

No. 25-939

IN THE
Supreme Court of the United States

JAMES GARFIELD BROADNAX,

Petitioner,

v.

TEXAS,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the state court's dismissal of two habeas claims, based on state-law procedural grounds and explicitly not reaching the merits of the claims, relied on an adequate and independent state procedural ground that forecloses certiorari review?
2. Whether the punishment-phase admission of Broadnax's written rap lyrics during his capital murder trial—including a rap lyric admitting to the capital murder—violated the Eighth and Fourteenth Amendments under *Hart v. State*, 688 S.W.3d 883 (Tex. Crim. App. 2024) and warrants this court's review?
3. Whether the admission—without objection by Broadnax—of a serologist's findings and report during a DNA analyst's testimony violated his confrontation rights under *Smith v. Arizona*, 602 U.S. 779 (2024) and warrants this court's review?

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BRIEF IN OPPOSITION

Petitioner James Garfield Broadnax is scheduled to be executed on April 30, 2026. Broadnax was found guilty of capital murder for the shooting deaths of Stephen Swan and Matthew Butler in the course of a robbery. Broadnax now seeks certiorari review of the Texas Court of Criminal Appeals's (TCCA's) dismissal of his latest subsequent application. Broadnax's second subsequent state habeas application included claims that (1) the punishment-phase admission of his rap lyrics violated his Eighth and Fourteenth Amendment due process, fundamental fairness, and equal protection rights and (2) the guilt-phase admission of a non-testifying serologist's findings and written report violated his Sixth Amendment Confrontation Clause rights under *Smith v. Arizona*, 602 U.S. 779 (2024).

The TCCA determined Broadnax's claims did not satisfy the statutory framework to excuse procedural default under Texas's abuse-of-the-writ bar and dismissed the application without considering the merits of the claims. Broadnax now seeks certiorari review of the TCCA's dismissal, but his petition only implicates the state court's application of state procedural rules for collateral review of death sentences. The state court's boilerplate dismissal of Broadnax's claims on the basis of an independent and adequate state-law ground forecloses certiorari review. Moreover, nothing Broadnax presents warrants this Court's review.

STATEMENT OF THE CASE

I. The Capital Murder

The TCCA summarized the facts of Broadnax's murder and robbery of Swan and Butler on direct appeal:

A man riding his bicycle home from work saw the bodies of Stephen Swan and Matthew Butler in the street outside their recording studio in Garland shortly after 1:00 a.m. on June 19, 2008. The man alerted Garland firefighters at a nearby fire station. Upon arriving at the scene, the firefighters quickly determined that both Swan and Butler were recently deceased. At [Broadnax's] trial, the medical examiner testified that Swan had suffered an intermediate-range gunshot wound to the head, in addition to a gunshot wound to the left chest.

Later that day, [Broadnax] and his cousin, Demarius Cummings, arrived at the Southeast Dallas apartment where [Broadnax] had been staying with family members. While there, [Broadnax] boasted of "hit[ting] a lick"—street slang for committing a robbery—and displayed Swan's driver's license. [Broadnax] and Cummings left the apartment in Swan's Ford Crown Victoria, after telling those present that they planned to sell the vehicle. Fifteen minutes after [Broadnax] and Cummings left, [Broadnax's] aunt's friend who had been present in the apartment saw news reports of the double homicide. She realized that [Broadnax] and

Cummings were likely involved, and she called the Garland Police.

That evening, police officers in Texarkana (which is about 150 miles from Garland) saw Swan's car in a high-crime area. After a check of the license plates returned information for a Cadillac, rather than a Ford, officers pulled the vehicle over. [Broadnax] gave the officers his name, and after they learned that there were warrants for [his] arrest, the officers placed [him] in custody. The arresting officer testified that [Broadnax] did not appear to be intoxicated when he was pulled over.

After being returned to Dallas, [Broadnax] gave multiple interviews to television broadcasters in the Dallas area. These interviews became the crux of the State's case at trial. In them, [Broadnax] confessed to murdering and robbing Swan and Butler, and he provided explicit details of the crimes. He said that he and Cummings had traveled to Garland that day with the specific intent of committing a robbery. [Broadnax] said that while Cummings had participated in the robberies, [he], alone, had murdered the victims. [Broadnax] told reporters that he had no remorse for his actions, and that he hoped a jury would sentence him to death.

At trial, the defense conceded that [Broadnax] had shot Swan and Butler, but argued that [he] was under the influence of marijuana and PCP

at the time of the murders. The defense further posited that [Broadnax] was still intoxicated at the time of his multiple television interviews and confessions four days after his arrest. Several of the State's witnesses were skeptical of [Broadnax's] theory. In addition to the arresting officer's testimony that [Broadnax] was lucid at the time of his arrest, the reporters who interviewed him described [Broadnax] as intelligent and rational. The jail nurse, too, testified that [Broadnax] did not appear to be under the influence of alcohol or drugs.

Broadnax v. State, No. AP-76,207, 2011 WL 6225399, at *1 (Tex. Crim. App. Dec. 14, 2011) (not designated for publication).

II. The Punishment Evidence

The federal district court summarized the punishment evidence as follows:

The punishment phase of Broadnax's capital murder trial commenced on August 13, 2009. The prosecution presented (1) victim impact testimony from Butler's mother and Swan's mother, (2) testimony concerning the results of Butler's autopsy, (3) the custodian of Dallas County Jail inmate telephone records, (4) a pair of investigators for the Dallas County District Attorney's Office, (5) a Dallas County Jail Special Response Team officer who helped supervise a shakedown of Broadnax's cell during which Broadnax became agitated and

had to be restrained physically, (6) a Dallas County Jail detention officer who broke up a fight between Broadnax and another inmate in the jail's recreational area, (7) a Dallas County Jail detention officer who witnessed Broadnax strike a different inmate in an unprovoked assault only weeks before the start of Broadnax's capital murder trial and the inmate Broadnax assaulted, (8) a member of the Dallas Police Department's gang unit, who identified various symbols and phrases Broadnax employed in his drawings and writings as indicating Broadnax's gang membership, and (9) the assistant Warden of a Texas Department of Criminal Justice ("TDCJ") unit, who explained the TDCJ's system for classifying prisoners, the TDCJ's prison disciplinary procedures, and other aspects of prison life in Texas.

