No. 22–7546

IN THE
Supreme Court of the United States

ROBERT LESLIE ROBERSON III,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

Roberson filed a subsequent habeas application in the Texas Court of Criminal Appeals (CCA) seeking relief from his capital murder conviction pursuant to Texas Code of Criminal Procedure Article 11.073. Article 11.073 provides, in part, that the CCA may grant relief if a petitioner files a subsequent application demonstrating that previously unavailable, relevant, and admissible scientific evidence would contradict scientific evidence relied upon by the State at trial, and the court determines that, "had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted." In his application, Roberson argued that newly-discovered scientific evidence—largely alternative diagnoses for the "triad" of symptoms associated with Shaken Baby Syndrome—proved that the State's experts gave false testimony regarding the cause of death. The CCA disagreed, denying all of Roberson's claims. *See Ex parte Roberson*, No. WR-63,081-03, 2023 WL 151908 (Tex. Crim. App. Jan. 11, 2023). Now, Roberson additionally argues that he was deprived of due process by his state habeas proceedings. The following questions are presented.

1. Whether the Court possesses jurisdiction over claims that rely solely on a state law basis for relief?
2. Whether the Court should expend its limited resources to consider claims where there is no basis for federal relief and, in any event, where such claims are meritless?
3. Whether Roberson's postconviction proceedings violated his due process right to notice and an opportunity to be heard?

LIST OF ALL PROCEEDINGS

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

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

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

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

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

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

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

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

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

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INTRODUCTION

Robert Roberson was the only person at home with his two-year-old daughter Nikki when she sustained devastating and ultimately fatal injuries. Roberson was only a recent custodian of Nikki and was reluctant to be taking care of her alone for the first time. He was routinely violent towards Nikki; Roberson had paddled the toddler, shaken and thrown her, threatened her, and screamed at her. Nikki was afraid of Roberson, cried in his presence, and refused to be held by him. Some hours after Roberson alleged that Nikki fell off the bed, at the insistence of his then-girlfriend, Roberson drove Nikki to the hospital. He acted with no apparent urgency; Roberson took the time to dress Nikki's limp body and find parking at the hospital before bringing her inside. Nikki later died from her injuries. A Texas jury convicted Roberson of capital murder and sentenced him to die.

Now, Roberson claims that newly available scientific evidence undercuts testimony given at his trial relating to the diagnosis of the "triad"[1] of symptoms associated with Shaken Baby Syndrome (SBS), the number of impacts that Nikki sustained, and the mechanism of injury. The lower court disagreed. Not only do Roberson's current claims fail to implicate federal constitutional principles, they also fall short of showing that the testimony at his trial was

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

false or that he is actually innocent of murdering Nikki. Accordingly, Roberson's petition should be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

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

> The State called twelve witnesses during its case in chief. Among them was Kelly Gurganus, a registered nurse, who testified that she was working in the emergency room of the Palestine Regional Medical Center when [Roberson] came in, pushing a wheelchair in which sat his girlfriend Teddie Cox. Gurganus said Teddie was holding something in her lap, covered in a blanket or coat of some sort. Teddie told Gurganus, "She's not breathing," at which point Gurganus removed the covering and saw Nikki Curtis lying in Teddie's lap, limp and blue.
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> Gurganus further testified that when she laid Nikki down on the bed in the trauma room, she saw bruising on Nikki's body, including on her head. She said that she then spoke with [Roberson] and asked him what happened, and that he told her that Nikki's injuries were the result of falling off of the bed. She said she immediately became suspicious because that story seemed implausible in light of the severity of Nikki's injuries. She instructed the director of nurses to call the police.
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> The State also called Robbin Odem, the chief nursing officer at Palestine Regional Medical Center, who testified to her own observations of Nikki's extensive head injuries, as well as her similar interaction with, and impression of, [Roberson] in the emergency room that night.
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> Dr. John Ross, the pediatrician who examined Nikki the day she died, testified that she had bruising on her chin, as well as along her left cheek and jaw. Dr. Ross said she also had a large subdural hematoma, which he described as "bleeding outside the brain, but

inside the skull." He said there was edema on the brain tissue, and that her brain had actually shifted from the right side to the left. He said that, in his opinion, Nikki's injuries were not accidental but instead intentionally inflicted.

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

The jury also heard from Courtney Berryhill, Teddie Cox's eleven-year-old niece, who testified that sometimes she spent the night at the home where [Roberson] lived with Teddie, Nikki, and Teddie's ten-year-old daughter Rachel Cox. Courtney said that she once witnessed [Roberson] shake Nikki by the arms in an attempt to make her stop crying. Rachel Cox then testified that [Roberson] had a "bad temper," and that she had witnessed him shake and spank Nikki when she was crying. Rachel said she had seen this happen about ten times. She also recalled a time that [Roberson] threatened to kill Nikki.

