

No. 25-939

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**In the Supreme Court of the United States**

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JAMES GARFIELD BROADNAX, PETITIONER

*v.*

STATE OF TEXAS

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

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**REPLY BRIEF FOR THE PETITIONER**

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**CAPITAL CASE  
EXECUTION SCHEDULED FOR APRIL 30, 2026**

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The State does not dispute the fundamental bases of both of Mr. Broadnax’s claims. It does not deny that the jury was encouraged to consider Mr. Broadnax a dangerous person because he wrote “gangster rap,” or that a serology expert’s out-of-court testimonial statements were used to establish Mr. Broadnax’s guilt without any chance of cross-examination. Instead, the State argues that this Court should turn a blind eye to these unconstitutional practices, because the Texas Court of Criminal Appeals’ (“TCCA”) decision below is insulated from federal review on account of its boilerplate formulation that does not facially mention any federal question, and because the issues raised here are insufficiently important for this Court’s time. The State is wrong on both fronts.

**A. This Court Has Jurisdiction to Review Both Claims.**

The State argues that the TCCA’s dismissal “only implicates the state court’s application of state procedural rules” and is thus “unassailable on certiorari.” Opp’n 1, 9. That is incorrect.

1. It is wrong as a matter of law to label Tex. Code Crim. Proc. Art. 11.071, § 5(a)(1) a “state-court procedural bar” that automatically precludes this Court’s review. Opp’n 9–10. As the TCCA itself unequivocally held: “[T]o satisfy Art. 11.071, § 5(a), 1) the factual or legal basis for an applicant’s current claims must have been unavailable as to all of his previous applications; and 2) the specific facts alleged, if established, *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) (emphasis added). The TCCA’s “screening function” under § 5(a)(1) thus “entail[s] a *prima facie* review of the substantive merits of each applicant’s” constitutional claim. *Rocha v. Thaler*, 626 F.3d 815, 831 (5th Cir. 2010). Dismissals pursuant to this *prima facie* review are “not independent of federal law, and [this Court’s] jurisdiction is not precluded.” *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985). Numerous cases interpreting § 5(a)(1) dismissals after *Campbell* have upheld jurisdiction for federal review. *See, e.g., In re Davila*, 888 F.3d 179, 188–89 (5th Cir. 2018) (dismissal of subsequent habeas application under § 5(a)(1) not based on independent and adequate state ground); *Ruiz v. Quarterman*, 504 F.3d 523, 527–28 (5th Cir. 2007) (same); *Busby v. Davis*, 925 F.3d 699, 706–10 (5th Cir. 2019) (same).

The State cannot seriously dispute this clearly established law, so it resorts to two expedencies. Neither works.

*First*, the State misleadingly cites sound-bites proclaiming that Art. 11.071, § 5(a) “has been consistently applied as a procedural bar.” Opp’n 10–15. But half of the cases it cites either pre-date *Campbell* or entirely failed to acknowledge its holdings, and are thus of no help to this Court. *Id.* (citing *Matchett v. Dretke*, 380 F.3d 844, 848 (5th Cir. 2004); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008)). As the Fifth Circuit has subsequently explained: “It is true that prior to *Campbell*, our decisions had assumed that a dismissal under § 5(a)(1) always rested on an independent and adequate state-law ground. That assumption cannot survive *Campbell*.” *Rocha*, 626 F.3d at 835; *see also id.* (clarifying that *Hughes*’s refusal to review was based narrowly “on the fact that the factual and legal bases for the claim were available when Hughes filed his first state habeas application”).

The other cases cited by the State all rested their finding of no independent federal question upon the fact—*undisputed in those cases*—that the petitioner raised no factual or legal basis that purported to be previously unavailable, thus precluding the TCCA from reaching the *prima facie* review of the underlying constitutional claim. Opp’n 12–15 (citing *Balentine v. Thaler*, 626 F.3d 842, 857 (5th Cir. 2010) (noting that the petition “made no effort to show that the facts or law underlying his [§ 5(a)(1)] claim were unavailable to him”); *Buntion v. Lumpkin*, 31 F.4th 952, 962 (5th Cir. 2022) (noting that petitioner raised the same claims presented in previous habeas proceedings based on the same record)). That is not the situation here.

*Second*, the State purports to rely on “the TCCA’s explicit statement that it did not reach the federal question presented.” Opp’n 10. But the TCCA stated no such thing. What it said was only a boilerplate formulation that

“we dismiss the application as an abuse of the writ without considering the merits of the claims.” Pet., App. B at 4a.

