No. 22-6662

IN THE

Supreme Court of the United States

WESLEY LYNN RUIZ,
Petitioner,

v.

STATE OF TEXAS
Respondent.

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

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

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This is a capital case.

QUESTION PRESENTED

Does this Court have jurisdiction to review the dismissal of Petitioner Wesley Lynn Ruiz's third subsequently filed state habeas application as an abuse of the writ where it was filed eight days before his scheduled execution date, it relied upon a previously available factual and legal basis, and the lower court dismissed it on an adequate and independent state procedural ground without considering the merits of the underlying claim?

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BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

Ruiz **is scheduled to be executed after 6:00 p.m. on February 1, 2023.** He was convicted and sentenced to death for the 2007 capital murder of Dallas Police Officer, Corporal Mark Nix. Ruiz unsuccessfully appealed his conviction and sentence in state and federal court. On January 24, 2023, eight days before his scheduled execution date, Ruiz filed a subsequent habeas corpus application in the state court—his fourth state habeas application—alleging that two members of his jury harbored anti-Hispanic bias toward him, rendering his death sentence impermissibly tainted by racial bias, in violation of *Peña-Rodriguez v. Colorado*, 580 U.S. 206 (2017), and *Buck v. Davis*, 580 U.S. 100 (2017). The Texas Court of Criminal Appeals (CCA) dismissed his subsequent application pursuant to Texas Code of Criminal Procedure Article 11.071 § 5 "as an abuse of the writ without reviewing the merits of the claim raised." *Ex parte Ruiz,* No. WR-78,129-04, Order (Tex. Crim. App. Jan. 30, 2023) (per curium). Ruiz now seeks certiorari review of the CCA's dismissal order. However, Ruiz is unable to present any special or important reason for certiorari review and he fails to demonstrate a violation of any federal constitutional right. Certiorari review should therefore be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

The CCA accurately summarized the evidence from the guilt-innocence phase of trial as follows:

> On March 21, 2007, the homicide division of the Dallas Police Department issued a bulletin to its officers to be on the lookout for a 1996 four-door Chevy Caprice with dark tinted windows and chrome wheels, red and gray in color, that was suspected to have some involvement in a capital murder. Two days later, on March 23rd, two plainclothes officers in an unmarked police vehicle spotted a car matching this description on Stemmons Freeway.[1] They summoned marked patrol cars to stop the suspect vehicle and followed it as it exited the freeway at Mockingbird Lane and drove into West Dallas. Corporal Mark Nix arrived, positioning his patrol car directly behind the Caprice and activating his overhead lights and video camera. The Caprice momentarily braked as if to pull over, but then suddenly raced off at high speed down the winding road, followed by Nix and at least one other patrol car in hot pursuit. The ensuing events were recorded by Nix's video camera and that of the patrol car directly behind him, both of which recordings are in evidence.
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> Apparently taking a curve too fast, the Caprice hit the left-hand curb and spun out of control. It barreled backwards down a slight incline on the right side of the street and came to rest facing the roadway, its back-end apparently blocked by a fence. Nix followed the Caprice down the incline and pulled to a stop, directly hood to hood. The patrol car behind Nix also pulled off the road and came to a halt on the passenger side of the Caprice, a short way off but close enough to effectively hem it in. Corporal Nix jumped out of his patrol car and rushed to the front passenger side of the Caprice. There he began to swing his baton with his left

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1 Although it matched the description of the car sought in the March 21st bulletin, this particular Chevy Caprice did not turn out to be the one sought in the capital-murder investigation. [footnote in original but under different number].

> hand, smashing it against the tinted front passenger window.[2] He paused momentarily to place his pistol on the ground so that he could use both hands to wield the baton and continued striking the window, punching a small hole through it. A second later, a single gun shot shattered the rear passenger window, the bullet striking Nix's badge and splintering. A fragment entered Nix's chest at the level of his clavicle, severing his left common carotid artery. The other officers responded with a hail of gunfire, then dragged Nix to cover and summoned the SWAT team. [Ruiz] was eventually pulled from behind the wheel of the Caprice, wounded and unconscious, the pistol with which Nix had been shot found in his lap. Nobody else was in the car. Nix was pronounced dead at the hospital, but [Ruiz] was able to survive his multiple wounds.

Ruiz v. State, No. AP-75,968, 2011 WL 1168414, at *1 (Tex. Crim. App. March 2, 2011).

II. Evidence Relating to Punishment

A. State's evidence

While in high school in the 1990s, Ruiz was a member of the Midnight Dreamers, a violent criminal street gang. 51 RR 49-53, 74-75, 88-91, 99-100, 117; 52 RR 75. The Midnight Dreamers had a bad reputation in the Irving community, and engaged in assaults, aggravated assaults, drive-by shootings, drug activities, and murders. 51 RR 74-75. Ruiz was likely a member of two other criminal gangs—the Westside Ledbetter 12 and Tango Blast. 52 RR 23-23, 42-45, 49, 91-93, 96; State's Exhibit (SX) 132, 139, 146, 147. Westside Ledbetter 12 and the Midnight Dreamers were ally gangs engaging in drugs

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[2] All of the windows were so darkly tinted that the officers could barely make out a "silhouette" behind the wheel of the Caprice. [footnote in original]

and other criminal activities. 52 RR 43. Tango Blast originated inside the prison system. 52 RR 77, 88-89, 94-96, 99-100.

