No. 22-7546
(CAPITAL CASE, NO EXECUTION DATE PENDING)

In the
# Supreme Court of the United States

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ROBERT LESLIE ROBERSON III,
*Petitioner*,

v.

TEXAS,
*Respondent*.

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

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## REPLY TO STATE OF TEXAS'S BRIEF IN OPPOSITION

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## REPLY

Petitioner Robert Roberson has asked the Court to hold that: (1) a conviction based on subsequently discredited "science" violates the federal right to due process and (2) a postconviction proceeding, expressly authorized to develop evidence of a change in scientific understanding, is devoid of due process when it does not fairly and accurately engage with any of the new evidence amassed to show why no crime occurred. Texas's Brief in Opposition ("BIO") grossly misstates both facts and law in defending a sham process simply to cling to a death sentence.

### I. Texas's BIO Badly Misrepresents the Facts and the Law.

#### A. Texas Misrepresents the Threshold Matter of Jurisdiction and Ignores the Legal Issues Presented.

The disdain for accuracy begins with Texas recasting the Questions Presented, suggesting that the Court does not have jurisdiction to take up this case because the underlying claims "rely solely on a state law basis for relief." BIO at i, 12-14. Petitioner's Questions Presented plainly arise under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. It is manifestly clear that federal courts—and particularly ***this*** Court—play a vital role in enforcing the Fourteenth Amendment's Due Process Clause, a creature of federal constitutional law.

The ***procedural*** vehicle that allowed Petitioner back into state court for a subsequent habeas proceeding is a creature of state law: Article 11.073 of the Texas Code of Criminal Procedure, a.k.a. the "junk science writ." But that is irrelevant to the substantive law at issue in the petition. The petition focuses, not on the state law claims in the habeas application, but only on federal due process claims. Texas

ignores the fact that, just last term, this Court summarily reversed the Texas Court of Criminal Appeals ("CCA") in a case that came to this Court in the ***exact same procedural posture*** as the instant case: *Escobar v. Texas*, 143 S.Ct. 557 (2023) (vacating CCA's denial of relief in Article 11.073 proceeding involving discredited forensic evidence and remanding for reanalysis).

The BIO barely acknowledges the core issue here: the sea change in scientific understanding of the medical "diagnosis" known as Shaken Baby Syndrome ("SBS") and subsequently rebranded as Abusive Head Trauma ("AHT"). Texas neither addresses nor rebuts the fact that every aspect of the SBS/AHT hypothesis put before Petitioner's jury has since been discredited by actual science.

Texas's efforts to trivialize this case are laid bare by the significant amici entreating this Court to provide guidance regarding the minimum due process required in post-conviction proceedings where the science used to obtain a conviction has proven to be false.[1] Convictions based on the discredited SBS/AHT hypothesis have torn apart countless families, and the judicial correction of this social catastrophe has been a matter of piecemeal litigation. The opportunity to hold that "due process" means fairly and fully reexamining convictions based on pseudo-science in all jurisdictions—including the nation's most execution-prolific state—is an exceedingly compelling reason to grant the petition.

[1] *See* Brief of Concerned Physicians and Scientists as *Amici Curiae* in Support of Petitioner ("Brief of Concerned Physicians"); Brief of *Amicus Curiae* The Center for Integrity in Forensic Sciences in Support of Petitioner ("Brief of CIFS"); Brief of Retired Federal Judges as *Amici Curiae* in Support of Petitioner ("Brief of Retired Federal Judges"); Brief of *Amicus Curiae* Witness to Innocence in Support of Petitioner; Brief of the Innocence Project of Texas as *Amicus Curiae* in Support of Petitioner.

**B. Texas Engages in a Fallacious Smear Campaign.**

Much of the BIO consists of large block quotes lifted from the CCA's direct-appeal opinion decided ***in 2007***. The misleading nature of these selective quotations is legion. For instance, Texas's "Statement of the Case" includes blatant misrepresentations of the trial record, *e.g.*, the assertion that "Robin Odem," the chief nursing officer at the local hospital, had "testified to her own observations of Nikki's extensive head injuries." BIO at 2. The trial record establishes that Nurse Odem never saw Nikki and testified only about her view of Robert's demeanor and her skepticism about his report that Nikki had fallen out of bed. *See* 41RR81-100.

