CAPITAL CASE
EXECUTION SCHEDULED FOR FEBRUARY 5, 2025, 6:00 PM CST
NO. 24-6442

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

REPLY BRIEF FOR PETITIONER

Lee B. Kovarsky
PHILLIPS BLACK, INC.
787 East Dean Keeton Street
Austin, TX 78705

Meaghan VerGow
Counsel of Record
Carly Gibbs
Casey Matsumoto
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
mvergow@omm.com

Louis W. Fisher
O'MELVENY & MYERS LLP
400 S. Hope Street,
18th Floor
Los Angeles, CA 90071

Attorneys for Petitioner

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REPLY BRIEF FOR PETITIONER

Steven Nelson was sentenced to death after his own expert testified that his "minority status" contributed to his future dangerousness; after a state expert provided testimonial hearsay; after a trial in which the jury did not hear the extensive available evidence demonstrating that another person caused Dobson's death; and after his trial counsel failed to present the jury with the compelling reasons to spare his life. No court has resolved these constitutional errors because the precedents entitling Nelson to relief came *after* his habeas proceedings, and because his ineffective state habeas counsel prevented the federal courts from considering his claims.

The TCCA denied Nelson authorization to pursue these constitutional claims, and while the court's cursory order does not explain why, the Court can discern from the surrounding circumstances that the rationale was likely interwoven with federal law. The State urges the Court to apply the opposite inference to an opaque order such as this, but that rule would disempower the Court and eviscerate its role as the final arbiter of constitutional law. This is an endemic problem. This Court's review is necessary and important to ensure that state courts cannot arrogate the Court's authority by declining to provide the reasons for their decisions.

The State opposes review based on a distorted version of the facts that blinks away the evidence demonstrating Nelson's limited culpability for the offense and the prejudice resulting from the errors leading to his unconstitutional death sentence. But even what the State concedes demonstrates the merits of Nelson's claims: his expert told the jury that his race factored into the "mental illness" making Nelson a future danger. The medical examiner testified about an autopsy he did not attend in full, based on an autopsy report he did not prepare. And the federal courts did not consider the substantial evidence controverting the State's narrative because it was precluded by federal law. The State can argue that Nelson suffered no prejudice only by holding fast to a record that is incomplete, inaccurate, and fatally undermined.

Nelson is scheduled to be executed this evening without a single court ever having considered the reasons why a jury would not have sentenced him to death after a constitutional trial. The TCCA's pervasive practice of summarily denying relief without explanation purports to preclude this Court's review. This Court should grant certiorari to reassert its authority to pronounce federal constitutional law, and should stay Nelson's execution pending that decision.

I. NELSON'S PETITION WAS NOT DILATORY

The State's argument that Nelson delayed bringing his claims rewrites the timeline of this case. When Nelson filed his initial state application in 2014, *Buck v. Davis*, 580 U.S. 100 (2017), and *Smith v. Arizona*, 602 U.S. 779 (2024), had not been decided.[1] Nelson filed his federal habeas petition in 2016—a year before *Buck* and eight years before *Smith*. Nelson could not file unexhausted claims in his federal habeas application, and Texas courts require that any federal proceedings be stayed before considering challenges to the same judgment, so he immediately sought a "*Rhines* stay" necessary to pursue his unexhausted claims in state court. *See Rhines v. Weber*, 544 U.S. 269 (2005). The *Rhines* stay was denied by both the district court and the Fifth Circuit, the latter of which took *six years* to decide the case. Nelson's subsequent state filing was not even *possible* until this Court denied certiorari on April 15, 2024, *Nelson v. Lumpkin*, 144 S. Ct. 1344 (2024).

Resolution of federal habeas proceedings was not the only impediment to bringing these claims earlier. When a Texas habeas claimant files a subsequent habeas application, he gets one shot to include *everything* in that subsequent application. When this Court denied certiorari—i.e., when it became apparent that Nelson would need to pursue a state subsequent habeas

[1] That 2014 application was filed by a lawyer who functionally abandoned Nelson—who conducted no meaningful investigation, and simply recycled irrelevant claims from another client's case. Pet. 9-11.

application—*Smith v. Arizona* was still pending in this Court. In fact, the state court set an execution date at a hearing before this Court decided *Smith* on June 21, 2024.

