Nos. 24–6442 & 24A–753

IN THE

Supreme Court of the United States

STEVEN LAWAYNE NELSON,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

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CAPITAL CASE
QUESTIONS PRESENTED

Petitioner Steven Lawayne Nelson was convicted and sentenced to death for murdering Pastor Clinton Dobson in his church office. After the trial court set Nelson's execution date and just three weeks before his execution, Nelson belatedly filed a subsequent state application for a writ of habeas corpus. The Texas Court of Criminal Appeals (CCA) dismissed Nelson's application as an abuse of the writ. Nelson's petition for a writ of certiorari and application for a stay of execution now presents the following claims for review:

1. Whether the state court's disposition, which relied upon an adequate and independent state procedural ground, forecloses certiorari review and a stay of execution?

2. Whether the defense expert's discussion of risk factors for mental illness qualifies Nelson for relief under *Buck v. Davis*, 580 U.S. 100 (2017)?

3. Whether the testimony of the chief medical examiner—who was present for part of the autopsy, the collection of evidence, and critical case review and who related an uncontroversial cause of death to the jury—violated Nelson's confrontation rights under *Smith v. Arizona*, 602 U.S. 779 (2024)?

4. Whether the Court should entertain Nelson's claim—already largely raised and rejected on federal habeas review—that his trial counsel provided ineffective assistance because they failed to adequately investigate Nelson's role in the offense?

5. Whether the Court should reexamine Nelson's claim—again largely raised and rejected on federal habeas review—that his trial counsel provided ineffective assistance because they failed to adequately investigate, develop, and present trauma-related mitigating evidence?

LIST OF ALL PROCEEDINGS

State v. Nelson, No. 1232507D (Crim. Dist. Ct. No. 4 Tarrant Cty., Tex. Oct. 16, 2012) (conviction of capital murder and sentence of death)

Nelson v. State, No. AP-76,924 (Tex. Crim. App. Apr. 15, 2015) (direct appeal opinion affirming conviction and sentence)

Nelson v. Tex., No. 15-5265 (Oct. 19, 2015) (denying certiorari off direct review)

Ex parte Nelson, WR-82,814-01 (Tex. Crim. App. Oct. 14, 2015) (denying initial state habeas application)

Ex parte Nelson, WR-82,814-02 (Tex. Crim. App. Jan. 28, 2025) (dismissing subsequent state habeas application)

Nelson v. Davis, No. 4:16-CV-904-A (N.D. Tex. Mar. 29, 2017) (denying federal habeas relief)

Nelson v. Davis, No. 17-70012 (5th Cir. Mar. 20, 2020) (granting in part and denying in part a certificate of appealability)

Nelson v. Lumpkin, No. 17-70012 (5th Cir. June 30, 2023) (affirming district court's judgment)

Nelson v. Lumpkin, No. 23-635 (Apr. 15, 2024) (denying certiorari off federal habeas)

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INTRODUCTION

In March 2011, Nelson brutally murdered Pastor Dobson while he burglarized a church office. Nelson bound, beat, and ultimately suffocated the Pastor with a plastic bag, and savagely beat (but did not manage to kill) Pastor Dobson's elderly secretary, Judy Elliott. While Dobson and Elliott were laying bloody and beaten—but still alive—Nelson robbed them, absconding with Elliot's car, Dobson's laptop and cellphone, and Elliot's credit cards, leaving them to die.

Multiple powerful pieces of physical evidence—fingerprints, decorative fragments of Nelson's belt, the victims' blood on the top of Nelson's shoes, his possession of the fruits of the robbery, and incriminating text messages—directly linked Nelson to the murder. Indeed, at his capital murder trial Nelson took the stand and put himself at the scene. Nelson admitted to robbing Dobson and Elliot as they lay beaten or dying, however, he improbably insisted that he had only agreed to serve as a "lookout" for two friends, Anthony Springs and Claude Jefferson, who intended to burglarize the church. But Springs and Jefferson had corroborated alibis, and forensic evidence tied neither to the scene.

Eyewitness testimony and DNA evidence further showed that, while incarcerated pretrial, Nelson strangled a mentally-challenged inmate to death with a blanket. Afterwards, Nelson did a celebratory "Chuck Berry" dance, hopping on one foot and playing a broomstick like a guitar. Based on these and other egregious facts, a Texas jury convicted Nelson of capital murder and sentenced him to die.

Pursuant to the order of the trial court, Nelson is scheduled to be executed sometime after 6:00 P.M. on February 5, 2024. As shown below, Nelson has already availed himself of the full state and federal appeals available to death-row inmates in Texas. Now, a mere *two days* before his scheduled execution, Nelson seeks certiorari review of the CCA's decision to dismiss his subsequent state habeas application, which itself was only filed three weeks before Nelson's execution date. *Ex parte Nelson*, WR-82,814-02, 2025 WL 327287, at *1 (Tex. Crim. App. Jan. 28, 2025) (per curiam) (not designated for publication). In his dilatory petition for certiorari (Pet.), Nelson first asserts that his sentence violates *Buck* because his trial counsel purportedly elicited testimony that Nelson was more dangerous because he is Black. Pet.28–30. In his second claim, Nelson argues that his Sixth Amendment right to confront witnesses against him was violated by the chief medical examiner's testimony about Pastor Dobson's autopsy. *Id.* at 30–32. In his third claim, Nelson maintains that his trial counsel provided ineffective assistance because they failed to adequately investigate his role in the crime. *Id.* 32–37. Finally, in his fourth claim, Nelson contends that his trial counsel was ineffective for failing to adequately investigate, develop, and present trauma-related mitigating evidence. *Id.* at 37–38.

However, these claims are not worthy of the Court's review. Review is barred by the CCA's workaday application of an adequate and independent state procedural ground, namely, Texas's abuse-of-the-writ bar. Nelson contends that the Court should decline to enforce the procedural bar because the CCA's reasoning is purportedly unclear, and its decision may therefore rest on a merits-based application of federal

law. However, the CCA was explicit—it dismissed Nelson's subsequent application without considering the merits. This Court will not presume that there is no independent and adequate state ground for a state court decision unless the decision "fairly appear[s] to rest primarily on federal law or to be interwoven with federal law." *Coleman v. Thompson*, 501 U.S. 722, 735 (1991). Here, the Court is dealing with a commonplace abuse-of-the-writ bar, straightforwardly applied.

But regardless, Nelson's claims fail on the merits. Nelson's failure-to-investigate claims were largely raised and rejected on federal habeas review. Nelson's *Buck* claim is predicated on a complete misconstruction of the defense expert's testimony, expressly contradicted by the expert herself. And Nelson's autopsy claim either does not present confrontation error or such error was harmless—the medical examiner's unobjected-to testimony was grounded in his personal participation in the autopsy process, and Pastor Dobson's cause of death was both incontrovertible (suffocation from a plastic bag over the head) and known from other testimony. Nelson's petition does not demonstrate any special or important reason for this Court to review the CCA's decision, and this Court does not typically engage in routine error correction. Certiorari review is therefore unwarranted.

Similarly, Nelson's request for a stay is meritless. Nelson has the burden of persuasion on his stay request, and he is required to make "a clear showing" that he is entitled to one. *Hill v. McDonough*, 547 U.S. 573, 584 (2006). "Last-minute stays should be the extreme exception, not the norm[.]" *Bucklew v. Precythe*, 587 U.S. 119, 150 (2019); *see also Barr v. Lee*, 591 U.S. 979, 981 (2020). As the Court has explained:

> "[T[he last-minute nature of an application" that "could have been brought" earlier, or "an applicant's attempt at manipulation," "may be grounds for denial of a stay." *Hill*, 547 U.S. at 584 (internal quotation marks omitted). . . . If litigation is allowed to proceed, federal courts "can and should" protect settled state judgments from "undue interference" by invoking their "equitable powers" to dismiss or curtail suits that are pursued in a "dilatory" fashion or based on "speculative" theories. [*Hill*, 547 U.S. at 584–85].

Bucklew, 587 U.S. at 150–51 (footnote omitted).

