No. 21-5050
CAPITAL CASE

IN THE
Supreme Court of the United States

KRISTOPHER LOVE,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether, in a death penalty case, the Texas Court of Criminal Appeals decided an important federal question contrary to federal constitutional law when it upheld the trial court's denial of Petitioner Kristopher Love's challenge for cause to a veniremember on state-law procedural harmless-error grounds, without reaching the federal question.

2. Whether, in a death penalty case, the Texas Court of Criminal Appeals decided an important federal question in a manner conflicting with relevant decisions of this Court when it upheld the trial court's denial of Petitioner Kristopher Love's challenge for cause to a veniremember on state-law procedural harmless-error grounds, without reaching the federal question.

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BRIEF IN OPPOSITION

In August 2015, Brenda Delgado was distraught about her breakup with Dr. Ricardo "Ricky" Paniagua and jealous of his new relationship with Dr. Kendra Hatcher. Delgado offered to pay Petitioner Kristopher Love and Crystal Cortes for their help in murdering Hatcher, and they accepted her offer. After several meetings and phone conversations, they decided to make the murder look like a robbery gone wrong. They followed Hatcher to learn her routine and how to access her apartment building's parking garage. Love suggested that Cortes be the driver because she was more familiar with the area; he volunteered to be the triggerman and obtained a gun to use during the offense. On September 2, 2015, Delgado went to a restaurant to create an alibi for herself while Love and Cortes waited for Hatcher in her parking garage. When Hatcher came home that evening, Love executed their plan by shooting Hatcher to death near her vehicle and taking some of her property. In October 2018, a Dallas County jury convicted Love of capital murder and, via the special issues, sentenced him to death.

In the instant petition for certiorari review of the state court's affirmation of his conviction and sentence, Love contends that the trial court placed a racially prejudiced juror on his jury over his challenge for cause in violation of his Sixth Amendment right to a fair trial by an impartial jury, his Fourteenth Amendment right to due process of law, and relevant decisions of this Court. However, this Court does not have jurisdiction to grant review. The state court below did not reach Love's alleged constitutional issues. Rather, the Texas Court of Criminal Appeals

("TCCA") properly decided this claim against Love based solely on state-law grounds. In any event, the record does not support Love's claim that a racially prejudiced juror was seated on his jury. Accordingly, this Court should deny certiorari review.

STATEMENT OF THE CASE

I. Procedural History

A Dallas County jury convicted Kristopher Love of capital murder committed on September 2, 2015, for intentionally killing Kendra Hatcher in the course of committing or attempting to commit robbery. *See* Tex. Penal Code § 19.03(a)(2) (West Supp. 2020). In accordance with the jury's answers to the special issues, the trial court sentenced Love to death on October 31, 2018. *See* Tex. Code Crim. Proc. Ann. art. 37.071, § 2(g) (West Supp. 2020).

On direct appeal, Love raised forty-six points of error. Having found all of Love's claims to be without merit, the TCCA affirmed the judgment and sentence on April 14, 2021. *Love v. State*, No. AP-77,085, 2021 WL 1396409 (Tex. Crim. App. April 14, 2021) (not designated for publication). Love then filed this petition for a writ of certiorari.

II. Facts of the Crime

In its opinion on direct appeal, the TCCA summarized the facts of the capital murder as follows:

> Hatcher was killed in her apartment building's garage on September 2. Hashem Saad, a resident of the building, testified that on that evening he exited the elevator onto the lowest level of the complex's parking garage and heard animal-like screaming and one or two gunshots. He then heard a car door close and tires screech. Saad

ran to his Corvette and got inside. He saw a Jeep Cherokee speed down the ramp from the parking level above, make a left, and pass behind his car. Saad backed out of his parking place and drove up the ramp toward the garage's exit. Meanwhile, the Jeep turned around on the lower level where Saad had been parked, came up the ramp, and followed him out of the garage. While Saad was driving up the ramp, he saw a woman lying on the floor of the garage. She appeared to have been shot. Saad called 9-1-1.

Security camera footage corroborated Saad's testimony. A dark-colored Jeep Cherokee entered the garage's unsecured visitor area at 7:13 p.m. and waited there until 7:17 p.m. when it followed another vehicle through the gate and parked in the secured area of the garage. At about 7:42 p.m. Hatcher drove a white car into the garage's secured area and parked on the last row. A person wearing black immediately exited the Jeep and walked down the ramp toward Hatcher's car. Moments later, the Jeep's lights came on and began backing out of its parking spot. The person wearing black walked back up the ramp and got into the Jeep which then drove down the ramp to the garage's lower level. At 7:44 p.m., a silver Corvette exited the garage, followed by the Jeep.

