No. _____

_____

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2025

_____

CHARLES VICTOR THOMPSON, *Petitioner*
v.
STATE OF TEXAS, *Respondent*

_____

On Petition for a Writ of Certiorari
To the TEXAS COURT OF CRIMINAL APPEALS
THIS IS A CAPITAL CASE
EXECUTION IS SCHEDULED FOR JANUARY 28, 2026

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COMPLIANCE

No. _____

_____

Charles Victor Thompson, *Petitioner*

v.

State of Texas, *Respondent*

_____

As required by Supreme Court Rule 33.1(h), I certify the petition of a writ of certiorari contains **7763** words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 27, 2026.

s/ Eric Allen

_____

Eric Allen (0073384)

QUESTION PRESENTED

Did the Texas Court of Criminal Appeals err when it failed to apply this Court's holdings in *Smith v. Arizona*, 602 U.S. __ (2024) and *Crawford v. Washington*, 541 U.S. 36 (2004) to a case, not final until after *Crawford* was announced, where the Petitioner was denied his Sixth Amendment Right to confront the highly impeachable medical examiner who performed the victim's autopsy because the State used a "surrogate" pathologist witness to admit the autopsy report and establish the victim's cause of death? *See Seavey v. Texas*, 145 S. Ct. 368 (2024) (mem.).

LIST OF PARTIES

1. Petitioner: Charles Victor Thompson, Polunksy Unit, 3872 FM 350 South, Livingston, TX 77351. For Petitioner: Eric J. Allen, Law Office of Eric J. Allen, LTD. 4200 Regent Street, Suite 200, Columbus, Ohio 43219.
2. Respondent: State of Texas, Jay Clendenin, Assistant Attorney General of Texas, 300 W. 15th Street Austin, TX 78701.

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner Charles Victor Thompson respectfully prays that a writ of certiorari issue to review the Texas Court of Criminal Appeals' judgement below.

OPINION BELOW

The Texas Court of Criminal Appeals ("TCCA") decision sought to be reviewed is unreported and is styled as, *Ex Parte Thompson*, WR-78,135-04 (Tex. Crim. App., January 27, 2026) (per curiam), and it appears as Appendix A to this petition.

JURISDICTION

The Texas Court of Criminal Appeals issued its decision on January 27, 2026. A copy is attached as Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI, XIV.

STATEMENT OF THE CASE

A. Factual Summary

Charles Thompson was convicted of capital murder for the deaths of more than one person for the April 30, 1998, deaths of Glenda Dennise Hayslip, Thompson's on-again/off-again girlfriend, and Darren Cain, a man with whom

Hayslip had recently begun a new relationship. 16 RR2 139.[1] Cain died immediately and Hayslip was alive and coherent leaving the crime scene. Following medical negligence at Houston's Hermann Hospital, Hayslip died at the hospital days later. At Mr. Thompson's trials, the State was able to present unconfronted expert evidence on the critical question of the cause of death of the second victim, Dennise Hayslip. Ms. Hayslip was injured by a bullet wound that broke her jaw and lacerated her tongue but was alive, ambulatory, communicative and had good vitals while awaiting treatment for a clearly survivable wound. However, a failed intubation resulted in Ms. Hayslip being deprived of oxygen during her surgery, causing catastrophic brain damage and resulting in her death after she was removed from life support days later.

Ms. Hayslip was shot once in the jaw, with the damage from the bullet limited to her jaw bones and soft tissues of the mouth and tongue.[2] Before surgery, none of her vital organs were damaged: not the brain, the kidneys, heart, or lungs; nor was her spinal cord damaged.[3] Though injured, Ms. Hayslip walked away from the shooting. She walked to a neighbor's door and knocked; after receiving no response, she walked to another neighbor's door where she received a response.[4]

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[1] This petition uses the following citation convention:
- the clerk's record from the first trial is cited as CR1 (page #);
- the reporter's record from the first trial as (volume #) RR1 (page #);
- the clerk's record from the punishment retrial as CR2 (page #); and

the reporter's record from the punishment retrial as (volume #) RR2 (page #).

[2] 12 RR 104-05.

[3] 12 RR 110–13.

[4] 11 RR1 57-59.

The first neighbor called an ambulance, and Ms. Hayslip walked to the roadside and waited for the ambulance.[5]

After initial treatment on the scene by emergency medical personnel, Ms. Hayslip was brought to the trauma center at Hermann Hospital in Houston.[6] Ms. Hayslip signed herself into the hospital and signed and initialed a consent-to-treatment form.[7]

Despite the wound, Ms. Hayslip was alert and responsive after the shooting.[8] She was able to communicate with police, hospital staff, and her family by using sign language or by writing notes.[9] Pre-surgery, she received a perfect score on a numerical measure of functioning called the Glasgow Coma Scale: the highest level of responsiveness.[10] She was able to sit upright to allow the blood to drip out from the wound and protect her airway.[11] She was breathing through her nose on her own; her blood pressure and pulse were normal.[12]

While waiting for surgery, she was visited by her brother, Mike Donaghy.[13] Mr. Donaghy spoke to Ms. Hayslip for twenty minutes, and Ms. Hayslip wrote notes in response. During their conversation, Ms. Hayslip fully understood everything her brother said and was coherently responding to him. According to Mr. Donaghy, "she

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[5] *Id.*
[6] 12 RR1 7.
[7] Exhibit 14, Medical Consent Form.
[8] 11 RR1 97.
[9] 12 RR1 61–62.
[10] 12 RR1 230–31.
[11] 12 RR1 182–83.
[12] 12 RR1 184.
[13] 11 RR1 242.

was there."[14] Ms. Hayslip asked her brother to call her boss, including writing down his phone number, and to call her ex-husband, Felix.[15]

Ms. Hayslip was suffering from a survivable wound capable of adequate treatment in any trauma center in the country.[16]

