CASE NO. 24-_____ (CAPITAL CASE) (24A545)

IN THE SUPREME COURT OF THE UNITED STATES

BARTHOLOMEW GRANGER,
Petitioner,

v.

BOBBY LUMPKIN, DIRECTOR,
Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

CAPITAL CASE

The Texas Court of Criminal Appeals (CCA) dismissed Petitioner's subsequent application for writ of habeas corpus, containing several unexhausted claims, as an abuse of the writ under Article 11.071, section 5. In applying section 5, the CCA reviews both whether there is a prima facie showing that the claim has merit, and whether the claim was factually or legally unavailable at the time of any prior filings by the applicant. Both prongs require the CCA to assess the state of federal law as it applies to the claim raised.

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

This Court is currently considering comparable issues in *Glossip v. Oklahoma*, No. 22-7466. The questions presented here are:

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

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

STATEMENT OF RELATED PROCEEDINGS

Granger v. Lumpkin, No. 24-70001 (United States Court of Appeals for the Fifth Circuit) (order denying rehearing and rehearing en banc, filed September 13, 2024).

Granger v. Lumpkin, No. 24-70001 (United States Court of Appeals for the Fifth Circuit) (order denying certificate of appealability, filed July 30, 2024).

Granger v. Director, No. 1:17-CV-291 (United States District Court) (Opinion and Order denying petition for writ of habeas corpus and certificate of appealability, filed February 24, 2024).

Ex parte Granger, No. WR-83,135-02 (filed February 26, 2020).

Ex parte Granger, No. WR-83,135-01 (Texas Court of Criminal Appeals) (order denying habeas corpus relief, filed on May 17, 2017).

Ex parte Granger, No. 13-16388 (58th District Court of Jefferson County, Texas) (order adopting the State's proposed findings of fac and conclusions of law, filed October 28, 2016).

Granger v. Texas, No. AP-77,017 (Texas Court of Criminal Appeals) (opinion affirming judgment and sentence of trial court on direct appeal, filed April 22, 2015).

Texas v. Granger, No. 13-16388 (58th District Court of Jefferson County, Texas) (judgment of guilt and sentence, entered May 7, 2013).

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The opinion of the United States Court of Appeals for the Fifth Circuit, *Granger v. Lumpkin*, 2024 WL 3582651 (5th Cir. 2021), is unreported and appears in the appendix. A timely petition for panel rehearing was denied by order on September 13, 2023, is not reported, and appears in the Appendix.

The opinion of the United States District Court for the Eastern District of Texas, *Granger v. Director*, TDCJ-CID, No. 1:17-CV-291, 2023 WL 2224444 (E.D. Tex. Feb. 24, 2023), is unreported and appears in the Appendix.

The Texas Court of Criminal Appeals' decision dismissing Mr. Granger's subsequent application for writ of habeas corpus, *Ex parte Granger*, No. WR-83,135-02, 2020 WL 915434 (Tex. Crim. App. Feb. 26, 2020), is unreported and appears in the Appendix.

JURISDICTION

The court of appeals denied a certificate of appealability on July 30, 2024, and denied petitions for rehearing and rehearing en banc on September 13, 2024. On December 4, 2024, Justice Alito extended the time for filing a petition for certiorari until January 11, 2024. This Court has jurisdiction under 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

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

STATEMENT

A. Introduction

Mr. Granger was convicted of capital murder and sentenced to death for the March 14, 2012, killing of Minnie Ray Sebolt. The shooting occurred in front of the Jefferson County Courthouse, where Mr. Granger was on trial for sexual-assault charges based on allegations made by his daughter. Mr. Granger shot at his daughter and her mother as they were headed towards the courthouse. Numerous law enforcement officers immediately responded, firing back from the direction of the courthouse and various surrounding locations. ROA.1451–53. As a result of this shooting incident, Mr. Granger was arrested and capitally charged with the death of Ms. Sebolt, who suffered two gunshot wounds to her thigh as she approached the courthouse entrance. ROA.10878–84.

The only contested issue at the guilt phase was whose bullets hit and ultimately killed Ms. Sebolt. The State's evidence did not resolve this issue, and

inexplicably, trial counsel presented a pathologist who concluded the fatal shots came from Mr. Granger's direction. ROA.11148–49.

