CAPITAL CASE
EXECUTION SCHEDULED FOR FEBRUARY 5, 2025, 6:00 PM CST
NO. _____

IN THE
Supreme Court of the United States

STEVEN LAWAYNE NELSON,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED (CAPITAL CASE)

Steven Nelson filed a subsequent state habeas application asserting federal law-claims. The Texas Court of Criminal Appeals ("TCCA") denied Nelson authorization to file the application in an order stating, without explanation, that Nelson has "failed to show that he satisfies the requirements of Article 11.071 § 5." That holding may have depended on the federal-law conclusion that the evidence supporting the claims was insufficient, or on inadequate state grounds, but there is no way to tell from the order if either was the case.

This case presents the following questions:

1. If a state court does not specify the grounds of an order denying postconviction relief, and if one of the several potential grounds depends on federal law, may the Court presume that the decision was unsupported by adequate and independent state grounds?

2. Did the TCCA err in refusing to authorize a postconviction application that raised meritorious federal-law claims, and for which there was no adequate and independent state ground for denial?

PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a habeas corpus proceeding in which petitioner, Steven Lawayne Nelson, was the Applicant before the Texas Court of Criminal Appeals.

Mr. Nelson asks that the Court issue a Writ of Certiorari to the Texas Court of Criminal Appeals.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

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PETITION FOR A WRIT OF CERTIORARI

Steven Lawayne Nelson respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals.

OPINIONS BELOW

The order of the Texas Court of Criminal Appeals (App. 001-002) is unpublished.

STATEMENT OF JURISDICTION

The Texas Court of Criminal Appeals had jurisdiction under Texas Code of Criminal Procedure article 11.071 § 5. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him … and to have the assistance of counsel for his defense."

Texas Code of Criminal Procedure article 11.071 § 5(a) provides in pertinent part: "(a) [A] court may not consider the merits of or grant relief based on [a] subsequent application unless the application contains sufficient specific facts establishing that: (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article … because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; … or … (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072."

* * * * *

STATEMENT OF THE CASE

I. THE CHURCH ROBBERY AND DOBSON MURDER

Around noon on March 3, 2011, Clinton Dobson, the pastor of an Arlington, Texas church, was beaten and killed during a church robbery. Judy Elliott, the church's secretary, was also beaten. The assailants stole a laptop, Dobson's iPhone and credit cards, and Elliott's car. That evening, Anthony "A.G." Springs, told Allison Cobb and his best friend Morgan Cotter that he was trying to sell an iPhone that "belonged to the dead Pastor." App. 230-232.

A police report shows that Cotter and Cobb thereafter told police that a man matching Nelson's description approached them and asked for help getting out of town, stating that he had an iPhone belonging to a deceased pastor. App. 230. Surveillance footage belied that story, and Cotter eventually told the police that she believed Springs was involved in Dobson's death. *Id.* at 231; Ex. 2 at 55:05.[1] According to Cobb, Springs was "laughing" about the murder when it appeared on the news. Ex. 3 at NELSON_00495.

Police arrested both Springs and Nelson. Springs had Elliott's car keys and Dobson's iPhone, 34 R.R. 167,[2] and police photographed "a large bruise on Springs['s] inner left arm at or near his lower biceps/elbow," as well as extensive bruising and swelling on the knuckles of both hands (which Springs attributed to a "nervous fidget"). App. 239; Ex. 4 at NELSON_00327-28. Nelson showed no physical signs of a violent encounter. He admitted to using the stolen credit cards, but he told police that he was only a lookout for the robbery and that he did not hurt anyone or expect anyone to get hurt. App. 236-237.

The Arlington Police Department filed sworn complaints alleging that Springs and Nelson committed capital murder. The investigating officers "were convinced the crime could not have been committed by one person," Ex. 5 at PDF p. 4. Elliott, the surviving victim, maintained that there were two attackers in the church, and a maintenance worker across the street reported seeing multiple people fleeing the scene. Ex. 6 at 13:34, 16:00, 24:55. Law enforcement did not believe Springs's "self preserving statements" maintaining his innocence, and believed that Springs played a major role in causing Dobson's death. Ex. 5 at PDF p. 4;

[1] Citations to "Ex. __" refer to Exhibits to Nelson's First Subsequent Application for Writ of Habeas Corpus, filed January 15, 2025 ("State Successor") with the TCCA. Exhibits with time stamps refer to audio recordings filed with the TCCA concurrently with Nelson's State Successor.

[2] "R.R." refers to the Reporter's Record in the Texas trial court.

App. 234; Ex. 6 at 36:25. Nor did they credit the alibi supplied by Springs's teenage girlfriend Kelsey Duffer and vouched for by her best friend, Darrian McClain—that Springs was in Venus, Texas the day of the crime. Police believed "Springs was involved in this offense and [that Duffer] may be attempting to cover up his behavior." App. 234.

Still, Springs avoided grand-jury indictment, and an investigating officer later stated that it was because Springs's phone records might have appeared inconsistent with his participation in the crime. 1 C.R. 12, 26.[3] Those records, however, showed only that Springs's phone "was quiet for a number of hours" during the time of the murder. *See Nelson v. Davis*, No. 4:16-CV-904-A, 2017 WL 1187880, at *13 (N.D. Tex. Mar. 29, 2017); Ex. 7; 35 R.R. 61-62. Other evidence established that Springs had multiple cell phones, 36 R.R. 85, and that he switched SIM cards between cell phones, 34 R.R. 167-68, 173-74; *see also* 35 R.R. 21-22; Ex. 6 at 14:17 (Springs was switching SIM cards on the day of crime). The State ultimately charged only Nelson, and prosecuted him as a lone assailant. 1 C.R. 12, 26.

II. THE TRIAL

On March 14, 2011, the fourth criminal district court in Tarrant County appointed William Ray and Stephen Gordon to represent Nelson. 1 C.R. 28-29. Even though Nelson insisted that he was not the assailant, trial counsel did not pursue evidence that would have substantiated Nelson's account that two accomplices were more culpable for the offense.

Substantial physical and testimonial evidence inculpating Springs was available to trial counsel. Cotter's statements to the police, Springs's possession of Dobson's phone and Elliott's car keys at the time of his arrest, phone records contradicting the alibi, police reports documenting officers' belief that Springs and his alibi witnesses were lying, and the substantial

[3] "C.R." refers to the Clerk's Record filed in the TCCA.

injuries to Springs's arms and hands, among other things—all invited investigation. Ex. 8 at NELSON_0003-15; App. 231-235, 238-239; Ex. 4 at NELSON_00327-28; Ex. 9 at NELSON_00482; Ex. 7. But trial counsel did not try to question the witnesses or seek other evidence that could invalidate Springs's story.

Trial counsel also failed to investigate a second accomplice, Claude Jefferson. 34 R.R. 165-66; 36 R.R. 69-73. Jefferson's aunt, Brittany Bursey, testified that Jefferson was with Springs and Nelson around noon on the day of the crime, long before Springs supposedly left Duffer's house at 2:30 p.m., 35 R.R. 132-33; mall video footage showed Jefferson with Springs and Nelson using the stolen credit cards, App. 233-234; and phone records showed that Jefferson communicated with Springs and Nelson extensively before and after the crime, Ex. 10 at NELSON_00332-95. Records from the State's case file show that, after getting arrested, Springs called Jefferson from jail to ask Jefferson "to take care of that thing" (evidently, to implicate Nelson). Ex. 5 at PDF p. 17. And Jefferson's alibi was suspect. Jefferson claimed to be taking an in-class chemistry quiz when the crime took place, but there was no chemistry quiz that day, Ex. 11 at NELSON_00464, Jefferson's aunt later testified that Jefferson had appeared at her house when Jefferson said he was taking the quiz, 35 R.R. 132-23, and Jefferson's initials on the class sign-in sheet appeared to have been written by another person. Ex. 11 at NELSON_00459-65. Jefferson's phone records also show that he answered a call during the window when he would have taken the quiz. Ex. 10 at NELSON_00339.

Rather than developing any evidence about Nelson's secondary participation, counsel undertook only a shallow investigation into Nelson's background and social history. They hired a mitigation specialist to interview some people who knew Nelson, and they obtained some official documents from the State. But even those records—including from schools, hospitals,

juvenile detention facilities, and criminal justice institutions—contained extensive evidence of childhood trauma, neglect, and abuse, as well as other red flags pointing to further evidence of mental illness and abuse mitigating Nelson's culpability. *See* App. 092-097 (recounting record evidence of depression and suicidality); *id.* at 101-105 (discussing unpresented evidence of child abuse, neglect, and violence); Ex. 85 at NELSON_01408 (unpresented PTSD diagnosis postconviction). Trial counsel never developed the mitigating evidence from these records.

