Nos. 22A724, 22-6728

IN THE
# Supreme Court of the United States

JOHN BALENTINE,
*Petitioner*,

v.

STATE OF TEXAS,
*Respondent*.

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

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR A STAY OF EXECUTION

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**CAPITAL CASE**

## QUESTIONS PRESENTED

1. Whether the Court has jurisdiction over claims that were dismissed on an adequate and independent state law ground.

2. Whether the Court should expend its limited resources to consider highly fact-bound questions, raised for the first time and at the latest possible moment in last-minute litigation, where there has been no fact finding and no merits analysis in the court below and the claims are meritless, barred by non-retroactivity or both.

## BRIEF IN OPPOSITION

The State of Texas respectfully submits this brief in opposition to the petition for a writ of certiorari and application for a stay of execution filed by John Balentine.

## STATEMENT OF THE CASE

### I. Facts Concerning Balentine's Murder of Mark Caylor, Kai Geyer, and Steven Watson

> At 2:30 A.M. on January 21, 1998, Officer Timothy Hardin of the Amarillo Police Department responded to a call that shots had been fired in an Amarillo, Texas neighborhood. While investigating the call, he noticed [Balentine] walking from the area where the shots had been fired. Believing [Balentine] to be acting in a suspicious manner, Officer Hardin conducted a *Terry* stop. [Balentine] gave the officer incorrect information regarding his identity and address. A subsequent frisk of [Balentine's] person revealed a .32 caliber bullet in his possession. However, no weapon was found and [Balentine] was not taken into custody, but was eventually released. Later that morning, three young men were discovered murdered in that same neighborhood, and in a house where [Balentine] had resided until a few weeks before the incident when he broke up with Misty Caylor, his girlfriend who lived there. Each of the young men had been shot in the head with a .32 caliber bullet while they slept. One of the murder victims was Mark Caylor, who had threatened [Balentine] because of [Balentine's] treatment of Misty Caylor, Mark's sister. The investigation focused on [Balentine] and an arrest warrant was issued. [Balentine] left the Amarillo area shortly after the murders, but was later arrested in Houston, Texas. After his arrest in Houston, [Balentine] confessed he had committed these crimes.

*Balentine v. Quarterman*, No. 2:03-CV-00039, 2008 WL 862992, at *2 (N.D. Tex. Mar. 31, 2008) (report and recommendation) (citations omitted).

## II. Facts Relevant to Punishment and the Sentencing Phase of Trial

Rosa Miller testified about a night in November 1996, when Balentine broke into her home and then kidnapped her. ROA.15009–37.[1] Miller heard a loud crashing noise in her house; she tried to call the police but the phone lines had been cut. ROA.15013–15. As Miller tried to leave, a man grabbed her by the throat. ROA.15017. The assailant told her, by name, to stop screaming or he would cut her. ROA.15017–19. When the man forced her into her car, she recognized her attacker as Balentine, who used to be a maintenance man at her workplace. ROA.15010–11.

Balentine drove off with Miller. ROA.15020–26. Miller saw that Balentine had a box cutter, and when he told her he would cut her, she believed him. ROA.15026. Balentine told her he was going to put her in the trunk or tie her up in the back seat. ROA.15030. Miller was able to escape when Balentine stopped for cigarettes. ROA.15034–37. Miller recalled that, throughout the ordeal, she thought Balentine was going to tie her up, rape her, and kill her. ROA.15037.

The prosecution also introduced evidence establishing that Balentine was found delinquent by a juvenile court in 1985 for having burglarized a high school JROTC building and stolen several rifles and uniforms. ROA.14985–86;

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[1] "ROA" refers to the Record on Appeal in Balentine's most recent federal habeas proceedings in the Fifth Circuit. *Balentine v. Lumpkin*, No. 18-70035 (5th Cir.).

ROA.15087. The jury learned that Balentine was also arrested at a Wal-Mart store in December 1986 after attempting to steal a large quantity of firearms. ROA.15000–03. Balentine was sentenced to five years' imprisonment for burglary and attempted theft of property. ROA.15099. Balentine was also convicted of robbery in November 1989 and received a five-year sentence. ROA.15098.

Finally, while awaiting transfer on the capital-murder charge, Balentine struck a sheriff's deputy and knocked another into a wall with enough force to require medical attention. ROA.15043–48. Several deputies were needed to restrain Balentine, who kept resisting, kicking, and throwing punches. ROA.15047.

At the close of the prosecution's case, the defense informed the court they had "about four or five, maybe six" witnesses they planned to call; however, after a recess, the defense rested its case after presenting no witnesses. ROA.15049–52. Following an evidentiary hearing regarding Balentine's allegation that his trial counsel were ineffective for failing to present mitigating evidence, the federal district court found the claim meritless because Balentine instructed trial counsel not to present such evidence. *See Balentine v. Lumpkin*, No. 18-70035, 2021 WL 3376528, at *5–11 (5th Cir. Aug. 3, 2021). The jury sentenced Balentine to death. ROA.9836.

## III. Course of State and Federal Proceedings

Balentine's conviction and sentence were affirmed on direct appeal by the Texas Court of Criminal Appeals (CCA). *Balentine v. State*, 71 S.W.3d 763, 774 (Tex. Crim. App. 2002). The CCA thereafter denied Balentine state habeas relief. *Ex parte Balentine*, No. WR-54,071-01 (Tex. Crim. App. Dec. 4, 2002) (unpublished).

