Nos. 24–5753 & 24A349

IN THE

Supreme Court of the United States

ROBERT LESLIE ROBERSON III,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

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

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

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CAPITAL CASE
QUESTIONS PRESENTED

Roberson has filed multiple subsequent habeas applications in the Texas Court of Criminal Appeals (CCA) seeking relief from his capital murder conviction. In his third state habeas application, Roberson argued that newly-discovered scientific evidence—largely alternative diagnoses for the "triad" of symptoms associated with Shaken Baby Syndrome—proved that the State's experts gave false testimony regarding the cause of death and that he was actually innocent. The CCA disagreed, denying all of Roberson's claims. *See Ex parte Roberson*, No. WR-63,081-03, 2023 WL 151908 (Tex. Crim. App. Jan. 11, 2023). This Court denied certiorari. *Roberson v. Texas*, No. 22-7546, 144 S. Ct. 129 (2023).

After his execution date was set, Roberson filed a fourth state habeas application raising actual innocence based on three additional expert medical opinions that supported his earlier claim that victim died as the result of pneumonia and the effects of medication. The CCA dismissed the application for failing to "satisfy the requirements of Article 11.071, Section 5." *Ex parte Roberson*, No. WR-63,081-04, 2024 WL 4143552 (Tex. Crim. App. Sept. 11, 2024) (per curiam) (not designated for publication). Now, Roberson argues that he was deprived of due process by his state habeas proceedings. The following question is presented:

> Whether this Court should impose a new rule requiring state courts to explain the reasons for applying a state procedural rule when a capital state habeas applicant asserts an actual innocence claim that has not even been recognized as a valid basis for relief?

LIST OF ALL PROCEEDINGS

The State of Texas v. Roberson, No. 26,162-A (3rd Dist. Ct., Anderson County, Texas 2003)

Roberson v. State, No. AP-74,671, 2002 WL 34217382 (Tex. Crim. App. June 20, 2007) (not designated for publication)

Roberson v. Texas, No. 07–8536, 552 U.S. 1314 (2008)

Ex parte Roberson, Nos. WR-63,081-01, WR-63,081-02, 2009 WL 2959738 (Tex. Crim. App. Sept. 16, 2009) (per curiam) (not designated for publication)

Roberson v. Dir., TDCJ-CID, No. 2:09CV327, 2014 WL 5343198 (E.D. Tex. Sept. 30, 2014)

Roberson v. Stephens, No. 14–70033, 619 F. App'x 353 (5th Cir. 2015) (per curiam)

Roberson v. Stephens, No. 15–6282, 577 U.S. 1033 (2015)

Roberson v. Stephens, No. 15–7246, 577 U.S. 1150 (2016)

Ex parte Roberson, No. WR-63,081-03, 2023 WL 151908 (Tex. Crim. App. Jan. 11, 2023) (per curiam) (not designated for publication)

Roberson v. Texas, No. 22-7546, 144 S. Ct. 129 (2023)

Ex parte Roberson, No. WR-63,081-04, 2024 WL 4143552 (Tex. Crim. App. Sept. 11, 2024) (per curiam) (not designated for publication)

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INTRODUCTION

Petitioner Robert Roberson was convicted and sentenced to death in 2003 for the murder of his two-year-old daughter Nikki. He is scheduled to be executed **after 6:00 p.m. (Central Time) on Thursday, October 17, 2024**. Roberson was the only person at home with Nikki when she sustained devastating and ultimately fatal injuries. He was only a recent custodian of Nikki and was reluctant to be taking care of her alone for the first time. Roberson was routinely violent towards Nikki; he had paddled the toddler, shaken and thrown her, threatened her, and screamed at her. Nikki was afraid of Roberson, cried in his presence, and refused to be held by him. Some hours after Roberson alleged that Nikki fell off the bed, at the insistence of his then-girlfriend, Roberson drove Nikki to the hospital. He acted with no apparent urgency; Roberson took the time to dress Nikki's limp body and find parking at the hospital before bringing her inside. Nikki later died from her injuries. Punishment evidence showed that Roberson had prior theft convictions, had been arrested over a dozen times, had strangled his ex-wife with a coat hanger, punched her in the face and broke her nose while she was pregnant, and beat her with a fireplace shovel.

Since 2016, Roberson has claimed that newly available scientific evidence proves he is actually innocent and undercuts testimony given at his

trial relating to the diagnosis of the "triad"[1] of symptoms associated with Shaken Baby Syndrome (SBS), the number of impacts that Nikki sustained, and the mechanism of injury. The CCA disagreed. Just over one year ago, this Court denied certiorari on Roberson's third state habeas application that addressed the bulk of his new evidence. With his execution date set, Roberson filed a fourth state habeas application based on three additional expert opinions that support his previous claims. Like his previous petition, not only does Roberson's current claim fail to implicate federal constitutional requirements, he also falls short of showing that he is actually innocent of murdering Nikki. As noted by the CCA's opinion on direct review and Judge Yeary's recent concurrence, "the tiny victim suffered multiple traumas" that are inconsistent with a short fall from a bed or complications from a virus:

> The victim was found to have a bruise on the back of her shoulder, a scraped elbow, a bruise over her right eyebrow, bruises on her chin, a bruise on her left cheek, an abrasion next to her left eye, multiple bruises on the back of her head, a torn frenulum in her mouth, bruising on the inner surface of the lower lip, subscapular and subgaleal hemorrhaging between her skin and her skull, subarachnoid bleeding, subdural hematoma, both pre-retinal and retinal hemorrhages, and brain edema."

Concurring Opinion at 2, *Ex parte Roberson*, Nos. WR-63,081-03, 04 (Tex. Crim. App. Oct. 10, 2024) (Yeary, J., concurring on denial of suggestion for

[1] The of symptoms of the so-called "triad" are subdural hematoma, retinal hemorrhage, and encephalopathy.

reconsideration and motion for stay of execution). Even setting aside the possibility of shaking, the testimony at trial established that the victim died of multiple blunt force traumas. *Id*. at 2–3. Roberson also admitted to a defense expert that he "lost it" and shook the child. *Id*. at 3.