Trial counsel retained Dr. Antoinette McGarrahan, a neuropsychologist with whom they worked regularly. With Nelson, as with two other clients, trial counsel used Dr. McGarrahan to argue that their capitally charged client was incurably psychopathic, but that such psychopathic behavior should be excused because he couldn't control his violent impulses.[4] All three defendants were sentenced to death. In Nelson's case, trial counsel proceeded with Dr. McGarrahan even though she warned them ahead of trial that on cross she would "agree that [Nelson] has several traits associated with psychopathy." Ex. 12 at NELSON_00775 (A. McGarrahan Letter to B. Ray (Aug. 20, 2012)).

A. Guilt Phase

At *voir dire* for Nelson's trial, the State focused on selecting jurors who were open to imposing vicarious criminal liability. The State impaneled an (all-white) jury willing to convict Nelson of capital murder even if the evidence showed Nelson just agreed to participate in the robbery, and even if it showed he neither caused nor intended Dobson's death. *See, e.g.*, 28 R.R. 172-74; 21 R.R. 70-74; 31 R.R. 19.

[4] These other defendants were Cedric Ricks and Amos Wells. *See* Application for Writ of Habeas Corpus, *Ex parte Ricks*, No. 1361004 (371st Dist. Ct., Tarrant Cnty., Tex.); Application for Writ of Habeas Corpus, *Ex parte Wells*, No. C-432-W011509-1405275-A, at 22 (432nd Dist. Ct., Tarrant Cnty., Tex.).

The guilt phase of Nelson's trial began on October 1, 2012. 32 R.R. 1. The State called Dr. Nizam Peerwani, the State's chief medical examiner, to testify to the victim's cause of death and to suggest that a single assailant could have subdued Elliot and murdered Dobson. A different doctor, Dr. Gary Sisler, had "actually performed" the forensic autopsy and prepared the autopsy report, but Dr. Sisler did not testify. App. 212-214. Dr. Peerwani testified that he "overs[aw]" Dr. Sisler in conducting Dobson's autopsy and was "present at the inception of the exam," but was not present for most of the autopsy. *Id.* at 213-214. Instead, he based his trial testimony on his review of the autopsy report and of diagrams that Dr. Sisler had prepared, and "concur[red]" that the cause of Dobson's death was suffocation. *Id.* at 214, 216-218. Dr. Peerwani was the sole expert witness to testify in support of the State's theory that Nelson, acting alone, beat and then suffocated Dobson to death. *See, e.g.*, *id.* at 291-220.

The State's case-in-chief also included the two alibi witnesses for Springs (Duffer and McClain), 35 R.R. 10-40. 35 R.R. 18; Ex. 2 at 7:40, 20:35. Trial counsel did not cross-examine those witnesses about bias, nor confront them with evidence inconsistent with their account. For example, Springs's cell phone logs disproved Duffer's story that she heard Springs take an 11:15 call from Nelson the morning of the murder—in which Springs, on speaker phone, supposedly declined to join him in a robbery. App. 239; Ex. 9 at NELSON_00482 (showing *unanswered* calls from Nelson to Springs at 10:46 a.m. and at 12:12 p.m. on March 3); Ex. 7.

At the guilt phase, trial counsel called only Nelson to testify. Nelson testified that he served as a lookout for Springs and Jefferson while the two robbed the church, and that he found Dobson and Elliott already wounded when Springs told him to come inside. Once inside, Nelson testified, he noticed a laptop computer, which he took, and then saw "the bag that goes to the laptop … underneath the desk," which he crawled on his "hands and knees" to grab. 36 R.R. 73.

The State's DNA expert confirmed that DNA found on the ligatures used to bind the victims did not belong to Nelson or to the victims. 36 R.R. 69-76, 86-87, 109; 35 R.R. 205. Nevertheless, during guilt-phase closing, the State repeatedly stated that Nelson acted alone. 37 R.R. 7-13, 31.

The trial court instructed the jury that there were two ways to convict Nelson of capital murder: (1) as Dobson's actual killer; or (2) as a party to a robbery in which a capital murder took place (the "parties instruction"). The parties instruction allowed the jury to convict Nelson for capital murder even if he neither intended nor directly caused the killing. *See* TEX. PENAL CODE § 7.02(b). Texas parties liability requires only that the "the defendant [be] physically present at the commission of the offense and encourages its commission by words or other agreement." *Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1994).

On October 8, 2012, the jury found Nelson guilty of capital murder. *See* 2 C.R. 401.

B. Sentencing Phase

Before a defendant can be sentenced to death in Texas where the guilt finding involves a parties-liability theory, the sentencing-phase jury must unanimously find: (1) the defendant poses "a continuing threat to society" (the "future dangerousness" issue); (2) the defendant "actually caused" the killing, "intended" the death at issue, or actually "anticipated that a human life would be taken" (the anti-parties issue); *and* (3) other mitigating circumstances do not prohibit the death penalty (the "mitigation" issue). TEX. CODE CRIM. PROC. art. 37.071, § 2(b).[5] Texas's anti-parties instruction ensures that Texas complies with the Eighth Amendment's constraints on death sentences in accomplice liability scenarios. *See Tison v. Arizona*, 481 U.S. 137, 158 (1987); *Enmund v. Florida*, 458 U.S. 782, 801 (1982); *Johnson v. State*, 853 S.W.2d 527, 535 (Tex. Crim. App. 1992). The anti-parties instruction requires that a defendant have had

[5] The future danger, anti-parties, and mitigation questions are called the Texas "special issues."

a "highly culpable mental state" that is "at least as culpable as the one involved in *Tison.*"—i.e., "[r]eckless disregard for human life" plus "major" participation. *Ladd v. State*, 3 S.W.3d 547, 573 (Tex. Crim. App. 1999).

The anti-parties requirement permitted a death sentence only if Nelson's sentencing-phase jury found that Nelson's *personal* culpability warranted that penalty. Evidence of Nelson's limited involvement in the murder was thus critical to his sentencing-phase defense. But because trial counsel did not explore Nelson's reduced role before trial, they failed to substantiate that position with evidence at sentencing. 44 R.R. 20-21. The only evidence trial counsel offered to show Nelson's limited participation was the testimony of one DNA expert, who found a hair on Dobson's body containing DNA from an unknown third party. 43 R.R. 99-102. Trial counsel didn't offer a theory on the hair's source, or any other evidence showing that Nelson had not, in the State's words, "d[one] it alone." 37 R.R. 10.

At the sentencing phase, trial counsel called Dr. McGarrahan to testify despite her pre-trial warning that she was prepared to testify that Nelson was a "psychopath", Ex. 12 at NELSON_00775. She did indeed testify that Nelson "has many, many psychopathic characteristics"; "meets most of that criteria [for being a psychopath]"; "likes violence" and finds it "emotionally pleasing"; and meets all criteria for psychopathy except "short-term marital relationships," but only because "he's never been out of prison long enough to get married." App. 206-208. On the ultimate question of whether Nelson would pose a future danger to society, Dr. McGarrahan testified that Nelson would prove dangerous "[a]s long as there are other people around him that are preventing him from getting his way." *Id.* at 209.

Dr. McGarrahan based her opinion about Nelson's future dangerousness on his being Black. Nelson's "risk factors," she told his all-white jury, included his "*minority status*," which

made him "a storm waiting to happen," and at risk of "severe violence" for which "[t]here is no cure." *Id.* at 203-205 (emphasis added). Following all that damaging testimony, the State decided it was no longer necessary to present its own mental health expert, Dr. Randall Price, who had been waiting in the courtroom to testify. Ex. 13 at NELSON_01279.

To secure a death sentence, the State returned to the theme that "the only person who is responsible for these murders [is] this Defendant." 44 R.R. 10. It told the jury that Nelson "is capable of having been the only person in that church committing that crime. And he was." 44 R.R. 27. Dr. Peerwani's guilt-phase expert testimony on the victim's cause of death (suffocation) lent expert credence to the State's attempt to argue that Nelson could commit the assault alone. *See* 32 R.R. 25; 37 R.R. 30 (arguing that a broken stud from a belt Nelson was wearing was found on victim's leg, so Nelson must have been the one "making him suffocate"). The jury made the three statutory findings against Nelson, 44 R.R. 32-36; 2 C.R. 417-19, and the trial court sentenced Nelson to death. 2 C.R. 424-46.

III. DIRECT APPEAL

The TCCA affirmed Nelson's conviction and sentence. Opinion, *Nelson v. Texas*, No. AP-76,924 (Tex. Crim. App. Apr. 15, 2015). That appeal included no issues relevant to this Petition. This Court denied Nelson's certiorari petition on October 19, 2015. Order, *Nelson v. Texas*, No. 15-5265 (U.S. Oct. 19, 2015).

IV. STATE POST-CONVICTION PROCEEDINGS

On October 16, 2012, the trial court appointed John Stickels to represent Nelson in state habeas proceedings. 2 C.R. 432. Stickels, whose bar license has since been suspended for

negligence in capital case litigation,[6] performed no meaningful investigation on Nelson's case. He waited six months to meet with Nelson, and did not request Nelson's files from trial counsel until two months after that first meeting. Ex. 14 at NELSON_00211-12. Stickels spent only 4.5 hours reviewing Nelson's files, and he did not conduct any independent investigation into the facts or circumstances of the offense. *See id.* at NELSON_00207-12. Stickels contacted a mitigation specialist who also failed to independently investigate the offense or alleged accomplices, opting to conduct a records-only review. Ex. 15 at NELSON_00206; Ex. 16 at NELSON_00213-18. In March 2014, Nelson wrote a letter to the trial court expressing concern about Stickels's representation and pleading for new counsel. 1 C.R. 131. The court docketed the letter but took no other action.