Balentine then filed a federal habeas petition. Pet., *Balentine v. Thaler*, No. 2:03-CV-00039 (N.D. Tex. Dec. 1, 2003), ECF No. 21. The federal district court denied the petition and granted a certificate of appealability (COA). *Balentine v. Thaler*, No. 2:03-CV-00039, 2008 WL 2246456, at *1 (N.D. Tex. May 30, 2008). The Fifth Circuit denied Balentine's application to expand the COA and affirmed the district court's denial of the petition. *Balentine v. Quarterman*, 324 F. App'x 304, 305 (5th Cir. 2009), *cert. denied*, 558 U.S. 971.

Balentine's execution was scheduled for September 30, 2009. He filed a subsequent state habeas application and a motion for a stay of execution, which the CCA dismissed and denied, respectively. *Ex parte Balentine*, Nos. WR-54,071-01, WR-54,071-02, 2009 WL 3042425 (Tex. Crim. App. Sept. 22, 2009), *cert. denied*, 558 U.S. 1003. Balentine also filed a motion for relief from judgment and a motion for a stay of execution in the federal district court, which the district court denied. Order, *Balentine v. Thaler*, No. 2:03-CV-00039 (N.D. Tex. Sept. 28, 2009), ECF No. 89. The Fifth Circuit granted a stay of

execution. Order, *Balentine v. Thaler*, No. 09-70026 (5th Cir. Sept. 29, 2009). The Fifth Circuit initially reversed the denial of Balentine's motion for relief from judgment but ultimately affirmed. *Balentine v. Thaler*, 626 F.3d 842, 857 (5th Cir. 2010). The Fifth Circuit denied Balentine's petition for rehearing en banc. *Balentine v. Thaler*, 629 F.3d 470, 471 (2010). This Court denied Balentine's petition for a writ of certiorari. *Balentine v. Thaler*, 564 U.S. 1006 (2011).

Balentine was scheduled for execution on June 15, 2011. He filed his second subsequent state habeas application and a motion for a stay of execution, which the CCA dismissed and denied, respectively. *Ex parte Balentine*, No. WR-54,071-03 (Tex. Crim. App. June 14, 2011) (unpublished). This Court granted a stay of execution, *Balentine v. Texas*, 564 U.S. 1014 (2011), and later denied Balentine's petition for a writ of certiorari, *Balentine v. Texas*, 566 U.S. 904 (2012).

Balentine's execution was scheduled for August 22, 2012. He filed a motion for relief from judgment and a motion for a stay of execution in the federal district court. The court denied the motions and granted a COA. Order, *Balentine v. Thaler*, No. 2:03-CV-00039, 2012 WL 3263908 (N.D. Tex. Aug. 10, 2012), ECF No. 128. The Fifth Circuit affirmed the denial of the motion for relief from judgment and denied Balentine's motion for a stay of execution, Op., *Balentine v. Thaler*, No. 12-70023 (5th Cir. Aug. 17, 2012), and denied

Balentine's petitions for rehearing, *Balentine v. Thaler*, 692 F.3d 352 (5th Cir. 2012), *Balentine v. Thaler*, 692 F.3d 357 (5th Cir. 2012). This Court vacated the Fifth Circuit's judgment and remanded the case for further proceedings. *Balentine v. Thaler*, 569 U.S. 1014 (2013). The Fifth Circuit remanded the case to the district court. *Balentine v. Stephens*, 553 F. App'x 424, 425 (5th Cir. 2014).

The federal district court held an evidentiary hearing in October 2016 and January 2017 after which the court denied Balentine's motion for relief from judgment. *Balentine v. Davis*, No. 2:03-CV-00039, 2018 WL 2298987, at *1 (N.D. Tex. May 21, 2018). The Fifth Circuit granted a COA and later affirmed the denial of the motion for relief from judgment. *Balentine v. Lumpkin*, 2021 WL 3376528, at *4, 11. The Fifth Circuit denied Balentine's petition for rehearing. Order, *Balentine v. Lumpkin*, No. 18-70035 (5th Cir. Aug. 31, 2021). This Court denied Balentine's petition for a writ of certiorari. *Balentine v. Lumpkin*, 142 S. Ct. 2818 (2022).

Balentine's execution was scheduled for February 8, 2023. On December 16, 2022, Balentine and death row inmate Wesley Ruiz filed an Original Verified Petition and Application for Temporary Injunction, Declaratory Relief, and Permanent Injunction in Travis County District Court, seeking to enjoin the Texas Department of Criminal Justice (TDCJ) from using allegedly expired pentobarbital in their scheduled executions. The suit was later joined by Harris

County death row inmates Robert Fratta and Arthur Brown. On January 4, 2023, the CCA granted the Relator's motion for leave to file an application for writ of prohibition and ordered the district court judge "to refrain from issuing any order purporting to stay the January and February executions of Harris County death row inmate [Fratta], Dallas County death row inmate [Ruiz], or Potter County death row inmate [Balentine]." Mem. Opinion at 2–3, *In re State of Texas ex rel. Ken Paxton,* No. WR-94,432-01 (Tex. Crim. App. Jan. 4, 2023) ("Mem. Op. Grant Prohibition"). And when the district court judge nevertheless granted a motion for temporary injunction ordering officials to refrain from using expired pentobarbital to execute the four death row inmates until the case reached final judgment following a trial set for March 20, 2023, the CCA granted the Relator's application for writ of mandamus and vacated the temporary injunction order, and again ordered the judge "'to refrain from issuing any order purporting to stay the' executions of the various inmates." *In re State of Texas Ex. Rel. Ken Paxton,* No. 94,432-02 (Jan. 10, 2023).[2]

On January 19, 2023, Balentine filed in the Potter County trial court a motion to withdraw his execution date, alleging errors in the service of the