In June 1996, a sixteen-year-old Ruiz was convicted as a juvenile for theft. SX 117; 51 RR 17. In January 1997, Ruiz committed burglary of a vehicle, a misdemeanor offense, and was placed on deferred adjudication. SX 118; 51 RR 17-18. On March 8, 1997, Ruiz participated in the shooting of the home of rival gang member, Joe Ramos, after a member of Ramos's gang "shot up" the house of Midnight Dreamers member, Raul Toledo. 51 RR 92-97. Ruiz, Toledo, and four others opened fire on Ramos's house, occupied by Ramos, his girlfriend, parents, and two young nephews. 51 RR 92-97, 107-08, 121. The bullets came through the walls, but no one inside was hit. 51 RR 108, 120-22. Ruiz and Toledo were arrested for deadly conduct. 51 RR 95, 103-04.

In August 1997, Ruiz committed burglary of a vehicle. SX 120. He escaped custody but was ultimately convicted of burglary of a vehicle and misdemeanor escape. SX 120, 121; 51 RR 18. In September 1997, Ruiz was convicted of misdemeanor theft, SX 119, and was adjudicated guilty of the January 1997 offense of burglary of a vehicle. The court revoked his probation and sentenced him to 100 days' confinement. SX 118.

The State presented no offenses, arrests, or convictions between 1997 and 2003, but on November 25, 2004, Ruiz was involved in a high-speed chase with the police while driving his vehicle with his then-girlfriend. 52 RR 8-12.

The chase ended when Ruiz's car hit a light pole at an intersection, "T-boned" another vehicle at the intersection, spun around, and came to a stop. 52 RR 10-11. Ruiz tried to run from the police but was eventually taken into custody. 52 RR 11-12. The police found a .25-caliber gun containing seven rounds in the glove compartment of Ruiz's car, with one round chambered and ready to fire. 52 RR 14-15. The arresting officer believed Ruiz was under the influence of drugs or alcohol. 52 RR 12. Ruiz was convicted of the felony offenses of evading arrest/detention and unlawful carrying of a handgun. SX 123, 124; 51 RR 18-19. Pursuant to a plea agreement, he received a reduced misdemeanor sentence in each cause. SX 123, 124.

On April 3, 2005, Ruiz was arrested in Tarrant County for possession of methamphetamine and was subsequently placed on ten years' deferred adjudication probation for possession with intent to deliver. SX 125; 51 RR 19. On April 12, 2005, gang-unit officers arrested Ruiz at an apartment complex after receiving information of possible drug activity; drugs and guns were seized during this arrest. 52 RR 22-26, 31. Ruiz was convicted the following November of possession of methamphetamine but received a reduced misdemeanor sentence. SX 126; 51 RR 19-20.

Ruiz's friend, Hector Martinez, testified that in the period between Ruiz's release from jail in 2006 and Officer Nix's murder, Ruiz bragged about stealing from people, and told Martinez that he "got into some trouble" with

some guys at a club, and shot at them in the parking lot after they blocked him in. 52 RR 77-79.

On May 23, 2006, Ruiz was convicted in Dallas County of possession with intent to deliver methamphetamine. SX 127; 47 RR 44; 51 RR 20. Ruiz was arrested under an alias. 51 RR 29-30. Ruiz was given a ten-year suspended sentence with eight-years-probation, SX 127; 47 RR 44; but was still on probation in Tarrant County at that time, 52 RR 57. Less than six months into the Dallas County probation, Ruiz failed to report as required. 47 RR 45. By March 20, 2007—three days before the shooting of Officer Nix—Ruiz was in violation of his probation. 47 RR 27; 52 RR 60.

On March 14, 2007—nine days before Officer Nix's murder—Hector Martinez discovered Ruiz's father's car in the alley behind his house. Ruiz told Martinez that he had fled from the police. 52 RR 89.

Ruiz's girlfriend testified that while they were together, Ruiz would say "he wasn't going to go down without a fight," and that he would not make it easy. 42 RR 55-56. Also, that he was going to "go out like a G," meaning "gangster." 42 RR 156, 162-64. Hector Martinez testified that Ruiz told him that the only way he was ever going back to jail was "in a box." 52 RR 79-80.

The State also presented evidence from A. P. Merillat, criminal investigator for the Special Prosecution Unit (SPU) in Huntsville. 51 RR 149. Merillat testified regarding the prison classification system in the Texas

Department of Corrections (TDCJ), and the potential opportunities for violence within TDCJ. 51 RR 159-98.

As a rebuttal witness, the State called Kenneth Crawford, forensic document examiner for the Texas Department of Public Safety Crime Laboratory in Austin. 54 RR 47. Crawford read to the jury the content of several letters sent by Ruiz, in which he tried to obliterate threatening statements written in those letters, directed towards other inmates and guards. 54 RR 67-69; SX 198.