On April 15, 2014, Stickels filed Nelson's state habeas application, raising 17 claims: 11 boilerplate and non-cognizable challenges to the Texas capital punishment scheme; 4 claims that had already been raised and denied on direct appeal; a claim based on "excessive and prejudicial security measures"; and a pro forma ineffective assistance of trial counsel ("IATC") claim that vaguely alleged trial counsel's failure to "gather relevant records" relating to "mitigation evidence." Ex. 17 at NELSON_00106-10, NELSON_00139-40. In drafting this application, Stickels included *five* separate claims based on Fetal Alcohol Spectrum Disorder ("FASD") that did not apply to Nelson (who does not have FASD). *Id.* at NELSON_00106-10, NELSON_00138. Stickels repeatedly advanced arguments on behalf of Tony—Mark Anthony

[6] In February 2024, the Texas Bar suspended Stickels's license for one year for neglecting to perform reasonable services for clients in capital murder and postconviction cases. State Bar of Texas, Profile of John William Stickels, at https://www.texasbar.com/AM/Template.cfm?template=/Customsource/MemberDirectory/MemberDirectoryDetail.cfm&ContactID=188387, last accessed January 29, 2025.

Soliz, another client of Stickels's, who did suffer from FASD. *Id.* at NELSON_00136; *see also Soliz v. State*, 432 S.W.3d 895, 903 (Tex. Crim. App. 2014) (adjudicating the Soliz FASD claim).

On January 29, 2015, the trial court entered an order recommending that the TCCA adopt the State's proposed findings of fact and conclusions of law and deny all relief, including the State's proposed factual finding emphasizing the persuasive effect of Dr. McGarrahan's testimony that Nelson's Blackness was linked to future danger, 1 S.H.C.R. 309.[7] *See Ex parte Steven Lawayne Nelson*, No. C-4-010180-1232507-A (Tex. Crim. Dist. Ct. Jan. 29, 2015). On October 14, 2015, the TCCA adopted the trial court's findings of fact and conclusions of law. *Id.*

V. FEDERAL HABEAS PROCEEDINGS

New federal habeas counsel conducted the investigation that trial and state habeas counsel hadn't. After discovering that the involvement of Springs and Jefferson was unexplored, federal counsel developed the record of Nelson's secondary involvement. Federal counsel interviewed people never contacted during pretrial investigation. They also re-interviewed people from Nelson's childhood and early adulthood, yielding new evidence about Nelson's background. Counsel uncovered and followed up on numerous records detailing childhood trauma, severe abuse, neglect, mental illness, suicidality, and poverty. (Federal courts would ultimately refuse to consider this evidence because it was not in Stickels's state application.)

On December 22, 2016, Nelson filed his amended federal habeas petition, raising five claims, including (1) an "IATC-Participation" claim alleging trial counsel's failure to adequately investigate and litigate the role of accomplices and (2) a "*Wiggins*" claim alleging trial counsel's failure to adequately investigate and develop mitigation. The district court denied all relief, including requests for fact development services under 18 U.S.C. § 3599(f), a hearing, and a stay

[7] "S.H.C.R." refers to the State Habeas Clerk's Record.

necessary to exhaust new claims. *Nelson v. Davis*, No. 4:16-CV-904-A, 2017 WL 1187880, at *10-*23 (N.D. Tex. Mar. 29, 2017).

The Fifth Circuit certified only the IATC-Participation claim for appeal, *Nelson v. Davis*, 952 F.3d 651, 656 (5th Cir. 2020), but eventually determined in a split decision that the TCCA's initial post-conviction denial meant that 28 U.S.C. § 2254(d) precluded federal merits consideration. *Nelson v. Lumpkin*, 72 F.4th 649, 660 (5th Cir. 2023). For that reason, its review was "limited to the state court record." *Id.* at 657. In the alternative, the Fifth Circuit majority affirmed summary judgment against Nelson's accomplice allegations on "*Strickland* prejudice" grounds. *Id.* at 661-62. On that alternative ground, it still excluded all the new evidence that federal habeas counsel had developed. *Id.* at 656 (it "may not consider any evidence beyond the state court record."). Judge Dennis dissented. *Id.* at 662. The Fifth Circuit denied rehearing on August 11, 2023. Order, *Nelson v. Lumpkin*, No. 17-70012, Dkt. 214. This Court later denied certiorari. Order, *Nelson v. Lumpkin*, No. 23-635 (U.S. Apr. 15, 2024).

About a month after this Court denied certiorari, the State moved to set an execution date. State's Mot. For Court to Enter Order Setting Execution Date, No. 1232570D (Tex. Crim. Dist. Ct. May 16, 2024). After a hearing, the court set an execution date of February 5, 2025.

VI. FIRST SUBSEQUENT STATE HABEAS APPLICATION

While Nelson's federal habeas petition was pending, this Court issued two relevant Sixth Amendment decisions. First, on February 22, 2017, the Court held in *Buck v. Davis* that there is a Sixth Amendment right-to-counsel violation when defense counsel elicits sentencing-phase expert testimony that their client's race predicts his "future dangerousness." 580 U.S. 100, 119 (2017). Second, on June 21, 2024, the Court held that the Confrontation Clause bars prosecutors from introducing expert-witness opinion testimony that includes testimonial hearsay from an absent forensic analyst. *Smith v. Arizona*, 602 U.S. 779, 783 (2024).

On January 15, 2025, Nelson filed a subsequent habeas application in the TCCA seeking authorization, under Texas Code of Criminal Procedure Article 11.071, § 5(a), to litigate four claims. None had been adjudicated on a full record by any court. Nelson sought authorization under two § 5(a) provisions. First, Nelson invoked § 5(a)(1)'s gateway for newly available claims, which authorizes litigation where "the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application[.]" Second, Nelson invoked § 5(a)(3)'s gateway for innocence of the death penalty, which authorizes litigation upon a showing "by clear and convincing evidence, [that] but for a violation of the [U.S.] Constitution no rational juror would have answered in the state's favor one or more of the special issues …."

Nelson's *Buck* claim alleged that trial counsel violated the Sixth Amendment in eliciting testimony from their own expert that Nelson's "minority status" was a "risk factor[]," making him "a storm waiting to happen," and a threat of "severe violence" for which "[t]here is no cure." App. 203-205; *id.* at 081-082. The application cited the State's express references to Dr. McGarrahan's future-dangerousness testimony in closing, and its decision to decline to call its own mental health expert, who had been sitting in the courtroom, following Dr. McGarrahan's damaging testimony. *See id.* at 029, 084-085; 44 R.R. 8; Ex. 13 at NELSON_01279.

Nelson's *Smith* claim challenged the State's introduction of testimonial hearsay statements through Dr. Peerwani's testimony. Dr. Peerwani testified about the victim's cause of death, which the State used to argue that Nelson was a lone assailant. 37 R.R. 30 (closing); *see also, e.g.*, 32 R.R. 25 (opening). Dr. Peerwani's testimony relied on the results of an autopsy memorialized in a report and diagrams prepared by a different doctor who "actually performed" the forensic examination but did not testify. App. 212-214.

Nelson alleged two other claims not involving new law. Both claims comprised evidence and allegations that, because of statutory restrictions on federal habeas review, had never been considered by any court. Nelson's IATC-Participation claim challenged his trial counsel's failure to develop evidence about Nelson's secondary role in the offense. The claim outlined the evidence inculpating Springs and Jefferson and asserted that the failure to investigate accomplices prejudiced the sentencing phase jury's answers to all three special issues, especially the anti-parties issue. Nelson's *Wiggins* claim alleged a deficient, prejudicial failure to investigate and develop evidence of Nelson's childhood abuse and trauma.

On January 28, 2025, the TCCA denied authorization in a two-page order. Most of the order is procedural history. The Court's legal reasoning appears in two sentences: "Applicant has failed to show that he satisfies the requirements of Article 11.071 § 5. Accordingly, we dismiss the application as an abuse of the writ without reviewing the merits of the claims raised." App. 002. This Petition follows.

REASONS FOR GRANTING RELIEF

Cursory denials of relief like the TCCA opinion below threaten this Court's supremacy on matters of constitutional law. Many criminal procedure rights can be meaningfully enforced only through post-conviction proceedings. *See*, *e.g.*, *Trevino v. Thaler*, 569 U.S. 413, 422 (2013) (explaining why Sixth Amendment right to counsel requires collateral enforcement); *Panetti v. Quarterman*, 551 U.S. 930, 935 (2007) (rule against executing offenders that become insane after sentence requiring collateral enforcement); *House v. Bell*, 547 U.S. 518, 522 (2006) (consideration of new evidence of innocence requiring collateral enforcement); *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (rule against the death penalty for juvenile offenders requiring collateral enforcement). And federal habeas review is severely restricted. *See Shoop v.*

Twyford, 596 U.S. 811, 818 (2022). That means *state* post-conviction proceedings—subject to this Court's direct review—are critical to the enforcement of constitutional rights.