By delaying until the last minute to raise his claims, Nelson fails to make the requisite showing to justify interference by the federal courts. As shown below, Nelson's claims have been available since trial. Furthermore, almost fourteen years have passed since Nelson killed Pastor Dobson. The ensuing delay in carrying out Nelson's sentence should weigh heavily in the evaluation of this application for a stay, and justice for Nelson's victims should be denied no longer. Simply put, "[t]he people of [Texas], the surviving victims of Mr. [Nelson]'s crimes, and others like them deserve better." *Id*. at 149. The State's interest in the timely enforcement of Nelson's sentence is not outweighed by the unlikely possibility that certiorari will be granted. Nelson thus fails to demonstrate that he is entitled to a stay of execution under this Court's precedent. Accordingly, Nelson's request for a stay should be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

The CCA provided the following summary of the facts on direct appeal:

> **A. Discovery of the Victims**
>
> Members of NorthPointe Baptist Church described the events surrounding the discovery of Clint Dobson and Judy Elliot. Church member Dale Harwell had plans to meet Dobson for lunch. When Dobson did not arrive at the appointed time, Harwell tried

unsuccessfully to contact him. Debra Jenkins went to NorthPointe at around 12:40, where she saw Dobson's and Elliot's cars in the parking lot. Jenkins rang the doorbell and called the church office but received no answer, so she left after about five minutes. She returned fifteen minutes later, and Elliot's car, a Galant, was no longer in the parking lot. At 1:00 p.m., another church member, Suzanne Richards, arrived for a meeting with Dobson. His car was in the parking lot, but Elliot's was not. Richards waited for half of an hour, ringing the doorbell, calling, and texting Dobson.

Meanwhile, Clint Dobson's wife, Laura, called Jake Turner, the part-time music minister, because she had been unable to reach her husband by phone. Turner agreed to go to the church, and he called Judy Elliott's husband John, who promptly drove to the church. John entered the church using his passcode and called out Dobson's name. John saw Dobson's office in disarray and saw a severely beaten woman, whom he did not immediately recognize as his wife, lying on the ground. He did not notice Dobson lying on the other side of the desk. John called the police.

Arlington police officer Jesse Parrish responded to the call. He noticed signs of a struggle, including blood and what appeared to be a grip plate of a pistol. Elliot was lying on her back with her hands bound behind her. John recognized his wife by her clothing. Parrish found Dobson lying face-up with his hands bound behind his back. A bloody plastic bag was covering his head and sucked into his mouth. Upon lifting the plastic bag off of his head, Parrish knew that Dobson was dead.

Elliot was taken to the hospital in critical condition. She had a heart attack while there and neither the physicians nor John believed she would survive. She had traumatic injuries to her face, head, arms, legs, and back and internal bleeding in her brain. She was in the hospital for two weeks and underwent five months of therapy and rehabilitation. A permanent fixture of mesh, screws, and other metal holds her face together. At the time of trial, Elliot still had physical and mental impairments from the attack.

Doctor Nizam Peerwani, medical examiner for Tarrant County, testified that the manner of Dobson's death was homicide. Dobson's injuries indicated a violent altercation during which he attempted to shield himself from blows from an object such as the butt of a firearm. Two wounds to his forehead appeared to be from the computer monitor stand in the office. According to Dr. Peerwani, the injuries indicated that

Dobson was standing when he was first struck in the head and that he was struck in the back of his head as he fell. After he had fallen to the ground and lost consciousness, his hands were tied behind his back, and the bag was placed over his head. With the bag over his head, he suffocated and died.

B. [Nelson]'s Actions after the Murder

[Nelson] texted Whitley Daniels at 1:24 p.m., and Daniels told him to bring her a cigar. After stopping at his apartment, [Nelson] drove Elliot's car to a Tire King store, where a customer bought Dobson's laptop and case out of the trunk of the Galant. At around 2:00 p.m., [Nelson] drove to a Tetco convenience store, where he used Elliot's credit card to buy gas, a drink, and a cigar. Anthony "AG" Springs' girlfriend brought AG to the Tetco. When [Nelson] tried to buy gas for her car, the card was declined. [Nelson] and AG drove in Elliot's car to the apartment of Claude "Twist" Jefferson and Jefferson's aunt Brittany Bursey.

Daniels testified that [Nelson] and AG arrived at her house with the cigar some time after 3:00 p.m. [Nelson] and AG soon left, but [Nelson] returned alone fifteen or twenty minutes later. [Nelson] asked Daniels to go to the mall and use her identification with the credit cards. She declined to do so, and [Nelson] left.

[Nelson] went to The Parks at Arlington mall. Using Elliot's credit cards at Sheikh Shoes, he purchased a t-shirt featuring the Sesame Street character Oscar the Grouch, and Air Max shoes. He also used the cards to buy costume jewelry at Jewelry Hut and Silver Gallery. [Nelson] later returned to Sheikh Shoes with two companions, but a second attempt to use the credit card was not approved.

[Nelson] returned to Bursey's apartment that evening with AG and Twist. [Nelson] was wearing the shirt, jewelry, and shoes that he had bought with Elliot's cards. While taking pills and smoking, he told Bursey that he had stolen the Galant from a pastor. [Nelson] left Bursey's apartment the next morning.

The next day, [Nelson] sent a series of text messages. One asked to see the recipient because "[i]t might be the last time." Another said, "Say, I might need to come up there to stay. I did some shit the other day, Cuz." A third said, "I fucked up bad, Cuz, real bad."

Tracey Nixon, who had dated [Nelson] off and on, picked him up the day after the murder at a gas station on Brown Boulevard. [Nelson] wore the t-shirt and some of the jewelry that he had bought with Elliot's

cards. After going to a Dallas nightclub, [Nelson] spent the night with Nixon, who returned [Nelson] to Brown Boulevard the next morning.

C. Investigation and Arrest

Officers obtained an arrest warrant and arrested [Nelson] at Nixon's apartment on March 5. At the time of his arrest, [Nelson] was wearing the tennis shoes and some of the jewelry he brought with Elliot's stolen credit cards. He was also wearing a black belt with metal studs. The shoes, belt, phone, and jewelry were seized during [Nelson]'s jail book-in.

Officers seized other items from [Nelson]'s apartment pursuant to a search warrant. They recovered a pair of black and green Nike Air Jordan tennis shoes that appeared to match a bloody shoe print at NorthPointe, the New Orleans Saints jersey seen on the mall surveillance videos, a gold chain necklace, a pair of men's silver earrings with diamond-like stones, a Nike Air Max shoe box, a Sheikh Shoes shopping bag, a Sesame Street price tag, a Jimmy Jazz business card, and receipts dated March 3 from several of the stores. Officers found Dobson's identification cards, insurance cards, and credit cards in Elliot's car.

DNA from Dobson and from Elliot was discovered in a stain on [Nelson]'s shoe. [Nelson]'s fingerprints were lifted from the wrist rest on Dobson's desk, from receipts, and from some of the items from the mall.

A trace-evidence analyst detected similarities between [Nelson]'s shoe and a bloody shoe print on an envelope in Dobson's office. [Nelson]'s belt appeared to be missing studs, and similar studs were recovered from the office. According to a firearms expert, the plastic grip panel found in Dobson's office came from a 15XT Daisy air gun, which is a CO2-charged semiautomatic BB gun modeled on a Colt firearm. The jury saw a BB gun manufactured from the same master mold and heard from a text message read into the record that [Nelson] was seeking to buy a gun just days before the killing.

D. Defense Testimony

[Nelson] testified on his own behalf. According to him, from about 11:30 p.m. on March 2, until 6:00 or 7:00 a.m. on March 3, he and three companions were looking for people to rob. They had firearms. [Nelson] went home for a while in the morning but later joined up with AG and Twist. [Nelson] claimed that he waited outside the church while AG and Twist went in. Twenty-five minutes later, he went inside and saw the victims on the ground. They were bleeding from the backs of their heads,

but they were still alive. [Nelson] then took the laptop and case. According to [Nelson], AG gave him keys and credit cards. [Nelson] waited in Elliot's car for a while and then returned to Dobson's office. By that time, the man was dead. [Nelson] could not stand the smell, so he returned to Elliot's car. He drove the group to his apartment, retrieved a CD and his New Orleans Saints jersey, and continued to Bursey's apartment, where they smoked marijuana. [Nelson] then left Bursey's apartment in Elliot's car.

[Nelson] testified that he knew people were inside the church and that he agreed to rob them. He claimed that he did not intend to hurt anyone and had no part in what happened inside of the church. He also acknowledged making the purchases at Tetco and buying the items at the mall.

[Nelson] testified to having several prior convictions.

Nelson v. State, No. AP-76,924, 2015 WL 1757144, at *1–3 (Tex. Crim. App. Apr. 15, 2015) (headings in original).

II. Punishment Evidence

The CCA also provided the following summary of the punishment evidence in its discussion of Nelson's future dangerousness:

[] The State's Punishment Evidence[…]

a. Youth History in Oklahoma

[Nelson] began getting into trouble with Oklahoma juvenile authorities when he was six years old. His juvenile career included property crimes, burglaries, and thefts. Despite efforts by Oklahoma authorities to place him in counseling and on probation, [Nelson] was incarcerated in that state at a young age because he continued to commit felonies. According to Ronnie Meeks, an Oklahoma Juvenile Affairs employee who worked with [Nelson], this was "quite alarming."