B. Defendant's evidence

Ruiz called Larry Fitzgerald, retired TDCJ public information officer. 53 RR 16. Fitzgerald related that death row inmates used to work in a garment factory within TDCJ, but the program ceased when death row was moved to the Polunsky Unit in Livingston, Texas. 53 RR 20-21. Anyone on death row now is in administrative segregation. 53 RR 22. Also, capital inmates who received a life sentence rather than a death sentence are no longer eligible for parole. 53 RR 23. Fitzgerald testified that life-without-parole (LWOP) offenders receive incentives to comply with rules—longer visitation, more money for commissary, more recreation time, and better work assignments. 53 RR 24-25. Fitzgerald felt safe among the inmates, and neither he nor anyone from the tours he took through TDCJ was ever assaulted. 53 RR 24-25.

Fitzgerald described the intake process when a defendant is sentenced

to TDCJ. 53 RR 26-27. Fitzgerald reviewed Merillat's testimony but had no serious disagreement with it. 53 RR 27, 43. All capital murders who receive LWOP sentences will be presumed to be a G-3 when they begin the classification procedure but could receive a higher classification depending on record, past behavior, and possible gang associations. 53 RR 27-29, 31. Fitzgerald stated that, at the time of his testimony, TDCJ had recorded 439 serious offender assaults for the year; one homicide that year, and one escape; 24 disciplinary convictions for serious staff assaults, and 2,109 disciplinary convictions for nonserious staff assaults; and 5,817 disciplinary convictions for offender assaults. 53 RR 32-35.

Ruiz's grandfather, Richard Ziegenhain, testified that Ruiz's mother and father divorced when Ruiz was a teenager. Ruiz and his brothers alternated their time between their father's home and Richard's home; their mother had a drug and alcohol problem, which led to the divorce, and she became a "street person," losing contact with her sons for a while. 53 RR 79-81. Richard said Ruiz was a hard worker when he was a teenager; when he graduated high school he became a truck driver. 53 RR 81-83. He eventually quit so that he could be closer to his wife and children; Ruiz was a good father. 53 RR 84-85. Richard testified Ruiz and his wife had a tumultuous relationship and she was physically aggressive towards Ruiz, but Ruiz always tried to keep things from escalating. 53 RR 85-86.

Ruiz's grandmother, Sue Ziegenhain called him an intent worker, who as a teenager often mowed their lawn and cleaned up their house. 53 RR 95-97. He was a very proud and patient father. 53 RR 97-98. Sue testified that Ruiz and his wife had a difficult marriage, but his wife was the aggressor while Ruiz was non-confrontational. 53 RR 98-100. She described Ruiz as "fun-loving, great sense of humor, almost passive," and asked the jury to be merciful. 53 RR 100-01.

Ruiz's mother, Barbara Ruiz, testified that she and Ruiz's father did drugs together during their marriage, including methamphetamine and marijuana, and Barbara's drug-usage escalated. 53 RR 119-21. Her drug-usage led to her divorce in 1992; Ruiz's father took the children with him. 53 RR 122. Barbara testified that, when Ruiz was seventeen and his brother was eighteen or nineteen, their father left them living alone in a trailer, without adult supervision. 53 RR 130. Barbara began abusing alcohol because she could not afford methamphetamine. 53 RR 122-23. Barbara alternated between living on the streets and living with her parents. 53 RR 123-24. In 1995, Barbara was diagnosed with syphilis, herpes, and was HIV positive. 53 RR 124-25. At that time, Barbara entered a treatment program for her alcoholism. 53 RR 125-26. When Barbara celebrated one year of sobriety, Ruiz gave a speech thanking the treatment facility for giving him his mom back. 53 RR 127-28. Barbara said Ruiz was remorseful about the murder. 53 RR 134.

Psychologist Dr. Gilda Kessner testified that the first five years of Ruiz's life were somewhat normal, but his mother was impaired by substance abuse and his parents' marriage was on the decline. 53 RR 151-54. His mother began using methamphetamine when Ruiz was around five. She also began drinking, and his father began selling drugs. 53 RR 155-56. Ruiz and his brothers observed this drug activity and saw their parents impaired. 53 RR 156-57. As Ruiz got older, his grades declined; he was retained in the sixth and seventh grade. 53 RR 157-58. When Ruiz was thirteen, his parents separated; the boys lived between their father and their grandparents' house while their mother lived on the streets. 53 RR 158-59. Ruiz and his brothers had limited supervision while living with his father; Ruiz had his first child a month before he turned seventeen and dropped out of high school a month later. 53 RR 159-60. Ruiz began driving trucks from eighteen to twenty, and during this period he had no arrests. 53 RR 161-62. Difficulty in his marriage resulted in a domestic violence arrest. 53 RR 162. Dr. Kessner associated the string of arrests beginning in 2004 with Ruiz's relationship with his wife, Erica. 53 RR 162-63.