In preparation for the surgery to deal with Ms. Hayslip's injury, the attending physicians decided to establish an airway to allow Ms. Hayslip to be repositioned onto her back and to simplify operating on her mouth.[17] The doctor in charge of making these decisions was Dr. David Warters, the anesthesiologist; he was the expert in the area of airway management.[18]

Dr. Warters inserted a breathing tube through Ms. Hayslip's nose and down the back of her throat.[19] When this procedure is performed properly, this flexible breathing tube will curl down, pass by the vocal cords, and enter the trachea.[20] Once the tube is at the right level, the cuff-like balloon near the end of the tube is

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[14] 18 RR2 25:
Q. Did you speak with your sister?
A. I spoke to her. She could not speak to me. She could communicate with writing notes.
Q. Did it appear that she was understanding what you were saying?
A. She understood everything I said.
Q. What makes you say that?
A. She was fully coherent. She was talking to me. She was writing notes. I mean, she was there.
[15] 18 RR2 26-7.
[16] 12 RR 232
[17] 12 RR1 18.
[18] *Id.*; *see also* 12 RR1 63 ("Q. If you hadn't considered [the airway procedure] reliable you wouldn't have used it in this case; would you?
A. Doctor Warters, that was his first choice and he is the anesthesia expert.
Q. His decision to use the nasotracheal tube?
[ ]
A. That was his decision").
[19] 12 RR1 215.
[20] 12 RR1 216.

inflated in order to secure the tube and prevent drainage into the lungs.[21] This is a standard, common, and safe procedure.[22] Here, as is common, it was performed before a more invasive (but more secure) airway was to be established.[23] After the tube was inserted, Ms. Hayslip was laid back to prepare for surgery, and the physicians went out to scrub down for five minutes before surgery.[24]

But the intubation was botched, and Ms. Hayslip did not receive the oxygen she needed. The physicians were called back into the room because Ms. Hayslip did not look good: she looked ashen, indicating a lack of oxygen.[25] Her heart rate was slowing and continued to slow, along with her blood pressure and carbon dioxide levels.[26] According to the attending physician, Dr. Marvin, the crisis lasted for about five to ten minutes.[27] The surgeons began inserting the more invasive emergency airway by cutting between the cartilage in the throat.[28] One of the surgeons investigated this incision by probing it with his finger; the breathing tube that should have supplied air to Ms. Hayslip's lungs was not there.[29]

After inserting a new airway and performing emergency CPR, Ms. Hayslip's vital signs stabilized.[30] At this point, her oral surgery proceeded, and the surgeons

[21] 12 RR1 35.
[22] 12 RR1 18 (describing it as a "standard" procedure); 12 RR1 217–18 (describing it as "common" and "safe").
[23] 12 RR1 19.
[24] 12 RR1 19
[25] 12 RR1 19–20.
[26] 12 RR1 20.
[27] 12 RR1 64.
[28] 12 RR1 20.
[29] 12 RR1 58.
[30] 12 RR1 21.

were able to clean up and suture her gunshot wound without further incident.[31] Because Ms. Hayslip was deprived of oxygen due to the botched intubation, however, her brain did not get enough oxygen and was severely damaged.[32]

The surgery lasted ten hours.[33] During that time, a group of twenty to thirty loved ones joined Ms. Hayslip's brother, Mr. Donaghy, at the hospital.[34] As they were becoming increasingly worried, they received no updates from the hospital until the surgery was over.[35]

Finally, the surgeons came out and told the family that Ms. Hayslip went into cardiac arrest; she was revived, but her brain went without oxygen for an unspecified period of time.[36]

Ms. Hayslip remained unresponsive for four days. At that point, her family elected to turn off life support. She died three days later, on May 6, 1998.[37]

Following Ms. Hayslip's death, her family gave notice of[38] and eventually filed a medical malpractice suit against the hospital and attending physicians, alleging negligence in her medical care.[39] Notably, Ms. Hayslip's family relied on the same medical expert on the question of cause of death as Mr. Thompson did in his criminal trial, Dr. Paul Radelat. The civil suit alleged that Ms. Hayslip had

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[31] 12 RR1 22.
[32] 12 RR1 222.
[33] 11 RR1 253.
[34] 18 RR2 29.
[35] 18 RR2 30.
[36] *Id*.
[37] 11 RR1 249.
[38] 12 RR1 77 (Dr. Marvin testified at the time of the criminal trial that he had received notice that there was going to be a civil action).
[39] Exhibit 15 , Civil Complaint, Subsequent Writ Filed January 20, 2026.

suffered a non-lethal gunshot wound that, while serious, was not critical, did not require immediate care and was survivable with routine, proper care. The suit alleged that Ms. Hayslip's death was the natural result of acts and omissions of the hospital and its staff in its faulty intubation and inattention.[40]

Experts on both sides of the civil lawsuit did not offer the autopsy report or its conclusions as to cause of death into evidence at the civil trial and instead "agreed that the ultimate cause of death [of Ms. Hayslip] was oxygen starvation to her brain."[41] A motion *in limine* was granted to prohibit reference to the Shrode autopsy report and its conclusion as to cause of death as being misleading and because all experts agreed that the cause of death was, in fact, oxygen starvation.[42]

Dr. Paul Shrode conducted the autopsy of Ms. Hayslip. At trial, however, the State called Dr. Patricia Moore, who performed the autopsy on Mr. Cain but did not participate in the autopsy of Ms. Hayslip. [43] Dr. Shrode—who, it turns out, was a highly impeachable witness—never testified, despite being available to the State. The State introduced Dr. Shrode's hearsay report and autopsy photographs through Dr. Moore's testimony as records kept in the ordinary course of business. Dr. Shrode's report concluded that the cause of death was gunshot wound of face.

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[40] After the guilt-phase trial in this case, the lawsuit went to a jury trial against Dr. Warters only; ten jurors concurred in finding Dr. Warters not liable, with two jurors not joining that verdict. Exhibit 16 , Civil Lawsuit Verdict.

