OCTOBER TERM, 2024

No. _____

In the

Supreme Court of the United States

ROBERT LESLIE ROBERSON III,

Petitioner,

v.

TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

APPLICATION FOR STAY OF EXECUTION

Capital Case
Execution Scheduled for October 17, 2024

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To the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

The State of Texas has scheduled the execution of Robert Leslie Roberson, III for October 17, 2024. Mr. Roberson respectfully requests a stay of execution pending consideration and disposition of the petition for a writ of certiorari that is being filed along with this application.

STATEMENT OF THE CASE[1]

Robert Roberson is an innocent man. In 2003, a jury convicted him of allegedly murdering his chronically ill, two-year-old daughter, Nikki Curtis, in 2002. In fact, Nikki died from a virulent pneumonia that had progressed to the point of sepsis. Robert did not harm Nikki in any way. There was no crime—only the tragic natural death of a little girl.

Nikki was seriously ill for a week before she died—coughing, vomiting, suffering from diarrhea, with a high fever (up to 104.5 degrees). When Robert took her to multiple doctors, she was diagnosed with a "respiratory infection," "likely viral" and given prescriptions. Early in the morning on January 31, 2002, Robert found Nikki had fallen out of bed. He comforted her, and they both fell back asleep. Hours later, Robert awoke to find Nikki had stopped breathing and turned blue. After he brought Nikki to the hospital, CAT scans were made of her head and doctors observed a set of internal head conditions: subdural bleeding, brain swelling, and retinal

[1] The case background is more fully set forth in the Petition for Certiorari review filed contemporaneously with this Application for Stay.

hemorrhages ("the triad"). At that time, this triad was seen as "proof positive" of Shaken Baby Syndrome, and thus proof of child abuse caused by a combination of "shaking" and "blunt impact." And whoever was with the child when she collapsed was considered the perpetrator. As science started to catch up with the presumptions underlying Shaken Baby Syndrome (SBS), it was tweaked and renamed "Abusive Head Trauma" (AHT), a much broader term that also recognizes that numerous other accidental and natural conditions can cause the same triad. But the version of SBS used to convict Robert in 2003 has since been entirely discredited.

Shortly after rushing her to the hospital for medical care, Roberson was arrested for the death of his child. Not only was abuse presumed in 2003 when children presented with "the triad," but Roberson's blunted affect and aloof mannerisms, manifestations of his Autism Spectrum Disorder mistaken for a lack of care, led medical staff and law enforcement alike to presume culpability.

New evidence supporting Roberson's successor habeas petition shows that Nikki died of a virulent double pneumonia, exacerbated by dangerous medications, an illness that had progressed to the point of sepsis. That condition triggered her accidental fall from bed in the night and subsequent collapse. Yet the Texas Court of Criminal Appeals (TCCA) has refused to even review this evidence, despite two state rules designed precisely to enable a return to court in these kinds of circumstances. Instead, on September 11, 2024, the TCCA simply issued the following boilerplate denial: "We have reviewed the application and find that the allegations do not satisfy the requirements of Article 11.071, Section 5. *See* Tex. Code Crim. Proc. art. 37.071, §

5(a). Accordingly, we dismiss the application as an abuse of the writ without reviewing the merits of the claims raised. *See* id. art. 37.071, § 5(c)."[2]

This judicial recalcitrance has prompted a public outcry from the very lawmakers who enacted the "changed science" procedural vehicle over ten years ago, a law intended to allow habeas applicants like Robert a chance to obtain relief from wrongful convictions. The TCCA was apprised of this outpouring of unprecedented bipartisan support from lawmakers, voicing the belief that the legislative intent underlying Article 11.073 had not been honored in this case. *See* AppG.[3] But that did not prompt the TCCA to stay the execution or reconsider its previous decision dismissing the new changed-science claim without considering its merits or the voluminous new evidence supporting that claim. Counsel was informed, by email on October 10, 2024, after 6:00 PM, that the TCCA was denying the Suggestion to

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[2] "Article 37.071" is a statute that deals only with death-penalty ***trials***—and there is no section 5 in that statute; it only goes up to section 2. In other words, Texas's highest criminal court, in refusing to consider substantial evidence of Actual Innocence, did not even cite correct existing state law as a basis for refusing to review the case.

[3] In a rare show of bipartisan support, 86 Texas lawmakers have signed a letter addressed to the Governor and the Texas Board of Pardons and paroles expressing "grave concern that Texas may put Mr. Roberson to death for a crime that did not occur." They emphasized how, "[m]ore than a decade ago, the Texas Legislature passed Senate Bill 344, which allowed challenges to convictions that were based on disproven or incomplete science. That law passed with unanimous support of the Texas House because we recognized that innocent people are sometimes wrongfully convicted based on scientific evidence that later turns out to be wrong." They are "dismayed to learn that this law has not been applied as intended and has not been a pathway to relief—or even a new trial—for people like" Mr. Roberson. AppH.

