No.10-10881

IN THE
SUPREME COURT OF THE UNITED STATES

BEUNKA ADAMS,
Petitioner,

v.

RICK THALER,
Director, Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

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

BRIEF IN OPPOSITION

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

DON CLEMMER
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Postconviction Litigation Division

*TINA J. MIRANDA
Assistant Attorney General,
P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936 1400
Fax (512) 936-1280

ATTORNEYS FOR RESPONDENT

*Attorney of Record

QUESTION PRESENTED

Petitioner Beunka Adams was denied relief on his initial application for writ of habeas corpus in state court in 2007 but did not raise his jury charge and related ineffective-assistance-of-counsel (IAC) claim until after he filed his federal habeas corpus petition over a year later. Because these two claims were raised in a subsequent application, the Court of Criminal Appeals of Texas (CCA) dismissed them as an abuse of the writ. These claims were later found defaulted by the United States District Court, and Fifth Circuit Court of Appeals affirmed the procedural bar. Adams now asks this Court to decide the following question:

> Did the state court's unambiguous citation to a state procedural rule in its dismissal order constitute an independent and adequate state-law ground barring federal consideration of his defaulted IAC claim?

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This is a federal habeas corpus proceeding in which Petitioner Adams unsuccessfully challenged his presumptively valid state capital-murder conviction and sentence of death pursuant to 28 U.S.C. § 2254. Adams now seeks certiorari review of the Fifth Circuit's denial of federal habeas relief, complaining the appellate court erred in its determination that his jury charge and related IAC claim was procedurally barred. But, as discussed below, the lower court's holding is entirely consistent with the relevant precedent set by this Court. Thus, further review of Adams's federal habeas claims is unwarranted.

STATEMENT OF THE CASE

I. Facts of the Crime

The CCA set out the evidence supporting Adams's conviction for capital murder in its direct-appeal opinion:

> On September 2, 2002, Candace Driver and Nikki Dement[1] were working at BDJ's convenience store in Rusk, Texas. Kenneth Vandever, a customer described as mentally challenged who often "hung around" at BDJ's and helped take out the trash, was in the store with Candace and Nikki when two masked men entered the store. One of the men was armed with a shotgun and demanded money. The two men were later identified as [Adams] and his co-defendant, Richard Cobb.

[1]Between the time of the offense and the time of trial, Nikki Ansley married, taking the name Nikki Ansley Dement. She is referred to through [the Court of Criminal Appeals's] opinion by her married name, Nikki Dement.

After taking the money from the cash register, [Adams] demanded the key to a Cadillac parked outside. After Candace produced her car keys, [Adams] forced her, along with Nikki and Kenneth, into the car. As [Adams] drove Candace's car, Nikki said, "I know you, don't I?" [Adams] said, "Yes," and took his mask off. When they arrived at a remote pea patch near Alto, Cobb pointed the shotgun at Candace and Kenneth and [Adams] ordered them to get into the trunk of the Cadillac. [Adams] then took Nikki to a more secluded spot, away from the car, and sexually assaulted her. Later, [Adams] led Nikki back to the Cadillac and let Candace and Kenneth out of the trunk, but he tied the two women's arms behind their backs and made them kneel on the ground while the two robbers made their escape. [Adams] and Cobb seemingly developed a plan to leave Kenneth untied so that he could free the women once [Adams] and Cobb were far enough away from the scene. [Adams], however, believed that Kenneth was attempting to untie the women too soon, so he returned and ordered Kenneth to kneel behind the women. Candace heard Kenneth say that "it was time for him to take his medicine and he was ready to go home."

The women then heard a single gunshot. [Adams] asked, "Did we get anybody?" And Candace said, "No." Shortly thereafter, a second shot was fired, and Kenneth cried out, "They shot me." Kenneth Vandever died from the gunshot wound. Seconds later, Candace heard another shot, and Nikki fell forward. Candace fell forward as well, pretending to be hit. [Adams] approached Candace and asked her if she was bleeding. He was carrying the shotgun. Candace did not immediately answer in hope that [Adams] would believe that she had been killed. [Adams] then said, "Are you bleeding? You better answer me. I'll shoot you in the face if you don't answer me." When Candace said, "No, no, I'm not bleeding," [Adams] shot her in the face, hitting her lip.