Broadnax's defense team called (1) a research psychologist who testified regarding the processes of brain development in humans, (2) a psychiatrist who treated Broadnax at the Dallas County Jail and diagnosed Broadnax with substance abuse-induced psychosis, (3) a professor and researcher in clinical pharmacology who opined that Broadnax was under the influence of marijuana and PCP at the time of his offense and during his interviews several days later, (4) a cousin of Broadnax's mother, who testified to Broadnax's good character as a child, (5) a trio of Broadnax's maternal aunts, concerning Broadnax's abusive childhood, (6) Broadnax's mother,

who testified extensively regarding her own difficulties growing up, Broadnax's family background, her many unstable relationships with men, and Broadnax's extremely unstable, difficult, childhood, (7) Broadnax's brother-in-law, who testified regarding Broadnax's good character traits and responsible behavior as a baby sitter, (8) two of Broadnax's cousins, who testified to Broadnax's good character, (9) the Dallas County Jail inmate with whom Broadnax fought in the recreational area, who testified he started the fight between them because he felt Broadnax had disrespected him, (10) two persons who knew Broadnax's family, who testified via deposition about the difficult challenges Broadnax faced growing up, (11) Broadnax's sister, who testified about Broadnax's unstable abusive childhood, her own experiences growing up with their abusive mother, and Broadnax's difficult teenage years, and (12) one of Broadnax's mother's ex-husbands, who testified that he ended their relationship and threw Broadnax's mother out of his house after she beat Broadnax so badly his back was bloody.

After the defense rested at the punishment phase of trial, in rebuttal the prosecution (1) introduced Broadnax's Dallas County Jail commissary account records and a series of recordings of telephone calls Broadnax made from the Dallas County Jail on the same day the jury returned its verdict at the guilt-innocence phase of trial, (2) presented the testimony of

a forensic psychologist, who read a list of the characteristics of a psychopathic personality, explained in layman's terms what each of the terms in the list meant, but also admitted that he had not interviewed Broadnax and expressly declined to offer an opinion as to whether Broadnax possessed any of the traits of a psychopathic personality he identified and defined for the jury, and (3) presented more victim impact testimony from Swan's younger sister and brother.

Broadnax v. Davis, No. 3:15-CV-1758-N, 2019 WL 3302840, at *2-3 (N.D. Tex. July 23, 2019) (footnotes omitted).

III. Procedural History

The TCCA affirmed Broadnax's conviction and sentence on direct appeal. *Broadnax*, 2011 WL 6225399, at *1, 20. Broadnax sought certiorari review, and this Court denied his petition. *Broadnax v. Texas*, 568 U.S. 828 (2012).

Broadnax filed an original state habeas application. The TCCA denied relief, and this Court denied review. *Ex parte Broadnax*, No. WR-81,573-01, 2015 WL 2452758, at *1 (Tex. Crim. App. May 20, 2015) (per curiam) (not designated for publication); *Broadnax v. Texas*, 577 U.S. 842 (2015).

Broadnax filed an amended habeas petition in federal district court. *Broadnax*, 2019 WL 3302840, at *5. The federal district court denied all relief and denied a certificate of appealability. *Id.* at *55. The Fifth Circuit

granted a certificate of appealability on one issue but ultimately denied all relief. *Broadnax v. Lumpkin*, 987 F.3d 400, 404, 416 (5th Cir. 2021). This Court then denied Broadnax’s petition for writ of certiorari. *Broadnax v. Lumpkin*, 142 S. Ct. 859 (2022).

In 2023, Broadnax filed a first subsequent state habeas application under Article 11.071 of the Texas Code of Criminal Procedure, raising two claims, including a *Batson* claim. The TCCA dismissed the first subsequent habeas application without reviewing the merits of the claims, concluding Broadnax failed to satisfy the requirements of Article 11.071, Section 5. *Ex parte Broadnax*, No. WR-81,573-02, 2023 WL 3855947, at *1 (Tex. Crim. App. June 7, 2023) (per curiam) (not designated for publication). On June 24, 2024, this Court denied Broadnax’s petition for writ of certiorari on his *Batson* claim.¹ *Broadnax v. Texas*, 144 S. Ct. 2700 (2024).

In 2025, Broadnax filed two pleadings in the TCCA: (1) a second subsequent state habeas application and (2) a “suggestion the TCCA reconsider on its own motion” his first subsequent state habeas application (*see* Tex. R. App. P. 79.2(d)). The TCCA dismissed the second subsequent habeas application without reviewing the merits of the claims raised, concluding Broadnax failed to satisfy the requirements of Article 11.071, Section 5. *Ex parte Broadnax*, No. WR-81,573-03, 2025 WL 3095921, at *1 (Tex. Crim. App. Nov. 6, 2025) (per curiam) (not designated for publication). (Pet. at 4a). On the same day, the TCCA denied without a written order Broadnax’s

¹ The decision stated in full: “Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied. Justice Sotomayor and Justice Jackson would reverse the judgment.”

request for reconsideration of his first subsequent state habeas application.² *Ex parte Broadnax*, No. WR-81,573-02 (Tex. Crim. App. Nov. 6, 2025) (docket entry denying suggestion to reconsider on court's own motion).

On December 17, 2025, the state trial court scheduled Broadnax's execution for April 30, 2026. (Pet. at 5a–7a). Broadnax filed his instant petition for writ of certiorari along with a corresponding Application for Stay of Execution, No. 25A900.

REASONS FOR DENYING THE PETITION

The court below dismissed the claims for which Broadnax seeks review on an adequate and independent state-law ground without reaching the merits of the claims (Pet. at 3a–4a), which deprives this Court of jurisdiction to consider them. Broadnax's petition seeks review of the TCCA's order dismissing his second subsequent state habeas application as an abuse of the writ under Texas Code of Criminal Procedure Article 11.071, Section 5. Because the TCCA's decision applied Texas's procedural rules governing subsequent habeas applications in death-penalty cases, it is unassailable on certiorari, and the Court lacks jurisdiction to grant review. Even assuming jurisdiction, Broadnax has not furnished a compelling reason for this Court to review his case, and none exists. The questions Broadnax presents for review are unworthy of this Court's attention.

² Broadnax has a petition for writ of certiorari pending on the TCCA's denial of his motion for rehearing of his state first subsequent habeas application, along with a motion for stay of execution, in Nos. 25-938 and 25A899.

ARGUMENT

I. An Adequate and Independent State Procedural Bar Forecloses Certiorari Review

Broadnax seeks review of the lower court's dismissal of his rap-lyrics and serology-evidence claims. Despite the TCCA's explicit statement that it did not reach the federal questions presented, Broadnax alleges it did, rejecting the TCCA's state-law procedural determinations and relying on a misinterpretation of *Ex parte Campbell*, 226 S.W.3d 418 (Tex. Crim. App. 2007) that has already been soundly rejected by the federal courts. This is a straightforward case: the TCCA's dismissal on adequate and independent state-law grounds strips this Court of jurisdiction.