Roberson's third state habeas application—again, addressing the bulk of his evidence—was denied on the merits by the CCA on the findings and conclusions of the trial court following a hearing. This Court denied certiorari review of that application. While a certiorari denial is not precedent, the same jurisprudential concerns that animated that denial apply with equal force here to the appeal of Roberson's abusive fourth application raising similar claims and assertions. Accordingly, Roberson's petition should be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

The CCA summarized the relevant evidence presented during guilt-innocence in its opinion on direct appeal:

> The State called twelve witnesses during its case in chief. Among them was Kelly Gurganus, a registered nurse, who testified that she was working in the emergency room of the Palestine Regional Medical Center when [Roberson] came in, pushing a wheelchair in which sat his girlfriend Teddie Cox. Gurganus said Teddie was holding something in her lap, covered in a blanket or coat of some sort. Teddie told Gurganus, "She's not breathing," at which point Gurganus removed the covering and saw Nikki Curtis lying in Teddie's lap, limp and blue.
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Gurganus further testified that when she laid Nikki down on the bed in the trauma room, she saw bruising on Nikki's body, including on her head. She said that she then spoke with [Roberson] and asked him what happened, and that he told her that Nikki's injuries were the result of falling off of the bed. She said she immediately became suspicious because that story seemed implausible in light of the severity of Nikki's injuries. She instructed the director of nurses to call the police.

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The State also called Robbin Odem, the chief nursing officer at Palestine Regional Medical Center, who testified to her own observations of Nikki's extensive head injuries, as well as her similar interaction with, and impression of, [Roberson] in the emergency room that night.

Dr. John Ross, the pediatrician who examined Nikki the day she died, testified that she had bruising on her chin, as well as along her left cheek and jaw. Dr. Ross said she also had a large subdural hematoma, which he described as "bleeding outside the brain, but inside the skull." He said there was edema on the brain tissue, and that her brain had actually shifted from the right side to the left. He said that, in his opinion, Nikki's injuries were not accidental but instead intentionally inflicted.

Dr. Thomas Konjoyan, the emergency room physician who treated Nikki the day she died, also testified that she had bruising on the left side of her jaw, and that she had uncal herniation, which is "essentially a precursor to brain death." Dr. Konjoyan said that the severity of the swelling in Nikki's brain necessitated her transfer to the Children's Medical Center in Dallas for pediatric neurosurgical services. He said that, in his opinion, it would be "basically impossible" for such an injury to have resulted from a fall out of bed. Dr. Jill Urban, a forensic pathologist for Dallas County, testified for the State that she performed the autopsy on Nikki and concluded that Nikki died as a result of "blunt force head injuries."

The jury also heard from Courtney Berryhill, Teddie Cox's eleven-year-old niece, who testified that sometimes she spent the night at the home where [Roberson] lived with Teddie, Nikki, and Teddie's ten-year-old daughter Rachel Cox. Courtney said that she

once witnessed [Roberson] shake Nikki by the arms in an attempt to make her stop crying. Rachel Cox then testified that [Roberson] had a "bad temper," and that she had witnessed him shake and spank Nikki when she was crying. Rachel said she had seen this happen about ten times. She also recalled a time that [Roberson] threatened to kill Nikki.

Finally, Teddie Cox testified for the State. . .Teddie testified that [Roberson] had a bad temper, and that he would yell at Nikki when she cried, which apparently happened every time he approached her. Teddie said she once heard [Roberson] yell at Nikki: "If you don't shut up I'm going to beat your ass." She also said that [Roberson] would hit Nikki with his hand and also once with a paddle. She said that on that occasion she told [Roberson] that he should not do that because Nikki was a baby. That whipping left bruising on Nikki's buttocks which the Bowmans [Nikki's grandparents] later noticed. Teddie said that, when the Bowmans asked about it, [Roberson] told them that Rachel did it. She said that she confronted [Roberson] about the incident and that he promised her he would never hit Nikki again.

Teddie also testified that she witnessed [Roberson], when he was angry at Nikki, pick her up off the bed, shake her for a few seconds, and throw her back on the bed. This upset Teddie, and she briefly left [Roberson]'s home with Rachel, but [Roberson] apologized and convinced her to return. According to Teddie, this incident happened within a month of Nikki's death.

Teddie testified that, on the evening of January 30, 2002, Teddie was in the hospital after undergoing a hysterectomy procedure. Nikki was staying with the Bowmans, but Mrs. Bowman became ill, so it became necessary for [Roberson] to pick up Nikki and look after her. Teddie said [Roberson] seemed mad about this development, because he preferred to stay with her in her hospital room watching a movie on television. Teddie said [Roberson] had never once before been asked to be the sole caretaker of Nikki. She said [Roberson] did not leave immediately, but waited quite a while and, when he finally did leave, he was mad.

> The next morning, Teddie was told she was being released. When she spoke to [Roberson] about picking her up, he said that he was bringing Nikki to the hospital because she wasn't breathing and he couldn't get her to wake up. Teddie noted that he did not seem upset about the situation. . .[Roberson] eventually pulled into the parking lot. Teddie said he did not seem to be moving urgently and in fact found a parking spot instead of pulling up to the front door. Nor did he seem to be in any hurry to get Nikki out of the car.
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> Teddie urged him to bring Nikki to her, and he did. Teddie said Nikki was limp, blue, and did not appear to be breathing. Teddie said she asked [Roberson] what happened, and he said that they had fallen asleep in bed while watching a movie and that he awoke to her crying near the foot of the bed, on the floor. He said he made sure that she was okay and then brought her back into bed with him, and they went back to sleep. Teddie said she was skeptical of this story, because, in her experience, Nikki would always cry for Teddie when [Roberson] tried to sleep in the bed with her. In fact, Teddie said, [Roberson] later did tell her that Nikki was crying for her.
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> Nikki died from her injuries after being taken to the hospital in Dallas. Teddie could not accompany Nikki when she was taken to Dallas, but she did not want to return to [Roberson]'s home, so she took her daughter to stay with a relative. In the ensuing weeks, she spoke with [Roberson] occasionally, and she said he never once mentioned Nikki, and that when she did he expressed no interest in talking about her. Teddie said he did not seem sad or emotionally distraught, but that he just showed no interest. At one point, while [Roberson] was in the Anderson County Jail, Teddie said she asked him directly if he had killed Nikki. She said his response was that if he did do it, he didn't remember; that he might have "snapped," but that he doesn't remember doing so.