[Nelson] was sent to a detention center in Oklahoma for high-risk juveniles. On one occasion, while Meeks was driving [Nelson] to the facility for diagnostic services, [Nelson] fled from Meeks' pickup truck. He was apprehended a few minutes later. At the facility, [Nelson] was disruptive and tried to escape. After a few weeks, [Nelson] was sent to a group home in Norman, Oklahoma, for counseling. There, [Nelson] did

not fare well. He was disruptive and did not try to make any improvements. . . .

b. Youth Offenses in Texas

[Nelson] was also involved in the Texas juvenile justice system through the Tarrant County probation office. Mary Kelleher, of that office, first had contact with [Nelson] in April 2000, when he was thirteen years old. The police referred [Nelson] to her for having committed aggravated assault with a deadly weapon. Kelleher worked with [Nelson] during a time when he was pulling fire alarms, was truant, and was declining in school performance. In December 2001, the police department again referred [Nelson] to Kelleher for multiple charges, including burglaries of a habitation, criminal trespass of a habitation, and unauthorized use of a motor vehicle. After the department was notified that [Nelson] was a runaway, the juvenile court detained him until all of the charges were disposed.

The Tarrant County juvenile court adjudicated [Nelson], then fourteen years old, for burglary of a habitation and unauthorized use of a motor vehicle. He was committed to the Texas Youth Commission ("TYC") for an indeterminate period. According to Kelleher, it is unusual for a juvenile to be committed to TYC for property crimes at that age, but [Nelson]'s history made him a rare case.

Kelleher testified that [Nelson] had family support from his mother but none from his father. [Nelson]'s mother was neither abusive nor neglectful. According to [Nelson]'s mother, his two siblings went to college and did not get into trouble. [Nelson] indicated to Kelleher that he knew his actions were wrong, but he acted out of impulse and boredom, without an exact reason.

[Nelson] was a "chronic serious offender." While in TYC, [Nelson] had four of the highest-level disciplinary hearings and was repeatedly placed in the behavior-management plan. [Nelson] was originally sent to TYC for nine months, but he spent over three and a half years confined because of his infractions. This sentence for a burglary adjudication was an extraordinarily lengthy time to spend in TYC. He eventually made parole, had his parole revoked, and returned to TYC.

[Nelson] was paroled from TYC a second time. On his second parole, when [Nelson] was twenty years old, he again did not comply with the terms, even after counseling. His parole officer issued a directive to apprehend [Nelson] for these violations, but he "aged out" of

the juvenile system before he could be picked up, allowing him to remain unapprehended.

c. Adult Arrests and Convictions

In 2005, [Nelson], then eighteen years old, was stopped while driving a stolen car. The officer who arrested him concluded that [Nelson] was "a compulsive liar."

Video evidence and testimony from November 30, 2007, showed [Nelson] in a Wal-Mart stock room posing as an associate from a different store. [Nelson] put a laptop computer down his pants and then walked to the exit. The following week, [Nelson] was apprehended at a separate Arlington Wal-Mart for putting on new boots off the shelf and leaving the store without paying.

After being released from state jail in 2010, [Nelson] assaulted his live-in girlfriend, Sarina Daniels. When Sarina ran outside after an argument, [Nelson] caught her and dragged her inside. When she tried to call 9-1-1, he broke her telephone. [Nelson] bound Sarina with duct tape and tried to have her stand on a trash bag so her blood would not get on the carpet. He held a knife to her throat while holding her by the hair and made her apologize for talking to another man while [Nelson] was incarcerated. [Nelson] pulled the knife away and told Sarina that he was not going to kill her. He then grabbed her by the throat, pushed her onto a dresser, and said, "But if you do it again, then I will." [Nelson] then choked Sarina. Sarina filed charges, and [Nelson] was arrested.

For this aggravated assault with a deadly weapon, [Nelson] was placed on probation and sent to a ninety-day program at the Intermediate Sanctions Facility ("ISF") in Burnet. Sherry Price, a Dallas County probation officer, told [Nelson] to report as soon as he was released from the program, which [Nelson] failed to do. After [Nelson] failed to report as directed, Price told him to report to her on March 3. He did not report, and hours later, he killed Clint Dobson.

d. Early Jail Infractions

[Nelson] was classified as an assaultive inmate in the Tarrant County Jail while awaiting trial. For a time, he was in restrictive housing, but he nevertheless committed numerous serious disciplinary infractions. Among other things, [Nelson] broke a telephone in the visitation booth and then threatened the responding officer. After one altercation with a guard, it took three officers to subdue [Nelson]. One officer's foot was fractured. In another incident, [Nelson] refused to return to his cell. Three officers tried to escort him to his cell, but

[Nelson] stood in his cell door to prevent it shutting. When officer Kent Williams reached in to slide the door shut, [Nelson] grabbed him, struck him in the face, pulled him into his cell, and threw him on the desk and into a wall.

[Nelson] was also combative with other inmates and, on at least one occasion, was complicit in arranging for a bag filled with feces and urine to be placed in another inmate's cell. After [Nelson] was assigned to a tank for problematic inmates, he broke the lights in his cell.

On February 22, 2012, [Nelson] broke multiple fire-sprinkler heads and flooded the day room. The jury saw photographs and video of this, including [Nelson] dancing in the water. Six officers restrained him. Breaking the sprinkler heads triggered the fire alarm in the whole jail.

e. Killing of Jonathon Holden

On March 19, 2012, while [Nelson] was in the Tarrant County jail awaiting trial in this case, he killed Jonathon Holden, a mentally challenged inmate. According to a fellow inmate who witnessed the incident, Holden had angered inmates when he mentioned "the N word under his voice." [Nelson] was in the day room of the holding area, and he talked Holden into faking a suicide attempt to cause Holden to be moved to a different part of the jail. Holden came to the cell bars, and [Nelson] looped a blanket around Holden's neck. [Nelson] tightened the blanket by bracing his feet on the bars and pulling with both hands on the blanket. Holden's back was against the bars and he was being pulled up almost off his feet. It took four minutes for Holden to die. Afterwards, [Nelson] did a "celebration dance" in the style of Chuck Berry, "where he hops on one foot and plays the guitar." [Nelson] used a broom stick, which he had previously used to poke another mentally challenged inmate in the eye, as a guitar.

f. Jail Infractions while Segregated.

Following Holden's death, [Nelson] was assigned to a single-man, self-contained cell for dangerous and violent inmates. On April 22, 2012, officers found contraband, such as a broom handle and extra rolls of toilet tissue, in [Nelson]'s cell. In May 2012, a search of [Nelson]'s cell yielded a bag of prescription drugs.

On July 20, 2012, a few weeks before trial, [Nelson] damaged jail property in a two-hour-long incident, of which the jury saw security footage and heard testimony. While in a segregation cell, [Nelson] blocked the window with wet toilet paper. He then flooded his cell.

Ultimately, the officers had to use pepper spray to subdue [Nelson]. Officers in protective gear restrained [Nelson] and took him to the decontamination shower. During this time, [Nelson] rapped and sang. While his own cell was decontaminated, [Nelson] flooded the toilet in the holdover cell. He brandished a shank made from a plastic spoon. When he was being returned to his cell, [Nelson] fought and threatened the officers. They ultimately placed him in a restraint chair, a process that took eight officers. This disturbance took about seventy percent of the jail's manpower. Sergeant Kevin Chambliss, who testified about the incident, had to request back-up personnel from another facility.

On August 23, 2012, on a day of voir dire proceedings, [Nelson] cracked one of the jail's windows and chipped off paint with his belly chain while in the jail gym. He showed no remorse. [Nelson]'s dangerous activity continued after the guilt phase of trial. After the jury's verdict was read, while [Nelson] was in a holdover cell, he ripped the stun cuff off of his leg. Again, he showed no remorse. During trial, while [Nelson] was being escorted from the jail to the courtroom, he tried to move his cuffs from behind his back multiple times. During the punishment phase, officers found three razor blades inside letters addressed to [Nelson], along with other contraband items.

g. Prior Convictions

[Nelson]'s prior convictions comprised failure to identify, unauthorized use of a motor vehicle, burglary of a building, and numerous thefts.

[] Defense Evidence

The defense put on a forensic psychologist, Doctor Antoinette McGarrahan. She testified that, although [Nelson] had no current learning disability or cognitive impairment, he had a past history of learning disabilities. Dr. McGarrahan explained that, when, as a three-year-old, [Nelson] set fire to his mother's bed with intent to cause harm, it was essentially a cry for attention and security. She believed that there was "something significantly wrong with [[Nelson]'s] brain being wired in a different way, being predisposed to this severe aggressive and violence from a very early age." She testified that, by the time [Nelson] was six years old, he had had at least three EEGs, meaning that people were already "looking to the brain for an explanation" of his behavior. The test results did not indicate a seizure disorder, but Dr. McGarrahan said that they did not rule out [Nelson] having one. Risk factors present in [Nelson]'s life included having ADHD, a mother who worked two jobs, an absent father, verbal abuse, and witnessing domestic violence.