This sentence is the standard language the TCCA routinely uses when denying subsequent habeas applications under § 5(a), **regardless of** whether the underlying decision was based on a procedural or substantive ground. See, e.g., *Ex parte Davila*, 2018 WL 1738210, at \*1 (Tex. Crim. App. Apr. 9, 2018) (dismissing subsequent application “as an abuse of the writ without reviewing the merits of the claims raised” after concluding that “Applicant has failed to make a *prima facie* showing of a *Brady* violation”). The Fifth Circuit has repeatedly warned that the “boilerplate dismissal by the [TCCA] of an application for abuse of the writ” is frequently “uncertain” and “unclear” about “whether the [TCCA] decision was based on . . . a question of federal constitutional law,” and that a closer look at the underlying record is required to determine whether there is federal jurisdiction or not. *Ruiz*, 504 F.3d at 527; *Rocha*, 626 F.3d at 836. The State’s argument has been rejected multiple times, where federal courts found that the “boilerplate” dismissals under § 5(a)—despite their facial proclamation that the dismissals were “without considering the merits of the claims”—are based on substantive federal law when the record of the specific case so indicates. See, e.g., *Busby*, 925 F.3d at 707 (“On its face, the TCCA’s order states that i[t] has denied the application as an abuse of the writ without considering the merits of the claims . . . [but] [t]hat determination is necessarily dependent on a substantive analysis of the Eighth and Fourteenth Amendments as applied to the factual allegations.”); *In re Davila*, 888 F.3d at 187–89 (“[W]e are unpersuaded by Texas’s argument that the language provided at the end of the paragraph”—stating that the TCCA “dismiss[es] this application as an abuse of the writ

without reviewing the merits of the claims raised”—“controls over what common sense would indicate.”); *Ruiz*, 504 F.3d at 527–28 (finding federal jurisdiction despite “[t]he boilerplate dismissal by the [TCCA] of an application for abuse of the writ”); *Rocha*, 626 F.3d at 835 (same). This is consistent with this Court’s instructions that it is “important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action.” *Florida. v. Powell*, 559 U.S. 50, 56 (2010).

2. The State concedes—as it must—that “[w]hether a § 5(a)(1) dismissal is independent of federal law turns on case-specific factors,” including the records of the case, which a federal court “can—and should—read . . . to determine which of the two elements of § 5(a)(1) was the basis of the court’s dismissal.” *Rocha*, 626 F.3d at 835–37 (cited in Opp’n 14–15). Such review establishes certiorari jurisdiction regarding both claims presented here.

The standard for “previously unavailable” legal grounds under § 5(a)(1) is well-established and not disputed by the State. The State’s own cited authorities recite the same test Mr. Broadnax advances: “[A] legal basis was previously unavailable if subsequent case law makes it easier to establish the claim.” *Ex parte Barbee*, 616 S.W.3d 836, 839 (Tex. Crim. App. 2021) (cited in Opp’n 21); *see also* Mot. to Dismiss 34 (“Broadnax correctly asserts that ‘a legal basis was previously unavailable if subsequent case law makes it easier to establish the claim.’”). Each of Mr. Broadnax’s claims meets this standard.

Mr. Broadnax’s first claim arises from the State’s racially inflammatory use at the capital punishment phase of rap lyrics he composed. Mr. Broadnax raised this claim after *Hart v. State* held, as a matter of first impression in

Texas, that “the admission of rap music . . . is highly prejudicial due to the nature of the lyrics.” 688 S.W.3d 883, 894 (Tex. Crim. App. 2024). The *Hart* court made clear that “Texas has not yet addressed this issue”—which should alone prove that the TCCA’s dismissal of the rap lyrics claim was based on a substantive ground. *Id.* In response, the State argues that *Hart* is not enough, because Mr. Broadnax still needs a new *constitutional* basis to bring his rap lyrics claim under § 5(a)(1). Opp’n 20. But the State cites no support for reading into § 5(a)(1) the non-existent requirement that any new legal basis underlying a petitioner’s *prima facie* constitutional claim must itself be constitutional in nature, and petitioner is aware of none. The State also attempts to downplay the significance of *Hart* by citing to cases outside Texas regarding *different* evidentiary rules, as well as pre-*Hart* cases that actually refused to find the admission of rap lyrics prejudicial enough to warrant relief. Opp’n 21–22 (citing *Stewart v. State*, 995 S.W.2d 251 (Tex. App. 1999) (holding that rap lyrics depicting violence are “admissible and relevant” as to the “[defendant’s] character and reputation”), and *McDade v. State*, 613 S.W.3d 349 (Tex. App. 2020) (holding that recordings of the defendant performing rap songs “describe[d] [defendant’s] professed attitude towards lawbreaking and violence” and are admissible at punishment phase)). Prior to *Hart*, those cases would have foreclosed Mr. Broadnax’s rap lyrics claim—only reinforcing that *Hart* indisputably provided a previously unavailable basis under § 5(a)(1).