A. The state-law grounds for denying review were adequate and independent.

Article 11.071, Section 5 of the Texas Code of Criminal Procedure governs subsequent habeas applications by state applicants who have previously sought post-conviction relief. To receive review of his subsequent application, Broadnax needed to establish that his claims could not have been presented previously in a habeas application because the factual or legal bases for the claims were unavailable at the time a previous application was filed. *See* Tex. Code Crim. Proc. art. 11.071, § 5(a)(1). The Texas statute restricts applicants to one habeas review, and subsequent applications are prohibited except in the delineated circumstances. *See id.* § 5(a). This statute, like the federal habeas "second or successive" writ prohibition, works to limit the number of attempts an inmate may seek to collaterally attack a conviction, subject to the

exceptions. *Compare* Tex. Code Crim. Proc. art. 11.071, § 5 *with* 28 U.S.C. § 2244(b); *see also* *Beard v. Kindler*, 558 U.S. 53, 62 (2009) (noting that federal courts should not “disregard state procedural rules that are substantially similar to those to which we give full force in our own courts”).

At this stage in the lower court proceeding, the TCCA determines whether a subsequent habeas applicant meets the state statutory procedural hurdles of Section 5 and can litigate his claim further in the trial court. If the TCCA determines an applicant meets Section 5’s requirements, it remands the case to the trial court—the fact-finder in the state habeas proceeding. If the TCCA determines the statutory requirements for bypassing the procedural bar have not been satisfied, it must issue an order dismissing the application as an abuse of the writ. Tex. Code Crim. Proc. art. 11.071, § 5(c).

The Texas statute requires proof of unavailability in all prior state habeas applications. *Campbell*, 226 S.W.3d at 421. A legal basis for a claim was unavailable within the meaning of Section 5(a)(1) if the legal basis was not recognized by or could not have reasonably been formulated from a decision of this Court, a federal appellate court, or a Texas appellate court. Tex. Code Crim. Proc. art. 11.071, § 5(d).³ In the court below, Broadnax argued that both claims were based on newly-available legal grounds.

The lower court’s Section 5(a) dismissal was independent of the federal issues raised and adequate to

³There is no dispute about the factual availability of Broadnax’s trial-record based claims. *See* Tex. Code Crim. Proc. art. 11.071, § 5(e).

support the judgment. The TCCA dismissed Broadnax’s application “as an abuse of the writ without considering the merits of the claims.” (Pet. at 4a). *See* Tex. Code Crim. Proc. art. 11.071, § 5(c). By explicitly indicating it had not considered the merits, the TCCA left no doubt as to the independent, state-law character of its dismissal. Broadnax’s claims are therefore unequivocally procedurally barred because the state court’s disposition of the claims relies upon an adequate and independent state-law ground—the Texas abuse-of-the-writ statute. *See, e.g., Moore v. Texas*, 122 S. Ct. 2350, 2352–53 (2002) (Scalia, J., dissenting); *Balentine v. Thaler*, 626 F.3d 842, 857 (5th Cir. 2010) (recognizing that Article 11.701, Section 5 is an adequate state-law ground for rejecting a claim); *Matchett v. Dretke*, 380 F.3d 844, 848 (5th Cir. 2004) (“Texas’ abuse-of-the-writ rule is ordinarily an ‘adequate and independent’ procedural ground on which to base a procedural default ruling”).

This Court has held numerous times it will not review a federal claim decided by a state court if the state court’s decision rests on a state-law ground that is independent of the merits of the federal claim and an adequate basis for the court’s decision. *Foster v. Chatman*, 578 U.S. 488, 497 (2016); *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997). The state-law ground barring federal review may be “substantive or procedural.” *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

To be adequate, a state-law ground must be “firmly established and regularly followed.” *Lee v. Kemna*, 534 U.S. 362, 376 (2002) (quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984)). Discretion does not deprive a state-law ground of its adequacy because “a discretionary rule can

be ‘firmly established’ and ‘regularly followed’—even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others.” *Kindler*, 558 U.S. at 60–61. Ultimately, situations where a state-law ground is found inadequate are but a “small category of cases.” *Kemna*, 534 U.S. at 381.

A state-law ground is “independent of federal law [when it] do[es] not depend upon a federal constitutional ruling on the merits.” *Stewart v. Smith*, 536 U.S. 856, 860 (2002). Broadnax wholly disregards the TCCA’s explicit statement it did not consider the merits of his claims, contending the decision below was in fact based on the TCCA’s interpretation of federal-law questions of Broadnax’s rights to due process, fundamental fairness, and equal protection under the Eighth and Fourteenth Amendments (his rap-evidence claim) and his confrontation rights under the Sixth Amendment (his serology-evidence claim). (Pet. at 30). Instead of accepting the TCCA’s unambiguous ruling that it dismissed his claims without merits review, Broadnax argues the two-step process described in *Campbell* means that, in every Texas subsequent habeas proceeding, the TCCA reaches the merits by examining two elements: first, the prior factual and/or legal availability of the claim; and second, whether the facts alleged establish a prima facie showing of a constitutional violation. (Pet. at 30–31). *See Campbell*, 226 S.W.3d at 421–22. Because Broadnax flatly disagrees with the TCCA’s determination that his two claims were previously available and could have been asserted when he filed his earlier habeas applications (and thus he failed to meet Section 5(a)’s “new-legal-basis” requirement for this application), he reasons the TCCA must have decided he failed to establish a prima facie showing of his federal

constitutional claims, thereby reaching the merits. (Pet. at 31–32).

Broadnax’s interpretation of *Campbell* is erroneous. It is well-settled that the TCCA can dismiss a subsequent habeas application on Section 5(a)’s previously-available legal-or-factual basis alone, without reaching *Campbell*’s prima facie prong. In the federal habeas context, the Fifth Circuit has rejected Broadnax’s exact contention—that the TCCA’s decisions under Section 5 are not independent of federal law due to *Campbell*. See *Buntion v. Lumpkin*, 31 F.4th 952, 962 (5th Cir. 2022) (indicating the argument “undebatably fails” and “misreads *Campbell*” because a Texas court may dismiss a claim on *Campbell*’s first ground alone—that the factual or legal basis for the current claims must have been unavailable as to all previous state habeas applications—without ever reaching the constitutional issue). The Fifth Circuit held it is “undebatable that an unelaborated dismissal under article 11.071, § 5 is based on an adequate and independent state ground.” *Id.* at 963 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) and *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008)).

