IN THE TEXAS COURT OF CRIMINAL APPEALS AND 3RD DISTRICT COURT, ANDERSON COUNTY, TEXAS

EX PARTE ROBERT LESLIE ROBERSON III, APPLICANT	)	Trial Cause No. 26,162 Writ Cause No. WR-63,081-__

SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS UNDER ARTICLES 11.071 AND 11.073 AND
<u>SUGGESTION TO RECONSIDER ON THE COURT'S OWN INITIATIVE</u>

This is a death-penalty case; no execution date pending.

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ORAL ARGUMENT REQUESTED

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REQUEST FOR ORAL ARGUMENT

Applicant Robert Leslie Roberson III (Robert or Roberson) submits that oral argument would help advance the jurisprudence of this State and aid in the fair adjudication of the important issues raised here. Oral argument would assist the Court due to the complexity of the record, the challenging nexus between law and science, and the need for consistent application of an important Texas law: Article 11.073 of the Texas Code of Criminal Procedure. Additionally, this death-penalty case involves a robust claim of Actual Innocence based in part on evidence that no court has yet considered.

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INTRODUCTION

Robert Leslie Roberson III (Robert or Roberson) submits this "Subsequent Application for Writ of Habeas Corpus under Articles 11.071 and 11.073 and Suggestion to Reconsider on the Court's Own Initiative" (Subsequent Application). Roberson presents significant new evidence supporting his Actual Innocence, including the affidavit of Dr. Michael Laposata, a nationally recognized pathologist with expertise in bleeding disorders. He explains that understanding the condition of Robert's very ill daughter Nikki upon arrival at the ER and her appearance two days later during the autopsy **requires accounting for**, but did not account for, her serious bleeding disorder that made her highly susceptible to internal bleeding and bruising. This Subsequent Application is also supported by the Joint Statement of ten independent pathologists explaining why the conclusions of the medical examiner who performed the 2002 autopsy are deeply flawed and unreliable. Roberson's new evidence shows (1) no rational juror would find Roberson guilty of capital murder; and (2) unreliable and outdated scientific and medical evidence was material to his conviction.

Roberson also urges reconsideration in view of this Court's recent recognition, in a materially indistinguishable case, that the purported scientific basis for his conviction cannot stand. *See Ex parte Roark*, No. WR-56,380-03, 2024 WL

4446858, __ S.W.3d __ (Tex. Crim. App. Oct. 9, 2024) (granting habeas relief under Article 11.073 based on change in the scientific understanding of "Shaken Baby Syndrome" (SBS) a/k/a "Abusive Head Trauma" (AHT)).[2] *Ex Parte Roark* invalidated a conviction based on the **same** SBS hypothesis used to convict Roberson. Central to *Ex parte Roark* is the conclusion that testimony from a "child abuse pediatrician" (CAP) reflected outdated and inaccurate conclusions that are contrary to today's prevailing scientific understanding. Roberson's conviction was secured through nearly identical testimony from the **same** witness.

Since Roberson's previous habeas application was filed and dismissed, Roark has been fully exonerated.[3]

In Roark's case, as in Roberson's, the State's principal causation expert was the CAP, Dr. Janet Squires. Squires made her SBS diagnoses and testified in both Roark's and Roberson's trials when she was employed by Children's Medical Center of Dallas (Dallas Children's). Squires' testimony in both cases was based on SBS, which then permitted declaring that a triad of intracranial conditions—(1) subdural hematoma/bleeding under the dura membrane surrounding the brain, (2) brain

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[2] SBS was also then known as "Shaken Impact Syndrome" and has since metamorphosed into AHT, as noted in *Ex parte Roark*.

[3] *See, e.g.*, M. Cardona, *North Texas man exonerated for 'shaken baby' conviction — 24 years later*, KERA News (Nov. 19, 2024) *available at* https://www.keranews.org/criminal-justice/2024-11-19/north-texas-man-exonerated-for-shaken-baby-conviction-24-years-later.

swelling, and (3) retinal hemorrhages—was proof-positive that a child had been violently shaken and, perhaps, struck against a blunt surface. Today, even the most ardent defenders of SBS/AHT have had to concede that the version of SBS from that era is unscientific and unreliable.

Dr. Squires' SBS diagnosis was used to arrest, and her trial testimony to convict, both Roark and Roberson; in both cases she testified that a child in their care had sustained a triad of intracranial conditions because she must have been violently shaking, which generated "rotational forces" that "sheared" the brain and the blood vessels outside of it, causing bleeding inside the child's head. *See Ex parte Roark*, *supra*, at *5; 42RR106-07, 112 (Roberson trial testimony). In both cases, Dr. Squires testified that the only plausible explanation for the child's condition was shaking and, with Robert's daughter Nikki, perhaps shaking in combination with a single impact that Dr. Squires (correctly) perceived as relatively minor. Neither she nor other treating physicians at the time considered whether any underlying medical issues or an accidental short fall could explain any aspect of the child's condition.

During Roberson's trial, Squires testified unequivocally that Nikki had been shaken and that her diagnosis of a "massive brain injury"[4] was based on SBS, also then known as "Shaken Impact Syndrome." *See, e.g.*:

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[4] In fact, everyone, even the medical examiner, now agrees there was no injury to Nikki's brain tissue and no brain contusions of any kind. 8EHRR96.

> [Prosecutor]….. What you wrote is when you saw her, she wasn't going to live, and your diagnosis was massive brain injury and your only explanation was trauma. And medical findings is **a picture of shaken impact syndrome**. […] Can you explain to us then what **shaken impact syndrome** is?
>
> [Squires].… So for all those reasons, **shaken baby** has been a well described entity. Now, some people think that with **shaken baby** that the most part of the damage is that they're often **shaken and then thrown against something**. […] There are some experts that think that you cannot kill a child by just shaking alone, but you have to-- And they call it **shaken impact**. So **the term is about the same**.
>
> * * *
>
> Well, it is my opinion, my estimation after a consultation with all that there was **some component of shaking that happened to explain all the deep brain injury out of proportion, I would say, to the injury to the skull and the back of the head**. There had to have been something more than just impact.

42RR105-08; *see also* 42RR119-20 (discussing "the rotational force of the shaking").

In both the Roark and Roberson cases, Squires testified that retinal hemorrhages in particular were a distinct sign that abusive shaking had occurred. *Compare Roark*, *supra*, at *24 ("Dr. Squires testified at [Roark's] trial that B.D.'s retinal hemorrhaging was specific in nature to having been shaken and that only trauma, 'a lot of trauma,' would cause this.") *with* 42RR108 (Dr. Squires testifying in Roberson's trial: "And then the retinal hemorrhages are just further—It's one more thing that really lets you know that those eyes were being shaken and that the blood vessels broke."). *Ex parte Roark*, relying on contemporary science, expressly

rejected Dr. Squires' outdated belief that retinal hemorrhages are diagnostic of violent shaking: "We find the retinal hemorrhaging, applied through today's scientific method, to be non-specific and of no value in assigning causation for its existence." *Id*.

In both the Roark and Roberson cases, Squires also testified that the child would have immediately collapsed after the violent shaking because the intracranial triad would have materialized instantly, a now-discredited premise. The idea that there could be "no lucid interval"—because shaking would immediately cause the intracranial condition that was viewed, in circular fashion, as proof that shaking had occurred—allowed accusing whoever was with the child when she collapsed. *Compare Ex parte Roark*, *supra*, at *6 ("Dr. Squires also testified that B.D. would not be neurologically normal, or have a lucid interval, between the time of the injury and being brought to the emergency room) *with* 42RR108, 110 (Dr. Squires in Roberson: "It is my assessment in this child that after the event that caused all this deep brain injury she would not have been normal…. Well, I mean, this child would not talk, would not walk. Usually they're very-- Usually they're very hard. They're not normally neurological. Often times they're having trouble breathing.").

Today, the medical consensus is quite different: "there would be a marked shift in the testimony today concerning the effect of … lucid intervals," compared to the "mainstream science at the time of trial." *Ex parte Roark*, *supra,* at *23.

When both Roark and Roberson were accused and convicted, the SBS hypothesis could not explain why, if violent shaking had occurred, a child's neck was not injured, something that biomechanical engineering studies have exposed as a significant problem for the hypothesis.[5] Indeed, Robert's daughter Nikki had no injury whatsoever to her neck, spine, or spinal cord. Laboratory studies of anatomically accurate "crash-test dummies" have shown that any injury from shaking would be experienced, first and foremost, in the neck and, possibly, spinal cord, like whiplash, and has not been shown to cause subdural bleeding.

Squires' opinions, in both the Roark and Roberson cases—that abuse was the only way to explain the child's internal head condition—is no longer accepted as valid because scientific advancements have demonstrated that accidental falls with head impact and a wide array of natural diseases and genetic disorders can cause the same triad of internal head conditions. But when Roark and Roberson were tried, these conditions were thought to be exclusively caused by inflicted trauma, primarily in the form of violent shaking.

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[5] *See, e.g.*, Faris A Bandak, *Shaken baby syndrome: a biomechanics analysis of injury mechanisms*, FORENSIC SCI INT, 2005 Jun 30;151(1):71-9. doi: 10.1016/j.forsciint.2005.02.033.

Squires' testimony in Roark's and Roberson's cases regarding SBS was virtually identical.[6] But as *Ex parte Roark* has now recognized, any expert who might attempt today to testify as Dr. Squires did—

> would be confronted with twenty years of reputable scientific studies and publications that, if graphed, continually point away from their stated positions. If the expert were to experience the ostrich effect and wish to bury his or her head in the sand, then that expert would have to bear the brunt of a grueling cross-examination.

Ex parte Roark, *supra*, *26.

Squires was not the only expert who provided outdated and simply incorrect "scientific" opinions during Roberson's trial. Dr. Jill Urban, the medical examiner, testified for the State that Nikki's condition was explained, in significant part, by shaking. Dr. Urban also testified she could not tell what aspect of Nikki's condition was caused by "shaking" versus "blows," while not considering any other possible explanation. 43RR85-86.

During Roberson's 2003 trial, Dr. Urban repeatedly treated "shaking" and "blunt force" trauma as one and the same:

> [Prosecutor]. So just tell us what you mean by blunt force. What causes blunt force?
>
> [Urban]. Typically in a-- Especially in a child this age, blunt force can be caused both by-- well, by an impact to the head, so being struck with something or being struck against something. **Shaking also falls into this definition of blunt force** and when enough-- And although it

[6] *See* EX12 (side-by-side comparison of her testimony).

> doesn't seem like, you know, **shaking** is not necessarily striking a child, when you are-- When a child is say, **shaken hard enough**, **the brain is actually moving back and forth** within, again, within the skull, impacting the skull itself and that motion is enough to actually damage the brain.

43RR78-79.

Today, SBS/AHT is an extraordinarily controversial diagnosis.[7] At best, it is a diagnosis of exclusion, only permitted after all other possible causes have been ruled out, as even those committed to propping up the teetering AHT diagnosis have had to recognize. *See, e.g.*, *Consensus statement on abusive head trauma in infants and young children*, 48 PEDIATRIC RADIOLOGY 1048, 1048 (May 23, 2018) ("2018 Consensus Statement") ("When diagnosed [SBS/AHT] signifies that accidental and disease processes cannot plausibly explain the etiology of the infant/child's injuries.").[8]

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[7] *See, e.g.*, Cato Institute Forum, *Shaken Baby Syndrome: Examining the Evidence in the Shadow of an Execution* (Oct. 2, 2024), *available at* https://www.cato.org/events/shaken-baby-syndrome-examining-evidence-shadow-execution.

[8] The 2018 Consensus Statement, although an implicit recognition of significant advances in science that the AAP had previously disregarded, was not a true "consensus" statement. It was authored by a small group who agreed with each other and had testified in SBS cases for the prosecution; the statement did not account for the views of pediatricians and pediatric radiologists who disagreed with them. Nor did the 2018 Consensus Statement reflect the views of forensic pathologists, clinical pathologists, hematologists, pediatric infectious disease specialists, pulmonologists, biomechanical engineers, and many other scientists who had long recognized that the core premises underlying the SBS/AHT hypothesis have been discredited by modern evidence-based scientific research.

Experts from multiple disciplines have now provided a comprehensive explanation for the death of Robert's daughter: Nikki was a profoundly ill child suffering from an undiagnosed chronic interstitial viral pneumonia compounded by a secondary acute bacterial pneumonia. Her diseased lungs were pushed to respiratory failure by inappropriate prescription medications that further suppressed her breathing. Breathing arrest caused brain swelling, and her infection devolved into sepsis, causing Disseminated Intravascular Coagulation (DIC), a severe and often fatal bleeding disorder. None of these circumstances were identified or even considered, let alone excluded, in assessing her condition when her father brought her to the Palestine, Texas ER seeking help on January 31, 2002, or during the autopsy two days later.

This Subsequent Application is supported by additional new evidence establishing that Roberson's conviction was based on discredited and unreliable forensic science and that he is actually innocent. There was no homicide, only the tragic death of his very ill little girl.

Roberson urges the Court to consider the totality of evidence, old and new, and make an Actual Innocence finding. Alternatively, he asks the Court to grant a new trial or, at the very least, an opportunity to return to the trial court to develop the factual bases for the following new claims:

- Roberson Is Entitled to Habeas Relief Because He Is Actually Innocent;

- Roberson Is Entitled to Habeas Relief under Article 11.073; and
- Roberson Has Been Deprived of a State-Created Liberty Interest in Violation of Federal Constitutional Law.