Mr. Broadnax’s second claim also rests on a previously unavailable legal basis: *Smith v. Arizona* itself explained that its holding aimed to resolve, for the first time, the “confusion in courts across the country” about whether one testifying expert could rely upon another, out-of-court

expert's report without violating the Confrontation Clause. 602 U.S. 779, 789 (2024). In the State's own characterization, Mr. Broadnax's petition "points out that" *Smith* "abrogat[ed] the plurality opinion in *Williams v. Illinois*, 567 U.S. 50 (2012)," and "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." Opp'n 27–28. If that does not provide "a legal basis [that] was previously unavailable" by "mak[ing] it easier to establish the claim," *Ex parte Barbee*, 616 S.W.3d at 839, then hardly anything will. The State's arguments to the contrary are unavailing. The pre-*Smith* cases it cites either do not address the situation presented in *Smith* (and here), where one expert purported to cite the report of another as the factual basis of his own report, see *Burch v. State*, 401 S.W.3d 634 (Tex. Crim. App. 2013); *Cuadros-Fernandez v. State*, 316 S.W.3d 645, 658 (Tex. App. 2009), or addressed an analogous situation and reached a conclusion contrary to *Smith*, see *Washington v. Griffin*, 876 F.3d 395, 400–02 (2d Cir. 2017); *Benjamin v. Gipson*, 640 F. App'x 656, 659 (9th Cir. 2016); *Paredes v. State*, 462 S.W.3d 510, 511 (Tex. Crim. App. 2015).

3. The rest of the State's arguments are all smokescreens. The State asserts that Mr. Broadnax "waived" both claims at trial and on direct appeal because he did not object on the same grounds as he does now. Opp'n 19, 25–26. That argument should be rejected based on the plain words of §5(a)(1), which explicitly allows subsequent habeas relief on a legal basis that "was unavailable on the date the applicant filed the previous [habeas] application." Waiver considerations based on trial and direct appeal are irrelevant under this statutory scheme. Indeed, Mr. Broadnax *could not* have waived the claims

before the legal bases became available—which is why the cases cited by the State, none addressing §5(a)(1) claims, all miss the point. Opp’n 19, 25–26.

The State’s retroactivity objection to Mr. Broadnax’s *Smith* claim also lacks merit.<sup>1</sup> Opp’n 33–34. Under *Teague v. Lane*, a holding automatically applies retroactively unless it “breaks new ground or imposes a new obligation” on the government—*i.e.*, “if the result was not *dictated* by precedent existing at the time the defendant’s conviction became final.” 489 U.S. 288, 301 (1989). By the State’s own logic that *Smith*’s holding in some sense “followed” from this Court’s previous jurisprudence, Opp’n 26—which, to be clear, does not preclude *Smith* from providing a previously unavailable legal basis for §5(a)(1) purposes, as explained above—*Smith* did not announce a new rule under *Teague* and applies retroactively. Further, the TCCA is not required to follow the federal *Teague* test, and there is no indication it did so here as a ground for dismissal. *See Ex parte De Los Reyes*, 392 S.W.3d 675, 679 (Tex. Crim. App. 2013) (“We recognize that we could accord retroactive effect to [applicant] as a matter of state habeas law” even if the applicant would not satisfy *Teague*).

**B. Both Claims Present Important Federal Constitutional Issues Warranting This Court’s Review.**

The State argues that, “[e]ven assuming jurisdiction,” certiorari is unwarranted because Mr. Broadnax’s claims “are unworthy of this Court’s attention.” Opp’n 9. This,

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<sup>1</sup> Notably, the State does not raise any retroactivity argument regarding Mr. Broadnax’s rap lyrics claim.

too, is incorrect, and underscores why certiorari is urgent and appropriate.