In *Rocha v. Thaler*, 626 F.3d 815 (5th Cir. 2010), the Fifth Circuit considered the independent nature of Texas’s Section 5 bar in the federal habeas context. There, the court rejected Rocha’s contention “that § 5(a)(1) is dependent on federal law in all cases.” *Id.* at 835. Instead, whether a Section 5(a)(1) dismissal is independent of federal law turns on case-specific factors. *Id.* As the court held,

If the CCA’s decision rests on availability, the procedural bar is intact. If the CCA determines that the claim was unavailable but that the

application does not make a prima facie showing of merit, a federal court can review that determination under the deferential standards of AEDPA.

Id. at 835. The TCCA’s decision in this case is unmistakable: it dismissed the application “as an abuse of the writ without considering the merits of the claims.” (Pet. at 4a). The TCCA conducts the availability and prima facie inquiries sequentially, and there is no indication the TCCA proceeded to a prima-facie merit analysis instead of resting its decision on availability. *See Buntion*, 31 F.4th at 962; *Rocha*, 626 F.3d at 834.

It is undebatable that the TCCA’s dismissal of Broadnax’s second subsequent writ application rested on state procedural grounds that were independent of any federal issues raised and adequate to support the judgment. *See Rocha*, 626 F.3d at 837 (“A [T]CCA decision fairly appears to rest on state law if it dismisses a subsequent habeas application under § 5(a)(1) because the application does not raise a claim that was factually or legally unavailable.”); *Hughes*, 530 F.3d at 342 (“This court has held that, since 1994, the Texas abuse of the writ doctrine has been consistently applied as a procedural bar, and that it is an independent and adequate state ground for the purpose of imposing a procedural bar.”). Accordingly, an adequate and independent state law barred Broadnax’s rap-lyrics and serology-evidence claims in state court and divests this Court of jurisdiction.

B. Review of Broadnax’s rap-evidence claim was barred below on state-law procedural grounds without the lower court reaching the merits.

Review of Broadnax’s rap-lyrics claim was barred in the lower court on state-law procedural grounds because: Broadnax failed to raise the claim on direct appeal; the Texas case he relies on, *Hart v. State*, is not a new legal basis for his constitutional claim; and the claim could have been raised in Broadnax’s prior habeas applications from existing law.

1. Background Facts: The Rap-Lyrics

In the court below, Broadnax complained about the punishment-phase admission⁴ of written rap lyrics contained in two spiral notebooks found after his arrest in his suitcase in the victim’s stolen vehicle. (RR46: 142, 148–49; RR49: 104, 106–08, 118; SX 131-I, 131-J). The trial court overruled Broadnax’s Texas Rule of Evidence 403 objection to the spiral notebooks. (RR49: 104).

The trial court also admitted photographs taken of two pages of handwritten lyrics from Broadnax’s county jail cell. (RR49: 36–41, 49–52; SX 474–75). The trial court overruled Broadnax’s objections to admission of all photographs from his cell. The objections were grounded in search-and-seizure and evidentiary issues, particularly the Fourth and Fourteenth Amendments; Article I,

⁴ The jury knew Broadnax was a rapper because he had explained in a recorded media interview, admitted into evidence during the guilt phase of trial, that he had engaged the two victims in a conversation about their music recording studio because he “raps.” (RR45: 276; SX 18, 405).

Sections 9, 13, and 19 of the Texas Constitution; Texas Code of Criminal Procedure Article 38.23; and Texas Rules of Evidence 401 and 403. (RR49: 8, 12, 38–39, 41). A portion of one lyric, titled “free-style [writing],” refers to the robbery, murders, and trial in this case and murking, or killing, the judge:

... Send da press, send da paper. Hold up. Stop N rewind[] [t]hat shit[.] I’m about [to] tell a little story [why] I’m in this b****[.]

[] Yeah, I hit the lick, but the reason I got caught cuz the n**** snitching [] [s]hit. Now this b**** [illegible] me, I got two counts of murder. I might go to trial and tell the Judge I’m going to [murk] [m] because I’m JB, b****. Do you know who you f****ing wit? ⁵

(RR49: 50–51; *see* SX 474). Notably, Broadnax has not acknowledged in his petition or his application in the lower court that the lyrics in State’s Exhibit 474 contain an admission to the capital murder and a reference to the judge presiding over his case.

At trial, the State used the complained-of spiral notebooks, along with Broadnax’s other writings and drawings, to show his association with and use of gang

⁵ Murk means “kill.” *See* State’s Exhibit 403, Broadnax’s recorded interview with a Channel 11 reporter, where he at first repeatedly denied murdering Swan and Butler, and he said in context, “I [didn’t] murk nobody though. I ain’t got no reason to. I don’t want nobody killing me.”

terminology and symbols.⁶ A Dallas Police Department gang unit officer testified about evidence from Broadnax's recorded media interviews, an audio-recorded jail call, items in his Dallas County jail cell, and the spiral notebooks and identified language and symbols referencing the Folk Nation and Gangster Disciples. (RR49: 83–123). Based on Broadnax's multiple instances of self-identification and admissions, the officer concluded Broadnax was a member of the Gangster Disciples gang. (*See* RR49: 89–91, 95–96, 100, 104, 109–11, 122, 131).

The two spiral notebooks also contain drawings, phone numbers, notes about drugs and ways to make money, job research from the internet, and a letter. (RR49: 125–33; SX 131-I, 131-J). Nelson testified the rap lyrics in the notebooks reference themes of murder, robbery, and drug sales. (RR49: 108, 116, 118–19, 123–24). The prosecutor read some of the lyrics to the jury. (RR49: 118–121, 123–24).

The State mentioned Broadnax's rap lyrics (from his suitcase in the victim's car) in its punishment-phase closing arguments:

He told you what he was going to do in his writings before he even did it. He talked about the murder and the robbery of people. And you know what? Maybe if he never got out and did it, maybe he'd just be another gangster rapper. But then he went out and did it. Counsel says we want you to kill him because of what he says

⁶ Broadnax had announced his gang affiliation in his first media interview, saying, "I'm a Folk." (SX 403).

he's going to do, but you've got evidence right here that told you what he was going to do, and then he went out and did it.

(RR53: 79). This discussion was 9 lines, or 1.02 percent, of the State's closing arguments in this case. (RR53: 10–31, 65–81). The State also briefly repeated Broadnax's post-offense free-style rap in which he admitted to the murders and referenced “murking” the judge. (RR53: 79; *see* SX 474).

2. The rap-lyrics claim was subject to dismissal by the TCCA on the adequate and independent state-law grounds of procedural default and availability.