[41] Exhibit 2, Civil Plaintiff's Motion and Order *in Limine,* Subsequent Writ Filed January 20, 2026 (noting that the presiding judge granted the motion in limine that prohibited the defense from "refer[ring], offer[ing] or attempt[ing] to offer, in any fashion, the conclusions as to the cause of death contained in the death certificate and autopsy report of Plaintiff's decedent, because same are misleading, and every expert, including Defendant, has agreed that the ultimate cause of death of Plaintiff's decedent was oxygen starvation to her brain.").

[42] *Id.*

[43] 13 RR 1 109

Dr. Moore testified, based on Shrode's work, that she agreed that the cause of death was gunshot wound of face. She was the sole testifying witness to this effect. In 2026, with more experience and training, Dr. Moore has now withdrawn that opinion and believes that the complications during the treatment of the gunshot wound caused Ms. Hayslip's death.[44]

On January 13, 2026, Dr. Patricia Moore swore an affidavit withdrawing the opinion she testified to at Mr. Thompson's trial that cause of Ms. Hayslip's death was gunshot wound of face and replacing it with the opinion that the cause of death was complications during the treatment of the gunshot wound. Dr. Moore also swore that the bullet wound to the face did not independently cause Ms. Hayslip's death and that Ms. Hayslip would most likely have survived the wound but for the medical misadventure. Dr. Moore further swore that Dr. Shrode's autopsy report failed to address the medical misadventure in this case and that she withdrew her adoption of its findings.

B. Procedural History

The State of Texas charged Mr. Thompson with capital murder on July 23, 1998. The specification was that he was responsible for the first-degree murder of more than one person. Tx Code 19.03 (a)(6). After a jury trial, Mr. Thompson was convicted on that count in April 1999, making him eligible for the death penalty. And the jury sentenced Mr. Thompson to death. Mr. Thompson filed an appeal of the conviction and sentence. The Texas Court of Criminal Appeals affirmed his

[44] Exhibit 26, Subsequent Writ Filed January 20, 2026.

conviction but vacated his sentence and remanded him to the trial court for a new punishment hearing. *Thompson v. State*, 93 S.W.3d 16, 29 (Tex Crim. App. 2001). The defense objected to Dr. Moore testifying to Dr. Shrode's opinion; the objection was overruled. 12 RR1 105 (defense objecting to "[Dr. Moore] testifying as to what [Dr. Shrode's] opinion was" overruled). Dr. Moore proceeded to testify to Dr. Shrode's written cause of death as the gunshot wound to the face. And over the same defense objection, Dr. Shrode's report was admitted into evidence. 12 RR1 109 (defense counsel objecting to the report "on the same basis that I made my oral objections to the testimony admitting her testimony about the other doctor's opinion").

At the punishment retrial, the jury again answered the special issues in a way requiring the trial court to sentence Mr. Thompson to death**.** Thompson filed a timely appeal. The Court of Criminal Appeals affirmed on direct review. *Thompson v. State*, No. AP–73,431, 2007 WL 3208755 (Tex. Crim. App. Oct. 31, 2007).

Mr. Thompson timely filed his first state habeas petition on October 30, 2000. Following the retrial of the punishment phase, a subsequent writ was filed on June 27, 2007. The Texas Court of Criminal Appeals denied state habeas relief on April 17, 2013. *Ex parte Thompson*, Nos. WR-78,135-01, WR-78,135-02, 2013 WL 1655676, *6 (Tex. Crim. App. Apr. 17, 2013).

On May 6, 2015, the federal district court granted a motion to stay Mr. Thompson's federal habeas proceedings so that he could return to state court to exhaust previously unraised claims. On September 24, 2015, Mr. Thompson filed

his first subsequent state habeas application. This Court dismissed the application. *Ex parte Thompson*, No. WR-78,135-03, 2016 WL 922131 (Tex. Crim. App. Mar. 9, 2016).

The federal district court subsequently denied federal habeas relief. The Fifth Circuit granted a certificate of appealability but affirmed the district court's denial of relief—*Thompson v. Davis,* 941 F.3d 813, 817 (5th Cir. 2019). On September 11, 2025, the trial court set an execution date for January 28, 2026.

REASONS FOR GRANTING THE PETITION

I.

THE TCCA'S SANCTIONING OF THE ADMISSION OF UNCONFRONTED TESTIMONIAL HEARSAY THROUGH A SURROGATE EXPERT WITNESS DECIDES AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

Mr. Thompson was convicted of capital murder in a trial in which, over a defense objection, the State was permitted to call a medical examiner who played no role in the autopsy and through that examiner was permitted to admit the absent pathologist's autopsy report, have the absent pathologist's findings presented to the jury and then endorsed by the surrogate pathologist. At a subsequent punishment trial, a different surrogate pathologist went through the same exercise and Thompson was sentenced to death. The original examiner was at all times available and un-cross-examined but was also a highly impeachable witness whose poor work has seen clemency granted in one case and his firing in another.

Thompson's trial and conviction took place before this Court announced *Crawford,* but *Crawford* was announced prior to Thompson's conviction and sentence becoming final on direct appeal.

No Texas court has ever considered the merits of Thompson's Confrontation Claim in light of *Crawford*, and now, in light of *Smith*. Prior to *Smith*, TCCA

jurisprudence permitted the admission of what would be testimonial hearsay from an absent pathologist as "basis" evidence. This Court has previously GVR'd a very similar Texas case in light of *Smith*. *Seavey v. Texas*, 145 S.Ct. 368 (2024), *cert. granted*.

Notwithstanding *Smith* and *Seavey*, the TCCA in Thompson's case affirmed the use of a surrogate pathologist to admit the autopsy report of an absent but available witness in direct violation of the Confrontation Clause. *Ex Parte Thompson*, WR-78,135-04 (Tex. Crim. App., January 27, 2026) (per curiam).

Certiorari should be granted because the TCCA has decided an important federal question in a way that conflicts with relevant decisions of this Court.