The doctrine of adequate and independent state grounds ("AISG") ensures that this Court can reach federal issues in the face of vague and irregular state decisions. The order here does not indicate which among many possible grounds—many of them dependent on federal law—formed the basis for the TCCA's decision. Ambiguity like that should not thwart this Court's direct review, or the enforcement function that it ensures, and cannot be credited as AISG. When the grounds for a state court's decision are not ascertainable, this Court has appellate jurisdiction to review the decision for violations of constitutional criminal procedure rights. In this case, it is possible—even likely—that the decision rested on an incorrect interpretation of federal law, because no adequate state law barred review. But Nelson's claims have clear merit under federal law, *see* Section II, *infra*, which means the TCCA got the constitutional questions wrong. The TCCA's refusal to say what it did should not foreclose this Court from reaching federal issues, and this Court should clarify that a state court cannot preclude federal court review by declining to explain the basis of its decision.

I. THIS COURT SHOULD CONSIDER THE ADEQUACY AND INDEPENDENCE OF STATE GROUNDS THAT AN OPINION DOES NOT SPECIFY.

This Court generally won't review a state-court decision that "rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Lee v. Kemna*, 534 U.S. 362, 375 (2002) (emphasis omitted). For AISG to preclude review, the judgment must rest on a ground that is *both* adequate and independent. *See Harris v. Reed*, 489 U.S. 255, 260 (1989). Adequacy and independence are themselves federal questions subject to review in this Court. *See Johnson v. Mississippi*, 486 U.S. 578, 587 (1988).

Here, the TCCA's state-law grounds are neither adequate nor independent. The TCCA denied Nelson's 110-page application in two boilerplate sentences: "We have reviewed the application and find that Applicant has failed to show that he satisfies the requirements of Article 11.071 § 5. Accordingly, we dismiss the application as an abuse of the writ without reviewing the merits of the claims raised." The unspecified § 5 grounds relied upon may have depended on federal law, or been inadequate. A § 5 order authorizing litigation of constitutional claims requires provisional review of the claims' factual sufficiency, so TCCA orders denying authorization often depend on federal law. And even if the TCCA's state-law grounds were independent of federal law, then those grounds would be highly irregular—that is, inadequate. *See Johnson*, 486 U.S. at 587. This Court should grant certiorari to consider whether the potential existence of an adequate, independent ground precludes appellate jurisdiction when the decision may also have been based on grounds that are *inadequate* and *dependent*.

A. The grounds for denying relief are presumptively and functionally dependent on federal law

Because the TCCA order does not specify its basis for decision, the potential grounds include any basis for refusing authorization under § 5, which bars subsequent applications unless an exception specified in § 5(a)(1) through (a)(3) applies. Nelson invoked a combination of § 5(a)(1) and (a)(3) as the authorization for further litigation of his four claims. For each, the denial of authorization may depend on federal law, and the TCCA cannot preclude this Court's review by declining to spell that out.

1. The § 5(a)(1) grounds are not independent of federal law.

The text of § 5(a)(1) provides a gateway for claims having a legal or factual basis that was "unavailable" when the claimant filed his initial state application.[8] The TCCA grafts a federal-law inquiry onto the § 5(a)(1) analysis—a claimant *also* must show that "the specific facts alleged … would constitute a constitutional violation that would likely require relief from either the conviction or sentence." *Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007). When the TCCA denies authorization of a claim based on its factual insufficiency (i.e., based on its application of federal law), its boilerplate denials *still* describe such resolutions as non-merits adjudications. *See*, *e.g.*, *Campbell*, 226 S.W.3d at 421-25 (refusing to allow claim to be considered "on its merits" because it flunked federal-law inquiry); *Ex parte Rubio*, Nos. WR-65,784-02 and WR-65,784-04, 2018 WL 2329302, at *5 (Tex. Crim. App. May 23, 2018) (describing holding that "applicant has not made a prima facie showing" on IATC claim as one that is not "review [of] the merits"); *Ex parte Davila*, No. WR-75,356-03, 2018 WL 1738210 at *1 (Tex. Crim. App. Apr. 9, 2018) ("Applicant has failed to make a *prima facie* showing of a *Brady* violation …. Accordingly, we dismiss this application as an abuse of the writ *without reviewing the merits of the claims raised*." (emphasis added)); *Ex parte Cruz-Garcia*, Nos. WR-85,051-02 and WR-85,051-03, 2017 WL 4947132 at *2 (Tex. Crim. App. Nov. 1, 2017) ("Applicant fails to make a *prima facie* showing that the new evidence [presented in due process claim] is material to the outcome of his case. Accordingly, we dismiss applicant's subsequent application … under Article 11.071 § 5(a)(1) *without reviewing the merits of the claims raised*." (emphasis added)); *Ex parte Shore*, No. WR-78,133-02, 2017 WL 4534734 at *1 (Tex. Crim.

[8] Section 5(a)(1) permits merits consideration when "the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously

App. Oct. 10, 2017) ("After reviewing this application, we find that applicant has failed to make a *prima facie* showing that a person with brain damage, like an intellectually disabled person, should be categorically exempt from execution…. Accordingly, we dismiss this application as an abuse of the writ *without reviewing the merits of the claim raised*." (emphasis added)); *Ex parte Reed*, Nos. WR-50,961-07 and WR-50,961-08, 2017 WL 2131826 at *1 (Tex. Crim. App. May 17, 2017) ("We find that applicant has failed to make a *prima facie* showing on any of his [federal] claims…. Accordingly, the application is dismissed as an abuse of the writ *without reviewing the merits of the claims*." (emphasis added)).

Accordingly, when the TCCA issues a boilerplate denial disclaiming any consideration of "the merits," that language does *not* mean that the disposition is independent of federal law, because the TCCA may have made a *prima facie* merits analysis. Rather, "the merits" in that boilerplate language refers to consideration of an applicant's claims after plenary review of the law and the facts, which the court may do only *after* concluding the applicant has satisfied § 5. *See* TEXAS CODE CRIM. PROC. Art. 11.071 § 5(a) ("a court may not consider *the merits* of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing" one of the three exceptions thereunder (emphasis added)). But that doesn't mean the § 5 analysis is independent of federal law. In the federal habeas posture, the Fifth Circuit regularly finds that TCCA dismissals "without reviewing the merits" are actually dependent on federal law for AISG purposes. *See*, *e.g.*, *In re Davila*, 888 F.3d 179, 187-89 (5th Cir. 2018) (rejecting Texas's contention that TCCA relied on AISG ground to dismiss Davila's

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considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application."

claim); *see also Rocha v. Thaler*, 626 F.3d 815, 835 (5th Cir. 2010) (holding that § 5(a)(1) dismissals can be merits or non-merits).

In this case, the § 5(a)(1) grounds aren't independent because the TCCA's boilerplate denial does not disclose whether it relied on the prior "presentation" or "availability" of claims (potentially independent), or on their factual sufficiency under federal law (dependent). Long-established authority holds that, when state-law issues are "interwoven" with federal law and when the independence of the state ground is ambiguous, the Supreme Court must presume in favor of its appellate jurisdiction. *See Coleman v. Thompson*, 501 U.S. 722, 733 (1991) (discussing presumption from *Michigan v. Long*, 463 U.S. 1032, 1040 (1983)). Given that § 5(a)(1) was asserted as a gateway for each claim in the Subsequent Application, the *Long* presumption is enough to establish the requisite independence for appellate jurisdiction here.

Even in the absence of the *Long* presumption, however, there are still strong indications that the TCCA relied on federal grounds to deny the four claims presented in the subsequent application. In cases where an order denying relief is "unelaborated," like the TCCA's boilerplate order here, this Court has relied on inference to decide AISG issues. *Foster v. Chatman*, 578 U.S. 488, 497 (2016); *see also Coleman v. Thompson*, 501 U.S. 722, 739 (1991). One inference-drawing method looks at the arguments raised. *See Coleman*, 501 U.S. at 740. Here, the State's arguments only strengthen the inference that the TCCA's decision depended on federal grounds.

On the *Buck* and *Smith* claims, the State's opposition focused on the merits. And even its glancing arguments about claim-availability were "interwoven" with federal law, debating whether existing Supreme Court precedent should have pushed Nelson to include his *Buck* and *Smith* claims in his 2014 state application. The State argued that Nelson's 2014 state application

should have included the *Buck* claim because this Court issued an order granting, vacating, and remanding ("GVR") in *Saldano v. Texas*, 530 U.S. 1212 (2000). App. 149-150. And it argued that the 2014 state application should have included the *Smith* claim because of *Crawford v. Washington*, 541 U.S. 36 (2004). App. 155. The question of whether *Saldano* and *Crawford* made Nelson's *Buck* and *Smith* claims available before 2014 depends on the scope of the federal rule established in those earlier precedents.