First, Broadnax's rap-lyrics claim was procedurally barred below, and the TCCA correctly dismissed it on this basis. Although Broadnax objected at trial to admission of the rap-lyrics evidence on constitutional search-and-seizure and evidentiary grounds (RR49: 8, 12, 38–39, 41, 104), he did not raise the due process, fundamental fairness, and equal protection constitutional grounds asserted in his second subsequent habeas application and thus waived the claims. *See Saldano v. State*, 70 S.W.3d 873, 889 (Tex. Crim. App. 2002) (recognizing a defendant's failure to object at trial “forfeits complaints about the admissibility of evidence” “even though the error may concern a constitutional right of the defendant”).

Nor did Broadnax assert the due process, fundamental fairness, and equal protection constitutional challenges to the evidence on direct appeal. “It is well-settled ‘that the writ of habeas corpus should not be used to litigate matters

which should have been raised on direct appeal.” *Ex parte Gardner*, 959 S.W.2d 189, 199 (Tex. Crim. App. 1998) (op. on reh’g) (quoting *Ex parte Goodman*, 816 S.W.2d 383, 385 (Tex. Crim. App. 1991)). The writ of habeas corpus “is an extraordinary remedy that is available only when there is no other adequate remedy at law,” and therefore even constitutional claims are forfeited if they could have been raised on appeal. *Ex parte Townsend*, 137 S.W.3d 79, 81 (Tex. Crim. App. 2004). Because Broadnax did not challenge the rap-lyrics evidence on the complained-of constitutional bases at trial or on direct appeal, his claim was procedurally defaulted—for this threshold reason alone—for purposes of his prior habeas applications *and this third state habeas application*.

Second, the TCCA correctly dismissed Broadnax’s rap-lyrics claim as barred because he failed to meet Section 5’s new-legal-basis requirement. In the court below, Broadnax alleged admission of the rap-lyrics evidence violated the Eighth and Fourteenth Amendments, relying on *Hart v. State*, 688 S.W.3d 883 (Tex. Crim. App. 2024) as new law meeting Section 5’s requirements. Broadnax’s insurmountable problem was that *Hart* did not create a new legal basis for a constitutional challenge to the admission of rap lyrics. *See Hart*, 688 S.W.3d at 891–97 (applying the prejudice-versus-probative balancing test of Texas Rule of Evidence 403). *Hart* merely applied state evidentiary rules to the case’s unique set of facts. There was no constitutional error in *Hart*. *Hart*, 688 S.W.3d at 897 (characterizing the error as “an abuse of discretion in admitting certain evidence” and applying the harm standard for non-constitutional error); *see* Tex. R. App. P. 44.2(b).

Because Broadnax formulated his constitutional claims from *Hart*, a Texas-Rules-of-Evidence case, he could have reasonably formulated or rationally fashioned his claim from countless state and federal cases over the last several decades. *See* Tex. Code Crim. Proc. art. 11.071, § 5(d) (indicating a legal basis is previously available if it was recognized by, or could have been reasonably formulated from, a final decision by the Supreme Court, a federal appeals court, or a state appellate court); *Ex parte Barbee*, 616 S.W.3d 836, 839 (Tex. Crim. App. 2021) (holding a legal basis was previously available if it could have been rationally fashioned from or is founded on familiar principles in precedent from the relevant courts). In the court below, Broadnax needed to demonstrate the new legal basis was unavailable as to all his previous habeas applications, *see Campbell*, 226 S.W.3d at 421, but in light of the extensive prior rap-related jurisprudence, he soundly failed, and the TCCA correctly dismissed his claim without reaching the merits.

Many federal circuit and Texas appellate court decisions have addressed the admissibility and prejudicial impact of rap evidence well before Broadnax filed his original and first subsequent habeas applications in 2011 and 2023, respectively. *See United States v. Gamory*, 635 F.3d 480, 493 (11th Cir. 2011) (holding that the guilt-phase admission during Gamory’s drug-distribution and money-laundering trial of a rap video produced by his music-recording business was error under Federal Rule of Evidence 403 and “heavily prejudicial”); *United States v. Recio*, 884 F.3d 230, 236 (4th Cir. 2018) (rejecting claim but acknowledging that some courts have excluded lyrics because they describe violent, criminal, or distasteful conduct); *United States v. Stuckey*, 253

F. App'x 468, 482–83 (6th Cir. 2007) (recognizing that violent rap lyrics involve the danger of unfair prejudice but rejecting Stuckey's guilt-phase claims because the rap lyrics described the charged offense); *United States v. Price*, 418 F.3d 771, 782–83 (7th Cir. 2005) (holding guilt-phase admission of rap lyrics was more prejudicial than probative); *McDade v. State*, 613 S.W.3d 349, 353, 358 (Tex. App.—Dallas 2020, no pet.)⁷ (upholding the punishment-phase admission of defendant singing rap lyrics threatening violence and featuring drugs, firearms, stalking, sex, and gang references); *Stewart v. State*, 995 S.W.2d 251, 255–56 (Tex. App.—Houston [14th Dist.] 1999, no pet.). Undoubtedly, Broadnax could have reasonably formulated or rationally fashioned his claim from prior precedent in an earlier habeas application.

C. Review of Broadnax's serology-evidence claim was barred below on state-law procedural grounds without the lower court reaching the merits.

In his second claim in the court below, Broadnax alleged that DNA analyst James Nichols's testimony about serology test results, along with the admission of the non-testifying serologist's report, violated *Crawford* pursuant to new law in *Smith*, 602 U.S. 779. Review of Broadnax's serology-evidence claim was barred below on state-law procedural grounds without the lower court reviewing the merits because, first, Broadnax did not object to the serology evidence at trial and, second, *Smith*

⁷The *McDade* case involved the same police-officer gang witness who testified during Broadnax's punishment phase and provided a literal road map for Broadnax to raise his claim at the latest in his 2023 first subsequent habeas application.

is not new law, and the legal basis for his claim could have been reasonably formulated or rationally fashioned from existing precedent, including *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) and *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), when he filed his 2011 original habeas application or his 2023 first subsequent habeas application.

1. Background Facts: The Serology Evidence

During the guilt-phase of trial, the State called James Nichols, a forensic scientist with the Texas Department of Public Safety (DPS) Crime Laboratory in Garland, Texas, to testify about the DNA testing and analysis he personally performed in Broadnax's case. (RR46: 184–85). Nichols defined DNA, described factors affecting whether DNA is present on an item, and described the process of performing DNA testing on crime-scene evidence. (RR46: 186–91, 199–200). Nichols testified about the DNA results he obtained from several items: a pistol (that the co-defendant, Cummings, had turned over to the police), one victim's pants-pocket liner, and a pair of Cummings's Nike tennis shoes. (RR46: 196–97, 200–01, 204). Nichols performed the DNA testing, analyzed the results, performed statistical analyses to determine the rarity of the resulting DNA profiles, and prepared a report which the trial court admitted into evidence. (RR46: 194–95, 202–03; SX 391). For the Nike shoes and Swan's pants-pocket liner, Nichols also testified about the statistical probability of finding a particular DNA profile within the population. (RR46: 198, 201).

