
No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 2017 TERM

MARK ROBERTSON,
Petitioner,

vs.

LORIE DAVIS, Director,
Texas Department of Criminal Justice
Institutional Division,
Respondent.

On Petition for a Writ of *Certiorari* to
the United States Court of Appeals for the Fifth Circuit

PETITION FOR FOR WRIT OF *CERTIORARI*

CAPITAL CASE

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QUESTION PRESENTED

- I. Whether the Fifth's Circuit's ruling that the district court could not consider "two new claims" is in conflict with *Cullen v. Pinholster*, 563 U.S. 170, 185 (2011) because the evidence upon which Robertson relied is not new evidence and does not constitute two new claims introduced for the first time in federal court. In repleading Issue 23 from the direct appeal brief into the federal amended petition, Robertson relied exclusively on evidence directly from the state court record in the direct appeal litigation (the record of the hearing on the Motion for New Trial, and the state court's direct appeal opinion)

LIST OF PARTIES

MARK ROBERTSON, Petitioner

LORIE DAVIS, Director, Texas Department of Criminal Justice Institutional Division.

Respondent

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PETITION FOR WRIT OF CERTIORARI

Petitioner, MARK ROBERTSON, petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit in *Robertson v. Davis*, No. 17-70013 (5th Cir. Dec. 21, 2017) (slip op.).

OPINION BELOW

The Fifth Circuit decision sought to be reviewed in *Robertson v. Davis*, No. 17-70013 (5th Cir. Dec. 21, 2017) (slip op.) is attached as Appendix 1. The district court's Memorandum Opinion and Judgment in *Robertson v. Davis*, 3:13-CV-0728-G (N.D. Tex. Mar. 30, 2017) and Judgment is attached as Appendix 2. The Texas Court of Criminal Appeals direct appeal opinion in *Robertson v. State*, 2011 WL 1161381 (Tex. Crim. App. March 9, 2011) (not designated for pub.) is attached as Appendix 3.

JURISDICTION

The Fifth Circuit Court of Appeals order sought to be reviewed was entered on December 21, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

28 USCA § 2254 State custody; remedies in Federal courts,

- (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
 - (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
 - (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE WITH FACTS RELEVANT TO THE ISSUE

A. The 1991 Trial, Direct Appeal & State/Federal Habeas Proceedings up Through Reversal and Remand in 2008 Because of the Nullification Instruction

In 1991, Mr. Robertson was tried and convicted in the Criminal District Court No. 5, Dallas County, of capital murder committed in course of robbery, and was sentenced to death. Under the 1989 Texas law, "The court also gave the jury a supplemental instruction in which it was told that Robertson could avoid a capital sentence-even if the answers to both questions were affirmative-should the jury find sufficient mitigating factors. To give effect to such a determination, the trial court instructed the jury to change its answer to either of the special issues from 'Yes' to 'No.'" [hereinafter "Nullification Instruction"]. *Robertson v. Cockrell*, 325 F.3d 243, 245 (5th Cir. 2003) *abrogated by Tennard v. Dretke*, 542 U.S. 274 (2004).

In 1993, the Texas Court of Criminal Appeals (TCCA) affirmed the conviction and sentence on direct appeal. *Robertson v. State*, 871 S.W.2d 701 (Tex. Crim. App.1993). The U.S. Supreme Court denied certiorari. *Robertson v. Texas*, 513 U.S. 853 (1994).

Thereafter, the Nullification Instruction became the prominent feature in the subsequent state and federal habeas proceedings; the courts denied Mr. Robertson's claim. *See Ex parte Robertson*, Writ No. 30,077-01 (Tex. Crim. App.1998); *Robertson v. Johnson*, 234 F.3d 890 (5th Cir.2000); *Robertson v. Johnson*, 533 U.S. 901 (2001) (remand for reconsideration); *Robertson v. Cockrell*, 325 F.3d 243 (5th Cir. 2003) (en banc denial of relief).

