No. 23-6008

IN THE

Supreme Court of the United States

MATTHEW JOHNSON,
Petitioner,

v.

BOBBY LUMPKIN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

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

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

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This is a capital case.

QUESTIONS PRESENTED

Johnson filed a petition for a writ of habeas corpus in the federal district court, pursuant to 28 U.S.C. § 2254, exactly one year from the denial of his state petition for habeas relief by the Texas Court of Criminal Appeals (CCA). In his federal petition, Johnson raised claims challenging the constitutionality of the Texas death penalty special issues answered by his jury during the punishment phase of trial. *See* Texas Code of Criminal Procedure Article 37.071 § 2(b)(1) and (e)(1). Johnson also filed a motion to recuse United States District Court Judge Ada Brown, citing the district court's issuance of an initial case-management order, imposing a deadline for the filing of Johnson's federal petition that fell prior to the one-year statute of limitation imposed by 28 U.S.C. 2244(d), but allowing for motions for extension of time—which the court granted when filed. Johnson also cited the district court's threat of sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure against Johnson's attorneys for raising claims challenging the constitutionality of the future dangerousness special issue without reference to Fifth Circuit authority that "has consistently rejected [the vagueness] argument for almost four decades," or Supreme Court authority that has "repeatedly affirmed the constitutionality of" the Texas future dangerousness special issue. ROA.618–60. The district court denied the motion to recuse, denied federal habeas relief, and denied a certificate of appealability (COA).

Did the Fifth Circuit Court of Appeals err in concluding that the district court did not abuse its discretion in denying the motion to recuse based upon the statute of limitations argument, where Johnson received the entire one year permitted by statute in which to file his federal habeas petition, and where "judicial rulings" like the case-management order at issue in this petition, "alone almost never constitute a valid basis for a bias or partiality motion," *Liteky v. United States,* 510 U.S. 540, 555 (1994)?

Did the Fifth Circuit err in denying a COA on Johnson's claims challenging the constitutionality of the Texas punishment phase special issues, finding the district court's ruling undebatable, where the claims were foreclosed by binding Supreme Court and Fifth Circuit authority that has existed for decades?

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BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

Petitioner Matthew Johnson was convicted of capital murder and sentenced to death for the immolation murder of Nancy Harris which he carried out during a convenience store robbery. Johnson has unsuccessfully appealed his conviction and sentence in state and federal court. Johnson now petitions this Court for a writ of certiorari from the Fifth Circuit's opinion denying a COA and affirming the district court's denial of a motion to recuse. Johnson first alleges that the district court's initial case-management order setting deadlines for the filing of his federal habeas petition that fell short of the one-year statute of limitation permitted by 28 U.S.C. § 2244(d) had a coercive effect on his attorney's ability to file his federal habeas petition and violated his right to due process and equal protection as an indigent defendant. However, Johnson was ultimately granted the entire one year in which to file his federal habeas petition. Further, the Fifth Circuit did not decide the constitutionality of the district court's case-management order, but, rather, determined that the district court did not abuse its discretion in denying a motion to recuse because a case-management order was not grounds for disqualification. Certiorari should thus be denied.

Johnson also seeks review of the denial of his claims challenging the constitutionality of the special issues submitted to his jury during the

punishment phase of his trial. But the Fifth Circuit correctly determined that reasonable jurists could not debate the district court's denial of these claims based upon clearly established and longstanding Supreme Court and circuit precedent. Because Johnson offers no compelling reason to grant certiorari, his petition should be denied.

STATEMENT OF JURISDICTION

The Court has jurisdiction to consider a petition for a writ of certiorari seeking review of the judgment of a court of appeals. *See* 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Facts of the Crime

The federal district court summarized the facts of the crime as follows:

> The grim facts of Johnson's capital offense are not in genuine dispute. They were recorded on a store surveillance camera and played for the jury at Johnson's capital murder trial. In May 2012, Johnson entered a convenience store and poured a bottle of what was later determined to be lighter fluid over the head of 76-year-old store clerk Nancy Harris. Johnson then demanded money. As Harris attempted to open the cash register, Johnson took two cigarette lighters, two packages of cigarettes, and a ring from Harris'[s] finger. Once Harris opened the cash register, Johnson took the money and then set Harris aflame. As Harris frantically attempted to extinguish herself and her clothing, the Texas Court of Criminal Appeals' opinion accurately described the video as showing Johnson "calmly" walk out of the store. *Ex parte Johnson,* WR-87,574-01, 2019 WL 4317046 (Tex. Crim. App. Sept. 11, 2019). Police officers arrived at the convenience store very quickly and used a fire extinguisher to put out the flaming Harris, who died five days later from her burns. A little more than an hour after setting Harris afire, Johnson was arrested shirtless carrying two new cigarette lighters, two packages of cigarettes, and Harris'[s]

ring. Police noted his unusually calm demeanor during his transport to the police station, corroborated by a video which was also played for the jury. . . .

The jury watched the video-only portion of the store surveillance video-recording of Johnson's offense and the video and audio of Johnson's post-arrest ride in a patrol car. Harris' store manager testified that Harris had been trained to cooperate with robbers and that after viewing the store video, it appeared to her that Harris had complied with all of Johnson's requests before Johnson set her afire. Harris's son identified a ring found in Johnson's possession at the time of his arrest as belonging to Harris and testified that Harris was diabetic and had a pacemaker. A resident of the neighborhood where the robbery took place testified that, on the morning of the robbery, he observed a shirtless man pushing a bicycle which was later abandoned on a street corner and he also found a tee shirt inside a garbage bin.

A homeowner testified that minutes after the robbery, Johnson knocked on his front door and then unsuccessfully attempted to force his way inside the man's home. Another local homeowner testified that he encountered Johnson, who was shirtless and wearing glasses, trying to get inside his gate on the morning of the robbery; he retreated inside his home when Johnson approached; and when another person inside his home came to the door, Johnson turned and ran off. A number of police officers and fire personnel testified about their response to Harris exiting her store while aflame and their efforts to chase and arrest Johnson as he attempted to flee from the scene with a bicycle and then on foot. Laboratory examination of the tee shirt recovered by law enforcement officers from a garbage can just blocks from the crime scene revealed that it contained traces of a medium petroleum distillate consistent with charcoal lighter fluid.

A nurse and a physician who treated Harris at Parkland Hospital testified that she was in a great deal of pain when she arrived at the hospital and for days thereafter; Harris suffered extensive second and third degree burns over her head and face, neck, shoulders, upper arms, and leg; Harris was intubated within fifteen minutes of her arrival at the hospital due to swelling in her airway and later was placed on a ventilator; Harris was heavily medicated; she also had a do not resuscitate order on file; Harris

> died on May 25, 2012 after she was removed from her ventilator. The medical examiner who performed Harris's autopsy testified Harris died due to her thermal injuries, i.e., she suffered serious burns to her entire head, chest, portions of her upper back, and portions of her left leg; she became septic; and she passed away when infection set in.
>
> The defense presented no witnesses or evidence at the guilt-innocence phase of trial.

Johnson v. Lumpkin, 593 F. Supp.3d 468, 479–82 (N.D. Tex. 2022) (footnotes omitted); Petitioner's Appendix C at a024, a026–028.

II. Evidence Relating to Punishment

A. State's evidence

At punishment, the State presented evidence of Johnson's extensive criminal history.

