

No. 23A_____

(CAPITAL CASE, NO PENDING EXECUTION DATE)

In the
Supreme Court of the United States

ROBERT LESLIE ROBERSON III,

Petitioner,

v.

TEXAS,

Respondent.

APPLICATION TO EXTEND TIME TO FILE A PETITION FOR A WRIT OF
CERTIORARI FROM APRIL 11, 2023, TO JUNE 7, 2023

To the Honorable Samuel A. Alito, Jr.:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.3, Petitioner Robert Leslie Roberson III (Petitioner) respectfully requests that the time to file a petition for a writ of certiorari be extended by 45 days from April 11, 2023, to and including June 7, 2023.

On January 11, 2023, the Texas Court of Criminal Appeals (CCA) issued a per curiam order denying Petitioner's application for a writ of habeas corpus. Exhibit A. Absent an extension, the petition would be due on April 11, 2023. This application is being filed at least 10 days before that date. *See* Sup. Ct. R. 13.5. The jurisdiction of

this Court would be invoked under 28 U.S.C. § 1257 to review this case.

Basic Background

Petitioner is on Texas's death row in the custody of the Warden at the Allan B. Polunsky Unit State Prison in Livingston, Texas. He was tried, convicted, and sentenced to death in February 2003 after taking his comatose daughter to the emergency room on January 31, 2002. The conviction relied on testimony from medical doctors about what could and could not have caused the child's death; the consensus of the State's experts was that her death was explained by "Shaken Baby Syndrome" (SBS) also know as "Shaken Impact Syndrome," and subsequently recharacterized as "Abusive Head Trauma."

The CCA ultimately affirmed the conviction and sentence, describing at length the SBS causation testimony that had been adduced at trial. *Roberson v. State*, No. AP-74,671 (Tex. Crim. App. June 20, 2007) (not designated for publication). The CCA later denied all relief requested in an initial state habeas application and dismissed a 2005 *pro se* filing as an unauthorized successive application. *Ex parte Roberson*, Nos. WR-63,081-01, WR-63,081-02, 2009 WL 2959738 (Tex. Crim. App. 2009) (unpublished). Neither Petitioner's appointed trial or state habeas counsel challenged the SBS causation theory, which defense counsel had conceded on the record throughout trial was the only explanation for the child's death, despite his client's insistence on his innocence. State habeas counsel continued to represent Petitioner in federal habeas proceedings but never revisited the State's SBS causation theory.

In 2016, with an execution date pending, the current proceeding was initiated,

focusing on intervening changes in the scientific understanding of SBS. The subsequent habeas application relied on a new procedural vehicle enacted by Texas's legislature specifically to address convictions based on subsequently discredited or changed scientific understanding. *See* TEX. CODE CRIM. PROC. art. 11.073. Four claims were raised: (1) that new scientific evidence established by a preponderance of the evidence that Petitioner would not have been convicted; (2) that the State's reliance on false, misleading, and scientifically invalid testimony had deprived Petitioner of the right to due process under state law; (3) that Petitioner was entitled to habeas relief because he is actually innocent; and (4) that Petitioner was entitled to habeas relief because his federal rights to due process and a fair trial were violated by the State's introduction of forensic science testimony that current science has exposed as false. The application, supported by several volumes of evidentiary proffers, was submitted to the CCA, along with a motion seeking to stay the then-pending execution.

On June 16, 2016, the CCA granted the motion to stay the execution and entered an order remanding all four of Robert's claims "to the trial court for resolution." Exhibit B.

During a 9-day evidentiary hearing, 11 volumes of new evidence were amassed, including thousands of pages of scientific articles and treatises. Most importantly, substantial new evidence regarding the natural and accidental factors that explained the child's death was adduced; this was evidence supporting Petitioner's claim of actual innocence that had not been available to him when this subsequent state

habeas proceeding was initiated in June of 2016.

Thereafter, the parties submitted proposed Findings of Fact and Conclusions of Law (FFCL). The FFCL that the convicting court ultimately submitted to the CCA, recommending that relief be denied, was essentially a verbatim copy of the State's proposal, including its typographical and grammatical errors; the convicting court's FFCL, like the State's proposal, did not mention any of the new scientific evidence challenging the validity of SBS or the new evidence that the child's death had been caused by natural and accidental causes, not an inflicted injury. On January 11, 2023, the CCA issued an unsigned, two-page opinion, adopting the convicting court's proposed FFCL as its own and summarily denying a new trial. Exhibit A.