Just after *Smith* was decided, Nelson's counsel reviewed the District Attorney's case file for material pertinent to the *Smith* claim, and reviewed other previously undiscovered materials relevant to the claims ultimately raised. Counsel promptly drafted and filed a 110-page subsequent Texas application, which included 88 exhibits. In view of the constraints imposed by state and federal abstention doctrines, the timing of intervening Supreme Court precedent, and the practical realities of processing an enormous prosecution file, there is no "astounding dilatoriness" here. BIO 22.

II. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER THE TCCA ORDER, WHICH DOESN'T SPECIFY THE ACTUAL GROUNDS FOR DECISION, WAS ADEQUATE AND INDEPENDENT.

The State does not and cannot dispute that, when the TCCA decides federal-law questions of factual sufficiency, it uses boilerplate language that formally disclaims merits adjudication. Pet. at 17-18 (collecting numerous examples); *see also* BIO 21 (recognizing that "sometimes the CCA finds no prima facie merit and still says that it is not reaching the merits"). Whatever "merits" means under state law, it does *not* mean no federal question was decided. And the mere use of the term doesn't resolve the AISG inquiry because independence is a question of federal law. *See Johnson v. Mississippi*, 486 U.S. 578, 587 (1988). Under *Michigan v. Long*, 463 U.S. 1032, 1040 (1983), the TCCA's failure to specify the § 5 ground means that this Court presumes in favor of its own jurisdiction.

Nor does the petition seek mere error correction. As the BIO acknowledges, the TCCA regularly uses this boilerplate order. BIO 2 (referring to "workaday application" of the bar). When the TCCA, as here, states only that the claimant fails to satisfy "§ 5," the Court is left uncertain as to *which part of § 5* predicates the order. Is it the potentially independent ground

(prior "presentation" or "availability") or the dependent one (factual sufficiency)? The TCCA would need to provide little more to explain itself, but routinely declines to do so. The TCCA's opinion-writing practice should not thwart this Court's jurisdiction.

A. This Court Must Presume that the State Ground Depends on Federal Law.

The State responds largely based on cases that *precede* the TCCA's incorporation of the factual sufficiency ground into § 5(a) in 2007. *See Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007) (§ 5(a)(1)); *Ex parte Blue*, 230 S.W.3d 151, 163 & n.51 (Tex. Crim. App. 2007) (§ 5(a)(3)). Pre-2007 decisions about the independence of § 5(a) grounds are therefore inapt. *See Rocha v. Thaler*, 626 F.3d 815, 835 (5th Cir. 2010) (the view that "a dismissal under § 5(a)(1) always rested on an [AISG] … cannot survive *Campbell*" (emphasis omitted)). That leaves the State with two authorities, both federal habeas cases: *Balentine v. Thaler*, 626 F.3d 842, 857 (5th Cir. 2010), and *Rocha*, 626 F.3d 815. And the State only cites *Balentine* for adequacy, not independence. BIO 18.

That leaves *Rocha*, a case about § 5(a)(1). The State's reliance on *Rocha* is mystifying, as the State's own block quotation shows that *Rocha* decisively supports Nelson:

> 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.

BIO 20 (quoting *Rocha*, 626 F.3d at 835). As *Rocha* says, the ground is not independent if it is a finding that the claimant "does not make a prima facie showing of merit." *Rocha*, 626 F.3d at 835; *see also Ruiz v. Quarterman*, 504 F.3d 523, 527 (5th Cir. 2007) ("[t]he boilerplate dismissal by the CCA of an application for abuse of the writ" renders "unclear" whether the decision was based on "a state-law question" or "a question of federal constitutional law").

In this case, there is no basis to conclude that the TCCA relied on "unavailability" or

"previous presentation" instead of the federal-law ground of factual sufficiency. The order says only that Nelson "failed to show that he satisfies the requirements of Article 11.071 § 5" and that the TCCA reached that conclusion "without reviewing the merits." Pet. App. at Nelson Appendix-002. But *that* doesn't mean the ground is independent. Over and over again, the TCCA has described § 5(a)(1) findings of factual insufficiency as nonmerits adjudications, even though they are plainly dependent on federal law. *See* Pet. 17-18 (collecting case law). And the State cannot deny that the TCCA may have denied authorization based on its federal-law conclusion that Nelson's claims were factually insufficient.