A more shameful deception involves simultaneously insisting that medical examiner Dr. Urban never opined that shaking had caused Nikki's condition while invoking the trial testimony of lay witnesses whose role at trial was to suggest that they had previously "seen Roberson shaking and abusing Nikki." BIO at 20. To support the latter, Texas deceptively highlights the trial testimony of Robert's estranged, intellectually disabled girlfriend, Teddie Cox, who was enlisted to testify that she had once seen Robert "shake" Nikki. Teddie was asked to demonstrate this alleged shaking using a teddy bear, which bore no anatomical resemblance to the 27-pound toddler 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," 42RR183-84, 185-86, 190, was not credible in light of Teddie's repeated admissions that she kept changing her story

about Robert depending on "how [she] feel[s]" at the moment. 43RR11, 36, 48.

Likewise, Texas's recourse to the trial testimony of two children related to Teddie suggests truly desperate mudslinging.[2] 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 had been sexually abused by her own father. 43RR19. The testimony of these traumatized children—claiming they had once seen Robert "shake" Nikki—shows nothing more than the ferocity of the State's commitment at trial to proving that Nikki's death had been caused by shaking, a causation theory that cannot withstand scrutiny in light of current scientific understanding. Shockingly, Texas even stoops to inserting a skewed summary of the punishment-phase testimony of Robert's estranged ex-wife (Delia Gray); this woman had ***lost custody*** of their two children to him and his family years before and then was flown in from Alabama to testify against Robert at trial, leveling accusations uncorroborated by any records. The trial testimony of these lay witnesses was so unreliable that none of it is ***even mentioned*** in the State's proposed FFCL or in the habeas court's (virtually identical) FFCL. *See* AppB & AppE.

[2] All those prosecuting and even defending Robert in 2002-03 started with the ***presumption*** that the SBS triad proved he must have caused Nikki's death—absent evidence of violence at the scene. But before trial, there was no credible evidence that Robert was a violent man. *See* 7EHRR128-129 (describing the absence of any history of aggressive or violent acts in Robert's voluminous records). Such "evidence" had to be drummed up ***for*** trial—an unprincipled strategy revisited in the BIO.

### C. Texas Invents a "Battle of the Experts."

Texas misleadingly and repeatedly insists that the case involves a mere "battle of the experts" relevant to only one litigant, making this case "unworthy of the Court's attention." BIO at 10, 18-19, 21-23. Yet there was no "battle of the experts" below.

The jury heard only ***one*** explanation for Nikki's tragic death: blunt force injuries caused by an unknown combination of shaking and impact—a hypothesis reputedly supported by evidence of subdural bleeding, brain swelling, and bleeding in the eyes (*i.e.*, the SBS "triad"). *See, e.g.*, 42RR107-08, 116-17; 43RR85-86. The only guilt-phase experts at trial were ***the State's*** experts, principally: Dr. Janet Squires, an SBS/child abuse expert who provided the SBS hypothesis used to effect Robert's arrest before an autopsy was even performed; and Dr. Jill Urban, the medical examiner who performed the autopsy and hastily concluded that Nikki's death was a homicide. The defense's ***only*** guilt-phase witness was Patricia Conklin, sister of Robert's girlfriend, Teddie Cox. Patricia described Robert as being loving and caring with Nikki, said she had never seen Robert be unkind to Nikki, and described her sister Teddie's problems with telling the truth. 44RR10-22.

At trial, ***not a single witness*** testified that Nikki's recent respiratory illness and high fever were relevant;[3] her medical history of breathing apnea and chronic infections was likewise deemed irrelevant; the short fall her father described was dismissed by one and all as irrelevant.[4] No one, including the medical examiner,

[3] Because Dr. Urban did not know about Nikki's illness in the days leading up to her collapse, Dr. Urban did not bother to explore the evidence that Nikki's lungs were diseased with pneumonia. Those facts were only adduced years later in this habeas proceeding. *See, e.g.*, APPX124; APPX110.

[4] Robert's repeated assertion that Nikki must have fallen out of bed because he found her on the

addressed the toxic level of respiratory-suppressing medications in Nikki's system. Likewise, the medical examiner—at trial and in this habeas proceeding—did not even think it relevant to review Nikki's medical records, including the head CAT scans made the morning she arrived at the hospital. Moreover, Petitioner's appointed lawyer ***conceded*** throughout trial that this was a "classic Shaken Baby" case, despite his client's insistence that he had done nothing to harm his daughter. 41RR57-61.