On the IATC-Participation and *Wiggins* claims, which consumed 68 pages of the application, the State offered two sentences: "Both claims, however, have been raised in and rejected by this Court and the federal courts. Nelson gives this Court no reason to revisit them now." *Id.* at 148. But the TCCA has never held that federal adjudication of a habeas claim is issue preclusive in a later state post-conviction proceeding. If the TCCA applied that rule here, then such a ground would have been unprecedented and therefore flagrantly inadequate (*see infra* Section I.B.2); the better inference is that the TCCA simply reviewed the merits of the claims. *Cf. Sochor v. Fla.*, 504 U.S. 527, 538 (1992) (holding that when one of two potentially but unspecified grounds is unsupported by law, the Supreme Court will presume that the other was the basis for judgment).

2. The § 5(a)(3) grounds are not independent of federal law.

The § 5(a)(3) grounds are even less plausibly independent. Under § 5(a)(3), the TCCA is to authorize subsequent litigation of a claim when, "by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered" any one of three Texas special issues in favor of a death sentence. Section 5(a)(3) requires an inquiry into whether there is "a violation of the United States Constitution," and the TCCA reviews the "adequacy of the pleading" for the factual sufficiency of the underlying claim. *Ex parte Blue*, 230 S.W.3d 151, 163 & n.51 (Tex. Crim. App. 2007). Without any indication that the TCCA

eschewed the inquiry into the sufficiency of the underlying constitutional claim, the *Long* presumption applies and this Court has appellate jurisdiction over the Texas judgment.

Furthermore, and assuming only *arguendo* that the TCCA relied on the threshold showing of sentencing ineligibility—that is, what it sometimes positions as the state-law part of § 5(a)(3)—there would still be major problems with the independence requirement. In the federal habeas context, the Fifth Circuit has expressly recognized a circuit split on whether this type of gatekeeping condition is independent of federal law. *See Rocha v. Thaler*, 619 F.3d 387, 403 nn. 52-58 (5th Cir. 2010) (collecting cases establishing that "circuits are split on whether these exceptions negate an otherwise independent state-law ground"); *Rocha v. Thaler*, 626 F.3d 815, 826 n.44 (5th Cir. 2010) (re-incorporating note from prior *Rocha* opinion).

The State's sparse briefing on § 5(a)(3) doesn't create an inference that all TCCA grounds were independent. Nelson explicitly invoked the § 5(a)(3) gateway—with respect to the IATC-Participation claim, in its own subsection. In a footnote regarding the IATC-Participation and *Wiggins* claims, the State offered a mere sentence on § 5(a)(3) that is even arguably merits-independent: "This, too, is a very high bar, one which Nelson simply cannot meet." App. 148.

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Because its reasoning was two sentences long, this Court has no idea what legal grounds formed the bases for the TCCA order. The *Long* presumption recognizes that such opinion writing practices should not preclude this Court's jurisdiction, and forcefully held that this Court should presume that affected state decisions rest on federal grounds.

B. The grounds for denying relief are inadequate

"[A]n unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question." *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964). If a rule is not "firmly

established and regularly followed," or if the application an ordinary rule is "exceptional," then the state ground isn't adequate. *Cruz v. Arizona*, 598 U.S. 17, 26 (2023) (quoting *Lee*, 534 U.S. at 376). Those principles apply to this Court's direct review of state post-conviction judgments in the same way they apply to any other state decision. *See*, *e.g.*, *Cruz*, 598 U.S. at 26 (Arizona post-conviction case involving new-law exception); *see also Glossip v. Oklahoma*, 144 S. Ct. 691, 692 (2024) (granting certiorari to review state post-conviction decision and ordering briefing on adequacy of novel procedural ruling).

The TCCA's boilerplate two-sentence denial makes it impossible to discern its actual grounds for decision—whether an assessment of merit or an application of a procedural requirement. As explained, the Court should presume that the grounds were dependent on federal law. *See* Section I.A.1, *supra*. But even if they were independent, the grounds would still be *inadequate*, since the claims clearly satisfied Texas's threshold for review.

1. The § 5(a)(1) grounds for denying the *Buck* and *Smith* claims are not adequate.

Section 5(a)(1) permits authorization when the "factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." Nelson's Texas application alleged that his *Buck* and *Smith* claims were legally unavailable. Under Texas law, a claim's legal basis is "unavailable" if, at the time of a prior application, it "was not recognized by or could not have been reasonably formulated from" a Texas or federal appellate decision. TEX. CODE CRIM. PROC. art. 11.071, § 5(d). If the TCCA denied authorization on the *Buck* and *Smith* claims because they were "available" in 2014, then it departed drastically from the established Texas definition of "legal availability"—rendering the grounds for its decision inadequate.

Start with the availability analysis for Nelson's *Buck* claim. *Buck* held, for the first time, that defense-elicited testimony linking race to danger violated the Sixth Amendment right to

counsel. *Buck v. Davis*, 580 U.S. 100, 119 (2017). In the proceeding below, the State offered a single citation as the federal decision from which Nelson should have pleaded the *Buck* claim in 2014: this Court's GVR in *Saldano v. Texas*, 530 U.S. 1212 (2000). But *Saldano* did not make a *Buck* claim available earlier. The *Saldano* GVR lacks any precedential value,[9] and *Saldano* and *Buck* involved entirely different legal issues. *Saldano* concerned a *due process* theory that *prosecutors* impermissibly elicited testimony linking race and danger, not a Sixth Amendment rule about the defense doing so. The constitutional rights and violations were distinct. If the TCCA's order on the *Buck* claim was actually premised on *Saldano*'s GVR, then that state ground would be inadequate because it would be "without fair support [and] so unfounded as to be essentially arbitrary." *Enter. Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 165, (1917).

The TCCA's rejection of the *Smith* claim is also inadequate. Nelson based that claim on a 2024 decision announcing, for the first time, that the Sixth Amendment's Confrontation Clause precludes prosecutors from using expert testimony to nest testimonial hearsay from an absent forensic analyst. *See Smith v. Arizona*, 602 U.S. 779, 789, 800 (2024). The only argument the State made on the availability ground was that Nelson could have made the claim in 2014, in view of *Crawford v. Washington*, 541 U.S. 36 (2004). The differences between *Crawford* and *Nelson*, the State said, were "based on factual distinctions, not legal ones." App. 155. Of course, the whole point of *Smith* was to eliminate the *legally* significant distinction, existing in the Confrontation Clause cases since *Crawford*, between hearsay introduced by percipient witnesses and hearsay introduced by forensic experts. *Compare Crawford* 541 U.S. at 38, 68 (percipient

[9] *See, e.g.*, *Gonzalez v. Justices of Mun. Ct.*, 420 F.3d 5, 7 (1st Cir. 2005) (a GVR "is merely a device that allows a lower court that had rendered its decision without the benefit of an intervening clarification to have an opportunity to reconsider that decision").

witness's out-of-court statements), *with Smith*, 602 U.S. at 783 ("The question presented here concerns the application of those principles to a case in which an expert witness restates an absent lab analyst's factual assertions to support his own opinion testimony.")

If the TCCA relied on the State-cited authority to deny the *Buck* and *Smith* claims on legal availability grounds, then those grounds are highly irregular and therefore grossly inadequate. The TCCA regularly authorizes new-legal-basis claims when the difference between original and subsequent authority is far less than the differences between (1) *Saldano* and *Buck* and (2) *Crawford* and *Smith*. Consider its determination, under § 5(a)(1), that *Moore v. Texas*, 581 U.S. 1 (2017), was a new legal basis for an Eighth Amendment ineligibility challenge based on intellectual disability (mental retardation). Fifteen years earlier, *Atkins v. Virginia* had announced the intellectual disability exemption, using a now-familiar three-pronged framework: significantly subaverage intellectual functioning, adaptive deficits, and developmental onset. *See* 536 U.S. 304, 308 n.3 (2002). *Moore* simply reaffirmed that the three-pronged definition applied, and barred adjudication of adaptive deficits by reference to lay stereotypes of intellectual disability. *See* 581 U.S. at 18, 21. States with rules to the contrary "dr[e]w no strength from our precedent," *Moore* said, 581 U.S. at 6. Still, in case after case, and despite the incremental nature of *Moore*'s holding on a single *Atkins* prong (adaptive deficits), the TCCA treated *Moore* as a new legal basis for relief under § 5(a)(1). *See*, *e.g.*, *Ex parte Butler*, WR-41,121-03, 2019 WL 4464270 at *2 (Tex. Crim. App. Sept. 18, 2019); *Ex parte Gutierrez*, WR-70,152-03, 2019 WL 4318678, at *1 (Tex. Crim. App. Sept. 11, 2019); *Ex parte Milam*, WR-79,322-02, 2019 WL 190209, at *1 (Tex. Crim. App. Jan. 14, 2019); *Ex parte Guevara*, WR-63,926-03, 2018 WL 2717041, at *1 (Tex. Crim. App. June 6, 2018); *Ex parte Williams*, WR–71,296–03, 2018 WL 2717039, *1 (Tex. Crim. App. June 5, 2018); *see also Ex parte Davis*,

WR-40,339-09, 2020 WL 1557291, at *3 (Tex. Crim. App. Apr. 1, 2020) (noting that the TCCA has "previously found *Moore I* to constitute a new legal basis under Article 11.071, § 5").