NEW BASES FOR RELIEF

Roberson's previous habeas application was filed on October 14, 2024, and denied on October 16, 2024. *See Ex parte Roberson*, WR-63,081-05, 2024 WL 4504434 (Oct. 16, 2024) (unpub.) (per curiam) (Richardson, Newell, Walker, McClure JJ., dissenting). Under Texas law, the Court of Criminal Appeals is the sole arbiter of whether any applicant can move forward with seeking the relief requested in a subsequent habeas application. TEX. CODE CRIM. PROC. art. 11.071, sec. 5(a).

For Roberson's new claims to move forward, his application must include "specific facts" showing that "the factual or legal basis" was unavailable when his previous habeas application was filed **or** showing that, by a "preponderance of the evidence," "no rational juror could have found [him] guilty beyond a reasonable doubt." *Id.* The latter pathway does not require a new factual or legal basis but merely a "preponderance of the evidence" that no rational juror would convict (a burden far lower than "beyond a reasonable doubt"). *See id.* art. 11.073 (b)(2).

Roberson's previous application (-05) expressly sought relief based on *Ex parte Roark*; Roberson respectfully asks that the Court reconsider its dismissal of both the -05 and -04 applications and its denial of the relief sought in the -03

application, which resulted in a 13-volume record of new evidence (EHRR). But this Subsequent Application is based on yet more new evidence.

Most notably, Roberson submits an affidavit from Dr. Michael Laposata, a pathologist with special expertise in serious bleeding disorders. EX1. Dr. Laposata explains how the medical examiner, Dr. Urban, mistook bruises and bleeding caused by DIC as evidence of "multiple impact" sites. In Nikki's medical history, Dr. Laposta found evidence of numerous infections and frequent prescriptions for synthetic antibiotics, both of which impair a child's ability to produce platelets and other factors necessary for clotting to prevent bleeding. He also observed that Nikki had an acute respiratory infection during the last week of her life. He has concluded that her respiratory illness, on top of her chronic infections, was the primary cause of Nikki's DIC. Additionally, he has identified evidence corroborating his DIC diagnosis in blood work done during her final hospitalization—but not interpreted or accounted for in assessing Nikki's condition at that time.

In addition, Roberson submits a new Joint Statement of Pathologists. EX2. These pathologists are unaffiliated with any party. They have reviewed a detailed summary of Nikki's history and the circumstances relevant to assessing the cause and manner of her death. The Joint Statement expresses deep concern with the medical examiner's flawed methodology (including her failure to review any of Nikki's medical records), which led to unreliable cause and manner of death findings

in the 2002 autopsy report. The Joint Statement also expresses astonishment that the medical examiner has refused to consider material new evidence that entirely undermines her 2002 conclusions.

Indeed, when the Innocence Project sought a non-adversarial meeting between Dr. Urban and some of Roberson's new medical experts, Dr. Urban, through her assistant, offered only to give "10-15 minutes" to one of Roberson's attorneys:

---------- Forwarded message ---------
From: **Melinda High** <Melinda.High@dallascounty.org>
Date: Tue, Aug 20, 2024 at 4:40 PM
Subject: Request to schedule meeting re: Autopsy of Nikki Curtis 0456-02-0299JU - (h) - (Nikki Curtis) Telephone Call:
To: Vanessa Potkin <vpotkin@innocenceproject.org>

Afternoon,

Dr. Jill Urban just informed me again today that she have reviewed your expert's opinions.

Dr. Urban is willing to speak to one of your attorneys as a courtesy for ONLY 10-15 minutes and won't charge.

Please confirm receipt.

Thank you.

EX3 (highlighting and formatting retained).

The new evidence that neither Dr. Urban nor any court has yet considered also includes:

- Testimony from a wide, diverse array of experts and lay witnesses during hearings before the Texas House Committee on Criminal Jurisprudence on October 16, October 21, and December 20, 2024, prompted by concerns that this Court has not been applying Article 11.073 as the Legislature intended, both generally and specifically in Roberson's case, EX4-EX6;

- House Committee on Criminal Jurisprudence Interim Report, November 19, 2024, reflecting new, serious concerns with the Texas courts' application of Article 11.073, EX7;

- Scientific developments further eroding the SBS/AHT causation hypothesis used to convict caregivers who are alone with a child when he or she experiences a medical crisis, EX8-EX11;

- Affidavit of Gary Udashen, attorney for Andrew Roark, EX13;

- Affidavit of Donald Salzman, attorney for Robert Roberson, EX54;

- Declaration of Patricia Conklin, trial character witness, EX14;

- Declaration of Thomas Roberson, applicant's brother, EX15;

- Letters of Support, submitted to the Texas Board of Pardons and Paroles (TBPP) from numerous entities and individuals expressing support for relief for Roberson, EX16-EX25.

The new evidence supporting this Subsequent Application adds to the vast evidence previously submitted, most of which no court has yet considered, including:

- Expert reports from medical doctors with special training in lung disease, medical toxicology, pediatric radiology, and neuropathology—Dr. Francis Green, Dr. Keenan Bora, Dr. Julie Mack, Dr. Roland Auer, respectively—who, after comprehensive reviews of the record, have concluded that Nikki's condition can be entirely explained by natural and accidental causes and thus her death was not properly deemed a homicide, EX26-EX29; and

- A sworn declaration and other testimony from the lead detective, Brian Wharton, who investigated Nikki's death as a homicide but now believes that Roberson is innocent, explaining how misassumptions about Roberson's demeanor during the crisis, due to his undiagnosed Autism Spectrum Disorder, severely prejudiced the way he was viewed by hospital personnel, police, and prosecutors who did not know him, EX30-EX32.

Roberson also relies on and incorporates here by reference:

- All evidentiary proffers attached to his -03 application and the new 13-volume Reporter's Record of the -03 evidentiary hearing previously transmitted to this Court;

- All evidentiary proffers attached to his -04 application filed on August 1, 2024, (which was dismissed without consideration of the merits on September 11, 2024, and thus has not yet been considered by any court); and

- All evidentiary proffers attached to his -05 application filed on October 14, 2024, (which was dismissed without consideration of the merits on October 16, 2024, and thus has not yet been considered by any court).

For the Court's convenience, some previous exhibits are included, along with all of the new evidence, in **Appendix A** filed with this application.

PROCEDURAL HISTORY

In 2003, an Anderson County jury in Palestine, Texas convicted Robert Roberson of allegedly murdering his chronically ill, two-year-old daughter, Nikki Curtis, who was taken off life support on February 1, 2002. The State explicitly relied on a Shaken Baby theory to prove that a crime had occurred. EX39.

The full procedural history is recounted in multiple recent filings and is incorporated here by reference. However, Roberson notes here that on April 24, 2024, he filed a "Suggestion to Reconsider on Court's Own Initiative and Motion to Hold for Adjudication of *Ex Parte Roark*" in the -03 proceeding; that pleading was denied without written decision on September 9, 2024. Then, on October 7, 2024, after *Ex parte Roark* issued, he filed "Suggestion to Reconsider on Court's Own Initiative Considering New Expression of Legislative Intent and the State's

Concession in Markedly Similar Case [Roark] That Relief under Article 11.073 Is Warranted" in both the -03 and -04 proceedings, which further discussed commonalities between the Roberson and Roark cases. That pleading was denied without written decision on October 10, 2024, as was a final motion to stay the pending execution (with Judges Richardson, Newell, Walker, and McClure dissenting from the denial).

On October 17, 2024, the day that Robert was scheduled to be executed, his last remaining filing—a petition for writ of certiorari to the Supreme Court of the United States—was denied upon a finding that there was no federal issue presented. However, one justice issued a lengthy statement summarizing the case and bemoaning that "**a stay permitting examination of Roberson's credible claims of actual innocence is imperative**; yet this Court is unable to grant it." EX33. *Roberson v. State*, 604 U.S. __, *10 (2024) (Sotomayor, J.) (emphasis added). Justice Sotomayor summed up the dire circumstances: "Few cases more urgently call for such a remedy than one where the accused has made a serious showing of actual innocence, as Roberson has here." *Id.* at *8-*9.

Justice Sotomayor flagged an array of issues, including the failure of Roberson's own trial counsel to defend him despite his "insistence that he was innocent." *Id.* at *4. She noted that Roberson had sought relief from the state's

highest criminal court, relying on *Ex parte Roark*, bipartisan support from over 80 lawmakers, and the former lead detective—but to no avail:

> While *Roark* was pending before the TCCA, Roberson filed a "suggestion for rehearing" with that court seeking reconsideration of its prior decision on his habeas petition, based on the proceedings in *Roark* and on a statement of support from 86 members of the Texas House of Representatives. In that statement, the bipartisan House Criminal Justice Caucus urged the Board of Pardons and Paroles to recommend clemency in light of the "strong evidence of [Roberson's] innocence." The representatives further explained that the House had unanimously passed Article 11.073 specifically to allow "challenges to convictions that were based on dis-proven or incomplete science," and that they were "dismayed to learn that this law has not been applied as intended and has not been a pathway to relief—or even a new trial—for people like Mr. Roberson." Brian Wharton, the lead detective on Roberson's case, likewise stated that he believed Roberson to be innocent and that clemency would be appropriate. Notwithstanding these statements, the Board of Pardons and Paroles declined to recommend clemency.

Id. at *7 (internal citations omitted).

Roberson is alive today only because the Texas Supreme Court temporarily stayed his execution on October 17, 2024. But that stay has since been lifted.[9]

Meanwhile, on November 25, 2024, the habeas judge who had presided since 2016 voluntarily recused herself from "any further matters in this cause." EX34. To undersigned counsel's knowledge, no new judge has yet been assigned to preside in the trial court.

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[9] As of today, the elected District Attorney has not sought a new execution date.

FACTUAL BASIS FOR HABEAS RELIEF

I. Nikki's Bio-Social History

Nikki Curtis was born on October 20, 1999, to a mother with a history of housing insecurity, addiction, and prostitution. Child Protective Services (CPS) removed Nikki from her mother's custody at birth because of the mother's history of child neglect. Nikki had two older half-brothers who had previously been removed from the mother's care. Both children had significant health issues: Fetal Alcohol Syndrome Disorder and a seizure disorder, respectively. Custody of Nikki was given to her maternal grandparents, the Bowmans, who lived in Palestine, Texas. The identity of Nikki's father was then unknown.

Nikki's medical records reflect an extensive history of interactions with doctors seeking treatment for infections and other unresolved issues, totaling nearly 50 interactions with medical doctors for various issues during her short life.

Nikki was first taken to her pediatrician at eight days of age with an infection that was assessed as bilateral otitis media (middle ear infection). Her ear and sinus infections persisted, despite treatment with four different kinds of antibiotics, and she eventually had tubes surgically implanted in both ears. Even after the surgery, the infections persisted.

Before the age of one, Nikki was taken to the Emergency Room (ER) of the Palestine Regional Medical Center (Palestine Regional) for an episode of breathing

apnea, when she suddenly ceased breathing, collapsed, and turned blue. She was resuscitated by her maternal grandmother who had some training as a nurse. These apneic episodes persisted, leading to a neurology referral. A clear cause, however, was not determined, and the head scans associated with that neurology work-up were subsequently lost.

Soon after Nikki turned two-years-old, the Bowmans voluntarily relinquished custody of her to her biological father, Robert Roberson, who had, in the interim, voluntarily taken a paternity test and expressed eagerness to help raise Nikki. Roberson was not involved in most of Nikki's medical care until after he was awarded custody in November 2001. Robert had minimal education (he completed the 9th grade as a Special Education student); and when he was awarded custody of Nikki, he was working to support his family by delivering newspapers.

II. Nikki's Last Illness and Medical Treatment

On January 28, 2002, Nikki was brought to the Palestine Regional ER with a one-week history of diarrhea, vomiting, and breathing issues. She was diagnosed with a viral infection and prescribed promethazine (brand name "Phenergan")[10] in suppository form and loperamide (for diarrhea). Robert was instructed to follow up with her pediatrician in two days or return to the ER if problems persisted.

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[10] Medical records show Nikki was repeatedly prescribed Phenergan, including two times on consecutive days the week she collapsed.

The next morning, January 29, 2002, Nikki had a temperature of 103.1°F. Therefore, Robert took her to her pediatrician's office, where her temperature was measured as **104.5°**F. She was assessed with "fever, possible viral etiology or unresolved upper respiratory tract infection" and again sent home with prescriptions—this time for Omnicef and Phenergan cough syrup with Codeine, 3-4 teaspoons every 4-6 hours. Nikki went home with the Bowmans, who had agreed to keep her for the next few days because Robert's live-in girlfriend was recovering from a hysterectomy, and he was staying with her at the hospital.[11]

However, the next night, January 30, 2002, the Bowmans contacted Robert and asked him to retrieve Nikki and take her back to his house. He drove from the hospital and arrived some time after 10:00 PM at night. The Bowmans carried the sick child to his car, and he drove her home, gave her some food, and they fell asleep watching a movie.

Robert later reported that, around 5:00 AM on January 31, 2002, he heard "a strange cry" and woke up to find Nikki on the floor at the foot of the bed, seemingly having fallen. He saw a small speck of blood on her mouth but no other injury. He wiped her mouth with a washcloth, kept her up for a while to ensure she was okay,

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[11] Robert's solution for his girlfriend post-surgery was to prop up their bed (which was box springs and a mattress) on two layers of cinder blocks to make it easier for her to get in and out of bed. But that had the inadvertent consequence of making it unfamiliar to Nikki when she returned home.

then they both fell back asleep. When his alarm went off a few hours later, around 9:00 AM, Robert found Nikki unresponsive with blue lips. He tried to wake her and clutched her face. Then, in a state of shock, he took her back to the Palestine Regional ER.

