IN THE 320TH JUDICIAL DISTRICT COURT
POTTER COUNTY, TEXAS

AND

IN THE TEXAS COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

Ex parte JOHN LEZELL BALENTINE,	§	Writ No. _____
	§	Trial Court Case No: 39532-D
Applicant.	§	**CAPITAL CASE**
	§	**Scheduled Execution Date: February 8, 2023**

SUBSEQUENT APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS

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INTRODUCTION

Applicant John Lezell Balentine seeks relief from his conviction and judgment imposing the death penalty, which were entered in violation of the United States Constitution. Mr. Balentine requests that the Texas Court of Criminal Appeals (CCA) authorize his claims that his death sentence 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, 119, 122 (2017).

Racism and racial issues pervaded Mr. Balentine's trial. The crime itself had strong racial implications – a Black man accused of killing three white teenagers. Defense counsel had racist attitudes, referred to the sentencing proceedings as a "justifiable lynching," and denigrated Mr. Balentine. The prosecutor used their peremptory challenges to remove all prospective Black jurors.

Subsequent investigation revealed that racism affected the jury deliberations as well. The jury foreman was a racist, who believed that it was up to him to make sure that Mr. Balentine would be killed, and, to that end, bullied jurors who thought a life sentence was appropriate into changing their minds. He also lied about his background in order to hide aspects of his background that would disqualify him as a juror. The impact of racial bias on the jury verdict undermines the reliability of the jury's decision.

Mr. Balentine's sentence must be vacated because newly obtained declarations from jurors establish that the jury's verdict "relied on racial stereotypes or animus," *Pena-Rodriguez*, 580 U.S. at 225, and introduced a "particularly noxious strain of racial prejudice," *Buck*, 580 U.S. at 121, into the jury's determination of whether Mr. Balentine was a future danger. This claim can be considered now because the legal basis of this claim arising from *Pena-Rodriguez* and *Buck*, and the related underlying factual basis, were unavailable on the dates that Mr. Balentine filed his previous applications. Tex. Code Crim. Proc. Ann. art. 11.071, § 5(a)(1). Because Mr. Balentine

has satisfied the requirements of section 5(a)(1), the CCA should authorize the district court to take further action and hear evidence on this claim under section 5(c).

STATEMENT OF THE CASE

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 Cty., 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*, No. WR-54,071-02, 2009 WL 3042425, at *1 (Tex. Crim. App. Sept. 22, 2009). The Supreme 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). The Supreme 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 Court of Appeals affirmed. *Balentine v. Quarterman*, 324 F. App'x 304, 307 (5th Cir. 2009). The Supreme Court denied his petition for writ of certiorari. *Balentine v. Thaler*, 558 U.S. 971 (2009).

Mr. Balentine's subsequent efforts to re-open his federal habeas proceedings were ultimately unsuccessful. *See Balentine v. Thaler*, 626 F.3d 842, 857 (5th Cir. 2010); *Balentine v. Lumpkin*, No. 18-70035, 2021 WL 3376528, at *11 (5th Cir. Aug. 3, 2021). The Supreme Court denied a petition for certiorari. *Balentine v. Lumpkin*, 142 S. Ct. 2818 (2022).

None of Mr. Balentine's previous applications for habeas relief raised the claims currently raised in this subsequent writ.

STATEMENT OF FACTS

Mr. Balentine was accused, and ultimately convicted, of shooting and killing three teenagers on January 21, 1998. The central conflict of this case was 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, spewing racist slurs towards Mr. Balentine. Things hit a boiling point when Mark Caylor, recently 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 Caylor stating he was going to "187" (meaning "kill") the "neger," followed by reference to Mark's own gang affiliation.[1] Mr. Balentine was the object of racial slurs and taunts from some of the victims. Chris Caylor, Mark's brother, testified that, as a threat to Mr. Balentine, he placed a note referencing the KKK to the front door of a house where Mr. Balentine was staying.[2] The jurors also heard about a second interracial relationship between Mr. Balentine and Ms. April Ryan, a white woman, who later testified.

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

On February 22, 2017, the United States Supreme Court decided *Buck v. Davis*, 580 U.S. 100 (2017). The Court noted that discrimination is "especially pernicious in the administration of

[1] Note of Mark Caylor, attached as Ex. 1.

