No. 23-1044

IN THE

Supreme Court of the United States

JUAN BALDERAS,
Petitioner,

vs.

STATE OF TEXAS,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Court has jurisdiction over claims that were disposed of on an adequate and independent state-law ground?

2. Whether the Court should impose requirements on state courts regarding the level of detail they must provide in summary dismissals under independent state-law grounds?

3. Whether the Court should expend its limited resources to consider highly fact-bound questions that can be more properly addressed in federal habeas proceedings?

LIST OF PROCEEDINGS

State v. Balderas, No. 1412826 (179th Dist. Ct., Harris County, Tex.) (convicted and sentenced to death March 14, 2014)

Balderas v. State, 517 S.W.3d 756 (Tex. Crim. App. 2016) (affirming death sentence)

Balderas v. Texas, 137 S. Ct. 1207 (Feb. 27, 2017) (denying petition for writ of certiorari)

In re Balderas, No. WR-84,066-02 (Tex. Crim. App. July 27, 2016) (denying motion for leave to file writ of mandamus)

Ex parte Balderas, No. WR-84,066-01 (Tex. Crim. App. Dec. 19, 2019) (denying state habeas application)

Balderas v. Texas, 141 S.Ct. 275 (Oct. 5, 2020) (denying petition for a writ of certiorari)

Balderas v. Lumpkin, No. 4:20-CV-4262 (S.D. Tex., Dec. 13, 2022) (granting Balderas's motion for a stay of federal habeas proceedings, administratively closing the case)

Ex parte Balderas, No. WR-84,066-03 (Tex. Crim. App. Oct. 25, 2023) (dismissing subsequent state habeas application)

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BRIEF IN OPPOSITION

The State of Texas respectfully submits this brief in opposition to the petition for a writ of certiorari filed by Juan Balderas.

STATEMENT OF THE CASE

I. Facts Concerning Balderas's Murder of Eduardo Hernandez

The Texas Court of Criminal Appeals (CCA) summarized the facts of the crime in its opinion affirming Balderas's conviction and sentence on direct appeal:

> In 2004, the victim, Eduardo Hernandez, became a member of the Barrio Tres Alief ("BTA"), a regional subset of the La Tercera Crips ("LTC") street gang in Houston. Balderas, a long-time member of the LTC gang and one of the founding members of the BTA subset, had introduced Hernandez to the gang. Initially, the other LTC members liked Hernandez, and Hernandez was proud to be part of the gang. LTC member Israel Diaz befriended Hernandez, and for a while Hernandez lived with Diaz. However, in late 2004, this friendship soured after Diaz let Hernandez borrow a vehicle that Diaz had stolen the week before. Police officers stopped and arrested Hernandez while he

was driving the stolen vehicle. After Hernandez informed them that he had borrowed the vehicle from Diaz, they arrested Diaz for aggravated robbery.

Diaz bonded out of jail in April 2005. He was angry with Hernandez for "snitching" on him. He "lectured" Hernandez about giving his name to the police, and Hernandez promised that he would not testify against Diaz in the aggravated robbery case. Balderas's defense counsel argued at trial that Hernandez's snitching gave Diaz a motive for murder, but Diaz denied that he wanted to kill Hernandez. Diaz testified that he knew that two other witnesses could identify him as the thief and that police had found his fingerprints on the stolen vehicle; therefore, preventing Hernandez from testifying would not have helped him avoid the robbery conviction. Also, because of the pending robbery case, Diaz knew that he would be the first suspect if anything happened to Hernandez. Diaz testified that even though he personally did not want to kill Hernandez, other LTC members viewed Hernandez's conduct as being disrespectful of the gang and thought that Hernandez needed to be punished. Diaz testified that he asked those members to wait until his trial was over before they took action against Hernandez.

After the snitching incident, Hernandez stopped associating with other LTC gang members. He also moved out of his family home so that LTC members could not easily locate him. In August or September 2005, he began dating Karen Bardales ("Karen"). Hernandez and Karen spent much of their time "hanging out" in an apartment belonging to one of Karen's friends, Durjan Decorado, who was not in a gang. Karen's older sister, Wendy Bardales ("Wendy"), and Wendy's boyfriend, Edgar Ferrufino, also spent much of their time in that apartment. Karen and Wendy's friends, including members of several rival gangs, would visit them there. Hernandez socialized with those friends.

Over the next few months, LTC gang members heard rumors that Hernandez was associating with members of rival gangs and flashing rival gangs' hand signs, which constituted acts of disloyalty and disrespect against the LTC gang. After seeing images of Hernandez on social media confirming these rumors, some indignant LTC members urged the gang to take action against him. Three or four days before Hernandez's killing, senior members of the gang called a meeting. Those in attendance agreed to shoot and kill Hernandez. Although they did not expressly select an individual to kill him,

everyone understood that Hernandez was Balderas's responsibility because he had introduced Hernandez to the gang.