Finally, Teddie Cox testified for the State. . .Teddie testified that [Roberson] had a bad temper, and that he would yell at Nikki when she cried, which apparently happened every time he approached her. Teddie said she once heard [Roberson] yell at Nikki: "If you don't shut up I'm going to beat your ass." She also said that [Roberson] would hit Nikki with his hand and also once with a paddle. She said that on that occasion she told [Roberson] that he should not do that because Nikki was a baby. That whipping left bruising on Nikki's buttocks which the Bowmans [Nikki's grandparents] later noticed. Teddie said that, when the Bowmans asked about it, [Roberson] told them that Rachel did it. She said

that she confronted [Roberson] about the incident and that he promised her he would never hit Nikki again.

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

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

The next morning, Teddie was told she was being released. When she spoke to [Roberson] about picking her up, he said that he was bringing Nikki to the hospital because she wasn't breathing and he couldn't get her to wake up. Teddie noted that he did not seem upset about the situation. . .[Roberson] eventually pulled into the parking lot. Teddie said he did not seem to be moving urgently and in fact found a parking spot instead of pulling up to the front door. Nor did he seem to be in any hurry to get Nikki out of the car.

Teddie urged him to bring Nikki to her, and he did. Teddie said Nikki was limp, blue, and did not appear to be breathing. Teddie said she asked [Roberson] what happened, and he said that they had fallen asleep in bed while watching a movie and that he awoke to her crying near the foot of the bed, on the floor. He said he made sure that she was okay and then brought her back into bed with him, and they went back to sleep. Teddie said she was skeptical of this story, because, in her experience, Nikki would always cry for Teddie when [Roberson] tried to sleep in the bed with her. In fact, Teddie said, [Roberson] later did tell her that Nikki was crying for her.

> Nikki died from her injuries after being taken to the hospital in Dallas. Teddie could not accompany Nikki when she was taken to Dallas, but she did not want to return to [Roberson]'s home, so she took her daughter to stay with a relative. In the ensuing weeks, she spoke with [Roberson] occasionally, and she said he never once mentioned Nikki, and that when she did he expressed no interest in talking about her. Teddie said he did not seem sad or emotionally distraught, but that he just showed no interest. At one point, while [Roberson] was in the Anderson County Jail, Teddie said she asked him directly if he had killed Nikki. She said his response was that if he did do it, he didn't remember; that he might have "snapped," but that he doesn't remember doing so.

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

II. Evidence Relating to Punishment

A. The State's evidence

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

> At the punishment phase, the State began by offering [Roberson]'s pen packets. They showed that [Roberson] had been convicted previously of burglary of a habitation, for which he was sentenced to ten years in prison (upon revocation of his probation). They also showed a prior conviction for felony theft, for which [Roberson] received a seven-year sentence, as well as a five-year term for another theft conviction. In total, [Roberson] had been arrested at least seventeen times before murdering Nikki.
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> The State then called Della Gray, [Roberson]'s ex wife and the mother of his two older children. Gray testified that [Roberson] was physically abusive towards her both before and after they got married, including incidents where he strangled her with a coat hanger, punched her in the face and broke her nose while she was

pregnant, and beat her with a fireplace shovel. She also told of a time when she had gone out to help a friend, leaving [Roberson] and their son, Robert, Jr., at home alone together. When she returned, Robert, Jr. had a bruised face, and when she asked him what happened, Robert, Jr. told her he had fallen off the bed. She also described an incident in which [Roberson] was alone in a bedroom with their then two-year-old daughter Victoria for thirty minutes. Victoria was screaming and upset, and when [Roberson] finally let her out of the room she had a "hickey" on her neck. Overall, Gray described herself as scared of [Roberson], such that she never reported any of the suspected abuse to the authorities. She said she currently was not allowed to spend any time with her children. On cross-examination, Gray admitted she had been involved in a lengthy custody battle against [Roberson] and his mother, which she ultimately lost, some eleven years previously. She also admitted to some history of alcohol and drug abuse, and that she had not provided, nor has she been asked to provide, any support for her children in the years since she lost custody of them.

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

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

The State then called David Self, M.D., a psychiatrist who interviewed [Roberson] along with Dr. Allen. Dr. Self disputed [defense psychiatrist Dr. John] Krusz's diagnosis of post-concussion syndrome. He agreed that [Roberson] has poor impulse control, but that led him to conclude that [Roberson] would be at risk to engage in future acts of criminal violence because he would be targeted by other inmates in prison as someone who had hurt a child, and he likely would have to defend himself from physical attacks. On cross-examination, Dr. Allen acknowledged that many people in [Roberson]'s condition do not act out violently in prison,

and that [Roberson] himself had no history of violent incidents during his prior years of incarceration.