Although state habeas counsel failed to develop and raise any claim regarding this crucial issue, Mr. Granger developed this issue in federal habeas proceedings, raising claims of ineffective assistance of counsel and a violation of due process and introducing evidence that the testimony of trial counsel's pathologist was inaccurate on this vital issue. Mr. Granger then returned to state court to exhaust these claims. ROA.15764–15902.

However, the Texas court, and, in turn, the federal courts, did not fully consider the merits of these claims or several others or much of the evidence in support, deeming them procedurally barred. This Court should address the issues arising from the CCA's application of the abuse-of-the-writ doctrine and the federal courts' subsequent rulings deeming it an independent and adequate state ground.

This case raises important procedural issues arising from the Texas Court of Criminal Appeals' unexplained application of the abuse-of-the-writ doctrine. The issues presented are comparable to those currently pending before this Court in *Glossip v. Oklahoma*, No. 22-7466 (argued October 9, 2024). 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 *Glossip*.

B. Trial, Direct Appeal, and Initial State Habeas Proceedings

In March 2012, Mr. Granger was on trial for purportedly sexually assaulting his daughter—a charge he vehemently denied. His mental health had declined substantially since the accusations arose. On March 4, 2012, Mr. Granger shot in

the direction of his daughter and ex-wife as they were entering the courthouse. Minnie Ray Sebolt, who happened to be in the vicinity at the time, was shot twice and died.

Mr. Granger was indicted for capital murder, and the trial began on April 22, 2013. The only contested issue at the guilt phase was who fired the shots that killed Ms. Sebolt as she headed towards the courthouse. Mr. Granger testified that although he shot at his daughter, he did not shoot at or intend to harm Ms. Sebolt. ROA.11013–14; ROA.11018. The trial testimony showed that Mr. Granger and dozens of law enforcement officers fired their weapons. *See, e.g.*, ROA.10451–53; ROA.849; ROA.803–10. Ms. Sebolt was shot and fell to the ground in front of the revolving doors at the courthouse entrance. She was shot once in her right knee and once, fatally, in her left thigh. ROA.10878–84. Because both bullets were "through and through," it was impossible to determine the caliber of the bullet that killed Ms. Sebolt or who shot it. ROA.10876–78.

The State's ballistics expert testified that all the identifiable bullets recovered near the courthouse entrance could be traced to Mr. Granger's weapon but that some ballistics evidence (the nature and location of which were not elicited) was unidentifiable. ROA.10942–45; ROA.10950. Ineffectively, trial counsel for Mr. Granger failed to elicit that these unidentifiable items were four bullet fragments all recovered near the courthouse entrance where Ms. Sebolt was shot and killed. ROA.844–51; ROA.829–42; ROA.822–26.

The State's medical examiner, Dr. Lisa Funte, testified that the entrance wound for the fatal shot was on the front of Ms. Sebolt's thigh, ROA.10878–84, which suggested it was fired from the direction of the courthouse, where law enforcement officers were located. Inexplicably, defense counsel presented their own pathologist, Dr. Lee Ann Grossberg, who testified to the contrary: that the entrance wound for the shot that killed Ms. Sebolt was on the back of her thigh, which showed that the fatal bullet was fired from the direction of the street—where Mr. Granger was located. ROA.11148–49.

The jury subsequently convicted Mr. Granger of capital murder and sentenced him to death. ROA.2813–14.

The Texas Court of Criminal Appeals affirmed Mr. Granger's conviction and sentence on direct appeal. ROA.234.

Mr. Granger sought a writ of habeas corpus under state law. ROA.12566. However, inexplicably, state habeas counsel failed to raise many meritorious claims for relief, including any challenge to the ballistics evidence presented at trial. The trial court adopted the State's findings of fact and conclusions of law nearly verbatim, and the CCA denied relief. ROA.366; ROA.13611. This Court denied certiorari review. *Granger v. Texas*, 583 U.S. 999 (2017).