> [Nelson] spoke about two alter egos, "Tank" and 'Rico." Dr. McGarrahan did not believe that [Nelson] had dissociative-identity disorder; rather, these alter egos were a way to avoid taking responsibility for his actions.
>
> Dr. McGarrahan acknowledged on cross-examination that [Nelson] likes violence and has a thrill for violence and that it is emotionally pleasing to him. She said he is "criminally versatile," and she agreed that characteristics of antisocial personality disorder describe him. According to her, people with antisocial personality disorder have trouble following the rules of society and repeatedly engage in behavior that is grounds for arrest. They are consistently and persistently irresponsible and impulsive; they tend to lie, steal, and cheat. [Nelson] has many characteristics of a psychopath—including a grandiose sense of self, a lack of empathy, and a failure to take responsibility. Generally, such a person prefers to lie, cheat, and steal to get by.

Nelson, 2015 WL 1757144, at *4–8 (headings in original).

Nelson also called the following witnesses to testify as part of his mitigation case: Nelson's mother (Cathy James), brother (Timothy James), and sister (Kitza Nelson); Gary Beal, who was married to Nelson's maternal aunt; Jerome Castleberry, who dated Nelson's mother in Oklahoma for several years beginning when Nelson was about twelve years old and whose younger brother remained Nelson's good friend; and Deanna Carpici, a Chicasaw Nation Medical Center employee who saw Nelson when he was a young patient at the hospital's behavioral health department. *See generally* 43.RR.115–237.[1]

The defense also submitted forensic testimony in an attempt to show that Nelson was not the sole perpetrator of the crime of conviction. Amy Lee, a forensic

[1] The State uses the following citation conventions: "CR" refers to the clerk's record of trial documents. "RR" refers to the court reporter's trial transcript. "SHCR" refers to the clerk's record of state habeas documents. All references are preceded by volume number and followed by page number.

serologist, testified that one of the hairs found on Dobson did not come from Nelson, Elliott, Dobson, or Springs. 43.RR.96, 105, 109–10; 44.RR.20–21.

Finally, the defense attempted to rebut the State's case concerning Holden's murder. The defense introduced documentary evidence of the scene. 43.RR.10–19. The defense also presented the testimony of John Plunkett, M.D. 43.RR.28. Dr. Plunkett opined that Holden was an active participant in his own death. *Id*. at 36. Dr. Plunkett speculated that Holden could have leaned into the blanket to cut off circulation.[2] *Id*. at 31, 33–34. He further suggested that Holden could have gotten out of the blanket by simply standing up prior to losing consciousness. *Id*. at 36. Nelson also tried to call one of Nelson's neighbors from the cellblock that he shared with Holden, but the witness invoked his right against self-incrimination under the Fifth Amendment and did not testify. 43.RR.278–79. At the end of punishment, Nelson explained on the record that did not wish to testify further and expressed satisfaction with his representation. 44.RR.5–6.

III. Conviction and Postconviction Proceedings

A Texas jury convicted Nelson of capital murder for killing Pastor Dobson while committing or attempting to commit a robbery. 1.CR.12; 9.RR.153; 37.RR.33; 2.CR.424–26. Pursuant to the jury's answers to Texas's punishment-phase special issues, the trial court sentenced Nelson to death. 2.CR.424–26; 44.RR.32. The CCA upheld Nelson's conviction and sentence on automatic direct appeal. *Nelson*, 2015 WL

[2] Defense witness Denise Anderson, forensic DNA analyst supervisor, acknowledged that Nelson's DNA was found in Holden's fingernail scrapings. 43.RR.50.

1757144, at *15; Tex. Code Crim. Pro. art. 37.071, § 2(h). This Court denied certiorari review. *Nelson v. Tex.*, 577 U.S. 940 (2015).

Nelson filed a state application for a writ of habeas corpus. SHCR.2. After briefing, the trial court issued findings of fact and conclusions of law and recommended that the CCA deny relief. SHCR.300–38, 352. Following its own review, the CCA adopted the trial court's findings and conclusions and denied Nelson's application. *Ex parte Nelson*, WR-82,814-01 slip op., 2015 WL 6689512, at *1 (Tex. Crim. App. Oct. 14, 2015) (per curiam) (not designated for publication).

Nelson then filed a federal habeas petition, which was denied. *Nelson v. Davis*, No. 4:16-CV-904-A, 2017 WL 1187880, at *23 (N.D. Tex. Mar. 29, 2017). The Fifth Circuit granted a partial certificate of appealability (COA) but ultimately affirmed the denial of relief. *Nelson v. Davis*, 952 F.3d 651, 656 (5th Cir. 2020); *Nelson v. Lumpkin*, 72 F.4th 649, 653 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 1344 (2024).

On June 10, 2024, the 485th Judicial District Court of Tarrant County, Texas, scheduled Nelson's execution for February 5, 2025. Nelson filed a subsequent state habeas application on January 15, 2025, and the CCA denied relief and a stay of execution on January 28, 2025. *Ex parte Nelson*, 2025 WL 327287, at *1.

REASONS FOR DENYING THE WRIT

The questions that Nelson presents for review are unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling

reasons." Where a petitioner asserts only factual errors or that a properly stated rule of law was misapplied, certiorari review is "rarely granted." *Id.*

Here, Nelson advances no compelling reason to review his case, and none exists. Indeed, the issues in this case involve only the lower court's proper application of state procedural rules for collateral review of death sentences. Specifically, Nelson was cited for abuse of the writ because he did not meet the subsequent application requirements of Texas Code of Criminal Procedure Article 11.071, Section 5. The state court's disposition, which relied upon an adequate and independent state procedural ground and did not reach the merits of Nelson's claims, forecloses a stay of execution or certiorari review.

Additionally, as Justice Stevens noted, concurring in the denial of an application for a stay in *Kyles v. Whitley*, 498 U.S. 931, 932 (1990):

> This Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims.

However, if Nelson attempted to raise his claims in federal habeas proceedings now, a new habeas petition would be impermissibly successive[3] and barred by the statute of limitations.[4] A federal court would also find any new claims (such as

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[3] To the extent that Nelson is re-raising a previous claim from his recent federal habeas proceeding, "[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1). To the extent that Nelson is raising a new claim, he fails to meet requirements of 28 U.S.C. § 2244(b)(2)(A).

[4] As explained below, all Nelson's claims have been available since trial, meaning that the federal statute of limitations has long since expired. 28 U.S.C. § 2244(d)(1). Nelson's federal habeas proceeding did not toll the statute of limitations. *Duncan v. Walker*, 533 U.S. 167, 181–82 (2001).

Nelson's *Buck* or autopsy claims) defaulted by virtue of the CCA's application of Section 5.[5] Nelson's petition presents no important question of law to justify this Court's exercise of its certiorari jurisdiction, and certiorari should be denied.

I. Certiorari Review and a Stay of Execution Are Foreclosed by an Independent and Adequate State-Procedural Bar.

Article 11.071 Section 5(a) of the Texas Code of Criminal Procedure forbids state courts to consider a prisoner's subsequent state habeas application unless:

> (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 or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
>
> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; 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 or 37.0711.

This statute, like the federal habeas "second or successive" writ prohibition, works to limit the number of attempts an inmate may seek to collaterally attack a conviction, subject to certain, limited exceptions. *Compare* Tex. Code Crim. Pro. art. 11.071 § 5(a), *with* 28 U.S.C. § 2244(b); *see also Beard v. Kindler*, 558 U.S. 53, 62 (2009) (noting that federal courts should not "disregard state procedural rules that are substantially similar to those to which we give full force in our own courts.").

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[5] *Aguilar v. Dretke*, 428 F.3d 526, 533 (5th Cir. 2005) ("Texas' abuse-of-writ rule is ordinarily an 'adequate and independent' procedural ground on which to base a procedural default ruling.").