"Just before the date set for his execution in August 2003, [Mr. Robertson] filed a subsequent application, again raising the claim that the nullification instruction impermissibly limited the jury's ability to consider and give effect to mitigating evidence presented during trial. On August 19, 2003, [the TCCA] stayed his execution while [it] considered an identical claim in *Ex parte Laroyce Lathair Smith*, 132 S.W.3d 407 (Tex. Crim. App. 2004). However, on June 24, 2004, the United States

Supreme Court decided *Tennard v. Dretke*, 542 U.S. 274 (2004), and specifically disapproved of the test used by the Fifth Circuit in *Penry I* claims; the same test used in the Fifth Circuit decision, *Robertson v. Cockrell*, 325 F.3d 243 (5th Cir.2003), and also applied by [the TCCA] in *Ex parte Smith*. As a result, the Supreme Court also reversed [the TCCA] decision in *Smith v. Texas*, 543 U.S. 37 (2004), holding that [the TCCA] assessed the claim under an improper legal standard." *Ex parte Robertson*, AP-74,720, 2008 WL 748373 (Tex. Crim. App. Mar. 12, 2008).

Applying the holding in *Smith v. Texas*, the TCCA remanded to the convicting court, which recommended relief be granted. On March 12, 2008, the TCCA adopted the trial court findings and conclusion, reversed Mr. Robertson's death sentence, and remanded the case to the trial court for a new trial on punishment. *Ex parte Robertson*, AP-74,720, 2008 WL 748373 (Tex. Crim. App. Mar. 12, 2008).

B. The 2009 Re-Sentencing

On April 7, 2008, the mandate issued from the TCCA, who had reversed Mr. Robertson's death sentence and remanded the case to the trial court for a new trial on punishment. ROA.14060 (Clerk Record 1:122). On May 19, 2008, the State of Texas again sought the death penalty. ROA.14064 (Clerk Record 1:126). In response, and although there is no appointment order within the clerk's record, by at least June 2008, Mr. Richard Franklin and Ms. Robbie McClung had been appointed by the state trial judge. ROA.14068 (Reporter's Record Vol 39).

1. The State's 2009 Re-Sentencing Presentation

The prosecution called thirty-eight (38) witnesses (some by reading their 1991 trial testimony into the record) to testify in its case-in-chief. ROA.11339 (Reporter Record 37); ROA.11407 (Reporter Record 38); ROA.11469 (Reporter Record 39). Although the retrial was limited to the punishment phase, the initial witnesses testified about the capital murders of Edna Brau and her grandson, Sean Hill, in the Preston Hollow area of Dallas, TX; the investigation that lead to the capture and arrest of Mr. Robertson in Las Vegas, Nevada, and his statement; events about Mr. Robertson's behavior during his transfer from Las Vegas to Dallas; and his behavior during the book-in and stay at the Dallas County Jail while awaiting trial. This was followed by witnesses who testified to extraneous-offense behaviors beginning when Mr. Robertson was 12 years old and concluded with the murder of a convenience store clerk, Jeffrey Saunders, a week prior to the murders of Brau and Hill; and about minor infractions of Mr. Robertson, during his 20 year-incarceration in TDCJ following his conviction and death sentence in the 1991 trial.

The State also called Warden Nelson, who testified concerning future dangerous in the 2009 punishment phase re-trial of Mark Robertson. ROA.11644. This testimony is the subject of the petition for writ of certiorari before this Supreme Court.

a. The State's future dangerousness expert, TDCJ Warden Melody Nelson

Warden Nelson testified before the jury that an inmate convicted of capital murder who received a life-sentence is classified as a G3. She further testified that once that inmate serves at least ten years and maintained a clear disciplinary record, he is "automatically" reclassified as a G2, which gives him substantial freedom to work within and without the fenced perimeters of the prison:

- Q. Okay. Now, Warden, you talked about someone coming in off the streets convicted of capital murder and getting a life sentence, they go in – they will be classified as a G3, is that correct?
- A. Yes, sir.
- Q. Okay and the sentence for someone with a G3 status, again is someone who is serving a capital murder life sentence or any other individual committing any other felony offense wherein they received a sentence of 50 years or greater, is classified as a G3 from the start?
- A. Yes, sir. From the start.
- Q. Is there a point in time that they can move to a less restrictive area?
- A. Ten years.
- A. If they have maintained, or have maintained for the last year, a clear disciplinary history at the ten-year mark, they will be automatically considered – automatically promoted to a G2 status. It's an automatic promotion.
- Q. So, in this case, where Mark Robertson – if he were to get a life sentence from this jury – they know he's been on death row for eighteen years, and they've heard his record. You've reviewed the record. Someone with that record, would he be in that pool that would automatically be in the G2 status, they were to get a life sentence?
- A. Yes.
- Q. And the G2 status that you mentioned to me, that is less restrictive than G3, in that the housing arrangements and where they can work within a unit; is that correct?
- A. Yes. ROA.11658 (RR 42:113-115).

b. The State's Closing Arguments and the Jury Notes

The prosecutor's closing argument emphasized Warden Nelson's testimony:

.... He is a sociopath. He will always be a sociopath. You put him in general population, minimum security, he will continue to be a sociopath. ROA.11687 (RR 43:11).

