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

PETITION FOR A WRIT OF CERTIORARI

Capital Case
Execution Scheduled for October 17, 2024

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QUESTIONS PRESENTED

Capital Case – Execution Date October 17, 2024

Petitioner Robert Leslie Roberson III was accused, tried, convicted, and sentenced to death over 20 years ago for purportedly causing the death of his two-year-old daughter Nikki, a chronically ill child. The presumption that a crime had occurred was based on the now-discredited Shaken Baby Syndrome (SBS) hypothesis. That is, the notion that Nikki's death was caused by abuse—in the form of violent shaking and perhaps blunt impact—was ***presumed*** based on prevailing medical beliefs at that time that have since proven to be devoid of scientific underpinning. For years, his insistence on his innocence was ignored.

In June 2016, when facing imminent execution, Roberson relied on a new state procedural vehicle (Texas Code of Criminal Procedure, Article 11.073) to challenge his conviction based on the change in scientific understanding since his trial. But at the end of that proceeding, the convicting court's recommendation did not mention ***any*** of the voluminous evidence of the change in the scientific understanding of SBS since his 2003 trial or ***any*** of the evidence of numerous material factors missed in 2002 when the SBS diagnosis was made and during the hasty autopsy that followed. Thereafter, Texas's highest criminal court, the Court of Criminal Appeals (TCCA), summarily denied relief without explanation.

On August 1, 2024, a subsequent habeas application was filed on Mr. Roberson's behalf, under Article 11.073, this time relying on yet more intervening changes in the relevant science ***since 2016*** and on entirely new expert reports from medical specialists, never before reviewed by any court. This new evidence established that Nikki died of a severe, undiagnosed pneumonia and exacerbated by inappropriate respiratory-suppressing medications prescribed during her final days. Instead of considering this new evidence, which establishes that no crime occurred, on September 11, 2024, the TCCA summarily dismissed the subsequent habeas application, stating, only the following: "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)." Yet "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 any existing state law as a basis for refusing to review the case.

The unexplained, boilerplate invocation of a state procedural rule, which includes a notable typographical error, in a case of profound significance gives rise to the following Question Presented:

> Whether the TCCA's unexplained application of a procedural bar violates the federal due process clause when a capital state habeas applicant asserts actual innocence based on substantial new scientific and medical evidence that was unavailable when the last application was filed?

PARTIES TO THE PROCEEDINGS BELOW

Both parties are identified in the case caption. Because neither party is a corporation, a corporate disclosure statement is not required.

RELATED PROCEEDINGS

- Trial: *State v. Roberson*, No. 26,162-A (3rd Dist. Court of Texas 2003).
- Direct Appeal, affirmed: *Roberson v. State*, No. AP-74,671 (Tex. Crim. App. June 20, 2007) (not designated for publication).
- Petition for Writ of Certiorari, denied: *Roberson v. Texas*, 552 U.S. 1314 (2008).
- Initial State Habeas, relief denied: *Ex parte Roberson*, Nos. WR-63,081-01, WR-63,081-02, 2009 WL 2959738 (Tex. Crim. App. Sept. 16, 2009) (unpublished).
- Federal Habeas, relief denied: *Roberson v. Stephens*, 619 F. App'x 353 (5th Cir. 2015).
- Petitions for Writ of Certiorari off of federal habeas, denied: *Roberson v. Stephens*, 577 U.S. 1033 (2015); *Roberson v. Stephens*, 577 U.S. 1150 (2016).[1]
- Subsequent State Habeas, relief denied: *Ex parte Roberson*, WR-63, 081-03, 2023 WL151908 (Tex. Crim. App. Jan. 11, 2023) (unpub).
- Petition for Writ of Certiorari off subsequent state habeas, denied: *Roberson v. Texas*, 144 S.Ct 129 (2023).
- Subsequent State Habeas, dismissed without written decision: *Ex parte Roberson*, WR-63, 081-04, 2024 WL 4143552 (Tex. Crim. App. Sept. 11, 2024) (unpub).

[1] In that proceeding, two different petitions were filed on Robert's behalf because he had asked to have his conflicted appointed counsel replaced, but that counsel declined to step aside—but was thereafter relieved of the representation.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Robert Leslie Roberson III respectfully asks that the Court issue a writ of certiorari to review the decision of the Texas Court of Criminal Appeals (TCCA) and meanwhile grant the application for a stay of execution filed coterminously.

OPINION BELOW

The CCA's unpublished opinion, *Ex parte Robert Leslie Roberson III*, No. WR-63, 081-04, 2024 WL 4143552 (Tex. Crim. App. Sept. 11, 2024), is in Appendix A (App1a-4a).

STATEMENT OF JURISDICTION

The TCCA entered its judgment on September 11, 2024. This Court has jurisdiction under 28 U.S.C. § 1257(a). Because of the flagrant denial of due process in a death-penalty postconviction proceeding supported by substantial evidence of innocence, this Court should exercise the jurisdiction conferred by Congress over the TCCA's judgment. *See Wearry v. Cain*, 577 U.S. 385, 395–96 (2016) (explaining "[t]his Court, of course, has jurisdiction over the final judgments of state postconviction courts, and exercises that jurisdiction in appropriate circumstances", citing 28 U.S.C. § 1257(a), collecting cases).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property without due process of law."

This case also involves two state procedural rules:

Texas Code of Criminal Procedure reads in pertinent part:

(a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

(1) the current claims and issues have not been and could not have been presented; previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; [or]

(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[.]

Texas Code of Criminal Procedure Article 11.073 reads in pertinent part:

(b) A court may grant a convicted person relief on an application for a writ of habeas corpus if:

(1) the convicted person files an application, in a manner provided by Article 11.07, 11.071, or 11.072, containing specific facts indicating that:

(A) relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial; and

(B) the scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the application; and

(2) the court makes the findings described by Subdivisions (1)(A) and (B) and also find that, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.

INTRODUCTION

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 and prescribed medication now known to suppress breathing in young children, along with codeine, a narcotic. 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 hemorrhages ("the triad"). At that time, the medical consensus permitted presuming that a child with the triad must have been the victim of an inflicted head injury caused by a combination of "shaking" and "blunt impact." And whoever was with the child when she collapsed was considered the perpetrator. That medical consensus, central to Robert's conviction, was known as "Shaken Baby Syndrome" (SBS), later revised and renamed "Abusive Head Trauma" (AHT) in part because of debates about the validity of SBS. The version of SBS used to convict Robert has since been entirely discredited.