Reasons for Granting an Extension of Time

Extending the time available to file a petition for writ of certiorari is appropriate for at least four distinct reasons:

First, because Petitioner is indigent, he will rely upon the assistance of undersigned counsel to develop and present his petition. Undersigned counsel is a solo practitioner, appointed by the habeas court in 2018 to continue her representation of Petitioner, which had begun in 2016 while she was employed in a state capital habeas public defender office. Exhibit C. Since the proceeding before the convicting court ended in February 14, 2022, counsel has been providing representation on a pro bono basis.¹ Undersigned is thus otherwise engaged in the

¹ Under current Texas state and Fifth Circuit law, there is no requirement to provide resources to fund investigation and representation in subsequent state habeas proceedings outside of very narrow parameters. *See, e.g., Storey v. Lumpkin*, 8 F.4th 382 (5th Cir. 2021) (rejecting the argument that counsel appointed under the Criminal Justice Act to represent individuals pursuant to § 3599

practice of law to earn a living. That practice includes representing other individuals in capital post-conviction proceedings and clients in civil matters. A brief for one such client is currently due in the Fifth Circuit Court of Appeals on April 17, 2023. *See Heath v. RPM Dining*, No. 22-51006, Doc. 45 (5th Cir. March 8, 2023) (setting deadline for Opening Brief). In another matter, the direct appeal of a death penalty case, the State's response brief is due on April 27, 2023, making undersigned's reply brief for her client due on May 13, 2023. *See Lucky Ward v. State of Texas*, AP-77,098 (Tex. Crim. App. Feb. 1, 2023) (extending deadline for filing State's brief); TEX. R. APP. P. 38.6(c).

Second, the factual predicate for the anticipated petition is dense, complex, and disturbing as it involves a chronically ill child who died at age two and a controversial medical hypothesis, SBS, the history of which is central to the habeas claims. The SBS medical diagnosis has been subjected to a great deal of debate since Petitioner's 2003 trial in light of evolving scientific inquiry into its basic tenets. Additional time will enable counsel to prepare a well-researched and yet accessible petition that will be of maximum benefit to this Court.

Third, no execution date is pending, and regardless of whether the extension is granted, the petition will not be considered until next Term. Moreover, if the petition were granted, it would be argued in the next Term. Therefore, the extension

should be compensated for work on subsequent state habeas proceedings). Although two capital habeas units have now been established within federal defender's offices in Texas, these two new offices do not have the capacity to represent the vast majority of death-sentenced individuals incarcerated in Texas. Therefore, it is not uncommon for individuals sentenced to death in Texas to rely on the fortuity of obtaining pro bono representation in post-conviction habeas proceedings, including those involving substantial claims of actual innocence. *See, e.g., Rodney Reed v. Bryan Goertz*, No. 21-442 (argued Oct. 11, 2022 in the wake of habeas applicant's eleventh subsequent state habeas application to the CCA).

will not likely substantially delay resolution of this case or prejudice any party.

Fourth, and most critically, Petitioner will be seeking a summary reversal, which the Court is likely to grant. The petition will raise significant concerns about the CCA's failure to adhere to the U.S. Constitution with regards to Petitioner's due process rights. The proceeding below was expressly authorized so that the factual record could be expanded to enable reconsideration of the suspect scientific causation theory used to obtain Petitioner's conviction in 2003, and yet the Texas courts below disregarded substantial, unrebutted new evidence of a change in scientific understanding since 2003, which has destabilized each of the tenets of the SBS causation theory once accepted as medical orthodoxy. The Texas courts also disregarded substantial, unrebutted evidence of the natural and accidental causes of the death at issue in this case, which establishes Petitioner's innocence. Relief was denied in an unsigned, two-page order without explanation or reference to any of the voluminous new evidence that the hypothesis used to obtain the conviction was false, misleading, and unreliable and that a contemporary scientific and medical inquiry has identified natural and accidental causes that explain the tragic death of Petitioner's child. Thus, the due process violation associated with a conviction based on subsequently discredited "science" was compounded by a deprivation of due process in this post-conviction proceeding, which was expressly authorized to address the change in scientific understanding. The conviction should have been vacated and a new trial authorized. These stakes warrant the extension requested.

Conclusion

For the foregoing reasons, Petitioner respectfully asks that the time to file a petition for a writ of certiorari in this matter be extended by 45 days to and including June 7, 2023.

Respectfully submitted,

/s/

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