OCTOBER TERM, 2024

No. 24-5753

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Capital Case
Execution Scheduled for October 17, 2024

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REPLY TO BRIEF IN OPPOSITION

We have reached an ominous moment in terms of the sanctity of law when vast swathes of the public can be more aware of the facts of this case and moved by the injustice it represents than the state judiciary that was charged with adjudicating it. Likewise, it is a sad day when the State's counsel, who have not previously participated in this case, can submit an unprincipled, baseless screed in hopes of encouraging this Court, Mr. Roberson's last resort, to slam the door.

"Unworthy of the court's attention." A callous phrase when the issue is a State's plan to execute a man when that State's courts have systematically refused to engage with evidence of his innocence. Is our federal Constitution so infirm that it does not guarantee a disabled, indigent man a right to be free from execution after demonstrating that his daughter, whom he was falsely accused of murdering using discredited science, died of an undiagnosed pneumonia—without any explanation? As even the State admits, federal courts may upset State's postconviction procedures if "they are fundamentally inadequate to vindicate the substantive rights provided." BIO 16 (quoting *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009)).

I. Old and Fresh Indications of the Denial of Due Process

The State hides behind technicalities, asserting that Mr. Roberson has had "multiple" bites at the apple, insisting that his "multiple" ***attempts*** to be heard have been given judicious consideration and then reasonably rebuffed. That is false.

Mr. Roberson's **initial** state habeas proceeding was unsupported by any investigation or challenge to the unreliable Shaken Baby causation theory that was used to convict him. Most of the claims raised by his appointed lawyer were deemed "not cognizable" because they were merely a repackaging of limp "points of error" raised and rejected in his direct appeal—pursued by the same trial lawyer who had conceded the State's "Shaken Baby" theory throughout the trial.

Mr. Roberson's **second** state habeas proceeding stopped his execution at the eleventh hour in 2016—thanks to Texas's trailblazing "changed science" law, Article 11.073. He adduced massive new evidence showing the change in scientific understanding of SBS, the array of false testimony used to convict him, and alternative causes of his daughter Nikki's death. That proceeding resulted in a robust new record—which was then entirely ignored in the habeas court's Findings, adopted virtually verbatim from the State's proposed Findings. Despite the plain legislative intent animating Article 11.073 to elevate truth over finality, the truth was buried, cynically counting on the reviewing court (the TCCA) to eschew looking at the actual postconviction record. AppC.

Then Mr. Roberson made a **third** attempt to obtain habeas relief from an unlawful conviction, the proceeding at issue here.[1] He relied on both the changed-science law but also Article 11.071, section 5(a)(2), which is supposed to provide a gateway for claims of Actual Innocence. Despite amassing yet more new evidence—

[1] The State refers to a "fourth," but that requires treating a pro se letter written to the Court begging for help as a habeas application.

showing further scientific evolution since 2016 and correlated expert reports from medical specialists explaining precisely how Mr. Roberson's daughter died, the application was deemed procedurally barred. Again without any explanation. The authority to which the TCCA cited was a non-existent statute. AppA. The untethered citation symbolizes chilling indifference. Treating sham process as due process can only destabilize both the rule of law and our federalist system, which presupposes state courts will shoulder responsibility with respect to criminal materials, which, historically, have been predominantly matters left to the States. *See Rochim v. California*, 342 U.S. 165, 173 (1952).

The State's BIO indulges in a truly unprincipled maneuver: lifting wholesale an extended passage out of the TCCA's ***2007*** direct appeal decision—as if none of the postconviction evidence exposing the baseless conviction existed and, meanwhile, hoping the mass of lies will serve as a distraction from the prospect of executing a man for a crime that did not occur. *See* BIO at 3-9 (incorrectly citing "2002 WL 34217382"). This unseemly tactic can best be characterized as such: if we sling enough unsubstantiated or discredited allegations, the world will recoil, so he can be carted off to the gurney without incident.