On the afternoon of December 6, 2005, Wendy, Ferrufino, Karen, and Hernandez were hanging out in Decorado's apartment. Jose Vazquez, a senior LTC gang member, stopped by to talk to Hernandez. Karen began saying disrespectful things about the LTC gang, which upset Vazquez. Vasquez wanted Hernandez to leave the apartment with him, but Hernandez refused. Hernandez was visibly upset after Vazquez left. He told Karen that he was worried that something was going to happen. Later, Hernandez left with his sister to go shopping and have dinner. He and Karen reunited at the apartment complex that night.

Around 9:45 p.m., Wendy, Ferrufino, Decorado, and Decorado's cousin were in Decorado's apartment. Ferrufino and Wendy were playing a video game in the living room. As Karen and Hernandez approached the apartment, Karen noticed fresh LTC gang graffiti on the exterior wall. Immediately after entering the apartment, they heard gunshots, and then the front door opened and a gunman ran into the apartment. Hernandez dropped to

the floor and pulled Karen down with him, positioning himself between Karen and the gunman. Decorado and his cousin fled to the bedrooms, and Ferrufino crouched next to the television stand. Wendy, who was sitting on the floor between the couch and the television, froze. She could see the gunman as he entered the apartment, and her eyes followed him until he left.

The gunman fired his gun as he ran around the living room. Wendy saw that he was wearing khaki pants and a black hoodie, with the hood pulled up over his head. She got a good look at his face when his hood fell down as he passed her. The gunman paused in front of Ferrufino, who asked him not to shoot. He did not shoot Ferrufino and began to move back toward the entryway, but then he stopped and stood over Hernandez. He shot Hernandez in the back and head multiple times. Karen, who was lying face-down next to Hernandez, did not see the gunman's face, but when the gunman extended his arm toward Hernandez, Karen could see that he was wearing a black sweater. After shooting Hernandez at least nine times, the gunman left. Ferrufino called 9-1-1.

Around that time, Diaz heard from another LTC gang member that "they" had "found [Hernandez,]" which Diaz

understood to mean that Hernandez was about to be (or had just been) killed. He and other LTC members gathered across the street from the apartment complex. They could see an ambulance and police cars in the parking lot. Diaz saw Balderas waiting near the apartment complex. Balderas was wearing a dark blue or black sweater-like top and khakis. When Balderas noticed Diaz and the others, he crossed the street to join them. Balderas hugged everyone and seemed "joyful" as he reported that he "finally got him." Diaz saw Balderas change the magazine of a silver handgun. Diaz recognized the handgun as one of two silver guns that Balderas regularly carried.

That night, law enforcement officials took Wendy, Karen, and Ferrufino to the police station to give witness statements. In the early morning hours of December 7, Wendy gave a statement that was committed to writing by Officer Thomas Cunningham. Wendy stated that she had never seen the gunman before, and she described him as a "skinny Hispanic guy dressed in a black hooded sweatshirt type jacket." She also stated that he had a "dark birth mark" on his face but she could not remember where.

Around 10:30 p.m., Sergeant Norman Ruland drove to Wendy's

apartment to show her a photo array of six suspects that included Diaz but not Balderas. Wendy did not identify the gunman, but she recognized Diaz. She stated that he was a friend of Hernandez who went by the street name "Cookie," and that she was sure he was not the gunman. She told Ruland that the gunman had a dark mark on his cheek that did not resemble the scars that were visible on Diaz's face.

On December 12, Ruland returned to Wendy's apartment with a second photo array that included Balderas's photograph. Wendy immediately pointed to Balderas, saying that she recognized him as a friend of Hernandez and Diaz who went by the street name "Apache." She also stated that he "looked like the shooter." When Ruland asked Wendy if Balderas was the shooter, she reiterated that Balderas's "face looked exactly like the shooter's face." She signed and dated Balderas's photograph to confirm her identification. Although Ruland felt that Wendy was confident in her identification of Balderas as the gunman, he was confused by her verbal phrasing in making the identification. Therefore, the following day, he returned to Wendy's apartment to seek clarification. On this occasion, Wendy expressly identified Balderas as the gunman, stating

that she was positive in her identification. She wrote a sentence in Spanish on the back of the lineup to confirm her positive identification. Based on this identification, police obtained a warrant for Balderas's arrest.

On December 16, Officer Rick Moreno drove to an apartment complex where he watched for Balderas and another LTC gang member, Rigalado Silder, and waited for the assistance of a SWAT team. After Moreno had been watching the complex for about 25 minutes, he observed Balderas and Silder leave an upstairs apartment and start down the stairs. Each man was carrying a large box, and Balderas had a black bag slung over his shoulder. When they saw the SWAT team arriving, Balderas and Silder set everything down and started running. Moreno caught Silder in the apartment complex, while the SWAT team pursued Balderas into the neighborhood and caught him as he tried to hide under a car. Moreno saw that the boxes and bag contained firearms and other weapons, bullet-proof vests, identification holders, magazines, and ammunition. One of the weapons recovered from the box that Balderas had been carrying was a handgun that was later identified, through ballistics testing, as the murder weapon in Hernandez's

> killing. A shell casing from a semiautomatic handgun was recovered from Balderas's right rear pants pocket.