As for § 5(a)(3), *Rocha* is also the only case the State cites. BIO 21. But the State fails to address a crucial distinction between that case and this one. In *Rocha*, the claimant argued "that when the CCA concluded that his successive state habeas application did not satisfy the requirements of § 5(a)(3), *it necessarily also concluded* that his Wiggins claim is without merit." 626 F.3d at 823-24 (emphasis added). Nelson does not argue that the TCCA *necessarily* reaches a federal question when it holds that "no rational juror" would have answered all special issues in the state's favor. Art. 11.071 § 5(a)(3). Nelson argues only that the *Long* presumption kicks in when this Court cannot tell whether the TCCA relied on the federal grounds.[2]

What's left, then, is the State's argument that the *Long* presumption does not apply because the TCCA decision is not sufficiently "interwoven" with federal law. BIO 19-20. The entanglement is obvious here, where Nelson raised federal claims and the State principally disputed the sufficiency of the supporting facts. In the Fifth Circuit's words: "As the CCA is keenly aware, its choice of language was made against a background legal standard—[which

[2] The State fails to acknowledge that, even if the TCCA denied authorization on "no rational juror" grounds, *Rocha* itself identifies a circuit split as to whether those grounds are independent. *See* Cert. Pet. at 21 (citing pertinent *Rocha* cases).

directs TCCA adjudication to proceed under § 5]—*that is interwoven with federal law*." *Ruiz v. Quarterman*, 504 F.3d 523, 527 (5th Cir. 2007) (emphasis added).[3]

Saying nothing about its grounds, the TCCA order offers no reason to shed the inference that the court adopted the federal grounds presented by the State. The Court should clarify that the order's silence does not extinguish this Court's jurisdiction. *Cf. Foster v. Chatman*, 578 U.S. 488, 497 (2016) (using inference from case history to decide independence when the "Georgia Supreme Court's unelaborated order on review provides no reasoning for its decision").

B. The Potential State Grounds Are Inadequate.

The State's assertion that the TCCA's order was "utterly unremarkable" would only confirm this Court's jurisdiction, if it were correct. *See* BIO 21. An order grounded in factual insufficiency may be unremarkable, but this Court cannot know whether insufficiency was the operative ground—a ground that would permit this Court's jurisdiction in any event. And if the TCCA relied on *other* grounds, they would be inadequate. As explained in the petition (at 21-28), if in deciding the IATC-Participation and *Wiggins* claims, the TCCA adopted the State's issue-preclusion argument, then that ground is a "'novel and unforeseeable' approach … that lacks 'fair or substantial support in prior law.'" *Cruz v. Arizona*, 598 U.S. 17, 30-31 (2023) (quoting *Walker v. Martin*, 562 U.S. 307, 320 (2011)). The State offers no precedent to the contrary. And if the TCCA denied authorization of the *Buck* and *Smith* claims because they were available in 2014, then those grounds are "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) (argued in Pet. at 22-26).

[3] The State also errs in its reliance on *Coleman v. Thompson*, 501 U.S. 722, 739-40 (1991). *Coleman* holds that independence requires a "clear indication" of state grounds only when a

III. THE FEDERAL CLAIMS WARRANTED AUTHORIZATION

A. The *Buck* Claim Has Sufficient Merit

Nelson's trial counsel violated *Buck v. Davis* by (1) introducing defense expert testimony that his race predicted future dangerousness, which (2) prejudiced his capital sentencing defense. *Buck*, 580 U.S. at 118.

The State contends that Nelson could have raised his claim earlier based on the trial record. BIO 22. But Nelson could not have raised his *Buck* claim until *Buck* itself was decided on February 22, 2017—several months after Nelson filed his federal habeas petition, and just a few weeks before the district court denied it. *Nelson v. Davis*, No. 4:16-CV-904-A, 2017 WL 1187880, at *1 (N.D. Tex. Mar. 29, 2017). The State argues that *Saldano v. Texas*, 530 U.S. 1212 (2000) was a viable legal basis. BIO 22. But *Saldano* involved a different constitutional rule (due process, not effective-assistance of counsel) and different fact scenarios (prosecutor-elicited race testimony) that resulted in a non-precedential GVR. *Saldano*, 530 U.S. 1212 (2000). Pet. 23. Before *Buck* itself, the claim would have been futile. *See Black v. State*, 816 S.W.2d 350, 364 (Tex. Crim. App. 1991) (no waiver where "it would have been futile" to object "under the law as established by this Court at the time of trial"). And once the claim arose, Nelson could not assert it until federal habeas proceedings concluded. *See* Section I, *supra*. [4]

Turning to the merits, the State argues that McGarrahan did not "tie Nelson's race to a propensity for future dangerousness," but instead merely said that his race put him "'at a greater

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"state court judgment" is not "a state court judgment rested primarily on federal law or … interwoven with federal law." 501 U.S. at 739-40.