[2] Trial Testimony of Christopher Caylor, April 12, 1999, pp. 133–35, (attached as Ex. 2).

justice," *id.* at 124, and recognized false notions equating race or ethnicity with future dangerousness as a "particularly noxious strain of racial prejudice," *id.* at 121.

On March 6, 2017, the Supreme Court decided *Pena-Rodriguez v. Colorado*, 580 U.S. 206 (2017). The Court held that traditional rules forbidding impeachment of jury verdicts must give way where a juror clearly "relied on racial stereotypes or animus" in reaching his or her verdict. *Id.* at 225. *Pena-Rodriguez* made clear that "racial bias in the justice system must be addressed," even in the face of such "no impeachment" rules. *Id*. Prior to *Pena-Rodriguez*, such statements from jurors were inadmissible under Texas Rule of Evidence 606(b)(1).

CLAIMS FOR RELIEF

I. MR. BALENTINE'S DEATH SENTENCE WAS IMPERMISSIBLY INFLUENCED BY RACIAL BIAS IN VIOLATION OF *PENA-RODRIGUEZ V. COLORADO* AND *BUCK V. DAVIS*.

The racism that impacted the jury deliberations would have been protected from challenge prior to the Supreme Court's decisions in *Buck* and *Pena-Rodriguez*. Both opinions were issued after Mr. Balentine's trial and habeas proceedings. In *Buck*, the Court explained that discrimination is "especially pernicious in the administration of justice," *Buck*, 580 U.S. at 124, and described false notions equating race or ethnicity with future dangerousness as a "particularly noxious strain of racial prejudice," *id.* at 121. *Pena-Rodriguez* gave litigants the opportunity to investigate and explore the concerns discussed in *Buck* by holding, for the first time, that traditional rules forbidding impeachment of jury verdicts must give way where a juror clearly "relied on racial stereotypes or animus" in reaching his or her verdict. *Pena-Rodriguez*, 580 U.S. at 225.

Both considerations figure prominently in Mr. Balentine's case. Consistent with *Pena-Rodriguez* and *Buck*, undersigned counsel investigated the impact of race on the jury deliberations. As described below, counsel learned that the jury foreman, Dory England, was a racist with a long-standing hatred of Black people.

Dory Carson England, Sr. was the jury foreman. His signed declaration[3] vividly demonstrates how his racist beliefs 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 at the start of the penalty-phase deliberations. 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."

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 believed that he would personally have to 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,

[3] Attached as Ex. 3.

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 adolescent and teenager. She explained to an investigator[4] that Mr. England had deep feelings of racism. While in school, he was arrested when he instigated a fight with a Black student. Mr. England explained to her that he started the fight because he did not like 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.[5]

Mr. England's racial bias mattered. Racist beliefs that Black men were more likely to act violently because of their race increased the likelihood that Mr. Balentine would be found to be a future danger. These racial stereotypes also dehumanized Mr. Balentine, rendering him unworthy of consideration of a life sentence and facilitating sentencing him to death.

The new evidence demonstrates that racial animus was a substantial motivating factor in the jury's verdict. This Court should grant a hearing on Mr. Balentine's claims.

A. The Pervasive Influence of Racism

1. Racial attitudes in the jury room and in the community

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

[5] Mr. England's life-long racism is also reflected in his social media posts. *See* Ex. 13 for examples.

Even beyond the racist beliefs of Foreman England, racism played a pernicious role in Mr. Balentine's trial and sentencing. Mr. Balentine, a Black man, was accused of killing three white teenagers. Racial concerns were pervasive both inside and outside the courtroom.

Juror Tara Cline Smith[6] 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[7] pointed to the plain racial divisions in the Amarillo community:

> Race is a big issue in Amarillo, its 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.

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

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[6] Ms. Smith's declaration is attached as Ex. 5.

[7] Mr. Fulton's declaration is attached as Ex. 6.

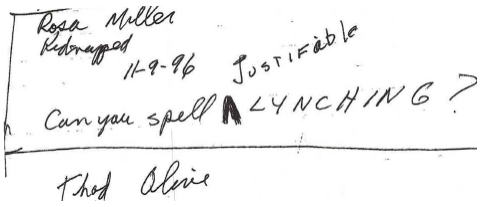
> We had given our full names as jurors and they were stated aloud in court. I wasn't just worried about Balentine, though. All due respect, the victims in this case were rough cut. Drugs, violence, and their families were in court. So in my mind, they could come after us if we didn't give death. I believe 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[8] 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.