Here, the CCA dismissed Nelson's application as "as an abuse of the writ without reviewing the merits of the claims raised." *Ex parte Nelson*, 2025 WL 327287, at *1 (citing Tex. Code Crim. Pro. art. 11.071, § 5(c)). Nelson's claims are therefore unequivocally procedurally barred because the state court's disposition of the claims relies upon an adequate and independent state-law ground, i.e., the Texas abuse-of-the-writ statute. *See*, *e.g.*, *Moore v. Texas*, 122 S. Ct. 2350, 2352–53 (2002) (Scalia, J., dissenting); *Balentine v. Thaler*, 626 F.3d 842, 857 (5th Cir. 2010) (recognizing that Section 5 is an adequate state law ground for rejecting a claim); *Matchett v. Dretke*, 380 F.3d 844, 848 (5th Cir. 2004) ("Texas' abuse-of-the-writ rule is ordinarily an 'adequate and independent' procedural ground on which to base a procedural default ruling."); *Busby v. Dretke*, 359 F.3d 708, 724 (5th Cir. 2004) ("the Texas abuse of the writ doctrine is an adequate ground for considering a claim procedurally defaulted."); *Barrientes v. Johnson*, 221 F.3d 741, 758–59 (5th Cir. 2000); *Fuller v. Johnson*, 158 F.3d 903, 906 (5th Cir. 1998); *Emery v. Johnson*, 139 F.3d 191, 195–96 (5th Cir. 1997). This Court has held on numerous occasions that it "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment," *Coleman*, 501 U.S. at 729, because "[the Court] in fact lack[s] jurisdiction to review such independently supported judgments on direct appeal: since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory." *Lambrix v. Singletary*, 520 U.S. 518, 523

(1997) (citing *Herb v. Pitcairn*, 324 U.S. 117, 125–26 (1945) & *Sochor v. Florida*, 504 U.S. 527, 533–34 & n.112 (1992)); *Michigan v. Long*, 463 U.S. 1032, 1042 (1983).

Despite this long-standing precedent, Nelson now argues that Section 5 is not adequate and independent. Pet.15–28. But even considering this Court's federal habeas jurisprudence—which does not apply to a jurisdictional bar—Nelson's arguments fail. In *Long*, the Court made clear that, in determining whether a state-court judgment is independent and adequate on direct review, it would first decide whether a state court decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law." 463 U.S. at 1040. If this predicate was met, the Court would presume that the state court's decision turned on federal law unless the "adequacy and independence of any possible state law ground" was "clear from the face of the opinion." *Id.* at 1040–41. This framework was imported into the federal habeas context in *Harris v. Reed*, 489 U.S. 255, 260–63 (1989), and it has since been called the "*Harris* presumption" when it is applied in such matters. *See, e.g.*, *Ylst v. Nunnemaker*, 501 U.S. 797, 802 (1991).

The Court later made clear in *Coleman* that a two-part, conjunctive test is required: "In habeas, if the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those claims, or to be interwoven with those claims, and did not clearly and expressly rely on an independent and adequate state ground, a federal court may address the petition." 501 U.S. at 735. *Coleman* rejected the notion that *Harris* imposed a "clearly and expressly" requirement on all procedural default holdings. *Id.* at 736.

Rather, the Court explained that the *Harris* presumption, and hence the "clearly and expressly" requirement, "appl[ies] only in those cases in which it fairly appears that the state court rested its decision primarily on federal law." *Id.* (internal quotation marks omitted); *see also id.* at 735 (describing this "predicate to the application of the *Harris* presumption"). Thus, there is no presumption of federal-law consideration unless it is first determined that the state court decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law." *Id.* at 735. 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.

In *Rocha v. Thaler*, 626 F.3d 815 (5th Cir. 2010), the Fifth Circuit considered the independent nature of Texas's Section 5 bar in the federal habeas context. There, the court rejected Rocha's contention "that § 5(a)(1) is dependent on federal law in all cases." *Id.* at 835. Instead, whether a § 5(a)(1) dismissal is independent of federal law turns on case-specific factors. *Id.* As the court held,

> If the CCA's decision rests on availability, the procedural bar is intact. If the CCA determines that the claim was unavailable but that the application does not make a prima facie showing of merit, a federal court can review that determination under the deferential standards of AEDPA.

Rocha, 626 F.3d at 835. But in this case, there is no need to assume. The CCA dismissed the application as "an abuse of the writ without reviewing the merits[.]" *Ex parte Nelson*, 2025 WL 327287, at *1. The CCA conducts the availability and prima facie inquiries sequentially, *Rocha*, 626 F.3d at 834, and there is no indication the CCA proceeded to a prima facie merit analysis instead of resting its decision on

availability. Nelson argues that the CCA does not mean it when it says it dismisses a claim without reviewing the merits, because sometimes the CCA finds no prima facie merit and still says that it is not reaching the merits, Pet.17–18; however, the CCA's instant order does not resemble Nelson's cited orders, which specifically reference the "prima facie" requirement.

Furthermore, *Rocha* held that, outside of cases involving categorical ineligibility for the death penalty, Texas "does not undermine the independent state-law character of its procedural-default doctrine by referring to a federal procedural-default standard to determine whether an otherwise defaulted successive habeas application should be permitted to bypass a procedural bar." *Id.* at 823–24, 826–27. Hence, § 5(a)(3) constitutes an independent and adequate bar in cases such as Nelson's, where categorical ineligibility is not raised by his claims.

Finally, Nelson contests Section 5 bar's adequacy, primarily by asserting that the CCA misapplied its own law or speculating that the CCA may have relied upon arguably impermissible rationales not mentioned in the order to undergird its dismissal. Pet.21–28. However, this is not a situation where the imposition of the bar was exorbitant. *See*, *e.g.*, *Lee v. Kemna*, 534 U.S. 362, 376, 381–84 (2002). Nelson's meritless claims have been available since trial, and it is utterly unremarkable that the CCA refused to authorize further proceedings.[6] This is simply not an "exceptional case[]" or "one of rarest of situations, [where] 'an unforeseeable and unsupported

[6] Nelson's stay application (Appl.) refers to the certiorari grant in *Glossip v. Oklahoma*, 144 S. Ct. 691, 692 (2024), to suggest that the Court might have interest in this issue; however, the unusual circumstances of *Glossip* (i.e., the State confessing error) are not present here. Appl.3; Brief of Respondent, *Glossip v. Oklahoma*, No. 22-7466, 2024 WL 1860351 (Apr. 23, 2024).

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.'" *Cruz v. Arizona*, 598 U.S. 17, 26 (2023) (citing *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964)).

II. Nelson's *Buck* Claim Fails on the Merits.

In his first dilatory claim for certiorari review, Nelson claims that he is entitled to relief under *Buck* because a defense expert made a solitary reference to his "minority status." Pet.28–30. However, there is no *Buck* error here. Dr. McGarrahan's single reference was made while discussing Nelson's *mental illness* and—unlike in *Buck*—was not part of an effort by the expert or the parties to link Nelson's race with a propensity for violence. Indeed, Dr. McGarrahan herself strenuously disputes Nelson's self-serving interpretation of her testimony.

To begin, it is worth noting Nelson's astounding dilatoriness. This is a claim based on *the trial record*. Nelson's trial occurred in 2012. Nelson could have raised this claim during direct appeal, state habeas review, or federal habeas review (where he was represented by current counsel). Nelson may assert that this claim was not available until the *Buck* decision in 2017, but the basis for this claim has obviously existed for more than two decades. *Buck*, 580 U.S. at 109 (citing *Saldano v. Tex.*, 530 U.S. 1212 (2000)). Indeed, this is empirically true, as Buck himself formulated his claim in 2002.[7] *Buck*, 580 U.S. at 110. But even assuming that the 2017 *Buck* decision was a necessary predicate, Nelson could have raised this claim during federal habeas proceedings almost eight years ago. And if *that* was somehow not possible, Nelson

[7] For the purposes of Texas's abuse-of-the-writ bar, a claim's legal basis is only unavailable if it could not be reasonably formulated from an appellate decision. Tex. Code Crim. Pro. art. 11.071, § 5(d).

could have at least raised this claim after federal habeas proceedings concluded in April 2024. 144 S. Ct. 1344. And at the *very* least, Nelson could have raised it when his execution was set in June 2024. Certainly, waiting until three weeks before his execution to finally raise this claim served no purpose save to rush and inconvenience the courts and the State. Any way it is sliced, Nelson has been dilatory, and this dilatoriness both mandates the denial of Nelson's claim and calls into question its validity. *Bucklew*, 587 U.S. at 149–50; *Rhines v. Weber*, 544 U.S. 269, 277–78 (2005) ("capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of a sentence of death").

Regardless, this claim is meritless, as it is predicated on a misleading and flatly incorrect interpretation of Dr. McGarrahan's testimony. In *Buck*, the Court held that Buck's counsel acted deficiently in presenting expert testimony regarding future dangerousness. This is because, in determining whether Buck was a future danger, defense expert Dr. Walter Quijano's report concluded that Buck's race (Black) increased the probability that he would be a future danger as "[t]here is an overrepresentation of Blacks among the violent offenders." *Buck*, 580 U.S. at 107. This report was shared with counsel and entered into evidence. Likewise, testimony was elicited from Dr. Quijano that race was "know[n] to predict future dangerousness." *Id.* Dr. Quijano explained "'that minorities, Hispanics and [B]lack people, are overrepresented in the Criminal Justice System.'" *Id.* The State then reiterated that "'the race factor, [B]lack, increases the future dangerousness for various complicated reasons.'" *Id.* at 108. And, in closing argument, the State

emphasized "the inability of Buck's own experts to guarantee that he would not act violently in the future—a point it supported by reference to Dr. Quijano's testimony." *Id*. During deliberations, the jury asked for, and were given, the "'psychology reports' that had been admitted into evidence," including that of Dr. Quijano. *Id*.