[Adams] and Cobb turned to Nikki, asking her the same questions. [Adams] kicked Nikki for about a minute, joined by Cobb. Then they picked her up by her hair and held a light to her face to see if she was alive. Candace feigned death for fear of being shot again. She heard Cobb say about Nikki, "She's dead. Let's go."[2] That was the only time that

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[2]In fact, Nikki had not died. She was life-flighted to a hospital, but she had suffered broken ribs, a broken shoulder blade, and a collapsed lung. The shotgun blast

> Candace ever heard Cobb speak. After [Adams] and Cobb left, Candace got up and ran barefooted down the deserted country road and banged on the door of the first house she saw.

Adams v. State, No. 75,023, slip op.at 2-4 (footnotes in original).

II. Facts Relating to Punishment

The CCA also summarized the evidence supporting the jury's affirmative finding of future dangerousness:

> The State introduced evidence that, in the days preceding the instant offense, [Adams] participated in two aggravated robberies with Cobb. During those offenses, [Adams] had remained outside, and no one was physically hurt or injured. Following those offenses, [Adams] kept the shotgun and shells used in the robberies. Both [he] and Cobb planned the robbery at BDJ's. Unlike the other two robberies, [Adams] decided to go into the store with Cobb at BDJ's.
>
> The jury heard that during this robbery, [Adams] was the leader. He did nearly all the talking, including commanding Cobb and giving orders to the three victims. The jury also heard that it was [Adams] who initiated the kidnaping and was in charge during that time. At the scene of the sexual assault and shootings, [Adams] was again doing all of the talking and giving orders. Candace testified that [Adams] threated to kill her if she did not do what he said. Nikki testified that it was [Adams] who sexually assaulted her. The jury also heard that it was [Adams] that forced all three victims to kneel. After the first shot was fired, [Adam] questioned whether anyone had been hit, and it was [Adams] who fired the shotgun again when Candace said she was not bleeding. [Adams] then began kicking Nikki in the chest so hard that he fractured her ribs and then lifted her up by her pony-tailed hair to see if she was alive.
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> The State also presented evidence that [Adams] was in charge of

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had torn away a 15 by 12 centimeter "divot" of skin and tissue on her left shoulder blade.

> Cobb's and his escape from the scene of the shootings. While his statement to law enforcement downplayed his role, [Adams] later bragged about the shooting to another jail inmate. Further, the State produced evidence of [Adams]'s bad character as a law-abiding citizen. Additionally, the State presented expert psychiatric testimony that [Adams] fit the profile of a person for whom there is a probability of future dangerousness.

Adams v. State, slip. op. at 9-10.

III. Direct Appeal and Post-conviction Proceedings

In September 2002, Adams was indicted in Cherokee County, Texas for capital murder. 1 CR[3] 2-4. The indictment alleged that Adams intentionally murdered Kenneth Wayne Vandever while in the course of committing or attempting to commit robbery and kidnaping of Candance Evans Driver, Kenneth Vandever, or Nikki Ansley. *Id.* The indictment further alleged that Adams intentionally murdered Kenneth Wayne Vandever while in the course of committing or attempting to commit aggravated sexual assault of Nikki Ansley. *Id.* A jury convicted Adams, and after a separate punishment hearing, he was sentenced to death. 3 CR 539-41. The Texas Court of Criminal Appeals affirmed both the conviction and sentence in an unpublished opinion. *Adams v.*

[3]"CR" refers to the Clerk's Records of pleadings and documents filed with the court during trial, followed by page number; "RR" refers to the Reporter's Record of transcribed trial proceedings, preceded by volume number and followed by page number; "SHCR" refers to the State Habeas Record, preceded by volume number and followed by page number. "SHE" refers to the transcript of the state habeas evidentiary hearing, followed by page number. "2SHR" refers to the State Habeas Record of Adams's second successive writ application.

State, No. 75,023 slip op. (Tex.Crim.App. June 27, 2007) (unpublished). The United States Supreme Court denied Adams's subsequent request for certiorari review. *Adams v. Texas*, 552 U.S 1145 (2008).