The focus here is on the state judiciary ***permitting*** this kind of abuse of the truth-seeking function of courts. When the State can posture that "Nothing can ever be falsified," they are engaging in a process antithetical to the rule of law—and to science. Yet allowing a person a chance to bring science into the courtroom was

precisely the goal animating Article 11.073. *See Ex parte Robbins*, 478 S.W.3d 678 (Tex. Crim. App. 2014).

Much of the BIO consists of a litany of lies about "devastating injuries" undocumented in any medical records; imagined acts of violence, when Mr. Roberson in fact had no documented history of violent conduct; the disgusting fiction that he only took his daughter to the hospital upon waking up to find her unconscious because "his then girlfriend" insisted; and the completely unprincipled assertion that he had "strangled his ex-wife with a coat hanger." Sadly, the State's BIO illustrates the harm to us all when the State is not held accountable by its highest criminal court.

Equally unprincipled is the State's recourse to the trial testimony of Robert's estranged, intellectually disabled girlfriend of three months, Teddie Cox, enlisted to testify that Robert had previously shaken Nikki. Teddie had no personal knowledge of what had happened to Nikki during the last days of her life, as Teddie was in the hospital at the time. Her willingness to respond to leading questions from the prosecutor denigrating Robert and suggesting that she once saw him "shook her," was not credible in light of Teddie's repeated admissions that she changed her story about Robert depending on "how [she] feel[s]" at the moment. 43RR11, 36, 48.

Likewise, the State's recourse to the trial testimony of two children related to Teddie suggests truly desperate mudslinging. Rachel and Courtney were 9 and 10, respectively, at the time of Nikki's death. By the time they testified, they had been told that Nikki's father, whom they barely knew, was responsible for Nikki's death, a circumstance that would certainly have induced an adverse bias against him. Rachel's

own mother (Teddie) testified that she did "not trust [her] little girl" Rachel "around any men," seemingly because Rachel was struggling with anger issues because of bad experiences with her own father (not Robert). 43RR19. The State even stoops to inserting a skewed summary of the punishment-phase testimony of Mr. Roberson's estranged ex-wife, a troubled young woman who ***lost custody*** of their two children, never even tried to see her kids again, and then agreed to be flown in to testify against Robert at trial, leveling accusations uncorroborated by any records or ever mentioned in their divorce proceedings—simply to "make him pay." The trial testimony of these lay witnesses was so unreliable that none of it is ***even mentioned*** in the State's proposed Findings or in the habeas court's (virtually identical) Findings. AppD.

The State's BIO also repurposes a false "confession" narrative that was first trotted out by the DA in seeking to avoid ***any*** fact-finding in the habeas proceeding initiated in 2016—even though the case had remanded from the TCCA expressly to enable development of the record. The State suggests that Mr. Roberson's "own expert" at trial "testified that the defendant told her that Mr. Roberson said that he lost it" and then shook Nikki. BIO at 3. More specifically, the State has relied on a "confession" allegedly obtained by a defense-retained trial expert, clinical psychologist Kelly Goodness, who testified during the punishment-phase of Mr. Roberson's trial. The State implies, using a decontextualized excerpt from Dr. Goodness's punishment-phase testimony, that a purported "confession" from Mr. Roberson that he "shook" Nikki shows that he would have been convicted anyway.

The precise trial testimony regarding this purported confession is as follows:

Q (defense counsel): Did you talk to Robert about this offense?

A (Goodness): Yes.

Q: And did he give you an account of it?