In short, there was ***no*** adversarial testing of the presumption of child abuse.

The absence of adversarial testing reflects the fact that, by 2003, SBS had become a "default diagnosis" that was "based solely on the finding of the triad—not for lack of other evidence, but for lack of looking for other evidence." *Jones v. State*, No. 0087, Sept. Term 2019, 2021 WL 346552, at *11 (Md. Ct. of Spec. App. Feb. 2, 2021). Only as science started to reveal that short falls impacting the head and many naturally occurring medical conditions (such as pneumonia) can produce the triad, did some leaders in the medical community begin to warn against "a rush to judgment" by pursuing "a timely and thorough multidisciplinary evaluation" necessary to avoid "an improper breakup of the family or a wrongful indictment and conviction." Brief of Concerned Physicians at n.62. Gradually, initial proponents of the SBS/AHT hypothesis began to change course—ultimately concluding that the hypothesis "does not belong in the courtroom." *Id.* at 20-24.

The evidentiary record amassed in this case, nearly two decades after trial, overwhelmingly demonstrates that, were this case tried today, at the very least, "a

floor in the night was treated as evidence he was lying because the medical professionals all dismissed the notion that a short fall could explain Nikki's condition. *See, e.g.*, 41RR69, 89, 123; 42RR17-18, 84.

jury would be faced with competing" medical opinions. *State v. Edmunds*, 746 N.W.2d 590, 599 (Wis. Ct. App. 2008) (recognizing new evidence of "a shift in mainstream opinion since the time of" defendant's trial premised on SBS hypothesis). But since *Edmunds* was decided in 2008, the overwhelming consensus now eschews ***all*** of the SBS assumptions used to convict Robert in 2003.

As the Center for Integrity in Forensic Sciences instructs, by now, "***all*** leading authorities on SBS/AHT" have recognized that "the SBS/AHT hypothesis is plagued by circular reasoning, that the past consensus statements of major medical associations were mistaken in critical respects," that "support for the hypothesis relies on unreliable and deeply problematic confessions by accused parents and caregivers[,]" and that the triad of "findings used to 'diagnose' SBS/AHT have multiple possible non-abusive etiologies"—including pneumonia and other phenomena associated with oxygen-deprivation. Brief of CIFS at 8, 9, 10. The American Academy of Pediatrics, which took the position at the time of Robert's trial that short falls could not cause the triad, now acknowledges that they can, rejects the belief that the triad can be used to "diagnosis" abuse, and recognizes that diseases can produce the same triad previously associated with SBS/AHT. *See id.* at n.28.

Were Robert tried today, the State would be unable to find ***any*** qualified, reputable expert to testify consistently with the medical testimony proffered in his 2003 trial.

### D. Texas Obscures the Medical Testimony It Sponsored at Trial and Mischaracterizes the Habeas Record.

Texas has clung to Dr. Urban's refusal to revisit her 2002 conclusion that

Nikki's death was a homicide by taking the false position that this is somehow not an SBS case: "Dr. Urban never testified that Nikki was shaken to death." BIO at 17. Not so. Dr. Urban testified repeatedly about shaking as a mechanism of injury. *See, e.g.*, 43RR78-79 (emphasis added):

> ***Shaking*** also falls into this definition of blunt force and when enough-- And although it doesn't seem like, you know, ***shaking*** is not necessarily striking a child, when you are-- When a child is say, ***shaken*** hard enough, the brain is actually ***moving back and forth*** within, again, within the skull, impacting the skull itself and that motion is enough to actually damage the brain.

While ignoring her (now discredited) testimony about shaking, Texas leans into Dr. Urban's claim that she could read the subdural blood as if it were tea leaves, seeing signs that Nikki had sustained "multiple impacts" to the head. Dr. Urban told the jury that she believed the subdural blood itself showed where "blows" and "shaking" had been inflicted despite the trial ***prosecutor*** admitting:

> There really is a large discrepancy, at least in my mind, between what you see on the outside [of Nikki] and what you see on the inside. You [Dr. Urban] 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.

To which Dr. Urban replied inexplicably: "Well, again, I think that's because just of the way children are built." 43RR89.