[2] The CCA also denied, without written order, a last-minute motion for a stay of the impending execution of co-plaintiff Fratta—scheduled for January 10, 2023. In addition, the trial court that issued Fratta's execution order refused a last-minute request to withdraw the execution date following the CCA's mandamus and order vacating the injunction. Finally, the Texas Supreme Court denied a last-minute petition for a writ of mandamus and motion for an injunction to preserve the court's jurisdiction. Robert Fratta was executed on January 10, 2023.

execution warrant. On January 25, 2023, he filed a second motion to withdraw the execution date, asking the court to exercise its inherent authority to withdraw the order setting his date and citing to the still pending litigation in the Travis County district court.[3] On January 31, 2023, the Potter County district court granted the motion to withdraw the warrant based on allegedly defective service and later denied a motion to reconsider that order. Order and Findings on State's Motion for Reconsideration, *Texas v. Balentine*, No. 39,532-D (320th Dist. Ct. Potter County, Feb. 1, 2023); Amended Order Recalling Execution Date and Warrant of Execution, *Texas v. Balentine*, No. 39,532-D (320th Dist. Ct., Potter County, Jan. 31, 2023). On January 7, 2023, the Potter County district court denied Balentine's motion to withdraw the warrant based on the pending litigation in the Travis County district court. Order, *Texas v. Balentine*, No. 39,532-D (320th Dist. Ct., Potter County, Jan. 7, 2023. The Potter County District Attorney's Office sought leave to file a petition for a writ of mandamus in the CCA, which the CCA granted on February 8, 2023, reinstating the warrant of execution. Op., *In re State of Texas ex rel. Randall Sims, Relator*, No. WR-94,538-01 (Tex. Crim. App. Feb. 8, 2023) (unpublished opinion).

[3] The March 20, 2023 trial is still pending, although TDCJ, through its representative from the Law Enforcement Defense Division of the Texas Attorney General's Office, has filed a plea challenging the district court's jurisdiction to hear the case, which remains pending.

Finally, on January 30, 2023, Balentine filed a subsequent habeas application in the CCA—his fourth state habeas application—and a motion for a stay of execution. On February 8, 2023, the CCA dismissed the application without reviewing its merits and denied the motion for a stay of execution. Order, *Ex parte Balentine*, No. WR-54,071-04 (Tex. Crim. App.). Balentine filed a petition for a writ of certiorari the same day. The instant brief in opposition follows.

## REASONS FOR DENYING THE PETITION

The claims for which Balentine seeks review were dismissed by the court below on an adequate and independent state law ground thus depriving this Court of jurisdiction to hear them. Jurisdiction notwithstanding, Balentine fails to provide a single compelling reason to grant a writ of certiorari. *See* Sup. Ct. R. 10. This petition is a poor vehicle for many of his claims—fact-bound questions without evidentiary development or merits analysis in the court below. Indeed, Balentine filed his latest subsequent application on January 30, 2023, shortly before the last possible day before his scheduled execution,[4] despite the fact that his claims rely on the trial record, evidence that existed at the time of his trial, and unreliable juror declarations that could have been

[4] *See* Texas Court of Criminal Appeals Miscellaneous Rule 11-003 https://www.txcourts.gov/media/208124/miscruleexecution.pdf (last visited January 31, 2023).

obtained at any time following his trial or for inclusion in any of his prior habeas applications and, in some instances, were obtained years ago. In at least one instance, the declaration of juror England, Balentine's evidence is facially incredible—indeed, fantastical. And for all his claims, they lack merit. The Court should deny his petition and his motion for a stay of execution.

## I. The Court Below Dismissed Balentine's Claims on an Adequate and Independent State Law Ground Depriving this Court of Jurisdiction.

In the court below, Balentine sought review of two claims: (1) his death sentence was influenced by racial bias; and (2) jurors committed misconduct by failing to disclose information in their juror questionnaires. Despite the CCA's explicit statement that it was not "reviewing the merits of the claims raised,"[5] Balentine argues that it did so sub silentio, meaning the Court can reach them too. But he is wrong, and the CCA's dismissal on a state law ground strips the Court of jurisdiction.

"This Court lacks jurisdiction to entertain a federal claim on review of a state court judgment 'if that judgment rests on a state law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision.'" *Foster v. Chatman*, 136 S. Ct. 1737, 1745 (2016) (quoting *Harris v. Reed*, 489 U.S. 255, 260 (1989)). The state law ground barring federal

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[5] Order 2, *Ex parte Balentine*, 54,071-04 (Tex. Crim. App. Feb. 8, 2023).

review may be "substantive or procedural." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

To be adequate, a state law ground must be "'firmly established and regularly followed.'" *Lee v. Kemna*, 534 U.S. 362, 885 (2002) (quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984)). Discretion does not deprive a state law ground of its adequacy for a "discretionary rule can be 'firmly established' and 'regularly followed' even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others." *Beard v. Kindler*, 558 U.S. 53, 60–61 (2009). Ultimately, situations where a state law ground is found inadequate are but a "small category of cases." *Kemna*, 534 U.S. at 381.

A state law ground is "independent of federal law [when it] do[es] not depend upon a federal constitutional ruling on the merits." *Stewart v. Smith*, 536 U.S. 856, 860 (2002). There is no presumption of federal law consideration. *Coleman*, 501 U.S. at 735. To so find, the state court's decision must "fairly appear to rest primarily on federal law, or to be interwoven with the federal law." *Id.* Where there is no "clear indication that a state court rested its decision on federal law, a federal court's task will not be difficult." *Id.* at 739–40.