> More specifically, a law enforcement officer and former paramour of Johnson both testified about an incident in September 1993 in which Johnson attempted to break into an apartment where his girlfriend and her children were living and, when he failed to do so, Johnson set a fire on the back porch of the apartment. Another law enforcement officer testified about a separate incident in November 1993 in which he arrested Johnson for outstanding warrants and possession of marijuana. A law enforcement officer testified about an incident in May 1994 in which he was dispatched to a scene where a man and woman were arguing by the side of a road and, when Johnson was advised that he was under arrest for outstanding warrants, Johnson violently resisted arrest, which led to Johnson receiving a probated sentence for resisting arrest—which probation was later revoked. A law enforcement officer testified about a July 1994 incident in which Johnson leaped from a moving vehicle during a traffic stop, ran from police, and violently resisted arrest. A law enforcement officer testified about an August 1995 incident in which, after Johnson was arrested for threatening his wife and outstanding warrants for theft, evading arrest, and aggravated assault with a deadly

weapon, Johnson verbally threatened the arresting officer. Two law enforcement officers testified about an October 2002 incident in which Johnson was arrested and later convicted for evading arrest.

A middle-aged woman testified about an incident in June 2004 in which Johnson forced her from her pickup truck, threw her to the ground, and drove off. Two law enforcement officers testified about the injuries observed on the carjacking victim, as well as the high speed chase through a residential neighborhood which ensued in which Johnson crashed the badly damaged pickup truck and then led police on a chase on foot and which eventually resulted in Johnson's arrest and conviction on a charge of robbery. Another law enforcement officer testified about a September 2004 incident in which Johnson, who was at that time the subject of a protective order, was arrested for attempting to kick in the door of his wife's residence.

One of Johnson's fellow Texas Department of Criminal Justice ("TDCJ") inmates testified Johnson frequently refused to go to his work assignment, refused to go to class, and grew more belligerent during their time as bunk mates, which eventually led to Johnson getting a lot of disciplinary cases and later assaulting him. A female former TDCJ correctional officer testified about an incident in February 2006 in which Johnson exposed himself and masturbated in front of her, which led to her writing a disciplinary case against him.

A TDCJ Warden testified about the TDCJ's inmate classification system, the conditions under which TDCJ inmates are housed, the availability of contraband (including weapons) inside TDCJ units, and differences between inmates housed on death row and in the general population.

One of Johnson's former employers testified that in November 2011 Johnson stole a computer monitor, cash, and several state automobile inspection books worth in excess of two thousand dollars from his oil change business; Johnson was caught on the store's surveillance cameras; he fired Johnson; and following Johnson's arrest, Johnson filed for unemployment benefits. A hospital social worker testified about an incident in mid-April 2012 in which Johnson was brought into the hospital in handcuffs in a highly confused and agitated state and it took eight

or nine staff to hold Johnson down so that a body net could be secured to keep Johnson from harming himself. A hotel maid testified about an incident in late-April 2012 in which Johnson exposed himself to her. A female Dallas County jail detention officer testified that during Johnson's pretrial detention he threatened her, refused to clean a shower, and was eventually moved to another part of the jail. . . .

The prosecution called three rebuttal witnesses. A nurse who worked in the burn ward at Parkland Hospital testified about Harris' difficulties after her admission to the hospital. One of the police officers who saw Harris aflame in the parking lot of the convenience store where she worked testified about his communications with her once the fires on her had been extinguished. Harris' daughter-in-law testified about the impact of Harris' murder on her family.

Pet. Appx. C at a028–031, a036 (footnotes omitted).

B. Defendant's evidence

The defense presented an extensive case in mitigation. Johnson himself was the defense's first witness. He testified that he drank a bottle of wine, took a Xanax, and smoked one-hundred dollars' worth of crack the night before the robbery; he put lighter fluid in a water bottle; he poured it over Harris's head to force her to comply with his directive to open the cash register; after she complied, he struck the lighter twice; but he did not intend to set Harris on fire because he did not know the lighter fluid was flammable. Johnson also testified extensively concerning his difficult childhood, his long history of abusing drugs and alcohol, and his addiction to drugs. In addition, Johnson testified he was molested on two occasions as a child, once by a family friend and once by a relative. Johnson also admitted to committing a number of criminal offenses, including stealing a car and wrecking it at age seventeen; assaulting his girlfriend; assaulting his wife; stealing a truck, selling drugs, and robbing his employer.

On cross-examination, Johnson admitted he came from a good family in which both his parents were gainfully employed; he dropped out of high school to sell drugs; he has no learning disabilities; his criminal history included arrests for pushing a

police officer, multiple assaults, multiple thefts, violating a protective order, driving a stolen car, throwing a burning object on his girlfriend's porch, possession of marijuana, and biting two police officers during an arrest; he pleaded guilty to aggravated assault for pointing a gun at his sister-in-law Courtney Johnson; while incarcerated, he got into a fight with another inmate which resulted in his loss of good time credits; he got a tattoo while in prison in violation of prison rules; and he got a tattoo while in jail awaiting trial in violation of jail rules.

A quartet of Johnson's former co-workers at a company that assembled compressors each testified that Johnson was a good coworker who nonetheless suffered from attendance problems which led to his dismissal. A Rowlett real estate agent and friend of Johnson's wife testified that she helped Johnson get a car and find a job; she opined that Johnson was good with his daughters, never aggressive, and a good tenant.

Johnson's wife Daphne testified she had known Johnson since they were in elementary school; they married at age eighteen; their relationship was volatile and they were often violent with each other, especially when Johnson was high on drugs; she was aware of Johnson's marijuana use from an early age but did not become aware Johnson was smoking crack until he confessed same to her around 2003; thereafter Johnson went on increasing drug binges in which he would disappear for one to two days; she locked him out of their home four-to-six times when he was on crack binges; on one occasion, Johnson broke a window to gain entrance to their home; on another occasion, Johnson got their maintenance man to open the door for him; Johnson was only violent when on drugs; at one point, she obtained a restraining order against Johnson; when sober, Johnson was affectionate with her and their daughters; Johnson stayed sober for about two years after he returned home from prison in 2009; Johnson became depressed and returned to drug abuse in the Fall of 2011 after he lost his job; and they were unable to get Johnson into a residential drug treatment program because they lacked insurance.

Dr. John Roache, an expert on addiction and pharmacology, testified that addiction is a learning process which happens with the repeated use of drugs leading to the activation of circuits within the brain in ways that take control of the brain until use of

drugs becomes a primary motivating factor with harmful consequences; addiction is a chronically relapsing disorder consisting of periods of abstinence followed by relapse; crack cocaine is a neuro-stimulant; Johnson's medical records reveal that he is depressed and addicted to crack cocaine; cocaine tends to make one more aggressive; the video of Johnson in the patrol car shows Johnson coming down from drugs and is consistent with Johnson being on a cocaine binge at the time of his capital offense; it takes more than will power to end addiction; there is no medication available to treat long-term cocaine addiction; a family history of drug and alcohol addiction increases a person's chance of becoming an addict; and he believed Johnson was intoxicated at the time of his capital offense.

Johnson's older brother Timothy testified that he was then serving a sentence for robbery; Johnson kept things to himself as a child; Timothy started using drugs in high school; he observed Johnson with red eyes from marijuana use at age ten or eleven; their diabetic mother suffered a heart attack only a few weeks before trial and was not available to testify; their father died in 2003, which profoundly affected Johnson; Johnson and Daphne had married young; Johnson was a good father; and he once broke up a fight between Johnson and Daphne.