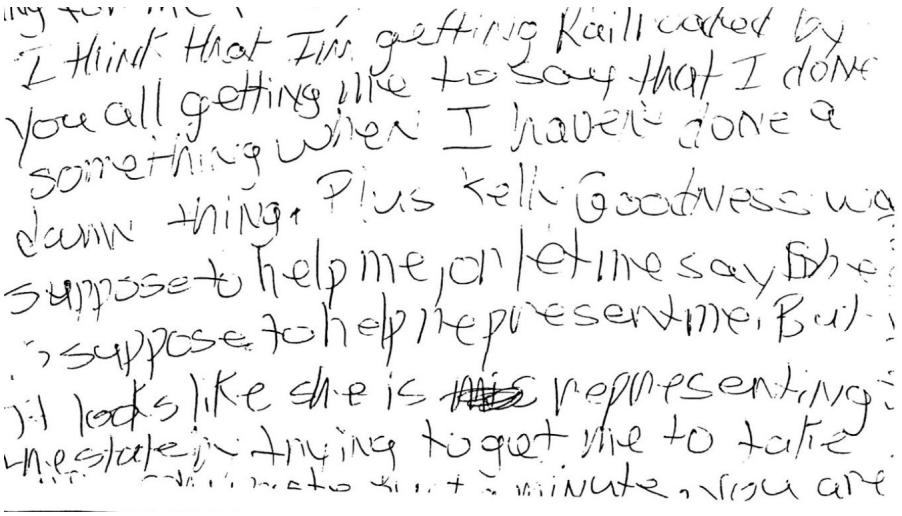
A: Yes.

Q: What was that account?

A; That he had lost it. That Nikki was crying and that he had shook her. That was one of his accounts. Let me back up a second. ***At first, he told me he didn't remember. And after I convinced him that was not going to fly with me, he then told me that he lost it.***

48RR24 (emphasis added). In the 2021 post-conviction proceeding, the trial testimony and methodology of Dr. Goodness were examined in light of prevailing standards in the field of forensic and neuro-psychology. Multiple bases regarding the ethics of her approach to Mr. Roberson, a person with Autism, were developed. 7EHRR130-131. Testifying about a false "confession" that Dr. Goodness herself had unethically coerced was also unethical. Moreover, Dr. Goodness, who had failed to diagnose Mr. Roberson's pronounced Autism, did not seem to appreciate that he is highly susceptible to suggestion, pressure, coercion; instead, boasting that "I told him this isn't going to fly with me." Individuals with Autism are very compliant, tend to agree with what people say to them and thus are more vulnerable to changing their story to please an interlocutor. 7EHRR136.

Dr. Goodness's alarming tactics prompted Mr. Roberson to write a pre-trial note to his lawyers (EX37), in the record because they had been unlawfully seized from his cell by the State; this contemporaneous evidence shows that he saw Dr. Goodness as an adversary, not someone who had been brought in to help him:


I think that I'm getting railroaded by you all getting like to say that I done something when I haven't done a damn thing. Plus kell Goodness was suppose to help me, or let me say she suppose to help represent me. But it looks like she is ~~was~~ representing the state in trying to get me to take

Because the State should be aware of the post-conviction evidence exposing Dr. Goodness's "confession" testimony as unreliable and had previously ceased relying on it, the decision to throw it into the BIO reflects privileging finality over all else—despite the plain directive of Article 11.073. Because this Court is the only entity that can preserve the crucial balance between state and federal power by ensuring that the bedrock principle of due process is honored, a writ of certiorari should be granted and Mr. Roberson's execution stayed.

II. The Due Process Violation Presented to this Court

The TCCA's routine practice of issuing boilerplate opinions dismissing subsequent habeas petitions for purported failure to satisfy the requirements of Article 11.071 § 5(a) is inadequate to vindicate Roberson's rights due to the unique circumstances of his presenting new and substantial evidence of his actual innocence and that his daughter died from a virulent pneumonia rather than homicide. Even a cursory look at the proffered rationales defending the TCCA's unexplained application of a procedural bar, BIO at 17-18, reveals they are illusory.

A. An Evidentiary Hearing Whose Results Are Entirely Ignored Is Not "Process."

The decidedly scant habeas court Findings following the evidentiary hearing in the previous habeas proceeding is part of the due process problem. Those Findings were a carbon copy of the State's proposal. More than being facially incoherent, they were demonstrably misleading. State's counsel and then the habeas court acted as if the habeas evidentiary hearing that took place, over 10 court days in 2018 and 2021 and that resulted in a ***13-volume new record***, never occurred. *Compare* AppE *with* AppD. That record includes thousands of pages of scientific studies and academic treatises related to the evolution of Shaken Baby Syndrome (SBS), all of which State's counsel fought to keep out of evidence. *See* Petition at 17-20.