While his direct appeal was pending, Adams filed his initial application for writ of habeas corpus in the state trial court through his attorney. SHCR 1-50. Following an evidentiary hearing, the trial court entered findings of fact and conclusions of law recommending that Adams's application for habeas corpus relief be denied. SHCR 280-304. The Court of Criminal Appeals adopted these findings and denied relief on all claims. *Ex parte Adams*, No. 68,066-01, slip op. at 2 (Tex. Crim. App. Nov. 21, 2007).

After more than a year had passed, Adams filed a successive application for relief in the state trial court. 2 SHCR 5-43. While that subsequent writ was still pending, Adams filed his federal petition for writ of habeas corpus simultaneously with a motion to stay and abate the federal proceedings until the Court of Criminal appeals ruled on his subsequent state application.[4] DE 3; DE 5. The district court granted that motion and abated the federal proceedings. DE 7. Several months later, the Court of Criminal Appeals dismissed Adams's second application for habeas corpus relief as an abuse of the writ. *Ex parte*

[4]Adams's federal petition was timely filed on January 8, 2009, as it was filed within one year of This Court's denial of certiorari on January 14, 2008. *See* U.S.C. 28 § 2244(d)(1).

Adams, No. 68,066-02 (Tex. Crim. App. Apr. 29, 2009). Specifically, the court's order stated, "We . . . find the allegations do not satisfy the requirements of Article 11.071, Section 5. Therefore, we dismiss the application as an abuse of the writ." *Id.*

Following further briefing, the court below, issued its memorandum and order rejecting Adams's bid for federal habeas relief. DE 23. Specifically, the Court dismissed Adams's second and third claims as procedurally barred, and denied the merits on the remaining eight claims. DE 23 at 26. The district court then granted a certificate of appealability on eleven separate issues. DE 34. The Fifth Circuit affirmed the district court's denial of federal habeas relief. *Adams v. Thaler*, 2010 U.S. Dist. LEXIS 74807 (5th Cir. 2010). The instant petition followed.

REASONS FOR DENYING THE WRIT

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Sup. Ct. R. 10 (West 2005). Adams advances no compelling reason in this case, and none exists.

I. The Court of Appeals Properly Upheld the Adequacy and Independence of Texas's Abuse-of-the-Writ Bar.

This Court will not review a question of federal law decided by a state court if the decision of that state court rests on a state ground that is both

independent of the merits of the federal claim and adequate to support that judgment. *Harris v. Reed*, 489 U.S. 255, 260, 262 (1989). This "independent and adequate state law" doctrine applies to both substantive and procedural grounds and affects federal review of claims that are raised on either direct or habeas review. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *Harris*, 489 U.S. at 261.

In *Michigan v. Long*, the Court explained,

> Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. It is precisely because of this respect for state courts, and this desire to avoid advisory opinions, that we do not wish to continue to decide issues of state law that go beyond the opinion that we review, or to require state courts to reconsider cases to clarify the grounds of their decisions. Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

463 U.S. 1032, 1040-41 (1983).

The Fifth Circuit has traditionally recognized Texas's abuse-of-the-writ doctrine as an independent and adequate state ground supporting the imposition of a procedural bar in federal court. *Hughes v Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008); *see also Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir.1995) (holding that Texas common law abuse of the writ doctrine has been strictly and regularly applied since 1994 and is an independent and adequate procedural bar); *Fuller v. Johnson*, 158 F.3d 903, 906 (5th Cir. 1998)(finding that Texas' abuse of writ doctrine was firmly established and regularly followed in May 1994).

But, following the Texas Court of Criminal Appeals decision in *Ex parte Campbell*, 226 S.W.3d 418 (Tex. Crim. App. 2007), questions arose concerning whether a dismissal under article 11.071, section 5 of the Texas Code of Criminal Procedure was truly independent of the merits and adequate to support a procedural bar in federal court.[5] The Fifth Circuit recently put these questions

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[5] Under Texas law, a subsequent application is one "filed after filing an initial application." Tex. Code Crim. Proc. Art. 11.071, § 5(a). The CCA "may not consider the merits" of a subsequent application unless it meets one of three exceptions contained in the statute. *Id.*