Upon arrival at the ER, hospital staff noted that Nikki's lips and skin were blue, and her pupils were fixed and dilated. She had a bruise on her chin and touch bruises on one check. She had no obvious signs of external trauma—such as bleeding or cuts. Nursing staff immediately assumed, however, that Nikki's condition had been caused by her father and contacted police and CPS. Multiple nurses described Robert's flat affect and failure to express emotion like a "normal" parent. Hospital staff were unaware that he is a person with Autism. Also, medical staff dismissed Robert's report about Nikki's recent illness and a fall out of bed as not credible explanations for Nikki's grave condition.

Nikki was intubated, and resuscitation was initiated. Her revived heart experienced tachycardia. A CT scan later revealed that the breathing tube had been placed too deep, ventilating only the right lung. Therefore, it was pulled out and reinserted so both lungs could be aerated. A CT scan of her head revealed a small subdural bleed, significant brain swelling, and a shift of the brain to one side.

A nurse felt a bump (swollen tissue) on the right back of Nikki's head and decided to shave the head of the comatose child, who was then on life support.

During this process, the nurse took several non-medical-grade Polaroids. She then took it upon herself to perform a sexual assault exam although she was not SANE-certified and had not been asked to undertake such an exam. She claimed to see signs of "anal tears," which she attributed to sexual abuse. But she did not know, or at least did not account for the fact, that Nikki had had diarrhea for over a week and been prescribed suppositories for that condition by the Palestine Regional ER two days before. Her own photos do not support her abuse finding. And no medical professional ever endorsed this nurse's sexual assault speculation. Additionally, the results of DPS testing of a sexual assault kit later failed to produce any support for this nurse's opinion.[12]

The CT scan showed no skull fractures of any kind and no neck injury. Meanwhile, Robert voluntarily took law enforcement to his house, showed them where Nikki had fallen out of bed, and gave them the washcloth he had used to wipe her mouth. Law enforcement looked for but found no signs of violence in the home. EX30.

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[12] Yet this nurse was treated at trial as one of the State's "star" witnesses. She testified at length about her sexual abuse speculation and other wildly baseless and highly prejudicial opinions. The sexual assault allegation was dropped by the State just as the case was submitted to the jury—well after the damage was done. 44RR3.

Because of the severity of Nikki's medical condition, she was transferred that afternoon by ground to Dallas Children's for further treatment. No records related to the transfer, including any treatment provided while in transit, were maintained.

At Dallas Children's, the case was referred to the in-house child abuse pediatrician (CAP), Dr. Squires. She conferred only with the Bowmans who incorrectly informed her that Nikki had been "totally well" the night before her collapse; they did not mention that Nikki had been very sick for over a week, that her father had twice taken her to doctors within the past three days, or that Nikki had been prescribed potent, respiratory-suppressing medication, including antibiotics and double doses of Phenergan, along with Codeine.

Dallas Children's took additional CT scans, which showed significant right cerebral hemisphere edema with midline shift and right subdural hematoma. Chest x-rays on February 1, 2002, were interpreted as probable edema fluid but "superimposed infection/atelectasis are not excluded." Other x-rays showed no evidence of traumatic injury to chest, spine, pelvis, or hips.

To try to relieve the pressure inside Nikki's head, a pressure monitor was affixed to the top of her head via a drill hole through the scalp and skull.

Blood work shows multiple signs of DIC, **but that condition, like her pneumonia, was not diagnosed at the time**.

Later on February 1, 2002, a decision was made, in consultation only with the Bowmans, to discontinue life support and initiate brain-death protocol. Nikki was pronounced dead at 19:04 hours. A notarized copy of Dr. Squires' report, diagnosing "shaken impact syndrome," was faxed to Palestine law enforcement and used to arrest Robert, before an autopsy was even performed. EX35.

III. Shaken Impact/Child Abuse Diagnosis

Dr. Squires' report includes the following findings in support of her conclusion that Nikki's condition had been caused by inflicted injury likely in the form of shaking:

- "Head CT from Palestine ER taken 1/31/02: (one view sheet missing, presumably in Neurosurgery) there are no obvious fractures, but a large amount of soft tissue swelling over the scalp in the right posterior aspect. The brain is very abnormal. There is fresh blood seen over the brain and between the hemispheres of the brain. The entire right side of the brain is abnormal with a 'blackened' appearance, showing major infarcted areas. There is a considerable amount of pressure changes with the right side of the brain shifting across the midline."

- "Eye exam: Ophthalmology report bi-lateral retinal hemorrhages. These are very obvious on my exam, there is extensive bi-lateral retinal hemorrhages."

- "At the time of dictation it is unlikely the child will live. Her diagnosis is massive brain injury. The only reasonable explanation is trauma. The medical findings fit **a picture of shaken impact syndrome**. There was **some flinging or shaking component** which resulted in subdural hemorrhaging and diffuse brain injury. There was also an area of impact in the right back of the head."

- "In my medical opinion, this child has been the victim of child physical abuse. This child is expected to die from major external brain injury and there is no history provided which would be a reasonable medical explanation."

- "Massive rotational forces were the likely mechanism to cause this brain injury, and **the pattern is indicative of shaken impact syndrome**. It is very likely that the child will die of inflicted injuries and police and CPS involvement is strongly indicated."

Id. (emphasis added).

IV. The Autopsy

The day after Nikki was taken off life support, February 2, 2002, Nikki was transported at 7:30 AM to Southwestern Institute for Forensic Sciences (SWIFS) for an autopsy. The autopsy was performed by Dr. Urban, medical examiner.

In 2002, SWIFS was not accredited. Also, at that time, the National Association of Medical Examiners (NAME) had not yet published basic standards to guide medical examiners in performing autopsies. The first NAME standards were not published until 2005.

Additionally, in 2002, the guidance of the American Academy of Pediatrics (AAP) was that any child who had bleeding outside of the brain was **presumed** to have been abused based on what was then known as "Shaken Baby" or "Shaken Impact" Syndrome (SBS). *See* AAP Committee on Child Abuse and Neglect (COCAN) Shaken Baby Syndrome: Rotational Cranial Injuries—Technical Report, 108 Pediatrics 206 (2001).

An "Investigation Narrative" in the SWIFS file shows that, before the autopsy was performed, Dr. Urban was informed that a Dallas Children's CAP had made a "trauma" finding of "Retinal Hemorrhage, Subdural Hemorrhage, Cerebral Edema"

and that the father had been arrested and was to be charged with "capital murder." EX36. A member of Palestine law enforcement, who claimed there was evidence of sexual abuse (although there was none), then sat in on the autopsy. *Id.* When recently testifying in another case to vouch for another SWIFS autopsy that she had not performed, Dr. Urban admitted that these kinds of "Investigative Narratives" are generated by others because SWIFS' medical examiners do not investigate the scene; she also acknowledged that these narratives could bias an autopsy if the facts were wrong because she does not verify them. EX37 at 12, 14-17. *See also* Keith A. Findley and Dean A. Strang, *Bias in Forensic Pathology Ending Manner-of-Death Testimony and Other Opinion Determinations of Crime*, 60 DUQUESNE UNIV. L. REV. 302 (2022) (discussing the cognitive biases that often shape the work of medical examiners and the fact-finding problems this can produce).

Per her 2002 autopsy report, Dr. Urban reached a conclusion regarding cause and manner of death the same day that the autopsy was performed, even before she received the results of toxicology and neuropathology analyses she had requested. That same day, she also signed a death certificate to that effect. EX38. This is highly irregular considering the complexity of the case. EX2. In addition, Dr. Urban did not seek, and thus did not review, Nikki's voluminous medical records showing her chronic infections or even the medical records from the last few days of her life, including the CT scans taken at the Palestine Regional ER and Dallas Children's on

January 31 and February 1, 2002. From a forensic pathology standpoint this too is highly irregular and indicates a bias toward the hospital and law enforcement or at least a rush to judgment contrary to norms associated with independent investigations. *Id*.

Dr. Urban did not consider any of the following before deciding the cause and manner of Nikki's death:

- Nikki's medical history, including the records of her recent illness the week of her collapse and the drugs that had been prescribed to her by both a pediatrician and an ER doctor;

- The local Palestine Regional ER records related to Nikki's admission and treatment the day of her collapse;

- The CT scans taken of Nikki's head when she was admitted to the Palestine Regional ER the morning of her collapse;

- The EMS records reflecting Nikki's treatment in transport from Palestine to Dallas;

- A medical reference book to determine whether Nikki's organs were of an abnormal weight at autopsy (which both the lungs and the brain were);

- The scene where Nikki collapsed, including: the fact that the bed where she had been sleeping was a mattress and box springs propped up on cinder blocks;

- The expertise of a biomechanical engineer or biomechanical research regarding the injury-potential of short falls;

- Data about the potential height, trajectory, or impact surface associated with the reported fall, trajectory of the fall, or the impact surface;

- The relevance of Nikki's height, weight, and age to determine whether it was physically possible to generate sufficient force through shaking to cause any aspect of her condition;

- The washcloth and bedding obtained from the scene containing very small specks of blood;

- Any information regarding "promethazine" a drug found in high quantities in Nikki's system, as identified by a toxicology report that Dr. Urban had requested but did not wait for; and

- All of the intervening medical treatment, transports, and medications that were applied to Nikki after she arrived at the ER the morning of January 31, 2002, until she arrived at SWIFS on February 2, 2002, including having a pressure monitor surgically screwed into her head, causing bruising, and the blood work that showed Nikki had DIC, which makes a person especially prone to bruising and internal bleeding.

9EHRR83-84.

Because Dr. Urban did not consider any of this information, her autopsy report does not account for how any of these factors may have affected Nikki's condition or appearance by the time the autopsy was performed two days after her admission to the hospital. For instance, a surgical pin is apparent in one of her autopsy photos showing where the pressure monitor had been surgically screwed into Nikki's skull at Dallas Children's and then removed from the top of her head before she was transported to SWIFS. This fact was not, however, noted in the autopsy report or later shared with Roberson's jury. Instead, Dr. Urban led the jury to believe the bruising caused by this medical intervention was an "impact site" suggesting a

"blow" to the head, a word that presumes an inflicted injury—although the injury did not even exist when Robert brought Nikki to the hospital.

V. **Specific Medical Opinions (2003-2024)**

A year after the autopsy, in February 2003, Dr. Squires, the CAP from Dallas Children's who had made the Shaken Baby diagnosis, and Dr. Urban, the medical examiner who had performed the autopsy, testified for the prosecution. They were the only two causation experts to testify. Both testified at length about "shaking" as a mechanism of injury and described a triad of internal head conditions—subdural bleeding, brain swelling, and retinal hemorrhages—as markers of a shaking-inflicted injury. EX39.

Robert's appointed counsel did not challenge the State's "Shaken Baby" causation theory in any respect, although Robert consistently denied shaking or otherwise harming his daughter. *See, e.g.*, 41RR57-58; EX40.

In 2016, Dr. Urban authored an affidavit in which she denied having opined that Nikki's death was caused by shaking and instead claimed that Nikki's internal head condition was caused by "multiple impacts." But Dr. Urban had testified at length during the 2003 trial about shaking, "rotational forces," "shearing" injuries, and other terminology then associated with SBS. She had also offered unsound opinions that children do not bruise easily because of excess "fat," that their necks are protected during shaking because the necks are "weak," that a short fall could

not have caused any aspect of Nikki's internal condition, and that her injuries show that she would have experienced an immediate loss of consciousness—none of which withstands scrutiny today. 43RR73-74, 81-82, 89.

In 2021, Dr. Urban testified in a post-conviction proceeding, admitting that she had not considered any of the factors listed above before reaching her conclusions regarding cause and manner of death. Dr. Urban also admitted that the "goose egg" captured in the CT scan on the back of Nikki's head "could be caused by a fall," and thus the result of an accident. 9EHRR148. But Dr. Urban maintained that she did not need to consider the possibility of an accidental fall in assessing Nikki's condition.[13] She also declined to revisit her opinions considering changes in scientific understanding since 2002. 9EHRR127.

Further, she rejected the concept that Nikki's recent respiratory illness or the promethazine and Codeine or the CT scans were relevant.

To date, considerable criticism regarding Dr. Urban's opinions exists. The well-substantiated critiques are documented in expert reports and sworn testimony. Multiple, highly qualified experts have concluded that Nikki's death was **not** a homicide, including Dr. Janice Ophoven (pediatric pathologist), Dr. Roland Auer

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[13] Pediatric forensic pathologist Dr. Ophoven explained that there is no scientific way to look at a bump on a head (a blunt force injury) and determine whether the injury was caused by an accidental fall or a blow. 3EHRR57. The State's retained expert, Dr. Downs, reluctantly agreed. 10EHRR169.

(neuropathologist), Dr. Carl Wigren (forensic pathologist), Dr. Francis Green (lung pathologist), Dr. Keenan Bora (medical toxicologist), Dr. Julie Mack (pediatric radiologist), and now Dr. Michael Laposata (pathologist with special expertise in hematology, the branch of medicine devoted to the study of blood and blood flow). *See* EX1; EX26-29.

Highly qualified specialists in the fields of lung pathology, neuropathology, forensic pathology, pediatric radiology, medical toxicology, and now hematology have thoroughly reviewed all available medical records and the autopsy file and have concluded that, when Nikki died, she had a severe, undiagnosed chronic viral pneumonia compounded by a secondary acute bacterial pneumonia, as assessed by lung pathologist Dr. Francis Green (with nearly 50 years of experience specializing in lung disease). Her infection progressed to sepsis. Sepsis reflects a system-wide failure to fight off infection—and thus a profoundly ill child.