Aside from her baseless notion that children are "built" so as to show no external signs of inflicted injury, Dr. Urban did not consider virtually any of the extensive medical intervention that had taken a toll on Nikki before the autopsy. For instance, one of the three "impact sites" Dr. Urban identified was on the top of Nikki's head—where a pressure monitor had been surgically screwed into her skull during her final hospitalization (about which the jury heard nothing). 5EHRR173, 175. Nor

did Dr. Urban account for the multiple attempts to intubate Nikki during triage, which likely explained a tear observed inside Nikki's mouth. Nor did Dr. Urban account for the clotting disorder discovered during Nikki's final hospitalization, which made her especially susceptible to bruising. 8EHRR8-144; APPX124; APPX110. Dr. Urban, like all of the doctors, viewed every aspect of Nikki's condition as evidence of abuse—because that is what the SBS hypothesis then demanded.

Three far more qualified and experienced pathologists in ***this*** proceeding—Drs. Ophoven, Wigren, and Auer—uniformly and adamantly disagreed with Dr. Urban's finding of "multiple impact" sites to Nikki's head.[5] Moreover, the ***only*** radiologist to interpret Nikki's CAT scans in any proceeding found the scans showed only a single impact site, which was consistent with Robert's description that Nikki had fallen out of bed. APPX93. Texas does not acknowledge that even its own child abuse expert at trial, Dr. Squires, agreed that the head CAT scans showed a single, minor impact site on Nikki's head, which was why the State was urging the shaking hypothesis in the first place. *See, e.g.*, 42RR107 (Dr. Squires testifying at trial that "there's no signs of trauma at all and yet as that head is moving and then suddenly stops these shear forces go through it and cause tremendous damage to the brain, deep in the brain.").

Texas's BIO, like the courts' opinions below, utterly disregards the new and unrebutted scientific and medical evidence debunking SBS and the new evidence that

[5] For instance, Texas does not—now or below—address the conclusions of Dr. Auer, a neuropathologist and the sole research scientist and expert in brain trauma to testify after studying the original autopsy slides and Nikki's entire medical history. He found only a single, minor impact site on Nikki's head and no skull fractures; he also addressed how the extensive treatment she had received during her hospitalization and her blood clotting disorder had affected the location and volume of subdural blood that Dr. Urban incorrectly interpreted as "impact sites." App139-40, 147-49.

Nikki died of natural and accidental causes, not shaking and impact. For instance, the habeas court's FFCL does not mention the exculpatory CAT scans at all and deceptively suggests that Nikki's pneumonia was "nothing new"—even though there is no mention of "pneumonia" anywhere in the trial record.

Texas's BIO, like the courts' opinions below, does not acknowledge that ***all*** tenets of SBS/AHT circa 2002-2003, which were put before Petitioner's jury as medical "fact," have since been falsified. Instead, in defending the "process" that resulted in a slammed courthouse door, the BIO emphasizes the habeas court's finding that "shaken baby syndrome/abusive head trauma is still a recognized diagnosis in the medical field." BIO at 19, 23. This assertion is akin to recognizing that some doctors continued to believe that peptic ulcers are caused by stress because that was the long-standing hypothesis doctors were taught in medical school. That hypothesis, like SBS, was finally falsified by empirical research, thereafter leading to a shift in medical consensus.

That some continue to recognize a retooled version of SBS/AHT as a "diagnosis" does not establish that SBS/AHT is scientifically valid, rebut the fact that the understanding of SBS put before Petitioner's jury in 2003 has been entirely discredited, or mean that this flawed hypothesis correctly explains how Nikki died.

## II. The Issues Presented Involve The Federal Right To Due Process.

### A. Petitioner's Conviction Reflects a Fundamental Due Process Violation.

A dozen years ago, in another death-penalty case, a (former) CCA judge warned her colleagues that ***this*** Court would and should hold one day that a "conviction later

found to be based upon unreliable scientific evidence deprives the defendant of a fundamentally fair trial and violates the Due Process Clause." *Ex parte Robbins*, 360 S.W.3d 446, 471 (Tex. Crim. App. 2011) (Cochran, J., dissenting). ***This*** case presents the ideal vehicle for addressing whether refusing to revisit a "conviction later found to be based upon unreliable scientific evidence" results in "an intolerable risk of an inaccurate verdict and undermines the integrity of our criminal justice system." *Id.*