Balderas v. State, 517 S.W.3d 756, 763–65 (Tex. Crim. App. 2016).

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

At punishment, the State implicated Balderas in three separate murders (additional to the underlying capital murder of Hernandez) and one shooting. Alejandro Garcia testified that in September 2005, Balderas was one of five LTC members that invaded the home of Daniel Zamora and Guadalupe Sepulveda. 34.RR 205–37.[1] In the course of this home invasion, Efrain Lopez shot and killed Zamora, and Balderas shot Sepulveda in the stomach. 34.RR 35, 226. Sepulveda lived, but he described how the .40 caliber bullet tore up his intestines. 34.RR 35. At the scene, law enforcement found two .40 caliber casings that were fired from the same .40 Taurus handgun that Balderas used to kill Hernandez. 34.RR 112–14; 37.RR 117–19; SX's 110, 184, 185.

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[1] "RR" refers to the reporter's record at trial, preceded by volume number and followed by page number. "CR" refers to the clerk's record, preceded by volume number and followed by page number. "SX" refers to the State's exhibits at trial, followed by exhibit number. "SHCR" refers to the state-habeas clerk's record submitted to the CCA in state-habeas proceedings, preceded by volume number and followed by page number.

Garcia also testified that Balderas took part in the "Bissonnet" murder of Eric Romero. Balderas and other LTC members drove up on Romero due to his alleged association with a rival gang. 35.RR 11–29. Balderas and another LTC member opened fire on Romero and his girlfriend who was also in the car. 35.RR 11–29. Romero died from multiple gunshot wounds. 35.RR 183–98; SX 334 (autopsy report). Garcia testified that, during the shooting, he thought Balderas was firing a chrome .357 caliber gun. 35.RR 24. Casings at the scene were determined to have been fired from a .357 Taurus that Balderas was carrying when he was arrested on December 16, 2005.[2] 35.RR 168; 37.RR 127–31; SX113.

Balderas was also tied to two more incidents. In the Bunker Hill murder, Jose Garcia was gunned down fleeing from a car in the middle of an intersection. 36.RR 96–111. Balderas's Honda was at the scene, identified by its license plate number. 36.RR 35–36, 105, 111. And again, casings and projectiles found at the scene were ejected from the same .357 semiautomatic Taurus gun Balderas was arrested with on December 16, 2005. 36.RR 86–89; 37.RR 29, 144–48; SX's 113, 303–06, 331–32.

In the Club Creek shooting, someone shot Luis Garcia in the hand while he was walking. 36.RR 158–72. The shot was fired from the Honda registered to Balderas. 36.RR 19–26, 31–40. And casings found at the

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[2] Specifically, the .357 Taurus (SX113) was dropped by Balderas as he ran from SWAT officers on December 16, 2005. 36.RR 231.

scene were again found to be ejected from the same .357 Taurus semiautomatic that Balderas was arrested with. 36.RR 44; 37.RR 122–23, 125–26; SX's 113, 208–09.

III. Course of Proceedings

Balderas was convicted and sentenced to death in March 2014. 12.CR 3284, 3334–45, 3355. The CCA affirmed the judgment on November 2, 2016. *Balderas,* 517 S.W.3d at 799. This Court denied certiorari review of that decision on February 27, 2017. *Balderas v. Texas,* 137 S. Ct. 1207 (2017).

Balderas filed his first state habeas application in 2016. 1.SHCR-01 2. The CCA denied the application on December 18, 2019. *Ex parte Balderas,* No. WR-84,066-01, 2019 WL 6885361, at *3 (Tex. Crim. App. Dec. 18, 2019). This Court denied certiorari review of that decision on October 5, 2020. *Balderas v. Texas*, 141 S. Ct. 275 (2020).

Balderas then filed a federal habeas petition. Pet., *Balderas v. Lumpkin*, No. 4:20-CV-4262 (S.D. Tex. Dec. 15, 2020), ECF Doc. 2. During the pendency of his petition, Balderas requested a stay of the district court's proceedings to allow the exhaustion of state court remedies for five claims. Order Granting Stay, *Balderas v. Lumpkin*, No. 4:20-CV-4262 (S.D. Tex. Dec. 13, 2022), ECF Doc. 57. The district court granted the stay. *Id.*

Balderas then filed another state habeas application, which the CCA dismissed on October 25, 2023. *Ex parte Balderas*, No. WR-84,066-03, 2023 WL

7023648, at *1 (Tex. Crim. App. Oct. 25, 2023).[3] The CCA found Balderas's subsequent application "failed to make a prima facie showing that he satisfies the requirements of Article 11.071, § 5(a)" so it "dismiss[ed] the subsequent application as an abuse of the writ without considering the merits of the claims." *Id.* Balderas has filed a petition for a writ of certiorari appealing that decision. The instant brief in opposition follows.