By contrast, Dr. McGarrahan did not tie Nelson's race to a propensity for future dangerousness. On cross-examination, the State asked Dr. McGarrahan to define "risk factor," which she explained as "conditions, issues, factors that put an individual at a greater likelihood to develop a mental illness or condition." 43.RR.265. This clarified her previous testimony about Nelson's ADHD:

> Q. People that - - just because somebody has got ADHD, that doesn't mean they're going to commit crimes.
>
> A. Absolutely not.
>
> Q. Okay. It's just one of those things, like you said earlier, just makes them a little higher risk?
>
> A. It does make them a higher risk for engaging - - especially if you add that to the fire setting and the aggression and the stealing and lying. When you add those problems in addition to ADHD, you have a significantly increased risk for engaging in criminal offenses, juvenile delinquency, and violent behavior.
>
> Q. What is it - - and there may not be an answer to this, what is it that steers people towards committing crimes as opposed to yelling at the teacher, which is - - maybe is a crime initially, but what is in a person's psyche if they start developing these problems, what makes them go commit crime? Is there anything that you can put your finger on or does it just happen that way or is it unexplained, tell us about that.
>
> A. I think if we could figure that out, that would be very positive for our society. But I think there are individual differences from the individual who has ADHD and goes on to commit violent offenses and those who don't.

> What we do know about Mr. Nelson is in addition to the ADHD, he 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 storm waiting to happen.

43.RR.252–53. This appears to be Dr. McGarrahan's solitary reference "minority status." In fact, a cursory search of Dr. McGarrahan's testimony yields no mention of Nelson being Black or African American. *See generally* 43.RR. Nelson's attempt to stretch this reference further appears to be mere daisy-chaining through references to risk factors. But Nelson's daisy-chains are easily severed by McGarrahan's clarification that the risk factors pertain to mental illness. It is further worth noting that Dr. McGarrahan's larger point in the above exchange seems to be that ADHD (or anything else) does not necessarily cause a person to commit crimes. As Dr. McGarrahan later agrees upon questioning by the State, people are free to make their own choices and risk factors do not compel behavior. 43.RR.265–67. This is night and day different from Dr. Quijano's representations in *Buck*—e.g., "**Race**. Black: Increased probability." *Buck*, 580 U.S. at 107.

Indeed, another capital inmate raised a similar point on federal habeas review, suggesting that Dr. McGarrahan's instant testimony should have precluded the other inmate's counsel from hiring her in his own case. Dr. McGarrahan—plainly offended at the "misrepresentation"—submitted a response explaining that that the contention was "specious" and that she "never correlated Nelson's race with future dangerousness." *See* Dr. Antoinette McGarrahan's Brief of Amicus Curiae, *Ricks v.*

Lumpkin, 4:20-cv-01299-O (N.D. Tex.), ECF No. 65. Nelson himself challenged counsel's presentation of Dr. McGarrahan during his own federal habeas review, yet not on this basis. The Fifth Circuit favorably described Dr. McGarrahan's testimony and found counsel did not act ineffectively with respect to her. *Nelson* 952 F.3d at 663–65. The fact that Nelson did not raise this issue at that time is telling.[8]

Finally, the State's closing[9] is likewise free of references to Nelson's race or minority status. Although the cited argument does remind the jury that Dr. McGarrahan agreed Nelson would be a future danger, the State did not dwell on this fact or mention race. Instead, the focus was on Nelson, his criminal history (including another murder while incarcerated), and his manipulative behavior. If anything, the prosecutor uses Dr. McGarrahan to emphasize Nelson's free will. 44.RR.9 ("And you even heard that from Dr. McGarrahan yesterday. He has made bad choices.").

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[8] Nelson even cited *Buck* for a different proposition (the COA standard) in his Fifth Circuit briefing. *See* Petitioner-Appellant's Application for a COA and Brief in Support at 12, *Nelson v. Davis*, No. 17-70012 (5th Cir.).

[9] I am not sure what other evidence we could bring you to show you that this Defendant is a future danger. We brought you another murder. We brought you continuous assaults in the jail on the jailers and other assaults by this Defendant in his victims, on people he perceives as weak, as people he perceives as somehow less than himself.

> We also brought you his extensive and versatile criminal history. The answer to Special Issue No. 1 should be yes. There nothing else that we could bring you to show that that answer should be yes. 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. He will use manipulation and power to get what he wants. He will manipulate jail guards, other inmates or whoever he needs to do to get what he wants, to exert power and control. And that, ladies and gentlemen, in this type of setting, is a very dangerous individual.

44.RR.7–8.

In sum, Nelson has taken Dr. McGarrahan's testimony wholly out of context, and he has completely failed to establish that any of Dr. McGarrahan's conclusions regarding Nelson's future dangerousness were based on race. Rather, the record establishes quite the opposite. Dr. McGarrahan admitted to the jury that Nelson's actions that day were the product of his choices—he made the choice to walk into NorthPointe Baptist Church and brutally attack Judy and Pastor Dobson. 43.RR.265–67. Given that this claim is predicated entirely on a misreading of the record, counsel's use of Dr. McGarrahan was not deficient or prejudicial. The Court should deny certiorari review on this dilatory and meritless claim.

III. Nelson's Autopsy Claim Is Meritless.

In his second claim for certiorari review, Nelson argues that his Sixth Amendment rights were violated when Dr. Peerwani (who observed the autopsy), rather than Dr. Gary Sisler (who performed the autopsy), testified about Dobson's autopsy and cause of death. Pet.30–32 (citing *Smith v. Arizona*, 602 U.S. 779 (2024)); 36.RR.11–12. However, as with Nelson's *Buck* claim, this claim is plainly dilatory. This claim could have been formulated based on some combination of *Crawford*, *Melendez-Diaz*, *Bullcoming*, or *Williams*—all available at trial. 44.RR.1, 34 (Nelson sentenced on Oct. 16, 2012); *Williams v. Illinois*, 567 U.S. 50 (2012) (decided on June 18, 2012); *Bullcoming v. New Mexico*, 564 U.S. 647 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Crawford v. Washington*, 541 U.S. 36 (2004). The *Smith* Court practically held as much. 602 U.S. at 802 (concluding "[o]ur holding today follows from all this Court has held about the Confrontation Clause's

application to forensic evidence" and subsequently citing *Crawford*, *Melendez-Diaz*, and *Bullcoming*); Tex. Code Crim. Pro. art. 11.071, § 5(d). But even if this claim could not have been formulated until *Smith*, *Smith* was decided on June 21, 2024. 602 U.S. at 799. Rather than raise the claim immediately, Nelson chose to wait seven months—three weeks before his execution—to proceed. That delay means summary dismissal is the appropriate federal remedy and suggests the claim is nothing more than a dilatory tactic. *Bucklew*, 587 U.S. at 149–50; *Rhines*, 544 U.S. at 277–78.

Regardless, Nelson's claim fails on the merits. In *Smith*, the Court held that "[w]hen an expert conveys an absent [forensic] analyst's statements in support of his opinion, and the statements provide that support only if true, then the statements come into evidence for their truth." 602 U.S. at 783. In doing so, the Court rejected the contrary view some state courts had taken in the wake of *Williams*. *Id*. at 783, 789. Further, the Court reiterated that if the absent analyst's statements are testimonial, they are barred by the Confrontation Clause as recognized in *Crawford*. *Id*. The Court did not decide whether the analyst's statements were testimonial, but instead remanded the case back to the state court with guidance. *Id*. at 801–03.

This is quite different from the situation presented by Nelson. First, Dr. Peerwani was present "at the inception of the exam," "when trace evidence was collected," "for part of the autopsy," and for "critical case review."[10] 36.RR.12. He also reviewed the photographs taken during the autopsy. 36.RR.12. Dr. Peerwani's

[10] Dr. Peerwani explained that during critical case review, "[w]e sit together, project pictures on the screen, the scene pictures, autopsy pictures, review any laboratory findings that are present in a particular case and then come to a consensus as to the cause and manner of death." 36.RR.14.

testimony thus had a basis in his personal observation and is not simply a hearsay recounting of Dr. Sisler's report. 36.RR.15–17.