2. Defense counsel's racist denigration of Mr. Balentine

His own trial counsel demonstrated racist animus towards Mr. Balentine and treated him with disdain. 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:[9]



Counsel's suggestion that Mr. Balentine deserved to be lynched is unconscionable. Lynching was white supremacist practice of murder perpetrated upon African-American victims to keep the Black community in fear of and subservient to whites. It conjures up images of our country at its worst: the racially motivated, lawless killing of Black people by a mob of angry

[8] Mr. Sesson's declaration is attached as Ex. 7.

[9] James Durham Trial Notes, attached as Ex. 8.

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. (There were no Black jurors.) Counsel's racially inflammatory commentary reflects the racial tensions that were at the core of this case. *See McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1116 (9th Cir. 2004) (holding that "[a] racial slur evocative of lynchings" is a consequential factor in the evaluation of racial hostility); *Allen v. Mich. Dep't of Corr.*, 165 F.3d 405, 411 (6th Cir.1999) (holding that a letter that references lynching is "most disturbing evidence" of serious racial harassment).

Nor was this the first time that counsel expressed disdain for Mr. Balentine and spoke about him in degrading terms. As explained by co-counsel, when Mr. Balentine rejected the State's late-trial offer of a plea to a life sentence – an offer seemingly born out of the State's concern about the strength of its case – lead trial counsel James Durham erupted in fury, calling Mr. Balentine "a dumb son of a bitch," and stormed out of the room.[10]

Counsel's attitude towards Mr. Balentine is particularly disturbing considering the racial dynamics of this case. The racial overtones of this case were unmistakable and to now know that the foreperson of the jury harbored racist beliefs and bullied jurors who wanted to vote for life into

[10] Randall Sherrod testimony at Federal Evidentiary Hearing, p. 126 (transcript attached as Ex. 9).

voting for death calls into question the fundamental fairness and reliability of the jury's sentencing decision. In a case where the State would have been satisfied with a life sentence, as indicated by its offer of life during the trial, the specter of executing Mr. Balentine under the pall of racist conduct by jurors and attorneys requires action from this Court.

3. The prosecutor's peremptory challenges left no Black people on the jury.

The prosecutor 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.

The prosecutor admitted, following the introduction of his voir dire notes into evidence, that he had indeed marked the race of prospective jurors, but testified it was simply to "jog [his] own memory" after reviewing all the juror questionnaires at home the night before. The questionnaires, however, did not include any indication or notation of race, so the explanation was nonsensical. [Vol. 16, p. 26]. Prosecutor Coyle admitted that, though he provided the O.J. Simpson query as reason to strike these two Black people, he did not strike *any* of the other white jurors who had similarly expressed doubt about O.J. Simpson's guilt. [Vol. 16, p. 49]. The prosecutor then tried to claim he struck Mrs. Rosales because she had a daughter in prison [Vol. 16, p. 51], but he seated juror Carmen Sena, who indicated on her questionnaire that she had a son serving twenty years in federal prison.

4. Jurors saw Mr. Balentine in chains and shackles.

The sight of a Black man in shackles and chains raises disturbing racial imagery and evokes racially biased beliefs that Black men are dangerous and need to be restrained., That is why the law generally tries to prevent such imagery from prejudicially impacting the jurors. Yet jurors saw Mr. Balentine in shackles and in chains both before and during the trial. Juror Smith explained that a Black man in chains was brought into the room where prospective jurors were filling out their questionnaires.[11] Although she did not know the man at the time, she recognized that it was Mr. Balentine, after she saw him in the courtroom. Juror Lynda Thornton,[12] who was excused for personal reasons prior to deliberations, remembered that although Mr. Balentine was well dressed at the trial, his hands were in handcuffs and his legs were chained. She could see the shackles around his legs under the defense table where he sat.

