CASE NO. 22-6662 (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

WESLEY RUIZ,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to
The Texas Court of Criminal Appeals

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.. ii
THE STATE'S ARGUMENTS PRESENT NO BARRIER TO THE GRANT OF CERTIORARI. 1

TABLE OF AUTHORITIES

Federal Cases

Buck v. Davis, 580 U.S. 100 (2017) 4
Florida v. Powell, 558 U.S. 50 (2010) 3
Lambrix v. Singletary, 520 U.S. 518 (1997) 2

Pena-Rodriguez v. Colorado, 580 U.S. 206 (2017) 4
Rocha v. Thaler, 626 F.3d 815 (5th Cir. 2010) 1
Ruiz v. Quarterman, 504 F.3d 523 (5th Cir. 2007) 2
Teague v. Lane, 489 U.S. 288 (1989) 3
Tharpe v. Sellers, 138 S. Ct. 545 (2018) 5-6

State Cases

Ex parte Campbell, 226 S.W.3d 418 (Tex. Crim. App. 2007) 1
Ex parte Davila, No. WR-75, 2018 WL 1738210 at *1 (Tex. Crim. App. Apr. 9, 2018) 1-2
Ex parte Robertson, 603 S.W.3d 427 (Tex. Crim. App. 2020) 4
Ex parte Shore, No. WR–78–02, 2017 WL 4534734 at *1 (Tex. Crim. App. Oct. 10, 2017) 2

State Statutes

§ 5 .... 1, 3

Other

Rule 10 4
Tex. R. Evid. 606 3

THE STATE'S ARGUMENTS PRESENT NO BARRIER TO THE GRANT OF CERTIORARI.

The State argues that abuse of the writ under Article 11.071 § 5 is an independent and adequate bar to this Court's review. This argument is without merit. No doubt, some applications of the abuse of the writ doctrine are adequate and independent, but other applications of that doctrine are not adequate and independent. As discussed in Petition 18-21, the Fifth Circuit has frequently found that article 11.071 § 5 is not adequate and independent. Indeed, this has happened so often that in one decision the Fifth Circuit took pains to emphasize that "it is not the case that a . . . dismissal under § 5(a)(1) *never* rests on an independent state law ground." *Rocha v. Thaler*, 626 F.3d 815, 835 (5th Cir. 2010) (emphasis supplied). Rather, whether the bar is independent and adequate "turns on case-specific factors." *Id.*

The State argues that the CCA's ruling must have been procedural because it stated that it denied the application without reviewing the merits of the claim. Br. in Opp. 19-20 (citing Order at 2). But that is standard language that the CCA uses in denying writs, including when denying them based on the "merits" prong of its article 11.071 § 5 analysis. *See* Petition 20-21. Even when the CCA finds that the allegations of a writ do not state a federal claim, it does not consider itself to have reviewed "the merits" of the claim. *See, e.g.*, *Ex parte Campbell*, 226 S.W.3d 418, 422-25 (Tex. Crim. App. 2007); *Ex parte Davila*, No. WR-75,356-03, 2018 WL 1738210 at *1 (Tex. Crim. App. Apr. 9, 2018) ("Applicant has failed to make a prima facie showing of a Brady violation, . . . and he has failed to show that the law he

claims renders the Texas scheme unconstitutional applies to the Texas scheme. . . . Accordingly, we dismiss this application as an abuse of the writ *without reviewing the merits of the claims raised*." (emphasis supplied)); *Ex parte Shore*, No. WR–78,133–02, 2017 WL 4534734 at *1 (Tex. Crim. App. Oct. 10, 2017) ("After reviewing this application, we find that applicant has failed to make a prima facie showing that a person with brain damage, like an intellectually disabled person, should be categorically exempt from execution. . . . Accordingly, we dismiss this application as an abuse of the writ *without reviewing the merits of the claim raised*." (emphasis supplied)).

The Fifth Circuit has specifically addressed whether a boilerplate order of the kind issued here is independent and adequate, and found such an order wanting. In *(Rolando) Ruiz v. Quarterman*, 504 F.3d 523 (5th Cir. 2007), the court ruled that a similar boilerplate order was not adequate and independent, because the order did not clearly state "whether the CCA decision was based on . . . a state-law question, or on . . . a question of federal constitutional law." *Id.* at 528. The same is true here. While the State would have this Court essentially ignore this Fifth Circuit jurisprudence, this Court has "repeatedly recognized [that] the courts of appeals and district courts are more familiar than we with the procedural practices of the States in which they regularly sit." *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997) (citing *Rummel v. Estelle*, 445 U.S. 263, 267, n. 7 (1980), and *County Court of Ulster Cty. v. Allen*, 442 U.S. 140, 153-154 (1979)). Here, as in *(Rolando) Ruiz*, it is impossible to tell whether the Texas Court of Criminal Appeals ("CCA") relied on

state or federal law, given that the CCA frequently relies on its assessment of the merits of a claim in denying review based on abuse of the writ.

The State speculates that the CCA *could have* found that the claim was legally available prior to *Pena-Rodriguez v. Colorado*, 580 U.S. 206 (2017), because *Peńa-Rodriguez* cited prior precedents that supported its decision. Br. in Opp. 21-24. Further, the State speculates that if this Court granted certiorari and relief and remanded the case, the CCA *could find* that the claim is barred by the non-retroactivity principles announced in *Teague v. Lane*, 489 U.S. 288 (1989). Br. in Opp. 24-25. This internally contradictory speculation is unavailing.