REASONS FOR DENYING THE PETITION

The claims for which Balderas seeks review were dismissed by the court below on an adequate and independent state law ground thus depriving this Court of jurisdiction to hear them. Jurisdiction notwithstanding, Balderas fails to provide a single compelling reason to grant a writ of certiorari. Indeed, this petition is a poor vehicle for his claims—fact-bound questions without evidentiary development or merits analysis in the court below. Further, Balderas has an avenue better suited to his factually intensive allegations: Federal habeas proceedings. For these reasons, the Court should deny his petition.

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[3] Balderas amended his federal habeas petition following the CCA's dismissal of his subsequent application. Pet., *Balderas v. Lumpkin*, No. 4:20-CV-4262 (S.D. Tex. Feb. 23, 2024), ECF Doc. 70.

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

In the court below, Balderas sought review of five claims: (1) denial of his right to due process under *Brady v. Maryland*, 373 U.S. 83 (1963); (2) ineffective assistance of trial counsel for failure to raise a mental incompetency claim; (3) violation of his right to due process for trying Balderas while incompetent; (4) violation of his Sixth Amendment right to autonomy based on failure of trial counsel to present an alibi defense; and (5) violation of his right to due process by failing to correct false testimony. Pet. Cert. 22–29. The CCA dismissed these claims under its procedural abuse-of-the-writ bar. *Ex parte Balderas*, 2023 WL 7023648, at *1. Such dismissal on an independent and adequate state law ground deprives the Court of jurisdiction.

"This Court lacks jurisdiction to entertain a federal claim on review of a state court judgment 'if that judgment rests on a state law ground that is both "independent" of the merits of the federal claim and an "adequate" basis for the court's decision.'" *Foster v. Chatman*, 578 U.S. 488, 497 (2016) (quoting *Harris v. Reed*, 489 U.S. 255, 260 (1989)). "This rule applies whether the state law ground is substantive or procedural." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

To be adequate, a state law ground must be "'firmly established and regularly followed.'" *Lee v.*

Kemna, 534 U.S. 362, 376 (2002) (quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984)). Discretion does not deprive a state law ground of its adequacy, for a "discretionary rule can be 'firmly established' and 'regularly followed' even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others." *Beard v. Kindler*, 558 U.S. 53, 60–61 (2009). Ultimately, situations where a state law ground is found inadequate are but a "small category of cases." *Kemna*, 534 U.S. at 381.

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

Texas, like Congress, has imposed significant restrictions on subsequent habeas applications.[4] *Compare* Tex. Code Crim. Proc. art. 11.071 § 5, *with* 28 U.S.C. § 2244(b). A Texas court may not reach the merits of a claim in a subsequent application "*except* in exceptional circumstances." *Ex parte Kerr*, 64 S.W.3d 414, 418 (Tex. Crim. App. 2002). The applicant bears the burden of providing "sufficient specific facts

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

establishing," Tex. Code Crim. Proc. art. 11.071 § 5(a), one of these "exceptional circumstances," *Ex parte Kerr*, 64 S.W.3d at 418.

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

Second, an applicant can prove that "but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt." Tex. Code Crim. Proc. art. 11.071 § 5(a)(2). This requires an applicant to "make a threshold, prima facie showing of innocence by a preponderance of the evidence." *Ex parte Reed*, 271 S.W.3d 698, 733 (Tex. Crim. App. 2008) (citation omitted). A "claim" of this sort is also known as a "*Schlup*-type claim," *Ex parte Franklin*, 72 S.W.3d 671, 675 (Tex. Crim. App. 2002), because § 5(a)(2) "was enacted in response to" *Schlup v. Delo*, 513 U.S. 298 (1995). *Ex parte Reed*, 271 S.W.3d at 73.

Third, an applicant can prove that, "by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the [S]tate's favor one or more of the special issues." Tex. Code Crim. Proc. art. 11.071 § 5(a)(3). Section 5(a)(3), "more or less, [codifies] the doctrine found in *Sawyer v. Whitley*, 505 U.S. 333 (1992)." *Ex parte Blue*, 230 S.W.3d 151, 160–61 (Tex. Crim. App. 2007).

In state court, Balderas accepted the burden of proving an exception to the abuse-of-the-writ bar. For his first claim, Balderas argued review should be granted under Article 11.071 § 5(a)(1), (2), and (3). Pet. App. 126a–29a. For his second and third claims, Balderas argued the claims satisfied § 5(a)(3). Pet. App. 152a. He argued his fourth claim satisfied § 5(a)(2) and (3). Pet. App. 156a. And for his last claim, he argued it satisfied § 5(a)(3). Pet. App. 160a. As mentioned before, the CCA did not agree, finding Balderas did not satisfy "the requirements of Article 11.071 § 5," and it dismissed the "application as an abuse of the writ without considering the merits of the claims." *Balderas*, 2023 WL 7023648, at *1.

Before this Court, Balderas does not challenge the adequacy of § 5, and that is with good reason—the Fifth Circuit "has held that, since 1994, the Texas abuse of the writ doctrine has been consistently applied as a procedural bar, and that it is an . . . adequate state ground for the purpose of imposing a [federal] procedural bar." *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008); *cf. Expressions Hair Design v.*

Schneiderman, 581 U.S. 37, 45 (2017) (noting that this Court generally defers to a court of appeals's interpretation of its respective states' laws); *De Buono v. NYSA-ILA Medical & Clinical Servs. Fund*, 520 U.S. 806, 810 n.5 (1997) (noting "settled practice of according respect to the courts of appeals' greater familiarity with issues of state law").