Roberson v. State, No. AP-74,671, 2002 WL 34217382, at *1–3 (Tex. Crim. App. 2007) (not designated for publication).

II. Evidence Relating to Punishment

A. The State's evidence

Again, the CCA summarized the relevant evidence in its opinion on direct appeal:

> At the punishment phase, the State began by offering [Roberson]'s pen packets. They showed that [Roberson] had been convicted previously of burglary of a habitation, for which he was sentenced to ten years in prison (upon revocation of his probation). They also showed a prior conviction for felony theft, for which [Roberson] received a seven-year sentence, as well as a five-year term for another theft conviction. In total, [Roberson] had been arrested at least seventeen times before murdering Nikki.
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> The State then called Della Gray, [Roberson]'s ex wife and the mother of his two older children. Gray testified that [Roberson] was physically abusive towards her both before and after they got married, including incidents where he strangled her with a coat hanger, punched her in the face and broke her nose while she was pregnant, and beat her with a fireplace shovel. She also told of a time when she had gone out to help a friend, leaving [Roberson] and their son, Robert, Jr., at home alone together. When she returned, Robert, Jr. had a bruised face, and when she asked him what happened, Robert, Jr. told her he had fallen off the bed. She also described an incident in which [Roberson] was alone in a bedroom with their then two-year-old daughter Victoria for thirty minutes. Victoria was screaming and upset, and when [Roberson] finally let her out of the room she had a "hickey" on her neck. Overall, Gray described herself as scared of [Roberson], such that she never reported any of the suspected abuse to the authorities. She said she currently was not allowed to spend any time with her children. On cross-examination, Gray admitted she had been involved in a lengthy custody battle against [Roberson] and his mother, which she ultimately lost, some eleven years previously. She also admitted to some history of alcohol and drug abuse, and that she had not provided, nor has she been asked to provide, any support for her children in the years since she lost custody of them.

There was testimony from another witness concerning a dispute with a neighbor that escalated into a physical altercation with a teenage boy. The State then rested its punishment case in chief.

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In rebuttal, the State called Thomas Allen, Ph.D., a psychologist who interviewed [Roberson] and reviewed his records. Dr. Allen testified that, based on the severity of the crime in this case, [Roberson]'s family history, his history of substance abuse, and other factors, he believed that [Roberson] was a psychopath and that it was probable he would commit future acts of violence, even in prison.

The State then called David Self, M.D., a psychiatrist who interviewed [Roberson] along with Dr. Allen. Dr. Self disputed [defense psychiatrist Dr. John] Krusz's diagnosis of post-concussion syndrome. He agreed that [Roberson] has poor impulse control, but that led him to conclude that [Roberson] would be at risk to engage in future acts of criminal violence because he would be targeted by other inmates in prison as someone who had hurt a child, and he likely would have to defend himself from physical attacks. On cross-examination, Dr. Allen acknowledged that many people in [Roberson]'s condition do not act out violently in prison, and that [Roberson] himself had no history of violent incidents during his prior years of incarceration.

Id. at *9–10.

B. The defense's evidence

The CCA further summarized:

[Roberson] called two officers from the Anderson County jail to testify that [Roberson] had no history of violence or disciplinary problems while incarcerated there. [Roberson] then called Dr. John Krusz. Dr. Krusz's testimony consisted of that which was offered and excluded at the guilt innocence phase, namely, a discussion of what he referred to as [Roberson]'s "post concussional type syndrome." Dr. Krusz said that his evaluation of [Roberson] led him to conclude that, despite his poor ability to deal with

> stressful situations in the past, [Roberson] would be able to control his behavior in the controlled, structured environment of prison.
>
> On cross-examination, Dr. Krusz acknowledged that the major portion of his work was in the treatment of chronic pain and migraine headaches. He also admitted that [Roberson] had not informed him of his history of abuse towards his ex-wife and children. He also acknowledged that, even if [Roberson] was brain damaged, there are many people in the world who are brain damaged and have not murdered a child. Dr. Krusz also conceded that [Roberson]'s brain disorder might be attributable to [Roberson]'s long term history of drug abuse, including intravenous drugs.
>
> [Roberson] then called Kelly R. Goodness, Ph.D. Dr. Goodness was a forensic psychologist who had interviewed [Roberson] while he was incarcerated during this trial, as well as other people who knew [Roberson], including his family. Dr. Goodness testified that, in her opinion, [Roberson] had been physically abused as a child by his father, despite denials of abuse by [Roberson] and his family. She also said she believed that [Roberson]'s two older children had been abused, but that she could find no conclusive evidence to say whether the abuse came from [Roberson] or his ex-wife. She said she believed [Roberson] suffered from brain damage specifically, that his brain was "compromised"—as well as depression, substance dependence, and antisocial personality disorder. She also testified that [Roberson]'s mother had a very dominant influence on him and that, if not for her influence, he likely would not have sought custody of Nikki. In her opinion, [Roberson] was unlikely to attempt to escape from prison, nor was he likely to pose a future danger while in prison. After Dr. Goodness's testimony, [Roberson] rested his punishment case in chief.

Id. at *9–10.

Notably, Dr. Goodness also testified that Roberson admitted he "lost it" when Nikki was crying and shook her. 48 RR 24. She thought he had a "rage

reaction," and that his brain injury made "him more susceptible to acting out when he becomes angry or rageful." 48 RR 43.