1. Mr. Broadnax’s first claim presents an important and recurring constitutional question this Court has never squarely answered: when, if ever, may the State use rap lyrics composed by a Black defendant to secure a death sentence? As *amici* from across the music industry compellingly demonstrate, guidance is urgently needed because prosecutors increasingly resort to rap lyrics in racially prejudicial ways, threatening important artistic creations and distorting due process and equal protection, particularly in capital cases. Br. of *Amicus Curiae* Travis Scott (“Travis Scott Br.”) 1–3, 9–11; Br. of *Amici Curiae* Killer Mike et al. (“Killer Mike Br.”) 20–22.

The constitutional stakes are high, and this case is an ideal vehicle for resolving them. Mr. Broadnax was a 20-year-old Black man tried by an almost all-White jury for murdering two White victims, and appeals to racial stereotypes plagued his whole trial. Pet. 21–22. The State capitalized upon anti-rap and anti-Black biases by explicitly urging the jury to equate “gangster rap” with a “gangster” disposition and future dangerousness, and by telling the jury to treat Mr. Broadnax’s musical creation as his “self-admission” of criminal thoughts and acts. *Id.* at 5–6. The jury twice asked to review all lyrics introduced by the State before sentencing Mr. Broadnax to death. *Id.* at 6–7. Tellingly, however, as the *amici* point out, the State did not introduce the lyrics at the guilt phase—implicitly conceding that they lacked any true factual nexus to the underlying crimes. Killer Mike Br. 10–11.

Indeed, the State’s arguments against certiorari continue to reflect exactly the same prejudices and biases that are the very reasons why certiorari should be

granted. Even now, the State posits without basis that Mr. Broadnax’s “free-style” rap music must “refer[] to the robbery, murders, and trial *in this case*,” and blames petitioner for “[n]otably . . . [still] not acknowledg[ing] in his petition or his application in the lower court that the lyrics . . . contain an admission to the capital murder and a reference to the judge presiding over *his case*.” Opp’n 17 (emphases added); *see also id.* at 32 (claiming that the lyrics were “admitting the murders”). These assertions demonstrate a fundamental misunderstanding about the rap music genre (and Mr. Broadnax’s arguments regarding them), and are themselves the perfect illustration of why prosecutorial use of rap lyrics to prove criminal propensity is problematic—because they are inevitably built upon the “racial and stereotypical fears of young Black men and rap music,” the “lack of understanding of rap music,” and “the biases and stereotypes about rap music and artists common in American society.” *Killer Mike Br. 3*, 11–21; *Travis Scott Br. 13–16*.

2. The State also misreads *Smith*. It acknowledges that “Nichols reported the [out-of-court] serologist’s test results” “throughout his testimony,” but argues this is allowed under *Smith* because “Nichols’s report stands alone.” Opp’n 23–24. That is untrue. Nichols testified that his own DNA analysis “rel[ied] on” Mack’s serology report, and explained in detail to the jury who Mack was, what she did in her analysis, and what her findings and conclusions were. *Pet. 10–12, 25–28*. These facts are indistinguishable from those in *Smith*—and, because the State does not dispute here that Mack’s out-of-court statements were testimonial, they warrant relief.

The State further argues that Nichols’s testimony and Mack’s report were exculpatory “personally” for Mr. Broadnax. Opp’n 26. Not so. At the guilt phase of

trial, the State introduced media interviews where Mr. Broadnax confessed to joining Mr. Cummings in a robbery and “lick.” State’s Exs. 404, 405, 407. Defense counsel presented substantial evidence about why these confessions were inherently unreliable, since Mr. Broadnax had no reliable memory about the incident due to drug use and exhibited severe psychological distress at the time of the interviews. *See, e.g.*, 46 RR 246; 47 RR 23–37, 188–90. However, the DNA evidence linked Mr. Cummings to the victims and the crime scene, and thus corroborated Mr. Broadnax’s media confessions about his and Mr. Cummings’s participation in the crime.<sup>2</sup> The violation of Mr. Broadnax’s Confrontation Clause rights was far from harmless and warrants review.

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The petition for a writ of certiorari should be granted.

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<sup>2</sup>The State is also wrong that the Nike shoes where one of the victim’s DNA was found were linked exclusively to Mr. Cummings, Opp’n 25 & n. 8, as those shoes were recovered from the trunk of the vehicle that Mr. Broadnax was driving (with Mr. Cummings as a passenger) at the time of his arrest, 45 RR 235; 46 RR 119–21; State’s Ex. 131.

Respectfully submitted,

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