Texas, like Congress, has imposed significant restrictions[6] on subsequent habeas applications. *Compare* Tex. Code Crim. Proc. art. 11.071 § 5, *with* 28 U.S.C. § 2244(b). A Texas court may not reach the merits of a claim in a subsequent application "*except* in exceptional circumstances." *Ex parte Kerr*, 64 S.W.3d 414, 418 (Tex. Crim. App. 2002). The applicant bears the burden of providing "sufficient specific facts establishing," Tex. Code Crim. Proc. art. 11.071 § 5(a), one of these "exceptional circumstances," *Ex parte Kerr*, 64 S.W.3d at 418.

First, an applicant can prove either factual or legal unavailability of a claim. Tex. Code Crim. Proc. art. 11.071 § 5(a)(1). This requires proof of unavailability in *all* prior state habeas applications. *See Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007). A claim is legally unavailable when its legal basis "was not recognized or could not have been reasonably formulated from a final decision of the [this Court], a court of appeals of the United States, or a court of appellate jurisdiction of this state," Tex. Code Crim. Proc. art. 11.071 § 5(d), and factually unavailable when its factual basis "was not ascertainable through the exercise of reasonable diligence," Tex. Code Crim. Proc. art. 11.071 § 5(e).

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[6] Texas's codification of these restrictions is sometimes referred to as the abuse-of-the-writ bar or section 5 bar in capital cases. *See, e.g.*, *Rocha v. Thaler*, 626 F.3d 815, 831 (5th Cir. 2010).

Second, an applicant can prove that "but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt." Tex. Code Crim. Proc. art. 11.071 § 5(a)(2). This requires an applicant to "make a threshold, prima facie showing of innocence by a preponderance of the evidence." *Ex parte Reed*, 271 S.W.3d 698, 733 (Tex. Crim. App. 2008) (citation omitted). A "claim" of this sort is also known as a "*Schlup*-type claim," *Ex parte Franklin*, 72 S.W.3d 671, 675 (Tex. Crim. App. 2002), because section 5(a)(2) "was enacted in response to" *Schlup v. Delo*, 513 U.S. 298 (1995). *Ex parte Reed*, 271 S.W.3d at 733.

Third, an applicant can prove that, "by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the [S]tate's favor one or more of the special issues." Tex. Code Crim. Proc. art. 11.071 § 5(a)(3). Section 5(a)(3), "more or less, [codifies] the doctrine found in *Sawyer v. Whitley*, 505 U.S. 333 (1992)." *Ex parte Blue*, 230 S.W.3d 151, 151 (Tex. Crim. App. 2007).

In state court, Balentine accepted the burden of proving an exception to the abuse-of-the-writ bar. *See, e.g.*, Sub. Appl. 14–16, 25. For each of his claims Balentine, Balentine relied on the factual and legal unavailability exceptions. *Id*. As mentioned before, the CCA did not agree, finding that Balentine did not satisfy "the requirements of Article 11.071 § 5," and it dismissed "the application as an abuse of the writ without reviewing the merits of the claims

raised." Order 2, *Ex parte Balentine*, No. WR-54,071-04 (Tex. Crim. App. February 8, 2023).

Before this Court, Balentine does not challenge the adequacy of section 5, and that is with good reason—the Fifth Circuit "has held that, since 1994, the Texas abuse of the writ doctrine has been consistently applied as a procedural bar, and that it is an . . . adequate state ground for the purpose of imposing a [federal] procedural bar." *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008); *cf. Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1149–50 (2017) (noting that this Court generally defers to a court of appeals's interpretation of their respective states' laws); *De Buono v. NYSA-ILA Medical & Clinical Servs. Fund*, 520 U.S. 806, 810 n.5 (1997) (noting "settled practice of according respect to the courts of appeals' greater familiarity with issues of state law"). The only question then is whether section 5 is independent of federal law. It is, and the state court's dismissal of Balentine's claims deprives this Court of jurisdiction.

Balentine's latest subsequent state habeas was subject to dismissal on an adequate and independent state law ground—availability. Tex. Code Crim. Proc. art. 11.071 § 5(a)(1). He argued his claims were previously unavailable by relying on, *inter alia*, two of this Court's opinions from 2017,[7] an exhibit

[7] *Peña-Rodriguez v. Colorado*, 580 U.S. 206 (2017); *Buck v. Davis*, 580 U.S. 100 (2017).

that was admitted at his trial, trial testimony, declarations of jurors that were obtained in 2021, his trial counsel's notes, and juror questionnaires. Sub. Appl. 14–16, 25. He argued his claim was legally unavailable until this Court held in *Buck* that testimony connecting race with future dangerousness is impermissible and held in *Peña-Rodriguez* that the "no-impeachment rule" gives way to permit consideration of juror statements that he or she relied on racial stereotypes or animus to convict a defendant. *Id*. But he fails to show prior unavailability of either the legal or factual basis of his claims.

First, his claim that his death sentence was influenced by racial bias was available at the time he filed any of his previous habeas applications, regardless of when *Peña-Rodriguez* and *Buck* were issued. His reliance on *Buck* to supply a new legal basis for his juror-bias claim is wholly misplaced. *Buck* involved an ineffective-assistance-of-counsel claim premised on defense counsel's presentation of expert testimony at the punishment phase of Buck's capital trial that, due to his race, Buck was statistically more likely to act violently in the future. 580 U.S. at 104. Here, Balentine does not contend, or even suggest, that his own trial counsel injected damaging racial stereotypes and prejudices into his trial.