First responders found Hatcher lying under the open driver's side door of her white Toyota Camry and blood on the floor. She had suffered trauma to her chin, and they found a wound to the back of her head. A pistol magazine and a fired bullet fragment were on the ground beside Hatcher's body. A fired cartridge case was on her car's passenger side floorboard.

The medical examiner testified that Hatcher sustained a gunshot wound to the back of her head with an exit wound under her chin. The bullet had traveled from back to front and downward. Hatcher also had an abrasion on her chest, which suggested that her chin was down and near her chest when she was shot. The bullet severed her spinal cord, leaving her unable to breathe and causing death quickly.

A trace evidence examiner testified that gunshot residue collected from the back of Hatcher's hands was consistent with her hands having been raised and behind her head when she was shot.

Cortes, who testified pursuant to a plea deal, said that she and Delgado had already begun planning the murder when they met [Love] through a close friend of Cortes's brother at the end of August. They all

met at the Mandalay Apartments, where [Love] lived, and Delgado and Cortes explained their intention to murder Hatcher. [Love] agreed to participate. They met between ten and fifteen times to plan Hatcher's murder and communicated frequently by phone. They followed Hatcher in different cars, including on at least one occasion [Love]'s blue Chrysler Sebring.

After discussing several potential plans, they ultimately agreed to kill Hatcher with a gun and make the offense look like a "robbery gone bad." [Love] suggested that Cortes drive because she was more familiar with the area, and he volunteered to shoot Hatcher and take her property. [Love] thereafter obtained a .40-caliber Smith & Wesson pistol to use in the murder. At Cortes's suggestion, [Love] wore gloves when he handled and loaded the pistol. Delgado promised to pay Cortes $500 for driving and promised to pay [Love] in drugs and money for shooting Hatcher.

Cortes testified that on the morning of September 2 she and Delgado picked up [Love] at his apartment and stopped at a convenience store so that [Love] could buy a black shirt. They then dropped [Love] off at a Jack in the Box while Delgado and Cortes drove to a mechanic shop owned by Delgado's friend, Jose Luis Ortiz. Delgado led Ortiz to believe that her BMW needed work, and he let her borrow his black Jeep Cherokee while he checked out her car. After leaving Ortiz's shop in his Jeep, Delgado and Cortes picked up [Love], returned to the Mandalay Apartments, and put stolen paper tags on the Jeep.

At about 11:45 a.m., Cortes and [Love] drove the Jeep to Hatcher's apartment complex, planning to follow her. They saw her pull out of the garage and anticipated that she was going to her dental office but did not find her there. Cortes then drove them back to the Mandalay Apartments and left [Love] there while she picked up her son from school, took him to Sonic, and dropped him off at her grandmother's house.

Cortes picked [Love] up from his apartment again at 4:30 p.m. They initially went to the dental office but then returned to Hatcher's apartment complex. Cortes was driving and [Love] was lying down in the back seat so that no one could see him. Cortes pulled into the garage's visitor section and waited for a vehicle to enter the secured area so that they could follow it through the gate, a strategy they had used several times before. The area where Hatcher usually parked was full, so they parked on the last row.

After thirty minutes to an hour, they saw Hatcher enter the garage in her white Toyota Camry. [Love] put on gloves, grabbed the pistol, and exited the Jeep. Cortes testified that she heard Hatcher scream and then heard gunshots. Cortes backed out of the parking spot, and [Love] got back in the Jeep with Hatcher's purse, a camera, and the pistol. Cortes drove down the ramp by mistake and then turned the Jeep around and came back up to leave through the main entrance. As they drove up the ramp, she saw Hatcher's body lying on the floor of the garage.

Cortes and [Love] went to an abandoned house in Pleasant Grove, cleaned the Jeep with disinfectant, and removed the paper tags. Cortes dropped [Love] off at the Mandalay Apartments and then picked up her son at her grandmother's house. Cortes testified that [Love] kept the pistol he had used to shoot Hatcher.

Cortes testified that Delgado called her between 8:00 and 9:00 p.m. using Ortiz's cell phone and asked whether "the task"—meaning the murder—"was complete." Cortes said that it was. Delgado, who was having dinner out with Ortiz, sent Ortiz's home address to Cortes so that they could meet there to return his Jeep and pick up the BMW.