The experts' correlated opinions also show that Nikki had DIC, the signs of which are evident in lab results that were never considered at the time of Roberson's trial and initial appeals. DIC, a clotting disorder, would have caused an increased tendency to bleed and would have contributed to the intracranial bleeding mistakenly interpreted as signs of inflicted head injury.

A medical toxicologist, Dr. Keenan Bora, has now demonstrated that, in the days leading up to Nikki's final collapse, she was given double prescriptions for

Phenergan/promethazine—one in suppository form and one in cough syrup with Codeine. EX28. These dangerous, respiratory-suppressing medications were prescribed by physicians unaware of her pneumonia and would have only further hastened her respiratory failure and not addressed her infections. Phenergan/promethazine now comes with an FDA "black box warning" against prescribing it to children under two or with respiratory conditions—precisely because of the risk of causing respiratory failure and sudden death. EX41. That is, promethazine suppresses breathing; it does not treat a respiratory illness like pneumonia. Dr. Bora has determined that post-mortem results of drug screens show that Nikki had ingested far more promethazine than would ever have been a reasonable therapeutic amount, a phenomenon likely explained by the double prescriptions from two different doctors on consecutive days. EX28.

Additionally, a pediatric radiologist, Dr. Mack, has concluded that Nikki had only a single impact site on her head, not "multiple impact sites," as claimed by the medical examiner, who did not review the CT head scans.[14] This single impact site

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[14] In her autopsy report, Dr. Urban also noted a torn frenulum (a flap of skin under the upper lip inside the mouth). Dr. Urban listed this as a "blunt force injury." At trial, she described this as an "impact site," which she attributed to a "blow." Seemingly, Dr. Urban was not aware of, or did not account for, the fact that Nikki had been repeatedly intubated, a process whereby a breathing tube is inserted down the throat, which, in Nikki's case, had to be pulled out and reinserted while in the Palestine Regional ER because it was initially misplaced. A torn frenulum is common when a child is intubated. 8EHRR113; 6EHRR123-125. Also, the staining

is consistent with the report of the fall out of bed, which may have started the subdural bleed (which the CT shows was small upon admission to the Palestine Regional ER). EX27.

Furthermore, an expert in forensic neuropathology and head trauma, Dr. Auer, has concluded there was no evidence of "multiple impact sites" on Nikki's head and no evidence of trauma of any kind that could explain her death. He agreed that the CT scans show only a single, minor impact site to the back right of her head and a small, subdural bleed upon admission to the hospital.

The larger volume of blood observed two days later during the autopsy was the result of DIC and medical intervention, not proof of "multiple impacts." Nikki was subjected to extensive medical treatment to see if her comatose condition could be reversed—all of which affected her blood circulation because her heart and breathing were revived after she had already experienced brain death, evidenced by eyes that were "fixed and dilated." Oxygen-deprivation for over 10-12 minutes causes brain death. No blood could thereafter enter her brain and was instead

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technique used on that wound during the autopsy indicated that it was "very recent," "not a few days old"—therefore, it had to have occurred during the hospitalization right before the autopsy. 8EHRR114. Moreover, a torn frenulum does not support the fatal head trauma finding. Nor is there any evidence that anyone observed a torn frenulum until well after Nikki was intubated. If Nikki had been struck on the mouth so as to tear a flap of skin inside her mouth, there would have been some sign of this on her face; but there was no evidence of abrasion, swelling, bruise, or disruption of skin on the outside of her mouth. 8EHRR123; 8EHRR125.

"detoured" around the outside of the brain until she was taken off life support. Dr. Auer showed that what the medical examiner saw under Nikki's scalp on February 2, 2002, was not the small subdural bleed captured in the CT scans on January 31, 2002. EX29.

The jury was shown graphic autopsy photos of Nikki's scalp cut open and peeled back to reveal far more blood than was present upon her arrival at the ER and was misinformed that this blood was proof of "shaking" and "blows" inflicted before she arrived at the ER.

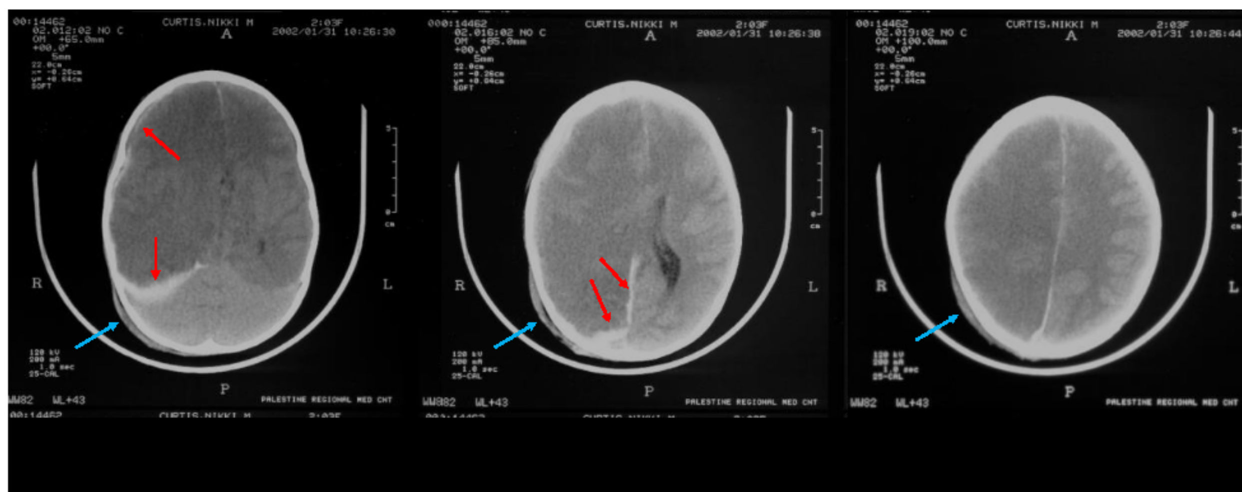
VI. New Medical Opinions (2025)

A. New Medical Opinions Confirm There Was No Homicide.

To date, all experts, including Dr. Urban, agree that Nikki's brain tissue was not damaged; there were no contusions or signs of a concussion. 8EHRR96. Her brain, as captured in the CT scan made at the Palestine ER, was, however, plainly swollen. Rediscovery of the long-lost CT scans in the courthouse basement in 2018, when finally interpreted by Dr. Mack, the only expert trained to interpret medical imaging (a radiologist), answered a key question.[15] Nikki's brain swelling **cannot** be attributed to pressure from intracranial bleeding because the initial CT scans

[15] Materials, never previously produced to Roberson, were found locked up in the courthouse basement in August of 2018. Among those additional materials were envelopes containing the CT scans taken at the Palestine Regional ER and Dallas Children's that had long been missing. 2EHRR85-87.

(which Dr. Urban never reviewed), show there was only a small subdural hematoma when she arrived at the hospital:



EX27.[16] Therefore, what caused Nikki's brain to swell was **not** pressure from the subdural hematoma, but the result of oxygen deprivation. 8EHRR15-31.

The critical question then is: what caused Nikki to cease breathing such that her brain was deprived of oxygen, ultimately causing her to become unresponsive?

The single bump on the back of Nikki's head, also captured in the CT head scans, does **not** explain Nikki becoming unresponsive. It was not a serious head injury. And, again, even if the impact caused the small subdural hematoma, the latter was too insubstantial to explain the brain swelling. The single, minor impact site on Nikki's head is explained by the fall out of bed in the night.

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[16] In a CT scan, the image is reversed; therefore, the blue arrow pointing to the bump on the back of the head that appears to be on the left was actually on the right back side of the head.

The combination of severely infected lungs (from the undiagnosed pneumonia) and the inappropriate medications Nikki was prescribed by doctors who had missed the pneumonia suggest Nikki likely became woozy and fell out of bed. Also, her medical records show that, a year before her father entered her life, Nikki had started having breathing apnea episodes when she would inexplicably cease breathing, collapse, turn blue, and have to be revived. These were so serious that her pediatrician recommended that she not move back and forth between her two sets of caregivers for a while:

Pediatric Associates of Palestine

111 Medical Drive • Palestine, Texas 75801
(903) 723-6092

August 24, 2000

To Whom It May Concern:

Nikki Bowman-Curtis is under my care for several apneic episodes. The origin and cause of her apnea at this point is undetermined. She is undergoing extensive testing to determine the cause of her apnea. She is on an apnea monitor at home as well. I feel like it would be in Nikki's best interest to not have her change environment and have her care shifted between different caretakers until such time we can determine the cause of her apnea and its' ultimate treatment. Please feel free to contact me if you have any questions.

Sincerely,

Dr. Karen Ostrom
Pediatric Associates

EX42.

Nikki's breathing problems, which her medical records show date back a year and a half before her final collapse, were never resolved. The initial hypothesis was a seizure disorder; but that concept was dismissed when there was no obvious neurological proof.

Soon after Robert took on responsibility for Nikki's care, when Nikki was 27 months-old, she had been struggling for over a week with an acute infection that sent her father seeking help from multiple doctors. Then, on January 31, 2002, she ceased breathing yet again while she and her father were asleep. When a person experiences respiratory arrest, the heart will slow and the brain will start to swell as it strains for sufficient oxygen. That is, her tragic collapse is entirely explained by natural and accidental causes.

During the 2021 evidentiary hearing, no experts in lung pathology, medical toxicology, pediatric radiology, or hematology testified—specializations all relevant to understanding Nikki's condition. Thus, there were open questions about the precise cause of some intracranial bleeding and bruising not present when Nikki was brought to the Palestine ER the morning of her collapse but noted during the autopsy. Now, every aspect of Nikki's condition can be explained. The last piece of the puzzle is Dr. Laposata's explanation of the role Nikki's DIC played.

In 2021, the State's retained expert, Dr. Downs, rejected the notion that Nikki had anything wrong with her—including pneumonia, DIC, or contra-indicated

prescription medication. Since then, a lung pathologist has shown precisely what Dr. Downs (and Dr. Urban) lacked the training to detect. EX26. During an October 16, 2024, hearing before the House Committee on Criminal Jurisprudence (House Committee), Dr. Green explained to lawmakers the multiple signs of pneumonia he found in Nikki's lung tissues. EX4 at 60-83.

On October 16, 2024, Dr. Auer also testified before the House Committee that he believed Nikki had both pneumonia and DIC, also known as "consumption coagulopathy," and that this condition was relevant to understanding her exterior and the intracranial bleeding observed during the autopsy. *Id.* at 84-85. According to Dr. Auer, if you simply Google "DIC," you will find images that, in extreme cases, can make a person with DIC appear as if they have been "beaten up." *Id.* at 94.

Nikki did not present at the Palestine ER with signs that she had been battered. But two days later, her DIC contributed to a change in her appearance, which Dr. Urban failed to consider during the autopsy and misconstrued as signs of "blows." A new expert report from Dr. Laposta, an expert in blood disorders, explains for the first time that Nikki had obvious clinical and laboratory test results showing that she had DIC, a serious bleeding disorder. None of Nikki's treating doctors on January 31 or February 1, 2002, diagnosed her DIC, even though they ordered laboratory tests designed to reveal bleeding disorders. Their failure is likely attributable to the

power of the erroneous belief at that time that Nikki's intracranial bleeding could only be explained by inflicted trauma.

B. Qualifications of Dr. Michael Laposata

Dr. Laposata has an M.D. and Ph.D. from Johns Hopkins University School of Medicine. He completed a two-year postdoctoral research fellowship in hematology-oncology in 1981 and has specialized in this branch of medicine, devoted to the study of blood and blood flow, ever since. EX1.

Dr. Laposata spent 19 years teaching at Harvard Medical School, where he became a full Professor. He is currently a Professor of Pathology and Chairman of the Department of Pathology at the University of Texas Medical Branch at Galveston. *Id.*

Dr. Laposata has written numerous peer-reviewed articles on topics related to the diagnosis of coagulation disorders. He has written several books, including a major textbook entitled *Laboratory Medicine: The Diagnosis of Disease in the Clinical Laboratory*. He is a nationally recognized expert on coagulation disorders.

Dr. Laposata has evaluated over 50,000 cases to assess excess bleeding or abnormal clotting. He was also recently selected as a member of a 21-member committee formed by the National Academy of Medicine charged with studying diagnostic error and, in that role, has educated the medical community about how

coagulation disorders can be missed. His treatise on the subject includes a discussion of the over-diagnosis of child abuse. One case study focuses on a child with a bleeding disorder that was undetected, leading to a false accusation of child abuse, and then imprisonment of the father and removal of the child from his attentive parents. *Id.*

Dr. Laposata has been involved as an expert in 20-30 legal cases where the possibility of coagulation disorders was raised. He has frequently been asked to determine whether an underlying bleeding disorder might explain internal bleeding and/or bruises observed in a child. In some cases, he has concluded that a bleeding disorder, not abuse, was the most appropriate diagnosis. Far more often, however, he has found that the clinical and medical evidence supported physicians' diagnoses of child abuse. Indeed, in a significant **minority** of cases has he determined that a clotting or bleeding disorder better explained some or all of the child's condition. That is, more often than not, after reviewing a case, he has to advise attorneys that he cannot provide opinions helpful to them. *Id.*

C. Opinions of Dr. Laposta in this Case

Dr. Laposa has concluded that Nikki's history of chronic infections is significant to assessing whether Nikki had DIC, as infections are the leading cause of DIC in infants and children. Dr. Laposata notes that her doctors' frequent prescription of five different synthetic antibiotics to Nikki (on at least ten separate

occasions) is also a significant factor; research shows that synthetic antibiotics impair platelet formation, which is critical to proper clotting. EX1.