Second, Nelson fails to show that the autopsy photos or report were testimonial. As noted, Dr. Peerwani also testified about the autopsy photographs. 36.RR.12, 27–35; SX 73–95. Autopsy photos are not testimonial. *Lee v. State*, 418 S.W.3d 892, 898 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd); *United States v. Williams*, 740 F. Supp. 2d 4, 10 (D.D.C. 2010) (suggesting autopsy photos could form the basis for an independent expert opinion); *cf. United States v. Lopez-Moreno*, 420 F.3d 420, 436 (5th Cir. 2005) (holding that admission of a photocopy of a voter identification card did not violate the Confrontation Clause because it did not involve a witness bearing testimony). As for the autopsy report, Nelson has not shown the report was prepared for the primary purpose of accusing him or that it possessed the requisite solemnity and formability envisioned by Justice Thomas in *Williams*. In *Williams*, Justice Thomas wrote a concurring opinion explaining that while he did not agree with the plurality's primary purpose test, he thought the report was not testimonial because it lacked the necessary solemnity and formality as it was neither sworn nor a certified declaration of fact.[11] 567 U.S. at 103–04, 110–13.

Third, even if there was confrontation error, it was harmless because there is no compelling factual dispute about the cause of death. *See Coy v. Iowa*, 487 U.S. 1012, 1021 (1988) (confrontation error subject to harmless error analysis); *Langham*

[11] Citing an unpublished intermediate court case, Nelson has suggested that Texas courts treat autopsy reports as testimonial. *Herrera v. State*, No. 07-09-00335-CR, 2011 WL 3802231, at *2 (Tex. App.—Amarillo Aug. 26, 2011, no pet.). But *Herrera* is not binding on the CCA or this Court.

v. State, 305 S.W.3d 568, 582 (Tex. Crim. App. 2010) (same). The jury had already heard testimony about how Pastor Dobson had been found with a bag over his head. 32.RR.105. The jurors also knew that Pastor Dobson had likely suffocated because Officer Parrish told them that the plastic bag was "bloody and covering his face," and that his "mouth was open and his- - the plastic was sucked into his mouth," "[a]s if his last breath was taken with the plastic." 32.RR.105. The jury hardly needed an expert to figure out the cause of death under these circumstances.

Finally, Nelson has not shown that he made a confrontation objection to Dr. Peerwani's testimony at trial. 36.RR.6–38. Accordingly, even if the CCA had not barred this claim as an abuse of the writ, it likely would have found that Nelson had waived this claim because an objection could have been made based on then-existing precedent, as explained above. Tex. R. App. Pro. 33.1(a)(1)(A). For the foregoing reasons, this claim is wholly meritless, and certiorari review should be denied.

IV. The Federal Courts Have Already Held Nelson's Participation Claim Is Meritless.

In his third claim for certiorari review, Nelson asserts that he received ineffective assistance of counsel at punishment[12] because his attorneys failed to demonstrate that he did not actually kill Dobson, but instead was only the lookout for two accomplices. Nelson raised a similar claim on federal habeas review, where it was soundly and thoroughly rejected by the district court and the Fifth Circuit. *Nelson*, 2017 WL 1187880, at *13–16; *Nelson*, 72 F.4th at 660–62. This Court denied

[12] At guilt-innocence the jury was allowed to convict Nelson as a party, *Nelson*, 72 F.4th at 654, which is why Nelson trains his attention on punishment.

certiorari review, 144 S. Ct. 1344, and while that denial is not precedential, the same jurisprudential concerns that dictated that result continue to apply. Nelson provides no compelling reason why he should be entitled to additional bites at the apple.

The district court bluntly explained that Nelson's "own testimony established his guilt as a party to the crime. The matters that [Nelson] says his counsel should have raised are but red herrings and the jury would have seen them as such." *Nelson*, 2017 WL 1187880, at *13. On appeal, the Fifth Circuit similarly concluded that Nelson could not show any deficient performance by trial counsel prejudiced him at sentencing. *Nelson*, 72 F.4th at 660–62.[13] To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. Nevertheless, "[t]he likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112. And a court must "consider all the relevant evidence that the jury would have had before it if [counsel] had pursued the different path." *Wong v. Belmontes*, 558 U.S. 15, 20 (2009).

Nelson has argued that, had his trial counsel investigated the alleged involvement of Springs and Jefferson in Pastor Dobson's murder and presented that theory at the sentencing phase, it would have convinced at least one juror to spare

[13] To demonstrate ineffective assistance of counsel under the familiar *Strickland* standard, a petitioner must "show both that his counsel provided deficient assistance and that there was prejudice as a result." *Harrington v. Richter*, 562 U.S. 86, 104 (2011). But where "it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed," *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Nelson*, 72 F.4th 661 n.4. The district court did not find that Nelson's attorneys acted deficiently. *Nelson*, 2017 WL 1187880, at *13–16.

Nelson's life by voting differently on one of the three statutory special issues prerequisite to imposing a death sentence. Tex. Code Crim. Pro. art. 37.071, § 2(b), (e)). The Fifth Circuit properly rejected this conjecture on the ground that even with such an investigation and evidentiary presentation "the State's case for death on each special question would have remained unassailable." *Nelson*, 72 F.4th at 661.

Concerning the "anti-parties" special issue, which asks the jury to determine whether Nelson "actually caused" Dobson's death or "anticipated that a human life would be taken," Tex. Code Crim. Pro. art. 37.071, § 2(b)(2), the Fifth Circuit rightly observed that "the State adduced a mountain of uncontroverted evidence that strongly suggested Nelson's *direct participation* in Dobson's murder"—including his fingerprints and decorative fragments of his belt at the scene (indicative of a struggle), the victims' blood on the *top* of his shoes, his possession of the fruits of the robbery, and incriminating text messages—while "no physical evidence linked Springs or Jefferson with Dobson's murder." *Nelson*, 72 F.4th at 661 (emphasis added). In the light of that physical evidence directly linking Nelson to the murder and Nelson's own damning testimony, evidence that he had help carrying out the murder would not "have made any difference in how the jury answered the anti-parties question." *Id*. Merely adding accomplices to Nelson's crime would not create a "substantial" "likelihood of a different result." *Richter*, 562 U.S. at 112.

Nelson fared even worse on the "future dangerousness" and "mitigation" special issues, which required the jury to assess whether Nelson posed a "continuing threat to society" and whether other mitigating circumstances warranted a "sentence

of life imprisonment without parole rather than a death sentence." Tex. Code Crim. Pro. art. 37.071, §§ 2(b)(1), (e)(1). By his own account, Nelson "participated in the aggravated robbery of a church during which that church's ecclesiastical leader was brutally and senselessly murdered." *Nelson*, 72 F.4th at 661. Worse yet, "[w]hile in custody and awaiting trial for Dobson's murder, Nelson murdered a fellow inmate"—and thereafter did a "'celebration dance' in the style of Chuck Berry" to commemorate that slaying—"engaged in several altercations with jail officers, repeatedly vandalized jail property, and smuggled weapons into jail." *Nelson*, 72 F.4th at 662. And his own forensic psychologist testified that he exhibited signs of "antisocial personality disorder" and that he shares "many characteristics of a psychopath." *Id*. It simply beggars belief to argue that hypothetical evidence of Springs's and Jefferson's involvement in Dobson's savage murder would have undermined the jurors' perception of Nelson's personal moral culpability and reduced their appraisal of his future dangerousness. Overwhelming evidence of Nelson's additional depraved acts—culminating in an additional murder—precluded such a possibility. *Belmontes*, 558 U.S. at 28 (recognizing that commission of an additional murder is "the most powerful imaginable aggravating evidence"). The lower federal courts have already found there is no merit to this dilatory claim, and this Court should find so as well.

V. The Courts Have Already Held That Nelson's *Wiggins*[14] Claim Fails on the Merits.

Concerning Nelson's assertion that counsel failed to investigate and present mitigating mental-health and personal background evidence, Nelson raised the same

[14] *Wiggins v. Smith*, 539 U.S. 510 (2003).

or similar *Wiggins* claim on federal habeas review. There, it was soundly rejected by the district court and the Fifth Circuit, which did not even deem it worthy of a COA. *Nelson*, 2017 WL 1187880, at *15–16; *Nelson*, 952 F.3d at 659–66. Nelson also raised a *Wiggins* claim in state court, which was denied by the CCA. SHCR.49–58; *Ex parte Nelson*, 2015 WL 6689512, at *1. Nelson provides no compelling reason why he should be entitled to a do-over on this meritless claim.[15]

Indeed, the district court found that this claim was wholly meritless, in part because "[t]he record makes abundantly clear that [Nelson] has no redeeming qualities." *Nelson*, 2017 WL 1187880, at *15–16. And the Fifth Circuit explained that "Nelson cites no authority that indicates that his counsel's extensive and manifold mitigation investigation fell below the objective standard of reasonableness." *Nelson*, 952 F.3d at 663. Nelson had previously raised a similar claim in his state habeas application. SHCR.49–58. There, the state court issued exhaustive findings and conclusions that are amply supported by the trial and habeas records. *Id.* at 301–15. The record shows that the defense team—in addition to retaining Dr. McGarrahan's expert assistance—conducted exhaustive research into Nelson's personal background and mental health. This is reflected by counsel's lengthy "People List" detailing witnesses and contacts (*id.* at 264–76), as well as the summary of the trial mitigation investigation produced by the state habeas mitigation specialist.[16] The summary

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[15] *Wiggins* claims will not satisfy § 5(a)(3). *Rocha*, 626 F.3d at 825–26.