Cortes and her son got to Ortiz's house before Delgado and Ortiz did. She retrieved from the back of the Jeep the shirt and gloves that [Love] had worn, the hoodie that she had worn, the paper tags, and Hatcher's purse. Moments later Delgado and Ortiz arrived in the BMW. They exchanged cars, and Ortiz drove away in his Jeep. Security-camera footage corroborated Cortes's account of this exchange.

Delgado and Cortes then exchanged the BMW for Delgado's Lexus at a parking garage and went to Cortes's grandmother's house where they burned the clothing, paper tags, and contents of Hatcher's purse. Delgado paid Cortes $500 for driving [Love] to murder Hatcher. The next day, Delgado paid [Love] with "Kush," cocaine, and the cash from Hatcher's wallet.

Dallas Police Department Detective Eric Barnes, the lead investigator, testified that a black Jeep Cherokee was a vehicle of interest based on Saad's 9-1-1 call. After a still image of the Jeep was released in connection with the offense, Ortiz contacted the police and claimed ownership of it. He recognized it from its distinctive rims, hood damage, and missing bumper cap. Ortiz told the police that he had

loaned the Jeep to Delgado on the day of the offense, and he consented to a vehicle and cell phone search. A crime scene analyst who processed the Jeep testified that he found a Sonic receipt for September 2 at 3:53 p.m. in the center console area.

Investigators questioned Delgado on September 4, but she denied having driven the Jeep, asserting that Cortes had used it on the day of the offense. After the interview Delgado fled to Mexico.

Barnes questioned Cortes on September 4. After being confronted with evidence that contradicted her initial statement, she eventually admitted that she had driven the Jeep during the killing. She was arrested and charged with capital murder. In a later interview, Cortes identified the shooter as a man named "Kris." She described him and his blue Chrysler Sebring bearing Tennessee license plates and identified the area of town where he lived or was known to frequent.

Retired DPD detective James Thompson testified that investigators used Cortes's phone to identify a Metro PCS number that they believed belonged to the shooter. Other testimony showed that Metro PCS only sells prepaid accounts, does not do credit checks, and does not verify its subscribers' identification information. The subscriber in this case provided the name "Kasino Jackson" and listed his address as 7272 Marvin D. Love Freeway, Dallas, Texas. This address corresponded to an area of South Dallas that [Love] was known to frequent.

Police got a warrant to "ping" the Metro PCS number and determine its location. On October 1 the phone was in an apartment complex in South Dallas, in the same area where Cortes claimed the shooter lived or frequented. Thompson went to the apartment complex and looked for a blue Chrysler Sebring. After finding it Thompson and other agents watched it and saw [Love] leave an apartment and drive away in the Sebring. [Love] matched the physical description of the shooter that Cortes had provided. As [Love] drove away, the phone's ping location corresponded with the Sebring's travel.

When [Love] parked at a nearby apartment complex the phone ping stopped at that same location. [Love] got out of the car and met a man and a woman in the parking lot. Thompson arranged for uniformed officers to approach the group and request identification, and then Thompson approached them. He saw a cell phone sitting on the Sebring's trunk. Barnes called the Metro PCS number, and the

phone on the trunk rang. [Love] was taken to the police station for questioning.

Detective Barnes interviewed [Love] after giving him *Miranda* warnings. *See Miranda v. Arizona*, 384 U.S. 436 (1966). The interview was videotaped, and the relevant portions were published to the jury. [Love] said that he did not know his way around town very well because he had recently moved to Dallas, and he stayed in one general area around his apartment. [Love] acknowledged that the Sebring he had been driving belonged to his girlfriend. He denied knowing Cortes or Delgado.

During the interview, authorities executed a search warrant on the Sebring and found a .40-caliber Smith and Wesson pistol underneath the center console. DPD firearms examiner Susan Kerr testified that the magazine found next to Hatcher's body would fit and could be used to fire the pistol found in the Sebring. Kerr further testified that the fired cartridge found on the floorboard of Hatcher's car was fired from the pistol found in the Sebring.

When Barnes confronted [Love] with Kerr's findings, [Love]'s demeanor changed. [Love] first claimed that he had bought the pistol from Cortes, but she was already in jail on the date he named. Eventually he admitted that he had been present during Hatcher's murder, but he asserted that Cortes was the shooter. He claimed that the offense was only supposed to be a robbery, but that Cortes shot Hatcher while he was struggling with Hatcher over her property.