Shortly after rushing her to the hospital for medical care, Roberson was arrested for the death of the child he had just lost—before an autopsy was even performed. Not only was abuse ***presumed*** in that era when children presented with "the triad," but Roberson's blunted affect and aloof mannerisms, manifestations of his Autism Spectrum Disorder, were mistaken for indifference at a time of crisis, which became a theme hammered throughout trial.

New evidence supporting Roberson's habeas petition shows that Nikki's pneumonia was so virulent that had progressed to the point of sepsis, resulting in a clotting disorder, which made her more susceptible to internal bleeding. Her struggle to breath was exacerbated by the respiration-suppressing medications. That new medical evidence explains why Nikki died and why her body appeared as it did at autopsy after two days of extensive medical intervention. Yet the Texas Court of Criminal Appeals has refused to even review this new evidence, despite two state procedural rules designed precisely to enable a return to court and to grant relief when a change in science would likely lead to a different outcome if presented to the jury or if there is compelling evidence of innocence.

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 Roberson 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, 492a-546a.[2] 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 Reconsider the habeas application at issue here, was denying the motion to stay the execution, and would not be issuing a written opinion.

This Court should grant certiorari to clarify whether it violates the federal constitutional right to due process for a State's highest criminal court to summarily find 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 showing that no crime occurred.

This Court is aware of the underlying problem: the possible due process violation of a conviction based on "science" subsequently exposed as not science at all. At the end of last term, this Court denied certiorari in *McCrory v. Alabama*, 603 U.S. __ (2024), a case raising due process concerns about a conviction that hinged on the

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[2] 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, 548a.

junk science of "bitemark" comparisons. Justice Sotomayor, however, issued an illuminating statement respecting the denial of certiorari, acknowledging the well-documented problem of wrongful convictions obtained using forensic "science" subsequently proven to be devoid of actual scientific underpinning. Among the problematic forensic sciences that Justice Sotomayor flagged is "'Shaken Baby Syndrome,' or SBS," which she defined as "an expert diagnosis that formed the basis for convicting caregivers of murder when babies died suddenly under their care." *See id.* n.2 (citing *Cavazos v. Smith*, 565 U.S. 1, 13 (2011) (Ginsburg, J., dissenting) (collecting studies questioning the validity of SBS). Justice Sotomayor also cited the National Registry of Exonerations, which now includes over 30 cases in which people convicted using an SBS diagnosis were later exonerated. *Id.*

Justice Sotomayer acknowledged problems with "the adequacy of current postconviction remedies to correct a conviction secured by what we now know was faulty science." *Id.* at 1; *see also id.* at 6-8 (noting and then describing how "ordinary state and federal avenues for postconviction relief can present significant barriers"). Additionally, Justice Sotomayor noted that "[s]everal States"—led by Texas—"have already tackled this troubling problem through targeted postconviction statutes." *Id.*; *see also* n.5 & 11 (citing Texas's Article 11.073 and describing its trailblazing status).

Justice Sotomayor was indeed correct that, in 2013, Texas was the first state in the nation to provide a specific procedural vehicle for prisoners to challenge wrongful convictions by showing changes in the science used to convict them. However, to date, no one sentenced to death has succeeded in using this new law to

obtain a new trial—despite more than satisfying the procedural requirements delineated in state law. *See* AppI, 551a-587a, Texas Defender Service, *An Unfulfilled Promise: Assessing the Efficacy of Article 11.073*, July 2024 ("The TCCA has never granted 11.073 relief to a person sentenced to death, as compared to granting relief to 31% of people who seek relief and are serving non-death sentences.").

Robert Roberson has now been denied twice under Article 11.073—without any substantive explanation. Yet, ironically, the Texas legislature was inspired to enact Article 11.073 because of concerns about the TCCA's refusal to grant habeas relief in a similar child-death case where the putative scientific opinion that had been used to place a man on death row had changed. *See id.* (discussing history of *Ex parte Robbins,* 360 S.W.3d 446 (Tex. Crim. App. 2011); *see also Ex parte Robbins*, 478 S.W.3d 678 (Tex. Crim. App. 2014); and *Ex parte Robbins*, 560 S.W.3d 130 (Tex. Crim. App. 2016). But in the *Robbins* case, the evidence of "change" in science was no more than the opinion of a single medical examiner—who, based on the evolution of her own thinking, concluded that she would now characterize the manner of death as "undetermined" instead of "homicide." *See id.*

Even when, as here, an applicant has amassed overwhelming evidence that the medical examiner got it wrong and that no crime occurred—which Article 11.073 does not even require—Roberson has been summarily barred from even ./;,,,=[.[3] If

[3] Texas legislators recognize that the TCCA is not properly applying Article 11.073. *See, e.g.*, M. Pitcher, *Bipartisan Legislators Join Calls for Clemency for Robert Roberson*, TEXAS OBSERVER (Sept. 17, 2024), *available at https://www.texasobserver.org/robert-roberson-clemency/* (quoting Representative

someone who has satisfied the evidentiary burden of a statute enacted to provide a remedy when changes in scientific knowledge show a conviction is based in part on a discredited scientific theory is met with no more than summary denial about a purported failure to satisfy state procedural requirements, the federal constitutional right to due process is implicated.

When this Court cannot rely on the integrity of the adjudicatory process of a state's highest criminal court in the state's most serious cases, the very premise of federalism is destabilized and the rule of law threatened.

STATEMENT OF THE CASE

I. Facts Underlying the Presumed Crime

A few months after her second birthday, Nikki collapsed during the early morning of January 31, 2002, never to wake again. Her father discovered her limp body. As he tried to wake her, he saw that she was not breathing and her lips had turned blue. In shock, he took her to the local ER, where staff observed that her eyes were "fixed and dilated," a sign of brain death. They managed to restart her heart, but no medical heroics could resuscitate her brain.

Hospital staff noticed a bump on the back of her head. But there were no other signs of significant external injury. A CAT scan revealed a small internal bleed

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Joe Moody during a bipartisan press conference announcing support for Mr. Roberson: ""We as a legislature actually created a way for people like Mr. Roberson to challenge convictions based on science that later turns out to be wrong,' said Democratic state Representative Joe Moody at a press conference Tuesday. 'We changed the law to give that power. … As far as we can tell, though, the courts simply aren't engaging in that process. So convictions are being allowed to stand on junk science.'").

outside the subdural membrane that covers the brain, near the "goose egg" on the back of her head. The image also showed that her brain had swollen and shifted to one side. But there were no skull fractures, neck injuries, broken bones, bloody abrasions, or other signs of battery. Her condition did not suggest abuse, but medical staff immediately looked with suspicion upon the awkward-looking father, who seemed to show no emotion. Law enforcement was immediately called in.