.... Well, you know from the warden, he['s] not gone [sic] be locked down anymore, if you give him a life sentence. ROA.11654 (RR 43:23).

During jury deliberation, the jury sent out several jury notes. As to their future dangerousness deliberations, those notes reflect in particular:

Jury Note No. 1

If question 2 [future dangerousness special issue] is not unanimously yes and we do not have 10 no's what is the disposition? ROA.14138 (CR 1:200)

Jury Note No. 2

If Mark Robertson is given a life sentence, given his 18 years incarceration would he enter as G2 or G3? If not, at what level would he enter and how long before he might achieve a G2 status? ROA.14140 (CR 1:202)

Jury Note No. 3

We would like to understand the date of Mark Robertson's six prison infractions. ROA.14143(CR 1:205).

Based on the jury's answers to the special issues, Mr. Robertson was sentenced to death again. ROA.14148 (CR 1:210).

2. The Defense Motion for New Trial and expert, S.O. Woods, contradicting the testimony of Warden Nelson

The defense filed a Motion for New Trial. ROA.15195 (Doc #81). The trial court held a hearing on the motion.

a. The Assistant DA asserted that Warden Nelson's testimony about prisoner classification was an error that "related to her credibility"

At the beginning of the hearing on the Motion for New Trial, Lisa Smith, an Assistant Dallas District Attorney, told the court:

Assistant District Attorney:

Judge, we just wanted to document for the record some information that we received last week and that we turned over to Defense counsel this morning. Last week, we discovered in the course of the prosecution of another death penalty case that our witness, *Warden Nelson, had given some testimony in the Juan Lizcano trial that was inaccurate. The testimony related to whether or not a capital murderer who got a life-without-parole sentence could ever be eligible for custody status of G2. She said they could, but she was wrong.* She learned – and we learned – after that trial that it was an addendum to the classification plan when the LWPO law was passed. So that capital murderers who get life without parole can never be in a custody level less than G3 – less restrictive than a G3. *That does not apply to Robertson. He's not an LWOP. Estrada v. State, 313 S.W.3d 274 (Tex. Crim. App. 2010) However, it relates to her credibility.* So we turned that over this morning to them, along with the addendum that we received last week.

(Emphasis supplied) ROA.10122 (Hearing Motion for New Trial ("Hg. MNT") at 4-6).

Robertson's Disciplinary Record

In the hearing on the Motion for New Trial, ROA.10119, the defense presented expert witness evidence (S.O. Woods) to contradict the testimony of Warden Nelson. ROA.10122. S. O. Woods had worked for TDCJ for 31 years and at the time of his retirement, he had been the Assistant Director in charge of the Classification and Records System. ROA.10122. (Hg. MNT at 7).

Mr. Woods testified that Mark Robertson's classification status would not be "automatic." ROA.10124-25. (Hg. MNT at 14-16). When an inmate is received into TDCJ, the prison uses a software program that has all the policy rules and guidelines built-in, which helps to make the classification "decisions more consistent agency wide." ROA.10123. (Hg. MNT at 10). However, once the computer generates a recommendation, it is still reviewed by two committees: a State Classification Committee, and thereafter a Unit Classification Committee. ROA.10123 (Hg. MNT at 9). Depending on what evidence is before these committees, they can accept the recommendation or override it. ROA.10123 (Hg. MNT at 9). One piece of evidence that these committees consider is an inmate's disciplinary record.

- b. Warden Nelson speculated at trial that Robertson's disciplinary record was not minor. But at the hearing on the MNT, the Assistant DA's questioning characterized it as "lack[ing] of any serious disciplinaries"). The TCCA's direct appeal opinion characterized it "as "contain[ing] only minor infractions..."**

In her trial testimony before the jury (which S.O. Woods had been asked to review for the hearing on the Motion for New Trial, ROA.10122 Hg. MNT at 7), Warden Nelson had testified at trial that the disciplinaries of Mark Robertson were not minor because of the possible adverse consequences to prison administration that could come from the infractions. Rather than testify as to fact; Warden Nelson engaged in speculation and presented the jury with what Robertson later characterized in his federal amended habeas petition, as a "parade of horrors," in support of a finding of future dangerousness and a sentence of death. Warden Nelson testified that an altered coffee pot can cause a fire hazard. It can also cause the water in the pot to heat up enough to scald an officer if the inmate splashes the water on a guard. ROA.11654 (RR 42:98-99). Broken headphones can be used to create a telephone system among the inmate cells. Warden Nelson testified that headphones had been used to transmit gang information. ROA.11654 (RR 42:100).