This Court does not issue decisions out of the blue, like Athena springing from Zeus's forehead. Some prior principle or precedent is cited in every decision. What is relevant here is that prior to *Peńa-Rodriguez*, any attempt to raise a claim based on juror admissions of racial bias would have been completely foreclosed by Tex. R. Evid. 606(b). Under article 11.071 §§ 5(a)(1) and (d), such a claim was legally unavailable. Speculation that the CCA could have ruled otherwise is irrelevant in the absence of any clear indication that it did so. *See Florida v. Powell*, 558 U.S. 50, 57 (2010) (state court must indicate "clearly and expressly that [its decision] is alternatively based on bona fide separate, adequate, and independent grounds") (citation omitted).

The internally contradictory speculation about *Teague* is even less relevant. The CCA did not rely on or apply any non-retroactivity principle. Rather, the state court apparently ruled on the merits of the federal question. As such, the *Teague*

doctrine poses no barrier to this Court's review of this petition. Indeed, the CCA has retroactively applied *Peńa-Rodriguez* and *Buck v. Davis*, 580 U.S. 100 (2017). *See Ex parte Robertson*, 603 S.W.3d 427, 427-28 (Tex. Crim. App. 2020) (reopening denial of *Batson* claim based on *Peńa-Rodriguez* and *Buck*). What the CCA might do in the future following remand is irrelevant.

The issue is squarely presented here. As discussed in Petition 21, it is very likely that the CCA denied the issue on the merits. The CCA's practice of issuing boilerplate denials of relief should not be allowed to shield its rulings from any further review.

The State contends that Petitioner has not presented an issue that is worthy of this Court's review. Br. in Opp. 17. Surely, however, the question whether *Peńa-Rodriguez* applies to capital sentencing decisions is a significant one. This Court has consistently treated eliminating the effects of racial bias from criminal proceedings as a goal of the utmost importance. *Peńa-Rodriguez*, 580 U.S. at 225; *Buck v. Davis*, 580 U.S. 100, 121, 124 (2017). The State does not contend that the issue is settled or unimportant. Granting certiorari to review this issue would be consistent with S. Ct. Rule 10.

Relying in large part on affidavits that it has never previously submitted, the State argues that the facts here would not support a claim under *Peńa-Rodriguez*. The State has no viable explanation for the submission of these affidavits—never previously disclosed to Petitioner—for the first time in this Court.

The affidavits indicate that they were obtained on January 26 and 27, 2023. Mr. Ruiz submitted his writ application to the Texas courts on January 24, 2023. The State indicates that it thought about submitting the affidavits in various courts, but that those courts acted before it could do so. Br. in Opp. 27 n.8. This attempted excuse does not hold water. Mr. Ruiz's execution was scheduled for February 1, 2023. It was obvious that a ruling from the CCA was imminent. Even assuming—without any evidence—that the State could not file a complete response before the CCA's ruling on January 31, it certainly could have found the means to submit the affidavits to the court before it ruled. But even assuming—again without any evidence—that the State could not have done so, it certainly could have notified opposing counsel that it had obtained the affidavits. This Court need not and should not consider the affidavits.

Moreover, even if this Court were to consider these affidavits (it should not do so), they are unavailing. The affidavits relate to only one of the two jurors who signed declarations submitted by Mr. Ruiz. The fact that the State did not obtain any such affidavit from the second juror is a clear indication that Jury Foreman J.G. has not in any way retracted his declaration.

J.G.'s declaration alone, supported by the report of Dr. Leza, supports the conclusion that jurors were biased against Hispanics, and that this bias affected their conduct as jurors. The state court did not make any ruling that these declarations are incapable of establishing a violation of *Peña-Rodriguez*. In the face of the declarations, any such ruling would at best be dubious. *See Tharpe v. Sellers*,

138 S. Ct. 545, 546 (2018) (granting certiorari, vacating and remanding, where state court's no-prejudice ruling on *Peńa-Rodriguez* claim was unreasonable given juror's affidavit acknowledging his own racial prejudice).

The State of Texas is so desperate to execute Mr. Ruiz that it waited until the early morning of the day of his execution to provide to any court or opposing counsel evidence that it asserts rebuts his claim of juror racial bias. That it would take such an action itself discloses the importance of the issue. This Court should grant certiorari and stay Mr. Ruiz's execution so that there can be an actual determination, after briefing and appropriate factual development, if necessary, of whether Mr. Ruiz's death sentence was the product of racial bias.

For the reasons set forth herein and in Petitioner's prior submissions, this Court should grant the petition for writ of certiorari and stay Petitioner's execution to enable the Court to consider the merits of his claim.

Respectfully submitted,

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Dated: February 1, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused the foregoing to be served on the following persons by ECF filing: John Creuzot, District Attorney, and Shelly O'Brien Yeatts, Assistant District Attorney, Dallas County District Attorney's Office, Frank Crowley Courts Building, 133 N. Riverfront Boulevard, LB 19, Dallas, TX 75207; and Tomee M. Heining, Assistant Attorney General, PO Box 12548, Capital Station, Austin TX 78711.

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Dated: February 1, 2023