Various members of the hospital staff and the lead detective assigned from the Palestine Police Department, Brian Wharton, pressed Roberson for an explanation. All he could tell them was that Nikki had been sick for a week and, in the night, he had heard a "strange cry" and woke up to find Nikki on the floor at the foot of the bed. Detective Wharton asked if Robert would show them where Nikki had fallen out of bed. Robert agreed to take the police to his house on Perry Street, a small rental property near the courthouse square in rural Palestine, Texas. Detective Wharton looked all through the house for some signs of violence, blood on the walls, but there was nothing. The only blood was a small speck on a washcloth that Robert showed them, which they never would have noticed on their own. EX9.[4]

Robert explained to the detectives that he had wiped this speck of blood from Nikki's mouth after he discovered her on the floor, but he had not seen anything else wrong with her. After comforting her, they had both eventually fallen back to sleep. But Nikki never woke up again. *Id.*; EX6. Detective Wharton had seen plenty of crime scenes, and this did not look like one. But he had no training in neurodevelopmental

[4] Citations to "EX#" are exhibits to the Subsequent Habeas Application.

disorders like Autism Spectrum Disorder, so he did not understand why Robert did not seem to comprehend how serious his daughter's condition was. EX9.

The following day, February 1, 2002, Detective Wharton's team went back and arrested Robert—relying solely on an affidavit provided by Dr. Janet Squires, a pediatrician at Children's Medical Center. The affidavit states that Nikki's maternal grandparents had claimed that the child was "totally well" when they last saw her around "10:00 PM" the night before her collapse. That assertion was false: Nikki's medical records show that in the days before her death, she had a fever that was measured at 104.5 degrees in the pediatrician's office, her breathing had been labored, and she was prescribed medication that further suppressed her breathing.

Instead of investigating Nikki's medical history, Dr. Squires concluded, based on the operative SBS hypothesis accepted in that era, that "[t]he only reasonable explanation" for Nikki's condition "is trauma." Dr. Squires further declared that "the medical findings," including "very obvious" retinal hemorrhages, "fit a picture of shaken impact syndrome." EX24. She claimed there was "some flinging or shaking component which resulted in subdural hemorrhaging and diffuse brain injury." *Id.* She also noted a single "area of impact in the right back of the head," a minor swelling of tissue, no skull fractures or even an abrasion. *Id.* After that time, SBS was also being called "Shaken Impact Syndrome," but was eventually rebranded and considerable tweaked as "Abusive Head Trauma," a unique medical diagnosis in that it presumes a crime occurred.

After Dr. Squires made her SBS diagnosis, which was used as the basis to arrest Roberson, Nikki was taken off life support and pronounced dead. Before Dr. Jill Urban performed the autopsy, she was told by a member of Detective Wharton's team that Roberson had already been arrested for capital murder. That same law enforcement officer then sat in on the autopsy. EX25. These are circumstances now known to create pronounced bias.[5]

When Dr. Urban performed the autopsy, she had only been certified as a medical examiner for a year and a half..[6] But Nikki's autopsy was already the 456th that the Southwestern Institute of Forensic Sciences had performed in 2002 as of February 2nd. Dr. Urban subsequently admitted that she did not consider ***any*** of the following in reaching conclusions about the cause and manner of Nikki's death:

- Nikki's medical history, including the records of her recent illness the week of her collapse and the drugs that had been prescribed to her by both a pediatrician and an ER doctor;
- The local Palestine ER records related to Nikki's admission and treatment the day of her collapse;
- The CAT scans taken of Nikki's head when she was admitted to the Palestine ER the morning of her collapse;

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[5] *See, e.g.*, National Academies of Sciences, Engineering, and Medicine, Description: Advancing the Field of Forensic Pathology: Lesson Learned from Death in Custody Investigations, *available at* https://www.nationalacademies.org/our-work/advancing-the-field-of-forensic-pathology-lesson-learned-from-death-in-custody-investigations (documenting the effects of implicit bias on medical examiners' conclusions regarding cause and manner of death).

[6] Dr. Janet Ophoven, who has specialized in pediatric pathology for many decades, explained that it is very uncommon for medical examiners' offices to do autopsies on children Nikki's age: "[P]ediatric cases represent less than 10 percent of the total population" and autopsies on 2-year-olds are even rarer. 3EHRR65. But Dr. Urban, despite her limited experience at that time, claimed at trial that autopsies on children Nikki's age were "common." 9EHRR156.

- The EMS records reflecting Nikki's treatment in transport from Palestine to Dallas;

- A medical reference book to determine whether Nikki's organs were of an abnormal weight at autopsy (which both the lungs and the brain were);

- The scene where Nikki collapsed, including: the fact that the bed where she had been sleeping was a mattress and box springs propped up on cinder blocks;

- The expertise of a biomechanical engineer or biomechanical research regarding the injury-potential of short falls;

- Data about the potential height, trajectory, or impact surface associated with the reported fall, trajectory of the fall, or the impact surface;

- The relevance of Nikki's height, weight, and age to determine whether it was physically possible to generate sufficient force through shaking her to cause any aspect of the condition observed in autopsy;

- The wash rag and bedding obtained from the scene containing very small specks of blood;

- Any information regarding "promethazine" a drug found in high quantities in Nikki's system, as identified by a toxicology report that Dr. Urban had requested but did not wait for; and

- All of the intervening medical treatment, transports, and medications that were applied to Nikki after she arrived at the ER the morning of January 31st until she arrived at SWIFS on February 2nd, including having a pressure monitor surgically implanted in her head.

Because Dr. Urban did not consider any of this information, when preparing her autopsy report, she did not account for how any of these factors may have affected Nikki's condition: Dr. Urban saw subdural blood and simply assumed that Nikki had died from an inflicted head injury. In her autopsy report, Dr. Urban labeled the cause of death "blunt force head injuries" and the manner "homicide." EX25. Later, during

trial, Dr. Urban repeatedly told the jury that the "blunt force head injuries" had been inflicted by an unknown combination of "shaking" and "blows." EX27.