Id. at *9-10.

B. The defense's evidence

The CCA further summarized:

> [Roberson] called two officers from the Anderson County jail to testify that [Roberson] had no history of violence or disciplinary problems while incarcerated there. [Roberson] then called Dr. John Krusz. Dr. Krusz's testimony consisted of that which was offered and excluded at the guilt innocence phase, namely, a discussion of what he referred to as [Roberson]'s "post concussional type syndrome." Dr. Krusz said that his evaluation of [Roberson] led him to conclude that, despite his poor ability to deal with stressful situations in the past, [Roberson] would be able to control his behavior in the controlled, structured environment of prison.
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> On cross-examination, Dr. Krusz acknowledged that the major portion of his work was in the treatment of chronic pain and migraine headaches. He also admitted that [Roberson] had not informed him of his history of abuse towards his ex-wife and children. He also acknowledged that, even if [Roberson] was brain damaged, there are many people in the world who are brain damaged and have not murdered a child. Dr. Krusz also conceded that [Roberson]'s brain disorder might be attributable to [Roberson]'s long term history of drug abuse, including intravenous drugs.
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> [Roberson] then called Kelly R. Goodness, Ph.D. Dr. Goodness was a forensic psychologist who had interviewed [Roberson] while he was incarcerated during this trial, as well as other people who knew [Roberson], including his family. Dr. Goodness testified that, in her opinion, [Roberson] had been physically abused as a child by his father, despite denials of abuse by [Roberson] and his family. She also said she believed that [Roberson]'s two older children had been abused, but that she could find no conclusive evidence to say whether the abuse came from [Roberson] or his ex-wife. She said she believed [Roberson] suffered from brain damage specifically,

> that his brain was "compromised"—as well as depression, substance dependence, and antisocial personality disorder. She also testified that [Roberson]'s mother had a very dominant influence on him and that, if not for her influence, he likely would not have sought custody of Nikki. In her opinion, [Roberson] was unlikely to attempt to escape from prison, nor was he likely to pose a future danger while in prison. After Dr. Goodness's testimony, [Roberson] rested his punishment case in chief.

Id. at *9-10.

III. Conviction and Postconviction Proceedings

In February 2003, a jury found Roberson guilty of capital murder for the death of his two-year-old daughter, Nikki Curtis. 5 CR 620[2]. Based on the jury's answers to the special issues, the trial court sentenced Roberson to death. *Id.* at 641–42; Tex. Code Crim. Proc. art. 37.071, § 2(g). The CCA affirmed Roberson's conviction and death sentence on June 20, 2007. *Roberson v. State*, 2002 WL 34217382. The CCA subsequently denied relief on Roberson's initial postconviction application for a writ of habeas corpus, in which he raised thirty-four grounds for relief. *Ex parte Roberson*, Nos. WR-63,081-01, WR-63,081-02, 2009 WL 2959738 (Tex. Crim. App. Sept. 16, 2009) (per curiam) (not

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[2] The Respondent employs the following citation conventions: "CR" refers to the clerk's record of pleadings and documents filed during Roberson's capital-murder trial. "RR" refers to the reporter's record of transcribed trial proceedings. "SX" and "DX" refer to the State's and defense's trial exhibits. "SHCR–01, –02, –03" refer to the clerk's record of pleadings and documents filed during Roberson's initial and subsequent state habeas proceedings. "SHRR–03" refers to the reporter's record of transcribed subsequent state habeas proceedings. "ECF No." refers to the entries on the federal district court's electronic docket sheet. All references are preceded by volume number and followed by page number.

designated for publication). On the same day, the CCA dismissed as a subsequent application a document titled "Notice of Desire to Raise Additional Habeas Corpus Claims." *See id.*

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

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

The CCA granted Roberson's motion to stay his execution and remanded the claims to the trial court for consideration. *Id.* Following a hearing, the trial

[3] When citing the Petitioner's Appendices, the Respondent uses the Petitioner's page numbers rather than the internal document pagination.

court made findings of fact and conclusions of law recommending that the CCA deny habeas relief on all four of Roberson's claims. *Id.* The CCA conducted an independent review of the habeas record and concluded that it supported the trial court's findings of fact and conclusions of law. *Id.* at 3–4. The CCA adopted the court's findings of fact and conclusions of law and denied habeas relief on all of Roberson's claims. *Id.* at 3–4.