Reconsider the application at issue here, was denying the motion to stay the execution, and would not be issuing a written opinion.

Mr. Roberson respectfully requests that this Court stay his execution, currently scheduled for October 17, 2024, so that this Court may consider whether a State's highest criminal court, in summarily finding a procedural bar to merits review, when that finding is contrary to both state law and the facts, and when the death-sentenced individual has adduced substantial evidence of actual innocence, violates the federal constitutional right to due process.

STANDARDS FOR A STAY OF EXECUTION

Mr. Roberson respectfully requests that this Court stay his execution, pursuant to Supreme Court Rule 23 and 28 U.S.C. § 2101(f), pending consideration of his concurrently filed petition for a writ of certiorari (the "Petition"). *See Barefoot v. Estelle*, 463 U.S. 880, 889 (1983) ("Approving the execution of a defendant before his [petition] is decided on the merits would clearly be improper."); *see also Lonchar v. Thomas*, 517 U.S. 314, 320 (1996) (holding that a court may stay an execution if needed to resolve issues raised in initial petition).

The standards for granting a stay of execution are well established. Relevant considerations include the prisoner's likelihood of success on the merits, the relative harm to the parties, the extent to which the prisoner has unnecessarily delayed his or her claims, and the public interest. *See Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004); *Barefoot*, 463 U.S. at 895. All four factors weigh strongly in Mr. Roberson's favor.

I. MR. ROBERSON SHOULD BE GRANTED A STAY OF EXECUTION.

A. Mr. Roberson is likely to succeed on the merits.

Mr. Roberson's Petition has a substantial likelihood of success. There is "a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari" and there is "a significant possibility of reversal of the lower court's decision." *Barefoot*, 463 U.S. at 895. Mr. Roberson's certiorari petition raises an "important question of federal law that has not, but should be, settled by this Court." Sup. Ct. R. 10(c). Specifically, Mr. Roberson asks this Court to determine what process is due a state habeas applicant who asserts innocence of a capital offense (and that no crime occurred) based upon substantial new scientific and medical evidence that was unavailable when the last application was filed. Surely, such circumstances require more than the invocation of an unexplained procedural bar to reviewing the merits of the claims. Yet that is exactly what the TCCA did here. By doing so, the court effectively slammed the courthouse doors to Mr. Roberson without any court ever reviewing the merits of his claims establishing his actual innocence.

As set forth more fully in Mr. Roberson's petition for certiorari, the TCCA routinely issues boilerplate opinions dismissing subsequent habeas petitions for purported failure to satisfy the requirements of Article 11.071 § 5(a). The TCCA's practice of dismissing subsequent petitions pursuant to Article 11.071 § 5(a) without explanation threatens the constitutional guarantees of due process for any applicants to the TCCA. This is especially so given the State's contention in many cases involving

the TCCA's dismissals of subsequent petitions that the decision is itself an independent and adequate state ground barring this Court's review. The specific circumstances of Roberson's case, as detailed in his petition for certiorari, render the TCCA's failure to explain the basis for its opinion dismissing his subsequent petition squarely at odds with the due process guarantees of the Fifth and Fourteenth Amendments.

A state court cannot evade direct review by issuing an ambiguous or obscure decision. *Florida v. Powell*, 559 U.S. 50, 56 (2010). ("[I]t is . . . important that ambiguous or obscure adjudications by the state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of the state action."). Indeed, this Court has held that an ambiguous ruling can threaten a criminal defendant's "liberty and due process interests." *Stutson v. United States*, 516 U.S. 193, 196 (1996). Allowing courts to issue ambiguous rulings as to important liberty rights can "risk effectively immunizing summary dispositions by courts of appeals from our review." *Id.* As a result, it is appropriate to require the court to "clarify its ambiguous ruling." *Id.*

As Mr. Roberson explained in greater detail in his petition for certiorari, although individuals facing the prospect of death are supposed to be afforded heightened reliability under long-settled constitutional law, Mr. Roberson has faced more obstacles and received less process than habeas applicants who have utilized Article 11.073 to overturn convictions in non-death-penalty cases. And he who faces the ultimate penalty has been denied relief where litigants in other SBS cases around

the country have obtained relief. In light of the specific circumstances of this case, the TCCA's application of a procedural bar without any explanation of the grounds for its decision violated Roberson's due process rights. This case presents this Court with an opportunity to set limits on the TCCA's practice of issuing boilerplate opinions when compelling circumstances exist for the TCCA to provide adequate justifications for its dismissals under Article 11.071 § 5(a).

As reflected in Articles 11.071 § 5(a) and 11.073, Texas law recognizes the importance of affording capital petitioners meaningful review of new claims in various circumstances. *Cf. Stutson*, 516 U.S. at 196 (recognizing that "judicial efficiency and finality" must give way to a "certain solicitude for [the] rights" of criminal defendants). Nevertheless, the TCCA has ignored its mandate by summarily dismissing subsequent petitions, like Roberson's, without meaningful review. This practice denies criminal defendants the kind of reasoned opinions that are integral to judicial processes and that allow this Court to provide meaningful review. *See Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010) ("The Court's interest in ensuring compliance with proper rules of judicial administration is particularly acute when those rules relate to the integrity of judicial processes.").