Warden Nelson testified that inmates have used Benadryl to alter their states of mind by mixing it with other substances. ROA.11655 (RR 42:101).

In contrast, during cross-examination at the hearing on the Motion for New Trial, the Dallas DA's questions characterized Mr. Robertson's record as "the lack of any serious disciplinaries – actually, I believe there was a good seven-year period where he had no disciplinaries at all." ROA.10131 (MNT at 40). The State took a contrary position at the hearing Motion for New Trial than it had in the jury trial. At the hearing on the Motion for New Trial, the State's position was that Mr. Robertson's infractions were minor. In support of that position, the State presented an affidavit from Cay Cannon, a member of the State Classification Committee, opining that Mr. Robertson would be classified as a G2. *See* ROA.10148 (Hg. MNT Exhibit 1). Even the TCCA's direct appeal opinion found that "appellant's disciplinary record during the eighteen years he spent on death row contained only minor infractions" (Emphasis supplied). *Robertson*, 2011 WL 1161381, at *7.

S. O. Woods also contradicted Warden Nelson's testimony that TDCJ staff was underpaid and understaffed. ROA.10127 (Hg. MNT at 25-30). Mr. Woods testified that Warden Nelson's assertion that TDCJ was 4,000 correctional officers short was high. Based on Mr. Woods inquiries, TDCJ was down by 900 officers and that "nine hundred is just such a minuscule number out of 26,000, that it's manageable." ROA.10127 (Hg. MNT at 25-6). S.O. Woods also testified:

They're getting a seven percent raise out of that last legislative session, which is more than most people are getting nowadays. The correctional staff that I know ... [t]hey were making a pretty substantial salary based on [mandatory] overtime, ... getting paid for it at time and a half. ROA.10127 (Hg. MNT at 25-26).

S.O. Woods corrected the misleading impression by Warden Nelson that general population was more violent than administrative segregation. Mr. Woods testified that there are 9,000 inmates

that are segregated and 150,000 that are "free to go to jobs and be in the hallways and living areas." ROA.10126 (Hg. MNT at 23). Because of the greater volume, there would be more incidence of violence among the general population than among the segregated population. Further, the inmates in administrative segregation are highly controlled, housed in single-cells, and restrained when they are out of their cells. ROA.10126 (Hg. MNT at 23). Mr. Woods concluded that TDCJ "does a really good job of handling a lot of bad people. It's a relatively safe place to work and be." ROA.10127 (Hg. MNT at 25).

Finally, Mr. Woods addressed Warden Nelson's testimony that the prison is filled with psychopaths. Mr. Woods testified:

"I wouldn't suspect that the population of psychopaths in the prison is too terribly much higher than that outside the prison. ... [A]s far as a general statement that every inmate is a psychopath, I think that's really way off." ROA.10128 (MNT at 30).

At the conclusion of the hearing on November 9, 2009, the trial court denied the motion. ROA.10143 (Hg. MNT at 91).

C. The Direct Appeal Opinion & Certiorari Denied by SCOTUS

On March 19, 2010, Mark Robertson filed his direct appeal brief in the TCCA. ROA.14192 (Doc 27, part 44). Two issues in particular addressing Warden Nelson's testimony were plead in issues 22 and 23:

22. The trial court erred in denying appellant's motion for new trial
23. The state denied appellant a fair trial and violated his constitutional right to due process under the Fifth, Sixth, Eighth and Fourteenth amendments by presenting false and highly misleading testimony on a crucial issue at the penalty phase of his trial. ROA.14296. (Doc 27, part 44)

On March 9, 2010, the TCCA issued its opinion denying relief. In addressing issues 22 and 23, the opinion set out the five topics testified to by Warden Nelson:

“Warden Nelson described how an inmate's living conditions are restricted through the use of a classification system ranking inmates from G1 (least restrictive) through G5 (most restrictive) and administrative segregation. Appellant complains about the warden's statements concerning the following:

- that appellant would automatically be classified as a G3 inmate;
- that prison personnel are underpaid and short staffed, that one officer may look after 150 inmates, and that a year previously the Texas Department of Criminal Justice was 4,000 officers short;
- that there is more violence in the general population than in administrative segregation;
- that inmates can come and go from their cells to work; and
- that prison is filled with psychopaths.