Roberson now seeks certiorari review of the CCA's decision. In his petition, Roberson complains that his right to due process was violated by the State's use of allegedly flawed or discredited science and by the state habeas proceeding itself. Petition for Writ of Certiorari (Pet.) at 26, 32. But, as shown below, Roberson's claims merit no relief.

REASONS FOR DENYING THE WRIT

The questions that Roberson presents for review are unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Where a petitioner asserts only factual errors or that a properly stated rule of law was misapplied, certiorari review is "rarely granted." *Id.*

Here, Roberson advances no compelling reason to review his case, and none exists. Indeed, the crux of Roberson's complaint stems from the lower court's application of Article 11.073—which provides a purely statutory, non-

constitutional pathway to habeas relief in cases involving newly available scientific evidence. To that end, this Court lacks jurisdiction to hear them. Even more, Roberson provides no basis for federal relief for his unknowing use of false testimony claim—which stems solely from state law. To the extent he asserts his innocence, this Court has never recognized a freestanding claim of actual innocence. And Roberson was not deprived of due process on state habeas because he had the opportunity to be heard. Beyond that, all of Roberson's claims presented to this Court are unsupported by the record below. Additionally, as Justice Stevens noted, concurring in the denial of an application for a stay in *Kyles v. Whitley*, 498 U.S. 931, 932 (1990):

> This Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims.

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

upon the finality of Roberson's conviction and sentence. Thus, the Court is bound to consider the issues raised only in light of clearly established constitutional principles dictated by precedent as of April 14, 2008. *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989). With this in mind, it is clear that Roberson's Petition presents no important questions of law to justify this Court's exercise of its certiorari jurisdiction.

I. The Court Lacks Jurisdiction over Wholly State Law Claims.

Because Roberson's claims are predicated on a purely state law avenue for relief—Article 11.073 of the Texas Code of Criminal Procedure—jurisdiction is lacking in this Court.[4]

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[4] Article 11.073 provides, in relevant part:

> (a) This article applies to relevant scientific evidence that:
> (1) was not available to be offered by a convicted person at the convicted person's trial; or
> (2) contradicts scientific evidence relied on by the state at trial.
> (b) A court may grant a convicted person relief on an application for a writ of habeas corpus if:
> (1) the convicted person files an application, in the manner provided by [Article 11.071], containing specific facts indicating that:
> (A) relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial; and
> (B) the scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the application; and

In his second subsequent state application, Roberson asserted under Article 11.073 that newly available scientific evidence contradicts evidence of SBS that the State relied on at trial. App. A at 3. Roberson argued that this newly available scientific evidence not only proved that the State violated his right to due process under state law and the federal constitution, but that it also showed that he was actually innocent of capital murder. *Id.* But, as discussed in Section II and Section III, below, Roberson's unknowing use of false testimony and actual innocence claims fail to show a federal constitutional violation. As such, all of Roberson's requested relief flows from a solely-state law source—Article 11.073 and the CCA's interpretation of the Constitution—and this Court lacks jurisdiction to consider the claims.

Indeed, "[e]nacted in 2013. . . Article 11.073 provides a *statutory, non-constitutional* pathway to habeas relief in cases in which 'relevant scientific evidence' was not available to be offered at a convicted person's trial or contradicts scientific evidence the state relied on at trial.'" *Ex parte Kussmaul*, 548 S.W.3d 606, 633 (Tex. Crim. App. 2018) (emphasis added). Similarly, the CCA has concluded as a matter of state law that the State's *unknowing* use of

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> (2) the court makes the findings described by Subdivisions (1)(A) and (B) and also finds that, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.
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false testimony violates due process. *Ex parte Chavez,* 371 S.W.3d at 205 (citing *Chabot,* 300 S.W.3d at 771). Because the CCA denied all of Roberson's arguments predicated on Article 11.073 and its own case law on the merits, such a substantive state law ruling precludes this Court from entertaining these claims. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991), *holding modified by Martinez v. Ryan*, 566 U.S. 1 (2012); *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977) ("[I]t is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts."); *Herb v. Pitcairn*, 324 U.S. 117, 125–26 (1945) ("Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights."). Accordingly, a writ of certiorari should be denied on Roberson's false testimony claim.

II. Roberson's False Testimony Claim Fails to Show a Federal Constitutional Violation. Alternatively, Roberson's False Testimony Claim Is Unsupported by the Record Below.

In the instant petition, Roberson complains that the State's use of "faulty evidence" undermines "his constitutional right to a fundamentally fair trial, denying him the due process the U.S. Constitution guarantees." Pet. at 31. Roberson does not contend that the State knowingly used perjured testimony, and cannot, because his claims are predicated on scientific advancements made after his trial. Thus, he necessarily raises the State's unknowing use of false testimony. *See* Pet.

