CAPITAL CASE

No. 23-1044

IN THE

Supreme Court of the United States

JUAN BALDERAS,

Petitioner,

—v.—

STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE TEXAS COURT OF CRIMINAL APPEALS

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR THE PETITIONER

I. Certiorari Is Appropriate Because The TCCA Decision Did Not Clearly Rest On An Independent And Adequate State Law Ground

The TCCA's one-sentence decision below dismissed Balderas's claims "without considering the merits of the claims" because Balderas "failed to make a prima facie showing that he satisfied the requirements of Article 11.071 § 5(a)." *Ex parte Balderas*, 2023 WL 7023648, at *1 (Tex. Crim. App. Oct. 25, 2023). The State argues that the Court should therefore reject Balderas's petition because the TCCA's order was based on an independent and adequate state law ground "prohibit[ing] this Court from exercising jurisdiction over any of the claims for which Balderas now seeks review." Br. in Opp. 17. The State's argument, however, is directly contradicted by this Court's precedent and common sense.

This Court has made clear that "ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." *Florida v. Powell*, 559 U.S. 50, 56 (2010). Consistent with that principle, this Court has long held that "when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, [this Court] will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

The TCCA's summary dismissal of Balderas's subsequent habeas application is ambiguous and obscure. The opinion admits it did not consider the

"merits of the claims," while at the same time stating that Balderas failed to make a prima facie showing of eligibility under Article 11.071 § 5(a). Moreover, a decision under Section 5(a) is often inextricably interwoven with a decision on the federal law merits of the claims. Indeed, the TCCA is explicitly required to make a determination as to whether a federal Consitutional violation has occurred under subsections (2) and (3) of Section 5(a).[1]

The State's citation to *Hughes v. Quarterman*, 530 F.3d 336 (5th Cir. 2008), underscores the problem. The State invokes *Hughes* for the proposition 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.'" Br. in Opp. 16 (quoting *Hughes*, 530 U.S. at 342) (alterations in original). But the State ignores the Fifth Circuit's numerous subsequent decisions holding that the TCCA's rulings under Article 11.071 § 5(a) are *not* generally entitled to a presumption that they rest on adequate and independent state grounds. *See, e.g.*, *Rocha v. Thaler*, 626 F.3d 815, 835 (5th Cir. 2010) (holding that the assumption that a dismissal under § 5(a)(1) always rested on independent and adequate state law grounds was no longer justified under the

[1] Section 5(a)(2) permits the TCCA to consider a subsequent application if "by a preponderance of the evidence, *but for a violation of the United States Constitution* no rational juror could have found the applicant guilty beyond a reasonable doubt." Art. 11.071 § 5(a)(2) (emphasis added). Section 5(a)(3) permits the TCCA to consider a subsequent application if "by clear and convincing evidence, *but for a violation of the United States Constitution* no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial." Art. 11.071 § 5(a)(3) (emphasis added).

TCCA's interpretation of the statute) (citing *Ex Parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007)); *Busby v. Davis,* 925 F.3d 699, 706–10 (5th Cir. 2019) (dismissal of subsequent application under § 5(a) not based on independent and adequate state law ground); *Ruiz v. Quarterman*, 504 F.3d 523, 527-28 (5th Cir. 2007) (same). The inherent logical inconsistencies are producing inconsistent opinions and jurisprudence.

It is not enough that the TCCA perfunctorily stated that it did not "consider[] the merits of the claims." App. 2a. The Fifth Circuit, which has repeatedly been tasked with interpreting the TCCA's unelaborated opinions, has recognized that boilerplate language stating that the TCCA did not review the merits of the claims does not "control over what common sense would indicate." *In re Davila*, 888 F.3d 179, 188-89 (5th Cir. 2018); *see also, e.g.*, *Busby*, 925 F.3d at 707 ("On its face, the TCCA's order states that i[t] has denied the application as an abuse of the writ without considering the merits of the claims . . . [but] [t]hat determination is necessarily dependent on a substantive analysis of the Eighth and Fourteenth Amendments as applied to the factual allegations."); *Ruiz*, 504 F.3d at 527-28 (finding federal jurisdiction despite "[t]he boilerplate dismissal by the [TCCA] of an application for abuse of the writ").[2]

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[2] To the extent that the Fifth Circuit's decisions analyzing boilerplate TCCA decisions have afforded them a presumption of resting on independent and adequate state law procedural grounds, those decisions are contrary to this Court's holdings in *Powell* and *Long*. That is particularly true, as here, where the TCCA's opinion did not even indicate which subsections of § 5(a) it considered with respect to each of Balderas's claims.