[4] Without a stay of federal proceedings—which was denied to Nelson, *see Nelson v. Davis*, No. 4:16-CV-904-A, 2017 WL 1187880, at *23 (N.D. Tex. Mar. 29, 2017)— the TCCA would have dismissed the litigation under a "two-forum[] rule" that bars collateral Texas litigation undertaken while a federal habeas petition is pending. *See Ex parte Soffar*, 143 S.W.3d 804, 805 (Tex. Crim. App. 2004).

likelihood to develop a mental illness or condition.'" BIO 24 (quoting 43 R.R. 265). But that propensity for mental illness—driven in part by his race—is exactly what made Nelson dangerous in the future, in McGarrahan's telling. The critical testimony speaks for itself: when asked what "steers people," including those with ADHD, "*towards committing crimes*," McGarrahan answered whether they have "risk factors," including "*minority status*." BIO 24-25 (citing 43 R.R. 252-53). The State focuses on later testimony by McGarrahan, but that did not cure the harm she caused. When asked, "what makes them go commit crime?," she testified that "minority status" was a "risk factor[]" for criminal behavior. 43 R.R. 252-53; *see Buck*, 580 U.S. at 107; *contra* BIO 25.

Next, the States argues that there were no "references to Nelson's race or minority status" in its closing. BIO 26. But the State explicitly referenced the McGarrahan future dangerousness testimony that was *based* on Nelson's race. As in *Buck*, the State's closing argument confirmed the prejudice of the testimony because the State observed that the defendant's "own experts" could not "guarantee that he would not act violently in the future," with reference to the relevant testimony. 580 U.S. at 108. As the State acknowledges, in closing the State "reminded the jury that McGarrahan agreed Nelson would be a future danger." BIO 26; *see also* 44 R.R. 7-8 ("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."). In fact, McGarrahan's race-linked future dangerousness testimony was so obviously prejudicial that the State decided that it didn't need to call its own psychological expert (Pet. 29).

B. The *Smith* Claim Has Sufficient Merit

The State violated Nelson's Confrontation Clause rights under *Smith v. Arizona* when it elicited, from Dr. Peerwani, (1) "testimonial statements" from (2) an out-of-court declarant (Dr. Sisler) introduced for the truth of the matter asserted (i.e., hearsay). 602 U.S. at 783.

The State claims that the claim is "plainly dilatory"—even though *Smith* was not decided until *after* state courts set Nelson's execution date—because the claim supposedly "could have been formulated based on some combination of *Crawford*, *Melendez-Diaz*, *Bullcoming*, or *Williams*." BIO 27. Not so. *Smith* definitively answered, for the first time, the question whether a forensic expert witness's out-of-court statements constituted hearsay, or instead "came into evidence not for their truth, but … to 'show the basis' of the in-court expert's independent opinion" under Rule of Evidence 703 (and state analogues). *See Smith*, 602 U.S. at 793. Before *Smith*, the answer to that question was hopelessly confused at very best, given this Court's 4-1-4 split in *Williams v. Illinois*, 567 U.S. 50 (2012); *Smith*, 602 U.S. at 789 (*Williams* had "'sown confusion in courts across the country' about the Confrontation Clause's application to expert opinion testimony"), as the State itself *acknowledges*, Bio 28. Indeed, prior to *Smith*, "[s]ome courts … [were] appl[ying] the Williams plurality's 'not for the truth' reasoning to basis testimony"—under which Nelson's claim would have failed—"while others ha[d] adopted the opposed" view of Justice Thomas's concurrence, shared by the four dissenting Justices (later adopted by the *Smith* majority). *Smith*, 602 U.S. at 789.

On the merits, the State contends that Dr. Peerwani's testimony was not hearsay because it "had a basis in his personal observation." BIO 28. But Dr. Peerwani was personally involved only "'for part of the autopsy,'" i.e., "'at the inception of the exam,'" and "'when trace evidence was collected,'" and during 'critical case review.'" BIO 28 (quoting 36 R.R. 12). His presence at the *beginning* of the exam does not mean that Dr. Peerwani had personal knowledge of the *conclusions* drawn from the completed autopsy (which Dr. Sisler "actually performed," 36 R.R. 11). Nor does it establish his personal knowledge over all statements the autopsy report (which

Dr. Sisler authored), or as to the diagrams of Dobson's injuries (which Dr. Sisler "prepared," 36 R.R. 12). 36 R.R. 12.