Dr. Laposata concludes that Nikki's laboratory blood results in the days before her collapse and during her final hospitalizations at the Palestine ER and Dallas Children's show unmistakable signs that Nikki had moderate DIC. His analysis reveals that Nikki's blood tests—some of which were specifically designed to identify bleeding disorders—reveal that Nikki had abnormally-shaped red blood cells, elevated blood-clotting times, and other markers highly suggestive of DIC. Dr. Laposata also explains that she had abnormal liver-function test results, which further corroborate his DIC diagnosis since the liver plays a role in the formation of the body's blood-clotting factors. DIC can also be triggered by a small intracranial bleed, following a short fall with head impact. *Id.*

The DIC finding is quite significant, as Dr. Laposata explains:

> When a person experiences DIC, their body rapidly uses up all of the clotting factors. Then, after their clotting factors are fully depleted, they can bleed anywhere and potentially everywhere in their body. During an emergency resuscitation effort, like Nikki experienced when she arrived at Palestine Regional, a patient in DIC can develop bleeding under the skin in the form of bruises. Nikki's minor bruises on her face captured in the hospital photos and scalp are entirely consistent with her father's efforts to wake her, the life-saving efforts to resuscitate her upon her arrival at the Palestine ER, and then subsequent treatment by her medical providers during the course of her hospitalization until she died two days later.

* * *

> The most plausible explanation for Nikki Curtis' bleeding and bruising is the development of DIC starting months before the event which took her life. […] A major diagnostic error in which the diagnosis of DIC is missed occurs when individuals who are not expert in the field of coagulation and are unaware of chronic DIC, recognize only overt DIC. Nikki Curtis clearly had a chronic DIC because she suffered from infections through virtually her entire life. Minor trauma in such a patient with chronic DIC can lead to major bleeding, especially if the infection is worsening into something more life-threatening like pneumonia. The presence of prior apneic episodes and her recent high fever in this patient all suggest that her status was worsening, most likely as her infection was becoming more severe.

Id.

Finally, Dr. Laposata explains that Dr. Downs' post-conviction testimony was patently erroneous. Dr. Downs claimed that Nikki did not have DIC because she would have had blood oozing everywhere, including her IV lines. As Dr. Laposata attests:

> While patients with DIC are susceptible to bleeding anywhere, they often have bleeding and bruising in discrete areas, not everywhere as Dr. Downs suggested was required. Dr. Downs' analysis of Nikki's laboratory PTT and D-dimer results is also wrong. As I have noted previously, Nikki's laboratory results indisputably demonstrate she had moderate DIC, particularly when combined with her clinical history.

Id.

In sum, Dr. Laposata has concluded that Nikki's moderate DIC explains the contrast between the minimal bruising and bleeding Nikki had when her father brought her to the Palestine ER and the more extensive bleeding and bruising Dr. Urban noted during the autopsy, which she incorrectly assumed was evidence of

multiple blunt force impacts. Instead, Dr. Laposata concurs with other experts that Nikki had a bleeding disorder which, along with her severe infection that progressed to sepsis, caused her death.

D. Further Corroboration

Roberson's team has approached other highly qualified pathologists, unaffiliated with any party, to look at a factual summary and previous expert opinions about the cause of Nikki's death. All have extensive experience performing autopsies, assessing human tissue, and making cause and manner of death determinations. They have signed a "Joint Statement of Pathologists" (Joint Statement) in February 2025 expressing profound concern about Dr. Urban's failure to revisit an autopsy performed over 20 years ago. Based on publicly available information, they do not believe that the autopsy comports with current standards of care in their field. EX2.

The Joint Statement urges reexamining the conclusions regarding the cause and manner of Nikki's death and asserts that the reexamination should be based on all available, relevant information, including the opinions of pathologists who have already studied the case and provided extensive written findings. *Id.*

The Joint Statement recognizes that, at the time of the 2002 autopsy and 2003 trial, medical experts generally considered the combination of subdural hematoma, retinal hemorrhage, and encephalopathy (brain swelling) sufficient to make a

determination of SBS/AHT. Since then, the profession's understanding of these issues has evolved. A forensic pathologist performing an autopsy today would consider undiagnosed pneumonia, dangerous medications, and a short fall significant and sufficient to explain Nikki's collapse and subsequent death. *Id.*

Additionally, the Joint Statement avers that Dr. Urban's autopsy does not reflect an attempt to account for the effects of extensive medical treatment, undertaken to try to reverse Nikki's condition, between the time when she was brought to the ER unconscious with blue lips and fixed, dilated pupils on the morning of January 31, 2002, and when Dr. Urban conducted the autopsy two days later. Pathologists today know that treatment can alter the evidence available and can complicate the picture viewed at autopsy. *Id.*

The Joint Statement expresses concern that, when Dr. Urban was asked in 2024 to meet with Roberson's counsel, the Innocence Project, and medical experts who have reexamined the case and concluded that her death was not a homicide, she (who is still employed by SWIFS as a medical examiner) was unwilling to participate in such a meeting. *Id.*; *see* also EX37 at 7-8; EX3. Dr. Urban's offer to give his defense counsel only a 10-15-minute phone conference is not, in their professional opinion, sufficient in a case of this complexity. Medical examiners should be objective and willing to engage with multiple stakeholders in criminal investigations. EX2.

The pathologists who signed the Joint Statement have concluded, based on their understanding of the facts, that the conclusions from the 2002 autopsy performed on Nikki Curtis are unreliable. They note that Dr. Urban reached her conclusions regarding cause and manner of death on February 2, 2002, the same day the autopsy was performed without waiting for critical test results. They believe these conclusions could not withstand scrutiny in light of contemporary scientific understanding, because it is now known that many naturally occurring phenomena, such as infection, genetic disorders, and accidental short falls with head impact can produce the same intracranial conditions once thought to be "diagnostic" of inflicted head trauma. *Id.*

The Joint Statement emphasizes that failing to properly analyze clinical data, radiology, and medical records can further skew autopsy results. For instance, a CT scan made on January 31, 2002, shows a small subdural hematoma and a swollen brain; but Dr. Urban never looked at those scans and did not recognize that the more extensive intracranial blood observed at autopsy two days later—and presumed to be a sign of multiple sites of trauma—were not present when Nikki arrived in the hospital and thus cannot reasonably be characterized as proof of trauma, inflicted or otherwise. *Id.*

The Joint Statement recognizes that, in 2002, when Roberson brought Nikki to the ER, the consensus in the medical community was that whenever a child had

the triad of conditions observed in Nikki—subdural bleeding, brain swelling, and retinal hemorrhages—she must have been violently shaken and possibly struck against a blunt surface. The consensus in the medical community at that time was that illnesses or accidents (unless particularly dramatic and violent) could not cause these symptoms. The medical consensus also presumed that violent shaking caused immediate brain damage, allowing investigators to assume that a crime had occurred and then to artificially limit the likely suspect(s) to whomever was with the child at the time of her collapse. Caregivers, like Roberson, who denied doing anything to hurt their child, were perceived as liars. *Id.*

The Joint Statement acknowledges that each of the SBS premises considered medical orthodoxy in 2002-2003, when Roberson was arrested and tried, has since been entirely undermined by evidence-based science. None of the SBS principles have ever been validated and many have since been debunked by evidence-based medicine and biomechanical engineering studies. *Id.*

Additionally, the Joint Statement notes that contemporary understanding of the role of cognitive bias in death investigations has justifiably prompted some jurisdictions to prohibit law enforcement personnel directly involved in an investigation to be inside the autopsy suite during the autopsy, as occurred in this case. Several factors suggest cognitive bias is an issue here, including the hasty conclusions regarding cause and manner of death made the same day as the autopsy

after being informed that Roberson had already been arrested using an SBS diagnosis and then the refusal to reconsider old findings based on new medical evidence and changes in scientific understanding during the intervening two decades. *Id,*

The Joint Statement reflects the opinion that a forensic pathologist faced with new medical evidence or changed science should be willing to reconsider previous opinions. That reconsideration should include all relevant evidence, including all reports from qualified specialists who have studied the case. An unwillingness to engage in meaningful review suggests that perceived reputational harm has been elevated over the truth-seeking function that is supposed to animate science. *Id.*

The Joint Statement instructs that accurate cause and manner of death determinations are severely undermined when medical examiners act as an adjunct of law enforcement and prosecution or are unwilling to contradict or fully examine determinations made by treating physicians. *Id.*

The Joint Statement notes that, after years of studies exposing the lack of scientific underpinning for SBS, since renamed AHT, even those in the pediatric community who have long endorsed the SBS/AHT hypothesis, now recognize that "the work-up must exclude those medical diseases that can mimic AHT," which includes, critically, sepsis and DIC, both of which the medical evidence shows that Roberson's daughter Nikki had. *Id.* (citing 2018 Consensus Statement).

The Joint Statement explains that the conditions Nikki seems to have had at the time of her death, including an undiagnosed viral and bacterial pneumonia that had likely caused DIC and sepsis, have been confused with SBS/AHT and thus the AAP itself has cautioned against this type of error:

> because DIC can cause any type of bruising/bleeding, including ICH, the finding of DIC in the context of suspected child abuse could significantly change the clinical approach to a patient. In children with DIC and bleeding symptoms as the only finding concerning for abuse, consideration must be given to the multitude of primary causes of DIC, including trauma, sepsis, and primary bleeding disorders, among many others.

Id. (quoting Anderst et al. 131 Pediatrics e1314 at e1319, April 2013).

According to the Joint Statement, even ardent supporters of the SBS/AHT hypothesis agree that physicians must be able to differentiate abusive injury from infectious etiologies, including those that lead to DIC. *Id*. (citing Lori Frasier et al, *Abusive Head Trauma in Infants and Children: A Medical, Legal, and Forensic Reference*. 2006, GW Medical Publishing, Inc. St. Louis, MO pp 204-5).

The Joint Statement urges that the medical evidence that Nikki had an advanced infection (interstitial viral pneumonia and a secondary necrotizing bacterial pneumonia) and DIC cannot be dismissed or ignored in making a reliable cause of death determination. They note that recent assessments by highly qualified medical experts have resulted in well-documented opinions that there was no

homicide, suggesting that Roberson should not have been prosecuted for murder, let alone convicted and sentenced to death. *Id.*

The Joint Statement reflects an evidence-based belief that this case threatens the integrity of the entire practice of making cause and manner determinations about in-hospital deaths, particularly of children where the entire basis for presuming that a crime occurred rests on medical opinions. *Id.*

In short, Dr. Urban's 2002 autopsy and related 2003 trial testimony are unreliable because her opinions seem distorted by many of the problems that scholars have identified as hindering accurate fact-finding. *See also, e.g.*, Keith A. Findley and Dean A. Strang, *Bias in Forensic Pathology Ending Manner-of-Death Testimony and Other Opinion Determinations of Crime*, 60 DUQUESNE UNIV. L. REV. 302 (2022).

During her 2021 testimony, Dr. Urban admitted that, during the past twenty years, she has not "written much" and has no publications in peer-reviewed journals. 9EHRR10-11. She also volunteered that "a lot of these cases run together." 9EHRR121. She testified that she had learned nothing in the intervening years that would prompt her to reconsider any of her initial findings or trial testimony. Yet, at the same time, she disavowed her trial testimony about shaking. 9EHRR127. These circumstances further undermine the reliability of her opinions.

In signing the Joint Statement, the pathologists looking at this case from the perspective of 2025 join the loud chorus of informed medical professionals urging "an independent, objective reassessment of the cause and manner of Nikki Curtis's death." EX2. Such a reassessment is more than warranted but requires the authorization of this Court.

NEW CLAIMS

Robert Roberson is actually innocence, the "science" used to convict him has changed profoundly, and the courts' reliance on the State's misrepresentation of the postconviction record amount to a flagrant violation of the federal constitutional right to due process.

I. Claim 1: Roberson Is Entitled to Habeas Relief Because He Is Actually Innocent.

All facts alleged above are incorporated here by reference.

A. Overview

Since the -03 application was filed, Robert's legal team has continued to fight for the necessary resources to retain essential experts and obtain access to complete records so that an adequate investigation of Nikki's death could be undertaken. That robust investigation has led to a comprehensive explanation based on new evidence showing why there was no homicide.

Experts from multiple disciplines have provided a comprehensive explanation for Nikki's death: she was a profoundly ill child whose diseased lungs were pushed

to respiratory failure by contra-indicated medications. She had DIC and sepsis. None of these circumstances were identified, let alone, taken into account, in assessing her condition (1) upon arrival at the ER and (2) two days later during the autopsy. No reasonable jury could possibly convict Robert if presented with the new evidence debunking the notion that Nikki sustained an inflicted injury of any kind. *See* EX26-EX29; EX1; *see also* EX30 (lead detective explaining his belief in Robert's innocence).

B. Legal Standard

Texas law recognizes that incarceration or execution of the actually innocent violates the federal Constitution. *State ex rel. Holmes v. Court of Appeals*, 885 S.W.2d 389, 397 (Tex. Crim. App. 1994); *Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996). *See also Herrera v. Collins*, 506 U.S. 390, 417 (1993) (recognizing "that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim."); *House v. Bell*, 547 U.S. 518, 555 (2006) (assuming, without deciding, the existence of a freestanding innocence claim); *In re Davis*, 557 U.S. 952 (2009) (permitting freestanding innocence claim to move forward).