The entire issue at trial was cause of death and the only direct evidence that death was caused here by the gunshot wound, rather than by the botched intubation, was that of the absent pathologist, as related and rubber stamped by the surrogate pathologist. Moreover, the surrogate pathologist has now withdrawn her opinion and no longer endorses the absent pathologist's findings.

Thompson should not be executed on a record in which his Confrontation rights have been so baldly violated and where the TCCA has declined to apply and follow the decisions of this Court.

A. THE STATE COURT GROUNDS WERE NOT ADEQUATE AND INDEPENDENT OF THE FEDERAL QUESTION AND DO NOT PRECLUDE REVIEW BY THIS COURT

This Court generally won't review a state-court decision that "rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Lee v. Kemna*, 534 U.S. 362, 375 (2002) (emphasis omitted). For adequate and independent state grounds (AISG) to preclude review, the judgment must rest on a ground that is *both* adequate and independent. *See Harris v. Reed*, 489 U.S. 255, 260 (1989). Adequacy and independence are themselves federal questions subject to review in this Court. *See Johnson v. Mississippi*, 486 U.S. 578, 587 (1988).

Here, the TCCA's state-law grounds are neither adequate nor independent. The TCCA denied Thompson's application in two boilerplate sentences: "We have reviewed the application and find that Applicant has failed to show that he satisfies the requirements of Article 11.071 § 5 or Article 11.073. Accordingly, we dismiss the application as an abuse of the writ without reviewing the merits of the claims raised. Art. 11.071 § 5(c)." *Ex Parte Thompson*, WR-78,135-04 (Tex. Crim. App., January 27, 2026) (per curiam).

The unspecified § 5 grounds relied upon may have depended on federal law, or been inadequate. A § 5 order authorizing litigation of constitutional claims requires provisional review of the claims' factual sufficiency, so TCCA orders denying authorization often depend on federal law. And even if the TCCA's state-law grounds were independent of federal law, then those grounds would be highly irregular—that is, inadequate. *See Johnson*, 486 U.S. at 587. This Court should grant certiorari to consider whether the potential existence of an adequate,

independent ground precludes appellate jurisdiction when the decision may also have been based on grounds that are *inadequate* and *dependent*.

1. **The grounds for denying relief are presumptively and functionally dependent on federal law**

Because the TCCA order does not specify its basis for decision, the potential grounds include any basis for refusing authorization under § 5, which bars subsequent applications unless an exception specified in § 5(a)(1) through (a)(3) applies. Thompson invoked § 5(a)(1) as the authorization for further litigation of his two Confrontation Clause claims. For each, the denial of authorization may depend on federal law, and the TCCA cannot preclude this Court's review by declining to spell that out. The § 5(a)(1) grounds are not independent of federal law.

The text of § 5(a)(1) provides a gateway for claims having a legal or factual basis that was "unavailable" when the claimant filed his initial state application.[45] The TCCA grafts a federal-law inquiry onto the § 5(a)(1) analysis—a claimant *also* must show that "the specific facts alleged … would constitute a constitutional violation that would likely require relief from either the conviction or sentence." *Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007). When the TCCA denies authorization of a claim based on its factual insufficiency (i.e., based on its application of federal law), its boilerplate denials *still* describe such resolutions as non-merits adjudications. *See*, *e.g.*, *Campbell*, 226 S.W.3d at 421-25 (refusing to

[45] Section 5(a)(1) permits merits consideration when "the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application."

allow claim to be considered "on its merits" because it flunked federal-law inquiry); *Ex parte Rubio*, Nos. WR- 65,784-02 and WR-65,784-04, 2018 WL 2329302, at *5 (Tex. Crim. App. May 23, 2018) (describing holding that "applicant has not made a prima facie showing" on IATC claim as one that is not "review [of] the merits"); *Ex parte Davila*, No. WR-75,356-03, 2018 WL 1738210 at *1 (Tex. Crim. App. Apr. 9, 2018) ("Applicant has failed to make a *prima facie* showing of a *Brady* violation …. Accordingly, we dismiss this application as an abuse of the writ *without reviewing the merits of the claims raised*." (emphasis added)); *Ex parte Cruz-Garcia*, Nos. WR- 85,051-02 and WR-85,051-03, 2017 WL 4947132 at *2 (Tex. Crim. App. Nov. 1, 2017) ("Applicant fails to make a *prima facie* showing that the new evidence [presented in due process claim] is material to the outcome of his case. Accordingly, we dismiss applicant's subsequent application … under Article 11.071 § 5(a)(1) *without reviewing the merits of the claims raised*." (emphasis added)); *Ex parte Shore*, No. WR-78,133-02, 2017 WL 4534734 at *1 (Tex. Crim. App. Oct. 10, 2017) ("After reviewing this application, we find that applicant has failed to make a *prima facie* showing that a person with brain damage, like an intellectually disabled person, should be categorically exempt from execution.… Accordingly, we dismiss this application as an abuse of the writ *without reviewing the merits of the claim raised*." (emphasis added)); *Ex parte Reed*, Nos. WR-50,961-07 and WR-50,961-08, 2017 WL 2131826 at *1 (Tex. Crim. App. May 7, 2017) ("We find that applicant has failed to make a *prima facie* showing on any of his [federal]

claims…. Accordingly, the application is dismissed as an abuse of the writ *without reviewing the merits of the claims*." (emphasis added)).

Accordingly, when the TCCA issues a boilerplate denial disclaiming any consideration of "the merits," that language does *not* mean that the disposition is independent of federal law, because the TCCA may have made a *prima facie* merits analysis. Rather, "the merits" in that boilerplate language refers to consideration of an applicant's claims after plenary review of the law and the facts, which the court may do only *after* concluding the applicant has satisfied § 5. *See* TEXAS CODE CRIM. PROC. Art. 11.071 § 5(a) ("a court may not consider *the merits* of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing" one of the three exceptions thereunder (emphasis added)). But that doesn't mean the § 5 analysis is independent of federal law. In the federal habeas posture, the Fifth Circuit regularly finds that TCCA dismissals "without reviewing the merits" are actually dependent on federal law for AISG purposes. *See*, *e.g.*, *In re Davila*, 888 F.3d 179, 187-89 (5th Cir. 2018) (rejecting Texas's contention that TCCA relied on AISG ground to dismiss Davila's claim); *see also Rocha v. Thaler*, 626 F.3d 815, 835 (5th Cir. 2010) (holding that § 5(a)(1) dismissals can be merits or non-merits).