As noted in the petition, some courts have expressly recognized a due process claim, and thus a basis for habeas relief, where the trial involved "scientific" testimony that was subsequently discredited. *See, e.g.*, *Lee v. Houtzdale SCI*, 798 F.3d 159, 162 (3d Cir. 2015) (holding habeas petitioner, convicted of murder based primarily on subsequently discredited scientific evidence, was properly granted relief based on a denial of due process).[6] At the very least, this Court needs to recognize this due process right or risk nullifying the Court's settled jurisprudence about the need for heightened reliability in death-penalty cases. *See, e.g.*, *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988) (noting that, since *Furman v. Georgia*, 408 U.S. 238 (1972), "minimizing the risk of wholly arbitrary and capricious" death sentences has been "a fundamental constitutional requirement").[7]

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[6] The BIO spends considerable time quoting a Ninth Circuit case about whether such a due process claim could be the basis for a subsequent federal habeas petition (not the posture here). *See* BIO at 18-19 (discussing *Gimenez v. Ochoa*, 821 F.3d 1136 (9th Cir. 2016)). *Gimenez* recognized that "challenges to flawed expert testimony are cognizable in successive [federal] habeas petitions." *Id.* at 1146. That court found that, although Gimenez himself had not satisfied "the exacting prerequisites for obtaining relief" under the AEDPA, "he and others may be able to do so in the future as forensic science continues to evolve." *Id.* And the science debunking SBS/AHT has evolved considerably since Gimenez's habeas petition was filed. *See, e.g.*, App084-113.

[7] Initially, this Court's heightened-reliability jurisprudence arose in the sentencing context. But this Court subsequently emphasized the need for heightened reliability in virtually all aspects of death-penalty cases. *See, e.g.*, *Estelle v. Smith*, 451 U.S. 454 (1981); *Ake v. Oklahoma*, 470 U.S. 68

To ensure heightened reliability—and even basic reliability—the Constitution must require the law to reflect, in some circumstances, advances in scientific understanding. *See* Jennifer Laurin, *Criminal Law's Science Lag: How Criminal Justice Meets Changed Scientific Understanding*, 93 TEX. L. REV. 1751 (2015) (explaining the challenge and necessity of accommodating changed science in criminal law context). As this Court recognized in another recent Texas death-penalty case, states are not free to employ idiosyncratic, contra-scientific criteria in implementing constitutional mandates. *See Moore v. Texas*, 137 S.Ct. 1039 (2017) (*Moore I*) (rejecting unscientific procedures CCA had employed to assess whether someone has intellectual disability). That is, *Moore I* stands for the proposition that, when a scientific consensus has coalesced regarding an issue, the contemporary science should inform the law—especially in matters of life and death.

Since Robert's petition was filed, yet more courts have granted relief in cases of wrongful SBS/AHT convictions. *See, e.g.*, *State v. Hunter*, No. B 0600596, (Ohio Com. Pl. May 10, 2023) (vacating 2007 SBS/AHT conviction and granting new trial).[8] *See also* Brief of CIFS at 15-21 (providing "non-exhaustive list" of legal authorities granting relief based on a significant shift in the SBS/AHT hypothesis since Petitioner's trial). But, at present, massive arbitrariness threatens the integrity of the criminal legal system writ large. It is, after all, the epitome of arbitrariness when

(1985); *Morgan v. Illinois*, 504 U.S. 719 (1992); *Beck v. Alabama*, 447 U.S. 625 (1980); *Payne v. Tennessee*, 501 U.S. 808 (1991); *Ford v. Wainwright*, 477 U.S. 399 (1986).