III. Conviction and Postconviction Proceedings

In February 2003, a jury found Roberson guilty of capital murder for the death of his two-year-old daughter, Nikki Curtis. 5 CR 620.[2] Based on the jury's answers to the special issues, the trial court sentenced Roberson to death. *Id.* at 641–42; Tex. Code Crim. Proc. art. 37.071, § 2(g). The CCA affirmed Roberson's conviction and death sentence on June 20, 2007. *Roberson v. State*, No. AP-74,671, 2002 WL 34217382 (Tex. Crim. App. June 20, 2007) (not designated for publication). This Court denied certiorari. *Roberson v. Texas*, No. 07-8536, 552 U.S. 1314 (2008). The CCA subsequently denied relief on Roberson's initial postconviction application for a writ of habeas corpus, in which he raised thirty-four grounds for relief. *Ex parte Roberson*, Nos. WR-63,081-01, WR-63,081-02, 2009 WL 2959738 (Tex. Crim. App. Sept. 16, 2009) (per curiam) (not designated for publication). On the same day, the CCA dismissed as a subsequent application a document titled "Notice of Desire to Raise Additional Habeas Corpus Claims." *See id.*

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[2] The Respondent employs the following citation conventions: "CR" refers to the clerk's record of pleadings and documents filed during Roberson's capital-murder trial. "RR" refers to the reporter's record of transcribed trial proceedings. "SX" refers to the State's trial exhibits. "SHCR–04" refers to the clerk's record of pleadings and documents filed during Roberson's third subsequent state habeas proceeding. "SHRR–03" refers to the reporter's record of transcribed second subsequent state habeas proceedings. All references are preceded by volume number and followed by page number.

Roberson filed a federal habeas petition, including forty-five claims, which was denied and dismissed with prejudice. *Roberson v. Dir., TDCJ-CID*, No. 2:09CV327, 2014 WL 5343198, at *5, 62 (E.D. Tex. Sept. 30, 2014), *aff'd sub nom. Roberson v. Stephens*, 619 F. App'x 353 (5th Cir. 2015).

After his execution date was set, Roberson brought a second subsequent writ application in state court asserting that "(1) new scientific evidence contradicts evidence of Shaken Baby Syndrome that the State relied on at trial. . . (2) his conviction was secured using false, misleading, and scientifically invalid evidence, *see Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009); *Ex parte Chavez*, 371 S.W.3d 200, 207 (Tex. Crim. App. 2012), (3) he is actually innocent, *see Herrera v. Collins*, 506 U.S. 390 (1993); *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996), and (4) the use of false scientific testimony violated his due process right to a fundamentally fair trial." *Ex parte Roberson*, 2023 WL 151908, at *1.

The CCA granted Roberson's motion to stay his execution and remanded the claims to the trial court for consideration. *Id*. Following a hearing, the trial court made findings of fact and conclusions of law recommending that the CCA deny habeas relief on all four of Roberson's claims. *Id.* The CCA conducted an independent review of the habeas record and concluded that it supported the trial court's findings of fact and conclusions of law. *Id*. The CCA adopted the court's findings of fact and conclusions of law and denied habeas relief on all of

Roberson's claims. *Id*. The Court denied certiorari review of the CCA's decision just over one year ago. *Roberson*, 144 S. Ct. 129.

On August 1, 2024, after Roberson was again set for execution, he filed a fourth state habeas application based on three additional expert opinions that raised almost identical claims as his prior application. SHCR-04 at 4–161; *Ex parte Roberson*, 2024 WL 4143552, at *1. Over a month ago, the CCA denied Roberson's motion to stay and dismissed the application as abusive.[3] *Id.* at *2.

On October 14, Roberson filed a fifth state habeas application requesting relief based on the CCA's recent opinion in *Ex parte Roark*, No. WR-56,380-03, 2024 WL 4446858 (Tex. Crim. App. Oct. 9, 2024), a shaken baby case in which the CCA granted relief under Article 11.073 of the Texas Code of Criminal Procedure. The CCA again denied Roberson's motion to stay and dismissed the application as abusive. *Ex parte Roberson,* No, WR-63,081-05 (Tex. Crim. App. Oct. 16, 2024) (per curiam) (not designated for publication).

[3] Roberson also "suggested" that the CCA reopen his third and fourth overall habeas proceedings. Suggestion to Reconsider on Court's Own Initiative and Motion to Hold for Adjudication of *Ex Parte Roark*, *Ex parte Roberson*, No. WR-63,081-03 (Tex. Crim. App. April 24, 2024); 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, *Ex parte Roberson*, No. WR-63,081-03 (Tex. Crim. App. Oct. 7, 2024); 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, *Ex parte Roberson*, No. WR-63,081-04 (Tex. Crim. App. Oct. 7, 2024). All three "suggestions" were denied by the CCA without written order.

In this petition, Roberson complains that his right to due process was violated by the state habeas court's application of a state procedural rule without providing a detailed explanation. Petition for Writ of Certiorari (Pet.) at 29–36. But, as shown below, Roberson's claim does not merit relief.

REASONS FOR DENYING THE WRIT

The questions that Roberson presents for review are unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Here, Roberson advances no compelling reason to review his case, and none exists. Roberson was not deprived of due process on state habeas because he had the opportunity to be heard. This Court has never required a state habeas court to provide a detailed explanation for the application of a state procedural rule. To the extent he asserts his innocence, this Court has never recognized a freestanding claim of actual innocence. Even if actual innocence was a valid claim, Roberson does not meet the standard.

Finally, Roberson's conviction and sentence became final when this Court denied certiorari review on direct appeal on April 14, 2008. *Roberson v. Texas*, 552 U.S. 1314 (2008). The State's interest in finality outweighs Roberson's interest in the retroactive application of any new rule of constitutional law. *Teague v. Lane*, 489 U.S. 288, 309–10 (1989) (plurality opinion). Although Roberson's claims are not raised in a federal habeas

petition, a grant of certiorari review in this Court would have the same impact upon the finality of Roberson's conviction and sentence. Thus, the Court should consider the issues raised only in light of clearly established constitutional principles dictated by precedent as of April 14, 2008. *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989). With this in mind, Roberson's petition presents no important questions of law to justify this Court's exercise of its certiorari jurisdiction.

I. The CCA's Dismissal of Roberson's Fourth State Habeas Application Did Not Violate His Right to Due Process.

In his petition, Roberson alleges that the CCA's dismissal of his fourth state habeas application on procedural grounds violated his right to due process because the CCA only provided a boilerplate denial that lacked explanation. Pet. at 29–35. But because state habeas proceedings are not required under the Constitution, federal courts may upset the State's postconviction procedure only if it was fundamentally inadequate to vindicate Roberson's substantive rights. The record shows that the state habeas proceedings adequately complied with due process. Further, as explained below, this Court has never recognized a standalone actual innocence claim as a ground for relief, so there is no recognized right to vindicate here. Accordingly, Roberson's petition for a writ of certiorari should be denied.