C. Federal Habeas Proceedings

Mr. Granger filed a timely habeas petition and an amended petition. Mr. Granger alleged, among other claims, that trial counsel were constitutionally ineffective in their handling of the ballistics evidence and that the State knowingly presented false testimony regarding the origin of the bullets found near Ms. Sebolt's

body. ROA.188–92. As set forth in his federal habeas petition, trial counsels' chosen defense was that the State could not prove Mr. Granger's bullets caused Ms. Sebolt's fatal injuries. *See* ROA.10451–52; ROA.10485–86; ROA.11208–13. Counsels' handling of the ballistics evidence was objectively unreasonable. Faced with the prosecutor's false argument that "every single slug that was found in the courthouse" came from Granger's gun, ROA.11224, counsel missed the opportunity to highlight physical evidence that supported the chosen defense. Counsel failed to elucidate the fact that four bullet fragments located in or near the courthouse entrance could not be traced to anyone's weapon, including one bullet fragment recovered from inside the courthouse in front of the dedication sign and three fragments retrieved from the front of the courthouse pole. *See* ROA.844–51; ROA.829–42; ROA.822–26.

Mr. Granger also alleged that trial counsel presented Dr. Grossberg to testify to opinions and conclusions that were harmful to his defense and amounted to the sole evidence that the fatal gunshots were fired not from the courthouse but from where Mr. Granger was standing. This evidence was adverse to Mr. Granger on the sole issue in dispute. Without Dr. Grossberg's testimony, uncontested evidence would have shown that the fatal shots came from the direction of the courthouse—far from Mr. Granger.

New evidence, introduced in support of Mr. Granger's successor state habeas petition, only strengthened Mr. Granger's assertion of ineffectiveness. This evidence showed counsel spoke substantively with Dr. Grossberg only one time over the

phone for twenty minutes and one time in person—outside the courtroom just before she took the stand. ROA.11140; ROA.594. Notably, Dr. Grossberg spent as much time speaking with the prosecutor in advance of trial. ROA.594. But most importantly, Dr. Grossberg's handwritten notes reveal that, unbeknownst to the jury and perhaps even trial counsel, her testimony on this vital issue was inaccurate. Dr. Grossberg's notes, taken contemporaneously with her review of the evidence, show she reached the same conclusion as the State's medical examiner: the entrance wounds were on the front of Ms. Sebolt's body, consistent with the bullets' coming from the courthouse, not Mr. Granger. ROA.594. Counsel did nothing to correct this error.

With his federal habeas petition, Mr. Granger also filed a motion to stay the proceedings and hold them in abeyance to allow him to exhaust state remedies on a number of unexhausted claims, including this one. ROA.1206–23. The district court granted this motion, and Mr. Granger then filed a subsequent application for writ of habeas corpus in state court. ROA.1347–54; ROA.15764–15902. The Texas Court of Criminal Appeals dismissed this application as an abuse of the writ pursuant to Texas Code of Criminal Procedure Art. 11.071, section 5. ROA.17825–27 (attached as App. D).

Upon returning to federal court, Mr. Granger filed a second amended habeas petition. The district court denied relief, holding that most of Mr. Granger's claims, including those related to ballistics, were unexhausted and therefore procedurally barred. ROA.2504–2725 (attached as App. C). Central to that holding was the

district court's finding that the CCA's "abuse of the writ bar," or Tex. Crim. Proc. Art. 11.071, section 5, was an independent and adequate state procedural rule. ROA.2548. Similarly, the district court declined to consider much of the evidence in support of this claim, as it was not presented to the state court in initial state habeas proceedings. ROA.2679–80. The district court also declined to issue a COA. The district court denied Mr. Granger's timely motion to alter or amend the judgment. ROA.2774–86.

Mr. Granger filed a timely notice of appeal. He then filed an application and brief in support, requesting COA on the ballistics issue and two others. On August 30, 2024, the Fifth Circuit denied COA on all of the claims, holding, inter alia, that the ballistics claim was procedurally barred and the new evidence could not be considered because "Granger did not raise the claim properly in the state habeas proceeding." *Granger v. Lumpkin*, 2024 WL 3582651, at *3. On September 13, 2024, the court of appeals denied rehearing and rehearing en banc (attached as App. B). Mr. Granger now seeks review of that ruling. This Petition is timely filed, Justice Alito having granted Petitioner an extension of time to file.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD DECIDE WHETHER TEXAS'S APPLICATION OF A STATUTORY BAR TO PRECLUDE CONSIDERATION OF FEDERAL CONSTITUTIONAL CLAIMS WAS ADEQUATE AND INDEPENDENT.