The only question then is whether the CCA's dismissal of Balderas's claim was independent of federal law. It is. The CCA unequivocally and unambiguously dismissed Balderas's claims "without considering the merits of the claims." *Balderas*, 2023 WL 7023648, at *1.

Thus, Balderas's subsequent state habeas application was subject to dismissal on an adequate and independent state law ground. The abuse-of-the-writ bar—a state-law ground clearly and unambiguously applied by the CCA—prohibits this Court from exercising jurisdiction over any of the claims for which Balderas now seeks review. *See Kunkle v. Texas*, 125 S. Ct. 2898, 2898 (2004) (Stevens, J., concurring) ("I am now satisfied that the Texas court's determination was independently based on a determination of state law, *see* Tex. Code Crim. Proc. art. 11.071 § 5 [ ], and therefore that we cannot grant petitioner his requested relief."). All of Balderas's claims are foreclosed by an adequate and independent state procedural bar and certiorari review should be denied.

II. This Court Should Not Use its Supervisory Authority in Balderas's Case.

Balderas claims that this Court should exercise its supervisory powers because the CCA's "practice of summarily [dismissing] death row inmates' petitions without explanation cannot be reconciled with the most basic requirements of due process[.]" Pet. at 19. He takes issue with the CCA providing "no reasons" for its "conclusion that Balderas failed to make the necessary showing for review." *Id.* at 21–22 (citing Sup. Ct. R. 10(a)).

However, this Court "do[es] not hold a supervisory power over" state court proceedings, and its "authority is limited to enforcing the commands of the United States Constitution." *Dickerson v. United States*, 530 U.S. 428, 438–39 (2000) (citing *Smith v. Phillips*, 455 U.S. 209, 221 (1982) and quoting *Mu'Min v. Virginia*, 500 U.S. 415, 422 (1991)); *see Harris v. Rivera*, 454 U.S. 339, 344–45 (1981) ("Federal judges have no general supervisory power over state trial judges; they may not require the observance of any special procedures except when necessary to assure compliance with the dictates of the Federal Constitution.").

Balderas nevertheless suggests that this Court should create a new rule exercising supervisory review over state proceedings so that the CCA cannot "evade direct review by issuing an ambiguous or obscure decision." Pet. at 30. That's a specious argument because, jurisdictionally, there can *be no federal review* of the CCA's application of Texas's independent and

adequate bar. *See supra* Part I. Balderas's cite to *Florida v. Powell*, 559 U.S. 50 (2010) also fails to support his argument. Pet. at 30. In *Powell*, it was not clear from the "face of the opinion" whether the state court's decision rested on federal or state law. 559 U.S. at 58. This Court reiterated that, in a case in which the face of the opinion "indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Id*. at 57.[5]

There can be no doubt that the CCA "clearly and expressly" rested its denial on Texas's independent and adequate abuse-of-the-writ bar. *Ex parte Balderas*, 2023 WL 7023648, at *1 (dismissing "without considering the merits of the claim" because Balderas "failed to make a prima facie showing that he satisfied the requirements of Article 11.071 § 5(a)." Indeed, nowhere in his petition does Balderas muster any argument that this summary dismissal somehow implicated any federal question.

Thus, Balderas seeks a rule from this Court that would require the CCA better explain a decision that this Court lacks jurisdiction to review. Such a pointless rule hardly serves as a "compelling reason" to grant the writ. *See* Sup. Ct. R. 10 (A certiorari petition should be

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[5] And, even when the face of the state court opinion renders it unclear whether the opinion rests on federal law, the answer is not to impose procedural requirements on the state courts; rather, it is to entertain a presumption that the state-court decision does not rest on an independent state ground. *Powell*, 559 U.S. at 57.

granted for "compelling reasons" that involve "important" issues of federal law.).[6]

III. This Case Presents a Poor Vehicle for Balderas's Arguments.

The Court requires those seeking a writ of certiorari to provide "[a] direct and concise argument *amplifying* the reasons relied on for allowance of the writ." Sup. Ct. R. 14.1(h) (emphasis added). The Court would be hard pressed to discover any such reason in Balderas's petition, let alone amplification thereof. Indeed, Balderas makes no allegations of circuit or state-court-of-last-resort conflict. *See* Sup. Ct. R. 10(a)–(b).

Left with no true ground for review in his briefing, the only reasonable conclusion is that Balderas seeks mere error correction. Indeed, he spends most of his argument section simply arguing the merits of his claims or arguing why they meet the exceptions to Texas's abuse-of-the-writ bar. Pet. at 19–29.