A. The Constitution does not require state habeas proceedings or that such proceedings follow any particular federal model.

Justice O'Connor described the role of state habeas corpus proceedings as follows:

> A postconviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment. Nothing in the Constitution requires the States to provide such proceedings . . . nor does it seem to me that the Constitution requires the States to follow any particular federal model in those proceedings.

Murray v. Giarratano, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring) (citation omitted); *see also Pennsylvania v. Finley*, 481 U.S. 551, 557 (1989) (states have no obligation to provide collateral review of convictions). "State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal." *Giarratano*, 492 U.S. at 10. This Court has explained that "[t]he additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case are . . . sufficient to assure the reliability of the process by which the death penalty is imposed." *Id*.

And, where a State allows for post-conviction proceedings, "the Federal Constitution [does not] dictate[] the exact form such assistance must assume." *Finley*, 481 U.S. at 555, 557, 559; *cf. Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) ("federal habeas corpus relief does not lie for errors of state law")

(internal quotation marks and citation omitted); *Henderson v. Cockrell*, 333 F.3d 592, 606 (5th Cir. 2003) (infirmities in state habeas proceedings do not state a claim for federal habeas relief); *Beazley v. Johnson*, 242 F.3d 248, 271 (5th Cir. 2001); *Wheat v. Johnson*, 238 F.3d 357, 361 (5th Cir. 2001). Indeed, as the Court has explained, "[f]ederal courts may upset a State's postconviction procedures only if they are fundamentally inadequate to vindicate the substantive rights provided." *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009).

B. Roberson does not show that his state habeas proceedings failed to comport with due process.

The "fundamental requisite of due process of law is the opportunity to be heard." *Ford v. Wainwright*, 477 U.S. 399, 413 (1986) (citation omitted); *Tercero v. Stephens*, 738 F.3d 141, 148 (5th Cir. 2013) (federal habeas case extending core procedural due process protections to inmates seeking to prove that they are ineligible for the death penalty due to being underage, but noting that "states retain discretion to set gateways to full consideration and to define the manner in which habeas petitioners may develop their claims" and "'[d]ue process does not require a full trial on the merits'; instead, petitioners are guaranteed only the 'opportunity to be heard.'") (footnotes and citations omitted). In the case-at-bar, Roberson most certainly had notice and the opportunity to be heard.

The Texas habeas system gave Roberson the means and the opportunity to make claims, marshal evidence in support of his cause, and address the adverse evidence adduced against him. Simply because Roberson did not prevail does not mean that he was denied notice or an opportunity to be heard. Indeed, the CCA was not required to specifically address every jot of evidence or argument that Roberson raised. *Coleman v. Thompson*, 501 U.S. 722, 739 (1991) ("[W]e have no power to tell state courts how they must write their opinions."); *Ex parte Graves*, 70 S.W.3d 103, 120 n.3 (Tex. Crim. App. 2002) (Price, J., dissenting) ("we are not required to write an opinion explaining the reason or reasons we deny relief on applications of habeas corpus"). Indeed, "there are instances in which a state court may simply regard a claim as too insubstantial to merit discussion." *Johnson v. Williams*, 568 U.S. 289, 299–300 (2013). The fact that the state court did not specifically respond to Roberson's evidence is not surprising nor does it undermine its decision. State courts are tasked with reviewing scores of habeas applications and their "[o]pinion-writing practices" are influenced by considerations other than avoiding scrutiny in federal court. *Harrington v. Richter*, 562 U.S. 86, 99 (2011). And while Roberson argues that the state court has repeatedly failed to consider his evidence, he ignores (1) the evidentiary hearing on these issues following the stay of his previous execution; (2) the detailed findings of fact and conclusions adopted by the CCA in that proceeding; (3) the fact that the his

previous habeas application raising these issues was denied on the merits; and (4) Judge Yeary's concurrence respecting the denial of his suggestion for reconsideration, which outlined Judge Yeary's view of how the evidence supported the conclusion that Roberson killed the victim. *Ex parte Roberson*, 2023 WL 151908, at *1; Concurring Opinion, *Ex parte Roberson*, Nos. WR-63,081-03, 04 (Tex. Crim. App. Oct. 10, 2024) (Yeary, J., concurring on denial of suggestion for reconsideration and motion for stay of execution).

Roberson cites *Florida v. Powell*, 559 U.S. 50 (2010), in support, but that is a direct appeal case. *Id.* at 54–56. Further, in *Powell*, the Court found it had jurisdiction to review the federal claim because the state court "treated state and federal law as interchangeable and interwoven." *Id.* at 57. Roberson fails to show the CCA treated federal law and state law interchangeably here, particularly where actual innocence is not a recognized federal claim, and he fails to demonstrate any valid federal claim. Roberson's reliance on *Stutson v. United States*, 516 U.S. 193, 196 (1996) (per curiam), fares no better because it is also a direct appeal case. *Id.* at 602. *Stutson* involved an "exceptional combination of circumstances" where the Court invited the lower court to clarify its ruling after the government repudiated the argument advanced in the lower court, a recent Supreme Court decision applied to the case, the lower court had issued a summary denial, and all the other circuit courts to consider the issue in question had reached an opposite result. *Id.* at 195–96. None of the

cases or reasons cited by Roberson establish that it is a due process violation to rely on summary order based on a state procedural rule. Accordingly, certiorari review should be denied.

II. Even If a More Detailed Opinion Was Required, Review of Roberson's Underlying Claims Would Still Be Foreclosed by an Independent and Adequate State-Procedural Bar.

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

> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
>
> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or
>
> (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071 or 37.0711.

This statute, like the federal habeas "second or successive" writ prohibition, works to limit the number of attempts an inmate may seek to collaterally attack a conviction, subject to certain, limited exceptions. *Compare* Tex. Code Crim. Pro. art. 11.071 § 5(a), *with* 28 U.S.C. § 2244(b); *see also Beard*

v. *Kindler*, 558 U.S. 53, 62 (2009) (noting that federal courts should not "disregard state procedural rules that are substantially similar to those to which we give full force in our own courts.").