Johnson's mother-in-law testified that she had known Johnson since he was in elementary school with her daughter; Johnson and Daphne were married at age eighteen; Daphne's father was a drug addict wo was murdered; she was unaware that Johnson and Daphne had ever been violent with each other; Johnson was a good person and a very good father; Johnson was stressed and depressed in the months before the murder due to being out of a job; and Johnson was a faithful Christian.

The aunt of Johnson's wife testified that Johnson was kind and sweet when sober; Johnson was a good father who loved his daughters; she first noticed signs of Johnson's depression in 2011; thereafter Johnson would go out at night and not return; she and other members of the family would go out looking for Johnson; she was concerned Johnson might be suicidal; despite the foregoing she had never seen Johnson high and was unaware of any violence between Johnson and his wife.

> The sister of Johnson's wife testified that she had known Johnson for most of her life but had only been aware of Johnson's drug addiction in recent years; she was unaware that Johnson and his wife were ever violent with each other; when Johnson was high he would sometimes call her to come pick him up; Johnson was depressed and possibly suicidal; Johnson often spoke with her regarding his drug problems and gave her his money so he would not spend it on drugs; a week before his capital offense, Johnson turned himself into police and asked to be locked up because he needed help; and Johnson was depressed when police refused to arrest him.
>
> A former TDCJ employee testified regarding the TDCJ's inmate classification system, discussed Johnson's disciplinary case history and classification status during his prior incarceration, and explained Johnson had left the TDCJ as a class G-1 inmate.
>
> A co-worker of Johnson's wife and self-described youngest godmother of Johnson testified that Johnson spoke with her often during the 2009-12 timeframe; she believed Johnson was a wonderful and loving father; she was unaware of any violence between Johnson and his wife; Johnson was never aggressive toward her and she was unaware of any signs of Johnson's drug use; and Johnson's capital offense was inconsistent with Johnson's character.
>
> A researcher in prison violence testified that he had performed a risk assessment on Johnson and, based upon his evaluation of Johnson's educational background, prior prison record, and other factors (including Johnson's lack of gang membership), he believed Johnson posed less of a risk of future violence inside prison than most capital offenders. A former prison warden testified that, based on his assessment of Johnson's background (including his prior criminal history) and prison record, he believed Johnson posed a low risk of violence if incarcerated.

Pet. Appx. C at a031–036 (footnotes omitted).

III. The State-Court and Federal Appellate Proceedings.

Johnson was indicted, convicted, and sentenced to death in Dallas County, Texas, for the capital murder of Nancy Harris during a convenience store robbery. ROA.830-34, 1565. The CCA affirmed his conviction and sentence on direct appeal. *Johnson v. State*, No. AP-77,030, 2015 WL 7354609, at *1 (Tex. Crim. App. Nov. 18, 2015) (unpublished); ROA.1447–1529. This Court denied certiorari review. *Johnson v. Texas*, 579 U.S. 931 (2016).

Johnson filed a state habeas application. ROA.12404–573. The trial court entered findings of fact and conclusions of law recommending that relief be denied. ROA.13266–398. The CCA adopted most of the trial court's findings and conclusions, and based on those findings and its own review, denied habeas relief. *Ex parte Johnson*, No. WR-86,571-01, 2019 WL 4317046, at *3 (Tex. Crim. App. Sept. 11, 2019) (unpublished); ROA.17933–39.

Johnson filed a federal habeas petition in the federal district court. ROA.90–195. The Director answered. ROA.493–592. On February 8, 2022, Johnson filed a motion to recuse U.S. District Judge Ada Brown. ROA.684–708. On March 23, 2022, the district court denied Johnson's motion to recuse, denied habeas relief, and denied a COA. Pet. Appx. C at a021. On July 18, 2023, the Fifth Circuit affirmed denial of the motion to recuse, and denied COA, *Johnson v. Lumpkin,* 74 F.4th 334, 343 (5th Cir. 2023); Pet. Appx. A at a003; and then denied a petition for panel rehearing and rehearing on banc, 76

F.4th 1037 (5th Cir. Aug. 11, 2023); Pet. Appx. B at a019. This instant petition followed.

REASONS FOR DENYING THE WRIT

Johnson presents no compelling reason for granting review. *See* Sup. Ct. R. 10. Johnson must obtain a COA as a jurisdictional prerequisite to obtaining appellate review by the Fifth Circuit. 28 U.S.C. § 2253 (c)(1)(A); *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). The COA statute requires the circuit court to make only a "threshold inquiry into whether the circuit court may entertain the appeal," and permits issuance of a COA only where petitioner "has made a substantial showing of the denial of a constitutional right." *Miller-El*, 537 U.S. at 336 (citing *Slack,* 529 U.S. at 482-83; 28 U.S.C. § 2253 (c)(2)); *see also Buck v. Davis,* 580 U.S. 100, 115–16 (2017). This standard "includes showing that reasonable jurists could debate (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484 (internal quotation marks and citation omitted). But Johnson's challenges to the constitutionality of Texas's punishment phase special issues have been repeatedly rejected by the Fifth Circuit. Further, this Court has upheld the constitutionality of the Texas sentencing scheme. Both the district court and the Fifth Circuit were bound by this precedent and reasonable jurists could not

debate the denial of relief. Johnson presents no compelling reason for this Court to revisit these issues now.

While the Fifth Circuit had jurisdiction "to consider whether a district court judge properly declined to stand recused and therefore had the authority to deny a habeas petition" without the issuance of COA, the denial of a motion to recuse is reviewed under the abuse of discretion standard. *Trevino v. Johnson,* 168 F.3d 173, 177–78 (5th Cir. 1999); *United States v. Scroggins,* 485 F.3d 824, 829 (5th Cir. 2007). The Fifth Circuit correctly determined that the court did not abuse its discretion in setting case-management deadlines because Johnson was ultimately granted the entire one year allotted for the filing of federal habeas petitions and, regardless, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States,* 510 U.S. 540, 555 (1994). Johnson fails to establish how the Fifth Circuit erred or why any such error is so compelling that this Court's intervention is called for. Certiorari review should therefore be denied.

ARGUMENT

I. The District Court's Case-management Order Violated no Constitutional Right, nor did it Justify Recusal Because Johnson Utilized the Entire One-Year Period Permitted by 28 U.S.C. § 2244(d) to File his Federal Habeas Petition. (Issue 1)

Johnson asks the Court to grant certiorari to determine whether 28 U.S.C. § 2244(d), providing that a "1-year period of limitations shall apply" to

applications filed pursuant to 28 U.S.C. § 2254 requires a federal district court to allow a federal habeas applicant the full one-year period provided for by statute, notwithstanding the court's inherent power to control its own docket. *See* Pet. at 15–19. But the Court should not decide this issue now. Not only was Johnson ultimately given the entire one-year period in which to file his federal habeas petition, but this was not the issue decided by the Fifth Circuit. Rather, the Fifth Circuit determined that the district court did not abuse its discretion in denying a motion to recuse, holding that "the district court's case-management order is not a ground for disqualification under 28 U.S.C. § 455(a)." Pet. Appx. B at a019; *see also* Pet. Appx. A at a013 (*citing Liteky v. United States*, 510 U.S. 540, 555 (1994)).