Dr. Urban reached her conclusions, captured in her autopsy report, the same day that she performed the autopsy. She also signed the death certificate that same day. EX28. The toxicology report itself was not disclosed before trial or discussed before the jury. Dr. Urban never investigated promethazine and made no mention of the toxicology results at trial.[7]

II. The 2003 Trial

The State indicted Roberson on two counts of capital murder. It alleged that (1) he had "intentionally or knowingly" caused the death of "a person under the age of six" based on the Shaken Baby hypothesis; and absent any credible evidence, the State also alleged that (2) he had killed his child "in the course of committing or attempting to commit the offense of aggravated sexual assault." 1CR2-4. The jury that decided Roberson's fate heard a constant drumbeat from prosecutors—during voir dire, opening statement, testimony from treating physicians and a child abuse expert, and closing argument—that only violent shaking, combined with inflicted impact, could explain Nikki's death. Even trial counsel appointed to represent the defense agreed with the prosecution that this was a "classic" Shaken Baby case and did not challenge the SBS hypothesis during any phase of trial. This abdication

[7] The errors and omissions in Dr. Urban's autopsy were described in post-conviction testimony and/or expert reports provided by these pathologists with specialized training and decades of experience: Dr. Janice Ophoven, Dr. Harry Bonnell, Dr. Carl Wigren, Dr. Roland Auer, and Dr. Francis Green.

occurred despite his client's consistent insistence that he loved his daughter and had not done anything to hurt her. *See, e.g.*, 41RR57-61.

The State presented testimony from local medical staff, including doctors who had treated Nikki in the days before her collapse. They emphasized how her father had not displayed appropriate emotion and that a short fall and Nikki's recent illness could not have caused her condition. The State elicited the most extensive testimony from a local nurse who had designated herself a Sexual Assault Nurse Examiner (SANE), although she had never been certified as a SANE and did not comply with any of that training. She claimed to have seen "anal tears" that no one else saw and did not consider that Nikki had had diarrhea for over a week and had been prescribed suppositories two days before by the same ER doctor who saw her the day of her collapse.

But, ultimately, the State's theory as to why Nikki's death should be viewed as a homicide hinged on the testimony of Dr. Squires and Dr. Urban, who relied on the tenets of SBS as generally accepted in 2003. The jury heard unchallenged "scientific" testimony, now known to be false, that: the triad of internal head conditions observed in Nikki permitted presuming that abuse had occurred, in the form of violent shaking; that shaking can cause internal head injuries without injuring the neck; that shaking induces immediate brain damage and thus no lucid interval is possible; and that neither Nikki's illness nor a short fall could explain any aspect of her condition.

* * * *

Just before the jury was charged, the State abandoned the count of capital murder based on the sexual assault allegation. Yet the State continued to argue that there was evidence of a sexual abuse based solely on the testimony of the self-appointed SANE.

Roberson was convicted of capital murder on the lone count before it. The punishment-phase began the next day; Roberson was sentenced to death on February 14, 2003.

III. The Initial Appeals

Roberson spent years asking for his appointed lawyers to pursue his innocence or for the courts to appoint new lawyers willing to do so, only to be ignored and mocked.

The same appointed trial lawyer—who had ignored Roberson's insistence that he had done nothing to harm Nikki and who had conceded at trial that this was a "classic" Shaken Baby case—was appointed to represent Roberson in his direct appeal, over his objection. The TCCA affirmed the conviction and death sentence in an opinion that described at length the Shaken Baby trial testimony. *Roberson v. State*, No. AP-74,671 (Tex. Crim. App. June 20, 2007) (unpub.).

The trial lawyer who had ignored his client's protestations of innocence recommended that a friend be appointed to pursue an initial state habeas application. The resulting application did not include any claims challenging the State's Shaken Baby hypothesis. The convicting court, presided over by the same judge who had tried the case, denied an evidentiary hearing. The State filed its proposed Findings of Fact

and Conclusions of Law (FFCL). Then, two days later, the judge signed the same document without changes, not even scratching out the word "proposed" in the caption. The TCCA later denied all relief. *Ex parte Roberson*, Nos. WR-63, 081-01, WR-63, 081-02, 2009 WL 2959738 (Tex. Crim. App. Sept. 6, 2009) (unpub.).

Right after relief was denied, Roberson wrote a letter to the federal district court again requesting new counsel. But the court granted the state habeas lawyer's request to stay on as federal counsel, despite the patent conflict of interest. Roberson wrote another letter asking for new appointed counsel willing to pursue his innocence, to which his lawyer responded defending his representation and denigrating his client's wish to prove his innocence. The federal district court again declined to appoint substitute counsel.

A federal habeas petition was filed, but the lawyer raised no claims about the Shaken Baby hypothesis that was, by then, being widely challenged.[8] Less than a year after the federal district court denied the federal habeas petition, the Fifth Circuit denied an appeal. Soon thereafter, the Anderson County DA's Office sought and secured an execution date for June 21, 2016.

Meanwhile, Robert continued to send urgent requests asking for a lawyer

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[8] *See, e.g.*, A.N. Guthkelch, Problems of Infant Retino-Dural Hemorrhage with Minimal External Injury, 12 HOUS. J. HEALTH L. & POLICY (2012) (one of original proponents of SBS hypothesis explaining why he had retreated from his own unverified hypothesis, acknowledging that subdural and retinal bleeding, with or without brain swelling, had been observed in many accidentally and naturally occurring circumstances and recognizing that forces generated by humans and laboratory machines shaking anatomically accurate dummies had proven insufficient to cause disruption of human tissue or to create any component of the SBS triad).

willing to investigate his innocence.

IV. First Attempt to Rely on Article 11.073

Roberson finally obtained new counsel willing to investigate his innocence within a few months of his looming execution date. Relying on Article 11.073, Texas's "junk science law," a habeas application was filed, supported by four volumes of evidentiary proffers. The application raised not only a "changed science" claim but, for the first time, a claim of Actual Innocence. Mere days before the scheduled execution date, the TCCA granted a motion to stay Roberson's execution and entered an order remanding all claims "to the trial court for resolution." *Ex parte Roberson*, WR-63, 081-03, 2016 WL 3543332 (Tex. Crim. App. June 16, 2016).