Here, the CCA dismissed the application for failing to "satisfy the requirements of Article 11.071, Section 5."[4] *Ex parte Roberson*, 2024 WL 4143552 at *2. Roberson's claims are therefore unequivocally procedurally barred because the state court's disposition of the claims relies upon an adequate and independent state-law ground, i.e., the Texas abuse-of-the-writ statute. *See*, *e.g.*, *Moore v. Texas*, 122 S. Ct. 2350, 2352–53 (2002) (Scalia, J., dissenting); *Balentine v. Thaler*, 626 F.3d 842, 857 (5th Cir. 2010) (recognizing that Section 5 is an adequate state law ground for rejecting a claim); *Matchett v. Dretke*, 380 F.3d 844, 848 (5th Cir. 2004) ("Texas' abuse-of-the-writ rule is ordinarily an 'adequate and independent' procedural ground on which to base a procedural default ruling."); *Busby v. Dretke*, 359 F.3d 708, 724 (5th Cir. 2004) ("the Texas abuse of the writ doctrine is an adequate ground for considering a claim procedurally defaulted."); *Barrientes v. Johnson*, 221 F.3d 741, 758–59 (5th Cir. 2000); *Fuller v. Johnson*, 158 F.3d 903, 906 (5th Cir. 1998); *Emery v. Johnson*, 139 F.3d 191, 195–96 (5th Cir. 1997). This Court has held on numerous occasions that it "will not review a question of federal law

[4] The CCA's typographical error in its subsequent citation—referring to Article 37.071 rather than Article 11.071—is meaningless given that the correct provision is identified in the body text and is likewise obvious from the context.

decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment" because "[the Court] in fact lack[s] jurisdiction to review such independently supported judgments on direct appeal: since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory." *Sochor v. Florida*, 504 U.S. 527, 533 (1992); *Michigan v. Long*, 463 U.S. 1032, 1042 (1983). Here, even if the CCA provided a lengthier explanation of the reasoning behind its Section 5 denial, that lengthier Section 5 denial would still preclude review of the Roberson's underlying claims. Indeed, "'a basic tenet of federal habeas review is that a federal court does not have license to question a state court's finding of procedural default [that is] based upon an adequate and independent state ground.'" *Buntion v. Lumpkin*, 982 F.3d 945, 951-52 (5th Cir. 2020) (quoting *Smith v. Johnson*, 216 F.3d 521, 523 (5th Cir. 2000) (per curiam)). The Court should decline this exercise in futility.

III. Certiorari Review Is Likewise Pointless Because the Court Lacks Jurisdiction over Wholly State Law Claims.

To the extent that Roberson's underlying claims are predicated on a purely state law avenue for relief—Article 11.073 of the Texas Code of Criminal Procedure—jurisdiction is lacking in this Court. In his third subsequent state application, Roberson asserted under Article 11.073 that newly available

scientific evidence contradicts evidence of SBS that the State relied on at trial. App. B at 126a. But, as discussed below, Roberson's actual innocence claims fail to show a federal constitutional violation. As such, Roberson's requested relief flows from a solely-state law source—Article 11.073 and the CCA's interpretation of the Constitution—and this Court lacks jurisdiction to consider the claims.

Indeed, "[e]nacted in 2013. . . Article 11.073 provides a *statutory, non-constitutional* pathway to habeas relief in cases in which 'relevant scientific evidence' was not available to be offered at a convicted person's trial or contradicts scientific evidence the state relied on at trial.'" *Ex parte Kussmaul*, 548 S.W.3d 606, 633 (Tex. Crim. App. 2018) (emphasis added). To the extent that the CCA denied Roberson's arguments predicated on Article 11.073, such a substantive state law ruling precludes this Court from entertaining these claims. *See Herb v. Pitcairn*, 324 U.S. 117, 125–26 (1945) ("Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.").

IV. Roberson's Due Process Claim Is Barred by Nonretroactivity Principles.

Roberson's claim also fails because he seeks a new rule on collateral review. Habeas is not an appropriate avenue for the recognition of new constitutional rules of criminal procedure. *Teague*, 489 U.S. at 310. Such rules

do not apply to convictions final before the new rule was announced. *Id*. This facilitates federal and state court comity by "validat[ing] reasonable, good faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler*, 494 U.S. at 414.

"The *Teague* inquiry is conducted in three steps. First, the date on which the [petitioner's] conviction became final is determined." *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997). Second, a reviewing court must determine whether the rule or proposed rule is new. *Id*. "[A] case announces a new rule,' *Teague* explained, 'when it breaks new ground or imposes a new obligation' on the government." *Chaidez v. United States*, 568 U.S. 342, 347 (2013) (quoting *Teague*, 489 U.S. at 301)). "To put it differently, . . . if the result was not dictated by precedent existing at the time the [petitioner's] conviction became final," the rule is new. *Teague*, 489 U.S. at 301. "And a holding is not so dictated . . . unless it would have been 'apparent to all reasonable jurists.'" *Chaidez*, 568 U.S. at 347 (quoting *Lambrix v. Singletary*, 520 U.S. 518, 527–28 (1997)). Third, "the *Teague* analysis requires the court to determine whether the rule nonetheless falls within" the sole exception "to the *Teague* doctrine." *O'Dell*, 521 U.S at 157; *see Edwards v. Vannoy*, 593 U.S. 255, 271–72 (2021) (eliminating the "watershed exception"). That limitation is for rules that would place primary conduct beyond the government's power to proscribe or a class

of persons beyond its power to punish in certain ways. *See Graham v. Collins*, 506 U.S. 461, 477 (1993).

Roberson's conviction became final on April 14, 2008, when his request for a writ of certiorari was denied. *See Caspari v. Bohlen*, 510 U.S. 383, 390 (1994) ("A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and . . . a timely filed petition [for writ of certiorari] has been finally denied."); *Roberson*, 552 U.S. 1314. He clearly advocates for a new rule—that a state court must provide an explanation for the application of a state procedural rule when a capital state habeas applicant raises a claim of actual innocence based on new scientific and medical evidence. That was not the rule at the time of Roberson's conviction, and it's not the rule today. Accordingly, Roberson's proposed rule is a new one. Finally, his proposed rule is not substantive and he has not shown otherwise. Because Roberson's claim fails to overcome all three prongs of *Teague*, nonretroactivity principles bar relief.