In this case, the § 5(a)(1) grounds aren't independent because the TCCA's boilerplate denial does not disclose whether it relied on the prior "presentation" or "availability" of claims (potentially independent), or on their factual sufficiency under federal law (dependent). Long- established authority holds that, when state-

law issues are "interwoven" with federal law and when the independence of the state ground is ambiguous, the Supreme Court must presume in favor of its appellate jurisdiction. *See Coleman v. Thompson*, 501 U.S. 722, 733 (1991) (discussing presumption from *Michigan v. Long*, 463 U.S. 1032, 1040 (1983)). Given that § 5(a)(1) was asserted as a gateway for each claim in the Subsequent Application, the *Long* presumption is enough to establish the requisite independence for appellate jurisdiction here.

2. <u>The grounds for denying relief are inadequate</u>

"[A]n unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question." *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964). If a rule is not "firmly established and regularly followed," or if the application an ordinary rule is "exceptional," then the state ground isn't adequate. *Cruz v. Arizona*, 598 U.S. 17, 26 (2023) (quoting *Lee*, 534 U.S. at 376). Those principles apply to this Court's direct review of state post-conviction judgments in the same way they apply to any other state decision. *See*, *e.g.*, *Cruz*, 598 U.S. at 26 (Arizona post-conviction case involving new-law exception); *see also Glossip v. Oklahoma*, 144 S. Ct. 691, 692 (2024) (granting certiorari to review state post-conviction decision and ordering briefing on adequacy of novel procedural ruling).

The TCCA's boilerplate two-sentence denial makes it impossible to discern its actual grounds for decision—whether an assessment of merit or an application of a procedural requirement. As explained, the Court should presume that the

grounds were dependent on federal law. *See* Section I.A.1, *supra*. But even if they were independent, the grounds would still be *inadequate*, since the claims clearly satisfied Texas's threshold for review.

a. The § 5(a)(1) grounds for denying the *Smith* claims are not adequate.

Section 5(a)(1) permits authorization when the "factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." Thompson's Texas application alleged that his *Smith* claims were legally unavailable. Under Texas law, a claim's legal basis is "unavailable" if, at the time of a prior application, it "was not recognized by or could not have been reasonably formulated from" a Texas or federal appellate decision. TEX. CODE CRIM. PROC. art. 11.071, § 5(d). If the TCCA denied authorization on the *Smith* claims because they were "available" in 2015, then it departed drastically from the established Texas definition of "legal availability"—rendering the grounds for its decision inadequate.

The TCCA's rejection of the *Smith* claim is inadequate. Thompson based that claim on a 2024 decision announcing, for the first time, that the Sixth Amendment's Confrontation Clause precludes prosecutors from using expert testimony to nest testimonial hearsay from an absent forensic analyst. *See Smith v. Arizona*, 602 U.S. 779, 789, 800 (2024). The only argument the State made on the availability ground was that Thompson could have made the claim in 2015, in view of *Crawford v. Washington*, 541 U.S. 36 (2004). Of course, the whole point of

Smith was to eliminate the *legally* significant distinction, existing in the Confrontation Clause cases since *Crawford*, between hearsay introduced by percipient witnesses and hearsay introduced by forensic experts. *Compare Crawford* 541 U.S. at 38, 68 (percipient witness's out-of-court statements), *with Smith*, 602 U.S. at 783 ("The question presented here concerns the application of those principles to a case in which an expert witness restates an absent lab analyst's factual assertions to support his own opinion testimony.")

Further, as discussed in more detail in this petition, until *Smith*, the TCCA had taken the opposite view of the law, allowing "basis" testimony reciting testimonial hearsay as long as the expert ultimately expressed his or her own opinion. *Smith* wiped away the TCCA's erroneous understanding of federal constitutional law but the TCCA has refused to consider Thompson's claims under *Crawford* and *Smith*, even though *Crawford* was decided before Thompson's conviction was final on direct appeal.

II.

THE CCA'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *CRAWFORD*, *SMITH*, AND *SEAVEY*

A. The Testimony of Medical Examiner Patricia Moore Violated Mr. Thompson's Right to Confrontation

At Mr. Thompson's trial, Dr. Patricia Moore was permitted to testify to Dr. Paul Shrode's testimonial hearsay report, even though Dr. Moore did not perform the autopsy, was not present for the autopsy, and did not author or sign the autopsy report. At trial, the prosecution presented evidence about the autopsy findings,

including the critical conclusion that the cause of Ms. Hayslip's death was the gunshot wound. However, the medical examiner responsible for Ms. Hayslip's autopsy, Dr. Paul Shrode, was not called as a witness, even though he was available[46] and had not been previously cross-examined.[47] The prosecution instead relied on Dr. Patricia Moore as a surrogate medical examiner for Dr. Shrode's autopsy. Dr. Moore was an assistant medical examiner at the Harris County Medical Examiner's Office.[48] She reviewed Dr. Shrode's report[49] and photographs.[50] Dr. Moore testified that the autopsy was performed by Dr. Shrode.[51] When asked if she had participated in Dr. Shrode's autopsy, Dr. Moore stated:

Q. So [Dr. Shrode] actually did this autopsy? You never saw this?[]

A. I never saw the body. I've only seen the autopsy report and the pictures.[52]

Dr. Moore was asked to read directly from Dr. Shrode's report, reciting verbatim Dr. Shrode's descriptions of the gunshot wound and the bullet's path.[53] The prosecutor asked Dr. Moore to relay for the jury Dr. Shrode's direct observations made during