After he was booked into the Dallas County Jail on a capital murder charge [Love] called his girlfriend who asked him why he would keep the gun. [Love] responded, "I don't know, man. Stupid as fuck." She later said, "If you shot that girl with that gun, you should've ... [thrown] it away or something." [Love] replied, "I know, man, I know. Too late now though."

DPD criminal intelligence analyst Michael Freeman used call-detail records and data extracted from [Love]'s, Cortes's, and Delgado's cell phones to summarize cell phone activity between the three co-defendants around the time of the offense. He also mapped the cell towers that [Love]'s and Cortes's cell phones hit on the day of the offense.

At 10:36 a.m. on the day of the offense [Love]'s phone hit on a tower near a Jack in the Box located at Interstate Highway 35 and

> Royal Lane. Cortes's phone hit near the same location at 10:34 a.m. At 11:31 a.m., [Love]'s phone hit on a cell tower near Hatcher's apartment. Cortes's phone hit near the same location at 11:37 a.m. But [Love]'s phone was inactive between 3:29 p.m. and 7:47 p.m., and Cortes's phone was inactive between 4:17 p.m. and 7:40 p.m., suggesting that they had turned off their cell phones during these periods. When Cortes turned her phone back on it pinged on a tower close to Hatcher's apartment. At 7:47 p.m. Cortes received a call from Ortiz's cell phone.
>
> Between August 1 and September 30, Delgado contacted Cortes 131 times by call or text, Cortes contacted Delgado 95 times by call or text, [Love] contacted Cortes 111 times by call or text and Cortes contacted [Love] 23 times by call or text. [Love] last texted Cortes on September 4, asking, "Wats up wit da kush?"
>
> Around the time [Love] met Delgado, he began communicating with a person named "Mustang" in his phone's contacts. This number did not match Delgado's known phone number. But because other evidence showed that Delgado often drove her cousin's Mustang, the State argued that "Mustang" was the number for a second phone that Delgado had. Freeman testified that Mustang texted or called [Love] 23 times, and that [Love] contacted Mustang one time by phone call or text.
>
> The day after the shooting, [Love] searched the internet for "killings in Dallas" and "Dallas news today"; clicked on the headline, "Woman murdered in Uptown Dallas parking garage"; searched for a "gun shop in 75237", his zip code; and looked up "Gold & Gun Swap Shop" in Dallas. Over the next two weeks he continued to search the internet for "Dallas homicide" and for specific news articles about Hatcher's murder. His phone also contained images of the type of pistol that was used to murder Hatcher.

Love, 2021 WL 1396409, at *2-6.

III. State Proceedings Related to Love's Jury Selection Claim

A. Voir Dire

Prior to trial, the parties and the trial judge drafted a 19-page questionnaire for prospective jurors to complete. Both sides were permitted to include any topics or specific questions they wanted, including questions the issue of racial bias. On

pages 11-12 of the jury questionnaire, there was a section entitled "VIEWS ABOUT RACE" with the following explanatory paragraph:

> All people have various and different experiences with people of different races. It is important for the Court to know at this time your feelings and beliefs about race if they might affect your ability to serve fairly and impartially as a juror in this case. The Court recognizes this is a sensitive issue with many people and appreciates your honesty. Regardless of your views, no one will criticize any private opinions that you share in this questionnaire.

This section contained two questions. Question 68 asked: "Do you sometimes personally harbor bias against members of certain races or ethnic groups?" The prospective jurors were instructed to check "YES" or "NO" and explain their answer. Question 69 asked: "Do you believe that some races and/or ethnic groups tend to be more violent than others?" The prospective jurors were again instructed to check "YES" or "NO" and explain their answer.

The court summoned two large panels of prospective jurors to appear on June 8, 2018. (3 R.R. 10, 72). Zachary Niesman was a member of the afternoon panel and completed his questionnaire at that time. (29 R.R. 85-86). On Question 68 of his jury questionnaire, which asked "Do you sometimes personally harbor bias against members of certain races or ethnic groups," Niesman replied: "No." On Question 69, which asked "Do you believe that some races and/or ethnic groups tend to be more violent than others," Niesman replied: "Yes, statistics show more violent crimes are committed by certain races. I believe in statistics."