A. Relevant facts and procedural history.

Relevant to this Issue and the next, following the denial of state habeas relief on September 11, 2019, and upon Johnson's motion, a federal district court magistrate judge signed an order appointing federal habeas counsel on October 23, 2019, and ordering Johnson to file his federal habeas corpus petition by May 1, 2019. *See* ROA.10–17, 25–29 (Motion Appointing Counsel and Setting Deadlines). This scheduling order also provided deadlines for the respondent, and provided that the parties may seek extensions of time. ROA.25–29. Johnson filed his first motion for extension of time on April 6, 2020, seeking to file his petition on September 11, 2020—the full one-year

provided under AEDPA—and asserting that the "global pandemic makes the current filing deadline short of the one-year limitations period, impractical." ROA.51–52. The district court granted the motion in part, but ordered Johnson to file by July 1, 2020, and noted that nothing in AEDPA's legislative history requires that the federal court allow a petitioner to wait until the final day of the one-year limitations period to file his petition. ROA.66–68.

Johnson filed his second motion for extension of time on June 11, 2020, seeking the remainder of the limitations period, and again citing the global pandemic as grounds. ROA.69–85. This motion was granted, ROA.86–89, and Johnson's petition was filed on September 11, 2020, precisely one year from the denial of state habeas relief, ROA.90–415.

On February 8, 2022, Johnson filed a motion to recuse District Judge Ada Brown, arguing her impartiality could be questioned based upon her initial denial of a full one year to file his petition, and her later warning of possible sanctions against counsel for raising a claim challenging the constitutionality of the future-dangerousness issue. ROA.684–708; 28 U.S.C. § 455(a).[1] On March 23, 2022, the district court denied both the motion to

[1] Prior to the motion to recuse, Johnson filed a motion seeking to modify the scheduling order due to extraordinary circumstances, i.e., the global pandemic, by staying proceedings indefinitely so that he could amend his petition; this motion was denied. *See* ROA.416–75. He then filed a motion to stay proceedings, pending conclusion of the pandemic, or alternatively extend time to file a reply. ROA.593–605. The court denied the stay but granted the extension—after Johnson had filed his reply—ordering Johnson to also explain, within his reply, why his claim for relief

recuse and federal habeas relief. *See* Pet. Appx. C. at a102. Regarding the portion of the recusal motion based upon the statute of limitations, the district court first noted that Johnson cited no legal authority recognizing an absolute right to file his application on the last day of the applicable one-year limitations period under AEDPA, and that "[s]uch an interpretation of AEDPA would be inconsistent with the congressional intent underlying its passage . . . to advance finality of state court criminal judgments, streamline federal habeas proceedings, and reduce delays in the execution of state and federal criminal sentences, particularly in capital cases." *Id.* at a022–023; *see Mayle v. Felix,* 545 U.S. 644, 662 (2005); *Rhines v. Weber,* 544 U.S. 269, 276 (2005). The court then reasoned that, given the limitations imposed by AEDPA, its refusal to indefinitely stay all proceedings may furnish a basis for appeal but not for recusal. Pet. Appx. C at a023 (citing *Liteky,* 510 U.S. at 555–56; 28 U.S.C. § 455).

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challenging the constitutionality of the future dangerousness special issue did not warrant Rule 11 sanctions for Johnson's failure to reference Circuit authority that "has consistently rejected [the vagueness] argument for almost four decades," or Supreme Court authority that has "repeatedly affirmed the constitutionality of" the Texas future dangerousness special issue. ROA.618–60; *see also* ROA.658–59 (Johnson's "second claim for relief is bereft of any explanation as to why [the district court] should ignore decades of Fifth Circuit case law," and ordered counsel to do so in order to "avoid the possible imposition of sanctions under Rule 11 of the Federal Rules of Civil Procedure[.]") Johnson replied to the threat of sanctions, ROA.661–83, before filing his motion to recuse, which included both the statute-of-limitations argument and the threat of sanctions as grounds for recusal. Judge Brown denied the motion to recuse on both grounds, *see* Pet. Appx. C at a021–024, and the Fifth Circuit affirmed, but Johnson does not now raise the sanctions argument.

On appeal, Johnson asked the Fifth Circuit to determine whether the district court abused its discretion in refusing to grant the motion for recusal arguing, in part, that an "objective observer" would question the district court judge's impartiality because the court initially refused to give him the entire one-year period to file his federal habeas petition. *See* COA Brief at 36–47.

B. The Fifth Circuit did not err in rejecting the issue before that court—whether the district court abused its discretion in denying the motion to recuse.

Pursuant to 28 U.S.C. § 455(a), "[a]ny ... judge ... shall disqualify [her]self in any proceeding in which [her] impartiality might reasonably be questioned." Under this objective standard, "the relevant inquiry is whether a 'reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality.'" *Trevino,* 168 F.3d at 178 (citing *Health Servs. Acquisition Corp. v. Liljeberg,* 796 F.2d 796, 800 (5th Cir. 1986)) (internal quotation marks omitted)); *see also Liteky,* 510 U.S. at 548 ("Quite simply and quite universally, recusal was required whenever 'impartiality might reasonably be questioned.'"). A "reasonable person standard in the recusal context contemplates a 'well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious person.'" *Trevino,* 168 F.3d at 178 (citing *United States v. Jordan,* 49 F.3d 152, 156 (5th Cir. 1995)). "Recusal is required when, objectively speaking, 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally

tolerable.'" *Rippo v. Baker,* 580 U.S. 285, 287 (2017) (citing *Withrow v. Larkin,* 421 U.S. 35, 47 (1975)).

Applying this standard, the Fifth Circuit determined that the district court did not abuse its discretion in denying the motion to recuse. First, the circuit court found that Johnson "cited no governing legal authority recognizing the right to delay his briefing until the final day of AEDPA's one-year statute of limitations" but, rather, "a district court has 'the inherent authority to manage their dockets and courtrooms with a view toward the efficient and expedient resolution of cases.'" Pet. Appx. A at a013 (citing *Dietz v. Bouldin,* 579 U.S. 40, 47 (2016)). Second, citing this Court's precedent, the Fifth Circuit held "that 'judicial rulings alone almost never constitute a valid basis for a bias or partiality motion.'" *Id.* (citing *Liteky,* 510 U.S. at 555). Accordingly, the circuit court concluded that "'a reasonable person' who knows 'all the circumstances' would not 'harbor doubts about the district court's impartiality' on this basis." *Id.* (citing *Trevino,* 168 F.3d at 178; *Buck,* 580 U.S. at 115–16).

Johnson petitioned the Fifth Circuit for rehearing en banc, arguing that the panel opinion stood "for the proposition that a district court has power to shorten the one-year statute of limitations." Pet. Appx. B at a018–019. In denying rehearing, the court admonished that "the opinion stands for no such thing" but holds:

> only that the district court's case-management order is not a ground for disqualification under 28 U.S.C. § 455(a). Especially probative for that holding is the fact that the district court ultimately *granted* Johnson the extension he sought. Our conclusion that the district court was not required to recuse says nothing about the hypothetical issue of whether a district court would commit legal error if it did order a post-conviction habeas petitioner to file his petition before the deadline provided by the statute of limitations.