Jurors' view of Mr. Balentine in shackles added to the racial prejudice that permeated the trial. The use of visible restraints telegraphed the official view that Mr. Balentine was a threat. *Deck v. Missouri*, 544 U.S. 622, 630 (2005) ("Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process."); *see also Illinois v. Allen*, 397 U.S. 337, 344 (1970). Shackling is inherently prejudicial. *Holbrook v. Flynn*, 475 U.S. 560, 568 (1986) ("[C]ertain practices pose such a threat to the 'fairness of the factfinding process' that they must be subjected to 'close judicial scrutiny.'" (quoting *Estelle v. Williams*, 425 U.S. 501, 503–04 (1976))); *Allen*, 397 U.S. at 344 (emphasizing a substantial risk of prejudice in a defendant's appearing before the jury "bound and gagged"). The practice of restraining a defendant should be

[11] *See* Ex. 5.

[12] Lynda Thornton's declaration is attached as Ex. 10.

employed only as a last resort, since the use of this technique is "something of an affront to the very dignity and decorum of judicial proceedings." *Allen*, 397 U.S. at 344.

In the capital sentencing context, the jury's view of a defendant in shackles "undermine[s] the jury's ability to weigh accurately all relevant considerations – considerations that are often unquantifiable and elusive – when it determines whether a defendant deserves death." *Deck*, 544 U.S. at 632–33. Such practice places a "thumb on death's side of the scale." *Sochor v. Florida*, 504 U.S. 527, 532 (1992) (quoting *Stringer v. Black,* 503 U.S. 222, 232, 236 (1992)).

The prejudicial effect of the jurors' view of Mr. Balentine in shackles is yet another factor that adds to the racial prejudice that permeated his trial and the jurors' sentencing decisions.

B. The Jury's Decision to Sentence Mr. Balentine to Death Was Impermissibly Infected by Anti-Black Bias. Tex. R. Evid. 606(b) Poses No Barrier to This Court's Review.

Prior to the Supreme Court's decision in *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 255 (2017), statements from these jurors were inadmissible under Texas law. Tex. R. Evid. 606 provides in relevant part:

> During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

Tex. R. Evid. 606(b)(1).

Pena-Rodriguez made clear that "racial bias in the justice system must be addressed," even in the face of such "no impeachment" rules. 580 U.S. at 225. In *Pena-Rodriguez*, two jurors came forward to state that a third juror, during deliberations, "had expressed anti-Hispanic bias toward [a] petition and [the] petitioner's alibi witness." *Id.* at 212. The Court held:

> [W]here a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to

> consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

Id. at 225.

The jurors' declarations discussed above demonstrate that Foreman England's racist bullying impacted the jury's sentencing deliberations.. This is precisely the harm *Pena-Rodriguez* and *Buck* seek to remedy. Even less overt statements fit within *Pena-Rodriguez*, if the "juror's statement indicates that racial bias played a role in the juror's vote." *Harden v. Hillman*, 993 F.3d 465, 484 (6th Cir. 2021). In *Harden*, the jury believed the Black defendant was a "crack head" and an "alcoholic," referred to his Black lawyer and defense team as the "Cosby Show," and made other drug-related references to the defendant. *Id.* at 482. Although the statements did not explicitly mention race, the stereotype that Black men were drug users led the jury to reject the defendant's testimony. *Id*. at 484; *see also State v. Spates*, 953 N.W.2d 372, 2020 WL 6156739, at *8 (Iowa Ct. App. 2020) (juror's race-based assumptions drew a connection to verdict-determining facts, where juror said that Black people are in gangs, are used to doing drive-by shootings, and are raised in a way where "it's o.k. to kill people").

Race "was a significant motivating factor" in the jury's decisions to find that Mr. Balentine was likely to commit violence in prison and to sentence him to death. *See Pena-Rodriguez*, 580 U.S. at 225. Though undisclosed at the time of trial, Foreman England referred to Black people with racial epithets, bragged about having killed a Black man, and fantasized about killing Mr. Balentine himself. His racist views led him to use his position as foreperson to forbid other jurors from reaching a life verdict or even from seeking assistance from the trial judge. Accordingly, the no-impeachment rule must give way to permit this Court to consider the evidence of the jurors' statements and the denial of the Sixth Amendment's guarantee of an impartial jury.

C. The Court Should Consider the Merits Pursuant to Article 11.071, § 5(a)(1).

The merits of this claim should be considered because

> the application contains sufficient specific facts establishing that . . . the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application.

Tex. Code Crim. Proc. Ann. art. 11.071, § 5(a)(1).