Thereafter, the habeas judge, a close friend of the DA who had given the habeas judge's son his first experience trying a criminal case—***in front of this mother*** without disclosing this relationship on the record, essentially adopted the State's proposal verbatim. The Findings ***did not mention*** any of Mr. Roberson's voluminous evidence except for a few vague allusions. The habeas court simply declared that SBS is "still an accepted mechanic [sic] of death" and affirmed the State's position that Nikki had died from inflicted head trauma. AppD.

At the outset of the postconviction litigation over the Shaken Baby cause-of-death theory in 2016, State's counsel argued in pleadings that this was not a Shaken Baby case after all. But from beginning to end, the case was tried as a Shaken Baby case, as the trial transcripts show. It was even described as a "classic" Shaken Baby case by multiple parties; it was "classic" in the worst sense: a circumstantial case

presuming that an unwitnessed crime had occurred based on SBS tenets that were conveyed to the jury as if they were grounded in science when we now know there is no underlying science to support much of the testimony that the jury heard.

There is no credible evidence that Nikki sustained "multiple impacts" to her head—although that was part of Dr. Urban's trial testimony. That testimony is inconsistent with her own autopsy photos and even with Dr. Squires' testimony who, unlike Dr. Urban, saw at least one set of the CAT scans taken of Nikki's head showing. "a single impact site" on the head 42RR107. That objective evidence, not presented to the jury, is dispositive. ***There is no evidence*** that Nikki sustained ***any*** battery. The list of minor bruises and abrasions in the autopsy report were, for one thing, not serious; moreover, the list was made ***after*** Nikki had been through two days of extensive medical treatment, not accounted for in the autopsy report or trial testimony. Her testimony, suggesting that you can beat a child's head and not "disrupt the skin" because a child has more "fat" even defies commonsense. 43RR89.

B. Reraising Actual Innocence With New Previously Unavailable Evidence Is Not a Legitimate Basis for Dismissing without Merits Review or Even an Opinion.

After the habeas court issued Findings disregarding all of the evidence amassed in his previous habeas proceeding, adopting the State's all-purpose expert, Dr. Downs' view—including the critical question of Nikki's undiagnosed pneumonia, Mr. Roberson sought pro bono resources to retain appropriate experts to take a look at Dr. Downs' and Dr. Urban's post-conviction opinions, as neither of them had any specialized training in lung pathology, medical toxicology, or radiology. The ***new***

evidence from highly qualified experts in each of these fields was then presented to the TCCA showing that Nikki died from a virulent pneumonia that had progressed to the point of sepsis and that she was pushed to the brink by dangerous inappropriate prescription medications. *See* EX5-EX7.

These new opinions were only possible because of new evidence that had emerged over the course of the previous habeas proceeding, as explained at length in the new habeas application. No legitimate basis supports the TCCA's subsequent decision to conclude that his new claims could all be dismissed because "the allegations do not satisfy the requirements of Article 11.071, Section 5." App4a.

Critically, section 5(a)(2) does not include the "the current claims and issues have not been and could not have been presented previously" language in section 5(a)(1). And the massive evidentiary proffers attached to the application show that he was well-positioned to prove "no rational juror could have found [him] guilty beyond a reasonable doubt." TEX. CODE CRIM. PROC. 11.071, sec. 5(a)(2).

But the TCCA did not explain how Mr. Roberson's 140-page new habeas application supported by 52 exhibits did not satisfy the state's statutory procedural requirements. *See* AppB; AppA. And because Mr. Roberson cannot intuit any good faith basis for this finding, he and future litigants are left with nothing but the strong impression that decisions are being rendered in cases of great consequence without any meaningful review. *See also* AppI.