But, mere error correction is not a good reason to expend the Court's resources. *See* Sup. Ct. R. 10 ("A petition . . . is rarely granted when the asserted error

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[6] In fact, even when a state court *does* reach the merits of a federal claim, no written decision is required; a federal court need only consider whether *some reasonable argument* could be made in support of denying relief. *Cf. Harrington v. Richter*, 562 U.S. 86, 99 (2011) ("[R]equiring a statement of reasons [for a state court's decision] could undercut state practices designed to preserve the integrity of the case-law tradition.").

consists of . . . the misapplication of a properly stated rule of law."). And such a request is especially problematic here because the court below did not reach the merits of Balderas's claims, and this Court is one "of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Even worse, Balderas's claims are heavily fact dependent, and because there was no evidentiary development in the lower court, this court would have "to review evidence and discuss specific facts" for Balderas to garner relief, something the Court "do[es] not" do. *United States v. Johnston*, 268 U.S. 220, 227 (1925).

Balderas suggests that direct review is necessary because the CCA's dismissal of his claims forecloses review of those claims altogether. Pet. at 33. But he can raise (and has raised) the exact same arguments in federal district court in his federal habeas proceedings under 28 U.S.C. § 2254. Much like his § 5(a)(1) argument, he can argue cause to overcome the default of any *Brady* or false testimony claim. *See Banks v. Dretke*, 540 U.S. 668, 691 (2004). He can make the same § 5(a)(2) "actual innocence" arguments to overcome any default as well. *Schlup*, 513 U.S. at 324. And he can make the same § 5(a)(3) "innocence of the death penalty" arguments in federal district court too. *See Sawyer*, 505 U.S. at 350. And unlike this Court, the federal district court can, if necessary,[7] take up any evidentiary issues that might inform those determinations.

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[7] This is not in any way a concession that evidentiary development is warranted in federal district court. It simply

Thus, Balderas's claim that he needs this Court to take up direct review or he will lose all available review of his claims is untrue. He points to *Cullen v. Pinholster*, 563 U.S. 170 (2011), in support of this argument, claiming that review under § 2254(d) is confined to the record. But § 2254(d) only applies "[i]f a claim has been adjudicated on the merits by a state court[.]" *Id.* a 185. Balderas's subsequent application was expressly not adjudicated on the merits. *Balderas*, 2023 WL 7023648, at *1 (dismissal "without considering the merits of the claims"). Thus, *Pinholster* has no bearing on the claims that were procedurally barred and thus defaulted in federal court.

IV. Balderas's Claims are Meritless.

A. Balderas's *Brady* and *Giglio* claims are meritless.

Under *Brady*, a petitioner must show that the prosecution withheld evidence favorable to the defense and that the evidence was material—"there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). "Impeachment evidence, however, as well as exculpatory evidence falls within the *Brady*

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illustrates that an avenue is available. Balderas must, of course, still make certain threshold showings to avail himself of that avenue.

rule." *Bagley*, 473 U.S. at 676 (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972)).

In his first *Brady* argument, Balderas argues that the suppression of the 2007-2008 Diaz Notes violated his due process rights because those notes undermined Diaz's account of Balderas's confession. Pet. at 23. Specifically he argues "[t]he State's withheld evidence revealed that [Diaz] gave several conflicting versions of Balderas's alleged confession[.]" *Id*.

Balderas's argument ignores the record. The 2007-2008 Diaz notes were attached to a *Brady* claim raised in his *initial* state application. 3.SHCR-01 782–804. And Balderas raised the *exact same argument* in that application. 1.SHCR-01 64–71. Trial counsel responded that they had, in fact, reviewed the 2007-2008 Diaz notes. 5.SHCR-01 1471, 1486. And the CCA rejected the claim on the merits:

> Specifically, [Balderas] alleges that the State failed to disclose handwritten notes from the State's pre-trial interviews with Diaz. However, [Balderas] must do more than state mere conclusions of law or allegations of error; applicant must support his claim with adequate facts . . . [Balderas] fails to do so here and *the evidence before us shows that the complained-of notes were contained within the State's file and were reviewed by defense counsel in preparation for trial.*

Balderas, 2019 WL 6885361, at *2 (emphasis added) (internal citation omitted).[8]

In his second *Brady* argument, Balderas argues that evidence of State misconduct regarding suggestive identification procedures would have cast doubt on Wendy Bardales's identification of Balderas. Pet. at 23. In support he points to the State's notes, which reveal that Angelina Quinones, a witness in an investigation in another LTC-related incident, claimed that officers were telling her which photo to identify as the perpetrator. *Id.* at 14–15.

Again, Balderas's argument is frivolous. The State turned over a *Brady* notice regarding this exact allegation, which is in the clerk's record. 2.CR 529–32. According to the notice, Quinones stated that "[Officer] Waters began to encourage her saying come on you can do this, help me out. He then guided her finger to one of the photos and said here he is, you know that's the guy, come on you can do it." *Id.* Thus, Balderas fails to show suppression.

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[8] Balderas briefly addresses statements given by Alejandro Garcia that the rumors were that MS-13 killed Hernandez. Pet. at 23. That particular *Brady* claim was not previously adjudicated in the initial application. However, that evidence was irrelevant because it has always been undisputed that LTC killed Hernandez. Balderas presented evidence that LTC leader Victor Arevalo committed the murder. 28.RR 226.