The requirement that, under the Sixth Amendment, the no-impeachment rule give way when there is evidence that the jury's verdict was racially biased was first recognized on March 6, 2017, in *Pena-Rodriguez*. As to the prohibition against connecting race with violence in the context of future dangerousness, *Buck* was decided on February 22, 2017. Both cases were decided well after Mr. Balentine's initial and successor habeas applications had been filed.

Prior to the decisions in those cases, neither trial nor habeas counsel had any duty to conduct post-trial interviews of jurors absent some indication of misconduct. "Jurors are presumed to be not only men of ordinary intelligence, but men endowed with the common instincts of fairness, which enables them, when not otherwise restrained, to determine issues of fact according to the accepted rules of right." *Funderburgh v. Skinner*, 209 S.W. 452, 455 (Tex. Civ. App. 1919). "We must presume that the jurors in this case were intelligent, honest and fairminded men, as has been our experience in dealing with jurors in the practice of our profession." *Yellow Cab & Baggage Co. v. Green*, 277 S.W.2d 92, 94 (Tex. 1955). Mr. Balentine had no notice of any evidence to contradict these presumptions. *See Williams v. Taylor*, 529 U.S. 420, 435, 443 (2000) (defendant lacked notice that a juror was the ex-wife of an investigating police officer or that the prosecutor had represented the juror during her divorce, where the juror disclosed no such relationships on voir dire).

Thus, the above claim was both factually and legally unavailable at the time of Mr. Balentine's successor application, under the definitions of such unavailability in Tex. Code Crim. Proc. Ann. art. 11.071, §§ 5(d) & (e).

Legal unavailability. The legal basis for this claim was unavailable at the time of Mr. Balentine's prior writ applications. Tex. Code Crim. Proc. Ann. art. 11.071, § 5(d). A

> 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. Texas law at the time of Mr. Ruiz's prior writ applications barred such evidence.

Rule 606(b) of the Texas Rules of Evidence 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. *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 the argument that Rule 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. 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*.

Mr. Balentine's claim was not recognized by and could not have been reasonably formulated from any final decision of the United States Supreme Court, any federal appeals court, or any Texas state appellate court at the time of his prior writ applications. The merits of the claim can now be considered.

Factual unavailability. The "factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date." Tex. Code Crim. Proc. Ann. art. 11.071, § 5(e). Since, as developed above, prior to *Pena-Rodriguez* the juror declarations would have been inadmissible, Mr. Balentine cannot be faulted for any lack of diligence in obtaining them at the time of his prior applications. Thus, the factual basis of the claim was unavailable as well.

II. MR. BALENTINE WAS DENIED HIS SIXTH AMENDMENT RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY BY THE INCLUSION OF JURORS WHO LIED ON JUROR QUESTIONNAIRES AND DURING VOIR DIRE ON GROUNDS THAT, IF THE JURORS HAD RESPONDED TRUTHFULLY, WOULD HAVE PROVIDED THE DEFENSE WITH VALID CHALLENGES FOR CAUSE.

The investigation prompted by the decisions in *Pena-Rodriguez* and *Buck* revealed more than just racial animus in the jury's deliberations. It also revealed that jurors had misrepresented key facts in their questionnaires and during voir dire. Had the defense known these facts, it would have excluded the jurors from serving at trial. Because of the jurors' misrepresentations, however, Mr. Balentine was tried by a biased and unfair jury.

The Sixth Amendment expressly guarantees the right to an impartial jury. *See* U.S. Const. amend. VI; *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966). Mr. Balentine's rights to a fair trial and a reliable sentencing determination were violated by the inclusion of individuals on his jury who failed to reveal material information and engaged in misconduct that prevented them from serving as fair and impartial jurors in Mr. Balentine's case. As such, Mr. Balentine's death sentence must be vacated.

A. Factual Background

Two members of Mr. Balentine's jury either misrepresented or withheld information on their juror questionnaires or in response to direct questioning that would have resulted in their dismissal for cause. At a minimum, had they provided truthful answers, defense counsel would

have exercised peremptory challenges to exclude them based on their apparent bias. Moreover, Foreman England engaged in misconduct by intimidating jurors to return a death sentence.