Id. at a019 (emphasis in original). The circuit court chastised Johnson's counsel for seeking rehearing on the above-cited ground, accusing them of "badly misstat[ing] the opinion's conclusion" when a "good-faith reading of the court's opinion clearly shows that it does not hold what counsels says it holds." *Id.*

Nevertheless, Johnson once again attempts to refocus the issue on the hypothetical question, whether the district court had the ability to set case-management deadlines that fell short of the one-year statute of limitations, rather than the issue actually decided by the Fifth Circuit—whether the court erred in denying the motion to recuse. But the Fifth Circuit correctly determined that the district court did not abuse its discretion because a reasonable person would not question the court's impartiality. The imposition of case-management deadlines demonstrated no probability of bias that was too high to be constitutionally tolerable. *See Rippo,* 580 U.S. at 287.

Indeed, the district court's case-management orders demonstrated no bias—actual or presumptive. *See Buntion v. Quarterman,* 524 F.3d 664, 672 (5th Cir. 2008) ("Generally, the Supreme Court has recognized two kinds of

judicial bias: actual bias and presumptive bias.") (*citing e.g., Withrow,* 421 U.S. at 47 ("[V]arious situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."); *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813 (1986) (judge standing to gain in related litigation should be disqualified); *Ward v. Vill. Of Monroeville,* 409 U.S. 57 (1972) (adjudicator disqualified for receiving portion of fines); *In re Murchison,* 349 U.S. 133 (1955) (judge disqualified because he acted as both a one-man grand jury and trial judge); *Johnson v. Mississippi,* 403 U.S. 212 (1971) (judge who was subject of personal attacks and a lawsuit by defendant could not preside)). The district court entered a routine scheduling order in conjunction with the order appointing counsel. Notably, this initial case-management order was signed by Magistrate Judge Rutherford—who rendered no other substantive ruling in this case—not District Judge Brown, who was the subject of the recusal motion. Further, the scheduling order set forth the initial filing requirements and deadlines for both parties and anticipated motions for extension of time. *See* ROA.28–29. Johnson's attorney sought and was granted two extensions of time, ultimately allowing exhaustion of the full one-year period in which to file his petition. And Johnson timely filed on the last day of the limitations period.

While claiming a "reasonable observer would interpret the district court's orders purporting to give Johnson substantially less time to file his

habeas petition than is prescribed by federal law as indicating the court was not impartial," COA Brief at 38–39, the court's orders were in keeping with the intended purpose of the statute. *See* Pet. Appx. C at a022–023. As the district court explained in granting Johnson's first extension of time: "Nothing in the legislative history of the AEDPA requires a federal district court to allow a federal habeas corpus petitioner to wait until the final day of the AEDPA's statutory limitations period to file an original federal habeas corpus petition." ROA.66. In fact, the court noted, such a conclusion is contrary to AEDPA's intended purpose of streamlining federal habeas corpus proceedings and reducing unnecessary delay. ROA.66–67. The court cited Supreme Court authority for the proposition that "'[t]he AEDPA statute of limitation promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh, and lends finality to state court judgments within a reasonable time.'" ROA.67 (quoting *Day v. McDonough,* 547 U.S. 198, 205–06 (2006)). In contrast, "[t]he arbitrary rule advocated by [Johnson] mandating the filing of an original federal habeas corpus petition on the final day of the AEDPA's limitations period furthers none of the foregoing legislative purposes underlying AEDPA." *Id.*

Far from exhibiting unfair bias, the district court intended the early deadline to inure to Johnson's benefit. Indeed, the district court noted that

waiting until the expiration of the limitations period could prove to a petitioner's detriment should he wish to file an amended petition after the respondent answers. Pet. Appx. C at a022 n.1. Regardless, the district court did not truncate the statutorily mandated period for filing his petition. Rather, the court granted two extensions ultimately allowing for the full one-year period for filing. Johnson cannot show that the district court's management of its docket demonstrated actual or presumed bias.

This tentative and ultimately flexible deadline set by the district court does not provide evidence of bias. As this Court has held, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky,* 510 U.S. at 555. Such rulings cannot show reliance on an extrajudicial source and only rarely "evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved." *Id.* Such rulings are, instead, "proper grounds for appeal, not for recusal." *Id.* The district court's reluctance to initially grant him the full year does not "display a deep-seated . . . antagonism that would make fair judgment impossible." *Id.* Regardless, as noted, he received the full one-year in which to file. As such, neither the tentative deadline nor the court's ruling on a motion for extension of time were grounds for recusal, and the district court did not abuse its discretion in issuing either order or denying the recusal motion.

Furthermore, the district court's case-management orders were not unauthorized or even unreasonable. The district court has the inherent power to control its docket and prevent undue delays in the disposition of pending cases. *See*, *e.g.*, *Dietz,* 579 U.S. at 41; *Landis v. N. Am. Co.,* 299 U.S. 248, 254 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."). As both the district court and the Fifth Circuit correctly noted, Johnson cited to them no legal authority prohibiting the district court from imposing reasonable deadlines in the maintenance of its docket. Pet. Appx. A at a013; Pet. Appx. C at a214.

While 28 U.S.C. §2244(d)(1) sets a one-year "period of limitation" that "shall apply" to the filing an application for writ of habeas corpus and sets forth triggering events from which that period of limitation begins to run, the statute does not mandate that the court permit the entire year at the outset—rather, the statute sets a period of *limitation* on the *petitioner* for filing an application. Johnson now cites cases from other circuits[2] suggesting a court may not truncate the time allowed to the petitioner's detriment, but these cases are inapposite to Johnson's circumstances and do not justify the grant of certiorari on this issue. *See* Pet. at 15–16. These cases involve pro se petitioners who,

[2] Johnson did not cite these cases in either the district court or the Fifth Circuit. *See* ROA.709–33 (motion to recuse); COA Brief at 36–47.

unlike Johnson, were unable to timely file a petition within the statutorily permitted time-period and address whether equitable tolling should apply.

Indeed, *Grant v. Swarthout*, involved a habeas petitioner who used most of his one-year limitations period before filing his state habeas petition, and was untimely in the filing of his federal habeas petition because of delay by the prison in issuing a "prison account certificate" necessary for filing his federal petition in forma pauperis. 862 F.3d 914, 917 (9th Cir. 2017). Grant was consequently denied equitable tolling because "he had not shown that he was diligent throughout the entire 354 days prior to his filing of his state petition for postconviction relief." *Id.* at 919. The Ninth Circuit held "that it was improper for the district court to fault the petitioner for filing his state petition for postconviction relief late in the statute-of-limitations period in reliance on his having a full year to file both his state and federal petitions, as promised by AEDPA." *Id.* The circuit court held, "it is . . . inherently reasonable for a petitioner to rely on that statute of limitations and to plan on filing at any point within that period" and a court should not retroactively assess a petitioner's actions to determine what a petitioner could have done differently. *Id.* at 919.

In *Valverde v. Stinson*, the habeas petitioner was unable to timely file due to misconduct by a corrections officer who confiscated Valverde's legal papers and did not return them until after the AEDPA filing deadline had passed. 224 F.3d 129, 135–36 (2d Cir. 2000). The Second Circuit remanded for

a determination of diligence by Valverde, finding that he was not ineligible for equitable tolling because he waited to file late in the limitations period. *Id.* Rather, the circuit court held that Valverde "would have acted reasonably by filing his petition any time during the applicable one-year period of limitations" and should not be faulted for failing to file early or take extraordinary precautions early in the limitations period against rare and exceptional circumstances that occur later in that period. *Id.* at 136.