Another example comes from this Court's so-called *Penry* jurisprudence—a series of cases about the degree to which Texas punishment phase-juries had to consider and give effect to mitigating evidence. *See Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); *Brewer v. Quarterman*, 550 U.S. 286 (2007); *Smith v. Texas*, 550 U.S. 297 (2007) ("*Smith II*"); *Tennard v. Dretke*, 542 U.S. 274 (2004); *Smith v. Texas*, 543 U.S. 37 (2004) ("*Smith I* "); *Penry v. Johnson*, 532 U.S. 782 (2001) ("*Penry II*"); *Johnson v. Texas*, 509 U.S. 350 (1993); *Graham v. Collins*, 506 U. S. 461 (1993); *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"). As of 2001, *Penry II* established that the Eighth Amendment prohibits "nullification instructions" telling sentencing-phase jurors to falsely answer Texas sentencing questions when sufficient mitigation evidence—unaccounted for by formal application of those questions—justified a noncapital sentence. *See Penry II*, 532 U.S. at 803-04. In *Ex parte Hood*, 304 S.W.3d 397 (Tex Crim. App. 2010), the TCCA held that the subsequent decisions applying *Penry II*—that is, *Smith*, *Abdul-Kabir*, *Brewer*, *Smith II*, *Tennard*, and *Smith I*—were newly available legal bases for an Eighth Amendment claim filed in 2005, even as those decisions simply and incrementally clarified Eighth Amendment law on precisely the sentencing practices that *Penry II* found unconstitutional in 2001. *See id.* at 409 ("Because we have already held … that *Tennard*, *Smith*, et al. did announce new law and that those death-row inmates were entitled to have the merits of their *Penry* claims addressed, we must treat applicant's *Penry* claim in the same manner."). *Buck* and *Smith* represent doctrinal change that far exceeds the change effected by the *Penry* cases at issue in *Hood*. Any rule that would treat *Abdul-Kabir*, *Brewer*, *Smith II*, *Tennard*, and *Smith I* as

legal bases that were "unavailable" in 2005 is being administered arbitrarily if it treats *Buck* as a routine application of *Saldano*, or *Smith* as a routine application of *Crawford*.

2. Issue preclusion is not adequate as to the *Wiggins* and IATC-Participation claims.

The only basis for rejecting the *Wiggins* and IATC-Participation claims offered by the State was a cursory argument for issue preclusion: "Both claims … have been raised in and rejected by [the TCCA] and the federal courts…. Nelson gives [the TCCA] no reason to revisit them now." App. 148. The State implied that the question of trial counsel's ineffectiveness had been fully litigated in some prior proceeding. But if the TCCA applied issue preclusion to deny authorization on the *Wiggins* and IATC-Participation claims, then that ground is inadequate—particularly as to the IATC-Participation claim—because a court cannot preclude "review by adopting a 'novel and unforeseeable' approach … that lacks 'fair or substantial support in prior law.'" *Cruz*, 598 U.S. at 30-31 (quoting *Walker v. Martin*, 562 U.S. 307, 320 (2011)).

For starters, the IATC-Participation allegations had never been presented to the Texas courts. The State's argument, then—the *only* argument responding to the IATC-Participation claim consuming 41 pages of Nelson's subsequent application—was that the federal adjudication of the IATC-Participation challenge was issue preclusive in the subsequent Texas proceeding. But Texas *does not recognize federal-state issue preclusion* in those proceedings. The State doesn't identify any federal-state preclusion of the sort hypothesized in its brief, and undersigned counsel has not located any. That's to be expected: issue preclusion here would be inconsistent with the understanding of habeas corpus as a "traditional exception to res judicata," *Allen v. McCurry*, 449 U.S. 90, 98 n.12 (1980).

Moreover, the federal adjudication would not be issue preclusive even if issue preclusion applied. Issue preclusion is limited to questions that were "fully and fairly litigated in the

previous action and [were] essential to the judgment in the previous action." *Quinney Elec., Inc. v. Kondos Ent., Inc.*, 988 S.W.2d 212, 213 (Tex. 1999). The allegations in the subsequent application, however, weren't "fully and fairly" litigated in the federal proceeding because the federal courts refused to consider most of the supporting facts alleged, barred fact development, and conducted no hearing. That abridged process and limited record resulted from the limitations on new evidence in federal habeas proceedings—and produced a prejudice holding that wasn't "essential to the judgment," as required for issue-preclusive effect, because it was offered as an alternative to the § 2254(d) finding. *Cf.* RESTATEMENT (SECOND) OF JUDGMENTS § 27, comment (i) (1982) (alternative holdings aren't issue preclusive).[10]

Unlike the IATC-Participation claim, however, the initial *state* application contained at least a nominal *Wiggins* claim. If the TCCA relied on the State's argument asserting that a *Wiggins* claim had been adjudicated in state court—albeit a claim comprising very different allegations supported by virtually no evidence—that might constitute adequate grounds for refusing authorization on that claim. But if the TCCA relied instead on the *federal Wiggins*

[10] The Fifth Circuit's alternative, record-restricted holding on the IATC-Participation claim isn't preclusive, but the holding was riddled with mistakes nonetheless. It is simply not true that "Nelson alone used Elliott's credit card in the ensuing days to make purchases" or that "no physical evidence linked Springs or Jefferson with Dobson's murder." *Nelson*, 72 F.4th at 661. *But see* App. 172 (detailing credit card usage and physical evidence pertaining to accomplices). Nor does the other evidence recited—Nelson's fingerprint on Dobson's desk, broken belt studs, and drops of blood on a shoe—disprove anything about Nelson's account, which fits the totality of evidence much better: that Nelson was a lookout, came into the church after the murder, and crawled around the desk to retrieve Dobson's computer case. *See supra* at 6-7. Moreover, the Fifth Circuit believed that the anti-parties finding was insensitive to the distinction between Nelson as the lookout and Nelson as the murderer. *See Nelson*, 72 F.4th at 662. The Fifth Circuit reasoned that, because the guilt-phase jury necessarily believed that Nelson was either the killer or that "he *should have anticipated* that a death was likely to occur" during the robbery, the sentencing-phase jury would necessarily make an anti-finding parties finding against him. *Id.* (emphasis added). The whole point of the anti-parties instruction, however, is that Nelson cannot receive a death sentence just because he *should have but did not actually* anticipate that a death would occur in the course of the robbery. *See* App. 060 (collecting authority).

adjudication as a source of preclusive effect, then that ground is inadequate for precisely the reasons set forth as to the IATC-Participation claim. Either way, and as with the other three claims, the fundamental problem remains that the TCCA's two-sentence reasoning makes it impossible to discern what grounds animated its decision to deny § 5 authorization.

* * *

This Court cannot discern which of several possible article 11.075 § 5 grounds were the basis for its judgment, and so it cannot know whether the TCCA performed a screening inquiry on the federal merits, or whether it did something else. But if its grounds were any of the "other" things the State suggested in its briefing, then those grounds are inadequate. A state court cannot arbitrarily toughen the standard for new legal bases and it cannot improvisationally apply un-recognized preclusion rules.

II. THE FEDERAL CLAIMS IN NELSON'S STATE SUCCESSOR APPLICATION WARRANTED AUTHORIZATION

If this Court has jurisdiction, the claims have enough merit to justify further litigation. This Court should either order the claims at issue authorized or remand for the TCCA to appropriately specify the grounds for its decision.

A. Nelson's trial counsel violated *Buck v. Davis* by eliciting testimony that Nelson was more dangerous because he is Black

A *Buck* violation requires (1) that trial counsel performed deficiently by introducing testimony that the defendant's race predicts danger; and (2) that the deficiency prejudiced a trial outcome. *See Buck*, 580 U.S. at 118. Both are shown here.

At Nelson's sentencing trial, his trial counsel elicited testimony from Dr. McGarrahan that Nelson's race made him a "storm waiting to happen":

> [Nelson] has a number of risk factors. The mother who is working two jobs and absent father, verbal abuse, witnessing domestic violence, the *minority status*, below SCS status, all of those things put an individual at greater risk. We can't

> pinpoint what it is that made Mr. Nelson go on and do what he did do. We just know that when you look at the risk factors that he had, I mean, it was a storm waiting to happen.