V. This Court Has Not Accepted Actual Innocence as a Cognizable Ground for Habeas Corpus Relief. In Any Event, Roberson Fails to Show He Is Actually Innocent of His Capital Crime.

Roberson's underlying claim is that he is actually innocent. Pet. at 1, 20–26, 36. But this Court has never recognized a standalone actual innocence claim for relief. *See Herrera*, 506 U.S. at 400. Indeed, a federal habeas court

does not concern itself with the petitioner's guilt or innocence—that is an issue of fact for determination by the state courts. *Id*. Rather, the sole question a federal court considers on habeas review is whether the petitioner's federal constitutional rights were violated. *Id*; *see, e.g., Moore v. Dempsey*, 261 U.S. 86, 87–88 (1923) (Holmes, J.) ("[W]hat we have to deal with [on habeas review] is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved.").

What is more, in *Hererra*, this Court made plain that even if federal habeas relief could be granted for a standalone actual innocence claim, such relief would be predicated on there being "no state avenue open to process such a claim." *Herrera*, 506 U.S. at 417. Texas has an avenue by which to pursue innocence claims. *Ex parte Elizondo*, 947 S.W.2d 202, 208–09 (Tex. Crim. App. 1996). Here, there was a lengthy hearing on Roberson's third state habeas application and the CCA ultimately determined relief is not warranted. Roberson's fourth state habeas petition failed to meet procedural requirements. Moreover, in *Roark*, the CCA made clear it will provide relief on shaken baby cases where it believes the standards in Article 11.073 of the Texas Code of Criminal Procedure have been met. Federal relief is therefore not permitted. As such, Roberson has not shown any recognized substantive right that additional postconvicton procedures are required to vindicate.

But even if this Court recognized a freestanding claim of actual innocence as a standalone ground for relief, he could not meet the demanding standard. That is because, even accepting Roberson's new scientific evidence, he fails to demonstrate that no reasonable juror would have convicted him in light of such evidence. Roberson's new scientific evidence, at most, engages a "battle of the experts" regarding the diagnosis of the SBS triad and debates the number of impacts and the mechanism of injury. When that evidence is considered in light of the trial record as a whole it "falls far short" of showing that Roberson is actually innocent of capital murder. *Herrera*, 506 U.S. at 417.

The indictment charged Roberson with causing the death of Nikki Curtis "by causing blunt force head injuries, by a manner and means unknown to the grand jury." 1 CR 02. The forensic pathologist who performed Nikki's autopsy[5], Dr. Jill Urban, testified at trial and at the state writ hearing that Nikki's death was a homicide, that she had sustained multiple impacts[6], and that she died due to blunt force head injuries. App. B at 8 (nos. 26, 27, 29); 43 RR 67–78, 85;

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[5] Dr. Urban's autopsy notes described a "2-by-1 1/2-inch, faint yellow-brown contusion" on Nikki's forehead, "two 1/4-inch contusions on the right side of [Nikki's] chin," a "faint red abrasion on the left cheek," "frenulum laceration," a "1/4-inch dark purple contusion on the right side of the lower lip," "a 2 1/2-by-1 1/2-inch aggregate of blue-purple contusions on the back of the head," "a 1 1/2-by-1-inch group of red-purple with some yellow-green contusions on the back of the right shoulder," and "a 1/2-inch abrasion on her left forearm and a 1/4-inch abrasion on her left foot." 9 SHRR-03 19–20, 22, 35; SX 48 (51 RR 113–120).

[6] Dr. Urban identified "several different points where the hemorrhage is very dense and very intense and it's consistent with an impact." 9 SHRR 38. She identified "three discrete impact sites on the top of the head, on the back of the head, and then on the left side of the head." *Id.* at 49.

9 SHRR-03 49, 114, 117, 176, 193, 213. Dr. Urban's autopsy report was signed by six other medical examiners. SX 48. And although Dr. Urban discussed shaking as a mechanism for injury in children and could not say there weren't shaking components to Nikki's injuries, Dr. Urban never testified that Nikki was shaken to death. *See* 43 RR 54–98; 9 SHRR-03 7–220; App. B at 8–9 (nos. 28, 30). And Dr. Janet Squires, a pediatrician who examined Nikki while she was on life support, testified at trial that there was evidence of an impact to the back of Nikki's head. App. B at 8 (no. 21); 42 RR 107. She testified that Nikki's death was caused by a combination of shaking and impact. App. B at 8 (nos. 21, 22); 42 RR 120. During the state habeas proceedings, Dr. James Downs outlined his findings of injury and testified he also concluded the cause of death was multiple blunt force injuries. 10 SHRR-03 33–47.

Further, ER Nurse Andrea Sims testified at trial that Nikki had bruising on her chin and around her eyes, a handprint on her face, and that the back of her skull was bruised and "mushy." 41 RR 111–26. And ER Nurse Kelly Gurganus testified that "the back of her head. . .was red and it was just mushy like a soft spot." *Id.* at 72. Nikki had significant external signs of trauma that were separate and apart from the classic triad of symptoms for which Roberson now offers alternative diagnoses.

Roberson's expert testimony demonstrates a controversy within the medical community regarding SBS but does not show it is an invalid diagnosis.

Many courts have recognized that a diagnosis of SBS is a matter of debate and presents a question of credibility. *See, e.g.*, *Gimenez v. Ochoa*, 821 F.3d 1136, 1145 (9th Cir. 2016); *Burns v. Washington*, No. 18-10606, 2019 WL 3067928, at *6 (E.D. Mich. July 12, 2019) (finding the state appeals court's conclusion that SBS is not "junk science" but "a question of credibility, a so-called battle of the experts," to be reasonable); *Johnson v. Espinoza*, No. 19CV1036 GPC (WVG), 2020 WL 1028504, at *15 (S.D. Cal. Mar. 3, 2020) (summarizing that "far from being junk science," SBS "remains the subject of significant debate among medical professionals") (internal quotations omitted).

Like here, in *Gimenez*, the petitioner had presented "a battle between experts who have different opinions about how [the victim] died." *Id*. at 1143. Gimenez was not entitled to relief because he "presented literature revealing not so much a repudiation of triad-only [SBS], but a vigorous debate about its validity within the scientific community" that "continues to the present day." *Id*. at 1145.