At appellant's hearing on the motion for new trial, appellant presented experts S.O. Woods and Dr. Mark Vigen, whose testimony was intended to counter the warden's testimony and show that her testimony was false or misleading.”

Robertson, 2011 WL 1161381, at *7. The TCCA ruled that "Appellant has not demonstrated that Warden Nelson's testimony was false or misleading." (Emphasis supplied) *Robertson*, 2011 WL 1161381, at *10.

The U.S. Supreme Court denied certiorari. *Robertson v. Texas*, 132 S. Ct. 844 (2011).

D. The 2010 State Habeas Proceeding Was Limited to Pleading a Wiggins IATC Claim for Failure to Present

While the direct appeal was pending, the state judge appointed Franklyn ("Mick") Mickelsen to represent Mr. Robertson in state habeas. An evidentiary hearing was held on January 24-26, 2012. The trial judge recommended that habeas relief be denied. The TCCA wrote in its opinion denying state habeas relief that Mr. Franklyn "presented a single allegation in his application." The claim was

a a *Wiggins* Ineffective Assistance of Trial Counsel Claim for Failure-to-Present, as opposed to a failure to investigate claim. *Ex parte Robertson*, WR-30,077-03, 2013 WL 135667 (Tex. Crim. App. Jan. 9, 2013).

E. The 2013 federal Amended Petition raised a new *Wiggins* claim, an IATC Claim for Failure to Investigate (Ground One) and relied on Martinez/Trevino to excuse procedural default. Ground Two plead issue 23 from the state direct appeal arising from the testimony of Warden Nelson and relied exclusively on state court record before the TCCA on direct appeal

The federal Amended Petition contained two grounds only:

GROUND ONE (IAC & *Wiggins* – Failure to Adequately Investigate & Develop Mitigating Evidence): Mr. Robertson was denied his federal 6th and 14th amendment rights to effective assistance of counsel, who unreasonably narrowed the scope of, and prematurely ceased, the investigation despite red flags that signaled further investigation needed to be done into Mark's mental state at the time of the offense, into maternal and paternal genetic-and-environmental influences, and into Mark's early childhood

GROUND TWO (Materially Inaccurate Evidence – 5th, 6th, 8th, 14th amendments): Mr. Robertson was denied his federal 5th, 6th, 8th, and 14th amendment rights because his death sentence was based on materially inaccurate evidence from Warden Nelson

As to Ground One, both prior and after filing the habeas petition, Mr. Robertson had sought funding under 28 U.S.C. § 3599 for investigative services "to assist counsel in her preparation of Mr. Robertson's federal habeas corpus petition," specifically to investigate, develop and present the IAC *Wiggins* claim in Ground One ROA.93 (Doc #17 at 2). The district court denied the requested investigative services and motions for reconsideration. ROA.118 (Doc #25); ROA.12,149 (Doc#33); ROA.12,331 (Doc #43); ROA.12,804 (Doc #69). In its Memorandum Opinion, the district court denied habeas relief on the *Wiggins* claim. Mem. Op. at 33; pages10-33 [Doc #72].

As to Ground Two, Robertson replead in the federal amended habeas petition, the state direct appeal issue 23, the materially inaccurate evidence arising from the Warden Nelson testimony. *See*

Statement of the Case, C. The Direct Appeal Opinion & Certiorari Denied by SCOTUS *supra*. Specifically, Ground Two in the federal amended habeas petition outlined and argued the following state court record evidence before the TCCA in the direct appeal litigation, as well as the very work product of that litigation, the direct appeal opinion penned by the TCCA:

1. Trial Testimony of Warden Nelson
2. Prosecutor's Closing Arguments and the Jury Notes
3. ***The Motion for New Trial (which was issue 22 in the direct appeal brief)***
4. ***The TCCA Direct Appeal Opinion***

(emphasis supplied). See Ground Two, Amended Pet., ROA.12342 (Doc #47).