Katherine Drake testified that Barbara Ruiz was a tenant in the apartment complex she managed, and Ruiz and Erica, lived with her on three separate occasions. 53 RR 179-81. On the first occasion, Drake described Ruiz and Erica as ideal tenants, but the second and third time they moved in they

were having marital problems. 53 RR 180-82. Drake described Ruiz as a "mannerable young man," and very nice and respectful to everyone. 53 RR 182-83. She said he was passive and nonaggressive with Erica. 53 RR 183. Drake could not believe Ruiz had been arrested for this crime. 53 RR 184-85.

David Rivera, Erica's father, testified that he considers Ruiz his son. 53 RR 187. Rivera gave Ruiz a job in his construction business; Rivera found him to be intelligent and a fast learner, and placed him in charge of a crew. 53 RR 189-90. Ruiz was a hard worker who took care of his family. 53 RR 191. Rivera testified that Erica was the instigator of the fights with Ruiz, and that she had a short temper, but he never saw Ruiz behave violently. 53 RR 191-92

Finally, the defense presented evidence that Ruiz was charged with two felonies—possession of methamphetamine and evading arrest—which were both state jail felonies, but Ruiz served a punishment in county jail equivalent to only a Class A misdemeanor. 54 RR 28-31. Ruiz's disciplinary records from the last time he was in county jail reflect no disciplinary incidents. 54 RR 34-36.

III. Appeal and Postconviction Proceedings.

Ruiz was convicted and sentenced to death in July 2008. 1 Clerk's Record (CR) 02; 2 CR 545; 663-64; 55 Reporter's Record (RR) 64. On March 2, 2011, the CCA affirmed Ruiz's conviction and sentence on direct appeal, *Ruiz v. State,* 2011 WL 1168414, and this Court denied certiorari review, *Ruiz v.*

Texas, 565 U.S. 946 (2011). While his direct appeal was pending, on December 6, 2010, Ruiz filed an application for writ of habeas corpus in the state court. 1 State Habeas Clerk's Record (SHCR) 2-58; Supplemental State Habeas Clerk's Record (Supp. SHCR) 1-93. Four days later, on December 10, 2010, and two days after the date his petition was due, Ruiz filed a supplement to his application. 1 SHCR 59-62. The trial court held an evidentiary hearing, after which the court entered findings of fact and conclusions of law recommending denial of relief. 2 SHCR 365-446. The CCA adopted the trial court's findings and conclusions and denied relief. *Ex parte Ruiz,* No. WR-78,129-01, WR-78,129-02, 2012 WL 4450820 (Tex. Crim. App. Sept. 26, 2012). The CCA found the untimely supplement to be a subsequent application, concluded that Ruiz failed to meet any exception under Article 11.071, § 5, and dismissed the supplement as an abuse of the writ, without considering the merits. *Id.* at *1. This Court denied certiorari review. *Ruiz v. Texas,* 569 U.S. 906 (2013).

On September 23, 2013, Ruiz filed an initial petition for writ of habeas corpus in federal district court, *Ruiz v. Davis,* No. 3:12-cv-05112-N, Docket Entry (DE) 14 (N.D. Tex.), and an unopposed motion to stay and abate federal habeas proceedings so that he could return to the state court to exhaust his false testimony related claims, DE 15. The district court granted his motion, DE 16, but the CCA concluded he failed to satisfy the requirements of Article 11.071, § 5(a), and dismissed the application as an abuse of the writ without

considering the merits of the claims. *Ex parte Ruiz,* No. WR-78,129-03, 2014 WL 6462553 (Tex. Crim. App. Nov. 19, 2014).

Ruiz returned to federal court and filed an amended petition for writ of habeas corpus on January 17, 2015. DE 23. The district court denied relief and a COA on December 14, 2018. *Ruiz v. Davis,* No. 3:12-cv-5112, 2018 WL 6591687 (N.D. Tex. 2018). The Fifth Circuit Court of Appeals also denied COA, *Id.,* 819 F. App'x 238 (5th Cir. 2020), and panel rehearing, *Ruiz v. Lumpkin,* No. 19-70003 (5th Cir. Jan. 22, 2021). This Court again denied certiorari review. *Id.,* 142 S. Ct. 354 (2021).

On June 24, 2022, the trial court—the Honorable Ernest White, presiding judge of the 194th District Court—signed an order setting Ruiz's execution date for February 1, 2023.[3]

On December 16, 2022, Ruiz and Potter County death row inmate John Balentine filed an Original Verified Petition and Application for Temporary Injunction, Declaratory Relief, and Permanent Injunction in Travis County District Court, seeking to enjoin 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. However, on

[3] This order was withdrawn due to a notification error pursuant to Texas Code of Criminal Procedure Article 43.141 (b-1), and reissued on July 18, 2022. The date of execution did not change.

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 TDCJ 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).[4]

[4] 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 writ of mandamus and motion for injunction to preserve the court's jurisdiction. Robert Fratta was executed on January 10, 2023.

On January 11, 2023, Ruiz filed in the trial court a motion to withdraw his execution date, citing an alleged error in service of the execution warrant. On January 20, 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, citing to the still pending litigation in the Travis County district court.[5] The trial court denied both motions on January 31, 2023. Later that day, Ruiz filed in the CCA a petition for a writ of mandamus and a motion for leave to file, and a motion for stay of execution, all related to the trial court's denial of his first motion to withdraw the warrant. That litigation remains pending.