1. Foreman Dory Carlson England

As set forth below, Juror 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 bias against Mr. Balentine and in favor of a death sentence. Moreover, Juror England infected the deliberative process with this bias by intimidating jurors who did not want to vote in favor of a death sentence. Juror England's history of being involved in multiple racially motivated assaults, some of which involved gun violence, also amounted to implicit bias 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 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.[13] However, 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 that he shot and killed the perpetrators.[14] Mr. England also withheld the fact that, as a child, he was molested by one of his stepfathers and escaped the

[13] *See* Juror Questionnaire of Dory England, p. 13, Ques. 52–53, attached as Ex. 11.

[14] Dory England Decl. para. 10.

situation only with the help of his grandmother.[15] Mr. England also witnessed his brother being molested by their stepfather.[16]

In the jury questionnaire, prospective jurors were asked whether they had ever been arrested for a crime.[17] Despite being arrested as a juvenile, Mr. England lied and stated he had never been arrested. *Id*. Mr. England explained 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.[18] The injuries were serious enough to cause brain damage. He later absconded from the juvenile facility.[19] He explained that despite having a difficult life he had overcome all of those hardships.

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 he had ever worked for various law enforcement agencies, including the CIA, and he responded in the negative.[20] In fact, Mr. England had worked with the CIA during his time in the Marine Corps.[21] He also denied being in combat during his military service.[22] This too was false. During his time in combat and working

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[15] *Id*. at para. 6.

[16] *Id*. at para. 7.

[17] Juror Questionnaire, p. 24, question 100.

[18] England Decl. para. 6.

[19] *Id*.

[20] Juror Questionnaire, p. 5, Question 23.

[21] England Decl. para. 9.

[22] Juror Questionnaire, p. 9, Question 37(e).

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.[23] 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:

> I've been in combat and I've come face to face with killers and I've killed more people than I can recall, so I understood what needed to happen to keep people safe. I knew if he didn't get death, I 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.

Mr. England, as the foreman, intimidated other jurors 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.[24] 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.

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[23] England Decl. para. 9.

[24] England Decl. para. 13.

Mr. England's aggression towards jurors willing to impose a life sentence was corroborated by at least one other juror. 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."[25] Juror Edward Sisson remembered a female juror who was a holdout on the death sentence whom he described as crying and shaken up.[26] After the verdict, when the jurors met with the prosecutors, they were asked whether they were able to express their opinion during deliberations, and one of the women pointed at Mr. England and said, "He wouldn't let us!"[27]

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."[28] 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.[29] Mr. England, as foreman, did not report this to the court.

2. Juror Steven Fulton

[25] Tara Smith Decl. para. 4.

[26] Edward Sisson Decl. para. 4.

[27] England Decl. para. 16.

[28] England Decl. para. 4.

[29] Smith Decl. para. 4.

The jury questionnaire required jurors to disclose if they had ever been arrested for a crime.[30] Juror Fulton failed to disclose that he was arrested and spent approximately ninety days in pre-trial detention in Kansas for computer fraud and embezzlement.[31] Mr. Fulton was initially detained in the Potter County jail before being transferred to Kansas. Although his charges were ultimately dismissed, his mother was incarcerated for her role in the crime. Mr. Fulton acknowledged that he was less than truthful on his questionnaire by not disclosing his time in custody or that his mother had served a significant prison sentence over the incident.[32]

B. Constitutional Violations

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).

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). The rights to due process and to an impartial jury are most indispensable in capital cases, and courts reviewing capital convictions

[30] Steven Fulton Juror Questionnaire, p. 24, question 100, attached as Ex. 12.

[31] Fulton Decl. para. 4.

[32] *Id*.

must closely scrutinize them for error. If even one juror improperly participated in a case, the conviction and sentence must be vacated.

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); *Von January v. State*, 576 S.W.2d 43, 45 (Tex. Crim. App. 1978) ("When a partial, biased, or prejudiced juror is selected without fault or lack of diligence on the part of defense counsel, who has acted in good faith upon the answers given to him on voir dire not knowing them to be inaccurate, good grounds exists for a new trial.").

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) (footnote omitted); *United States v. Perkins*, 748 F.2d 1519, 1533) (11th Cir. 1984) (same, quoting *Bynum*); *United States v. Scott*, 854 F.2d 697, 699–700 (5th Cir. 1988) (same, quoting *Bynum* and citing *Perkins*).