Similarly, *United States v. Gabaldon*, also involved the late filing of a federal petition due to extraordinary circumstances—the confiscation of the petitioner's legal papers by the prison officials—with the district court concluding Gabaldon was not diligent in pursuing his claims prior to the seizure because he "improvidently delayed filing his motion." 522 F.3d 1121, 1124–26 (10th Cir. 2008). Citing *Valverde*, the Tenth Circuit similarly held that Gabaldon should not be penalized for any delay in filing his motion while preparing his brief because he had one year to file. *Id.* at 1126.

In contrast, while Johnson's district court imposed deadlines short of the one-year statute of limitation, the district court did not refuse to extend those deadlines, nor did it refuse to accept Johnson's pleading filed after the court-appointed date but before the expiration of the one-year limitations period. For this reason alone, these cases are entirely distinguishable and irrelevant to the issue before this Court.

Regardless, as discussed above, the issue before the Court is not whether the district court had the authority to manage its caseload. Rather, did the district court's orders demonstrate bias against Johnson, and did the district court abuse its discretion in denying a motion to recuse. As noted by both appellate courts, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion" and the denial of such is the basis for appeal, not recusal. *Liteky*, 510 U.S. at 555-56. The cited cases do not speak to this issue and are irrelevant. The Fifth Circuit did not err in concluding that that district court did not abuse its discretion. Certiorari review must be denied.

II. The District Court Did Not Violate Johnson's Right to Equal Protection by Setting Case-Management Deadlines. (Issue 2)

In a second, related claim, Johnson asks the Court to grant certiorari review to determine whether the Equal Protection Clause requires a district court to treat indigent prisoners who seek habeas relief pursuant to § 2254 similarly to non-indigent prisoners by allowing both classes of Applicants the one-year period provided by § 2244. *See* Pet. at 19–21. Johnson contends that, had his indigence not required him to file a motion requesting appointed counsel, the district court would not have set an earlier filing date for his habeas petition rather than the one-year deadline afforded by statute. Consequently, the "Fifth Circuit has created a rule that is incompatible with the Fifth and Fourteenth Amendments, because it permits district courts to

treat indigent habeas petitioners differently from non-indigent petitioners." *See* Pet. at 20–21 (citing *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.")).

As with the first claim, certiorari review is not warranted because Johnson was not treated differently than a non-indigent petitioner—he was permitted the entire one-year period in which to file his petition and did in fact utilize the entire period to timely file. Moreover, as previously argued, the Fifth Circuit did not "create a rule" permitting the disparate treatment of indigent and wealthy petitioners. Rather, the circuit court determined that the district court did not abuse its discretion in denying a motion to recuse itself, because "judicial rulings alone"—like the case-management rulings in this case—"almost never constitute a valid basis for a bias or partiality motion." Pet. Appx. A at a013 (citing *Liteky,* 510 U.S. at 555). This ruling has no bearing on the Equal Protection Clause.

Furthermore, while Johnson made this argument in his motions for extension of time before the district court, ROA.58–59, 76–78, he did not make it to the Fifth Circuit in his motion for COA.[3] Therefore, the claim is not

[3] Johnson mentioned this district court argument, briefly, in the Statement of the Case Section IV(B), describing the federal habeas proceedings in the district

properly before the Court and should not be considered. *Meyer v. Holley*, 537 U.S. 280, 292 (2003) ("But in the absence of consideration of that matter by the Court of Appeals, we shall not consider it."); *Pennsylvania Dept. of Corr. v. Yeskey*, 524 U.S. 206, 212–13 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.").

Regardless, Johnson offers absolutely no evidence of disparate treatment based upon indigency, or any legal authority to support his claim. He cites only to the fact that an indigent petitioner must seek appointment of counsel as opposed to a petitioner with paid counsel, as support for his claim. He suggests the district court's entry of a routine scheduling order in conjunction with the order appointing counsel amounted to an action "not based on anything the court learned during the course of the proceeding," but "a deep-seated antagonism which makes fair judgment impossible, [and] are ones which this Court made clear in *Liteky* should be found to require a court's recusal." Pet. at 19 n.5. But the entering of a scheduling order—setting forth the filing requirements and deadlines of both parties and *providing for extensions of*

court, *see* COA Brief at 23, but made no other argument and cited no legal authority in support of an Equal Protection claim.

time—by a magistrate judge who rendered no other substantive rulings on this case, does not subject indigent petitioners to the "invidious discriminations" anticipated by the Equal Protection Clause. *See Griffin,* 351 U.S. at 18. And, again, Johnson received the entire one-year period in which to timely file his federal habeas application, therefore he cannot prove an equal protection violation, and this issue does not deserve this Court's consideration.

III. Johnson Presents No Compelling Reason for This Court to Reexamine the Constitutionality of Texas's Future Dangerousness Special Issue. (Issue 3)

In his third claim, Johnson asks the Court to grant certiorari to resolve whether the Texas future dangerousness special issue violates a capital defendant's right to due process and to a fair trial because the jury is punishing the defendant for future conduct, rather than past conduct, and because the predictions about future conduct are inherently unreliable. Pet. at 21–32.[4] The

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[4] Pursuant to Texas Code of Criminal Procedure Article 37.071 § 2(b)(1) and (e)(1), Johnson's jury was asked to decide the following issues on punishment:

> Special Issue No. 1: Do you find from the evidence beyond a reasonable doubt that there is a probability that [Johnson] would commit criminal acts of violence that would constitute a continuing threat to society?
>
> Special Issue No. 2: Do you find, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, [Johnson], that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed?

ROA.2590.

Fifth Circuit did not err in concluding the issue was not debatable. This argument has been rejected by this Court, and repeatedly rejected by the Fifth Circuit for decades. Johnson presents no new authority or even a circuit split that would justify this Court revisiting this issue now.

A. This Court has held, the future-dangerousness special issue is not unconstitutionally vague.

Johnson first argues that, because the jury must answer the future dangerousness special issue before a sentence of death may be imposed, this special issue is an eligibility factor and must narrow the class of death-eligible defendants. Pet. at 23. He complains that the issue fails to perform this narrowing function because it fails to define the terms "probability" and "criminal acts of violence" and is thus unconstitutionally vague. Pet. at 21–22.

The district court denied relief on this claim, Pet. Appx. C at a044–057, and the Fifth Circuit denied COA. In finding no reasonable jurists could debate the district court's conclusion, the Fifth Circuit cited this Court's authority in holding that "Texas's capital punishment scheme that asks 'whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society' is not unconstitutionally vague." Pet. Appx. A at a007 (citing *Tuilaepa v. California*, 512 U.S. 967, 974 (1994) (Citing Texas future danger issue as one previously upheld against vagueness challenge.); *Jurek v. Texas*, 428 U.S. 262, 274–76 (1976) (Rejecting

argument that future danger special issue is vague because it is impossible to predict future behavior.)). Further, the Fifth Circuit has "applied the Supreme Court's holding in *Jurek* that 'reject[ed] the contention that the [future dangerousness] issue is impermissibly vague,'" Pet. Appx. A at a077 (citing *Woods v. Johnson*, 75 F.3d 1017, 1034 (5th Cir. 1996)), and repeatedly re-affirmed this holding, *id.* (citing, *e.g.*, *Sprouse v. Stephens*, 748 F.3d 609, 622 (5th Cir. 2014) ("Texas does not run afoul of [Supreme Court precedent] by not expressly defining these terms.") (citation omitted); *Leal v. Dretke*, 428 F.3d 543, 553 (5th Cir. 2005) (listing numerous Fifth Circuit opinions rejecting similar arguments)). The Fifth Circuit's reliance on this clearly established authority was correct.