On January 25, 2023, Ruiz filed in the federal district court a Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6), DE 50, and on January 27, 2023, he filed a Motion for Stay, DE 51. On January 27, 2023, without waiting for a response from the Director, the district court entered a Memorandum Opinion and Order Denying Rule 60(b) Motion and Transferring Potentially Successive Petition. *Ruiz v. Lumpkin,* No. 3:12-CV-5112-N, 2023 WL 1070607 (N.D. Tex. Jan. 27, 2023); DE 52. The district court specifically (1) denied Ruiz's purported Rule 60(b) motion in all respects; (2)

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[5] The March 20, 2023 trial remains 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 also remains pending.

denied a COA on all alleged claims and on the denial of his Rule 60(b) motion; (3) directed the Clerk, pursuant to 28 U.S.C. Section 1631, to transfer the cause to this Court for a determination as to whether Ruiz is entitled to authorization to file a successive federal habeas corpus petition under 28 U.S.C. § 2244(b); and (4) denied a stay of execution. *Ruiz,* 2023 WL 1070607, at *8. Ruiz declined to seek authorization to file a successive application from the Fifth Circuit Court of Appeals.

Finally, pertaining to the current petition, Ruiz filed a subsequent habeas corpus application in the CCA—his third subsequent writ and fourth state habeas application—on January 24, 2023, alleging his death sentence was impermissibly influenced by racial bias, and proffering two juror declarations and a report from an anthropologist in support. He also filed a suggestion for the court to reconsider its November 19, 2014 denial of habeas corpus relief on its own initiative as it relates to the A. P. Merillat/false testimony claims, and a motion to stay the execution pending disposition of the subsequent application. On January 30, 2023, the CCA dismissed the subsequent application as an abuse of the writ without reviewing the merits, *see* Tex. Code Crim. Proc. Art. 11.071 § 5; declined the invitation to reconsider his second subsequent writ, and denied the motion to stay his execution. *Ex parte Ruiz,* No. WR-78,129-04, Order at *2. Ruiz filed the instant petition on the eve of his scheduled execution.

REASONS FOR DENYING THE WRIT

The question that Ruiz presents for review is unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Where a petitioner asserts only factual errors or that a properly stated rule of law was misapplied, certiorari review is "rarely granted." *Id*. Here, Ruiz advances no compelling reason to review his case, and none exists.

Ruiz's vehicle for raising his current complaint—a third subsequent state habeas application—was dismissed on an adequate and independent state law ground, which divests this Court of jurisdiction. Ruiz's issue stems from the lower court's application of Texas Code of Criminal Procedure Article 11.071 § 5, which provides a purely statutory, non-constitutional prohibition against abuse of the writ. The CCA determined that he did not satisfy the requirements of Article 11.071 § 5, and dismissed his claim without reaching the merits. The Court thus does not have jurisdiction to reach this issue.

But, assuming jurisdiction, Ruiz has not furnished a single reason to grant a writ of certiorari, let alone a compelling one. Instead, Ruiz attempts to undermine his conviction with "new" evidence—namely, unreliable juror declarations that could have been obtained for inclusion in any of his three prior habeas applications. But Ruiz cannot demonstrate the factual or legal

unavailability of the either his claim or this "new" evidence, as required by Article 11.071 § 5(a)(1), upon which he relies. Therefore, aside from being procedurally barred, his proposed claim is also meritless. Because there is no worthy ground for which a writ of certiorari should be granted, Ruiz's petition and concurrently filed application for stay of execution should be denied.

ARGUMENT

I. This Court Lacks Jurisdiction Because Ruiz's Claim was Dismissed Pursuant to an Adequate and Independent State Procedural Bar.

The CCA has strictly and regularly applied § 5(a), and dismissal of a successive habeas application upon such grounds constitutes an adequate and independent state procedural bar. *See, e.g., Moore v. Texas*, 122 S. Ct. 2350, 2352–53 (2002) (Scalia, J., dissenting) ("There is no question that this procedural bar is an adequate state ground; it is firmly established and has been regularly followed by Texas courts since at least 1994."); *see also Balentine v. Thaler,* 626 F.3d 842, 856-57 (5th Cir. 2010) ("We have previously held that the [CCA] regularly enforces the Section 5(a) requirements.").

The Court has explained that it "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment" because "[the Court] in fact lack[s] jurisdiction to review such independently supported judgments on direct appeal: Since the state-law

determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory." *Lambrix v. Singletary,* 520 U.S. 518, 523 (1997); *see also Sochor v. Florida,* 504 U.S. 527, 533-34 (1992); *Michigan v. Long*, 463 U.S. 1032, 1042 (1983); *Herb v. Pitcairn,* 324 U.S. 117, 125-26 (1945). The "independent" and "adequate" requirements are satisfied where the court "clearly and expressly" indicates that its dismissal rests upon state grounds that bar relief, and that bar is strictly or regularly followed by state courts and applied to the majority of similar claims. *Finley v. Johnson*, 243 F.3d 215, 218 (5th Cir. 2001) (citing *Amos v. Scott*, 61 F.3d 333, 338-39 (5th Cir. 1995)); *see also Johnson v. Mississippi,* 486 U.S. 578, 587 (1981).

