISCONDUCT FOR MERITS REVIEW BY THE STATE COURTS.

The jury foreman harbored deep-seated feelings of racial prejudice and believed that it was up to him to make sure that Mr. Balentine would be killed. He lied about his background in order to hide facts that would disqualify him as a juror. During sentencing deliberations, he bullied jurors who thought a life sentence was appropriate into changing their minds. The impact of racial bias on the jury verdict undermines the reliability of the jury's decision. *See Tharpe v. Sellers,* 138 S. Ct. 545 (2018) (juror's affidavit admitting his racial bias "presents a strong factual basis for the argument that Tharpe's race affected [the juror's] vote for a death verdict").

Mr. Balentine's right to a fair and impartial jury was violated because the jury's verdict "relied on racial stereotypes or animus," *Pena-Rodriguez*, 580 U.S. at 225, and the foreman introduced a "particularly noxious strain of racial prejudice," *Buck*, 580 U.S. at 121, into the jury's determination of whether Mr. Balentine should live or die. *Pena-Rodriguez* made clear that "racial bias in the justice system must be addressed." 580 U.S. at 225. "When racial bias infects a jury in a capital

case, it deprives a defendant of his right to an impartial tribunal in a life-or-death context." *Love v. Texas,* 142 S. Ct. 1406, 1406 (2022) (Sotomayor, J., dissenting from denial of certiorari) (citation and quotation marks omitted).

Petitioner presents a viable claim of racial bias and juror misconduct that deserves to be heard. Since the CCA's application of section 5's abuse-of-the-writ doctrine was not adequate and independent, this case should be remanded to the Texas courts with instructions to conduct any necessary hearings and determine the merits of his claim.

The Sixth and Fourteenth Amendments to the United States Constitution "guarantee a defendant on trial for his life the right to an impartial jury." *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988); *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). "The Sixth Amendment guarantees an impartial jury, and the presence of a biased juror may require a new trial as a remedy." *Hatten v. Quarterman*, 570 F.3d 595, 600 (5th Cir. 2009). Claims of racial bias must be treated "with added precaution" in light of the special danger such bias imposes. *Pena-Rodriguez*, 580 U.S. at 225.

Actual bias is established when a juror fails to answer a material question honestly on voir dire, where a correct response would have provided a valid basis for a challenge for cause. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984); *Hatten*, 570 F.3d at 600; *Craaybeek v. Lumpkin*, 855 F. App'x 942, 946 (5th Cir. 2021). If even one juror improperly participated in a case, the conviction and sentence must be vacated. *Ross*, 487 U.S. at 85.

The voir dire process, which ordinarily serves to protect the right to a fair trial by exposing possible biases on the part of potential jurors, is predicated upon obtaining truthful answers from prospective jurors. *See, e.g.*, *Turner v. Murray*, 476 U.S. 28, 36 (1986) (plurality opinion); *Ham v. South Carolina*, 409 U.S. 524, 527 (1973); *see also Gonzales v. State*, 3 S.W.3d 915, 916–17 (Tex. Crim. App. 1999) (en banc) ("[E]rror occurs where a prejudiced or biased juror is selected without fault or lack of diligence on the part of the defense counsel, such acting in good faith on the juror's responses and having no knowledge of their inaccuracy.") (internal quotation marks and emphasis omitted).

Moreover, any possible "[d]oubts regarding bias must be resolved against the juror." *Burton v. Johnson*, 948 F.2d 1150, 1158 (10th Cir. 1991) (citation omitted) (reversing murder conviction of wife for killing husband, where juror failed to reveal that she was victim of spousal abuse). "Certainly, when possible non-objectivity is secreted and compounded by the untruthfulness of a potential juror's answer on voir dire, the result is the deprivation of the defendant's right to a fair trial." *United States v. Bynum*, 634 F.2d 768, 771 (4th Cir. 1980).

This Court has also recognized that certain situations justify a finding of implied bias. *Smith v. Phillips*, 455 U.S. 209, 214–18 (1982). Indeed, "[w]here a juror has a close connection to the circumstances at hand, . . . bias may be presumed as a matter of law." *Buckner v. Davis*, 945 F.3d 906, 910 (5th Cir. 2019); *see Brooks v. Dretke*, 444 F.3d 328, 332 (5th Cir. 2006) (finding implied bias where juror was arrested in courthouse for weapons offense during the presentation of evidence at

sentencing in capital-murder trial). The circumstances of this case suggest that Foreman England displayed both actual and implied bias.