App. 203 (emphasis added). That "minority status," McGarrahan testified, is among the "factors that if are not gotten under control, will result in severe violence." *Id.* "There is no cure." *Id.* at 204-05. As in *Buck*, Nelson's lawyers used their expert to effectively tell the jury that "the color of [Nelson's] skin made him more deserving of execution." 580 U.S. at 119. "No competent defense attorney would introduce such evidence about his own client." *Id.*

The damaging effect of Dr. McGarrahan's testimony was magnified by her testimony on cross that, based on Nelson's risk factors, he "likes violence" and finds it "emotionally pleasing," App. 206; that he was a "psychopath," *id.* at 203, 207-208; and that he was "a very dangerous individual" who was "going to continue to be dangerous" as long as people are "preventing him from getting his way," *id.* at 209. Dr. McGarrahan's testimony about Nelson's risk factors, including his "minority status," was itself so devastating in its self-inflicted prejudice that the State did not even call its own expert (who had been ready and waiting to testify on the State's behalf). Ex. 13 at NELSON_01279.

As in *Buck*, the State capitalized on Dr. McGarrahan's damaging race-based testimony in closing argument, by emphasizing "the inability of [Nelson's] own experts to guarantee that he would not act violently in the future—a point it supported by reference to Dr. [McGarrahan's] testimony," *Buck*, 580 U.S. at 108: "Even the *Defendant's own expert* told you-all yesterday that he will continue to be a danger. Because that, ladies and gentlemen, is *who this Defendant is*." 44. R.R. 7-8 (State's sentencing closing) (emphasis added).

A *Buck* deficiency will almost always be prejudicial, regardless of "how much air time it received at trial or how many pages it occupies in the record." *Buck,* 580 U.S. at 122. The

prejudicial impact of McGarrahan's testimony far exceeded the "*de minimis*" threshold required to establish *Buck* prejudice. *Id.* at 121. It prejudiced Nelson on all three special issues, especially future danger.

B. The State violated *Smith v. Arizona* when it elicited testimonial hearsay about the victim's cause of death from an expert

The Confrontation Clause prohibits the admission of (1) "testimonial statements" from (2) an out-of-court declarant introduced for the truth of the matter asserted (i.e., hearsay), unless the witness is "unavailable to testify, and the defendant ha[s] had a prior opportunity" to cross-examine her. *Smith*, 602 U.S. at 783. Here, the State violated that rule by eliciting expert testimony from its chief medical examiner, Dr. Nizam Peerwani, who testified about Dobson's cause of death based on testimonial hearsay statements composed by an absent doctor.

The facts here are remarkably similar to those in *Smith*. There, this Court held that the Confrontation Clause prohibited a forensic analyst (Longoni) from testifying to the "same conclusion"—the seized substances analyzed were illicit drugs—"in reliance on [an absent analyst's] records," which Longoni had reviewed to "prepare[] for trial" because "he had not participated" otherwise. *Id.* at 791. The absent analyst's statements were hearsay—they "came in for their truth, and no less because they were admitted to show the basis of Longoni's expert opinions." *Id.* at 798, 800. This Court held that the admission of the hearsay statements offended the Confrontation Clause insofar as "the[ir] primary purpose … was to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 784 (alteration omitted) (quoting *Michigan v. Bryant*, 562 U.S. 344, 358 (2011)).

Dr. Peerwani likewise testified based on hearsay statements. Like Longoni, he did not perform the underlying forensic analysis. Dr. Sisler "actually performed" Dobson's forensic autopsy and completed the report, but he did not testify at Nelson's trial. App. 212-214. Dr.

Peerwani prepared his testimony by "review[ing] the autopsy report" and "diagrams" that "*Dr. Sisler* prepare[d]." *Id.* at 214, 216 (emphasis added). And Dr. Peerwani then "recreate[d] those diagrams so that [he] could testify to them" at the sentencing trial. *Id.* at 216. Like Longoni, Dr. Peerwani ultimately testified that he reached the "same conclusion" as the out-of-court declarant, *Smith*, 602 U.S. at 791—that is, Dr. Peerwani "totally concur[red]," presumably with "Dr. Sisler's autopsy," that the cause of Dobson's death was suffocation. *Id.* at 217-218. Dr. Peerwani, like Longoni, thus became a "mouthpiece" for Dr. Sisler's hearsay statements, which came in to support Dr. Peerwani's cause-of-death opinion. *Smith*, 602 U.S. at 783, 800. Because Dr. Sisler's statements could "provide that support only if true," they are hearsay. *Id.* at 783.

Dr. Peerwani's testimony accordingly violated the Confrontation Clause if Dr. Sisler's autopsy-report statements and diagrams were "testimonial." *Id.* They were: "[a]n objective analysis of the circumstances" would have confirmed to Dr. Sisler that they'd be used for a future prosecution. *Bryant*, 562 U.S. at 360-61. Dr. Sisler would have known that the victim died in a "violent altercation" (a crime), and that the autopsy was required pursuant to the requirements of TEXAS CODE OF CRIMINAL PROCEDURE, article 49.25. App. 215, 218 (Peerwani: death was homicide; autopsy was conducted pursuant to art. 49.25).

Dr. Sisler's statements describing Dobson's injuries and identifying suffocation as the cause of death were crucial to the State's theory that Nelson acted alone. *See, e.g.*, 44 R.R. 27. The State used the cause of death to argue that Nelson *could* have committed the fatal assault alone. *See* 37 R.R. 29-30. And Dr. Peerwani, "totally concur[ring]" with Dr. Sisler's autopsy report, was the only expert witness testifying to cause of death. App. 217-218. He lent expert credence to the State's overarching narrative that Nelson, acting alone, brutally beat and then suffocated Dobson to death. *See id.* 219-20 (Peerwani: "I can't tell you whether it was one or

two [assailants], but certainly one can easily have done that."). This testimonial hearsay violated Nelson's Confrontation Clause right, and fettered his ability to defend against the anti-parties special issue at sentencing.[11]

III. NELSON'S TRIAL COUNSEL VIOLATED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN THEY FAILED TO ADEQUATELY INVESTIGATE HIS SECONDARY ROLE IN THE OFFENSE

An IATC claimant must prove his counsel's deficiency and prejudice to the trial outcome. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Performance is deficient when it is "unreasonable," *id.* at 690-91, and reasonableness must be evaluated "under prevailing professional norms," *id.* at 688. When the deficiency alleged is a failure to investigate, the salient question is whether counsel reasonably bypassed investigation—in view of information available at the time that counsel made that decision. *See Wiggins v. Smith*, 539 U.S. 510, 527 (2003). Once "red flags" indicate the need for further investigation, they "c[annot] reasonably [be] ignored." *Rompilla v. Beard*, 545 U.S. 374, 391 n.8 (2005). Indeed, the 2003 AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES ("GUIDELINES") provide that counsel seek out "eye witnesses or other witnesses having purported knowledge of events surrounding the alleged offense itself." GUIDELINE 10.7.

[11] Texas law doesn't require a state post-conviction claimant to make a harm showing if a claim was unavailable. *See Ex parte Ghahremani*, 332 S.W.3d 470, 483 (Tex. Crim. App. 2011) (false testimony claim that was unavailable at trial); *see also Ex Parte Chavez*, 371 S.W.3d 200, 214 (Tex. Crim. App. 2012) (Keller, P.J., dissenting) ("It has become apparent from our caselaw that the habeas harm standard applies only to claims that could have been raised in an earlier proceeding. … Applicants … who are not responsible for failing to raise their claims earlier, are generally allowed a more favorable harm standard than the preponderance standard."). To meet the standard for harm applicable for claims that were previously available, claimants must show that "the error did in fact contribute to his conviction or punishment." *Ex parte Dutchover*, 779 S.W.2d 76, 78 (Tex. Crim. App. 1989).

Nelson's counsel deficiently failed to investigate and develop evidence of Nelson's secondary role in the crime. Nelson has maintained from the outset that he was a lookout for a robbery, not the killer, and trial counsel knew that. *See* App. 236-237; 36 R.R. 69-77, 86-87. Yet trial counsel failed to develop available evidence supporting Nelson's secondary role.

A multitude of "red flags," *Rompilla*, 545 U.S. at 391 n.8, pointed to Nelson's secondary participation and to more culpable accomplices, but counsel failed to investigate them. Counsel knew or should have known that: DNA found at the crime scene belonged to an unknown third party (not from the two victims or Nelson), *supra* at 7; the surviving victim maintained that two assailants were involved, *supra* at 2; Springs had Dobson's iPhone and Elliott's car keys and had told people he was trying to sell Dobson's phone, *supra* at 1-2; Springs had extensive bruising and swelling on his arm and hands days after his arrest, *supra* at 2; a witness claimed that Springs told Nelson that Elliott couldn't identify anyone due to her injuries, App. 055; investigating officers thought Springs was involved from the start, *supra* at 2-4; and Springs was with Nelson directly after the murder and was seen riding with Nelson in Elliott's car, 33 R.R. 193; 34 R.R. 163-64.