Moreover, although Balentine relies on *Buck* for the proposition that "discrimination is 'especially pernicious in the administration of justice,'" he omits the fact that *Buck* explicitly attributed this quote to a 1979 opinion of

this Court. *See id.* at 124 (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)). Additionally, *Buck*'s acknowledgment that connecting a defendant's race to his propensity for violence is "a particularly noxious strain of prejudice" did not signal the creation of a new rule of constitutional law, as *Buck* specifically cites to a 1986 decision of this Court in its discussion of this point. *See id.* at 121 (citing *Turner v. Murray*, 476 U.S. 28, 35 (1986) (plurality op.) (noting that "[t]he risk of racial prejudice infecting a capital sentencing proceeding is especially serious" and holding that the trial judge failed to adequately protect Turner's right to an impartial jury by refusing to question prospective jurors on racial prejudice)). Because *Buck* announced no new law relevant to Balentine's claim, he may not rely on it to meet the new-legal-basis exception to the subsequent-writ bar.

Balentine's reliance on *Peña-Rodriguez* is similarly unavailing. In that case, this Court noted "the Constitution's guarantee against state-sponsored racial discrimination in the jury system" is one that the Court had enforced "[t]ime and again," in decisions dating back to 1880. 580 U.S. at 222. The Court specifically recognized its previous efforts "to ensure that individuals who sit on juries are free of racial bias." *Id.* at 223 (citing *Ham v. South Carolina*, 409 U.S. 524, 526–27 (1973); *Rosales-Lopez v. United States*, 451 U.S. 182, 189–90 (1981) (plurality op.); *Turner*, 476 U.S. at 35). The Court also observed that even under common law, it had "noted the possibility of an exception to the

[no-impeachment] rule in the 'gravest and most important cases.'" *Id.* at 219 (citing *United States v. Reid*, 53 U.S. 361, 366 (1851); *McDonald v. Pless*, 238 U.S. 264, 269 (1915)). Further, the Court noted several federal courts—governed by the comparable Federal Rule of Evidence 606(b)—had previously either held or suggested that a constitutional exception exists for evidence of racial bias. *Id.* at 218–19 (citing *United States v. Villar*, 586 F.3d 76, 87–88 (1st Cir. 2009); *United States v. Henley*, 238 F.3d 1111, 1119–21 (9th Cir. 2001); *Shillcut v. Gagnon*, 827 F.2d 1155, 1158–60 (7th Cir. 1987)).

Thus, Balentine could have reasonably formulated his juror-bias claim from existing law. *See* Tex. Code Crim. Proc. Ann. art. 11.071, § 5(d). A criminal defendant's right to be tried by a jury free from racial bias is simply not new law. That this Court did not formally recognize an exception to the no-impeachment rule until *Peña-Rodriguez* does not excuse Balentine's failure to timely advance the claim. The unlikelihood that his claim would have succeeded does not excuse his failure to raise it. *See Ex parte Barbee*, 616 S.W.3d 836, 839 (Tex. Crim. App. 2021). Importantly, none of the juror declarations aver that any juror's verdict was animated by racial stereotypes or animus, so his reliance on *Peña-Rodriguez* as a new legal basis is simply erroneous.

And even if *Buck* or *Peña-Rodriguez* announced a new rule of constitutional law, this Court has never held that either should be retroactively

applied. Habeas is generally not an appropriate avenue for the recognition of new constitutional rules. *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality opinion). Thus, for the most part, new constitutional rules do not apply to convictions final before the new rule was announced. *Id.*[8] The CCA "follows *Teague* as a general matter of state habeas practice." *Ex parte De Los Reyes*, 392 S.W.3d 675, 679 (Tex. Crim. App. 2013); *Ex parte Lave,* 257 S.W.3d 235, 237 (Tex. Crim. App. 2008) (applied *Teague* to Art. 11.071).

Finally, regardless of their admissibility, Balentine fails to show that he could not have advanced the factual basis for his first claim in any of his previous writ applications. Indeed, many of the exhibits he presented to the state court existed *at the time of his trial*—a trial exhibit, trial testimony of one witness, a handwritten note by his trial counsel, and juror questionnaires that were completed prior to Balentine's trial.[9] He also relied on a declaration by an investigator who spoke to an individual who was not a juror and whose declaration presumably would not have been inadmissible under Texas's no-

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[8] Balentine's conviction was final with the CCA's affirmance of his conviction and sentence in 2002. *Balentine v. State*, 71 S.W.3d at 774.

[9] Balentine also made an oblique reference to a possible *Batson* claim, Sub. Appl. 10, but did not advance such a claim, presumably because he raised a *Batson* claim in a previous habeas application, *see Ex parte Balentine*, 2009 WL 3042425, at *1. Balentine also made the spurious contention that jurors saw him in shackles before his trial and the shackles would have evoked racial imagery. Sub. Appl. 11. Such an argument was plainly an effort to avoid the fact that claims alleging improper shackling had been recognized long before Balentine's previous habeas proceedings. *See Illinois v. Allen*, 397 U.S. 337, 344 (1970).

impeachment rule. Tex. R. Evid. 606(b). Moreover, jurors England, Smith, and Sisson stated that they were contacted by investigators after Balentine's trial.[10] Pet'r's App., Ex. 4, 7, 8. Balentine points to nothing that prevented him from contacting jurors and obtaining the information in their declarations earlier.

Second, his claim that jurors England and Fulton committed misconduct by not disclosing pertinent information in their questionnaires is wholly unrelated to either *Peña-Rodriguez* or *Buck* because it does not rest on an allegation that those jurors were influenced by racial animus. Consequently, neither of those opinions could constitute a new legal basis for this claim. Balentine cited to no other newly available legal basis for this claim. And as to factual availability, Balentine makes no showing the facts underlying the claim could not have been discovered during his earlier habeas proceedings. Indeed, as noted above, Balentine relied on juror questionnaires that were completed prior to his trial, and three of the declarations Balentine relied upon indicated the jurors were contacted by investigators after Balentine's trial. Pet'r's App. at 4, 6, 7, 8.