In its Memorandum Opinion (Mem. Op.), the district court denied habeas relief on Ground Two and denied a certificate of appealability. ROA.12,816 (Doc #72, Mem. Op. at 46). Among other things, the Analysis section of the Mem. Op. recites:

Robertson argues that he is entitled to relief because the state court's decision to deny relief was contrary to an an unreasonable application of federal law, and also was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Amended Petition at 57, 61-62 (citing 28 U.S.C. § 2254(d)). In addition to the five areas of concern with Nelson's testimony presented to the CCA, however, ***Robertson also asserts that Nelson had given false testimony in a different trial affecting her credibility that was never revealed to Robertson's jury [from the Motion for New Trial and hearing in the state-court record], and that she had 'testified to a speculative 'parade of horrors,' with no evidence whatsoever*** that Mr. Robertson had altered his coffee pot and scalded a guard with boiling water, or broke his headphones and transmitted gang information." Amended Petition at 53, 57-59.

(Emphasis supplied) ROA.12,816 (Doc #72 at p.42).

Although omitted from the Mem. Op., the Amended Petition had argued the State court determination was also an unreasonable determination of the facts. Robertson quoted from the ADA's questioning in the MNT and the TCCA's direct appeal opinion, both of which characterized Robertson's disciplinary record as minor, ROA.10131 (MNT at 40); *Robertson*, 2011 WL 1161381,

at *7, even as the TCCA ultimately ruled that "Appellant has not demonstrated that Warden Nelson's testimony was false or misleading." *Robertson*, 2011 WL 1161381, at *10.

The Analysis section continued:

Were this court to consider these additional assertions as part of the claim presented in these proceedings, it would render the entire claim unexhausted and, now, subject to a procedural bar by the Texas abuse-of-the-writ rule..... Under [28 U.S.C. § 2254(d)], ***Robertson's new evidence and arguments cannot be considered by this court because they were not part of the claims submitted to the CCA on direct appeal. See Pinholster***, 563 U.S. at 185.

In any event Robertson has not shown that the state court unreasonably determined that Warden Nelson's testimony was not false or misleading. In fact, the state court determinations appear to be correct.

(Emphasis supplied). ROA.12,816 (Doc #72, Mem. Op. at 43).

F. The Fifth Circuit Proceedings & Denial of COA as to Ground Two (Warden Nelson testimony)

In the Fifth Circuit, Mr. Robertson filed two briefs. A brief-as-of right on the denial of funding issue under § 3599 issue and its effect on Ground One. In his § 3599 brief, Mr. Robertson had relied on *Ayestas v. Davis*, No. 16-6795 (USSC 2016) currently pending before this Court. In a contemporaneously filed Motion for Stay, Mr. Robertson asked that the appeal proceedings be held in abeyance until *Ayestas* is decided. This issue is still pending in the Fifth Circuit Court of Appeals.

On Ground Two, however, the Fifth Circuit issued an unpublished opinion and denied a COA as to the claim of Robertson "that his death sentence was based on materially inaccurate evidence from the States's witness, Warden Melodye Nelson." *Robertson v. Davis*, No. 17-70013 (5th Cir. Dec. 21, 2017). In section F of the Fifth Circuit's unpublished opinion, the panel characterized the evidence presented by Robertson from the state court record on direct appeal as being "two new claims":

F. Robertson's *two new claims*

The district court correctly noted that because Robertson failed to present two of his assertions—the warden's inaccurate testimony in a different trial as evidence she was unreliable and the warden's speculations as to his conduct violations—to the TCCA on direct appeal, ***these claims are barred from consideration by the federal courts through his habeas petition.*** *Cullen v. Pinholster* established that § 2254 “imposes a limitation on the discretion of federal habeas courts to [consider] new evidence.” 563 U.S. at 185, 131 S.Ct. 1388. ***The record supports the district court's determination that it could not consider these two new grounds for relief.*** [inserting footnote 4]

Robertson v. Davis, 2017 WL 6547386, at *4–5 (5th Cir. 2017) (emphasis supplied). At the end of this paragraph, the panel inserted footnote 4. In this footnote, and recognizing that the district court had ruled in the alternative on the merits, the Fifth Circuit declined to do so holding “we refrain from reaching the merits of this argument because it was not properly raised before the state court. *See Pinholster*, 563 U.S. at 185-86.”

Mr. Robertson files this petition for writ of certiorari arising from this latter proceeding on Ground Two, the materially inaccurate testimony of Warden Nelson.