After the remand order (and long after the statutory deadline), the State filed an Answer, attaching just one item: an affidavit from Dr. Urban denying that she had opined about "shaking" as a cause of Nikki's death and stating that subdural blood she had seen during the autopsy amounted to evidence of "multiple impact sites." Yet Dr. Urban's trial testimony was replete with nearly 30 references to shaking and the forces reputedly generated by shaking as an explanation for Nikki's internal head condition—and an exterior that did not show any significant signs of injury. The State's causation theory was undoubtedly a now-discredited version of SBS, and its witnesses provided extensive and lurid testimony at trial inviting the jury to imagine an unwitnessed episode during which the child's head popped back and forth as an angry adult exerted "rotational forces" that caused "shearing injuries" to the brain and "torn bridging veins" that explained the subdural bleeding. Meanwhile, the

State's medical experts implied stated that Robert's report of a short fall was unbelievable and thus a sign he was a callous liar; and the doctors who had treated her during her last week and prescribed dangerous medications dismissed her recent illness as both trivial and irrelevant.

The presentation of evidence to support Roberson's habeas claims finally commenced on August 14, 2018. But the proceeding ended when long-lost CAT scans of Nikki were found locked in the courthouse basement. The evidentiary hearing resumed in March 2021 with a total of nine days of testimony, including the presentation of six highly qualified experts supporting the claims that the "science" used to convict Roberson had undergone a sea change since his 2003 trial, that the State had relied on materially false testimony, and that he was actually innocent.

After the hearing record was prepared, the parties submitted proposed findings of fact and conclusions of law. The proposal submitted on Roberson's behalf was 302-pages long with extensive citations to the new 13-volume record. AppE, 183a-487a. The State's proposal was 17-pages long and did not even acknowledge the new evidence amassed during the proceeding that showed how the core tenets of SBS circa 2003 had been disproven and that Nikki had died of natural and accidental causes. The State's proposed findings relied primarily on the 2003 trial testimony while misrepresenting the few components of the new evidentiary record that it cited. For instance, the State took the position that its trial causation theory had ***not*** been SBS, a position belied by a trial record replete to references to "shaking" and SBS terminology. The State also insisted that the scientific view of SBS had not changed

since 2003 because SBS, which is now called "Abusive Head Trauma" or AHT, "is still a recognized diagnosis in the medical field."

On February 14, 2022, the convicting court recommended that relief be denied in findings of fact and conclusions of law (FFCL) that tracked the State's proposal, including its typographical and grammatical errors and the finding that SBS is "still an accepted mechanic [sic] of death." The convicting court did not make any adverse credibility determinations about any of Roberson's experts; the court simply ignored them. The FFCL did not mention any of the extensive evidence that had been adduced to establish the change in the scientific understanding of SBS since 2003. Likewise, the FFCL did not mention any of the extensive evidence of errors and material omissions in how the 2002 autopsy was conduct, including the failure to investigate anything or to account for the extensive intervening medical intervention Nikki had been put through—such as having a pressure monitor surgically screwed into her skull that caused bruising and yet more internal bleeding. *Compare* AppD, 170a-182a, *with* AppE, 183a-487a.

A motion was filed urging the TCCA to deny deference to the lower court, documenting the extraordinary inconsistencies and omissions in the FCCL that ignored entire categories of new evidence, including the evidence of actual innocence. But on January 11, 2023, the TCCA issued an unsigned opinion (AppC, 166a-169a), summarily stating only this:

> We have reviewed the habeas record and conclude that it supports the habeas court's findings of fact and conclusions of law. We agree with the habeas court's recommendation and adopt the court's findings of fact and conclusions of law. Based on those findings and conclusions and our

own independent review of the record, we deny habeas relief on all of Applicant's claims.

Thereafter, the convicting court set the current execution date—without granting any of Roberson's multiple requests for a hearing urged both before and after the date was set.

V. Second Attempt to Rely on Article 11.073

On August 1, 2024, the underlying subsequent state habeas proceeding was initiated. The application included five new claims, including a new "changed science" claim under Article 11.073 and an Actual Innocence claim. These claims were based on scientific research published ***after*** 2016, when the previous habeas application had been filed, and supported by new expert reports specific to the case.

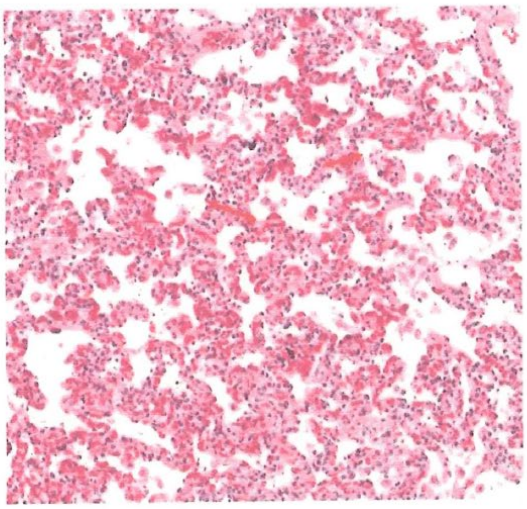
Three new expert opinions, reflecting different medical specialties, explain precisely ***how*** Nikki died. These correlated opinions were only possible because of new evidence that emerged over the course of the previous habeas proceeding and thereafter. This new evidence was thus not available when his 2016 application was filed.

The first new expert, Dr. Francis Green, is an expert in lung pathology with over 46 years of experience. Dr. Green recently reviewed Nikki's medical history and examined her lung tissue under a microscope. His detailed report explains how two different types of pneumonia—a viral and a bacterial infection—were ravishing Nikki's lungs. He found that interstitial viral pneumonia substantially thickened the cell walls of the tiny air sacs in Nikki's lungs, where oxygen is absorbed into the bloodstream. As those interstitial cell walls thickened, Nikki's ability to breathe was

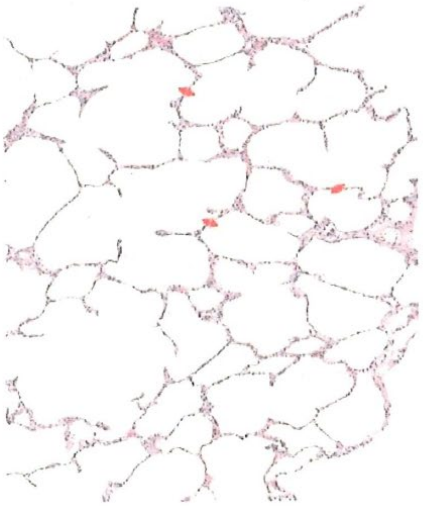
greatly inhibited and, eventually, her brain and other organs were starved of oxygen. *See, e.g.*:

3. Chronic Interstitial Pneumonia

Nikki Curtis Interstitial Pneumonia



Normal Interstitium



Dr. Green's detailed analysis shows that Nikki's pneumonia started many days, if not weeks, before her final hospitalization. This evidence from a highly qualified specialist also rebuts the opinions the State's experts provided in the previous habeas proceeding that Nikki's lung condition was only a function of time spent on a ventilator.