Interspersed throughout his testimony and without Broadnax objecting, Nichols reported the serologist's test

results on some of these same items. (RR46: 191–197). Nichols explained that Kimberlee Mack is a “screener” in the serology section of the DPS crime lab in Garland. (RR46: 191). Mack examines items of evidence and performs presumptive tests for possible blood or semen for the purpose of targeting which items can then be DNA tested. (RR46: 191; *see* SX 392, pp. 2–3). Nichols testified that he “relied on” Mack’s serology report while preparing his own DNA report. (RR46: 192). During Nichols’s testimony, Mack’s serology report was admitted into evidence. (RR46: 192–93; SX 392). Regarding the serology report, Broadnax’s counsel stated affirmatively, “[W]e have no objection. No objection.” (RR46: 193).

Mack’s report reflects a list of items of evidence submitted to the lab; the items are identified by number. (SX 392, pp. 1–2). Nichols’s report also identifies the items of evidence by their item numbers; therefore, Mack’s report is not necessary to identify the items Nichols tested. (*See* SX 391). Nichols’s report stands alone, independent of Mack’s report.

Broadnax claims the serology and DNA test results were especially damning because they linked him to the crime scene (Pet. at 4, 10, 12, 27, 29) and “were central to [his] conviction” (Pet. at 12, 29). To the contrary, Broadnax’s DNA was *excluded from every item that was DNA tested*, which trial counsel made clear during Nichols’s cross-examination. (RR46: 204–208 (reviewing all DNA test results in the case and pointing out Broadnax was excluded from the DNA results, including DNA on the pistol)). Cummings had led police to the apartment where the pistol was hidden. (RR46: 41–43). Cummings’s DNA and one victim’s DNA were on the pistol; Broadnax’s

was not. (RR46: 195–96, 204–06). Cummings’s DNA was inside Swan’s pants pocket; Broadnax’s was not. (RR46: 200–01, 204). And Butler’s DNA was in the blood splatter on Cummings’s Nike tennis shoes.⁸ (RR46: 197, 204). In a case where otherwise the evidence was overwhelmingly inculpatory as to Broadnax, the forensic physical evidence was in fact favorable to him. Counsel used the fact Broadnax’s DNA was not on the murder weapon (and Cummings’s DNA was) in closing arguments, in an attempt to refute both Evelyn Barg’s testimony and Broadnax’s own admissions in his media interviews. (RR47: 189).

2. The serology-evidence claim was subject to dismissal by the TCCA on the adequate and independent state-law grounds of procedural default and availability.

First, Broadnax did not object at trial that admission of the serology-related testimony or the serology report violated his constitutional right to confrontation, or on any other basis. (RR46: 184–208). When the State moved to admit the serologist’s report, Broadnax stated he had “no objection.” (RR46: 193). Because Broadnax did not object to the alleged confrontation violation at trial, the TCCA correctly determined Broadnax was procedurally barred from raising the claim for the first time on state habeas review. *See Saldano*, 70 S.W.3d at 889; *Garza v. State*, 435 S.W.3d 258, 261–62 (Tex. Crim. App. 2014). Specifically,

⁸ The white, size 10½ Nike tennis shoes were collected from a red and black backpack in the trunk of the stolen vehicle. (RR46: 121; SX 129, 268, 283). A different suitcase in the trunk contained Broadnax’s personal effects, including size 13 gray Fila tennis shoes. (RR46: xiii, 122, 141, 143; SX 139, 131-A, 131-B, 183, 392).

the failure to make a contemporaneous objection at trial based on the Confrontation Clause bars habeas review. *See Ex parte Dutchover*, 779 S.W.2d 76, 77 (Tex. Crim. App. 1989) (citing *Ex parte Crispin*, 777 S.W.2d 103, 106 (Tex. Crim. App. 1989)). Moreover, it is a reasonable conclusion from the record that counsel strategically elected not to object to any of Nichols’s testimony, including the serology findings and report, because the DNA results were exculpatory as to Broadnax personally—where little else in the guilt phase of this case was.

Second, the TCCA correctly applied a state-law procedural bar and dismissed Broadnax’s *Crawford* claim because *Smith v. Arizona* is not a new legal basis for the claim. *Smith* acknowledges as such on its face when it recognizes that its decision “follow[ed] from all this Court has held about the Confrontation Clause’s application to forensic evidence.” 602 U.S. at 802. Because Broadnax’s *Crawford* claim did not meet the new-law requirement of Section 5, the TCCA correctly dismissed it as procedurally barred.

Melendez-Diaz and *Bullcoming* were decided on June 25, 2009 and June 23, 2011 respectively, before Broadnax filed his original state habeas application on December 20, 2011. These two cases provided a foundation for Broadnax to raise his *Crawford* claim in his original or first subsequent habeas application. *See Melendez-Diaz*, 57 U.S. at 309–11, 329 (holding admission into evidence of notarized “certificates of analysis” by state lab analysts for the seized cocaine—without the analysts’ testimony—violated the Confrontation Clause); *Bullcoming*, 564 U.S. at 651–63 (finding a Confrontation Clause violation where a surrogate analyst, who had not performed or observed

the blood-alcohol testing in the case, sponsored the testing analyst's report at trial). Because Broadnax did not raise his claim in his original or first subsequent habeas application, the TCCA correctly decided he did not meet Texas's subsequent-writ-bar exception.

Likewise, Broadnax could have reasonably formulated or rationally fashioned his *Crawford* claim from the parade of federal and state decisions following *Melendez-Diaz* and *Bullcoming*. See, e.g., *Washington v. Griffin*, 876 F.3d 395, 400–02 (2d Cir. 2017) (where appellant raised a confrontation violation based on introduction of lab case file containing non-testifying analysts' work including appellant's buccal-swab DNA test results, and analyst testified the buccal-swab results matched the DNA found on crime-scene evidence); *Benjamin v. Gipson*, 640 F. App'x 656, 659 (9th Cir. 2016); *Paredes v. State*, 462 S.W.3d 510 (Tex. Crim. App. 2015) (analyzing prior caselaw to mean that admission of a lab report created solely by a non-testifying analyst, without calling that analyst to sponsor it, violates the Confrontation Clause); *Burch v. State*, 401 S.W.3d 634 (Tex. Crim. App. 2013) (concluding drug lab report was erroneously admitted where witness signed the report as a supervisor but had not participated in the testing); *Cuadros-Fernandez v. State*, 316 S.W.3d 645, 654–58 (Tex. App.—Dallas 2009, no pet.) (holding admission of non-testifying DNA analyst's report and notes violated the Confrontation Clause).