Mr. England's declaration establishes actual bias. He purposefully withheld facts about his background. Disclosure of these facts would have led any reasonable attorney to question his ability to be impartial. Any one of the violent incidents that Foreman England failed to disclose, such as having his throat slashed, being shot, or killing those who attacked him, would have served to disqualify him as a juror – as would an honest answer to the question of whether he could follow the court's instructions to base his verdict on the evidence alone. *See* Tex. Code Crim. Proc. Ann. art. 35.16(a)(3)(9)(10) (West). Indeed, Mr. England admitted that his prior history of being the victim of violent crimes and his combat experience influenced his ability to be impartial in this case because he knew "killers," and, if Balentine did not get death, "he would have to hunt him down."[24]

In addition, Mr. England's statements that he was arrested as a juvenile for smashing his stepfather in the head, causing brain damage, and absconding from a juvenile facility would potentially disqualify him as a juror under Tex. Code Crim. Proc. Ann. art. 35.16(a). Once again, Mr. England lied to cover up his past so that he could become a member of the jury and impose a sentence of death.

Mr. England also failed to disclose his racial biases. Had Mr. England explained his views on race, and particularly his views on interracial relationships,

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[24] England Decl. para. 5.

he would have been disqualified from jury service in this case. "Racial bias is too grave and systemic a threat to the fair administration of justice to be tolerated or ignored." *Love*, 142 S. Ct. at 1408 (Sotomayor, J., dissenting). Mr. Balentine's relationships with white women, including Misty Caylor, the sister of one of the deceased, were at the heart of the dispute that led to the killings. If Mr. England had disclosed his negative views of such relationships, he would not have been permitted to sit on the jury.

The circumstances in this case also demonstrate implied bias. There is a close correlation between the facts in this case (shooting death of three teenagers) and Mr. England's history of childhood trauma, being the victim of gun violence, and extensive combat experience. As to this type of connection, "it is well established that implied bias . . . may be found on the basis of similarities between the juror's experiences and the facts giving rise to the trial." *Gonzales v. Thomas*, 99 F.3d 978, 986 (10th Cir. 1996); *see also Hunley v. Godinez*, 975 F.2d 316, 319 (7th Cir. 1992) (noting that "courts have presumed bias in cases where the prospective juror has been the victim of a crime or has experienced a situation similar to the one at issue in the trial").

In *Green v. White*, 232 F.3d 671, 678 (9th Cir. 2000), a habeas petitioner's claim of implied bias was upheld where the juror purposefully withheld his prior conviction to get onto the jury and stated in deliberations that he knew the defendant was guilty and he wished he could get a gun and kill the defendant himself. So it is here: Foreman England withheld his combat experience, told the

other jurors that he knew Balentine was guilty and that they were "chosen to take care of this problem," and planned to kill Mr. Balentine himself if he was not sentenced to death.[25]

Foreman England repeatedly lied and covered up his past so he could become a part of the jury. Once seated, he was elected foreman, and then exploited his position to bully and coerce jurors who wanted to vote for life. He tore up a note for the judge from one such juror, and declared that he would not allow any notes to leave the jury room. Mr. England's bias and prejudices led him to determine that Mr. Balentine had to die. He was willing to hunt him down and kill him if necessary. He used his position, and aggressive personality, to force those who disagreed to bend to his will. He even sought to bring religion into the mix, stating to the jurors that they were "biblically justified" in sentencing Mr. Balentine to death. *See Oliver v. Quarterman*, 541 F.3d 329, 336–44 (5th Cir. 2008) (holding that jury's consultation of Bible passages amounted to external influence but declining to find prejudice).

All of the above circumstances raise important questions about the fairness of a jury led by a racially prejudiced foreman who lied during jury selection and then browbeat jurors who were initially unwilling to impose death. This claim deserves a hearing on its merits. This Court should grant certiorari and remand this case to the CCA for consideration on the merits.

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[25] England Decl. paras. 5, 11.

CONCLUSION

For these reasons, this Court should grant this petition for a writ of certiorari and place this case on its merits docket, or, in the alternative, hold this petition pending a decision in *Cruz v. Arizona*.

Respectfully submitted,

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