The State also disputes whether "the autopsy photos or report were testimonial." BIO 29. The testimonial status of the photos is irrelevant, because Nelson does not argue that the photos are hearsay. It is sufficient that Dr. Sisler's autopsy report itself was testimonial, because its "primary purpose" was "to establish or prove past events potentially relevant to later criminal prosecution," *Smith*, 602 U.S. at 784, an argument the State responds to with only an *ipse dixit*. BIO 29. But Dr. Sisler prepared that report pursuant to the Texas Code of Criminal Procedure following a suspected homicide, which is sufficient to discern its purpose. App. 215, 218; *see Herrera v. State*, 2011 WL 3802231, at *2 (Tex. Ct. App. Aug. 26, 2011) (holding that, under Texas law, autopsy reports prepared for suspicious deaths are testimonial).

The State argues that Nelson did not object at trial, so he waived the claim and a harm showing is required. BIO 29-30. But Nelson could not waive a claim that wasn't available before 2024. *See Black*, 816 S.W.2d at 364. Under Texas law, the unavailability of Nelson's claim at his trial and on direct appeal means that no post-conviction harm showing is required. *See, e.g, Ex parte Ghahremani*, 332 S.W.3d 470, 483 (Tex. Crim. App. 2011) (false testimony claim that was unavailable at trial). Furthermore, the offending testimony was not harmless. Dr. Sisler's description of Dobson's injuries and his cause-of-death testimony were central to the State's theory that Nelson committed the assault alone. Pet. 31-32. Even if other circumstantial evidence might have permitted a cause-of-death inference, BIO 30, Dr. Peerwani's testimony lent unique expert credence to the State's narrative. *See Coble v. State*, 330 S.W.3d 253, 281 (Tex. Crim. App. 2010).

C. The IATC-Participation Claim Has Sufficient Merit

Nelson's subsequent state application presented voluminous and critical new evidence confirming that his trial counsel could have, but did not, develop evidence of Nelson's secondary participation. Pet. 33. Nelson has not had prior "bites at the apple." BIO 31. No prior court has evaluated this claim on the full evidentiary record. No such claim was raised in the 2014 state application, and federal courts limited their consideration to the prior state record.

The balance of the State's argument defends the Fifth Circuit's alternative, record-restricted holding on prejudice. BIO 32 (citing *Nelson*, 72 F.4th at 667). The State simply ignores the blatant factual mistakes underlying the Fifth Circuit's legal conclusions, flagged in the petition, including that "Nelson alone used Elliott's credit card" and that "no physical evidence" linked the accomplices to the crime. Nelson, 72 F.4th at 661; Pet. 27 n.10. *Springs* had the stolen car keys and phone. 34 R.R. 167. And Springs and Jefferson were seen on video footage *with* Nelson using the stolen credit cards. App. 233-234.

Next, there is no "mountain of uncontroverted evidence" that "strongly suggest[s] Nelson's direct participation." BIO 32. Instead, the evidence the State identifies is actually more consistent with *Nelson's* account—that he was merely a lookout who entered the scene and took property after the assault was complete. Nelson testified to entering the church office to take a laptop, and that he knelt on the floor and crawled under the desk to grab the laptop bag. 36 R.R. 73-76. The text messages and physical evidence cited by the State are consistent with this account; the State has no explanation for the physical evidence demonstrating the presence of other parties, and indicating that Springs had recently been involved in a violent physical altercation. Pet. 7, 33.

Had the jury heard undeveloped but available evidence *supporting* Nelson's account, and inculpating others, then "adding accomplices to Nelson's crime" would indeed "create a

substantial likelihood of a different result." BIO 32 (quotation marks omitted). The State cannot wish away the likely impact of the unpresented physical evidence—bruises, stolen property, participation in similar aggravated robberies—inculpating Springs. Pet 2.

Nor can the State ignore the incident report showing that the police thought his alibi (Duffer) was lying, phone records disproving her claim that Nelson called Springs on speakerphone to plan the robbery at 11:15 in the morning, and testimony from Jefferson's aunt that Springs was at her house long before Springs said he came to Arlington that day. Pet. 3-4.