The trial court called Niesman for individual voir dire on September 26, 2018 and permitted both sides to question him about any topic relevant to the case,

including his responses on the questionnaire, to determine whether he was qualified to serve as a juror. When the prosecutor questioned Niesman about his response to Question 69 on the jury questionnaire, Niesman indicated that his response resonated from statistics only, not his own personal feelings toward one race or another. (29 R.R. 107). When questioned by the defense, Niesman indicated that the statistics he referred to in his questionnaire were ones he had seen in "news reports and criminology classes" he had taken. (29 R.R. 144). However, he again reiterated that the statistics he referenced do not reflect his own personal feelings. (29 R.R. 145). He specifically stated: "I don't think because of somebody's race they're more likely to commit a crime than somebody of a different race." (29 R.R. 145). Niesman assured defense counsel that the statistics he had seen would not affect his consideration of the evidence in this case. (29 R.R. 144-45). He told counsel that he would "look at the case at hand and where a person's heart is" in deciding his answers to the special issues. (29 R.R. 145). Defense counsel pressed Niesman further, stating: "[O]bviously, we're in this business and pretty familiar with…these things, and the statistics that I've seen seem to indicate otherwise, that there is no statistical imbalance. It's important for us to know that you're not going to come in here and believe, even in the back of your mind, that there is something I heard in a criminology class that causes me to feel different about this man because he's an African American." (29 R.R. 145-46). Niesman assured counsel that he "would not feel differently about [Love] because he's an African American." (29 R.R. 146).

At the conclusion of Niesman's individual voir dire, Love challenged Niesman for cause based on his response that he had read statistics showing that non-whites commit more violent crimes than whites. (29 R.R. 153). Love argued that Niesman "might make a decision on Special Issue No. 1 that would ultimately lead to a sentence of death [based] on his preconceived notions and beliefs that have to do with the race of the defendant." (29 R.R. 153-54). The trial judge, who had the opportunity to personally observe Niesman's demeanor and responses during individual voir dire, denied Love's challenge for cause. (29 R.R. 154). Love had exhausted all fifteen of his statutory peremptory strikes[1] and two additional peremptory strikes granted by the trial court,[2] so he identified Niesman as objectionable and requested a third additional peremptory strike. (29 R.R. 154). The trial court denied this request and seated Niesman as the twelfth juror. (29 R.R. 154-55).

B. Direct Appeal

On direct appeal, Love's allegations included that the trial court erred in denying seventeen of his challenges for cause during jury selection. *See Love*, 2021

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[1] *See* Tex. Code Crim. Proc. Ann. art. 35.15(a) (West 2006) ("In capital cases in which the State seeks the death penalty both the State and defendant shall be entitled to fifteen peremptory challenges.").

[2] Texas case law allows a trial court to allocate additional peremptory challenges when the defense expends their original allotment. *See Cooks v. State*, 844 S.W.2d 697, 717 (Tex. Crim. App. 1992) ("It is clearly within the discretion of the trial court to grant additional peremptory challenges upon exhaustion of the statutory number of strikes.").

WL 1396409, at *8-24.[3] His seventeenth point of error specifically challenged the trial court's denial of his challenge for cause to veniremember Niesman. *Id*. at *24. The TCCA noted that, in addition to error, a defendant must also show harm to prevail on a claim that the trial court erred in denying a challenge for cause. *Id*. at *9. A capital-murder defendant who is given seventeen peremptory challenges to use during voir dire, as in this case, cannot show harm unless he demonstrates that the trial court erroneously denied at least three of his challenges for cause. *Id*. at *9, 24.

The TCCA analyzed fifteen of the seventeen rulings challenged by Love and found no trial court error. *Id*. at *9-24. Accordingly, it declined to address whether the trial court erred by denying Love's challenges to the two remaining veniremembers, Wiley (point of error six) and Niesman (point of error seventeen), because any error would be harmless under Texas law. *Id*. at *24. Specifically, the TCCA held: "[E]ven if we assume that the trial court erred in denying [Love]'s challenges for cause to the two remaining veniremembers at issue, Wiley and Niesman, [Love] cannot show harm." *Id*. This holding by the TCCA is the basis of Love's instant petition.

[3] Love challenged the trial court's denial of his challenges for cause to twenty-one venirepersons in all. The TCCA readily dismissed four of these complaints because Love had peremptory challenges available but chose not to use one on these four individuals. Thus, those four complaints are irrelevant to the discussion here.

REASONS FOR DENYING THE PETITION

The claim for which Love seeks review is unworthy of this Court's attention. As a threshold matter, this Court does not have jurisdiction to review the state court's denial of Love's jury selection claim because the TCCA's ruling rests on an independent and adequate state-law ground. The TCCA never reached the federal issues Love raises in his petition. Jurisdiction notwithstanding, Love fails to provide a compelling reason to grant review in this case. The record from veniremember Niesman's individual voir dire supports the trial judge's finding that Niesman was not racially biased and was qualified to serve on the jury. Love simply disagrees with this finding. However, it is well-settled under Texas law, as well as this Court's precedent, that the trial judge's ruling is entitled to great deference because it is based on her assessment of Niesman's demeanor and credibility during voir dire. Accordingly, Love's claim has no merit, and this Court should deny certiorari review.