> (1) 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;

to rest, explaining that despite a slight shift in the legal landscape, Texas's abuse of the writ doctrine, in many instances—including the present case—continues to provide an independent and adequate state procedural ground barring federal habeas relief:

> It is true that prior to *Campbell*,[6] our decisions had assumed that a dismissal under § 5(a)(1) always rested on an independent and adequate state-law ground. That assumption cannot survive *Campbell*. At the same time, it is not the case that a post-*Campbell* dismissal under § 5(a)(1) never rests on an independent and adequate state-law ground. Whether a § 5(a)(1) dismissal is independent of federal law turns on case-specific factors. If the CCA decision rests on availability, the procedural bar is intact. If the CCA determines that the claim was unavailable but that the application does not make a prima facie showing of merit, a federal court can review that determination under the deferential standards of AEDPA.

Rocha v. Thaler, 626 F.3d 815, 835 (5th Cir. 2010) (opinion on rehearing).

As set out above, Adams did not raise his jury charge or related ineffective-assistance -of-counsel claims in his first state writ application, despite the fact

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> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or
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> (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072.

Id.

[6] *Ex parte Campbell*, 226 S.W.3rd 418 (Tex. Crim. App. 2007).

the claims were legally and factually available at that time. They were presented to the court in a subsequent application that was dismissed by the CCA as "an abuse of the writ." *Ex parte Adams*, No. 75,023-02 slip. op. at 2. The district court held, and the Fifth Circuit affirmed, that these claims were barred on federal habeas review because they were rejected by the state court on independent and adequate state procedural grounds.

Adams contends that the district court erred when it imposed a procedural bar on his claims. Despite the fact that there is no indication that the CCA's dismissal of Adam's application was based on federal law, Adams asks this Court to presume that the state court considered the merits of his federal constitutional claim because the CCA has done so in other dissimilar cases. Essentially he argues that all "boilerplate" dismissals must be considered to rest primarily on federal law where the opinion is ambiguous, and thus require application of the *Long* presumption precludes the application of a procedural bar.

A. The CCA's "boilerplate" dismissal cannot, consistent with this Court's precedent, be presumed to rest on federal law.

In *Long*, This Court set out the standard for determining "whether various forms of references to state law [by state courts] constitute adequate and independent state grounds." 463 U.S. at 1038. The Court announced that "when

... a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it do so." *Id.* at 1041.

Thus, *Long* provided a form of presumption administered through a two-part, conjunctive test. If a state court decision "fairly appears to rest primarily on federal law, or to be interwoven with federal law," federal courts should presume that the state court's decision turned on federal law unless the "adequacy and independence of any possible state law ground" was "clear from the face of the opinion." *Long*, 463 U.S. at 1040-41. The first part of the test forms the predicate for the *Long* presumption: the state court decision must first fairly appear to rest primarily on federal law or to be interwoven with federal law. *See id.* Once this predicate is satisfied, the second part of the test asks whether the state court has provided a plain statement of the independent and adequate state ground underlying its decision. If it has not, the *Long* presumption applies: federal courts will presume that "the state court decided the case the way it did because it believed that federal law required it to do so." *Id.*

When This Court extended *Long* to habeas cases in *Harris v. Reed*, 489

U.S. 255, 263 (1989), it created some confusion regarding whether the *Long* presumption applied to all state court procedural default holdings that did not clearly and expressly state an independent and adequate state ground for the decision, or only to those that fairly appeared to rest primarily on federal law or to be interwoven with federal law. The confusion resulted from a portion of the *Harris* opinion in which the Court omitted the critical prerequisite that the state decision first fairly appear to rest primarily on federal law, and appeared to impose a "clearly and expressly" requirement on all procedural default decisions. *See Harris*, 489 U.S. at 263.

In *Coleman*, however, This Court specifically addressed and rejected this interpretation, noting that the petitioner "read the rule out of context." 501 U.S. at 736. There, the petitioner sought "a conclusive presumption of no independent and adequate state grounds in every case in which a state prisoner presented his federal claims to a state court regardless of whether it fairly appears that the state court addressed [the federal] claims." 501 U.S. 722, 737-38 (1991). This Court rejected such a rule. It reasoned that in cases where the state court was silent about the basis for its decision or where federal law was *not* invoked in the opinion expressly, "it is simply not true that the 'most reasonable explanation is that the state judgment rested on federal grounds.'" *Id.* at 737 (internal citation omitted). Such a rule, the Court opined, would

"unacceptably expand the risk that federal courts will review the federal claims of prisoners in custody pursuant to judgments resting on independent and adequate state grounds. " *Id.* at 738.