By executing an innocent person, Texas would violate three features of the federal Constitution.

First, it would violate the Eighth Amendment's bar on Cruel and Unusual Punishment by imposing a punishment that fails to serve any "legitimate penological goal." *Graham v. Florida*, 560 U.S. 48, 67 (2010).

Second, executing an innocent person would violate Fourteenth Amendment substantive due process rights. State action violates the right to substantive due process if it "shocks the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952).

Third, refusing additional process to an inmate with persuasive new evidence of innocence would violate the Fourteenth Amendment right to procedural due process because an inmate retains a constitutional interest in his own life even after he has been sentenced to death. Thus, any process by which that life is taken must accord with the basic dictates of procedural due process. For those sentenced to death, basic due process entails a right to heightened reliability and a "high regard for truth" in adjudicative proceedings. *See, e.g., Ford v. Wainright*, 477 U.S. 399, 411 (1986). Therefore, states must heed "the overriding dual imperative of providing redress for those with substantial claims and of enforcing accuracy in the factfinding determination." *Id.* at 417.

Under Texas law, granting habeas relief requires finding that the new facts overwhelm any evidence adduced of guilt. *Elizondo*, 947 S.W.2d at 208-09. Thus, prevailing under *Elizondo* involves a high burden, which this Court has described as "Herculean." The applicant must establish that no reasonable juror would convict in

light of the new evidence. *Ex parte Brown*, 205 S.W.3d 538, 545 (Tex. Crim. App. 2006).

C. An Actual Innocence Finding Is Warranted

Robert has overcome the "Herculean" Actual Innocence burden. No reasonable jury could find him guilty beyond a reasonable doubt upon considering the evidence establishing that Nikki's death was not a homicide, now corroborated by yet another highly qualified specialist, Dr. Laposata. Dr. Laposata, a pathologist with special expertise in bleeding disorders has now confirmed that Nikki had DIC (a blood clotting disorder), explained how DIC is related to Nikki's illness in the last week of her life, and illuminated why DIC is relevant to understanding the volume of intracranial blood observed during the autopsy two days after her collapsed. EX1.

DIC is a form of abnormal blood coagulation that can complicate many clinical conditions, such as pneumonia, "with sepsis being the most common risk factor for DIC." EX26 (citing 2022 study). Sepsis is a systemic—*i.e.*, body-wide—response to the body's failure to fight off infections like pneumonia. *Id.*

Before her collapse, Nikki was profoundly ill with an undiagnosed chronic interstitial viral pneumonia that was colonizing her lung tissue, constricting her airways and thus her ability to take in oxygen essential for brain functioning. Compounding her chronic viral pneumonia, the slides of Nikki's lung tissue show that she also had an acute bacterial bronchopneumonia so advanced that necrotized

(dead) tissue was in Nikki's trachea (throat) and down her airway into her lungs. The lung pathologist who has studied Nikki's lung tissue under a microscope has concluded that the severity of Nikki's viral and bacterial pneumonia suggests that her illness must have started a week and likely several weeks to months before her final collapse. EX26.

Indeed, Nikki's medical records show that she was a chronically ill child who suffered from numerous, unresolved infections during her short life. Before Nikki was even a year old, she began having breathing apnea episodes where she would release a strange cry, cease breathing, collapse, and turn blue. A referral to a neurologist failed to identify a cause for these disturbing episodes. APPX43; APPX44.

The week before Nikki died, she had been sick with a persistent cough, vomiting, diarrhea, and wheezing. When Robert took her to the Palestine ER on January 28, 2002, a doctor prescribed Phenergan/promethazine, as Nikki's doctors had done previously. The next day, Nikki's fever spiked, and Robert took her to her pediatrician's office—where her temperature was measured at **104.5ºF**. But the pediatrician sent her and Robert home—with another prescription for Phenergan/promethazine, this time with Codeine. APPX43.

That is, Nikki's pneumonia was not diagnosed in the days leading up to her collapse when Robert repeatedly sought medical care from local doctors. Instead,

Nikki was prescribed dangerous medications, no longer given to children her age and in her condition. Those medications further suppressed respiration as Nikki's infected lungs struggled to take in sufficient oxygen. Unrebutted evidence establishes categorically that those medications were given to her before her collapse, not during her final hospitalization as the medical examiner speculated at the time. EX28.

The deadly combination of a severe lung disease and medications that suppress breathing explains why Nikki became unstable and fell out of bed in the night and later ceased breathing entirely—never to be revived. Brain death occurs after only 10-12 minutes of oxygen-deprivation. The brain is deprived of oxygen when respiration is impaired by severely infected lungs. EX26; EX28; EX29.

Additionally, long-lost radiological images (some of which were only produced in 2024) establish irrefutably that Nikki had only a single minor impact site on her head, consistent with a short fall with head impact, not the "multiple impacts" the medical examiner claimed. EX27. The radiological images of Nikki's lungs also support the finding of significant lung disease.

Dr. Laposata has now shown that the blood work done by Dallas Children's establishes that Nikki had DIC—but that diagnosis was not noted in her records. And even if it had been, Dr. Urban never reviewed any of Nikki's medical records so did not take DIC into account when considering the cause of the intracranial blood she

observed inside Nikki's skull. Nor did she look at the CT scans that show that the volume of blood she observed had not been present when her father brought her to the hospital after waking up to find Nikki unresponsive and turning blue due to respiratory failure.

Nikki's intracranial conditions (the SBS/AHT triad) and comatose state led medical personnel to **presume** abuse. No one considered Nikki's illness and her father's recent quest for medical care, the medications she had been prescribed, or her short fall as relevant to understanding her condition—let alone looked for DIC.

What actually happened is that pressure inside Nikki's skull rose as her brain strained for oxygen, and blood vessels in the brain's fibrous covering, called the dura, began to leak. After Nikki's brain shut down (and became non-perfused), the blood being pumped from her resuscitated heart toward her brain could no longer enter it, causing further subdural bleeding and retinal hemorrhages. Nikki's sepsis weakened her cell walls, further contributing to the intracranial and retinal hemorrhages. And finally, her sepsis likely caused her DIC, a depletion of clotting factors that can cause bleeding as well as bruising from virtually any contact, such as her father's efforts to revive her and hospital staff's efforts to resuscitate her. EX1.

No wonder the former lead detective Brian Wharton, who investigated Nikki's death as a murder and testified for the prosecution against Robert, has spoken out on Robert's behalf. Wharton's recent testimony before the House Committee is yet

more new evidence of Robert's innocence. Wharton recounted how the initial investigation was shaped by tunnel-vision and was shutdown the moment law enforcement got the "Shaken Baby" concept from doctors. Wharton told the Committee: "I'm ashamed that I was so focused on finding an offender and convicting someone that I did not see Robert and I did not hear his voice. … he's an innocent man and …we are very close to killing him for something … he did not do." EX4 at 8.

No wonder that, even without access to all of the new evidence inventoried here, one of the jurors has come forward of her own volition expressing grave concerns about the integrity of the verdict. Juror Terre Compton, told the House Committee: "everything that was presented to us was all about shaken baby syndrome. That was … what our decision was based on. Nothing else was ever mentioned or presented to us to consider. If it had been told to us, we would've—now I would've had a different opinion and I would've found him not guilty." EX5 at 48.

Juror Compton also explained, "what we were told about the [sic] shaken baby syndrome and showing the pictures of her brain with all the bleeding up in her brain, there was no other explanation that was given to us of anything else that could have happened to her." *Id.* at 50. She also recalled that a teddy bear was used repeatedly to "demonstrate" the shaking: "They grabbed it by its arms like this, and they just

violently shake, shake, shake, shake, shake, shake, shake. And just tried to give us an example of what the shaking consisted of." *Id.* at 53. Her current memory is corroborated by the trial transcripts.

Dr. Squires, who saw Nikki before the autopsy, told the jury she found "minimal" bruising, a "little chin abrasion," "no scars, no unusual bruising or anything." 42RR96. She found "no fractures," but saw subdural blood, edema, and "very obvious retinal hemorrhages." 42RR102-105. She concluded that the "medical findings" were "**a picture of shaken impact syndrome**" aka "**shaken baby syndrome**." 42RR105-106 (emphasis added). She believed Nikki's symptoms were "classically consistent with injuries from rotational force" caused by shaking. 42RR120. She saw "no other indication of traumatic injuries"—"no bruising" "no fractures" "no old fractures"—therefore, she concluded the injury was caused by violent shaking. 42RR123.

Medical examiner Jill Urban did not use the term "Shaken Baby" in her autopsy report.[17] But a review of the trial record shows that her 2003 testimony was consistent with Dr. Squires' testimony in that both opined extensively about "shaking" as explaining Nikki's condition and used SBS terminology. *See* EX39.

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[17] Dr. Urban used the terms "blunt force trauma" and "blunt force head injuries" but treated those terms as entirely consistent with her "shaking" opinions. Indeed, she testified at trial that she could not distinguish between injuries she believed were caused by "shaking" and by blunt force or "impact." 43RR85-86.

That is, Dr. Urban's trial testimony **corroborated** Dr. Squires' SBS diagnosis and trial testimony because Dr. Urban testified that, in her opinion, shaking could have caused, and probably did cause, the child's fatal condition.[18]

The trial transcripts show over 260 references to "shaking" and SBS terminology. The transcripts also show that a teddy bear was repeatedly used as a demonstrative with witnesses who were invited to show the jury how Nikki had been shaken—although no one had witnessed anything the night of Nikki's collapse and a small stuffed animal bears no anatomical resemblance to a 28-pound toddler. EX39; 42RR52; 42RR69-71; 5EHRR90-96.

Plainly, the jurors heard no testimony from a lung pathologist, neuropathologist, pediatric radiologist, medical toxicologist, biomechanical engineer, pathologist with special expertise in DIC—or any other kind of expert—because the defense put on no case. But all of these new experts who have now studied the case have explained how the blood outside Nikki's brain was **not** caused by shaking or abuse but was instead her body's response to a severe infection and contra-indicated medications, culminating in sepsis, DIC, and finally respiratory and cardiac arrest. Efforts to resuscitate her, after her brain had already become non-

[18] Dr. Squires' SBS diagnosis was used to obtain an arrest warrant, which was executed before an autopsy was even performed. Before the autopsy, Dr. Urban was informed that Roberson had already been arrested and charged with capital murder. EX35; EX36.

perfused, further contributed to the condition captured in the autopsy photos that the jury was told, falsely, could only be explained by shaking and inflicted blunt impact. *See* EX1; EX26-EX29.

As Juror Compton put it, the jurors were urged to believe that the bloody autopsy photos taken of the inside of Nikki's head showed the result of violent shaking that had caused vessels to burst:

> The only thing that we would basically discuss was the shaking of the baby and the head injuries with the bleeding and stuff that they showed us pictures for where they had cut her skin away from her brain where we could actually see the whole shape and the bleeding on her brain. And they sent those pictures around for all of us to look at. And that's what we would be looking at was all the bleeding in her brain. And that's what they told us had been done from the shaking so violently, it had burst those blood vessels.

EX5 at 55. Again, Juror Compton's current memory is corroborated by the trial record.

Juror Compton recently testified that, by following news about Roberson's case she became aware of some of the new medical evidence that was certainly not before the jury in 2003: "I started thinking back about all the things that I knew about [w]hat went on in the trial and I just realized, and I just finally came to the conclusion he was an innocent man. And I just, in good conscience, I could not live with myself thinking that I had a hand in putting an innocent man to death." *Id.* at 61-62.

This Court has previously recognized that executing an innocent person would violate the Eighth and Fourteenth Amendments to the U.S. Constitution. The Court

should make an Actual Innocence finding and end Roberson's long nightmare at last. *See, e.g.*, *Ex parte Mayhugh*, 512 S.W.3d 285 (Tex. Crim. App. 2016) (granting relief under Article 11.073 and concluding that women who had been falsely accused of child sexual abuse were actually innocent). In doing so, the Court should take pride in the fact that Texas law is more advanced than federal law in expressly recognizing what should be a self-evident proposition: executing someone who is innocent violates the federal Constitution. *Elizondo*, 947 S.W.2d 202. As the late Justice O'Connor noted in her *Herrera* concurrence: "Regardless of the verbal formula employed … [,] the execution of a legally and factually innocent person would be a constitutionally intolerable event." 506 U.S. at 419. It would indeed be intolerable for Robert Roberson to become the first person executed based on a discredited SBS/AHT hypothesis when his daughter plainly died of a severe undiagnosed pneumonia and medical care that unwittingly made her condition worse.

The State's causation theory is invalid. There was no crime. Robert Roberson should be found actually innocent. *See, e.g., Ex parte Garland Leon Martin Aka Butch Martin*, WR-93,211-01 (Tex. Crim. App. May 22, 2024).

At the very least, the Actual Innocence claim must be authorized and remanded for further development.

II. Claim 2: Roberson Is Entitled to Habeas Relief under Article 11.073.

All facts alleged above are incorporated here by reference.

A. Overview

New evidence has emerged since Roberson's previous habeas application was filed further underscoring that SBS/AHT lacks a sound scientific basis and validating the conclusion of the Texas House Committee on Criminal Jurisprudence (House Committee) that Article 11.073 has not been properly applied in this case. That is, in additional to new expert reports specific to this case, yet more scientific studies and commentary further debunking aspects of SBS/AHT have emerged since October 14, 2024. This new evidence shows material changes in the "science" used to convict him and provides a new factual basis for habeas relief under Article 11.073.