[10] During the federal district court's evidentiary hearing, a stipulation was entered stating that Balentine's initial state habeas counsel's investigator was asked to conduct juror interviews and speak to trial counsel and that he did those things. ROA.6941.

Balentine suggests it is unclear whether the CCA reached the merits of his claims. His argument ignores the CCA's express statement that the court dismissed his application "without reviewing the merits of the claims raised." Order 2, *Ex parte Balentine*, No. 54,071-04. Ultimately, the abuse-of-the-writ bar—a state-law ground clearly and unambiguously applied by the CCA—prohibits this Court from exercising jurisdiction over any of the claims for which Balentine now seeks review. *See Kunkle v. Texas*, 125 S. Ct. 2898, 2898 (2004) (Stevens, J., concurring) ("I am now satisfied that the Texas court's determination was independently based on a determination of state law, *see* Tex. Code Crim. Proc. art. 11.071 § 5 [ ], and therefore that we cannot grant petitioner his requested relief."). Balentine suggests this Court should hold this case until it decides *Cruz v. Arizona*, No. 21-846. He provides no reason why this Court's decision in *Cruz*, which specifically addresses an entirely different statute than Texas's article 11.071 §5, is relevant. To that point, this Court in *Cruz* will address whether Arizona's Rule of Criminal Procedure 32.1(g), which provides relief from judgment if there has been a significant change in the law that, if applied to a defendant's case, would probably overturn the conviction or sentence. Ariz. R. Crim. P. 32.1(g). Texas's abuse-of-the-writ availability provision has no similar merits-based assessment. Tex. Code Crim. Proc. art. 11.071 § 5(a)(1). Balentine's reliance on *Cruz* fails for that reason alone.

Because Balentine failed to establish the factual or legal unavailability of either his juror-bias or juror-misconduct claims, the claims were procedurally barred under Section 5(a), and the CCA appropriately dismissed Balentine's application as an abuse of the writ. *See* Tex. Code Crim. Proc. Ann. art. 11.071, § 5(c). This dismissal was based on clearly established state law grounds and, consequently, there is no jurisdictional basis for granting certiorari review in this case. *See Coleman,* 501 U.S. at 729; *Harris,* 489 U.S. at 265. Balentine fails to present any justification for not applying the Court's long-standing rule against reviewing claims denied by state courts on state law grounds, and none exists. There is simply no jurisdictional basis for granting certiorari review in this case.

## II. Balentine Provides No Compelling Reason for Further Review and His Claim Lack Merit in Any Event.

The Court requires those seeking a writ of certiorari to provide "[a] direct and concise argument *amplifying* the reasons relied on for allowance of the writ." Sup. Ct. R. 14.1(h) (emphasis added). The Court would be hard pressed to discover any such reason in Balentine's petition, let alone amplification thereof. Indeed, Balentine makes no allegations of circuit or state-court-of-last-resort conflict. *See* Sup. Ct. R. 10(a)–(b). Left with no true ground for review in his briefing, the only reasonable conclusion is that Balentine seeks mere error correction. But that is hardly a good reason to expend the Court's limited

resources. *See* Sup. Ct. R. 10 ("A petition . . . is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). And such a request is especially problematic here because the court below did not reach the merits of Balentine's claims and the Court is one "of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Even worse yet, Balentine's claims are heavily fact dependent, and because there was no evidentiary development in the lower court, this court would have "to review evidence and discuss specific facts" for him to garner relief, something the Court "do[es] not" do. *United States v. Johnston*, 268 U.S. 220, 227 (1925). Ultimately, this case presents an exceptionally poor vehicle for reaching the merits of Balentine's claims and his petition should be denied on this basis alone.

### A. Balentine's juror-bias claim lacks merit.

Balentine first claims his death sentence was impermissibly influenced by racial bias in violation of *Peña-Rodriguez* and *Buck*. The claim fails because neither *Peña-Rodriguez* nor *Buck* provides a basis for relief and Balentine presents no credible evidence that the jury relied on racial animus or stereotypes in reaching its verdicts. Notably, this Court in *Peña-Rodriguez* declined to provide "the appropriate standard for determining when evidence of racial bias is sufficient to require that the verdict be set aside and a new trial be granted." 580 U.S. at 228. Nonetheless, Balentine's claim is plainly

meritless because he fails to demonstrate that his jury's sentencing decision was tainted by racial animus or bias. His claim thus fails on the merits.

The facts in *Peña-Rodriguez* are clearly distinguishable from this case. In *Peña-Rodriguez*, the facts showed that immediately after the defendant's trial, two jurors advised defense counsel they had personally observed another juror make multiple race-based and derogatory comments about the Hispanic defendant and his Hispanic alibi witness. *Id.* at 212. The two jurors provided sworn affidavits detailing the comments made by Juror H.C.:

> According to the two jurors, H.C. told the other jurors that he "believed the defendant was guilty because, in [H.C.'s] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." The jurors reported that H.C. stated his belief that Mexican men are physically controlling of women because of their sense of entitlement, and further stated, "'I think he did it because he's Mexican and Mexican men take whatever they want.'" According to the jurors, H.C. further explained that, in his experience, "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls." Finally, the jurors recounted that H.C. said that he did not find petitioner's alibi witness credible because, among other things, the witness was "'an illegal.'"