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[46] Dr. Moore testified that Dr. Shrode was in the office at the time of her testimony. 12 RR1 113.
[47] 12 RR1 102–05.
[48] 12 RR1 78–79.
[49] CR1 at 103.
[50] CR1 at 106.
[51] 12 RR1 102:
Q. I want to talk with you a minute about an autopsy report in case number 98-1240.
Did you bring that report with you today at our request?
A. Yes. I did.
Q, Who is the doctor that performed that autopsy report?
A. Doctor Paul Shrode.
[52] 12 RR1 113
[53] 12 RR1 104 (testimony in response to the prosecutor asking, "How did Doctor Shrode describe the injury on Glenda Hayslip?").

the autopsy, essentially dictating his work in tracing the bullet's path and recovering the bullet itself.[54]

Finally, Dr. Moore was asked to relay for the jury Dr. Shrode's opinions as to the cause of Ms. Hayslip's death.[55] The defense objected to Dr. Moore testifying to Dr. Shrode's opinion; the objection was overruled.[56] Dr. Moore recited Dr. Shrode's written cause of death as the gunshot wound to the face and adopted this opinion based on her examination of Dr. Shrode's report and autopsy photographs.[57] (In 2026, Dr. Moore withdrew this opinion.). Over the same defense objection, Dr. Shrode's report was admitted into evidence, and the prosecutor confirmed that the State would not be calling Dr. Shrode.[58]

1. Dr. Shrode's autopsy report was testimonial under the Confrontation Clause.

Dr. Shrode's report was testimonial. It was made by an Assistant State Medical Examiner pursuant to express statutory mandate. Tex. Code Crim. Proc. art. 49.25, § 6 (4) (mandating the medical examiner to conduct an inquest in

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[54] 12 RR1 104–05 (continuing to ask about Dr. Shrode's descriptions of the injury, including asking whether Dr. Shrode noted any exit wounds and the path the bullet took; whether Dr. Shrode made a note to the extent of the damage; and whether he recovered the bullet).

[55] 12 RR1 105.

[56] 12 RR1 105 (defense objecting to "this doctor testifying as to what [Dr. Shrode's] opinion was" overruled).

[57] 12 RR1 106.

[58] 12 RR1 109:

[ADA] SIEGLER: At this time I offer into evidence State's Exhibit 80. Tender to Mr. McCullough for his inspection.

[Defense attorney]: I would object to State's Exhibit 80 on the same basis that I made my oral objections to the testimony admitting her testimony about the other doctor's opinion.

THE COURT: Is that it?

MR. WISNER: I'm not calling him.

THE COURT: Okay, It's overruled, Admitted.

(State's Exhibit(s) No . 80 [the Shrode autopsy report] Admitted)

suspicious-death cases); *Wood*, 299 S.W.3d at 209 (citing the statutory authority as a factor in concluding that the autopsy report was testimonial). It was made in aid of and in close cooperation with the criminal homicide investigation.[59] *Wood*, 299 S.W.3d at 209–10 (the fact that the autopsy was made in connection with the police homicide investigation makes it testimonial). Finally, because it bears the official seal of the Harris County Medical Examiner's Office and is signed by Dr. Shrode, it has sufficient indicia of formality and solemnity to qualify as testimonial.[60]

But Dr. Shrode never testified, and Mr. Thompson never had the opportunity to cross-examine him. Therefore, Dr. Moore relaying the testimonial statements in Dr. Shrode's report, including his firsthand observations and expert opinions based on those observations, clearly violated Mr. Thompson's rights under the Confrontation Clause. Admission of Dr. Shrode's report and testimonial statements based on that report through the testimony of a surrogate pathologist violated Mr. Thompson's Confrontation Clause rights.

Because forensic reports themselves are testimonial, the prosecution also is prohibited from using "surrogate testimony" by a different analyst, when such testimony introduces statements from those reports—unless the analyst who actually wrote the report or performed or observed the forensic procedure has been made available for cross-examination. *Bullcoming*, 564 U.S. at 652; *See Burch v.*

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[59] Exhibit 18, Harris County Sheriff's Office Supplemental Report at 2–3, Subsequent Writ Filed January 20, 2026 (documenting HCSO Detective Barnes's efforts in arranging Ms. Hayslip's autopsy in connection with the murder case, requesting to be present during the autopsy, and communicating the results of Dr. Shrode's autopsy); Exhibit 19, Shrode Autopsy Report at 7 & 10, Subsequent Writ Filed January 20, 2026, (noting contact with the HCSO detectives).

[60] Exhibit 19, Shrode Autopsy Report, Subsequent Writ Filed January 20, 2026.

State, 401 S.W.3d 634, 637-38 (Tex. Crim. App. 2013)("Without having the testimony of the analyst who actually performed the tests, or at least one who observed their execution, the defendant has no way to explore the types of corruption and missteps the Confrontation Clause was designed to protect against.").

And, as the United States Supreme Court recently held in *Smith*, this prohibition on use of surrogate testimony applies to so-called "basis testimony"—that is, testimony that presents the performing analyst's testimonial statements as the basis for the testifying surrogate's purportedly "independent" opinion. *Smith*, 602 U.S. at 803. Therefore, Dr. Moore could not relay Dr. Shrode's observations as a basis for her own opinion. As the holding in *Smith* dictates, the entirety of Dr. Moore's testimony as to Ms. Hayslip's death based on Dr. Shrode's testimonial hearsay violated Mr. Thompson's rights.

2. The testimonial hearsay on the issue of Ms. Hayslip's cause of death was not harmless, because the cause-of-death issue was central to the case, and Dr. Shrode's opinion that the cause of death was the gunshot wound was critical.

The error in admitting Dr. Shrode's report and Dr. Moore's surrogate testimony was not harmless. Mr. Thompson was charged with capital murder of more than one person under Tex. Penal Code § 19.03(a)(7)(A). Therefore, if he had been able to raise a reasonable doubt as to the cause of Ms. Hayslip's death, he would not be guilty of capital murder.