The second new expert is Dr. Keenan Bora, an expert in medical toxicology and emergency room medicine. He concluded that a post-mortem toxicology report shows that Nikki had dangerously high levels of promethazine in her system, likely explained by the fact that two different doctors prescribed the drug on two consecutive

days.[9] Promethazine is a drug no longer prescribed to children Nikki's age and in her condition because it impairs their ability to breathe and can be fatal. Dr. Bora explained that promethazine would have exacerbated the respiratory problems caused by Nikki's undiagnosed pneumonia. Dr. Bora also noted that the second promethazine prescription was in cough syrup that included codeine, a narcotic that would have further compounded Nikki's breathing challenges. Dr. Bora emphasized evidence that Nikki had a severe infection (her pneumonia) that developed into sepsis and then septic shock. He concluded that these drugs likely hastened her respiratory depression and death.

The third new expert, Dr. Julie Mack, is a pediatric radiologist. She concluded that CAT scans of Nikki's head, taken upon her arrival in the Palestine hospital, show that she had only a single minor impact site on her head. Dr. Mack based her opinion on CAT scans discovered in the courthouse basement in 2018—on the day the postconviction evidentiary hearing was supposed to begin. These scans were lost for 15 years. But as interpreted by the only type of expert qualified to read them, these scans corroborate Roberson's 2002 report that Nikki had fallen out of bed in the night and possibly hit her head, resulting in a "goose egg" of swollen tissue. But the medical examiner had testified in the 2003 trial that Nikki had sustained ***multiple*** impacts to her head, which, along with "shaking," was the "blunt force trauma" that she

[9] Promethazine is marketed under the brand name "Phenergan." Nikki's medical records show that her doctors repeatedly prescribed Phenergan to her, including two times on consecutive days the week she collapsed.

concluded had killed Nikki.[10] But the incontrovertible radiological evidence shows only ***one*** impact site on Nikki's head. The medical imaging further shows that this one minor impact site is associated with a small subdural bleed and no corresponding skull fractures, entirely consistent with an accidental fall out of bed and entirely inconsistent with the shaking and beating testimony of the medical examiner. As Dr. Mack has now explained, the short fall with head impact might not have been fatal if experienced by a healthy child; but Nikki was profoundly ill.

Dr. Mack had also finally been able to review a series of chest x-rays of Nikki, including ones only produced to Roberson's counsel in 2024. Dr. Mack concluded that these chest x-rays corroborate Dr. Green's conclusion that Nikki had a fatal lung infection (pneumonia).

When Roberson was accused and tried, no medical expert considered, and thus the jury did not hear, medical testimony explaining how the combination of pneumonia, respiration-suppressing medications, and a short fall brought on Nikki's death. Because of the mistaken SBS theory that was then widely accepted, none of the State's experts considered any other evidence. Now, new evidence proves that Nikki's condition, including intracranial bleeding was a response to oxygen deprivation caused by her pneumonia and the inappropriate medications and a

[10] The State called the medical examiner as one of its two witnesses in a 2021 evidentiary hearing, who declined to revisit her "multiple impacts" testimony but repeatedly claimed that the subdural blood itself proved "multiple impacts," a proposition entirely debunked by other experts explaining one cannot strike a "blow" to a child hard enough to cause internal bleeding and leave no external marks..

clotting disorder triggered by that infection, which led to a systemic failure known as sepsis.

The 2024 habeas application explained that, a year before Roberson's trial, the American Academy of Pediatrics (AAP) published a position paper informing doctors that shaking or shaking with impact (and thus child abuse) could be "presumed" based on the triad alone, thus permitting a default diagnosis of abuse.[11] That presumption is indefensible today and no longer represents the medical consensus. But at the time of Robert's trial, whenever the triad was found, unless there was evidence of a massive trauma event (such as a high-speed auto accident or a fall from a multi-story building), the SBS hypothesis was seen as dispositive, with or without evidence of impact, even when a child, like Nikki, had a history of serious medical issues.

Today, physicians must consider all potential natural illnesses (including pneumonia) and accidental injury (including short falls) before they can allege abuse. Even the AAP, the most ardent supporter of the SBS hypothesis, recognizes that a thorough investigation and a differential diagnosis is required before abuse can be posited.

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[11] AAP, *Shaken Baby Syndrome: Rotational Cranial Injuries—Technical Report*, Comm. on Child Abuse and Neglect, 108 Pediatrics 206 (July 2001) ("Although physical abuse in the past has been a diagnosis of exclusion, data regarding the nature and frequency of head trauma consistently support the need for a presumption of child abuse when a child younger than 1 year has suffered an intracranial injury."). A 2020 AAP position paper acknowledged that "[f]ew pediatric diagnoses have engendered as much debate" as SBS.

The 2024 habeas application explained that the medical examiner who performed Nikki's autopsy and testified in Roberson's 2003 trial did not obtain Nikki's medical records and did not know that Nikki had been extremely ill with a high fever and respiratory distress in the days leading up to her collapse. Although a post-mortem toxicology report showed that Nikki had a large quantity of promethazine in her system, the medical examiner did not investigate what promethazine was, much less any role it may have played in Nikki's death. Further, the medical examiner did not review any of the medical imagining taken of Nikki's head or lungs during her final hospitalizations. Finally, the medical examiner did not account for the effect on Nikki's body of two days of extensive medical intervention from the time she arrived at the hospital until the autopsy was performed.

The 2024 habeas application explained that the three new, correlated expert opinions, which could only have been developed after the previous proceeding closed, established that Nikki died a natural death. The 2016 habeas application had explained the evolution in the understanding of SBS as of that date and how the core principles underlying the hypothesis were no longer valid. But the vital evidence needed to explain precisely ***how*** Nikki died only became available piecemeal over years after the 2016 filing up to the 2024 filing.

