

CASE NO. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

JOHN LEZELL BALENTINE,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

APPLICATION FOR STAY OF EXECUTION

EXECUTION SCHEDULED FOR AFTER
7:00 P.M. EASTERN TIME, WEDNESDAY, FEBRUARY 8, 2023

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

The State of Texas has scheduled the execution of John Balentine for February 8, 2023. Mr. Balentine respectfully requests a stay of execution pending consideration and disposition of the petition for a writ of certiorari filed along with this application.

STANDARDS FOR A STAY OF EXECUTION

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

The standards for granting a stay of execution are well-established. Relevant considerations include the prisoner’s likelihood of success on the merits, the relative harm to the parties, the extent to which the prisoner has unnecessarily delayed his or her claims, and public interest. *See Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004); *Barefoot*, 463 U.S. at 895. All four factors weigh in Mr. Balentine’s favor.

PETITIONER SHOULD BE GRANTED A STAY OF EXECUTION

1. Petitioner is likely to succeed on the merits.

In the court below, Mr. Balentine raised claims that a prospective juror, who later became the jury foreman, hid evidence of his racial bias and lied about his background during jury selection in order to become a member of the jury. The evidence further showed the impact of the biased juror upon the jury, as he browbeat other jurors who were willing to vote for a life sentence into voting for death. The juror's lies during jury selection violated Mr. Balentine's constitutional rights to a fair and impartial jury for the reasons explained in the accompanying petition. *See also McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984) (misstatements on voir dire require a new trial when honest answers would have resulted in a strike for cause). Moreover, the foreman's influence during sentencing deliberations led to a death sentence that was impermissibly influenced by racial bias, in violation of *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 225 (2017), and *Buck v. Davis*, 580 U.S. 100, 121, 124 (2017).

The Texas Court of Criminal Appeals did not give meaningful consideration to these claims. Rather, with no explanation of its reasoning, the court dismissed Mr. Balentine's claims under its abuse of the writ doctrine. *See* Article 11.071 § 5. But the statutory requirements of that doctrine are deeply intertwined with federal questions and require an analysis of federal law. As a result, the doctrine is not an adequate and independent basis to deny a viable federal claim of constitutional

error. The Texas court should not be allowed to hide behind its rule to avoid having to address viable constitutional claims of juror bias and misconduct.

The issues presented here are comparable to those currently pending before this Court in *Cruz v. Arizona*, No. 21-846 (argued November 1, 2022). The questions here are likewise worthy of this Court's review as they arise repeatedly in Texas cases. At a minimum, this Court should hold this case pending its decision in *Cruz*.

For the reasons discussed in detail in the certiorari petition, Mr. Balentine makes a strong case that the application of the abuse of the writ doctrine was not adequate and independent and that the merits of his claim should be remanded to the Texas courts for further proceedings. This Court should grant Petitioner's request Court for a stay of execution, pending a ruling on his petition for a writ of certiorari.

2. Petitioner has been timely and diligent in his litigation.

Petitioner has been diligently pursuing claims for relief from his conviction and death sentence for many years. His initial federal habeas petition was filed in 2003 and litigation concerning that petition, and attempts to reopen the district court's initial denial of relief, were not completed until this Court denied certiorari on June 13, 2022. Following that denial, Petitioner continued his investigation of the juror misconduct claim and timely raised that claim, consistent with Texas law, by filing a successor petition for habeas corpus. Prior to his recent discovery of the foreman's misconduct, Petitioner had no notice that any such misconduct had occurred. Indeed, Texas law presumes that jurors have discharged their duties

honestly, lawfully, and in accordance with the trial court's instructions, *see Yellow Cab & Baggage Co. v. Green*, 277 S.W.2d 92, 94 (Tex. 1955); *Casanova v. State*, 383 S.W.3d 530, 543 (Tex. Crim. App. 2012), including the instruction to base their verdict solely on the evidence heard in court. Petitioner brought the claims below as promptly as possible following a thorough an ongoing investigation and search for supporting evidence. Petitioner has been timely and diligent in pursuing this litigation.

Petitioner has filed this motion in a timely manner, shortly after the Texas Court of Criminal Appeals February 8, 2023 Order denying Petitioner's Subsequent Application for Habeas Corpus.

3. Petitioner will be irreparably harmed if a stay is not granted.

Mr. Balentine's execution will cause irreparable harm. Irreparable injury "is necessarily present in capital cases." *Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985).

4. The public interest weighs in favor of granting a stay.

As the petition describes in detail, the questions whether racial prejudice can be tolerated in the administration of criminal justice, and particularly in the imposition of the death penalty, are issues of great public importance. Thus, Texas's refusal to consider these issues on their merit likewise raises questions of great public importance, as this Court's grant of certiorari in *Cruz*, demonstrates. The importance of these issues cuts in favor of a stay.

FOR THE FOREGOING REASONS, and those set forth in the petition for a writ of certiorari, Petitioner respectfully requests that his application for a stay of execution be granted.

Respectfully submitted,

/s/ Shawn Nolan

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Dated: February 8, 2023