[16] Nelson's amended federal petition also attached trial counsel's billing records, which reflect detailed work on the case. Exhibits 1–3, *Nelson*, No. 4:16-CV-904-A (N.D. Tex.), ECF No. 26-4.

states that the trial-level mitigation specialist employed was "experienced and well qualified," the procurement of records was "exhaustive," and "[t]he Mitigation Specialist identified, contacted and interviewed [Nelson]'s immediate and extended family members, friends, friends and paramours of his mother, probation officers, jail counselors and paramours of [Nelson]." Exhibit 11, *Nelson*, No. 4:16-CV-904-A (N.D. Tex.), ECF No. 26-4. The summary points to thirty-five individuals contacted by the trial team. *Id*. It observes that "[t]he interviews conducted by the Mitigation Specialists appear to have been a thorough exploration of the relationships that [Nelson] had with family, relatives, friends, and intimate others." *Id*. The trial team also produced a detailed psychosocial history and genogram. *Id*. The psychosocial history presented no less than thirty-seven discrete issues—including ones pertaining to Nelson's mental/physical health, family background, sexual history, and dealings with the authorities. *Id*.

Trial counsel testified via affidavit that they traveled to Oklahoma several times to investigate the mitigation case and met with Nelson's father in prison. SHCR.144, 303. They acquired juvenile records, adult criminal records, and medical records. *Id*. at 303. Many potential witnesses were unhelpful or unwilling to testify (*id*. at 304–05), but counsel still managed to produce several individuals to testify at trial. 43.RR.115–277.

The district court also thoroughly rejected Nelson's complaints regarding counsel's presentation of mitigating mental-health evidence through Dr. McGarrahan. *Nelson*, 2017 WL 1187880, at *15 & n.15 ("One of [Nelson]'s complaints

is that counsel failed to provide 'direction or assignment' and gave the expert 'nothing to generate a roadmap,' [. . .] as though counsel should have told the expert what conclusions to reach."). The district court noted that Nelson's "real complaint is that Dr. McGarrahan independently reviewed the records and interviewed [Nelson], disbelieving much of what he told her." *Id*. The district court further explained "[Nelson] does not argue that the expert who testified at trial was not competent or qualified to evaluate him. Rather, his complaint is that his trial counsel failed to direct the expert so that her testimony was more favorable to him." *Id*. at *12 n.6. Trial counsel is entitled to rely on the evaluations and opinions of retained experts. *Id*. (citing *Segundo v. Davis*, 831 F.3d 345, 352 (5th Cir. 2016); *Turner v. Epps*, 412 F. App'x 696, 704 (5th Cir. 2011)). Additionally, when counsel recognizes possible issues regarding a client's mental capacity and then employs an expert, counsel is not further required to "canvass[] the field to find a more favorable expert." *Dowthitt v. Johnson*, 230 F.3d 733, 748 (5th Cir. 2000); *accord Hinton v. Alabama*, 571 U.S. 263, 274–75 (2014) (per curiam). The Fifth Circuit held that "counsel presented a detailed and significant mitigation case, aided by Dr. McGarrahan's assessment of how childhood neglect and mistreatment likely left Nelson with significant psychological damage that set him on his violent path." *Nelson*, 952 F.3d at 663–66.

At any rate, the district court found that Nelson cannot show prejudice with respect to any of sentencing special issues. *Nelson*, 2017 WL 1187880, at *16. The evidence Nelson now offers is largely cumulative. The defense put on a thorough mitigation case that included expert and lay testimony concerning Nelson's personal

and family background and his mental health. Nelson's additional evidence would not have caused the jury to view Nelson any differently. In contrast, the State's punishment case showed that Nelson inveterate troublemaker with a pronounced incapacity to follow the rules either in the free world or in prison society. The facts of the crime—suffocating a pastor in his church office and savagely beating an elderly woman—are also especially heinous, even by the standards of capital crimes. Nelson's additional evidence would not have had any appreciable influence in this case—there is simply no reasonable probability of a different result.

In sum, the state court concluded during initial habeas review that Nelson had failed to demonstrate either deficiency or prejudice and therefore had failed to show that counsel were ineffective. SHCR.311–15. The district court and Fifth Circuit likewise held that counsel was not ineffective. *Nelson*, 2017 WL 1187880, at *15–16; *Nelson*, 952 F.3d at 659–66. There is no need to replow this ground after multiple courts have passed on the claim, and the Court should deny certiorari review.

VI. Nelson Is Not Entitled to a Stay of Execution.

A stay of execution is an equitable remedy. *Hill*, 547 U.S. at 584. "It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id.* (citing *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004)). "It is well-established that there must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari[ ]; there must be a significant possibility of reversal of the lower court's

decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed." *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983) (internal quotations and citation omitted), superseded on other grounds by 28 U.S.C. § 2253(c)(2). Indeed, "[a]pplications for stays of death sentences are expected to contain the information and materials necessary to make a careful assessment of the merits of the issue and so reliably to determine whether plenary review and a stay are warranted." *Id*. To demonstrate an entitlement to a stay, a petitioner must offer more than "the absence of frivolity" or "good faith." *Id*. at 892–93. Rather, the petitioner must make a substantial showing of the denial of a federal right. *Id*. In a capital case, a court may properly consider the nature of the penalty in deciding whether to grant a stay, but "the severity of the penalty does not in itself suffice." *Id*. at 893. The State's "powerful and legitimate interest in punishing the guilty," as well as its interest in finality, must also be considered, especially in a case such as this where the State and victims have for years borne the "significant costs of federal habeas review." *Herrera v. Collins*, 506 U.S. 390, 421 (1993) (O'Connor, J., concurring); *Calderon v. Thompson*, 52 U.S. 538, 556 (1998) (both the State and the victims of crime have an important interest in the timely enforcement of a sentence).

Thus, in deciding whether to grant a stay of execution, the Court must consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v.*

Holder, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see also Buxton v. Collins*, 925 F.2d 816, 819 (5th Cir. 1991).

A. Nelson has not made a strong showing that he will succeed on the merits.

Given the procedurally defective and meritless nature of his claims, Nelson fails to show that there is any significant possibility that the Court will grant certiorari. As amply demonstrated above, Nelson's failure to offer a sound claim for relief supports the denial of a stay of execution.

B. Nelson is unlikely to suffer irreparable harm.

In a capital case, a court may properly consider the nature of the penalty in deciding whether to grant a stay, but "the severity of the penalty does not in itself suffice." *Barefoot*, 463 U.S. at 893. Nelson's stay application only points to the severity of penalty in attempting to show harm, Appl.4, which is insufficient in itself.

C. The State and the public have a strong interest in seeing the state court judgment carried out.

The State and crime victims have a "powerful and legitimate interest in punishing the guilty." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (citation omitted). And "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a [death] sentence," *Bucklew*, 587 U.S. at 149 (quotation omitted); *see Nelson*, 541 U.S. at 650 ("a State retains a significant interest in meting out a sentence of death in a timely fashion"); *Gomez v. United States Dist. Court*, 503 U.S. 653, 654 (1992) (per curiam) ("[e]quity must take into consideration the State's strong interest in proceeding with its judgment"). Once post-conviction proceedings

"have run their course . . . finality acquires an added moral dimension." *Calderon*, 523 U.S. at 556. "Only with an assurance of real finality can the State execute its moral judgment in a case" and "the victims of crime move forward knowing the moral judgment will be carried out." *Id.* The State should be allowed to pursue its "strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Crutsinger v. Davis*, 936 F.3d 265, 273 (5th Cir. 2019) (citations and internal quotations omitted).

Nelson has already passed through the state and federal collateral review process. The public's interest is not advanced by postponing Nelson's execution, and the State opposes any action that would cause further delay. *Martel v. Clair*, 565 U.S. 648, 662 (2012) ("Protecting against abusive delay *is* an interest of justice.") (emphasis in original). The fact that Nelson's claims were not raised until after an execution was set must also inform the Court's analysis. "A court considering a stay must also apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" *Hill*, 547 U.S. at 584 (quoting *Nelson*, 541 U.S. 650). That presumption applies with full force here.

CONCLUSION

For the forgoing reasons, Nelson's petition for a writ of certiorari should be denied. Moreover, the State's strong interest in the timely enforcement of Nelson's death sentence is not outweighed by the unlikely possibility that Nelson's petition will be granted. Thus, Nelson's application for a stay should be denied too.

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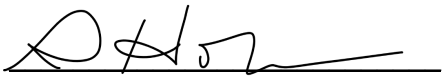

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