This Court went on to remind federal courts that they "have no power to tell state courts how they must write their opinions." *Id.* at 739. And "where a state court, in the course of disposing of cases on its overcrowded docket, neglects to provide a clear and express statement of procedural default, or is insufficiently motivated to do so . . . respect for the State's interests [that] underlies the application of the independent and adequate state ground doctrine" does not permit a federal court to presume from a silent order that federal law controlled the disposition. *Id.* While recognizing that a "broad presumption" might "ease the burden of inquiry on federal courts," This Court nevertheless held that in order to minimize the risk that the state procedural rules will go unhonored, "it remains the duty of the federal courts . . . to determine the scope of the *relevant* state court judgment." *Id.* at 739 (emphasis added). Indeed, "in the absence of a clear indication that a state court rested its decision on federal law, a federal court's task will not be difficult." *Id.* at 740.

Thus, in a case like the present one, where there is no indication from the state court's opinion that the dismissal was in any way based on federal law it cannot, consistent with *Coleman* be presumed that it was.

B. Regardless, it is clear that the dismissal in this case does not rest of federal law.

In this case there was no mention of, or reference to federal law by the CCA in its opinion. Furthermore, state law clearly indicates that the dismissal was based on a state procedural bar independent of the merits of Adam's federal constitutional claim. First, the district court correctly noted that Adams's claim was available at the time he filed his initial state habeas application. Further, Adams has not argued that he did not commit the crime for which he had been convicted, and in fact his defaulted claims relate only to his death sentence, so § 5(a)(2) does not apply. The CCA must have dismissed his application because it did not satisfy either the unavailability exception of § 5(a)(1)or the actual-innocence-of-the-death-penalty exception of § 5(a)(3). In either case, the CCA's dismissal did not constitute a merits determination. *Rocha,* 626 F.3d at 838; *Balentine v. Thaler*, 626 F.3d 842, 854-55 (2010). Consequently, Adams cannot demonstrate that the state procedural ruling was dependent on federal law. His request for further review of this claim should be denied.

II. The Courts Do Not Require Additional Guidance on the Issue

Adams avers that the circuits are split concerning the operation of the *Harris* presumption, and that the Fifth Circuit itself is confused. Pet. at 24 (citing *Fama v. Comm'r of Corr. Servs.*, 235 F.3d 804 (2nd Cir. 2000); *Newell v. Hanks*, 283 F.3d 827 (7th Cir. 2002); and *Koerner v. Gregas,* 328 F.3d 1039, 1052

(9th Cir. 2003)). However, this Court recently denied certiorari review in *Balentine,* — S. Ct. —, 2011 WL 1156549 (Jun 13, 2011). And the lower court's decisions in *Balentine* and this case, as well as other circuits, have consistently recognized that a necessary predicate to the application of the *Harris* presumption is that there be a fair indication that the decision of the last state court to which the petitioner presented his federal claims was based on federal law.[1]