Here the CCA concluded that Ruiz failed to satisfy the requirements of Texas Code of Criminal Procedure Article 11.071, §5, for filing a successive application for state habeas relief. *Ex parte Ruiz,* No. WR-78,129-04, Order at *2. Ruiz does not brief the adequacy of the lower court's order. Instead, he suggests the Court could review the claim because it is unclear whether the CCA reached the merits of his claim and opines that the Court's decision is not necessarily independent of the federal law inquiry. Petition at 17-18. This argument ignores the CCA's express statement that they are dismissing the application "as an abuse of the writ *without reviewing the merits of the claim raised*." *Ex parte Ruiz,* No. WR-78,129-04, Order at *2 (emphasis added). From

this, there can be no dispute that the State relief upon an adequate an independent state law ground.

The CCA's application of the procedural bar was not in error. The relevant portion of the Texas statute governing successive state habeas applications provides that:

> [A] court may not consider the merits of or grant relief based on the subsequent application unless the application contains specific facts establishing that:
>
> > (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. . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;

Tex. Crim. Proc. Code Ann. art. 11.071, § 5(a) (Vernon Supp. 2001). Ruiz argued that his new claim alleging that his death sentence was impermissibly influenced by anti-Hispanic bias met this standard. In support of this claim, he relied on two Supreme Court cases from 2017; declarations he obtained in August 2022 from two members of his jury; and an "expert evaluation" of those declarations by a linguistic anthropologist, who opines that the jurors' statements reflect anti-Hispanic attitudes, prejudices, and stereotypes. (Petitioner's Appendices 1–3). He argued that his claim was legally and factually unavailable until the Supreme Court found trial counsel was ineffective for presenting testimony connecting race and violence in the context

of the future-dangerousness special issue in *Buck*, 580 U.S. at 123–24; and lifted the barrier imposed by the Rule 606(b) "no-impeachment rule" in order to permit consideration of juror statements evincing clear racial bias during deliberations in *Peña-Rodriguez*, 580 U.S. at 225.

But Ruiz fails to show prior unavailability of either the legal or factual basis of his juror-bias claim. First, he confuses futility with unavailability. A juror bias claim was legally available at the time he filed any of his previous writ applications, regardless of the fact that, until *Peña-Rodriguez*, the juror declarations he obtained would have been inadmissible under Rule 606(b) of the Texas Rules of Evidence.[6] *Peña-Rodriguez* is grounded in familiar legal principles established long before Ruiz filed his initial application, and *Buck* is inapplicable to Ruiz's claim.

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[6] Rule 606(b), entitled "Juror's Competency as a Witness," prohibits, with two exceptions, juror testimony about statements made during deliberations:

> **(b) During Inquiry into the Validity of a Verdict or Indictment.**
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> **(1)** ***Prohibited Testimony or Other Evidence.*** During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.
>
> **(2)** ***Exceptions.*** A juror may testify:
>
> (A) about whether an outside influence was improperly brought to bear on any juror; or
>
> (B) to rebut a claim that the juror was not qualified to serve.

Tex. R. Evid. 606(b).

Second, Ruiz's 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, Ruiz does not contend, or even suggest, that his own trial counsel injected evidence of damaging racial stereotypes and prejudices into his trial. In denying Ruiz's motion for relief from judgment pursuant to Federal Rule of Civil Procedure Rule 60(b)(6), this district court agreed that *Buck* was inapplicable to this instance. *See Ruiz,* 2023 WL 1070607, at *7 (Reliance on *Buck* misplaced because "*Buck* involved an ineffective assistance claim premised upon a criminal defense counsel calling an expert witness who gave testimony reflecting racial animus or bias against the defendant's ethnic group. Ruiz does not suggest that his own trial counsel injected any racial animus or bias into Ruiz's trial.")

Moreover, although he quotes *Buck* for the proposition that "discrimination is 'especially pernicious in the administration of justice,'" Petition at 4, 8, he omits the fact that *Buck* explicitly attributed this quote to a 1979 Supreme Court opinion. *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"—another quote *Ruiz* lifts from *Buck*—did not signal the creation of a new rule of constitutional law, as *Buck* specifically cites to a 1986 Supreme Court decision 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 Ruiz's present claim, he may not rely on it to meet the new-legal-basis exception to the subsequent-writ bar.

Ruiz's reliance on *Peña-Rodriguez* is similarly unavailing. In that case, this Court noted that "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, Ruiz 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 the Supreme Court did not formally recognize an exception to the no-impeachment rule until *Peña-Rodriguez* does not excuse Ruiz's failure to timely advance his 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).

And even if *Buck* or *Pena-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.*[7] The CCA "follows

[7] Ruiz's conviction was final with this Court's denial of certiorari review from direct appeal, on October 11, 2011.

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). Thus, even if the lower court's order is reversed, the CCA would reach the same conclusion as a matter of non-retroactivity, and still be precluded from reviewing the merits of Ruiz's claim.