In Texas, the eligibility determination—which requires the finding of an aggravating circumstance that genuinely narrows the category of death-eligible defendants and cannot be unconstitutionally vague—occurs at the guilt-innocence phase of trial, not the punishment phase where the future danger special issue is presented. *See Jurek,* 428 U.S. at 270–71 ("[T]he Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed."); *see also Tuilaepa*, 512 U.S. at 971–74 (discussing eligibility and selection decision); *Loving v. United States*, 517 U.S. 748, 755–56 (1996); *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998). Consequently, the punishment phase is the selection phase,

where the jury makes an individualized determination whether to impose the death penalty on an already-eligible defendant. *See* Pet. Appx. C at a047 (citing *Buchanan,* 522 U.S. at 275–77). As found by the Fifth Circuit, this Court has consistently upheld the constitutionality of the future dangerousness issue. *See Johnson v. Texas*, 509 U.S. 350, 373 (1993); *Franklin v. Lynaugh*, 487 U.S.164, 171 (1988); *Jurek*, 428 U.S. at 274–76; *see also Pulley v. Harris*, 465 U.S. 37, 49 n.10 (1984) (stating that Texas's punishment issues are not impermissibly vague because they have a "common-sense core of meaning"). And the Fifth Circuit has repeatedly rejected similar claims complaining that these terms were undefined. *See Sprouse*, 748 F.3d at 622–23; *Paredes v. Quarterman*, 574 F.3d 281, 294 (5th Cir. 2009); *Leal*, 428 F.3d at 553.

The precedent is clear, "the terms in Texas's [future danger] special issue 'have a plain meaning of sufficient content that the discretion left to the jury [is] no more than that inherent in the jury system itself'" and "Texas performs the constitutionally required narrowing function *before* the punishment phase, so [petitioner's] attack on the words used *during* punishment is unavailing." *Paredes,* 574 F.3d at 294 (internal footnotes and citations omitted) (emphasis in original). Absent any intervening Supreme Court authority, both the district court and the Fifth Circuit were bound by this precedent. *See Allen v. Stephen,* 805 F.3d 617, 633 (5th Cir. 2015), *abrogated in part on other grounds by Ayestas v. Davis,* 138 S. Ct. 1080 (2018); *United States v. Alcantar,* 733 F.3d 143, 145–

46 (5th Cir. 2013) ("Under our rule of orderliness, only an intervening change in the law (such as by a Supreme Court case) permits a subsequent panel to decline to follow a prior Fifth Circuit precedent.") Johnson presents no reason to revisit the issue now.

B. This Court has upheld the constitutionality of future dangerousness predictions.

Johnson next argues that evidence now confirms that predictions on future dangerousness are inherently unreliable. Pet. at 25–31. While acknowledging clearly established precedent to the contrary, *see Jurek,* 428 U.S. at 274 (Holding that predicting future dangerousness, while "difficult" is still possible.); *Barefoot v. Estelle,* 463 U.S. 880, 899 (1983) (Rejecting argument that expert testimony on future dangerousness is unreliable.), Johnson maintains that this Court, in reaching those decisions, "depended upon 'first generation' evidence on the reliability of prediction of future dangerousness," the foundation of which has since been eroded. Pet. at 25–26.

On this argument, the Fifth Circuit correctly noted this Court's analysis in *Jurek* acknowledging that future dangerousness predictions, while "difficult" can still be done, and are no different than predictions made by government officials on a daily basis in deciding bail or parole issues. Pet. Appx. A at a007–008 (citing *Jurek,* 428 U.S. at 274–76); *see also Barefoot,* 463 U.S. at 899 (re-affirming *Jurek*). Regardless, the Fifth Circuit held, this

argument is "plainly foreclosed" by circuit precedent where the circuit court "considered the same arguments . . . made by the same lawyers." Pet. Appx. A at a008–009; *see Buntion v. Lumpkin,* 982 F.3d 945, 948–50 (5th Cir. 2020), *cert. denied,* 142 S. Ct. 3 (2021) (Rejecting argument that "new social science studies" undermined the factual predicate of *Jurek* and *Barefoot*, finding Supreme Court precedent controlling). Given this precedent, the court concluded no reasonable jurist could find the issue debatable. *Id.*

As the Fifth Circuit noted in *Buntion,* this Court "has repeatedly rejected" the theory that "future dangerousness predictions are unconstitutionally unreliable." 982 F.3d at 950; *see Simmons v. South Carolina,* 512 U.S. 154, 162 (1994); *Barefoot,* 463 U.S. at 899; *Jurek,* 428 U.S. at 274–76. The potential for inaccuracy in the jury's future dangerousness prediction does not render the statute unreliable as this Court "contemplated . . . that dangerousness evidence might be wrong 'most of the time.'" *Buntion,* 982 F.3d at 950–51 (citing *Barefoot,* 463 U.S. at 901). Johnson presents nothing new and no reason to warrant reexamination now.

C. The jury's prediction on the "probability" of future dangerousness was not proven inaccurate.

Finally, Johnson contends that evidence demonstrates that Johnson's jury was wrong in their assessment of the future dangerousness special issue because Johnson has committed no violent act while incarcerated on death row.

Therefore, relying on *Johnson v. Mississippi,* 486 U.S. 578 (1988), Johnson argues that his sentence was unconstitutionally predicated on an assessment that has since been proven invalid. *See* Pet. at 31–32.

The Fifth Circuit denied COA on Johnson's third argument, concluding this argument was also foreclosed by *Buntion*. Pet. Appx. A at a008–009.[5] The circuit court reaffirmed *Buntion*, finding first that Johnson misinterprets Supreme Court authority because this Court "has never intimated that the factual correctness of the jury's prediction on the issue of future dangerousness ... bears upon the constitutionality of a death sentence." *Id*. at a009 (citing *Buntion,* 982 F.3d at 950–51) (internal citations omitted). Indeed, this Court contemplated that future dangerousness evidence might be wrong "most of the time," but it did not create a remedy for death sentences that turned on such evidence. *See Buntion*, 982 F.3d at 951 (citing *Barefoot*, 463 U.S. at 901). The Court believed the adversarial process can be trusted to sort out the reliable evidence from the unreliable. *Barefoot,* 463 U.S. at 901. Second, the Fifth Circuit held there was no factual inaccuracy in sentencing because the jury

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[5] The Director also cited, as ground for denying COA, that the district court found this argument unexhausted and procedurally defaulted, as Johnson did not present it in state court. ROA.758, 768–70; *see* ROA.12558–62. Johnson did not dispute this conclusion, thus failing to show the debatability of the district court's procedural ruling. *See Slack*, 529 U.S. at 484–85 (where claim dismissed on procedural grounds, petitioner must show debatability of the court's procedural holding and the underlying claim). However, the district court also reviewed the issue de novo and denied relief, as permitted by 28 U.S.C. § 2254(b)(2). Pet. Appx. C at a055–057. The Fifth Circuit did not address this procedural ruling.

was only asked whether there was a "probability" that the petitioner would engage in future acts of violence, not that he would in fact do so. Pet. Appx. A at a009 (citing *Buntion,* 982 F.3d at 950–51). The fact that he has behaved peacefully in prison does not disprove the probability calculation. *Id.* Regardless, the Fifth Circuit concluded that Johnson advocates for a new extension of *Johnson v. Mississippi,* which would be barred by the non-retroactivity doctrine of *Teague v. Lane,* 489 U.S. 288 (1989). Pet. Appx. A at a010.