C. The Concurrence Reflects A Lack of Knowledge of the Record.

The only discussion of Mr. Roberson's case that has issued from any member of the TCCA since his Article 11.073 litigation began is a concurrence dated October 10, 2024, by Judge Yeary, filed in support of the Court's denials of all of Mr. Roberson's pending filings. This concurrence shows a palpable lack of awareness of the post-conviction record.

The concurrence states: "This is not just a shaken baby case." But the argument that Nikki died from ***any*** abuse—inflicted via shaking or otherwise—was dismantled by testimony from multiple highly qualified experts and admissions by Dr. Urban showing that her 2002 conclusions were contrary to objective evidence of which she was then unaware or rested on the since-discredited SBS tenets.

The concurrence refers to "multiple traumas." But there was not ***any*** significant trauma to Nikki's head or body. As demonstrated with uncontroverted and overwhelming evidence in the previous habeas proceeding, Nikki had only one minor impact site on her head—a "goose egg" captured in the CAT scans that were locked up in the courthouse basement for 15 years unbeknownst to anyone. The scans show that the single bump on the back of her head is associated with a small subdural bleed, but no fracture or external bleeding.

Judge Yeary's concurrence makes a comment about "blood on Nikki's mouth." But no one at the hospital observed any blood on Nikki's mouth—or anywhere else. The only blood were small specks on a washcloth that Mr. Roberson gave to the lead detective to show what he had wiped off Nikki's mouth a few hours before waking up to find Nikki unconscious. The detective acknowledged that they would not have

noticed this small amount of blood if Mr. Roberson had not made them aware of it; they looked for blood and any other sign of violence at the house and found known. And at the hospital, Nikki did not look like a battered child, which is why they accepted the Shaken Baby hypothesis to explain the complete mismatch between Nikki's exterior and her internal head condition of subdural bleeding, brain swelling, and retinal hemorrhages, then known as the Shaken Baby "triad." EX1.

Judge Yeary's concurrence states that the evidence is consistent with a theory that Nikki was beaten. That is incorrect. First, the "shaking" theory played a dominant role at trial precisely because there was no sign of any significant external injury. One cannot inflict "blows" to a child's head sufficient to cause internal bleeding and leave no marks on her exterior. That is why medical personnel were confused when she was brought to the hospital in a coma. It was her father's inability to explain her condition, his perceived "odd" behavior (because he is autistic), and the fact that Nikki had signs of brain death (eyes fixed and dilated) that staff ***presumed*** foul play.

Because there was no evidence of battery, the lead trial prosecutor asked Dr. Urban to explain the discrepancy between her outside and what Dr. Urban found ***under*** Nikki's scalp inside her head:

Q (from the State). . . . You described a lot of different impact sites, multiple blows to Nikki's head. **And you really don't see that when you look at the pictures of her face.** Can you explain to us why that is?

A (from Dr. Urban). Well, again, I think that's because just of the way children are built. You know, like I said, they've got a lot [sic] fat. There's a lot of fat between, say, the skin and actual bones of the skull and that can absorb a lot of energy that's inflicted on the skin. The same thing, the skin is also very elastic. It's almost more stretchable in little children and that's another reason why you can actually get a

great deal of injury to the head and not see anything on the outside because all that force is transmitted inwards without actually disrupting the skin.

43RR89 (emphasis added). But children are not, in fact, more resistant to bruising or abrasions; that is an unscientific suggestion.

Judge Yeary's concurrence emphasizes the fact that Dr. Urban identified the cause of death as "blunt force injuries"; but that is precisely the characterization made in virtually all Shaken Baby cases involving a death. At trial, she defined the ***mechanism*** of injury with nearly 30 references to violent shaking and the forces reputedly generated by shaking. EX26.