Here, common sense instructs that the TCCA's decision cannot rest on independent state law grounds.

First, with respect to Balderas's *Brady* and *Giglio* claims, the State only disputes that certain of the identified evidence underlying those claims was not disclosed. *See* Br. in Opp. 22-26. Balderas's subsequent application invoked, *inter alia*, Section § 5(a)(1) for these claims.[3] As applied by Texas courts, under Section 5(a)(1), an applicant need only show that: (1) the factual or legal basis for his current claims were unavailable at the time he filed his previous application; and (2) the specific facts alleged, if established, would constitute a constitutional violation that would likely require relief from either the conviction or sentence. *See, e.g., Ex parte Campbell,* 226 S.W.3d 418, 421 (Tex. Crim. App. 2007). Given that the State does not dispute that at least some evidence was previously unavailable to Balderas, the TCCA would have necessarily proceeded to the second step of the inquiry – which necessarily requires interpretation of federal constitutional law. In sum, it is of no consequence that the TCCA stated it did not consider the merits; it cannot be true that the TCCA did not consider the federal constitutional merits of Balderas's claims where the State does not contest unavailability.

Second, Texas enacted Section 5(a)(2) in response to this Court's decision in *Schlup v. Delo*, 513 U.S. 298 (1995), and the TCCA thus analyzes claims under

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[3] Section 5(a)(1) permits the TCCA to consider a subsequent application if "the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." Art. 11.071 § 5(a)(1).

Section 5(a)(2) using "the standards set forth for evaluating a gateway-actual-innocence claim announced by the Supreme Court" in *Schlup*. *Ex parte Reed*, 271 S.W.3d 698, 733 (Tex. Crim. App. 2008). For that reason alone, any decision by the TCCA under Section 5(a)(2) is plainly interwoven with federal constitutional law as pronounced by this Court.

Third, with respect to Section 5(a)(3), an applicant must show that "by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial" in sentencing a defendant to death. The Fifth Circuit has held that the TCCA reviews subsequent habeas applications presenting claims under *Atkins v. Virginia*, 536 U.S. 304 (2002), pursuant to Section 5(a)(3). This is "because a person who is intellectually disabled is constitutionally ineligible for the death penalty," and therefore, "the statutory special issues would not have been submitted to the jurors in the first place." *Busby*, 925 F.3d at 710 (quoting *Ex parte Blue*, 230 S.W.3d 151, 161 (Tex. Crim. App. 2007)). Accordingly, the Fifth Circuit has recognized that, when reviewing a subsequent application with an *Atkins* claim under Section 5(a)(3), the TCCA "necessarily considers the merits of a federal consitutional claim." *Id.* The same logic applies with equal weight to Balderas's claim that he was not competent to stand trial. *See* App. 25-26. If Balderas was incompetent to stand trial, plainly the statutory questions should never have been submitted to jurors and he is constitutionally ineligible for the death penalty.

Finally, even if the TCCA's decision were based on an independent state law ground, this Court has no way of evaluating whether the TCCA's reliance on

state law was *adequate*. Typically, a violation of a state procedural rule that is "firmly established and regularly followed" constitutes a state ground "adequate" to foreclose merits review of a federal claim. *Lee v. Kemna*, 534 U.S. 362, 376 (2002). A state court may, however, apply an otherwise generally sound rule in a manner that "renders the state ground inadequate to stop consideration of a federal question." *Cruz v. Arizona*, 598 U.S. 17, 26 (2023).