Broadnax points out that in abrogating the plurality opinion in *Williams v. Illinois*, 567 U.S. 50 (2012), *Smith* corrected jurisdictions across the country that were allowing an absent lab analyst's test results to be admitted through another expert's testimony as facts underlying

the testifying expert's opinions. (Pet. at 14–15, 31). *See Smith*, 602 U.S. at 783. But Texas was not one of those jurisdictions. *See Paredes*, 462 S.W.3d at 517–18. The TCCA's *Paredes* decision encompassed the later holding in *Smith* when it acknowledged that a testifying expert could rely on another analyst's work but cannot act as a surrogate to introduce the absent analyst's results. *See id.*

In short, based on then-existing caselaw, Broadnax could have asserted a *Crawford* claim during the DNA analyst's testimony at trial, in his direct appeal, in his original state habeas proceeding, in his federal habeas proceeding (where he was represented by current counsel), or in his first subsequent state habeas proceeding.

Moreover, the facts of *Smith* are sufficiently distinguishable that Broadnax's claim would not hinge on it. In *Smith*, authorities found a large quantity of drugs and drug-related paraphernalia while executing a search warrant. *Smith*, 602 U.S. at 789. A lab analyst tested the items and prepared a report detailing her findings on the identities and quantities of drugs. *Id.* The prosecution presented the information through a substitute analyst who had reviewed the case and drawn the same conclusions regarding the drugs and their quantities, reaching an "independent opinion." *Id.* at 791. The state court affirmed the conviction, reasoning the underlying facts were used only to show the basis for the testifying witness's opinion. *Id.* This Court held the restated factual conclusions of the absent lab analyst, even if they were the basis of the testifying expert's opinion, were inadmissible. *Id.* at 783, 791, 800.

Unlike in *Smith*, the absent serologist's testing and report here did not provide the substantive, scientific basis for the testifying expert's conclusions (i.e., his DNA opinions). Mack performed the serology examination, which was preliminary and separate from the later DNA testing. Nichols's DNA results were independent of Mack's serology results and could have stood alone.

Because *Smith* did not provide a previously unavailable legal basis for Broadnax's *Crawford* claim, the TCCA correctly concluded it was barred under state procedural law.

II. There Is No Compelling Reason for Further Review of Broadnax's Rap-Evidence Claim

There is no reason for this Court to expend its limited resources on this case. Broadnax appeals the state court's decision denying litigation of a claim he could have raised many years ago. It is worth noting the dilatoriness of this trial-record claim. Although Broadnax argues the claim was not available until 2022, the claim has obviously existed for over two decades.

Importantly, a procedurally-barred claim that has not been litigated on the merits is not in the appropriate stance for this Court's review, and certiorari should be denied on that basis alone. This situation lacks any of the usual compelling reasons for review. *See* Sup. Ct. R. 10(a)-(c). There is no circuit or state-court-of-last-resort conflict; there is no reason for this Court to exercise its supervisory power; and the state court did not even reach the federal question alleged, much less decide it in a conflicting manner. *See id.*

Moreover, the rap claim plainly lacks merit. Regardless of the state-court procedural bar, admission of the evidence neither violated Broadnax's constitutional rights nor rendered his trial unduly prejudicial. No federal or state court has held that rap evidence violates a defendant's constitutional rights. In citing cases in which the admission of character and extraneous-offense evidence was found to violate due process, Broadnax primarily relies on inapposite guilt-phase evidence cases. (Pet. at 18–20). Furthermore, the rap evidence here lacks the irrelevant and prejudicial character of the evidence about the defendant's sexual relationships, extramarital affairs, provocative clothing, and failings as a parent and wife in *Andrew v. White*, 604 U.S. 86, 87–89, 96 (2025).

Article 37.07, Section 3(a) of the Texas Code of Criminal Procedure allows punishment-phase admission of any matter the court deems relevant to sentencing, including the defendant's reputation and character. *See* Tex. Code Crim. Proc. art. 37.07, § 3(a)(1); *McDade*, 613 S.W.3d at 353–54. It is well-established generally that rap lyrics are admissible punishment evidence. *See supra* at 21–22 (citing federal and state cases admitting rap lyrics into evidence).

Broadnax's equal protection claim, alleging the State's use of his rap lyrics was part and parcel of its race-based practices, falls equally flat. (Pet. at 3, 20–22). Broadnax references the State's strikes of black jurors (Pet. at 5), but every state and federal court, including this Court, has reviewed those strikes and denied *Batson* relief. *See, e.g., Broadnax*, 987 F.3d at 411–12 (noting that, with the exception of one juror who was struck for a unique answer about an offender's drug use, every *Batson*-challenged

venireperson indicated they opposed the death penalty or it should not be invoked, and the State struck every juror, regardless of race, who answered this way). Extensive evidence—including a recorded media interview, phone call, drawings, letters, rap lyrics, and other writings—showed Broadnax associated with the Gangster Disciples (also known as the “Folk Nation”). (RR49: 83–133; SX 6, 7, 9, 18, 131-I, 131-J, 504–505, 553). Broadnax implies the State derogatorily referred to the gang as a “black gang.” (Pet. at 21). In fact, discussions occurred at trial about the distinction between and references to the “Gangster Disciples” versus the “Black Gangster Disciples,” an associated group. (RR49: 90–93, 97). References in closing arguments to Broadnax “chomping at the bit” or being a predator had to do with his extreme and unwarranted violent acts, including the fact he shot two men in the head who were already down—not his race. The prosecutor’s references to a “new breed” and “monster” were to the life-without-parole inmates in Texas who do not have the incentive of parole to quell their behavior. (RR53: 26–27). Finally, the prosecutor’s reference in opening arguments to Broadnax going to “where the rich white folks live” was merely a reference to Broadnax’s own words the jury would later hear in a recorded media interview. (RR45: 50 (stating “they started their manhunt, and what you will hear is they wound up [in] downtown Dallas, they got on a DART train and headed toward Garland. *And from the defendant’s own words*, they went to Garland because that’s where the rich white folks live”)). Broadnax’s complaints, considered in context of the whole record, do not reveal any race-based strategy.