Ms. Hayslip's cause of death was the central issue of the guilt-phase trial. Both sides focused their opening statements[61] and closing arguments on the cause of Ms. Hayslip's death, highlighting the issues with her medical treatment.[62] The legal arguments were focused particularly on the meaning of the jury instruction on the issue of causation.[63] The jury was instructed in accordance with Tex. Pen. Code § 6.04(a). Both sides hotly contested the meaning of the instruction in light of the botched medical treatment, with the parties' closings as to that instruction eliciting four separate objections, three of them by the State.[64] It was the prosecution's burden to prove beyond a reasonable doubt that Ms. Hayslip's death would not have occurred, but for Mr. Thompson's conduct and to exclude any reasonable possibility that the medical misadventure was clearly sufficient to cause the death and any reasonable possibility that Mr. Thompson's conduct was clearly insufficient to cause the death.

Mr. Thompson's defense during the guilt phase hinged on raising a reasonable doubt on the issue of causation and criminal responsibility. Defense counsel argued that Ms. Hayslip suffered a clearly survivable wound and would not have died but for the botched intubation, which deprived her of oxygen and ultimately caused her

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[61] 11 RR1 9–10 (State's opening); 11 RR1 10–11 (defense opening).

[62] 13 RR1 27–28 (State's closing);13 RR1 39–47 (defense closing); 13 RR1 57–60 (State's rebuttal).

[63] 13 RR1 23 (State arguing that "The defendant is guilty unless the concurrent cause was clearly sufficient to produce the result and the conduct of the defendant clearly insufficient. I'll be speaking about that a lot more. But that's so very important in this case.") and 24–26 (State arguing that the concurrent cause was "wholly insufficient"); 13 RR1 42–46 (defense arguing that the wound was survivable and that the medical treatment was the sufficient cause).

[64] 13 RR1 25 (defense objection); 13 RR1 42, 43 & 44 (three State objections; the defense proceeds to argue that the State's repeated objections to the defense interpretation of the instruction shows "how important it is to determine what this interpretation is of those words. Because, actually, that's what all this is it boils down to.").

death. This is not a case where the forensic evidence was uncontested or the evidence on this issue was overwhelming.[65]

Additionally, guilt-phase deliberations lasted over four hours,[66] and during deliberations, the jury requested:

- Dr. Shrode's autopsy report regarding Ms. Hayslip;
- the pictures of Ms. Hayslip before and after surgery; and,
- the hospital medical records regarding Ms. Hayslip. [67]

The jury also asked the court to explain why the name in the medical records was different from Ms. Hayslip's name, further demonstrating that the jurors were focusing on the cause-of-death issue.[68]

Befitting her critical function as a quasi-independent witness on the cause of death, Dr. Moore was the State's final witness, and the only expert witness called to testify by the State to opine that the cause of death was gunshot wound to the face, rather than the botched intubation.[69] The opinion in the autopsy report that the cause of death was the gunshot was, at best, misleading and the true cause of death was oxygen deprivation because of the botched intubation. Because (1) the unconfronted testimonial hearsay went to the heart of the critical issue before the jury, (2) the issue was repeatedly highlighted by the parties' closing arguments, and (3) the jury specifically requested Dr. Shrode's (hearsay) report itself and related

[65] *cf. Johnson v. State*, 605 S.W.3d 843 (Tex. App. 2020) (finding admission of a testimonial serology report harmless where nothing in the report constituted "a controverted fact.")
[66] CR1 at 234–35.
[67] CR1 at 189.
[68] CR1 at 188.
[69] 12 RR1 132.

medical records during the deliberations, it is more probable than not that the improperly admitted testimonial hearsay contributed to the verdict, requiring a grant of relief.

B. **It turns out that Dr. Shrode, the unconfronted witness, is a highly impeachable and vulnerable witness**

While it is no part of Mr. Thompson's burden to show that cross-examination of Dr. Shrode would have yielded valuable impeachment,[70] or that he was kept off the stand because he was a vulnerable witness, it is certainly the case that Dr. Shrode has proven to be an impeachable and vulnerable witness. If called and cross-examined at retrial, defense counsel could not only explore Dr. Shrode's flawed and incomplete opinions on the cause of death but also raise issues implicating Dr. Shrode's credibility and flawed techniques. For example, counsel would be able to raise how, in a different capital case predating his work in this case, the 1997 Ohio capital trial of Richard Nields, Dr. Shrode provided testimony central to establishing that the victim was killed by strangulation. However, later evidence presented to the Ohio Parole Board—evidence that the Board specifically relied on in recommending clemency—established that Dr. Shrode's testimony was not supported by science; the Ohio Governor went on to grant clemency to Mr. Nields.[71]

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[70] When cross-examination for impeachment purposes is curtailed, the harmless error test assumes the full damning effect of cross-examination, but where unconfronted evidence is admitted, the prosecution must prove that there is no reasonable possibility that the tainted evidence might have contributed to the jury's verdict of guilt. *United States v. Alvarado-Valdez*, 521 F.3d 337, 341-2 (5th Cir. 2008)(discussing differing application of harmless error test depending upon the nature of the violation) citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) and *Chapman v. California*, 386 U.S. 18 (1967).

[71] Death Penalty Information Center, *Ohio Governor Spares the Life of Death Row Inmate*, available at https://deathpenaltyinfo.org/ohio-governor-spares-the-life-of-death-row-inmate (last visited Nov. 6, 2025).