The 2024 habeas application explained all this—how these new expert assessments were only possible after habeas counsel obtained core pieces of evidence, unavailable when the previous application was filed, including: (1) long-lost CAT scans and x-rays of Nikki taken during her final hospitalizations; and (2) a complete

autopsy file, including access to lung tissue slides made during the autopsy. Despite multiple discovery requests, subpoenas, and PIA requests, Robert's legal team did not receive some components of the autopsy file until 2024 (x-rays taken during the 2002 autopsy).[12] After enlisting distinctly qualified experts who undertook a thorough reassessment of the autopsy, the new evidence assembled in the 2024 habeas application, built on the evidentiary record developed between 2016 and 2021, and showed, incontrovertibly, that Nikki died of natural and accidental causes.

In addition to evidence of the change in scientific understanding and the actual causes of Nikki's death, Roberson adduced new evidence that Brian Wharton, lead detective with the Palestine police department who had investigated Nikki's death in 2002 and testified for the State in the 2003 trial, had entirely disavowed his previous opinions. He explained that he had unquestioningly accepted the SBS diagnosis made by the child abuse expert in the Dallas hospital where Nikki was transported, then, based solely on that diagnosis, had authorized Roberson's arrest—even before an autopsy was performed. Wharton acknowledged learning in the interim of the evolution in the medical understanding of SBS. He attested to the belief that no crime occurred and has publicly urged relief for Robert to prevent a horrible miscarriage of justice: the execution of an innocent man: "I am asking for those who care deeply about justice to urge another look at this case." EX1-EX3.

On June 17, 2024, the DA's Office filed a "Motion Requesting Execution Date."

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[12] Some key medical records remain missing, such as an earlier scan made of Nikki's head when she was being assessed for possible neurological problems in September 2000 because of an alarming history of breathing apnea.

The next day, Roberson's counsel filed an "Opposition to Anderson County DA's Motion Requesting Execution Date" again requesting a hearing. The DA's Office then filed an opposition to Roberson's first-filed Motion to Be Heard—which is when Mr. Roberson's counsel first became aware that the case had been assigned to Judge Evans post-retirement, seven months before any case existed.

Without permitting a hearing, on July 1, 2024, Judge Evans signed an order setting an October 17, 2024, execution date and entering an execution warrant. These actions resulted in Mr. Roberson being removed from an experimental "group rec" program on death row and confined on "death watch" under 24-hour surveillance. An Objection to this violation of due process was filed on Mr. Roberson's behalf.

When the subsequent habeas application was filed in the convicting court on August 1, 2024, counsel for Roberson also filed a "Motion to Withdraw Execution Date"—again expressly asking for a hearing. On August 8, 2024, the DA's Office filed "State's Opposition to the Defendant's Motion to Recall the Execution Warrant," signed by DA Mitchell, claiming, contrary to statutory law, that the district court had no authority to grant the Motion to Withdraw Execution Date. The opposition cited three cases, none of which supported the DA's argument. In response to the flagrant misrepresentation of controlling law in a death-penalty case, Roberson filed a Reply—attaching the three inapposite mandamus cases that the DA had cited and explaining why they did not support the DA's claim that the district court had no authority to grant the Motion to Withdraw Execution Date. EX5. Mr. Roberson again requested a hearing on the contested motion. Renewed requests for a hearing were denied, even

after Roberson filed a Motion to Reconsider Denial of Hearing on Withdrawing the Execution Date, to which he attached over 20 examples of orders entered in other Texas death-penalty cases in similar situations, withdrawing execution dates as state statutory law permitted.

Ultimately, *none of Roberson's new evidence of innocence was considered by any court*. Instead, on September 11, 2024, the TCCA issued an unsigned opinion dismissing the application without consideration of the merits. The opinion includes no more than a brief procedural history and then this conclusory statement:

> 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). We deny the motion to stay Applicant's execution.

AppA, 4a (emphasis added).

On October 7, 2024, to alert 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. The pleading was styled: 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, 492a-546a). This request was denied without written order on October 10, 2024. This petition follows.

REASONS TO GRANT CERTIORARI

I. Mr. Roberson Has a Federal Due Process Right to More Than an Unreasoned, Boilerplate Invocation of a Procedural Bar After Presenting Substantial New Scientific and Medical Evidence of His Actual Innocence and that No Crime Occurred.

The TCCA routinely issues boilerplate opinions dismissing subsequent habeas petitions for purported failure to satisfy the requirements of Article 11.071 § 5(a). As recent petitions for certiorari pending before this Court explained, "Given the TCCA's practice of dismissing subsequent applications as 'abuse[s] of the writ' without ever explaining why the statutory conditions have not been met, a comprehensive list of other cases in which it has denied relief on inadequate purportedly procedural is difficult to compile." Petition for Writ of Certiorari at 30, *Balderas v. Texas*, No. 23-1044 (quoting *Medrano v. Texas*, No. 23-5597). Indeed, this Court has received numerous petitions for certiorari involving these boilerplate TCCA decisions. See, e.g., *Broadnax v. Texas*, No. 23-248; *Brown v. Texas*, No. 22-6964; *Valdez v. Texas*, No. 18-7637.

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.*

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 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.

First, Roberson has been sentenced to death. In a typical case, "[t]he very nature of [habeas proceedings] demands that [they] be administered with the initiative and flexibility essential to insure that miscarriages of justice within [their] reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 291 (1969). Capital cases in particular underscore the need for heightened procedural safeguards because the sentence is final and irreversible. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (The "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case."). Far from taking "painstaking care," the TCCA's boilerplate decision flouts the seriousness of the constitutional violations raised by Roberson in his subsequent petition.

Second, statistics bear out that Article 11.073 has not met its purpose of providing a pathway for people whose convictions were based on false forensic

evidence in capital cases. No one on Texas's death row, including Roberson, has succeeded in using this new law to obtain a new trial—despite more than satisfying the procedural requirements delineated in state law. *See* AppI, 551a-587a, Texas Defender Service, *An Unfulfilled Promise: Assessing the Efficacy of Article 11.073*, July 2024 ("The TCCA has never granted 11.073 relief to a person sentenced to death, as compared to granting relief to 31% of people who seek relief and are serving non-death sentences."). TCCA's practice of routinely issuing boilerplate opinions dismissing subsequent habeas petitions for purported failure to satisfy the requirements of Article 11.071 § 5(a) makes it nearly impossible for a reviewing court to get to the root of this disparity between capital and non-capital cases.