Balderas also fails to explain how this testimony is material. "Evidence may be material under *Brady* even though it is inadmissible." *United States v. Sipe*, 388 F.3d 471, 485 (5th Cir. 2004) (citing *Spence v. Johnson*, 80 F.3d 989, 1005 n.14 (5th Cir. 1996)). But in determining whether "the outcome of the proceeding [was] affected" a reviewing court will "often consider whether the suppressed inadmissible evidence would have led to admissible evidence." *Id.* The officer who conducted the identification procedure with Quinones was not the same officer who conducted the identification procedure with Wendy Bardales. Balderas argues that the jury "may have been swayed by testimony regarding the HPD's use of suggestive techniques." Pet. at 23. But Balderas offers no legal argument of how a separate officer's tactics in a separate investigation could have been imputed to Sergeant Ruland. The State is unaware of any rationale. Thus, the evidence is immaterial.

In his third *Brady* argument, Balderas argues that the State withheld evidence that Alejandro Garcia stated to prosecutors, "everyone gave [Balderas] guns to hold." Pet. at 24. He claims this would have provided an exculpatory theory for being arrested with the murder weapon. *Id.* at 23–24. But "there is no improper suppression within the meaning of *Brady* where facts are already known by the defendant." *United States v. Diaz*, 922 F.2d 998, 1007 (2d Cir. 1990). Obviously, Balderas would know if he was tasked with holding guns for other gang members. *See* 3.SHCR-01 715 (trial counsel email describing Balderas's claim that he "did

not do anything except provide[] the weapons"). Thus, there is no suppression.

Balderas also cannot show materiality. His own witness, Walter Benitez, testified that Balderas was only arrested with the murder weapon because LTC-leader Victor Arevalo dropped the murder weapon off with Balderas that morning. 28.RR 177–83, 225–26. Thus, Garcia's statement is cumulative of Benitez's testimony. *See Turner v. United States*, 582 U.S. 313, 327 (2017) (holding that impeachment evidence was "largely cumulative of impeachment evidence petitioners already had and used at trial" and thus was immaterial).[9]

B. Balderas's mental incompetency claims are meritless.

Balderas also asserts that he was incompetent at trial and that his trial counsel were ineffective for failing to raise the issue of his mental incompetency Pet. at 24–25. The test for competency asks whether the defendant had (1) "a rational as well as factual understanding of the proceedings against him" and (2) a "sufficient . . . ability to consult with his lawyer with a reasonable degree of rational understanding." *Indiana v. Edwards*, 554 U.S. 164, 170 (2008) (citing *Dusky v. United States*, 362 U.S. 402, 402 (1960)). Balderas fails to present any evidence that he did not have such an understanding or ability at trial.

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[9] In any event, it's dubious that trial counsel would ever had called Alejandro Garcia to testify at guilt, as he struck a deal with the State to testify against Balderas at punishment. 34.RR 156.

In state court, Balderas presented two expert reports: a neuropsychological evaluation from Dr. Robert Ouaou and a psychiatric evaluation from Dr. Bushan Agharkar. *See* SHCR-03 302–12 (Ex. FF, Ouaou report), 290–301 (Ex. EE, Agharkar report). Dr. Agharkar diagnosed Balderas with PTSD and schizoaffective disorder, and he also suggested neuropsychological testing for cognitive deficits. SHCR-03 291–300. Dr. Ouaou conducted a neuropsychological examination of Balderas and found that he suffered from cognitive defects and below average intellectual functioning. SHCR-03 302–12.

Completely absent in their reports, though, is any indication that Balderas didn't understand the trial proceedings or lacked the ability to consult with his attorneys. There is no mention that they reviewed trial counsel's files, court reports, or trial counsel statements. That is particularly telling given that "defense counsel will often have the best-informed view of the defendant's ability to participate in his defense." *Medina v. California*, 505 U.S. 437, 450 (1992).

In fact, the record demonstrates no lack of competence. Emails from trial counsel show that Balderas was perfectly aware of the evidence against him and the exculpatory theories trial counsel needed to explore. For example, Balderas professed his innocence to trial counsel by claiming that he only provided weapons to the gang. 3.SHCR-01 715. Balderas also testified at his motion for a speedy trial hearing, with no indication of incompetency. 22.RR 61–74. Finally, trial

counsel hired three different mental health experts to evaluate Balderas, and not one of them indicated that he might be incompetent. 38.RR 129–30 (Dr. Matthew Mendel testifying he met with Balderas five times for a "total of 18 or 20 hours"); 39.RR 140 (Dr. Matthew Brams testifying he interviewed Balderas for nine hours); 41.RR 259 (Dr. Jolie Brams testifying she met with Balderas for "many hours over the course of time").

C. Balderas's alibi-autonomy claim is meritless.

Balderas asserts his Sixth Amendment right to autonomy was violated because his trial counsel did not present an alibi defense. Pet. at 26–28. He relies on the statements of siblings Anali Garcia, Ileana Cortes, and Octavio Cortes, who claim that Balderas was at their apartment on the night of Hernandez's murder. *Id*.