The State takes the same non-responsive approach to Jefferson's alibi. Jefferson claimed he was taking an in-class chemistry quiz that the instructor said did not occur, Ex. 11 at NELSON_00464. He answered a phone call and appeared at his aunt's house (with Springs and Nelson) during the window he claimed to have been taking the quiz. Ex. 10 at NELSON_00339; 35 R.R. 132-23. Stickels's egregious performance meant that this evidence was not presented in 2014, and statutory restrictions on new evidence meant that federal courts could not consider it either.

Finally, the State contests prejudice by arguing that Nelson was responsible for the death of another prisoner, Jonathan Holden, while Nelson awaited trial. The State made no arguments about Holden in the TCCA proceedings. As an initial matter, the Holden death has no bearing on the anti-parties issue. More important, the State distorts the evidence about Holden's death. Holden was deeply unstable and had attempted suicide three weeks before he was arrested. He was placed in a suicide prevention cell. On March 19, he was found hanging from his blanket, which had been shared by several prisoners. A prisoner in the cell block, Charles Bailey, indicated to investigators that Holden had killed himself. The State's contrary narrative was based on the testimony of a jailhouse informant who was promised favorable treatment in

exchange for his help, and whose story at trial contradicted what he initially told investigators. Amended Petition for a Writ of Habeas Corpus, *Nelson v. Davis*, No. 4:16-CV-904-A (N.D. Tex. Mar. 29, 2017), ECF No. 25 at PDF pp. 29-30. The facility's failure to adequately respond to Holden's ongoing suicide risk was an obvious source of embarrassment, and there was no arrest or prosecution for Holden's death.

D. The Wiggins Claim Has Sufficient Merit

On the *Wiggins* deficiency prong, the State argues that trial counsel conducted *some* mitigation investigation. But the fact that trial counsel contacted some witnesses or procured *some* records does not preclude a deficiency finding—especially if the evidence was not used reasonably to present a sentencing defense. *See* Pet. 37. Instead, trial counsel relied on the self-serving testimony of Nelson's mother, contradicted in part by Nelson's sister, and made no independent exploration of available records containing the mitigating evidence of childhood trauma, depression, and suicidal ideation.

Trial counsel were also deficient for retaining and presenting the testimony of McGarrahan. The deficiency was not trial counsel's failure to "direct" her testimony. *Contra* BIO 36. It was the decision to retain a neuropsychologist who admitted childhood trauma was "not her area of expertise" and to call her to testify without having her evaluate Nelson or determining what her opinion would be. *See* Pet. 37-38. On prejudice, the State invokes the district court's bizarre finding that Nelson "[t]he record makes abundantly clear that [Nelson] has no redeeming qualities." BIO 34 (quoting *Nelson*, 2017 WL 1187880, at *15–16). On the contrary, the district court's appraisal of the state-court record proves prejudice: it reflects the very deficiencies alleged as the basis for relief here.

IV. NELSON IS ENTITLED TO A STAY OF EXECUTION

The appropriateness of an emergency stay largely reflects the merits and cert-worthiness of the underlying claims and Questions Presented. *See* BIO 39. Nelson has established the requisite merit here. On the harm prong, the State underscores that Nelson cannot get a stay just because he will die without one. *See* BIO 39. That observation is true enough, but not because stay applicants must show more harm than death. *Barefoot* simply states that, in addition to harm, Nelson must also show sufficient merit. *See id.*

The State's final stay arguments focus on equities. First, the State argues that Nelson has already had opportunities to litigate his claims. *See* BIO 40. As explained, neither the initial state nor federal habeas proceedings provided Nelson a reasonable opportunity to enforce his constitutional rights. Nelson was saddled with an incompetent, now-suspended lawyer for the 2014 state proceeding (Stickels), and then the federal courts refused to consider any allegations or evidence outside of the threadbare record that Stickels built. Second, the State alleges Nelson's dilatoriness. Part I of this Reply answers this allegation.

CONCLUSION AND PRAYER FOR RELIEF

The application for stay of execution and petition for a writ of certiorari should be granted.

February 5, 2025 Respectfully Submitted,

/s/ Meaghan Vergow

Lee B. Kovarsky
PHILLIPS BLACK, INC.
787 East Dean Keeton Street
Austin, TX 78705

Meaghan VerGow
Counsel of Record
Carly Gibbs
Casey Matsumoto
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
mvergow@omm.com

Louis W. Fisher
O'MELVENY & MYERS LLP
400 S. Hope Street,
19th Floor
Los Angeles, CA 90071

Attorneys for Petitioner