But this Court has never recognized such a claim. It has held that "the Due Process Clause is violated when the government knowingly uses perjured testimony to obtain a conviction." *Kinsel v. Cain*, 647 F.3d 265, 271 (5th Cir. 2011); *Napue v. Illinois*, 360 U.S. 264, 269 (1959). In *Cash v. Maxwell*, Justice Scalia reiterated that the Supreme Court has "never held" that the unknowing use of false testimony violates the Due Process Clause and that it is "unlikely ever to do so." 565 U.S. 1138, 1145 (2012) (Scalia, J., joined by Alito, J., dissenting from denial of certiorari) ("All we have held is that 'a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment.'") (quoting *Napue*, 360 U.S. at 269).

Roberson's citations to various federal circuit decisions, Pet. at 29, fail to change the fact that "[t]here is a long line of unbroken precedent from. . . the U.S. Supreme Court holding that false trial testimony does not implicate a defendant's due process rights if the State was unaware of the falsity at the time the testimony was given." *Pierre v. Vannoy*, 891 F.3d 224, 230 (5th Cir. 2018) (Ho, J., concurring), *as revised* (June 7, 2018), *cert. denied*, 139 S. Ct. 379 (2018). "That ends this case[.]" *Id.* at 227 (majority opinion). Moreover, there is no conflict between the law applied by the lower court—Article 11.073 and *Ex parte Chavez*—and the Third and Ninth Circuit cases relied upon by Roberson. Thus, there is no prudential reason to resolve any conflict, or to

"clarify" what the law is for the court below. Roberson merely quibbles with the CCA's application of his preferred legal standard to the evidence in his case and the result it subsequently reached. What he is seeking is actually mundane error correction; certiorari review is not warranted here.

Even if Roberson's unknowing use of false testimony argument involved a recognized constitutional claim worthy of this Court's review, he fails to show that his claim merits relief, or, as he contends, that the "State's cause-of-death theory" was "not just flawed and unreliable but patently false." Pet. at 31. The indictment charged Roberson with causing the death of Nikki Curtis "by causing blunt force head injuries, by a manner and means unknown to the grand jury." 1 CR 02. The forensic pathologist who performed Nikki's autopsy[5], Dr. Jill Urban, testified at trial and at the state writ hearing that Nikki's death was a homicide, that she had sustained multiple impacts[6], and that she died due to blunt force head injuries. App. B at 8 (nos. 26, 27, 29); 43 RR 67–78, 85;

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

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

9 SHRR-03 49, 114, 117, 176, 193, 213. And although Dr. Urban discussed shaking as a mechanism for injury in children and could not say there weren't shaking components to Nikki's injuries, Dr. Urban never testified that Nikki was shaken to death. *See* 43 RR 54–98; 9 SHRR-03 7–220; App. B at 8–9 (nos. 28, 30). And Dr. Janet Squires, a pediatrician who examined Nikki while she was on life support, testified at trial that there was evidence of an impact to the back of Nikki's head. App. B at 8 (no. 21); 42 RR 107. She testified that Nikki's death was caused by a combination of shaking and impact. App. B at 8 (nos. 21, 22); 42 RR 120. Because of this, the state habeas court found that "no diagnosis was made upon any triad alone." App. B at 8 (no. 20). The State's "cause-of-death theory," i.e. blunt force injuries, was not disproven by Roberson's new evidence.

Roberson asserts that Nikki had "no significant external signs of trauma." Pet. at i. But ER Nurse Andrea Sims, who saw Nikki before medical intervention allegedly "affected [Nikki's] external appearance," Pet. at 28, testified at trial that Nikki had bruising on her chin and around her eyes, a handprint on her face, and that the back of her skull was bruised and "mushy." 41 RR 111–26. And ER Nurse Kelly Gurganus testified that "the back of her head. . .was red and it was just mushy like a soft spot." *Id.* at 72. Nikki had significant external signs of trauma that were separate and apart from the classic triad of symptoms for which Roberson now offers alternative diagnoses.

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

Like here, in *Gimenez*, the petitioner presented affidavits from new experts to argue that the State's experts offered false testimony. 821 F.3d at 1142. The court observed that any contradictions in expert testimony amounted to "a difference of opinion—not false testimony." *Id*. The petitioner had presented "a battle between experts who have different opinions about how [the victim] died." *Id*. at 1143. Gimenez was not entitled to relief because he "presented literature revealing not so much a repudiation of triad-only [SBS], but a vigorous debate about its validity within the scientific community" that "continues to the present day." *Id*. at 1145. Ultimately, the court held that the

petitioner could not prove by "'clear and convincing evidence' that 'no reasonable factfinder' would have found him guilty but for the introduction of purportedly flawed SBS testimony." *Id*. (quoting 28 U.S.C. § 2244(b)(2)(B)(ii)). To be sure, Roberson's experts disagree with the State's testimony concerning the diagnosis of the triad, the number of impacts Nikki sustained, and the mechanism of injury. But as the court noted in *Gimenez*, "[i]ntroducing expert testimony that is contradicted by other experts, whether at trial or at a later date, doesn't amount to suborning perjury or falsifying documents; it's standard litigation." *Id*. at 1143.