I. This Court lacks jurisdiction to grant review because the TCCA's ruling rests exclusively on state-law grounds.

This Court holds "no supervisory power over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." *Smith v. Phillips*, 455 U.S. 209, 221 (1982). As such, this Court has consistently held that it will not address a federal question if the state-court decision rests on a state law ground that is independent of the federal question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). This rule applies

whether the state law ground is substantive or procedural, and its application means this Court lacks jurisdiction to review the federal claim. *Id.*

Although Love frames the issues presented in his petition as having constitutional dimension, in reality he implicates nothing more than the TCCA's proper application of Texas law for consideration of claims of jury selection error. To prevail on a claim that the trial court erroneously denied a challenge for cause, a Texas defendant must demonstrate both error and harm. *See Kemp v. State*, 846 S.W.2d 289, 296 (Tex. Crim. App. 1992); *see also Johnson v. State*, 43 S.W.3d 1, 6 (Tex. Crim. App. 2001) (noting that Texas courts have required a showing of harm since 1944). Harmless error rules are rules of appellate procedure. Under Texas law, harm from the erroneous denial of a challenge for cause focuses on whether a peremptory challenge was wrongfully taken from the defendant. *See Newbury v. State*, 135 S.W.3d 22, 30–31 (Tex. Crim. App. 2004); *Johnson*, 43 S.W.3d at 6. To establish harm, a defendant must show on the record that (1) he asserted a clear and specific challenge for cause; (2) he used a peremptory challenge to remove a veniremember whom the trial court should have excused for cause at the defendant's request; (3) he exhausted all of his peremptory challenges; (4) his request for additional peremptory strikes was denied; and (5) he identified an objectionable juror who sat on the jury.[4] *See Newbury*, 135 S.W.3d at 31. If these

[4] These steps to preserve error and establish harm are intended to allow the trial judge every opportunity to correct error and to allow the defendant to demonstrate that he did not have the benefit of using his peremptory challenges in the way that he desired. *Comeaux v. State*, 445 S.W.3d 745, 750 (Tex. Crim. App. 2014) (citing *Johnson*, 43 S.W.3d at 6).

five conditions are satisfied, the defendant must then show that the trial court erroneously denied a number of defense challenges for cause equal to at least one more than the number of additional, non-statutory peremptory challenges allotted to him, in order to show that he was wrongfully deprived of the use of at least one of his statutorily allotted peremptory challenges. *See, e.g., Tracy v. State*, 597 S.W.3d 502, 513 (Tex. Crim. App. 2020) (to demonstrate harm in a case where the defendant was granted two additional peremptory strikes, he must show that the trial court erroneously denied three of his challenges for cause); *Newbury*, 135 S.W.3d at 31 (to demonstrate harm in a case where the defendant was granted one additional peremptory strike, he must show that the trial court erroneously denied two of his challenges for cause).

The TCCA followed this longstanding procedure in addressing Love's jury selection claims on direct appeal. The TCCA found that Love had satisfied the five conditions outlined above for showing harm from any error in the trial court's denial of his challenges for cause with respect to seventeen potential jurors. *Love*, 2021 WL 1396409 at *9. Because the trial court granted Love two extra peremptory challenges in addition to the fifteen allotted by statute, the TCCA determined that Love could not show harm unless he demonstrated that the trial court should have granted at least three of his challenges for cause. *Id.* The TCCA thoroughly examined fifteen of Love's seventeen challenged rulings and found no error. *Id.* at *9-24. The TCCA then declined to address whether the trial court erred in denying his challenges for cause to the two remaining veniremembers because any error

would be harmless. The TCCA held: "[E]ven if we assume that the trial court erred in denying [Love]'s challenges for cause to the two remaining veniremembers at issue, Wiley and Niesman, [Love] cannot show harm. *Id.* at *24. Thus, the TCCA's disposition of Love's complaint regarding Juror Niesman rested on a state-law ground that was both independent of the federal issue raised and adequate to support the judgment. This is evident from the TCCA's opinion, which cites and relies solely on Texas law in resolving Love's jury selection claims. *See id.* at *8-24.