B. Legal Standard

Article 11.073 incorporates a broad understanding of "new science," even encompassing the change in understanding of a single expert—as illustrated by the Legislature's passage of Article 11.073 in response to *Ex Parte Robbins*, 360 S.W.3d 446 (Tex. Crim. App. 2011) (*Robbins I*). In *Robbins I*, Judge Cochran, in a dissenting opinion, captured the need to address the "disconnect between the worlds of science and of law," a need that spurred the law's enactment:

> Science is constantly evolving by testing and modifying its prior theories, knowledge, and "truths." It is a hallmark of the scientific method to challenge the status quo and to operate in an unbiased environment that encourages healthy skepticism, guards against unconscious bias, and acknowledges uncertainty and error…. The potential problem of relying on today's science in a criminal trial (especially to determine an essential element such as criminal causation or the identity of the perpetrator) is that tomorrow's science sometimes

> changes and, based upon that changed science, the former verdict may look inaccurate, if not downright ludicrous. But the convicted person is still imprisoned. Given the facts viewed in the fullness of time, today's public may reasonably perceive that the criminal justice system is sometimes unjust and inaccurate. Finality of judgment is essential in criminal cases, but so is accuracy of the result—an accurate result that will stand the test of time and changes in scientific knowledge.

Id. at 469–70 (Cochran, J., dissenting) (internal citations omitted).

"By enacting Article 11.073 without any express limitation on what constitutes 'scientific knowledge,' the Legislature tipped the scales in favor of accuracy perhaps at the expense of finality." *Ex parte Robbins*, 560 S.W.3d 130, 161 (Tex. Crim. App. 2016) (Newell, J., concurring) (*Robbins III*). *See also Ex parte Robbins*, 478 S.W.3d 678, 704 (Tex. Crim. App. 2014) (*Robbins II*) (Cochran, J, concurring) (noting "the Texas Legislature also chose accuracy over finality by enacting Article 11.073.").

Because this is a subsequent application, Roberson must show that his changed science claim "could not have been presented previously" because it is "based on relevant scientific evidence that was not ascertainable through the exercise of reasonable diligence by the convicted person on or before the date on which the … previously considered application" was filed. TEX. CODE CRIM. PROC. art. 11.073(c). In making the determination "as to whether relevant scientific evidence was not ascertainable through the exercise of reasonable diligence on or before a specific date, the court shall consider whether the field of scientific knowledge, a

testifying expert's scientific knowledge, or a scientific method on which the relevant scientific evidence is based has changed since" the date of "a previously considered application[.]." *Id.* at art. 11.073(d)(2).That date was October 14, 2024.

C. New Findings by Texas House Committee on Criminal Jurisprudence Show That Article 11.073 Relief Is Warranted.

Lawmakers on the committee responsible for evaluating how Article 11.073 is being applied have now made it clear: after digging deep into the trial and post-conviction records in this case and holding a series of public hearings, they do not believe that Article 11.073 was properly applied in Roberson's case. The Interim Report 2024 by the House Committee on Criminal Jurisprudence (EX7), which issued on November 19, 2024, includes multiple findings to explain why that bipartisan committee strongly believes that justice was not served in this case and that Robert is long overdue a new trial under Article 11.073. Those findings include, *inter alia*, the following (internal citations omitted):

- "The state's proposal [to the habeas court in the Roberson case] was adopted almost verbatim (down to matching typos and drafting choices), all calculated to deny relief. It relied almost exclusively on the trial evidence and hardly referred to the copious new medical evidence offered at the habeas proceedings. Incredibly, it both insisted on the continued validity of SBS but also that the trial was not really about SBS after all, and that 'even if any evidence [about SBS] was false, it was not material to the verdict of the jury.'" *Id.* at 27.

- "In early October, relief under Article 11.073 seemed imminent when the Court of Criminal Appeals ruled in another case [*Roark*] that 'scientific knowledge has evolved' to 'undermine the State's theory of a case involving SBS,' citing scientific experts, the *Journal of Neurosurgery and Journal for*

the British Academy for Forensic Science, and other state and federal courts. That case was not just similar to Robert's—it featured nearly identical testimony *from the same person*, Dr. Squires, about SBS. Shockingly, the court denied relief to Robert the very next day, with a concurring opinion continuing to hold (presumably based on the habeas court's findings of fact) that it was 'not just a 'shaken baby' case.'" *Id.* at 28.

- "Deference makes some sense—our courts of appeals weren't made to second-guess the live impressions juries had of evidence, and we don't have the resources to try every case twice. But that also provides a path for a courtroom lie to become an unchallengeable truth, even when the jury plainly didn't get the whole story." *Id.* at 31.

- Robert was denied a stay of execution in October and "the vote was 5-4 against—hardly the commanding certainty most Texans would expect before an execution. And eliminating something that has impeded nearly two out of every five claims—procedural bars, such as the notion that the claim *could* have been raised earlier than it was—would ensure that we're elevating truth above finality." *Id.* at 33.

One committee member, Representative Drew Darby (R), opted to include his own letter instead of signing the committee's Interim Report. That letter includes the following statement in bold typeface:

> As a member of the Texas House who voted for both Senate Bill 344 in 2013 [Article 11.073] and House Bill 3724 in 2015 [amending and expanding Article 11.073], I will state that, after numerous hours of testimony, I believe the TCCA incorrectly applied the "junk science" writs in Mr. Roberson's case based on the legislature's intent of the statu[t]e. The Committee is also in lockstep on this matter.

Id.

D. New Scientific Studies and Commentary Show That Article 11.073 Relief is Warranted.

Thankfully, young children do not die often. And when such tragedies occur, the cause of death is often fairly obvious—complications of pregnancy, witnessed accidents or car crashes, leukemia. SBS/AHT emerged as a hypothesis to explain the non-obvious. But SBS is a hypothesis that was never scientifically validated before it was nonetheless accepted as "fact." *See* Keith A. Findley, et al., ed., SHAKEN BABY SYNDROME: INVESTIGATING THE ABUSIVE HEAD TRAUMA CONTROVERSY (Cambridge Univ. Press 2023) (hereafter 2023 Treatise).

Today, it is widely recognized that a host of issues—from birth trauma, birth defects, infections, congenital disorders, pneumonia, as well as accidental falls with head impact—can cause the very conditions once assumed to be "diagnostic" of shaking and/or inflicted head trauma.

The idea that "shaking" might explain the mystifying deaths of some infants was first proposed in the 1970s in anecdotal articles by Dr. Norman Guthkelch, a neurosurgeon, and then Dr. John Caffey, a radiologist. Dr. Guthkelch published a paper titled *Infantile Subdural Hematoma and its Relationship to Whiplash Injuries*, in which he speculated that shaking an infant might cause subdural bleeding or "hematomas" despite an infant's head showing little or no external sign of impact or head trauma. Importantly, Guthkelch expressly stated that his shaking explanation

was a "hypothesis."[19] Caffey not only embraced Guthkelch's hypothesis, Caffey went further, arguing, absent any scientific testing, that, if an infant has subdural bleeding, retinal hemorrhages, and perhaps brain injury and/or rib fractures, then the infant was likely shaken and thus abuse could be "diagnosed."[20]

By the 1990s, a core tenet of the SBS hypothesis—the triad of conditions with which the SBS hypothesis became associated—had become entrenched although never validated biomechanically, forensically, or medically.[21] It soon became a "categorical medical belief" that shaking was the only possible explanation for the presence of these conditions and, analogously, that the triad "almost always" indicates that an infant was shaken.[22] Thus, the triad, or even just one component of the triad, was treated as diagnostic of child abuse.[23] Child abuse literature began "emphatically rejecting" all other explanations for the triad, such as short falls, accidents, seizures, severe illness, hypoxia. Some papers even urged physicians to

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[19] 2023 TREATISE at 12.

[20] *Id.* at 12, 161–62.

[21] *Id.* at 13. Child abuse literature at that time called SBS a "clearly defined medical diagnosis," and referred to the triad as the "diagnostic features" of SBS that were "virtually unique to this type of injury." DL Chadwick et al., *Shaken Baby Syndrome: A Forensic Pediatric Response*, 101 PEDIATRICS 321–23 (1998).

[22] *Id.*

[23] 2023 TREATISE at 13–14. A leading treatise on child mistreatment published during that era stated that the SBS "triad must be considered virtually pathognomonic of SBS in the absence of documented extraordinary blunt force such as an automobile accident." RH Kirschner, *Pathology of Child Abuse*, *in* 5 THE BATTERED CHILD 248–95 (1997).

characterize any other explanation as a lie.[24]

Gradually, criticisms of the SBS hypothesis started to gain traction, particularly in the field of biomechanical engineering. In response to the emerging criticisms, SBS was rebranded "Abusive Head Trauma." The name changed, but no evidence-based science had yet been adduced to support the hypothesis itself.[25]

Dr. Guthkelch himself later retreated from his own unverified hypothesis, acknowledging that subdural and retinal bleeding, with or without brain swelling, had been observed in many accidentally and naturally occurring circumstances. He also recognized that forces generated by humans and laboratory machines shaking anatomically accurate dummies had proven insufficient to cause disruption of human tissue or to create any component of the SBS triad.[26] And yet innocent parents and caregivers continued to be charged and imprisoned based on this medical hypothesis that had never been validated.

On October 16, 2024, Dr. Jeffrey Singer testified before the House Committee about his opinion that SBS/AHT exemplifies a larger problem that he described as the "medical profession's blind spots." EX4 at 25. Dr. Singer is a practicing surgeon,

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[24] *See, e.g.*, I. Blumenthal, *Shaken Baby Syndrome*, 78 POSTGRADUATE MEDICAL J. 732–35 (2002).

[25] *See generally* Moran, et al. above, at 209-312.

[26] A.N. Guthkelch, *Problems of Infant Retino-Dural Hemorrhage with Minimal External Injury*, 12 HOUS. J. HEALTH L. & POLICY (2012).

a senior fellow at the Cato Institute in Washington who focuses on public health policy, a visiting fellow at the Goldwater Institute in Phoenix, and a member of the board of scientific advisers of the American Council on Science and Health. *Id.* As Dr. Singer attested, the medical community has a history of embracing untested "medical dogma" that becomes entrenched, affects public policy, and thereafter can be quite resistant to "evidence-based medicine" exposing fallacious hypotheses. *Id.* at 26. He described how members of the medical establishment who have staked their careers on a certain hypothesis can later "close ranks" and refuse to admit they were wrong even when science proves that they were indeed wrong. *Id.*

Similarly, Professor Keith Findley, who has studied and published extensively about SBS/AHT and its role in the criminal justice system for over 20 years, testified before the House Committee. He offered his opinion that Article 11.073 "simply did not work as it should have in the Robert Roberson case" because the scientific understanding of the SBS hypothesis used to convict Roberson has undergone a sea change since his 2003 trial. *Id.* at 35. Professor Findley outlined how, as scientific experiments kept undermining the SBS hypothesis, it would be adjusted to try to salvage it; but the larger problem is that there was "no real scientific evidence base" from the outset. *Id.* at 37.

Professor Findley explained how there seems to have been a misconception in the courts that Roberson's case is somehow different from Roark's case—because

of some perceived sense that the latter was a “shaking only” case and Roberson’s involved shaking + “abusive head trauma.” As Professor Findley clarified, “the reality” is that AHT “rests upon the very same hypothesized scientific construct and hypothesized diagnostic standards”—not actual science. *Id.* at 39. As Professor Findley noted, “the American Academy of Pediatrics own literature, abusive head trauma and shaken baby syndrome are one and the same”; they “rest on the same hypothesis and depend on the same diagnostic features.” *Id.* What changed in 2009 was dropping “any presumption of abuse,” because, by then, that approach “was becoming untenable because there were numerous published case reports, including videotaped incidents of children experiencing shortfalls and dying an[d] presenting with the triad, and they directed instead now, for the first time that pediatricians also have a responsibility … ‘to consider alternative hypotheses when presented with a patient with findings suggestive of abusive head trauma.’” *Id.*

The medical community now accepts that SBS/AHT diagnoses can **only** be assessed after all other potential natural and accidental causes of the intracranial triad have been considered and excluded. That is diametrically different from what happened with Robert’s daughter Nikki.

The contemporary diagnosis-of-exclusion standard was recognized in *Ex parte Roark*, bringing Texas in line with other jurisdictions. *See, e.g.*, *Allison v. State*, 448 P.3d 266, 271 (Alaska Ct. App. 2019) (“A diagnosis of shaken baby

syndrome or abusive head trauma can only be made if all other possible causes are ruled out."); *Sissoko v. State*, 236 Md. App. 676, 723 (2018) ("A congruence of multiple findings, each of which independently correlates with abusive head trauma, narrows the field of potential diagnoses significantly, however, and absent a clinical history of accidental trauma or evidence of a disease process consistent with those findings, a diagnosis of abusive head trauma may be made."); *Commonwealth v. Millien*, 50 N.E.3d 808, 821-22 (Mass. Sup. Jud. Ct. 2016) (describing the jury's role in an SBS case as evaluating "whether the Commonwealth had eliminated the possibility that [the child's] injuries were caused by the accidental fall described by the defendant beyond a reasonable doubt").

Again, a "diagnosis of exclusion" refers to a diagnosis that can be "assigned only when all known and possible causes of death have been ruled out." *State v. Morrison*, 470 Md. 86, 101 (2020). This process is also known as a "differential diagnosis," a process undertaken by treating physicians in which they "tak[e] a history and mak[e] clinical findings, from which they generate a list of hypothetical causes." *Sissoko*, 236 Md. App. at 7153l. "They then conduct diagnostic tests and, using those results and all the information they have gathered, engage in a process of elimination by which diagnoses in the differential that do not fit are removed and the correct diagnosis is reached." *Id.*

Since Robert's previous habeas application was filed, scientific publications

have further underscored the change in scientific understanding since his 2003 trial and the necessity of a differential diagnosis.