Indeed, Roberson's own expert testimony did not establish Roberson's instant position. Professor Kenneth Monson, Roberson's expert on biomechanics, and Dr. Janice Ophoven, a pediatric forensic pathologist, testified at the state writ hearing that SBS is still a recognized diagnosis in the medical field. App. B at 7 (nos. 9, 12); 4 SHRR-03 67; 5 SHRR-03 121–22. Further, Professor Monson could not say that shaking cannot kill a child, agreed that no one testified at trial that Nikki was killed by shaking alone, and agreed that "the question of shaken baby alone" was moot because there was evidence of an impact. App. B at 7 (nos. 10, 11, 16); 5 SHRR-03 122.

Roberson's implausible version of events—that Nikki's traumatic injuries were caused by an unlikely, tragic coincidence of her underlying

medical conditions and a fall off a twenty-four inch[7] bed—ignores the testimony from several witnesses at trial that had seen Roberson shaking and abusing Nikki. Contrary to Roberson's contention that Nikki's death was all a terrible accident, the jury heard substantial evidence of Roberson's culpability through testimony that he delayed seeking treatment for Nikki and even dawdled by dressing Nikki and looking for parking at the hospital—all while Nikki had ceased to breathe.[8] Roberson's dilatoriness cannot be explained

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[7] 41 RR 162.

[8] Teddie Cox was herself in the hospital recuperating from an operation on the morning of Nikki's injuries. She testified that she called Roberson to ask him to come pick her up but the phone line was busy. 42 RR 181–82. Eventually, Roberson called her back, and they first discussed that Cox was to be released before Roberson said "he had to come up there anyway because he had to bring Nikki to the hospital" because "she wasn't breathing and he couldn't get her to wake up." *Id.* at 183. Cox then called back five minutes later and Roberson picked up. *Id.* at 184. Cox asked "Why was [Roberson] still there? Why wasn't he on his way to the hospital?" and Roberson responded that he had to "get [Nikki] dressed." *Id.* Cox commandeered a hospital wheelchair and went down to wait for Roberson and Nikki at the emergency door. *Id.* at 185. The following exchange occurred at trial:

> Q: Did Robert ever pull into the parking lot?
> A: Yes sir
> Q: Now when he came pulling in did he seem like he was in a hurry?
> A: No sir
> Q: Just sort of pulled in like anybody would pull in and find a spot?
> A: Yes sir
> Q: What happened next?
> A: He got out of the car and just—He was looking down and just shaking his head. And I said "Well where's Nikki? You need to get her out." He went around to the passenger's side because Nikki was in the back and he got her out. And I told him to hand her to me and he did.
> Q: Did he seem like he was in any great rush or any hurry to get Nikki out of the car?

away by a diagnosis of autism, as he attempts to do for his reported strange personal affect at the hospital. *See* Pet. at 6. Roberson's fall theory was explored at trial, but reasonably rejected by the jury who had heard the aforementioned testimony and could call upon their own experience of small children's falls. The CCA therefore rightly decided that Roberson had not met his burden of showing that, by a preponderance of the evidence, if the new scientific evidence had been presented at trial, he would not have been convicted. App. A; *see* Tex. Code Crim. Proc. Art. 11.073(b)(2). For all these reasons, this claim is unworthy of this Court's review.

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

Roberson contends that he is an "innocent man," "'like Forrest Gump,'" wrongly convicted for the "mystifying" death of his daughter. Pet. at i, 26, 31. Like his unknowing use of false testimony claim, Roberson's assertion that he is actually innocent falls flat. In his second subsequent application, Roberson alleged that the newly available scientific evidence showed he was actually innocent of his capital crime, citing *Herrera v. Collins*, 506 U.S. 390, 400 (1993). App. A at 3. But this Court has never recognized a standalone actual innocence

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A: Not to get her out of the car.

Id. at 185–86.

ground for relief. *See Herrera*, 506 U.S. at 400. Indeed, a federal habeas court does not concern itself with the petitioner's guilt or innocence—that is an issue of fact for determination by the state courts. *Id*. Rather, the sole question a federal court considers on habeas review is whether the petitioner's federal constitutional rights were violated. *Id*; *see, e.g., Moore v. Dempsey*, 261 U.S. 86, 87–88 (1923) (Holmes, J.) ("[W]hat we have to deal with [on habeas review] is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved.").