In *Glossip v. Oklahoma*, this Court granted certiorari and ordered the parties to address "whether the Oklahoma Court of Criminal Appeals' holding that the Oklahoma Post-Conviction Procedure Act precluded post-conviction relief is an independent and adequate state-law ground for the judgment." 144 S. Ct. 691 (2024). In *Glossip*, the petitioner has argued, among other things, that Oklahoma applied the Post-Conviction Procedure Act in a manner that was interwoven with federal law but that purports to be procedural in order to avoid further review of a federal constitutional error. *See* Brief of Petitioner, *Glossip v. Oklahoma*, No. 22-7466, 2024 WL 1860352, at *39–43 (U.S. Apr. 23, 2024).

Mr. Granger's case raises procedural questions at least as important as those in *Glossip*. As discussed *infra*, the Texas Court of Criminal Appeals' dismissal of Mr. Granger's successor under Tex. Crim. Proc. Art. 11.071, section 5, and the federal courts' subsequent ruling that this state-law ground was independent and adequate resulted in limited review of several of Mr. Granger's claims and much of the compelling evidence in support.

The Texas Court of Criminal Appeals relied upon Article 11.071, section 5, to ostensibly refuse to review the merits of Mr. Granger's successor habeas petition. The CCA order contains no explanation for its ruling and provides no analysis about why or how the rule was applied to Mr. Granger's petition. The order does not

indicate whether the Texas court relied on federal or state law in applying section 5. Its reasoning is opaque. The only clear point of the order is that it refused to consider the important claims that Mr. Granger raised. As it has in *Glossip*, this Court should decide whether the refusal to address important constitutional claims was adequate and independent.

The petitioner in *Glossip* argues that Oklahoma's refusal to apply controlling federal law rendered its application of Rule 32.1(g) inadequate. He argues that the decision discriminates against federal rights and is intertwined with federal questions. And that because the state-court ruling was intertwined with federal law, the state court should not be allowed to evade review of the federal questions before it. *See* Brief of Petitioner, *Glossip*, 2024 WL 1860352, at *39–48.

The CCA's application of section 5 raises the same concerns. Here, the CCA ruled that Mr. Granger had "failed to show that he satisfies the requirements of Article 11.071 § 5(a)," App. D at 3, but did not specify in what respect Mr. Granger had failed to satisfy the statute. This is significant because the CCA has interpreted Article 11.071, section 5(a)(1), the requirements of which Mr. Granger alleged he satisfied, as containing two separate prongs: (1) one requiring a prima facie showing of "a federal constitutional claim that requires relief from the conviction or sentence"; and (2) an "unavailability" prong requiring a showing that the factual or legal basis of the federal claim was unavailable at the time the initial application was filed. *Ex Parte Campbell,* 226 S.W.3d 418, 421 (Tex. Crim. App. 2007); *accord Ex Parte Staley,* 160 S.W.3d 56, 66 (Tex. Crim. App. 2005) (per curiam). An

application does not satisfy section 5(a)(1) if it fails to satisfy *either* the merits prong or the unavailability prong. *Campbell,* 226 S.W.3d at 421.

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

If the state court denied the writ based on a failure by Mr. Granger to satisfy the prima-facie-showing prong of section 5(a)(1), its decision was not based on an independent state ground. This prong involves review of whether the applicant has made a prima facie showing of a federal constitutional violation. *See* Article 11.071, § 5(a)(1); *Campbell,* 226 S.W.3d at 422–25 (denying claim as abuse of writ based on lack of merit of claim); *Ex parte Cruz-Garcia*, No. WR-85,051-03, 2017 WL 4947132, at *2 (Tex. Crim. App. Nov. 1, 2017) (denying claim as abuse of writ based on failure to show materiality); *Ex parte Reed*, No. WR-50,961-07, 2017 WL 2138127, at *1

(Tex. Crim. App. May 17, 2017) (denying claim as abuse of writ based on failure to make prima facie showing on federal claims).

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

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

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

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

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

Id., § 5(d).

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

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

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

CONCLUSION

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

Respectfully submitted,

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