Finally, regardless of their admissibility, Ruiz fails to show that he could not have obtained the jurors' declarations in time for any of his previous writ applications. He points to nothing that prevented him from contacting the two jurors earlier and nothing to suggest the jurors would have been unwilling to speak to him at that time. Moreover, he makes no showing that had he contacted the jurors earlier, they would not have given him the same information they provided in August 2022. Indeed, in his declaration, Juror J.G. recalls being previously contacted by two law students who did not ask as many questions as Ruiz's current legal team; had the students asked him the same questions as Ruiz's current team, J.G. states, he would have "told them everything" he included in his 2022 declaration. (Petitioner's Appendix B at 5).

Because Ruiz has failed to establish the factual or legal unavailability of his juror-bias claim, this claim is procedurally barred under Section 5(a), and the CCA appropriately dismissed Ruiz's application as an abuse of the writ. *See* Tex. Code Crim. Proc. Ann. art. 11.071, § 5(c).

Because this denial is based on clearly established state law grounds, there is no jurisdictional basis for granting certiorari review in this case. *See Coleman v. Thompson,* 501 U.S. 722, 729 (1991) (holding federal review of a claim is procedurally barred if the last state court to consider claim expressly and unambiguously based its denial of relief on a state procedural default); *Harris v. Reed,* 489 U.S. 255, 265 (1989). Because the lower state court's decision clearly and expressly rests on adequate and independent state grounds, certiorari review should not be granted. Ruiz 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. Ruiz's Claim Lacks Merit.

In his sole claim for relief, Ruiz alleged that the jury's decision to sentence him to death was "impermissibly influenced by racial bias." Petition at 8. Ruiz's claim is meritless. An investigation personally undertaken by Dallas County District Attorney John Creuzot (DA Creuzot) in response to the allegations in this subsequent writ has revealed that at least one of the jurors to whom Ruiz has attributed anti-Hispanic bias did not, in fact, harbor any such bias and made her decision in this case based solely on the evidence

presented at trial.[8] Ruiz fails to demonstrate that, under *Peña-Rodriguez*, 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 that they had personally observed another juror make multiple race-based and derogatory comments about the Hispanic defendant and his Hispanic alibi witness. 580 U.S. 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

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[8] The State was prepared to present these affidavits to the CCA in their response in opposition to Ruiz's subsequent application for habeas relief, but the CCA denied the application on procedural grounds before the State could file its response. Similarly, the Director intended to present this evidence in his response in opposition to Ruiz's motion for relief from judgment in the federal district court, but that court too denied relief without waiting for response. Finally, the Director hoped to present them to the Fifth Circuit Court of Appeals in a response to a motion for authorization to file a successive writ in federal court, but Ruiz declined to file such an appeal. The State asks the Court to now take judicial notice of these affidavits in rebuttal to the inaccurate representation in the declarations submitted by Ruiz.

> 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 *Pena-Rodriguez*, neither of the juror declarations in this case identify any statements made by the declarants or any other member of Ruiz's jury during deliberations that

exhibited overt racial bias. In her report, Ruiz's linguistic anthropology expert dissects the jurors' words, imposes on them her own interpretation, and then draws the wholly unsupported conclusion that the verdict rendered by Ruiz's jury fourteen years earlier was significantly influenced by racial bias. (Petitioner's Appendix 4 at 6–9). But nothing in *Peña-Rodriguez* suggests that opinions about what a juror's otherwise innocuous words meant may substitute for the clear statement of overt racial bias necessary to justify lifting the no-impeachment bar. *See Peña-Rodriguez*, 580 U.S. at 225. Moreover, far from establishing that racial bias or animus was a "significant motivating factor" in the jury's verdict, both declarations show that the jurors carefully deliberated and based their decisions on the evidence presented at trial. Indeed, both jurors recount being uncertain when they began their deliberations as to whether they would vote for the death penalty. *Id.* at 225–26; *see* Petitioner's Appendix B, at 1-3; Petitioner's Appendix C at 1. As found by the federal district court in denying Rule 60(b)(6) relief, "Neither of the [declarations] furnished by the two jurors in Ruiz's trial identify any clear statement that they or anyone else on Ruiz's jury made during deliberations evidencing overt racial bias, as required by *Pena-Rodriguez*." *Ruiz,* 2023 WL 1070607, at *6-7.

If, as Ruiz's expert contends, the jurors' declarations reveal that they viewed Ruiz as a violent and dangerous criminal and gang member, that is because the evidence at trial showed Ruiz to be exactly that. As the CCA

accurately noted in upholding the sufficiency of the evidence to support the jury's future-dangerousness finding, the evidence showed beyond a reasonable doubt that Ruiz was a "veteran criminal and gang member fully immersed in a life of drugs, guns, and violence." *Ruiz*, 2011 WL 1168414, at *5. It is hardly an indication of racial bias for Ruiz's jurors to conclude from this evidence that he would pose a future danger. *See Ruiz,* 2023 WL 1070607, at *7 ("It is hardly surprising (or evidence of racial animus or stereotyping) that Ruiz's jurors concluded from that evidence that Ruiz was a violent and dangerous criminal. Accordingly, the [declarations] of Ruiz's jurors, even when supplemented by the [report] of Ruiz's linguistic anthropology expert are insufficient to satisfy the standard announced in *Pena-Rodriguez* for disregarding Rule 606(b) of the Federal Rules of Evidence.")