What is more, in *Hererra*, this Court made plain that even if federal habeas relief could be granted for a standalone actual innocence claim, such relief would be predicated on there being "no state avenue open to process such a claim." *Herrera*, 506 U.S. at 417. Texas has an avenue by which to pursue innocence claims. *Ex parte Elizondo*, 947 S.W.2d 202, 208–09 (Tex. Crim. App. 1996). Federal relief is therefore not permitted.

But even if this Court recognized a freestanding claim of actual innocence as a standalone ground for relief, Roberson's case presents a poor vehicle for achieving that end. That is because, even accepting Roberson's new scientific evidence, there is nothing in the record indicating that no reasonable juror would have convicted him in light of such evidence. As discussed above, Roberson new scientific evidence, at most, engages a "battle of the experts" regarding the diagnosis of the SBS triad and debates the number of impacts

and the mechanism of injury. When that evidence is considered in light of the trial record as a whole it "falls far short" of showing that Roberson is actually innocent of capital murder. *Herrera*, 506 U.S. at 417.

IV. Roberson's Second Subsequent State Writ Application Proceedings Did Not Violate His Right to Due Process.

In his petition, Roberson alleges that he was deprived of due process because the evidentiary record that he developed was "inexplicably ignored." Pet. at 32. Roberson contends that the State: 1) "endeavored to keep out scientific articles illustrating the change in scientific understanding"; 2) argued that it had not relied on SBS, and, in the alternative, that SBS was still a recognized diagnosis in the medical field; and 3) produced a "skeletal" proposed Factual Findings and Conclusions of Law (FFCL) that "misrepresented" or "ignored" Roberson's new evidence. Pet. at 33. Roberson accuses the state habeas court of rubber-stamping the State's proposed FFCL, including the proposition that "some members of the medical community still believe" in the legitimacy of SBS and its alleged insistence that Roberson had adduced no new evidence. Pet. at 33–34. Roberson then critiques the CCA for "uncritically" adopting the habeas court's FFCL, contends that the CCA did so without "considering" the evidentiary record and asserts that the CCA's "abdication warrants summary reversal." Pet. at 35, 38–39.

Because State habeas proceedings are not required under the Constitution, federal courts may upset the State's postconviction procedure only if it was fundamentally inadequate to vindicate Roberson's substantive rights. The record shows that the State's habeas proceedings adequately complied with due process. Accordingly, Roberson's petition for a writ of certiorari should be denied.

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

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

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

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

trial stage of a capital case are . . . sufficient to assure the reliability of the process by which the death penalty is imposed." *Id.*

And, where a State allows for post-conviction proceedings, "the Federal Constitution [does not] dictate[] the exact form such assistance must assume." *Finley*, 481 U.S. at 555, 557, 559; *cf. Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) ("federal habeas corpus relief does not lie for errors of state law") (internal quotation marks and citation omitted); *Henderson v. Cockrell*, 333 F.3d 592, 606 (5th Cir. 2003) (infirmities in state habeas proceedings do not state a claim for federal habeas relief); *Beazley v. Johnson*, 242 F.3d 248, 271 (5th Cir. 2001); *Wheat v. Johnson*, 238 F.3d 357, 361 (5th Cir. 2001). Indeed, as the Court has explained, "[f]ederal courts may upset a State's postconviction procedures only if they are fundamentally inadequate to vindicate the substantive rights provided." *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009).

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

The "fundamental requisite of due process of law is the opportunity to be heard." *Ford v. Wainwright*, 477 U.S. 399, 413 (1986) (citation omitted); *Tercero v. Stephens*, 738 F.3d 141, 148 (5th Cir. 2013) (federal habeas case extending core procedural due process protections to inmates seeking to prove that they are ineligible for the death penalty due to being underage, but noting

that "states retain discretion to set gateways to full consideration and to define the manner in which habeas petitioners may develop their claims" and "'[d]ue process does not require a full trial on the merits'; instead, petitioners are guaranteed only the 'opportunity to be heard.'") (footnotes and citations omitted). In the case-at-bar, Roberson most certainly had notice and the opportunity to be heard.