As is stands, petitioners are forced to present arguments to this Court regarding the merits of newly raised claims of violations of federal law unmoored from any substantive decision below. As a practical matter, petitions to this Court of boilerplate TCCA decisions will undeniably appear less deserving of certiorari

relative to other petitions where a court below expressly "decided an important question of federal law." Supreme Court Rule 10 (b), (c).

Here, Roberson filed a detailed habeas application with all the necessary new scientific evidence presented to establish his actual innocence and that his daughter died from natural and accidental causes. The TCCA simply denied the application without any meaningful review of the evidence. The TCCA's ruling is indisputably unclear; there is no mechanism by which Roberson or this Court could divine its basis. Nor is there any basis for concluding that it rests on any independent and adequate state grounds. *See Powell*, 559 U.S. at 56. The case thus presents an ideal vehicle for rejecting the TCCA's practice.

B. Mr. Roberson has been timely and diligent in this litigation.

The TCCA's issued its boilerplate decision applying a procedural bar without assessing the merits of Mr. Roberson's claims establishing his actual innocence on September 11, 2024. On October 7, 2024, Mr. Roberson filed an almost 50-page Suggestion to Reconsider on Court's Own Initiative Considering New Expression of Legislative Intent and the State's Concession In Markedly Similar Case That Relief Under Article 11.073 Is Warranted (AppG). This filing alerted the TCCA of the Texas legislators' outpouring of support for Mr. Roberson and their belief that Article 11.073 did not seem to have been applied as intended and to highlight a markedly similar Shaken Baby case pending before the court in which the State had conceded that the SBS science had changed and that the habeas applicant should be granted a new trial

under Article 11.073. This request was denied without written order on October 10, 2024.

On September 25, 2024, Mr. Roberson also filed a lengthy Motion to Vacate the Unlawful Execution Warrant and All Related Orders and To Recuse Judge Deborah Oakes Evans in the trial court. This motion detailed the disturbing and improper efforts of the Senior Judge to get herself assigned to a case that did not yet exist, absent any judicial authority, seemingly so that she could set an execution and end the attention this case is receiving, as suggested by numerous factors that call her impartiality into question. But the administrative judge did not set a hearing until October 15, 2024, and then denied all relief. Foreclosing virtually all state-court avenues for relief.

Mr. Roberson has been diligent every step of the way and in every aspect of his case. There have been no unnecessary delays in bringing this issue to this Court in a timely manner.

C. Mr. Roberson will be irreparably harmed if a stay is not granted.

Mr. Roberson's execution will cause irreparable harm. Irreparable injury "is necessarily present in capital cases." *Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985). "A prisoner under a death sentence remains a living person and consequently has an interest in life." *Ohio Adult Parole v. Woodward*, 523 U.S. 272, 288 (1998) (O'Connor, J., concurring in part and concurring in judgment). Beyond that injury, Mr. Roberson's execution would cause his due process claim to become moot and would extinguish his years-long effort to establish that new medical and scientific

evidence proves he did not murder his daughter and that she died as a result of natural and accidental causes rather than a homicide.

D. The public interest weighs in favor of granting a stay.

Reflecting the strong public interest against executing Mr. Roberson before any court reviews the merits of his claims demonstrating he did not kill his daughter and that her death was caused by natural causes rather than a homicide, 86 bipartisan Texas lawmakers have signed a letter addressed to the Governor and the Texas Board of Pardons and paroles expressing "grave concern that Texas may put Mr. Roberson to death for a crime that did not occur." They emphasized how, "[m]ore than a decade ago, the Texas Legislature passed Senate Bill 344, which allowed challenges to convictions that were based on disproven or incomplete science. That law passed with unanimous support of the Texas House because we recognized that innocent people are sometimes wrongfully convicted based on scientific evidence that later turns out to be wrong." They are "dismayed to learn that this law has not been applied as intended and has not been a pathway to relief—or even a new trial—for people like" Mr. Roberson. AppH. These elected state legislators represent the will of the people of Texas, reflecting a strong public interest in favor of granting Mr. Roberson's stay request.

Executing an innocent man undermines the purported penological purposes for carrying out an execution. *See generally Hall v. Florida*, 572 U.S. 701, 708-09 (2014) (recognizing that capital punishment is justified under the rationales of

deterrence and retribution). Expedience should not be prioritized over justice. No public interest is served by the execution of an innocent man.

CONCLUSION

Accordingly, this Court should grant Robert Roberson a stay of execution pending disposition of the petition for writ of certiorari and, if granted, pending a disposition on the merits.

Respectfully submitted,

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October 15, 2024