REASONS FOR GRANTING THE WRIT

I. The Fifth's Circuit's ruling that the district court could not consider "two new claims" is in conflict with *Cullen v. Pinholster*, 563 U.S. 170, 185 (2011) because the evidence upon which Robertson relied is not new evidence and does not constitute two new claims introduced for the first time in federal court. In repleading Issue 23 from the direct appeal brief into the federal amended petition, Robertson relied exclusively on evidence directly from the state court record in the direct appeal litigation (the record of the hearing on the Motion for New Trial, and the state court's direct appeal opinion)

A. In his federal amended petition, Robertson relied exclusively on the state court record in existence before the Texas Court of Criminal Appeals, who adjudicated the Warden Nelson claim on the merits

In his federal habeas proceedings below, Mr. Robertson argued that the direct appeal decision of the Texas Court of Criminal Appeals on the issue of the Warden Nelson testimony was both contrary to and an unreasonable determination of federal law, as well as an unreasonable determination of the facts pursuant to 28 U.S.C. § 2254. The so-called "two new claims" – as the Fifth Circuit denominated the state-court record evidence relied on by Mr. Robertson – were *not* new claims and were not new evidence introduced into federal court for the first time. Rather, Mr. Robertson relied exclusively on the state-court record that was before the Texas Court of Criminal Appeals in existence at the time that the state court made its decision. Specifically, this evidence under review in federal court was limited to the state-court record of the hearing on the Motion for New Trial, and the state court's direct appeal opinion penned by the Texas Court of Criminal Appeals denying the Warden Nelson issue.

First, Robertson argued that at the trial, Warden Nelson testified that if Mr. Robertson were to get a life sentence he would automatically be eligible for G2 status because he had served 10 years, and would be moved to a less restrictive area. Robertson then contrasted this with the state court record of the hearing on the Motion for New Trial (MNT) to show that the jury was never told that Warden Nelson had given prior, inaccurate testimony; thus, she was not a credible witness. In

fact, Robertson quoted Lisa Smith, Assistant Dallas District Attorney, who admitted: "Warden Nelson had given some testimony in the Juan Lizcano trial that was inaccurate. ... [Nelson's testimony] relates to her credibility." *See* MNT at 4-6. This was record evidence before the TCCA in the direct appeal proceeding and related to Issues 22 and 23 in the direct appeal brief.

Second, and once again relying exclusively on the state court record before the TCCA, Robertson also quoted from that portion of the hearing on the Motion for New Trial, in which the prosecutor formulated cross-examination questions that characterized Mr. Robertson's record as "the lack of any serious disciplinaries – actually, I believe there was a good seven-year period where he had no disciplinaries at all." (MNT at 40). Robertson further relied on the direct appeal opinion from the TCCA that characterized Robertson's "disciplinary record during the eighteen years he spent on death row [as] contain[ing] only minor infractions" (Emphasis supplied). *Robertson*, 2011 WL 1161381, at *7.

It is unfathomable how the Fifth Circuit recast Robertson's state court record evidence as "two new claims" that the district court was barred from considering because *Pinholster* "established that § 2254 'imposes a limitation on the discretion of federal habeas courts to [consider] new evidence.' 563 U.S. at 185." *Robertson v. Davis*, 2017 WL 6547386, at *5 (5th Cir. 2017). *See also* ROA.12858, USDC's Mem. Op. at 43. The rulings of both lower federal courts are in conflict with *Pinholster*.

The question before this Court in *Pinholster* was "whether review under § 2254(d)(1) permits consideration of evidence introduced in an evidentiary hearing before the federal habeas court." *Pinholster*, 536 U.S. at 180. The federal district had granted habeas relief based on the testimony in a federal evidentiary hearing from "two new medical experts," who had never been called in the state trial or state habeas proceedings. *Pinholster*, 563 U.S. at 179. Reasoning that "[i]t would be

strange to ask federal courts to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court," this Court held that "evidence introduced in federal habeas has no bearing on § 2254(d)(1) review." *Pinholster*, 563 U.S. at 183, 185.

The *Pinholster* Court instructed:

review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that "resulted in" a decision that was contrary to, or "involved" an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time i.e., the record before the state court.

Pinholster, 563 U.S. at 181-182.

Robertson satisfied all that *Pinholster* required. It cannot be any plainer that the state court record evidence on the Motion for New Trial relied on by Robertson was state-court record in existence at the time the TCCA rendered its direct appeal opinion that "Appellant has not demonstrated that Warden Nelson's testimony was false or misleading." *Robertson*, 2011 WL 1161381, at *10. Moreover, it is a distortion of *Pinholster* for the lower federal courts to recast a quotation from the direct appeal opinion by the CCA as being a "new claim," when the direct appeal opinion is the culmination of the direct appeal litigation penned by the very state court whose decision is being challenged.