In *Cruz*, this Court reaffirmed that it has "for over a century" followed the rule that "an unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question." 598 U.S. at 26 (quoting *Bouie v. City of Columbia*, 378 U.S. 347 (1964)); *see also Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157 (1917) (holding that a state ground was adequate where it was not "without fair support, or so unfounded as to be essentially arbitrary, or merely a device to prevent a review of the other [federal] ground of the judgment"); *Walker v. Martin*, 562 U.S. 307 (2011) ("A State ground, no doubt, may be found inadequate when 'discretion has been exercised to impose novel and unforeseeable requirements without fair or substantial support in prior state law'" (quoting 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4026, p. 386 (2d ed. 1996) (Wright & Miller))).

Of course, in *Cruz* and other cases, when this Court assesses the adequacy of state-court decisions it grapples with the state court's reasoning. Where, as here, a court wholly fails to explain its reasoning, such failure should not and cannot serve as a bar to review by this Court. To find otherwise gives the TCCA *carte blanche* to deny subsequent habeas applications

without explanation, and thereby potentially shield improper merits rulings that are contrary to federal constitutional law from this Court's review. In the absence of any explanation from the TCCA, Balderas and this Court have no method to determine whether the procedural grounds in Article 11.071 § 5(a) were applied arbitrarily by the TCCA in violation of Balderas's federal constitutional due process rights.

II. At A Minimum, This Court Can And Should Vacate And Remand For The TCCA To Clarify The Grounds For Its Decision

The State next argues that this Court lacks "supervisory authority" over state court proceedings such that it cannot require the TCCA to provide adequate justification for its dismissal of Balderas's subsequent habeas application. Br. in Opp. 18-20. But this Court's authority to direct state courts to clarify the reasoning of their decisions is well settled.

This Court has repeatedly exercised its authority to grant *certiorari*, vacate the judgment of a state court, and remand for clarification of the state court's decision ("GVR") – especially where it is not clear if a state court's decision rests on independent and adequate state law grounds. *See, e.g.*, *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 78 (2000) (vacating Florida Supreme Court's judgment and remanding where there was "considerable uncertaintity as to the precise grounds for the decision" and this Court was "unclear" as to the extent the Florida Supreme Court relied on the Florida Constitution or federal law); *Cap. Cities Media, Inc. v. Toole*, 466 U.S. 378, 378 (1984) (vacating judgment of the Supreme Court of Pennsylvania and remanding where "the record did not disclose" whether it relied on

"an adequate and independent state ground"); *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 679 (1940) (vacating judgment of the Supreme Court of Minnesota and remanding explaining that "it is [] important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action").[4]

In any event, as the State acknowledges (*see* Br. in Opp. 18), this Court *does* have supervisory authority over state court proceedings when "enforcing the commands of the constitution." *Dickerson v. United States*, 530 U.S. 428, 438-39 (2000). Here, as demonstrated in Balderas's petition, "aggravating circumstances render the TCCA's failure to explain the basis for its opinion to dismiss his subsequent petition squarely incongruent with the due process guarantees of the Fifth and Fourteenth Amendments." App. 30-31.

The State claims that Balderas is asking that this Court "create a new rule exercising supervisory review over state proceedings." Br. in Opp. 18. As Balderas's petition makes clear, that is not the case. He is explicit that he "is not requesting that the Court make a blanket determination that [the boilerplate TCCA decisions] always violate petitioner's due process [rights]." App. 32. Rather, the totality of the circumstances in this case demand the Court exercise its authority, "supervisory" or otherwise, to cure a violation of Balderas's federal constitutional rights.

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[4] Even the justices of this Court that have taken issue with the Court's practice of utilizing GVR orders have recognized that a GVR order is appropriate where "clarification of the opinion below is needed to assure [this Court's] jurisdiction." *See Stutson v. U.S.*, 516 U.S. 163, 191-92 (1996) (Scalia, J. dissenting).