The Supreme 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 (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 warrant a finding of both actual and implied bias.

Mr. England's declaration establishes actual bias. Foreman England admitted that 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. *See* Tex. Code Crim. Proc. Ann. art. 35.16 (a)(3)(9)(10). 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."[33]

In addition, 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 fall under Tex. Code Crim. Proc. Ann. art. 35.16 (a)(3). Likewise, had Juror Fulton disclosed the extent of his involvement in the criminal legal system, including his incarceration for several months and his mother's conviction and incarceration, he would have been subject to a challenge for cause under article 35.16 (a)(9). For all of the above reasons, Mr. Balentine has

[33] England Decl. para. 5.

established a case of actual bias on the part of Jurors England and Fulton, and Mr. Balentine is entitled to a new trial.

Further, Foreman England's statement to the jurors that they were "biblically justified" in finding Mr. Balentine guilty and sentencing him to death, and the jurors' reliance on religion in their deliberations, amounted to improper external influences on the jury warranting a new trial. *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). Here, Foreman England reliance on the Bible to persuade hesitant jurors to impose a death sentence resulted in prejudice to Mr. Balentine, and he is entitled to a new sentencing.

Moreover, the circumstances in this case rise to the level of implied bias on the part of Foreman England. There is a close correlation between the facts in this case (shooting death of three teenagers) and 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 on 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. Similarly here, Foreman England withheld his combat experience, told the other jurors 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. England Decl. paras. 5, 11. Foreman England withheld information from the court to make sure he was selected and intimidated jurors in favor of a life sentence to exact revenge on Mr. Balentine who he pre-judged as a "killer."

C. The Court Should Consider the Merits Pursuant to Article 11.071, § 5(a)(1).

As explained in Section I(C), *supra*, at the time of Mr. Balentine's trial and state-habeas proceedings, investigation of juror conduct and racism during jury deliberations was inadmissible. At that time, counsel had no duty to investigate or interview jurors after a verdict. After *Pena-Rodriguez* and *Buck*, this changed. Evidence of racial prejudice impacting jury deliberations can now be admitted and considered. Thus, particularly in a case such as this, a black man who shot three white teenagers, where racial issues were pervasive and obvious, investigation of juror conduct and racism became, for the first time, a reasonable course of action.

That it was happened here, and the investigation uncovered not only racial bias, but jurors who lied about critical background facts on their jury questionnaires and in voir dire. For the same reasons as set forth in Claim I, such evidence was neither legally nor factually available at the time of the prior habeas proceedings. There is no bar to the consideration of this claim now.

CONCLUSION

WHEREFORE, Mr. Balentine respectfully requests that the Court of Criminal Appeals grant the writ and remand the case to the convicting court for factual development. Mr. Balentine also requests any and all other relief to which he may be entitled.

Respectfully submitted,

/s/ Peter Walker
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Dated: January 30, 2023

Counsel for John Lezell Balentine

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA

VERIFICATION

BEFORE ME, the undersigned authority, on this day personally appeared Peter Walker, who upon being duly sworn by me testified as follows:

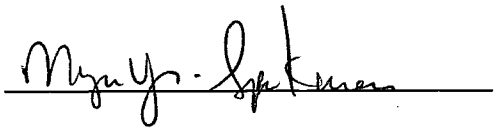
1. I am a member of the State Bar of Texas.

2. I am the duly authorized attorney for John Balentine, having the authority to prepare and to verify Mr. Balentine's Subsequent Application for Post-Conviction Writ of Habeas Corpus.

3. I have prepared and have read the foregoing Subsequent Application, and I believe all allegations therein to be true to the best of my knowledge.

Signed under penalty of perjury:

SUBSCRIBED AND SWORN TO BEFORE ME on January 30, 2023.



Notary Public, Commonwealth of Pennsylvania

Commonwealth of Pennsylvania - Notary Seal
Mya Y. Sparkman, Notary Public
Philadelphia County
My Commission Expires 09/27/2025
Commission Number 1408712

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of January 2023, I have caused a true and correct copy of the foregoing Subsequent Application for Post-Conviction Writ of Habeas Corpus to be served by email on counsel for the State, Potter County District Attorney Randall Simms, at defensefilings@co.potter.tx.us.

/s/ Peter Walker
Peter Walker