In summary, Ground Two *was* limited to the record that was before the state court that adjudicated the claim on the merits. There has been *neither* a federal evidentiary hearing, *nor* any "new" evidence or claims raised for the first time in federal habeas. Rather, Mr. Robertson asked the lower federal courts to analyze whether the adjudication by the Texas Court of Criminal Appeals –

including the direct appeal opinion of the TCCA itself – resulted in a decision that unreasonably applied federal law and unreasonably determined the very facts before the state court.

B. The testimony of Warden Nelson was not harmless

The testimony of Warden Nelson was not harmless. The jury never knew the information, *supra*, during its future dangerousness deliberations. These two salient pieces of information cast doubt on Nelson's credibility as an expert who was knowledgeable about TDCJ's classification status, violence in prisons, and future dangerousness. (RR 42:57).

In *Velez v. State*, AP-76,051, 2012 WL 2130890 (Tex. Crim. App. 2012), the TCCA reversed and remanded a capital case for a new sentencing trial because of the inaccurate testimony of the State's testifying future dangerousness expert (Merillat). The decision of the TCCA was preceded by a harm analysis. In *Velez*, the TCCA found the testimony was not harmless because:

- Merillat's "extensive credentials increased his credibility as a person knowledgeable about violence in prisons and future dangerousness." *Velez*, 2012 WL 2130890 at 32;
- Merillat had testified to the high level of violence inside TDCJ; and
- the defendant's inmate records showed only minor offenses.

Like *Velez*, the materially inaccurate testimony of Warden Nelson in *Robertson* is not harmless.

- Warden Nelson's extensive credentials increased her credibility as a person knowledgeable about violence in prisons and future dangerousness. *Compare Velez*, 2012 WL 2130890 at 32;
- Warden Nelson described violence "as more prevalent in general population than in administrative segregation or death row." *Robertson*, 2011 WL 1161381 at *9; compare *Velez*, 2012 WL 2130890 at 32;
- Robertson's inmate records showed only minor offenses.

Further exacerbating the harm, the prosecutor stressed the testimony of Warden Nelson in arguing that Mark Robertson was a future danger: ".... Well, you know from the warden, he['s] not gone [sic] be locked down anymore, if you give him a life sentence. (RR 43:23)."

As reflected in Jury Notes 2 and 3, the jury heeded the prosecution's warning, and took Warden Nelson's testimony into consideration during their deliberations. The jury notes asked about two particular issues that Warden Nelson testified to:

Jury Note No. 2

If Mark Robertson is given a life sentence, given his 18 years incarceration would he enter as G2 or G3? If not, at what level would he enter and how long before he might achieve a G2 status? (CR 1:202)

Jury Note No. 3

We would like to understand the date of Mark Robertson's six prison infractions. (CR 1:205).

Based on the jury's answers to the special issues, Mr. Robertson was sentenced to death. (CR 1:210)

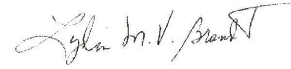
Hence, the Robertson death-sentence was based on the false and materially inaccurate testimony of Warden Nelson, who was not credible as an expert on TDCJ, yet this fact was not made known to the jury. *See Simmons v. South Carolina*, 512 U.S. 154, 160, 165–66 (1994) (defendant "was prevented from rebutting information that the [jury] considered, and upon which it may have relied, in imposing the sentence of death" and the jury "was denied a straight answer about [defendant's] parole eligibility even when it was requested" in a jury note).

Because Mark Robertson's death sentence was based on materially inaccurate evidence and the error was not harmless, the 8th and 14th amendment rights of Mr. Robertson were violated. *See Johnson v. Mississippi*, 486 U.S. 578, 590 (1988) (death sentence based on "materially inaccurate" evidence violates Eighth Amendment).

CONCLUSION

For all of the aforementioned reasons, Mr. Robertson respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,



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APPENDICES

Appendix 1 *Robertson v. Davis*, No. 17-70013 (5th Cir. Dec. 21, 2017) (slip op.)

Appendix 2 *Robertson v. Davis*, 3:13-CV-0728-G (N.D. Tex. Mar. 30, 2017)

Appendix 3 *Robertson v. State*, 2011 WL 1161381 (Tex. Crim. App. March 9, 2011) (not designated for pub.)