Johnson makes no effort to rebut these findings. Rather, he asks for certiorari by suggesting that this Court has not "examined [in a generation] whether the sole aggravating factor defined in the Texas capital sentencing scheme—future dangerousness—" continues to satisfy the Eighth Amendment reliability requirements. Pet. at 32. But Johnson once again misstates the role the future dangerousness issue plays in the Texas capital punishment scheme. The future dangerousness issue plays no part in the eligibility determination and is not subject to the reliability requirements of *Johnson v. Mississippi*.

As explained by the district court, the future dangerousness special issue does not violate the Eighth and Fourteenth Amendments because it plays no role in determining a capital defendant's eligibility; rather, that determination takes place in the guilt innocence phase. *See* Pet. Appx. C at a049–050. The district court correctly noted that reliance on *Johnson v. Mississippi* in this

case was misplaced because that petitioner was tried in a weighing state, the prosecution relied upon a prior conviction as one of three aggravating factors supporting sentence, but that conviction was ultimately reversed. *See id.*; *Johnson v. Mississippi*, 486 U.S. at 581–82, 586. This Court granted relief on grounds that the conviction was based in part on an invalid aggravating factor. Pet. Appx. C at a049–050; *Johnson v. Mississippi*, 486 U.S. at 586. The district court distinguished Johnson's case on grounds that, unlike Mississippi, the Texas capital sentencing special issues were not aggravating factors and did not serve the Eighth Amendment's required narrowing function. Pet. Appx. C at a050; *Lowenfield v. Phelps*, 484 U.S. 231, 242–47 (1988). Rather, the narrowing function took place in the guilt-innocence phase, when the jury determined Johnson was guilty of murder in the course of a robbery. *See* Pet. Appx. C at a050; *see* Section III(A), supra. Therefore, Johnson cites no violation of Supreme Court authority, and no reason for the Court to reexamine this issue now.

IV. The Court Should Deny Certiorari Because No Existing Law Requires a Burden of Proof for the Mitigation Special Issue, and Johnson Identifies No Reason to Reexamine this Issue. (Issue IV)

In his final claim, Johnson asks the Court to grant certiorari review to determine whether the Texas death penalty scheme runs afoul of *In re Winship*, 397 U.S. 358, 364 (1970) (Holding that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable

doubt of every fact necessary to constitute the crime with which he is charged."), and its progeny—*Apprendi v. New Jersey,* 530 U.S. 466 (2000) and *Ring v. Arizona,* 536 U.S. 584 (2002)—by placing the burden of proof on a capital murder defendant to persuade the jury that he should not be sentenced to death because mitigating factors outweigh the single aggravating factor (i.e., future dangerousness) established by the state. Johnson presents no reason for this Court to grant certiorari review. *See* Pet. at 32–37.

In denying COA on this claim, the Fifth Circuit once again concluded that this claim was foreclosed by circuit precedent. Pet. Appx. A at a010–011. "[N]o Supreme Court or Fifth Circuit authority requires the State to prove the absence of mitigating circumstances beyond a reasonable doubt." *Id.* (citing *Rowell v. Dretke,* 398 F.3d 370, 378 (5th Cir. 2005)). Nor does any precedent require that the Texas mitigation issue be assigned a burden of proof. *Id.; see also Scheanette v. Quarterman,* 482 F.3d 815, 828 (5th Cir. 2007). Because "[e]ach of Johnson's arguments for the issuance of a [COA] is foreclosed by on-point binding precedent that 'fits like a glove' . . . no 'reasonable jurist would find the district court's assessment of the constitutional claims debatable or wrong.'" Pet. Appx. A at a011 (citing *Fowler v. United States,* 563 U.S. 668, 672 (2011); and *Miller-El,* 537 U.S. at 338). As noted above, absent intervening Supreme Court authority, the Fifth Circuit was bound by Circuit precedent. *Allen,* 805 F.3d at 633. Johnson cites no authority to the contrary.

Indeed, no Supreme Court authority mandates the imposition of a burden of proof on the prosecution with regard to the Texas capital sentencing statute's mitigation special issue. In fact, the Court has rejected such a requirement for mitigating circumstances. *See Kansas v. Carr*, 577 U.S. 108, 118–22 (2016) (Rejecting Kansas Supreme Court's conclusion that the Eighth Amendment requires capital-sentencing courts in Kansas "to affirmatively inform the jury that mitigating circumstances need not be proven beyond a reasonable doubt."); *see* Pet. Appx. C at a062 (In *Carr*, the Supreme Court "expressly recognized the lack of efficacy in selection phase jury instructions addressing mitigating evidence[.]"). Johnson argues that reliance by the lower state and federal courts on *Carr* is misplaced because, unlike Kansas, Texas is not a weighing state. Pet. at 36–37. But this distinction is irrelevant.

Indeed, in *Carr,* the Court "approach[ed] the question in the abstract, and without reference to our capital-sentencing case law[.]" *Carr,* 577 U.S. at 119. The Court questioned whether it would even be possible to apply a standard of proof to a selection-phase determination like the mitigation special issue because that determination rests on a "judgment call," whereas an eligibility determination is a "purely factual" determination. *Id.* It is possible to apply a burden of proof to a factual determination—the facts either exist or they do not. *Id.* In contrast, the mitigation special issue is a question of mercy, for which the jury need not agree on the underlying supporting facts. *See id.*

Regardless, this Court held that its "case law does not require capital sentencing courts 'to affirmatively inform the jury that mitigating circumstances need not be proved beyond a reasonable doubt.'" *Id.* at 119–20; *see Buchanan,* 522 U.S. at 275 (Upholding death sentence even though trial court "failed to provide the jury with express guidance on the concept of mitigation."); *Weeks v. Angelone,* 528 U.S. 225, 232–33 (2000) (Reaffirming that Court has "never held that State must structure in a particular way the manner in which juries consider mitigating evidence" and rejecting contention that additional guidance needed for jury instruction to "consider a mitigating circumstance if you find there is evidence to support it".)

Relief on this issue would have required extension of this Court's case law to require that a burden of proof be assigned to the Texas mitigation issue. The district court correctly concluded that this proposed new rule is foreclosed by the non-retroactivity principles of *Teague*. Pet. Appx. C at a063; *see also Rowell*, 398 F.3d at 378–79 (accepting argument that mitigation special issue must be subjected to "beyond a reasonable doubt" burden of proof would create new constitutional rule violating *Teague*); *Schriro v. Summerlin,* 542 U.S. 348 (2004) (Holding that *Ring* announced a new procedural rule that does not apply retroactively). Johnson offers no reason for the Court to revisit this issue now. Indeed, he cites no authority to the contrary, nor does he identify a circuit split on the issue. The Court should deny certiorari review.

CONCLUSION

The Fifth Circuit correctly denied Johnson's application for COA and affirmed the district court's denial of his motion to recuse. For all the reasons discussed above, the Court should deny Johnson's petition for a writ of certiorari.

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