Neither Springs nor Jefferson had a credible alibi: Springs's alibi relied on testimony from a clearly biased witness, *supra* at 3; Jefferson's alibi was inconsistent with documentary evidence, *supra* at 4; surveillance footage showed Springs, Jefferson, and Nelson using the victim's credit cards at the mall after the crime, *supra* at 4; phone records showed numerous calls between Springs, Jefferson, and Nelson on the day of and after the crime, *supra* at 4; and Jefferson's aunt, Brittany Bursey, placed Jefferson and Springs with Nelson at her house in Arlington around noon on the afternoon of the crime (contradicting both accomplices' alibis), 35 R.R. 118-19. But trial counsel never subpoenaed a video recording that could have disproved

Jefferson's alibi, App. 050; investigated how Springs's cell phone activity failed to corroborate his alibi, *supra* at 3, 6; or delved into the physical evidence (bruises, stolen property, participation in similar aggravated robberies) that linked Springs to the crime, *supra* at 2 and App. 043.

The failure to investigate Nelson's secondary participation prejudiced his sentence, especially the anti-parties finding. To ensure that the sentencing-phase jury evaluated only *Nelson's* culpability, the anti-parties issue required all jurors to find beyond a reasonable doubt that Nelson "actually caused" the killing, "intended" the death at issue, or "anticipated that a human life would be taken." TEX. CODE CRIM. PROC. art. 37.071, § 2(b)(2). *Cf. Bullock v. Lucas*, 743 F.2d 244, 247 (5th Cir. 1984) (anti-parties issue ensures that "the trier of fact" does not impute intent "for the purpose of imposing the death penalty"); *Martinez v. State*, 899 S.W.2d 655, 657 (Tex. Crim. App. 1994) (anti-parties issue ensures "that a jury's punishment-phase deliberations are based solely upon the conduct of that defendant and not that of another party"). The anti-parties finding requires a "highly culpable mental state" that is "at least as culpable as the one involved in *Tison v. Arizona*, [481 U.S. 137 (1987)]"—i.e., "reckless disregard for human life" plus "major" participation. *Ladd*, 3 S.W.3d at 573. An adequate investigation would have had a reasonable probability of affecting at least one juror's vote—because the accomplice evidence showed that Nelson's participation was inconsistent with his having sufficiently anticipated, intended, or caused the murder.

The State's theory of the case was that Nelson committed the offense as the lone assailant. During its guilt-phase closing, the State made nearly *thirty* references to Nelson acting alone. *See, e.g.*, 37 R.R. 10 ("This Defendant did this, only one person, him. No other person."). But the State's lone-assailant story convinced the jury on the anti-parties finding only because of

trial counsel's deficiency. The State was able to mislead jurors—without resistance from defense counsel—that there was no other evidence pointing to any other person, and because trial counsel failed to present a full picture of the favorable evidence showing Nelson was a secondary participant in a multiparty crime where others committed the fatal assault.

The most egregious information kept from the jury was the obvious physical evidence that Springs was the primary assailant, including police records and photographs taken at the time of his arrest. The evidence would have showed that Springs had injuries consistent with an assault, including extensive bruising and swelling on his knuckles and inner left arm near his biceps or elbow. App. 238-239; Ex. 4 at NELSON_00327-28. Springs's explanation to police for these injuries was incredible: he claimed he "got th[e] bruise from lying on his arm while in jail" and the bruises and swelling on his knuckles "from beating his fists together" in a "nervous fidget." App. 239. Nor did the jury hear that the underlying robbery matched the modus operandi of Springs, who admitted to committing aggravated robberies, including at least one where the victim was violently beaten and Springs took and sold the victim's phone. *Id.* at 053.

The jury never heard that that Springs was "laughing" when the news about Dobson's murder appeared on television, Ex. 3 at NELSON_00495, or that one of Springs's best friends (Morgan Cotter) told police that she believed Springs was involved in the killing, App. 231. Nor did they hear another witness testify that Springs told Nelson that "the woman at the church couldn't have seen or identified anyone because 'her eyes were swollen shut.'" Ex. 25 at NELSON_00816 (Decl. of Tracey Nixon, ¶ 27 (Oct. 11, 2016)).

Nor did the jury hear about the obvious bias that undermined the credibility of Springs's main alibi witness, Kelsey Duffer—his girlfriend and mother of his one-year old child—who was preparing to move in with Springs's mother at the time that she vouched for Springs. App. 045.

The jury did not learn that police believed Duffer was covering for Springs, *see supra* at 3, nor did counsel impeach his alibi with Brittany Bursey's testimony that Springs was with Jefferson and Nelson at her house in Arlington around noon, not Venus (as his alibi required), 35 R.R. 118-19. They didn't hear that Duffer's claim that Nelson had called Springs at 11:15 a.m. the morning of the crime asking for help to "hit a lick," App. 239, was flatly contradicted by Nelson's and Springs's phone records, *see supra* at 6.

Trial counsel's failure to investigate Jefferson's involvement further distorted the jury's perception of Nelson's culpability. Jurors did not know, for example, that Jefferson had asked a reporting witness why she had snitched on "all of them." Ex. 3 at NELSON_00496. The jury never saw or heard about surveillance footage showing a third man, presumably Jefferson, with Springs and Nelson using the stolen credit cards at a mall after the murder. *See* App. 232-234, 236. And the jury did not learn that Jefferson's alibi about his chemistry quiz was baseless: There was no in-class quiz in class that day; the time-stamp of a phone call he answered disproves the story; a video that could have shown Jefferson's absence disappeared; and his aunt testified that he was with Springs and Nelson at her house around noon, 35. R.R. 118-19. *See supra* at 4.

With the full evidentiary picture, at least one juror would have voted differently on the anti-parties issue. That prejudice is underscored by the jurors' openness to considering a life sentence. During punishment-phase deliberations, the jury sent a note to the court asking whether Nelson had "any chance of parole if the death sentence is not pick[ed]?" 2 C.R. 421, and multiple jurors later indicated that they were open to voting for a life sentence based on evidence of secondary participation, had trial counsel presented any. *See* Ex. 26 at NELSON_00250 (Decl. of Juror James Kirk Vanderbilt); Ex. 27 at NELSON_00248 (Decl. of Juror Susan Meares

Hickey). Had counsel performed adequately, there is a reasonable probability that at least one juror would have resolved at least one of the sentencing-phase special issues in Nelson's favor.

IV. NELSON'S TRIAL COUNSEL VIOLATED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN THEY FAILED TO ADEQUATELY INVESTIGATE, DEVELOP, AND PRESENT TRAUMA-RELATED MITIGATING EVIDENCE

Trial counsel's failure to conduct an adequate investigation of possible mitigating evidence constitutes deficient performance. *See Wiggins*, 539 U.S. at 524.

Trial counsel perform deficiently when they "fail[ed] to uncover and present voluminous mitigating evidence at sentencing." *Id.* at 522. Nelson's trial counsel made no independent inquiry into the records in their possession containing mitigating evidence of childhood trauma and neglect, depression, and suicidal ideation. As a result, counsel over-relied on the sanitized recollections of Nelson's mother to present Nelson's social history to the jury. *See* App. 091-095 (Sister's account of abuse from their mother clashed with their mother's sanitized recollections; institution records showed a childhood diagnosis and ongoing battle with depression and suicidal tendencies, as well as multiple suicide attempts). Their deficient investigation was then exacerbated by their decision to rely on Dr. McGarrahan—a neuropsychologist with the wrong specialization, who never evaluated Nelson in person, and who ultimately presented aggravating testimony that Nelson was psychopathic and dangerous because he was Black.

The deficient investigation and development of mitigating evidence prejudiced sentencing Nelson's outcome—especially the mitigation finding—because the jury never considered the mitigating effects of Nelson's history of childhood trauma, neglect, and untreated mental illness. The jury never heard evidence about violence, child neglect and abuse at the hands of both parents; depression that started in childhood and only worsened with age; stints in

and out of state institutions; and suicidality leading to multiple suicide attempts. *See* App. 090-097.

Instead of mitigation testimony from a childhood-trauma expert, the jury heard from a neuropsychologist, Dr. McGarrahan. *See supra* at 8-9. She told the defense team that "environmental/social issues" were "not her area of expertise," Ex. 31 at NELSON_00773, and advised counsel that she believed Nelson did pose a future danger and that she would testify, if asked, that Nelson was a psychopath, *id.*; Ex. 12 at NELSON_00775-76 (A. McGarrahan Letter to B. Ray (Aug. 20, 2012)). As warned, Dr. McGarrahan did exactly that during Nelson's sentencing, speaking not to Nelson's traumatic history, but instead misdiagnosing Nelson before the jury with incurable "psychopathy" that made him dangerous. App. 205, 207-208.

* * *

The TCCA's decision did not rest on adequate and independent state grounds, and the affected claims have more than enough merit to warrant a remedy upon the exercise of appellate jurisdiction. This Court should either order the claims authorized or require the TCCA to specify the bases for decision on each claim.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Mr. Nelson prays that this Court grant a writ of certiorari to resolve the Questions Presented.

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Respectfully Submitted,

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