[8] *See also* Melinda Henneberger, '*Shaken baby' murder charges finally dismissed. But Kansas won't admit he's innocent: Opinion*, KANSAS CITY STAR (July 18, 2023) (describing dismissal of SBS conviction of former Army Sergeant/Bronze Star recipient who spent nearly a decade behind bars for allegedly killing a baby who actually died of pneumonia ignored by hospital's child abuse expert), *available at* https://news.yahoo.com/shaken-baby-murder-charges-finally-100700398.html.

individual medical examiners in some, but not all, jurisdictions can admit that their opinions in SBS/AHT cases have not withstood the test of time and where many, but not all, courts can do the hard work of reviewing new evidence and acknowledging the significant change in the scientific understanding of SBS/AHT.[9]

**B. Petitioner Was Deprived of Due Process in Seeking a New Trial.**

Texas argues that Petitioner was afforded sufficient process because he was allowed into a courtroom and thus was "heard." BIO at 25-27. But being "heard" must mean that the evidence developed to substantiate one's claims is at least acknowledged—and should be done so "exactly and fairly." *Rochin v. California*, 342 U.S. 165, 172 (1952). As a compendium of federal judges has put it:

> Due process requires more than a rubber stamp. Judges must fairly and fully consider the evidence in the cases that come before them. And judges flout that responsibility when they disregard valid evidence submitted by one side. Without engaging in a genuine and fair inquiry into the presentation of evidence, judges render the promises of due process essentially meaningless. Due process guarantees are more than mere formalities. Allowing a capital defendant to introduce new evidence that calls into doubt the scientific or medical understandings that undergird his capital conviction is the beginning, not the end, of the analysis.

*See* Brief of Retired Federal Judges at 7-8. When the habeas factfinder fails to engage with the postconviction record and actively misrepresents that record, and then the lone reviewing court uncritically adopts the misrepresentation of that record, that is

[9] *See, e.g.*, *State v. Hunter*, No. B 0600596 (Ohio Com. Pl. May 10, 2023) (granting habeas relief after medical examiner, who had relied on SBS/AHT hypothesis at trial, recognized new evidence that child's injuries were consistent with a short fall and that the anal and rectal wounds, previously used to support a sexual assault conviction, had been medically inflicted by hospital staff); *People v. Liebich*, No. 2-13-0894, 2016 WL 1222198 (Ill. App. Ct. Mar. 28, 2016) (2002 SBS conviction vacated where medical examiner admitted that medical records revealed a condition that could have started two-year-old's decline days before child's collapse); *Johnson v. Felker*, No. CV-07-357-RHW, 2010 WL 1904858 (E.D. Cal. May 10, 2010) (2002 SBS conviction vacated after medical examiner acknowledged that, in light of new scientific evidence, child's head injuries could have been caused by accidental fall).

a powerful indication that the litigant was not actually "heard."

Petitioner presented the habeas court with a 302-page recommendation, comprehensively summarizing the new scientific and medical evidence that had been adduced. AppD. By contrast, the State submitted 17 pages mischaracterizing the new evidence in the few references made to Petitioner's experts and rehashing the quasi-science presented during the 2003 trial. AppE. Texas's BIO defends the State's deceptive proposed FFCL, which was adopted almost verbatim by the habeas court, stating that "Attorneys for the State have a duty to represent their client's best interest" by "proposing a FFCL that vindicates their position[.]" BIO at 27. This notion of a prosecutor's duty grossly misses the mark. *See, e.g.*, American Bar Association, *Criminal Justice Standards for the Prosecution Function* 3-8.1 (4th ed. 2017) ("The prosecutor should not defend a conviction if the prosecutor believes the defendant is innocent or was wrongfully convicted, or that a miscarriage of justice associated with the conviction has occurred.").

Texas then defends the habeas court's rubberstamping of the State's misleading proposal by absurdly exaggerating the differences between the two documents. *But compare* AppB *with* AppE.

Next Texas suggests that the CCA's boilerplate language asserting that it conducted an "independent review of the record" means that it did not merely rubberstamp the habeas court's FFCL. BIO at 27. But the FFCL, on its face, is neither a fair nor accurate reflection of the relevant record. Most of the FFCL relies on the very trial testimony that was challenged by the vast new evidence of changed science

and of the natural and accidental factors that caused Nikki's death, all of which the FFCL fails to discuss.

Due process in cases of this nature should require the factfinder to do more than "evaluat[e] the strength of only one party's evidence." *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006). "[N]o logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt" if that evidence is simply ignored. *Id.*

## CONCLUSION

Texas's tortured arguments reflect a disturbing desire to hold onto a conviction and death sentence despite intervening changes in scientific understanding and overwhelming evidence of Petitioner's innocence. For these reasons and those stated in the petition, this Court should grant the petition for writ of certiorari, order a plenary review, or summarily reverse.

Respectfully submitted,

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Date submitted: July 28, 2023