The facts underlying this claim have already been rejected by the CCA. In his initial application, Balderas raised this as a straightforward IATC claim, alleging failure to call an alibi witness. 1.SHCR-01 92–98. Trial counsel provided statements and emails proving that they spoke with Ileana and Anali and that they never offered any alibi information. 5.SHCR-01 1471–72, 1487. The CCA entered findings that trial counsel were credible and that no alibi witnesses were brought to the attention of trial counsel. 10.SHCR-01 2863–66. It further entered findings that Anali and Octavio's

decade-after-the-fact alibi testimony was not credible. 10.SHR-01 2868–74.[10]

Balderas tries to present this as a claim under *McCoy v. Louisiana*, 584 U.S. 414 (2018). *McCoy* is inapplicable here, as it concerned trial counsel's concession of guilt. *Id.* at 422–23. At no point did it stand for the proposition that trial counsel must call certain witnesses who either (1) have no relevant information or (2) are not credible; those kinds of determinations must be reviewed under *Strickland v Washington*, 466 U.S. 668 (1984). *See McCoy*, 584 U.S. at 423 (clarifying the holding "should not displace counsel's . . . respective trial management roles"). Balderas's attempt to extend *McCoy* to the strategic decisions of which witnesses to call is barred under *Teague v. Lane*, 489 U.S. 288, 310 (1989). There is no authority, other than *Strickland*, that controls trial counsel's strategic decision to not call a witness they deem unhelpful.

D. Balderas's false-testimony claim is meritless.

Next, Balderas points to jail calls made by Israel Diaz, which he claims reveal that Diaz "had long sought a deal from prosecutors in exchange for testifying

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[10] Given that the CCA has already rejected the credibility of Balderas's alibi witnesses, Balderas's argument that this claim should pass through the CCA's § 5(a)(2) "innocence" gateway is quite specious. Pet. at 23.

against Balderas."[11] Pet. at 28. He further claims that this rendered false Diaz's testimony "that he 'never asked [the prosecutors] for anything.'" *Id.*

This Court has "held that due process is violated when the State knowingly offers false testimony to obtain a conviction and fails to correct testimony." *Tucker v. Johnson*, 242 F.3d 617, 625–26 (5th Cir. 2001) (citing *Napue v. Illinois*, 360 U.S. 264 (1959)). To prove such a violation, the petitioner must show that the testimony was "actually false," that the prosecution knew the testimony was false, and that the statements were material. *Id.* at 626. Materially false testimony is testimony that, through nondisclosure of the falsity, creates a "reasonable probability" of a different outcome. *United States v. O'Keefe*, 128 F.3d 885, 894 (5th Cir. 1997) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).

Balderas fails to show any falsity. When Diaz made the "never asked them for anything" statement, he was referring to the period between 2007 and 2008 when he first spoke to prosecutors: "Q: Back in 2007, 2008, what did you think would be a fair deal for you? A: I never asked them for anything." 26.RR 168. Balderas

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[11] As best the State can tell, Balderas never offered these jail calls in state court so that the CCA could review them. Typically audio exhibits will contain a cover letter indicating that they have been sent to the CCA, but the State is unable to locate any such notation in the record. SHCR-03. This seems consistent with the fact that Balderas failed to cite to any exhibit when discussing the jail calls. Pet. App. 107a–09a.

fails to show that Diaz's answer to this limited inquiry was false. Even if Diaz's testimony *could be* construed as inconsistent with the jail calls, mere inconsistency does not establish falsity. *See United States v. Griley*, 814 F.2d 967, 971 (4th Cir. 1987) ("Mere inconsistencies in testimony by government witnesses do not establish the government's knowing use of false testimony." (citing *Overton v. United States,* 450 F.2d 919, 920 (5th Cir. 1971)); *United States v. Stanford*, 823 F.3d 814, 841 (5th Cir. 2016) (finding that, where alleged falsehoods were "based on apparent evidentiary inconsistencies, it is questionable whether one could describe the inconsistencies as false, let alone material").

Moreover, any evidence impeaching Diaz for his desire to obtain a plea deal would have been cumulative. Trial counsel impeached Diaz with the fact that he had long hoped for a plea deal and discussed potential deals with his own attorney. 26.RR 168–69. And, of course, it was no secret that Diaz *did* get a plea deal and was only testifying to avoid a capital murder charge and a potential death sentence. 26.RR 122–24, 169–70. Trial counsel even elicited for the jury that Diaz was holding out hope that he would get "probation" in exchange for cooperation. 26.RR 171. Thus, any "correction" by pointing out that Diaz wanted a deal from prosecutors would have been cumulative. *See Turner*, 582 U.S. at 327.

CONCLUSION

Balderas fails to show this Court possesses jurisdiction over the matters for which he seeks review

or that there are otherwise compelling grounds to issue a writ of certiorari. Consequently, Balderas's petition should be denied.

Respectfully submitted,

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