Third, less than one week ago, the TCCA granted state habeas relief under Articles 11.071 § 5(a) and 11.073 in a markedly similar case prosecuted "under the theory of Shaken Baby Syndrome" and prosecuted in the same era as Roberson's case. *Ex **p**arte Roark*, 2024 WL 4446858 at *23-24, __ S.W.3d __ (Tex. Ct. App. Oct. 9, 2024).[13] Specifically, the TCCA concluded "that Article 11.073 applies and Applicant has met his burden for relief"; found "that scientific knowledge has evolved regarding SBS and its application in Applicant's case"; and concluded that "[t]he admissible scientific testimony at trial today would likely yield an acquittal." *Id.* at *23.

Roark and Roberson's case are indistinguishable in all material aspects. Roark was tried in 2000 in Dallas County; Roberson was tried in 2003 in Anderson County.

[13] Further illustrating that non-capital petitioners fare far better under Article 11.073 than capital petitioners, Roark was convicted of the non-capital offense of injury to a child.

The ***very same*** "child abuse specialist," Dr. Janet Squires, formerly with the Children's Medical Center of Dallas, diagnosed SBS in both cases and testified at length for the State about her SBS diagnosis and tenets in both trials.[14] In *Ex parte Roark*, the TCCA aptly recognized that the case against Roark, just like the case against Roberson, was an entirely "circumstantial case"—devoid of eyewitnesses to what transpired during the limited window when each man was alone with a child in their care when she experienced a medical crisis. *Id.* at *25. Likewise, as the TCCA noted, "the most persuasive evidence in trial was medical testimony," which was in fact "[t]he only way to assign criminal responsibility" to the defendant. *Id.*

The similarities between *Roark* and Roberson's case are strikingly similar on an even more granular level. For instance, in ***both*** cases, the defendant reported the child had experienced a short fall out of bed—a report dismissed, in both cases, as not credible because the medical community did not believe short falls could cause the "triad" of injuries. *Id*. at 15. In ***both*** cases, Dr. Squires testified that shaking had to have caused the brain injuries. *Id.* at *5-7. In ***both*** cases, the children experienced episodes of breathing apnea—but the child in *Roark* experienced an episode of apnea that was caught before it resulted in her death. By contrast, Roberson's daughter had experienced multiple episodes of breathing apnea before her death on January 31, 2002, when she stopped breathing in her sleep before her father woke up and found

[14] One difference is that the 13-month-old child in *Roark* did not die as Roberson's 27-month-old daughter Nikki did. Thus, a medical examiner performed an autopsy and testified in in Roberson's case. But that medical examiner has admitted that she never considered a host of critical variables that show her 2002 inflicted head trauma opinion is indefensible.

her unresponsive. Despite these factual similarities between the Roark and Roberson cases, the TCCA treated the cases diametrically differently.

Numerous courts in other jurisdiction have relied on the same change in scientific understanding to grant relief to individuals prosecuted under an SBS/AHT theory. One such case, which led to an exoneration, is markedly similar. *State v. Butts*, 2023 WL 4883377 (Ohio Ct. App. Aug. 1, 2023).

Both Butts and Roberson were tried in 2003 when the SBS/AHT causation theory was widely accepted as medical orthodoxy. Both cases involve the death of a two-year-old child where the medical examiner had deemed the death a homicide and the State relied at trial on experts who testified that the cause of death was a brain injury involving a triad of symptoms (subdural bleeding, brain swelling, and retinal hemorrhage) then viewed as conclusive proof that the child had been violently shaken and sustained blunt force impact that could be deemed inflicted. *Id*. at ¶ ¶3, 6, 34, 44. Both cases involve the absence of any evidence that the child's neck had sustained injuries. *Id.* at ¶57. And both cases involve the rejection, at trial, of the proposition that a short fall could have played any role in causing the child's condition. *Id.* at ¶55.

In both cases, State experts testified that the child's illness at the time of death was irrelevant. Both children had pneumonia; however, the signs of Nikki's pneumonia were only discovered after trial, and the severity of that illness has very recently been categorically proven by a highly qualified expert in lung disease.

In both cases, the State called experts at trial who repeatedly told the jury that *only* abusive head trauma could cause retinal hemorrhages. *Id.* at ¶95. The Ohio

reviewing court concluded the "shift in understanding by the medical community [on retinal hemorrhages, alone] raises a strong probability of a different result on retrial." *Id*.

In describing the changes in medical understanding since Butts' 2003 trial, the Ohio court relied on some of the same experts who provided expert opinions, reports and testimony for Mr. Roberson: Dr. Julie Mack, pediatric radiologist, and Dr. Roland Auer, neuropathologist. *Id*. at ¶ ¶8, 42, 44, 51, 91. The Ohio court ultimately concluded that Butts had presented "new advancements" reflecting "a quantum leap in the medical community's understanding of non-abusive mechanisms that can mimic abusive head trauma and development of standards that required medical providers to consider and, where appropriate, explore alternative diagnoses before finding the cause to be abuse, trauma, or shaking." *Id*. at ¶ 70. This new evidence created a "strong possibility that a jury would have reached a different result had his proffered evidence been admitted at trial." Id.

The significant change in scientific understanding in *Butts, Roark*, and Mr. Roberson's case recently led an appellate court in New Jersey to affirm a trial court's finding that SBS/AHT is actually "junk science" as "no study has ever validated the hypothesis that shaking a child can cause the trial of symptoms associated with [SBS/]AHT. *State v. Nieves*, 476 N.J. Super. 609 (2023) (affirming trial court's decision to exclude expert testimony about SBS/AHT after finding "a real dispute in the larger medical and scientific community about" its validity).

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, as the very recent opinion of *Ex parte Roark* illustrates. 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).

II. This Case is An Ideal Vehicle to Review the TCCA's Practice of Summarily Dismissing Petitions Without Substantive Review.

The question presented is one of substantial legal and practical importance to the federal criminal justice system. This case provides an optimal vehicle for the Court to resolve that question.

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 from the legislature by summarily dismissing subsequent petitions, like Roberson's, without meaningful review. This practice denies 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 hopelessly 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 law grounds. *See Powell*, 559 U.S. at 56. The case thus presents an ideal vehicle for rejecting the TCCA's practice—at least in death-penalty cases raising substantial claims of innocence.

CONCLUSION

For the foregoing reasons, this Court should grant the petition and stay Robert Roberson's execution. The case should then either be set for full merits briefing or

summarily reversed and remanded with a directive that the CCA explain its reasoning when, under the circumstances, its bare assertion that the "allegations do not satisfy the requirements of Article 11.071, Section 5" cannot be reconciled with the statutory text.

Respectfully submitted,

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