*Id.* at 212–13 (citations omitted).

The Supreme Court observed that H.C's statements were, on their face, "egregious and unmistakable in their reliance on racial bias. Not only did H.C. deploy a dangerous racial stereotype to conclude [Peña-Rodriguez] was guilty and his alibi witness should not be believed, but he also encouraged other

jurors to join him in convicting on that basis." *Id.* at 226. The Court concluded that when a showing is made "that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict," the no-impeachment rule must yield to allow a court to consider such statements and any resulting denial of the Sixth Amendment's jury-trial guarantee. *Id.* at 225. The Court cautioned, however, that "[n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry." *Id.* To qualify for the exception, the statement "must tend to show that racial animus was a significant motivating factor in the juror's vote to convict." *Id.* at 225–26.

In stark contrast to the juror statements at issue in *Peña-Rodriguez*, none of the juror declarations in this case identify any statements made by the declarants or any other member of Balentine's jury during deliberations that exhibited overt racial bias, unlike the immediate reports by jurors in *Peña-Rodriguez*. *Id.* at 212. The declarations in this case were provided decades after trial. Juror Smith stated in her declaration—which Balentine obtained almost two years ago—that "[t]here was talk about the racial aspects of this case," but those aspects were part of the defense. *See Balentine v. Lumpkin*, 2021 WL 3376528, at *1 n.1; *Balentine v. Davis*, 2017 WL 9470540, at *14 (discussing the defense's planned punishment strategy of focusing on the threats that had

been made against Balentine); *Balentine v. Quarterman*, 2008 WL 862992, at *19 ("[T]he defense attempted to show the acts of violence directed toward victim Mark Caylor were in response to threats made against [Balentine]."); Pet'r's App., Ex. 1; Pet'r's App., Ex. 2 at 134–44, 161–62. Balentine provides nothing that shows racial animus or stereotypes were the basis for the jury's verdicts.

Balentine relies heavily on the declaration of juror England, who Balentine alleges was a racist who stated he would "hunt" Balentine if he was released from prison and bragged about being in control of deliberations.[11] Pet. Cert. at 20. But even a cursory review of the declaration reveals it is worthy of no credit. England's declaration puts forth several fantastical assertions: while he was in the Marines, he worked "in a number of countries" in purportedly secretive operations for the C.I.A.;[12] he was the lone survivor of a mission to Honduras to destroy cocaine operations where his throat was sliced by a machete and he dragged himself along the ground using a knife until he lost consciousness, later waking up in a hospital in Maryland; he took part in

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[11] England's declaration was purportedly obtained very shortly before his death.

[12] England's juror questionnaire appears to indicate that he served in the Marines from 1972 to 1975. Pet'r's App. 6. He stated on his questionnaire that, while in the Marines, he had taken the life of an individual who "was in a secured area and charged in a threatening manner." Pet'r's App. 6. He also stated on his questionnaire he had applied for or worked for the Secret Service, "presidential security." During voir dire he stated he was "detached from the Marine Corps to the CIA" and traveled with President Nixon for two and a half years. 12 RR 118–19.

"several other disruptions of governments," including an operation in Sudan where he witnessed boys' bodies hanging from spears, and he "did what needed to be done"; and he thwarted three assassination attempts against Henry Kissinger, killing each of the would-be assassins. Pet'r's App. 4. These far-fetched assertions call all of England's assertions in his declaration into serious doubt, to say the least.[13] Balentine's reliance on such a declaration, after having obtained it almost two years ago and presenting it for the first time shortly before his scheduled execution when the declaration cannot be subjected to adversarial testing, should not be condoned.

Balentine also relies on the declaration of an investigator who interviewed an acquaintance of England's. At the outset, such hearsay is of obviously limited value. Nonetheless, this acquaintance stated she was England's caretaker when he was young, later marrying England's brother. Pet'r's App. 5. She stated that England used racial epithets when he was a child and once fought a Black child at school. She also didn't "think" England approved of interracial marriages when he was an adult. Pet'r's App. 5.

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[13] Notably, the other jurors' declarations do not corroborate England's self-aggrandizing statements. Juror Smith stated only that the jury foreman "was a really strong personality," and that "a few people" were holdouts (although she contradictorily stated a "couple" of those people "may have felt like they couldn't express that they didn't want to sentence John to death"). Pet'r's App. 7. Juror Sisson stated there were three or four holdouts "who wanted to vote for life or weren't sure," but he did not state England intimidated them into voting for a death sentence. Pet'r's App. 8.

Critically, this acquaintance of England's stated she knew nothing about Balentine's trial and was even unaware England served as the jury foreman. Pet'r's App. 5. Such evidence does nothing to show England—or anyone else on the jury—uttered "egregious and unmistakable" comments evincing racial bias or relied on racial animus or stereotypes in reaching their verdicts. *Peña-Rodriguez*, 580 U.S. at 226.

For the same reasons, Balentine fails to show the jurors' declarations are admissible. As discussed above, this Court has held the "no-impeachment" rule gives way where a juror indicates he or she relied on racial stereotypes or animus in rendering a verdict. *Id.* at 225. Again, none of the juror declarations do so in this case. Therefore, the declarations remain inadmissible.

Balentine also relied on juror declarations stating they saw him in shackles prior to trial. Balentine makes the spurious assertion that the shackles evoked racial imagery for the jury and, by extension, his death sentence must have been based on racial animus. Pet. Cert. at 13. The argument should be rejected outright. As noted above, courts have long disapproved of unjustified visible shackling of defendants at the penalty phase of trial. This is because shackling suggests the defendant is dangerous. *See Deck*, 544 U.S. 630–33. Balentine's attempt to bootstrap that longstanding rule to *Buck* is baseless, and it fails to show his death sentence was predicated on his race.