As part of the evidence, Mr. Nields' defense counsel introduced an affidavit of Dr. Shrode's supervisor at the time that identified critical issues with Dr. Shrode's findings in the case, specifically as to the timing of the injuries relative to the time of death, evidence of the victim's concussions or loss of consciousness, and evidence concerning lack of fingernail scrapings proving unconsciousness of the victim.[72] The Ohio parole authority specifically relied on the affidavit in voting to grant clemency to Mr. Nields.[73]

In addition to the Nields case, Dr. Shrode's credibility in homicide cases has been severely undermined, eventually resulting in him being fired from the El Paso Medical Examiner's Office.[74] Further, Dr. Moore, the surrogate pathologist, has now withdrawn her adoption of Dr. Shrode's findings, noting that Dr. Shrode's autopsy report fails to address the medical misadventure, and concluding that the proper finding regarding cause of death is not "gunshot wound of face," but complications during the treatment of the gunshot wound.

C. **This Court's 2024 decision in *Smith* upended the Texas rule regarding surrogate forensic testimony**

Smith, decided in 2024, addressed one specific question on which the Court had previously fractured. *Smith* held that the State may not introduce the testimonial out-of-court statements of a forensic analyst at trial, unless he is

[72] Exhibit 20, Pfalzgraf affidavit.
[73] Exhibit 21, Parole Authority Recommendation.
[74] *See Medical Examiner Fired after Complaints*, available at https://www.newschannel10.com/storycase/12535964/medical-examiner-fired-after-complaints/ (last visited Nov. 6, 2025), (listing complaints about Shrode, including Shrode lying about his qualifications, "a grieving widow who claims the doctor picked the wrong race for her husband and listed his appendix as missing when it had never been removed," and the testimony in the Ohio capital case discussed below).

unavailable and the defendant has had a prior chance to cross-examine him. Further, the State may not introduce those statements through a "surrogate analyst" who did not participate in their creation. *Smith*, 602 U.S. at 802–03. *Smith* further held that this prohibition extends to situations where the surrogate "presents the out-of-court statements as the basis for his expert opinion." *Id.* at 803. Therefore, the testifying analyst may not relay the substance of the non-testifying analyst's report, even when offering an "independent opinion" on the evidence. *Id.* at 798–99.

Finally, the Court in *Smith* expressly rejected the argument that statutes and evidentiary rules, such as Federal (and Texas) Rule of Evidence 703, which exempt categories of evidence from hearsay rules, control the analysis under the Confrontation Clause. *Id.* at 794. Instead, the Court held that Confrontation Clause analysis requires careful and statement-specific parsing of the testimony, determining each statement's source and its testimonial nature. *Id.* at 800–02. Thus, the Supreme Court announced a rule in *Smith* that upended the prevailing authority in Texas on this point. *Smith* made claims like Mr. Thompson's easier to establish and rendered inapplicable the factor of whether the surrogate expert expressed an independent opinion when that opinion was based on the hearsay statements of an original expert. *See Barbee*, 616 S.W.3d at 839; *Chavez*, 371 S.W.3d at 207. Previously, under *Paredes* and its progeny in the appellate courts, this factor was dispositive: so long as the surrogate expressed an independent opinion, he could introduce the hearsay statements for a non-hearsay purpose, as a

basis for the surrogate's opinion. *Smith* expressly rejected this approach as erroneous and held that those statements are properly understood to be coming in for the truth of what they assert. Following *Smith*, this factor–that the expert goes on to state an independent opinion–is inapplicable in determining whether the original expert's statements are admissible in the Confrontation Clause analysis. After *Smith*, courts may not admit "basis" evidence, such as Dr. Shrode's report or the statements contained in it, and the erroneous admission of such testimonial hearsay can no longer be said to "add little" to the basis evidence and therefore be harmless.

D. This Court GVR'd in light of *Smith* of a Texas surrogate-pathology case on all fours with Mr. Thompson's case

Following *Smith*, the U.S. Supreme Court granted certiorari, vacated, and remanded a Texas surrogate-testimony case to allow reconsideration of the case in light of the new rule from *Smith*. *Seavey v. Texas*, 145 S. Ct. 368 (2024) (mem.). *Seavey*, on certiorari to the Fourteenth Court of Appeal, presented a nearly identical issue to the one presented in Mr. Thompson's case. *Seavey*, No. 24-5118, Pet. ii ("Where the State used a surrogate medical examiner to opine as to the cause of death in a murder trial, should the Court GVR this matter in light of the Court's recent decision in *Smith v. Arizona*?").[75] The lower court had simply relied on Texas' post-*Williams* "more-than-a-mere-surrogate" rule, finding that that because the medical examiner did not "blindly recite" the performing analyst's findings and

[75] Available at https://www.supremecourt.gov/DocketPDF/24/24-5118/318094/20240715153916311_Cert%20Petition.pdf.

instead based his testimony on "independent analysis" of the available records, including hearsay forensic reports and autopsy photographs, his testimony was admissible. *Seavey v. State*, No. 14-22-00513-CR, 2023 WL 8588054, at *2–3 (Tex. App.—Houston [14th Dist.] Dec. 12, 2023, pet. ref'd) (mem. op. not designated for publication).

The State of Texas opposed certiorari, arguing in opposition that the substitute pathologist's "independent opinion" was properly based on autopsy photographs. *Seavey*, No. 24-5118, State's Br. in Opp. 19.[76] The Supreme Court summarily reversed the appellate court's decision and remanded for further consideration in light of *Smith*. Because his case is on all fours with *Seavey,* this Court should grant certiorari, vacate, and remand Mr. Thompson's case, in light of *Smith*.

CONCLUSION

In this capital case, the State proved the victim's cause of death through unconfronted testimonial hearsay channeled through a surrogate pathologist, while the actual pathologist was never cross-examined. The TCCA's cursory denial of this claim neither provides an adequate and independent state ground, nor withstands Crawford. In fact, no court has so far applied Crawford to Mr. Thompson's claims. Just as in *Seavey*, this Court should grant certiorari and reverse for reconsideration, in light of *Smith*.

[76] Available at https://www.supremecourt.gov/DocketPDF/24/24-5118/325591/20240917121723173_Seavey%20v%20Texas%2024-5118%20Brief%20in%20Opposition%20with%20service.pdf.

Respectfully submitted,

s/ Eric Allen

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