Indeed, Roberson's own expert testimony did not establish SBS has been invalidated. Professor Kenneth Monson, Roberson's expert on biomechanics, and Dr. Janice Ophoven, a pediatric forensic pathologist, testified at the state writ hearing that SBS is still a recognized diagnosis in the medical field. 4 SHRR-03 67; 5 SHRR-03 121–22. Further, Professor Monson could not say that shaking cannot kill a child, agreed that no one testified at trial that Nikki was

killed by shaking alone, and agreed that "the question of shaken baby alone" was moot because there was evidence of an impact.[7] 5 SHRR-03 122.

To be sure, Roberson's experts disagree with the State's testimony concerning the diagnosis of the triad, the number of impacts Nikki sustained, and the mechanism of injury. But Roberson's version of events—that Nikki's traumatic injuries were caused by an unlikely, tragic coincidence of her underlying medical conditions—ignores the testimony from several witnesses at trial that had seen Roberson shaking and abusing Nikki. In addition, Roberson confessed to losing it and shaking Nikki, and there was testimony from multiple witnesses about his bad temper, as well as the shaking, threatening, and hitting of Nikki. 48 RR 24; *Roberson,* 2002 WL 34217382, at *2–3.

In his fourth state habeas application, Roberson presented opinions from three additional experts. Pet. at 20–23. First, Dr. Francis Green, who reviewed Nikki's lung tissue and opined that Nikki had pneumonia that led to her death. Second, Dr. Keenan Bora, who described how Nikki's medications, combined

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[7] CNN recently published an article describing how there is broad consensus among pediatricians that shaken baby syndrome/abusive head trauma is legitimate. According to child abuse pediatricians "[c]riminal defense lawyers also have oversimplified how doctors diagnose abusive head trauma" and there are many factors to consider. One doctor who reviewed the case at the request of one of Roberson's supporters told CNN he thought there was a clear reasonable basis for the conviction and "a high probability of abusive head trauma" given the evidence. Dakin Andone, Ed Lavandera, and Ashley Killough, *He was sentenced to death after his toddler died. Now, shaken baby syndrome is at the heart of Robert Roberson's 11th-hour appeals*, CNN, https://www.cnn.com/2024/10/13/us/robert-roberson-execution-shaken-baby-syndrome/index.html (last accessed October 16, 2024).

with her pneumonia, likely hastened her death. Third, Dr. Julie Mack, who reviewed CAT scans and concluded there was only one single minor impact on Nikki's head. She also reviewed chest x-rays supporting Dr. Green's conclusion on pneumonia.

Roberson's additional expert opinions are just additional support for the theories already addressed his previous state habeas proceedings. During the previous state habeas hearing, Dr. Carl Wigren testified that after looking at slides of Nikki's lungs, he believed pneumonia and medications led to Nikki's death. 5 SHRR-03 180, 183, 201–02, 227–39, 244. Dr. Roland Auer offered similar testimony. 8 SHRR-03 13, 44, 46–68, 91–97. Dr. Mack's opinion that there was only one impact site was also repeatedly discussed. 5 SHRR-03 172; 8 SHRR-03 19, 22; 10 SHRR-03 171.

Dr. Downs, who observed the habeas proceedings, remained convinced the cause of death was multiple blunt force injuries. 10 SHRR-03 18, 45, 47, 83, 86, 240–43. Dr. Urban also held to her belief as to the cause of death after listening to the testimony. 9 SHRR-03 39, 205, 213, 215–17, 219–20. Further, both Dr. Downs and Dr. Urban discussed how the CT scans would not show what could be seen during an autopsy by looking at the tissue. 9 SHRR-03 59, 206–07, 216; 10 SHRR-03 29, 96, 101–02, 244–45. Thus, even considering the additional expert opinions from Roberson's fourth state habeas application, he fails to prove he is actually innocent, especially in light of the other evidence.

See Concurring Opinion at 2–3, *Ex parte Roberson*, Nos. WR-63,081-03, 04. For all these reasons, this claim is unworthy of this Court's review.

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

A request for a stay "is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (citing *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004)). Rather, the inmate must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits. *Id*. (citing *Barefoot v. Estelle*, 463 U.S. 880, 895–96 (1983)). When the requested relief is a stay of execution, a court must consider:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceed; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

Importantly, a federal court must consider "the State's strong interest in proceeding with its judgment" and "attempt[s] at manipulation," as well as "the extent to which the inmate has delayed unnecessarily in bringing the claim." *Nelson*, 541 U.S. at 649–50. Indeed, "there is a strong presumption against the

grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Id*. at 650.

As demonstrated above, Roberson presents no occasion for this Court to recognize for the first time a requirement that state courts explain the reasons for applying a state procedural rule when a capital state habeas applicant asserts an actual innocence claim. Thus, Roberson cannot demonstrate the likelihood of success on the merits of his claim; nor can he demonstrate that his ground for relief amounts to a substantial case on the merits that would justify the granting of relief.

Further, "[b]oth the State and the victims of crimes have an important interest in the timely enforcement of a sentence." *Hill*, 547 U.S. at 584. Roberson's challenges to his death sentence have persisted since 2003, and he seeks further unjustifiable delay through his litigation here. Moreover, as this Court recognized in *Hill*, "[r]epetitive" litigation raises the same concerns as where a petitioner files a speculative or dilatory suit. Each concern is present here. As discussed above, Roberson has repeatedly challenged the validity of his conviction and death sentence, and he has been properly rejected in each instance. His current claim is based on a non-existent constitutional right that has never been recognized.

Moreover, the CCA dismissed Roberson's fourth state habeas application over a month ago, on September 11, 2024. Roberson waited over a month before

filing this petition in this Court, and with just hours remaining before his execution. Instead of giving this Court sufficient time to review the case, Roberson pursued suggestions for rehearing and a fifth state habeas application based on the CCA's decision in *Roark* that the CCA was obviously already aware of. Roberson was dilatory in bringing this latest petition, so a stay is not warranted. Consequently, equity does not favor a stay of execution.

CONCLUSION

For all foregoing reasons. Roberson's petition for a writ of certiorari should be denied.

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