In sum, there was no federal issue passed upon by the TCCA and therefore no federal issue upon which jurisdiction can rest. Accordingly, this Court should deny Love's petition.

II. Love's claim has no merit.

In any event, the record does not support Love's claim. Love relies solely on Niesman's response to Question 69 on the jury questionnaire in support of his argument that Niesman was racially biased. However, questionnaires are not a formal part of the voir dire process and therefore do not alone provide a valid basis for a challenge for cause. Moreover, Niesman's answers during individual voir dire demonstrated that he was not biased or prejudiced against Love and that he was qualified to serve as a juror.

Niesman's response on the jury questionnaire does not by itself support a challenge for cause

Individual voir dire in a capital case is governed by statute. *See* Tex. Code Crim. Proc. Ann. art. 35.17(2) (West 2006). Jury questionnaires, on the other hand, are not constitutionally or statutorily required, and the TCCA has specifically held

they are not a formal part of voir dire proceedings. *Spielbauer v. State*, 622 S.W.3d 314, 321 (Tex. Crim. App. 2021); *Garza v. State*, 7 S.W.3d 164, 166 (Tex. Crim. App. 1999). As such, a veniremember's questionnaire completed before individual voir dire will not by itself support a challenge for cause. *Spielbauer*, 622 S.W.3d at 321; *Gonzales v. State*, 3 S.W.3d 915, 917 (Tex. Crim. App. 1999). This is a logical approach given the subjective manner in which prospective jurors may interpret or understand the written questions. As the TCCA has explained, "Counsel should never assume that [prospective jurors] will understand each question as it was intended by counsel to be understood." *Gonzales*, 3 S.W.3d at 917. Questionnaires are "vulnerable to misinterpretation—even questions that appear to be subject to only one interpretation." *Id*. They may be a useful tool, but questionnaires are no substitute for the human interaction inherent to voir dire and essential to the trial court's evaluation of a juror's suitability for jury service. *Spielbauer*, 622 S.W.3d at 321.

In support of his allegation of racial bias, Love relies solely on Juror Niesman's response to Question 69 on the jury questionnaire. *See* Pet. at 12. He wholly disregards Niesman's live testimony during individual voir dire. The questionnaire Niesman completed before voir dire, however, was not a formal part of the proceedings. Accordingly, the answers the questionnaire prompted do not, by themselves, support a challenge for cause. *See Spielbauer*, 622 S.W.3d at 321.

Niesman's individual voir dire showed no bias or prejudice

Under Texas law, a veniremember is challengeable for cause if (among other reasons) he has a bias or prejudice in favor of or against the defendant. Tex. Code Crim. Proc. Ann. art. 35.16(a)(9) (West 2006). The test is whether the bias or prejudice would substantially impair the prospective juror's ability to carry out his oath and instructions in accordance with the law. *Tracy*, 597 S.W.3d at 512; *see also Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (a juror is biased if his "views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath"). Before a veniremember may be excused for cause, the law must be explained to him, and he must be asked whether he can follow that law, regardless of his personal views. *Tracy*, 597 S.W.3d at 512. The proponent of a challenge for cause has the burden of establishing that the challenge is proper, and he does not meet this burden until he has shown that the veniremember understood the requirements of the law and could not overcome his prejudice well enough to follow the law. *Id*.

When assessing a trial court's decision to deny a challenge for cause, a reviewing court examines the entire record to determine whether sufficient evidence exists to support the court's ruling. *Davis v. State*, 329 S.W.3d 798, 807 (Tex. Crim. App. 2010). A trial court's ruling will be reversed only for a clear abuse of discretion. *Id*. Because the trial judge is in the best position to evaluate a potential juror's demeanor and responses, a trial court's ruling on a challenge for cause is reviewed with considerable deference. *Gardner v. State*, 306 S.W.3d 274, 295 (Tex. Crim. App.

2009); *see also Uttecht v. Brown*, 551 U.S. 1, 9 (2007) ("Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors"); *Patton v. Yount*, 467 U.S. 1025, 1038 (1984) (the trial court's determination of demeanor and credibility is entitled to "special deference").

In this case, the testimony veniremember Niesman provided during individual voir dire showed that he did not have a bias or prejudice against the defendant. When the prosecutor asked Niesman about his response to Question 69 on the jury questionnaire, he explained that his response resonated from statistics only, not his own personal feelings toward one race or another. (29 R.R. 107). When questioned by the defense, he again reiterated that the statistics he referenced do not reflect his own personal feelings. (29 R.R. 145). He specifically stated: "I don't think because of somebody's race they're more likely to commit a crime than somebody of a different race." (29 R.R. 145). He assured defense counsel that he was not biased toward Love because of his race and that the statistics he had previously read would not interfere with his consideration of the evidence in this case. (29 R.R. 145-46).