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[1] *See, e.g., Johnson v. Pinchak,* 392 F.3d 551, 557 (3d Cir. 2004) ("*Harris*'s plain statement rule was subsequently narrowed by *Coleman,* which established that the first step is to determine whether the decision of the last state court to which the petitioner presented his federal claims 'fairly appears to rest primarily on federal law, or to be interwoven with the federal law'") (quoting *Coleman,* 501 U.S. at 735); *Gulertekin v. Tinnelman-Cooper,* 340 F.3d 415, 422-423 (6th Cir. 2003) (noting that a determination that a state court decision rests on federal grounds is a predicate to any application of the *Harris* presumption); *Aparicio v. Artuz,* 269 F.3d 78, 92 (2d Cir. 2001) ("[I]n *Coleman,* the Supreme Court backed away from the 'clear statement' principle, holding it was an essential predicate to the *Harris* presumption that the state court decision on petitioner's claims be grounded in substantive federal law"); *Thomas v. Davis,* 192 F.3d 445, 453 n.6 (4th Cir. 1999) ("Although the opinion of the [state court] nowhere states that its rejection of [the habeas applicant's] fair-notice claim was based on the application of a procedural bar, we are not entitled to simply presume that the court therefore decided the case on the merits. . . . The *Harris* presumption does not apply in cases such as this one, however, where the state court's decision does not 'fairly appear' to rest primarily on federal law or to be interwoven with such law"); *Brewer v. Marshall,* 119 F.3d 993, 999-1000 (1st Cir. 1997) ("When the state decision fairly appears to rest primarily on federal law or to be interwoven with federal law, the federal court presumes there is no independent and adequate state ground for the decision. However, that presumption does not apply where, as here, there is no clear indication that [the] state court rested its decision on federal law") (internal quotation marks and citations omitted); *Klein v. Neal,* 45 F.3d 1395, 1399 (10th Cir. 1995) ("*Coleman* thus clarifies that the *Harris* presumption is applicable if, and only if, the predicate question of whether the state court decision fairly appears to rest primarily on federal law is first answered in the affirmative"); *Willis v. Aiken,* 8 F.3d 556, 561 (7th Cir. 1993) ("[T]he Court in *Coleman* cautioned that, before the *Long–Harris* presumption is applicable, a federal court must first ascertain that the

III. Notwithstanding the Fact that the CCA's Opinion Does Not Fairly Appear to Rest of Federal Law , the CCA Clearly and Expressly Indicated its Reliance on State Procedural Grounds.

The Texas abuse-of-the-writ statute has long been considered an independent and adequate bar to federal review. *Hughes,* 530 F.3d at 342;; *Emery v. Johnson,* 139 F.3d 191, 196 (5th Cir. 1998); *Nobles v. Johnson,* 127 F.3d 409, 423 (5th Cir. 1997). Here, the CCA delivered a plain and unambiguous statement of its actual reliance on the same statute, which is independent of federal law and adequate to support the judgment.

Under the "plain statement" rule of *Long,* a federal court may not review such a decision. 463 U.S. at 1042. Such a plain statement must clearly and expressly indicate, on the face of the opinion, that the judgment is based on distinct, state-law grounds. *Id.* at 1041-42; *see also Harris,* 489 U.S. at 263 (habeas review is barred if the state-court judgment rests on a state procedural bar). Here, the CCA expressly stated that Adams's claim was brought in a subsequent habeas application, cited the state statute prohibiting such

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state court decision fairly appears to rest on federal grounds or is interwoven with federal law. Thus, even when the state court does not make a 'clear and express' statement that it is deciding an issue based on state law, the presumption may not automatically apply: The federal court first must determine whether the state court decision fairly appears to rest on federal grounds."); *Hunter v. Aispuro,* 982 F.2d 344, 347 (9th Cir. 1992) ("The state courts' terse dismissals of the habeas petitions do not disclose whether they were based on state or federal law. Certainly the *pro forma* orders do not fairly appear[ ] to rest primarily on federal law, or to be interwoven with the federal law. Therefore, the necessary federal law predicate is missing and the *Harris* presumption of a reviewable federal issue does not apply.") (internal quotation marks and citation omitted).

subsequent applications, and held that the claim failed to meet any exception to that prohibition. Pet. Appx. A. No federal law was cited within the order. This is exactly the sort of plain statement that is contemplated under *Long*. *Cf. Sochor v. Florida,* 504 U.S. 527, 534 (1992) (state court's opinion which said that "[n]one of the complained-of jury instructions were objected to at trial, and, thus, they are not preserved for appeal" indicated with requisite clarity reliance on state law); *Coleman,* 501 U.S. at 740 (perfunctory order of dismissal, which did not mention federal law, "fairly appears" to rely on state law). Thus, Adams's claim is procedurally defaulted.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

DON CLEMMER
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Postconviction
Litigation Division

*TINA J. MIRANDA
Assistant Attorney General
Postconviction Litigation Division

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Tel: (512) 936-1400
Fax: (512) 320-8132

ATTORNEYS FOR RESPONDENT

*Counsel of Record