Balentine also alleged the jury's verdict was influenced by racial bias as evidenced by a note purportedly written by trial counsel and a comment counsel made regarding Balentine—neither of which were in front of the jury. Pet. Cert. at 12. The note states "Can you spell justifiable lynching?" Pet'r's App. 9. Balentine provides no context or explanation regarding the note, despite presumably having obtained it prior to the federal district court's evidentiary hearing in 2016. He also referenced testimony given at the evidentiary hearing that Balentine's trial counsel called him a "dumb son-of-a-bitch" following Balentine's rejection of a life offer counsel had obtained. *See Balentine v. Lumpkin*, 2021 WL 3376528, at *6 (discussing trial counsels' strategy to make "the case as difficult as possible for the State so as to secure an offer for a life sentence"). No racial connotation even exists in the comment. Most importantly, Balentine does not allege that trial counsel injected race into the trial. He simply fails to show that the jury relied on racial animus or stereotypes in reaching its verdicts.

The facts alleged by Balentine fall far short of meeting *Peña-Rodriguez*'s racial-bias exception to the no-impeachment rule, and he presents no evidence racial animus played a role in the jury's deliberations. For this reason, Balentine has failed to demonstrate a compelling reason to grant certiorari review, and this Court should dismiss his petition. In the end, Balentine asks this Court to intervene despite the absence of jurisdiction and based on

evidence that has long been available to him and that he sat on for years, evidence that does not show his jury relied on racial animus or stereotypes in reaching its verdicts, and, in some instances, is facially incredible—indeed, fantastical. His petition should be denied.

### B. Balentine's juror-misconduct claim has no merit.

Balentine next claimed in the court below that jurors England and Fulton withheld information on their juror questionnaire. In addition to being defaulted because the factual basis of the claim was available at the time of Balentine's trial, the claim is meritless.

Balentine's claim fails at the outset because (1) he again relies on the fantastical declaration of juror England, and (2) juror Fulton disclosed on his juror questionnaire that he had been charged with a computer crime along with his family members. As discussed above, England's declaration is facially incredible and deserving of no credit. For instance, Balentine's claim that England failed to disclose that the thwarted three assassination attempts against Henry Kissinger—killing each of the would-be assassins—and had his throat sliced during a covert operation in Honduras during which he was the lone survivor, strains credulity to the breaking point. Pet'r's App. 4. All of England's assertions in the declaration are hardly reliable in the face of those

statements.[14] As for juror Fulton, he disclosed in his juror questionnaire that he had been charged with computer theft in Kansas, and he disclosed his recent conviction for driving while intoxicated. Balentine fails entirely to show that either England or Fulton failed to answer a material question honestly such that a correct answer would have provided a basis for a challenge for cause.[15] *See McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984).

## III. Balentine Is Not Entitled to a Stay Because His Claims Are Meritless and His Delay in Bringing These Claims Disentitles Him to Such Relief.

When a stay of execution is requested, a court must consider:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

*Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). Balentine is plainly not entitled to a stay.

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[14] Balentine asserts that some jurors discussed religion during their deliberations and that such discussions amounted to improper external influences on the jury, but he does not assert jurors had or read from a Bible during deliberations. Pet. Cert. at 27. Consequently, to the extent Balentine raised this as an independent claim, it is meritless. *See Oliver v. Quarterman*, 541 F.3d 329, 339–40 (5th Cir. 2008) ("The question before us is not whether a juror must leave his or her moral values at the door or even whether a juror may consult the Bible for his or her own personal inspiration during the deliberation process.").

[15] For instance, Balentine fails to show Fulton's charge for a computer crime in Kansas—which he stated was dismissed—would have qualified as a valid basis for a challenge for cause under Texas Code of Criminal Procedure article 35.16.

First, as discussed above, Balentine's claims are jurisdictionally barred and plainly meritless.[16] He cannot make a strong showing that he is likely to succeed on the merits of his claims. Second, a stay would substantially injure the State and the victims' in light of their important interest in the enforcement of Balentine's sentence given the significant litigation and re-litigation over more than twenty years since his conviction. *See Hill v. McDonough*, 547 U.S. 573, 584 (2006). Lastly, Balentine filed his latest subsequent state habeas application nearly on the last day he could do so under the state court's rules. *See* Texas Court of Criminal Appeals Miscellaneous Rule 11-003. This, despite the fact that his claims rely almost entirely on the trial record and evidence that existed at the time of trial and on declarations he obtained almost two years ago. Even the purportedly new legal bases for Balentine's claims—*Peña-Rodriguez* and *Buck*—are almost five years old. Balentine's plainly dilatory litigation strategy requires a "strong equitable presumption" against a stay of execution. *Hill*, 547 U.S. at 584. He provides no reason for the delay in his bringing these claims. Consequently, the Court should deny Balentine's request for a stay of execution.

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[16] For the same reason, Balentine cannot show he would suffer irreparable harm if denied a stay of execution. *See Walker v. Epps*, 287 F. App'x 371, 375 (5th Cir. 2008) ("[T]he merits of his case are essential to our determination of whether he will suffer irreparable harm if a stay does not issue.").

## CONCLUSION

Balentine fails to show that this Court possesses jurisdiction over the matters for which he seeks review or that there are otherwise compelling grounds to issue a writ of certiorari. He also fails to justify a stay of execution considering the lack of merit to his last-minute filing. Consequently, Balentine's petition and request for a stay of execution should be denied.

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