At trial, Dr. Urban pointed to bruises on top of Nikki's head that she told the jury was an "impact site" and proof of "blows." But that precise spot was ***where a pressure monitor had been surgically affixed to Nikki's skull during her hospitalization***. Those bruises did not exist when Nikki was brought in by her father. Dr. Urban's own autopsy photos show a surgical pin on the top of Nikki's head where the pressure monitor was removed before she was transferred to SWIFS for the autopsy—information was not shared with the jury. The jury was given the false impression that Nikki's condition at autopsy was the same as her condition upon arrival at the hospital. That was "highly misleading," as noted by an expert with decades of experience with pediatric autopsies. *See* APPX2 at 16. But back in 2002, precisely because of the then-accepted tenets of SBS, Dr. Urban saw subdural blood under Nikki's scalp and Dr. Squires' SBS diagnosis then presumed inflicted trauma.

Judge Yeary's concurrence also alludes to the coerced false "confession" discounted and discussed above.

Most importantly, Judge Yeary's concurrence suggests a misapprehension that the State's abuse trial narrative was somehow left untouched after the 2021 evidentiary hearing. The new science and new causation evidence adduced shows that Nikki died because she stopped breathing due to her undiagnosed double pneumonia and respiratory-suppressing medications. Oxygen-deprivation and clotting disorders, both of which Nikki had, are now known to produce a cascade of intracranial conditions (subdural bleeding, brain swelling, retinal hemorrhages) that "mimic" the symptoms associated with accidental and inflicted head trauma. The intracranial conditions noted during her final hospitalizations do not prove that Nikki sustained an inflicted head injury. Instead, Nikki's lungs show that she had a fatal pneumonia. Her body was not battered. Aside from the minor goose egg, the only trauma to her head was a function of treatment she received while hospitalized and steps performed during the autopsy itself.

III. Nothing Indicates That The TCCA's Decision Rests on an Independent or Adequate State Law Ground.

The TCCA's boilerplate decision below dismissed Mr. Roberson's subsequent state habeas application "without reviewing the merits of the claims" because the "allegations do not satisfy the requirements of Article 11.071, Section 5." App4a. The State argues that the Court should reject Roberson's petition because the TCCA's order was based on an independent and adequate state law ground prohibiting this Court from exercising jurisdiction. BIO at 19-21. The State's argument contradicts this Court's precedent: "ambiguous or obscure adjudications by state courts do not

stand as barriers to a determination by this Court of the validity under the federal constitution of the state action." *Florida v. Powell*, 559 U.S. 50, 56 (2010).

The State's position ignores the Fifth Circuit's numerous decisions holding that the TCCA's rulings under Article 11.071, § 5(a) are ***not*** generally entitled to a presumption that they rest on adequate and independent state grounds. *See, e.g., Rocha v. Thaler*, 626 F.3d 815, 835 (5th Cir. 2010) ((citing *Ex Parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007)); *Busby v. Davis*, 925 F.3d 699 706-10 (5th Cir. 2019); *Ruiz v. Quarterman*, 504 F.3d 523, 527-28 (5th Cir. 2007). The inherent inconsistencies are producing inconsistent opinions and jurisprudence. The Fifth Circuit, which has repeatedly been tasked with interpreting the TCCA's unelaborated opinions, has recognized that boilerplate language stating that the TCCA did not review the merits of the claims does not "control over what common sense would indicate." *In re Davilla*, 888 F.3d 179, 188-89 (5th Cir. 2018). Here, common sense shows the absence of independent state law grounds.

Section 5(a)(2), upon which Mr. Roberson relied in bringing his new Actual Innocence claim, was enacted in response to this Court's decision in *Schlup v. Delo*, 513 U.S. 298 (1995). Thus, the TCCA must analyze claims under Section 5(a)(2) using the "standards set forth for evaluating a gateway-actual-innocence claim announced by the Supreme Court in *Schlup*." *Ex Parte Reed*, 271 S.W.3d 698, 733 (Tex. Crim. App. 2008).

CONCLUSION

The petition should be granted, and Mr. Roberson's execution stayed.

Respectfully submitted,

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