Represented by the Office of Capital and Forensic Wits, a state public defender statutorily mandated to provide Texas death row inmates with full-service postconviction representation, Roberson filed a second subsequent habeas application raising four claims related to the newly available scientific evidence. App. C at 20. The CCA remanded the claims to the trial court for resolution. App. C at 21. The trial court held an evidentiary hearing, wherein Roberson brought ten witnesses and over one hundred exhibits. App. A at 3; *see* 1 SHRR-03 2–13. Both sides submitted proposed FFCLs. App. D; App. E. Ultimately, the trial court made findings of fact and conclusions of law recommending that the CCA deny relief on all of Roberson's claims. App. A at 3. The CCA "reviewed the habeas record" and concluded that "it supports the habeas court's findings of fact and conclusions of law." App. A at 3. The CCA agreed with the habeas court's recommendation and adopted the court's FFCL. *Id.* at 3–4. And "[b]ased on those findings and conclusions" and the CCA's "own

independent review of the record," the CCA denied habeas relief on all of Roberson's claims. *Id.* at 4.

The Texas habeas system thus gave Roberson the means and the opportunity to make claims, marshal evidence in support of his cause, and address the adverse evidence adduced against him. Simply because Roberson did not prevail does not mean that he was denied notice or an opportunity to be heard.

Several of Roberson's complaints concern the State's subjecting his claims and new evidence to the adversarial process. *See* Pet. at 33. But litigants are afforded an equal opportunity to present arguments and challenge experts and evidence under the rules of evidence and the rules of criminal procedure. *See*, *e.g.*, Tex. Evid. R. 101, 705; Tex. Code Crim. Proc. Art. 11.071 §§ 7, 8(b), 9(e), 10. Attorneys for the State have a duty to represent their client's best interests; challenging experts and evidence, refusing to waive arguments, and proposing a FFCL that vindicates their position are part of that duty. Roberson provides no caselaw that suggests that the State's actions deprived him of due process.

Next, Roberson contends that the state habeas court merely "rubber-stamped" the State's proposed FFCL. Pet. at 33. This Court has previously accepted the verbatim adoption of the findings submitted by a prevailing party,

although it has been critical of the process.[9] *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 572 (1985) ("even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous"); *see also Hudson v. Quarterman*, 273 F. App'x 331, 335 (5th Cir. 2008) (rejecting assertion that deference was not required because state court adopted respondent's proposed findings and conclusions) (citing *Trevino v. Johnson*, 168 F.3d 173, 180 (5th Cir. 1999)); *see also Trevino*, 168 F.3d at 180 (rejecting due process challenge to state habeas court's verbatim adoption of district attorney's proposed findings of fact and conclusions of law).

But here the state habeas court's FFCL are not identical to the State's proposal. Indeed, the state habeas court's FFCL differ in significant ways that display the court's consideration of Roberson's new scientific evidence from the state writ hearing. The state habeas court's FFCL helpfully demarcates many of its contributions or alterations to the State's proposed FFCL with a dash. *Compare* App. B *with* App. E. While Roberson complains that the State's proposed FFCL "ignored" his evidence, the state habeas court certainly did not. Pet. at 33; *see* App. B. For example, the state habeas court's FFCL included Dr. Monson's testimony (nos. 13, 17), Dr. Wilgren's testimony (no. 43), Dr. Auer's

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[9] Criticism of this practice occurs "particularly when those findings have taken the form of conclusory statements unsupported by citation to the record." *Anderson*, 470 U.S. at 572. The findings and conclusions in this case are neither conclusory nor unaccompanied by citations to the record. App. B.

testimony (no. 44), and Dr. Ophoven's testimony (no.45), among others, whereas the State's proposed FFCL did not. *See* App. B. If the State's proposed FFCL was "skeletal" as Roberson contends, then the state court endeavored to flesh it out with exactly what Roberson alleges was missing—the evidence he adduced at the state writ hearing. Pet. at 33. Such an endeavor demonstrates the very deliberation of his new evidence that Roberson contends was lacking. There was no rubber-stamping.

Finally, Roberson complains that the CCA "uncritically adopted the habeas court's" FFCL "without any substantive discussion at all." Pet. at 35. Roberson seemingly contends that, contrary to the CCA's assertion, it did not conduct an independent review of the habeas record. *See* Pet. at 38. Roberson can point to no circumstances other than the CCA's failure to grant relief that would give rise to an inference that the CCA conducted no independent judicial analysis or factfinding. *See generally* Pet. As discussed in Section II and III, above, Roberson had not met his burden of showing that, by a preponderance of the evidence, if the new scientific evidence had been presented at trial, he would not have been convicted. App. A; *see* Tex. Code Crim. Proc. Art. 11.073(b)(2). Certiorari should therefore be denied on this claim.

CONCLUSION

As demonstrated above, the CCA correctly denied Roberson's second subsequent state habeas petition and the state habeas process did not violate

Roberson's right to due process. Roberson's petition for a writ of certiorari should be denied.

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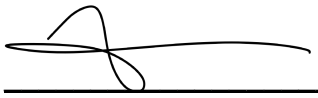

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