If the Court issues a GVR order here, it may, as a practical matter, help cabin the TCCA's practice of summarily denying subsequent applications – even if only discouraging such orders with respect to petitioners in capital cases, where the death sentence compels heightened concern for due process. The Court should not hesitate to exercise its authority, "supervisory" or otherwise, when the State is seeking to end a life. *See Eddings v. Oklahoma*, 455 U.S. 104, 117-18 (1982) (O'Connor, J. concurring) ("Because sentences of death are qualitatively different from prison sentences, this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guaranatee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake.") (internal quotation marks and citation omitted); *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) ("[O]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case.") (internal quotation marks omitted). And the TCCA should be required to issue truly adequate decisions before the State may execute individuals who may have suffered Constitutional violations.

III. There Are Compelling Reasons For The Court To Grant Balderas's Petition

The State suggests that Balderas seeks "mere error correction" unworthy of this Court's time and resources. Br. in Opp. 20. There are, however, compelling reasons for the Court to grant Balderas's petition.

First, it merits repeating that Balderas faces execution, which warrants the Court's careful scrutiny

for error. *See Gregg v. Georgia*, 428 U.S. 153, 187 (1976) ("There is no question that death as a punishment is unique in its severity and irrevocability. When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed.") (citations omitted); *Zant v. Stephens*, 462 U.S. 862 (1983) ("[T]he severity of the [death penalty] mandates careful scrutiny in the review of any colorable claim of error.").

Second, the refusal of the TCCA to review Balderas's subsequent habeas application renders it virtually impossible for Balderas to develop factual support for the newly raised claims therein. The State mistakenly suggests that this Court's decision in *Cullen v. Pinholster*, 563 U.S. 170 (2011), does not prevent the district court from taking up evidentiary issues on Balderas's newly raised claims. *See* Br. in Opp. 21-22. *Pinholster* requires that Balderas meet the heightened statutory requirements of 28 U.S.C. § 2554(e)(2) for consideration of new evidence, including that the facts underlying the new claims "would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2554(e)(2)(B). TCCA's summary dismissal of Balderas's new claims means that Balderas cannot take advantage of the evidentiary development processes that would be available to him in state habeas proceedings and cannot seek evidentiary development in federal court unless the currently available (and relatively underdeveloped) evidence supporting his new claims already meets this exacting "clear and convincing" standard.

Third, the State does not address the fact that Balderas's new claims were determined by the federal district court to be "potentially meritorious" when

granting his *Rhines* motion to stay federal habeas proceedings to allow him to exhaust his new claims. The TCCA's summary dismissal is impossible to square with the district court's holding. *See* App. 32.

Indeed, several judges have commented on the difficulty in divining meaning from the TCCA's single-sentence opinions and expressed frustration with this practice. *See, e.g.*, *Reed v. Thaler*, 2012 WL 2254217, at *11, n.6 (W.D. Tex. June 15, 2012) (Austin, J.) (explaining that in light of boilerplate decision "the Court has little choice but to wade into these waters and do its best to sort out the status of each of [petitioner's] claims" and noting that "after spending weeks with the various and sundry state court records in this case, the undersigned respectfully suggests that finding 'clarity' in the CCA's 'ambiguity' in this case is more like alchemy"); *Rocha v. Thaler*, 628 F.3d 218 (5th Cir. 2010) (Dennis, J. dissenting) (criticizing need to "examine ambiguous and obscure state court data to guess that the unexplained dismissals of state habeas claims by the [TCCA] are based on an independent and adequate state ground" as "'antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations are involved'") (quoting *Long*, 463 U.S. at 1039); *In re Davila*, 888 F.3d at 179 (explaining that the independent and adequate state ground "inquiry often proves difficult . . . as the state court frequently employs boilerplate language when dismissing claims as an abuse of the writ").

As such, Balderas's case serves as a compelling vehicle for the Court to place some limitation on the TCCA's practice, both to alleviate due process concerns and to alleviate the burden placed on the Fifth Circuit courts when analyzing the TCCA's opinions on federal habeas review. Such limits would ultimately benefit

the finality of state convictions by simplifying the legal analysis, and reducing the risk of constitutional error.

CONCLUSION

For the foregoing reasons and those stated in the the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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