Moreover, the entirety of Niemsan's voir dire demonstrated that he would follow the law and his oath to render a verdict based on the law and evidence heard in the courtroom. *Tracy*, 597 S.W.3d at 512; *see also Wainwright*, 469 U.S. at 424. Niesman's testimony showed that, in deciding his answer to the first special issue,

he would keep an open mind and listen to and weigh all the facts and evidence presented. (29 R.R. 93-94, 135, 139-40, 144). He testified that he would hold the State to its burden and would not automatically answer the first special issue "yes." (29 R.R. 91-95, 98-99, 103, 135-44, 149). Likewise, his testimony showed that he would consider all of the evidence from both sides before answering the second special issue. (29 R.R. 99-100, 134). He gave examples of evidence he thought the parties could present during punishment, showing his willingness to consider evidence from both sides. (29 R.R. 134). He told defense counsel that he could not assess a death sentence without considering a person's background or other factors. (29 R.R. 147). He confirmed that he could—and would—give a sentence of life without parole if he thought it were appropriate. (29 R.R. 152).

Under well-established Texas law, as well as this Court's precedent, the trial court's denial of Love's challenge for cause—and implicit finding that Niesman would be an impartial juror—is entitled to great deference. *See Gardner*, 306 S.W.3d at 295; *see also Uttecht*, 551 U.S. at 9; *Patton*, 467 U.S. at 1038. This is because the trial judge, who personally observed Niesman's voir dire, was in the best position to evaluate his demeanor and responses. In contrast to the cold transcript, the in-the-moment voir dire affords the trial court a more intimate and immediate basis for assessing a veniremember's fitness for jury service. *Skilling v. United States*, 561 U.S. 358, 386 (2010). The trial judge's appraisal of Niesman's impartiality in this case was undoubtedly influenced by a host of factors impossible

to capture fully in the record—among them, Niesman's inflection, sincerity, demeanor, candor, and body language. *See id*.

That great deference should be accorded to the trial court's ruling is further supported by the quality and breadth of the voir dire proceedings in this case. The record reflects that the trial court conducted a diligent and thoughtful voir dire process that took approximately eight weeks. As noted above, the trial judge permitted the parties to prepare a comprehensive jury questionnaire for prospective jurors to complete. The parties used the questionnaire as a springboard for questioning the veniremembers. Each veniremember was questioned individually, and the trial court gave the parties extensive leeway during this process. The trial court permitted the parties to broach any topic relevant to the case, including the topic of racial bias. Voir dire is specifically designed to identify biased veniremen, and it has long been recognized as an effective method of rooting out such bias. *See Patton*, 467 U.S. at 1039 (citing *In re Application of National Broadcasting Co.*, 653 F.2d 609, 617 (1981) ("[V]oir dire has long been recognized as an effective method of rooting out such bias, especially when conducted in a careful and thoroughgoing manner")). Given the careful and thorough voir dire process employed in this case by the trial court, this Court should have no reservations about deferring to the trial court's finding of impartiality with respect to veniremember Niesman.

Love fails to cite any cases in his petition that support granting review in this case. This is not a case where the trial court prohibited the parties from questioning jurors on racial prejudice. *See, e.g., Turner v. Murray*, 476 U.S. 28 (1986) (holding

the trial court's refusal to question prospective jurors on racial bias deprived the defendant of his constitutional right to a fair and impartial jury). Nor is it a case where a juror relied on racial stereotypes or animus to convict a criminal defendant. *See, e.g., Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017). There is no evidence that Niesman or any other jury committed the type of misconduct that occurred in *Pena-Rodriguez*. In contrast, this is a situation where the trial court assessed a juror's suitability for service after observing his individual voir dire, and Love simply disagrees with the trial court's assessment. To entertain his claim, this Court would have to ignore the rest of the record supporting the trial court's finding of impartiality and decline to afford the proper deference to the trial court's assessment of Niesman's credibility, which is improper under this Court's precedent.

Based on the foregoing, Love's claim is meritless and therefore unworthy of this Court's attention. The petition for certiorari review should be denied.

CONCLUSION

For the foregoing reasons, the State of Texas respectfully requests that Love's petition for writ of certiorari be denied.

Respectfully submitted,

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