Broadnax mischaracterizes the rap evidence as the State’s primary evidence he was a future danger. (Pet. at 3,

5, 7). But when the TCCA reviewed Broadnax's challenge to the sufficiency of the evidence supporting the jury's affirmative answer to the future-danger special issue, the court did not mention the rap lyrics, relying instead on the egregious facts of the capital murder, evidence of Broadnax's extreme lack of remorse, and Broadnax's threat to kill again. *See Broadnax*, 2011 WL 6225399, at *17.

Evidence of Broadnax's use of violence, threats, and ire and evidence showing him to be callous, unremorseful, and relishing in his notoriety would have strongly outweighed any impact of his written, artistic expressions. (RR45: 227; SX 405 (Broadnax admitting to shooting the victims in the head when they tried to stand); RR48: 96–99; SX 544–45 (blatantly bragging about altercations with an inmate and a jail staff member); RR48: 98; RR52: 195–99; SX 544, 552 (threatening his defense attorney and a jail maintenance employee); RR48: 98; SX 544 (boasting he did not need a “shank” to commit future violence because he could use his hands); RR48: 97–98; SX 544–45 (saying he did not regret the murders and “f*** [the victims'] family”); RR45: 227; SX 405 (threatening to kill again if given a life sentence)).

Broadnax cites the jury's requests to see the rap lyrics “twice” during its deliberations as evidence they were overly inflammatory. (Pet. at 3, 6–7, 21–22). The jury asked to see the lyric found in Broadnax's jail cell admitting the murders (CR3: 645; *see* SX 474) and then to receive the journals from the car (CR3: 648; *see* SX 131-I, 131-J), containing lyrics and other evidence. First, the spiral notebooks contain evidence in addition to the rap lyrics, and nothing in the record indicates the jury was

particularly focused on the rap-lyrics portions. (CR3: 644–46, 648; *see* RR49: 125–33; SX 131-I, 131-J). Second, the jury requested access to numerous items from both phases of trial. (CR3: 644–46, 648 (referencing two demonstrative exhibits, the “[p]hoto titled Free styling found in jail,” a letter given to one victim’s father, recordings and transcripts of jail phone conversations, Broadnax’s school records, the spiral notebooks, Broadnax’s Channel 5 interview, and crime scene photos)).

In short, Broadnax is unable to present a valid or compelling reason for certiorari review.

III. There Is No Compelling Reason for Further Review of Broadnax’s Serology-Evidence Claim

Broadnax appeals the decision below denying him further development and litigation of a Confrontation Clause claim that he did not see fit to raise at trial or in the many years of litigation since. In fact, it appears Broadnax strategically chose not to raise it at trial. At a minimum, the claim is plainly dilatory because Broadnax could have raised it during his state and federal habeas proceedings in light of *Melendez-Diaz* and *Bullcoming*. Broadnax’s serology-evidence claim is not worthy of this Court’s time, and nothing about the claim casts doubt on the jury’s verdict.

A. Non-retroactivity principles bar relief.

Habeas is generally not an appropriate avenue for the recognition of new constitutional rules. *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality op.). Thus, for the most part, new constitutional rules do not apply to

convictions final before the new rule was announced. *Id.* This facilitates federal- and state-court comity by “validat[ing] reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.” *Butler v. McKeller*, 494 U.S. 407, 414 (1990).

Broadnax seeks retroactive application of this Court’s opinion in *Smith*. But *Smith* was issued years after Broadnax’s conviction and sentence became final. *See Teague*, 489 U.S. at 301 (“[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant’s conviction became final.”). The inquiry then turns on whether the rule Broadnax proposes is substantive or a watershed rule of criminal procedure. It is neither.

The rule in *Smith* is not substantive—it does not “prohibit the imposition of capital punishment on a particular class of persons.” *Saffle v. Parks*, 494 U.S. 484, 495 (1990). Rather, it is clearly procedural. *Cf. Schriro v. Summerlin*, 542 U.S. 348, 353 (2004) (“[R]ules that regulate only the *manner of determining* the defendant’s culpability are procedural.”). And because the “watershed” exception is “moribund,” *Edwards v. Vannoy*, 593 U.S. 255, 272 (2021), *Smith* does not qualify for retroactive application. As such, *Teague*’s non-retroactivity bar applies, and Broadnax’s petition should be denied.

B. Broadnax’s serology-evidence claim lacks merit.

This is a straight-forward Confrontation Clause claim that Broadnax elected not to raise at trial. Broadnax did not object at trial to the admission of the serologist’s

findings or report on either evidentiary or Confrontation Clause grounds. (RR46: 191–200). Because an objection could have been made at trial on then-existing precedent, Broadnax did not preserve his Confrontation Clause complaint to the testimony’s or report’s admission, and the claim is barred. *See* Tex. R. App. P. 33.1(a)(1)(A).

Broadnax complains the TCCA erred in failing to follow *Smith* (Pet. at 23–24), even though the court did not reach the federal question or touch the merits of the claim. Regardless, the claim is not compelling and does not warrant this Court’s review.

The serologist in this case was a screener: she did not conduct DNA testing. (*See* RR46: 191; SX 392). She performed the preliminary steps to prepare evidence for subsequent DNA testing by examining the evidence for presumptive fluids like blood. (*See* RR46: 191). Her preliminary decisions and opinions did not impact the final outcome of the case. Unlike the non-testifying drug analyst in *Smith* who made a substantive determination impacting the outcome of the case (i.e., by drawing conclusions about the drugs and their quantities), the serologist’s work here was merely a preliminary step in the testing process. (*See* RR46: 191–92).

A comparison of the serology and DNA-related evidence shows the serology screenings were merely preliminary—literally “presumptive”—and not outcome determinative. (RR46: 196–97, 200–01, 204–08). Particularly, *none* of the serology or DNA testing further inculpated Broadnax.

But even if there were confrontation error, it was harmless because there is no compelling factual dispute about the serological evidence. *See Coy v. Iowa*, 487 U.S.

1012, 1021 (1988) (confrontation error subject to harmless error analysis); *Langham v. State*, 305 S.W.3d 568, 582 (Tex. Crim. App. 2010) (same). Serological evidence does not inculcate a particular individual; and while the DNA evidence directly inculpated Cummings, none inculpated Broadnax. The record indicates Broadnax's counsel strategically asked the analyst about each item tested, to show the jury Broadnax's DNA was not found on the crime-scene evidence. (RR46: 204–208; *see also* RR46: 155, 158–60 (asking witnesses about testing victim's pocket liners for DNA and swabbing the gun)). He then used the fact Broadnax's DNA was not on the murder weapon in his closing arguments. (RR47: 189).

For these reasons, the claim is meritless, and this Court should deny certiorari review.

CONCLUSION

Respondent respectfully asks this Court to deny Broadnax's petition.

Respectfully submitted,

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