Finally, in *Peña-Rodriguez*, two jurors sought out defense counsel immediately after trial and volunteered information about personal observations of race-based and derogatory comments they observed. 580 U.S. at 212. In contrast to this case, postconviction counsel sought out these jurors, fourteen years after trial, and then hired a linguistics expert to put words into their mouths.

The facts alleged by Ruiz fall far short of meeting *Peña-Rodriguez*'s racial-bias exception to the no-impeachment rule. For this reason, Ruiz has

failed to demonstrate a compelling reason to grant certiorari review, and this Court should dismiss his petition.[9]

Additionally, an independent investigation conducted by the State shows Ruiz's juror-bias claim to be completely meritless. In the interests of justice, and even though Ruiz's writ application is plainly procedurally barred by Section 5, Dallas County District Attorney (DA) John Creuzot personally investigated Ruiz's juror-bias claim to determine whether it had any merit. DA Creuzot spoke to at least one of the jurors who provided declarations to Ruiz and asked the critical question her statement did not address: whether, when you served on the jury in this case, did you have any bias or animus toward Ruiz because of his Hispanic race. Juror B.P. answered that question emphatically, "No."

DA Creuzot spoke to Juror B.P. in person on January 26, 2023. B.P. provided a sworn affidavit that day and a second sworn affidavit the following day. (Respondent's Appendices A–B). In her first affidavit, B.P. addresses her

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[9] Ruiz includes an argument in his application that the jury's alleged racial bias "was exacerbated" by the State's knowing presentation of false testimony regarding Ruiz's eligibility to achieve a less-restrictive classification status if he were sentenced to life in prison without parole. Petition at 10. This argument refers to a claim Ruiz made in his second subsequent state habeas application concerning the inaccurate testimony of prison-classification expert, A.P. Merillat. Ruiz does not raise this claim now, and the federal district court declined a motion for relief from judgment regarding this claim. *Ruiz,* 2023 WL 1070607. Ruiz does suggest that Juror B.P. "was particularly vulnerable to Merillat's false testimony." Petition at 6, 11. But, as discussed below, Juror B.P. refutes this accusation.

statements from paragraph four of her August 2022 declaration about growing up in Oak Cliff, bussing, and Ruiz being from West Dallas—statements that Ruiz's expert has claimed reveal overt anti-Hispanic bias:

> I talked about growing up in Oak Cliff. As someone who grew up there in the 60's [and] 70's time was different. We all had our own territories but yet we all were diversed [sic]. I understood what the street life was like, because I had friends and family in that lifestyle. I had a human compassion for Mr. Ruiz because of it. I was not nor am not bias[ed] to anyone or any race. I have black, Hispanic and white members of my own family. Bussing was brought up in elementary school, which my dad didn't want me bussed to another school because we had a school around the corner

(Respondent's Appendix A at 1). Thus, far from being prejudiced against Ruiz, B.P. had sympathy and compassion for him because she understood what his life in a neighboring area of Dallas had been like. Further, her comment about "bussing" referred not to others being bussed *into* her neighborhood school, but to her being bussed *out*. (Respondent's Appendix A at 1).

Regarding her statements in paragraphs five and six of her 2022 declaration about crimes that had happened to members of her family, including her sister's abduction and rape by a Hispanic man, B.P. explains in her affidavit: "Even though I have had violent events happen in my family, none have given me any thought or feelings of bias towards hispanics or any race. I am a Christian and I believe we will be judged by our own actions and not as a group." (Respondent's Appendix A at 2). Thus, contrary to Ruiz's

expert's claims that B.P.'s account of these past events reflects her "racial fears about Hispanics," her affidavit shows that she makes no such race-based generalizations. (Petitioner's Appendix 4 at 8).

Finally, B.P. states that she took her responsibilities as a juror in Ruiz's case "very seriously" and reviewed the evidence "to be sure of [her] decision." (Respondent's Appendix A at 2). She recalls that during deliberations, "there was not any discussion or bias about Mr. Ruiz's ethnicity." (Respondent's Appendix A at 2).

In her second affidavit, B.P. disavows portions of paragraph three of her 2022 declaration, including her statement that she "thought Wes could escape if he was sentenced to life without parole." (Petitioner's Appendix 3 at 1). She clarifies that she "do[es] not recall ever having any thoughts or concerns with Mr. Ruiz escaping if he was sentence[d] to life without parole." (Respondent's Appendix B at 1).

In short, even if not procedurally barred, Ruiz's claim of juror bias has no merit. Therefore, certiorari review is not warranted and should be denied.

CONCLUSION

The CCA correctly dismissed Ruiz's successive state habeas application. For the reasons set forth above, this petition for a writ of certiorari should be denied.

Respectfully submitted,

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