For instance, a scientific study published in late October 2024 provides new support for the proposition that SBS/AHT lacks established and reliable diagnostic criteria, is subjective in nature, is not verifiable, and hence fails the *Daubert* test of scientific reliability. The paper surveyed child abuse allegations in a database covering 2008 to 2022, excluding cases based on specific variables, leaving thirty cases for review. The study shows that disagreements about causation hypotheses in purported child abuse cases are now common. But most critically, the results of the study show that even the current version of AHT is not reliable enough to satisfy the *Daubert* standard. *See* EX8: Chin-Min Tang et al., *Divergent Interpretations of Child Abuse in Legal Judgments: Perspectives from Clinicians and Forensic Experts*, 82 BMC: ARCHIVES OF PUBLIC HEALTH (Oct. 25, 2024).

Additionally, a scientific study first publicly available in November 2024 presents new biomechanical research that confirms that violent shaking produces very low G-forces, unlikely to cause brain injury. But this paper goes further and shows that even simply placing an infant on a table without properly supporting the head (even when participants were "instructed to avoid rough handling") produced G-forces more than 300% greater than the forces that could be generated by the most violent shaking. This is new research that strongly shows shaking was an unlikely

cause of Nikki's injuries and death. *See* EX9: Jonathan S. Lee-Confer et al., *High G-Forces in Unintentionally Improper Infant Handling: Implications for Shaken Baby Syndrome Diagnosis*, BIORXIV (Nov. 3, 2024).

A scientific study published in December 2024 further dismantles the SBS/AHT presumption that violent shaking could ever cause retinal hemorrhages. SBS/AHT defenders have long argued that Terson Syndrome was a diagnosis only applicable to adults and have argued that intracranial pressure does not explain retinal hemorrhages. This new study shows that increased intracranial pressure had caused retinal hemorrhages in a four-month-old, healthy infant injured in a car accident and a ten-month-old with a heart condition who suffered an accidental short fall. The new Terson Syndrome study further undermines the SBS/AHT claim that retinal hemorrhages in children are caused by vitreo-retinal traction from shaking. *See* EX10: Muhannad M. Alobaid et al., *Terson Syndrome in Two Infants: Case Report and Literature Review*, 16 CUREUS (Dec. 4, 2024).

Finally, in January of 2025, an important scientific commentary was published in ACTA PAEDIATRICA, a monthly, peer-reviewed medical journal covering pediatric issues. The article discusses the issue of "medical blind spots" about which Dr. Singer testified in October 2024 before the House Committee. The article analogizes the recalcitrance of the SBS/AHT hypothesis to other unvalidated medical pronouncements that had a huge impact on public policy—and yet evidence-

based science eventually showed that the pronouncements were wrong and had, in fact, caused significant harm. The author cites, *inter alia*, the example of the debate around peanut allergies—when pediatrics got it wrong by insisting, absent evidence, that mothers should avoid exposing a child in utero and beyond to peanuts to avoid the child developing an allergy; instead, such avoidance decreased immunity ultimately causing peanut allergies to **explode**. Yet long-standing "groupthink" within the medical community made it very hard for physicians to heed the evidence-based science and reverse course—to the detriment of public health. *See* EX11: Niels Lynøe, *When Paediatrics Gets It Wrong*, ACTA PEDIATRICA (Jan. 31, 2025).

In short, Roberson's new Article 11.073 claim is based on further changes in science since his previous habeas application was dismissed.

Contemporary medical standards do not support the medical and scientific evidence that was used to accuse, convict, and sentence Roberson to death. The SBS/AHT hypothesis of that time allowed presuming abuse whenever the intracranial conditions observed in Nikki were found. The medical standard of care has evolved considerably since 2002-2003. A differential diagnosis is now required, because it is now a consensus medical understanding that many things can cause the intracranial conditions found in Nikki other than inflicted head trauma. The version of SBS/AHT that the State relied on at trial and in post-conviction proceedings is scientifically unsound.

E. The SBS Cause-of-Death Hypothesis Was Patently Material to the Conviction; Robert Would Not Have Been Convicted If the New Scientific Evidence Had Been Presented to His Jury.

When Nikki was hospitalized, there was no differential diagnosis undertaken; abuse was the first, and only, assumption. As noted above, in 2002-2003, the triad was treated as a *res ipsa loquitur* of abuse, because it supposedly "proved" that shaking, combined with blunt head impact, had occurred. That is, virtually all physicians and forensic pathologists then believed that, absent evidence of a high-speed car crash or similar event, seeing the triad was sufficient to presume intentionally inflicted head injury. 4EHRR23; 8EHRR129.

As the new evidence detailed above shows, Nikki had a fatal pneumonia. The Phenergan prescribed to her on consecutive days along with Codeine further challenged her ability to breathe and caused wooziness, likely contributing to her fall out of bed. As Dr. Green has now explained, infants and toddlers are "at high risk for cardiopulmonary arrest when under hypoxic conditions"—meaning, that Nikki's pneumonia compromised her ability to maintain a normal blood oxygen level, a condition that leads to cardiac and respiratory arrest. EX26. Rather than presuming abuse, the current medical consensus would require a comprehensive differential diagnosis—looking at her medical history, considering her severe pneumonia, assessing the medications she was given, accounting for the accidental

fall out of bed, and accounting for her DIC. EX1. None of these factors was even identified when the "abuse" allegations were made.

The SBS/AHT hypothesis operative in 2002-2003 assumed that violent shaking/blunt impact would lead to immediate brain damage and thus a change in consciousness—a premise that both Dr. Squires and Dr. Urban conveyed to Robert's jury as fact. But that core SBS/AHT premise, used to attribute guilt to whoever was with an infant or child when she collapsed, has been entirely falsified too. Now, the medical community recognizes that it can take hours or even days for a subdural bleed, whatever the origin, to lead to brain swelling and loss of consciousness. *See Ex parte Roark*, *supra*.

Likewise, it is now clear that the trial testimony from multiple medical professionals stating that a short fall could not have caused any aspect of Nikki's condition was false. Dr. Squires expressed that opinion in an affidavit used to obtain a warrant for Robert's arrest.[27] And during his trial, Nikki's pediatrician, who had prescribed the Phenergan with Codeine, testified that a short fall was not consistent with Nikki's condition on January 31, 2002. 42RR17-18. The ER doctor, who had seen her two days before and also prescribed Phenergan, was adamant: "In my

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[27] EX35 ("The medical findings are inconsistent with a short fall from a bed.").

opinion the injury did not result from a fall out of bed. That would be basically impossible." 42RR85.

This kind of testimony—that short falls cannot cause fatal injuries, including the triad of conditions previously attributed only to SBS/AHT—has since been repeatedly falsified by scientific study. 5EHRR27-28, 104-05. This development was expressly recognized in *Ex parte Roark*:

- "The habeas court found that new scientific evidence greatly overwhelmed and contradicted the statements made by the State's medical professionals at trial. The evidence presented included affidavits and testimony from a variety of doctors including Dr. Cox, Dr. Plunkett, Dr. Galaznik, and Dr. Van Ee. In addition, the habeas court cites this Court's decision in [*Ex parte Henderson*, 384 S.W.3d 833 (Tex. Crim. App. 2012)] in which Dr. Plunkett and Dr. Van Ee also testified, as an acceptance of the scientific community's current view that short-distance falls can cause serious injury or death." *Ex parte Roark*, *supra*, at *15.

- "We find the testimony during writ hearings from Dr. Plunkett, Dr. Bux, and Dr. Galaznik to be credible in demonstrating the change in medical science. The science today supports the proposition that B.D.'s injury could have been sustained by a short-distance fall, or occurred spontaneously, due to the acute-on-chronic subdural hematoma. We find the retinal hemorrhaging, applied through today's scientific method, to be non-specific and of no value in assigning causation for its existence." *Id.* at *24.

The incorrect understanding about the injury-potential of short falls led to the improper branding of Robert as a liar whose description of Nikki's final hours should

be entirely rejected.[28] New studies—including ones published in the last few months— demonstrate that many cases of presumed SBS/AHT were in fact the result of accidents.[29] More importantly, the report of Nikki's fall from bed fits within the evidentiary picture based on a holistic understanding of **all** relevant factors that explain Nikki's tragic death.

Numerous courts in other jurisdictions have relied on the same change in scientific understanding to grant relief to habeas applicants like Robert. *See* EX43.

One such case led to an exoneration late last year of a father named Joshua Burns. Burns, who was convicted using the SBS/AHT hypothesis and then recently exonerated in Michigan, now resides in Dallas, Texas. After learning about Robert's case, he contacted members of the House Committee and was invited to testify about his experience being wrongfully accused and convicted.[30] On December 20, 2024,

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[28] At trial, Robert's own lawyer told the jury that his statement about Nikki falling out of bed was not correct and that they should accept that she had been shaken in a crazed loss of control (that no one had witnessed and that was completely contrary to Robert's character). 41RR57-58; EX14; EX15. Although the short fall in this case is only one factor relevant to understanding Nikki's condition, contemporary science teaches that it was Robert's lawyer and the proponents of the SBS hypothesis who were wrong about the injury-potential of short falls with head impact.

[29] *See, e.g.*, Chris Brook, et al., *26 cm Fall Caught on Video Causing Subdural Hemorrhages and Extensive Retinal Hemorrhages in an 8-Month-Old Infant*, CLINICAL CASE REPORTS 12: (2024): e9105. *See also* 5EHRR107-08.

[30] Burns was invited after the Committee's repeated efforts to take testimony from Roberson were blocked by members of the Office of Attorney General (OAG). EX6 at 2-7.

Burns described the nightmare of finding his infant daughter, who had struggled to thrive after a difficult birth, unresponsive, getting her to the hospital for care, and then being falsely accused by a CAP of having caused her condition by shaking her. EX6 at 7-9.

The similarities between Burns' and Roberson's experiences are notable. Both were alone with their child when she experienced a medical crisis. Both were accused of abuse based on a in-house CAP's interpretation of a CT scan showing subdural bleeding, brain swelling, and retinal hemorrhages (the SBS triad). But Burns is a well-educated, middle-class professional with resources who was able to obtain his own lawyer and numerous medical experts. *See id.* at 8. Roberson, by contrast, is a poor, uneducated, person with severe Autism whose court-appointed lawyer conceded his guilt despite his consistent insistence that he had done nothing to harm his child. EX44.

A virtually identical SBS case, which has also resulted in a recent exoneration, is *State of Ohio v. Alan Butts*, 2023 WL 4883377 (Ohio Ct. App. Aug. 1, 2023) (EX45).[31]

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[31] *See also* entry in the National Registry of Exonerations discussing Butts' 2024 exoneration:https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=675.

Both Alan Butts and Robert Roberson were tried in 2003 when the SBS/AHT causation theory was widely accepted as medical orthodoxy. In Robert's case, his counsel did not contest the hypothesis at all; Alan Butts' defense counsel did adduce contrary expert testimony from one expert: Dr. John Plunkett, a forensic pathologist. Yet, as the Ohio court explained, "Dr. Plunkett's [2003] testimony would have been considered a fringe medical opinion" and "equating Dr. Plunkett to a transient quack was precisely the trial prosecutor's strategy in undermining Mr. Butts's defense." *Id.* ¶10. Today "there have been significant developments in the medical community concerning the diagnosis of SBS." *Id.* at ¶8.

Dr. Plunkett, now deceased, provided an affidavit supporting Roberson's -03 application. That affidavit, later admitted into evidence (but ignored by the habeas judge), explained, *inter alia*, how Dr. Plunkett's SBS-skepticism was an outlier at the time of Robert's 2003 trial. EX47. Indeed, the DA's office that prosecuted Robert in 2003 was expressly told that, per the chief ME at SWIFS (Dr. Barnard), Dr. Plunkett and his research challenging core SBS assumptions were "garbage." EX48.

By contrast, in the recent *Butts* case, Dr. Plunkett's contribution to the advancement of scientific understanding is described as anything but "garbage." In *Ex parte Roark* too, Dr. Plunkett is listed among the experts whose views represent "the scientific community's current view that short-distance falls can cause serious injury or death"; his writ testimony is quoted at length; and his testimony is

repeatedly cited as pivotal to the Court's previous decision in *Ex parte Henderson*. *Ex parte Roark*, *supra*, *15-*16, *18. The Court also invoked Dr. Plunkett's opinions to show "that there is new scientific evidence since the time of Applicant's 2000 trial showing that Dr. Squires was wrong" and that the "medical consensus" had "changed since the time of trial." *Id.* at *21. The Court expressly found Dr. Plunkett's testimony during the *Roark* writ hearings "credible in demonstrating the change in medical science[.]" *Id.* at *24.

Yet this seminal expert testimony—accepted as credible and highly relevant to understanding how scientific understanding had changed since Butts and Roark were tried—was completely ignored in Roberson's case. But the rejection, at trial, of the proposition that a short fall could have played any role in causing or explaining the child's condition is not the only similarity between Butts' and Roberson's cases. *Id.* ¶55. Their cases are virtually the same.

Both the Butts and Roberson cases involve the death of a two-year-old child where the medical examiner had deemed the death a homicide and the State relied at trial on experts who testified that the cause of death was a brain injury involving a triad of conditions (subdural bleeding, brain swelling, and retinal hemorrhage) then viewed as conclusive proof that the child had been violently shaken and sustained blunt impact that could be deemed inflicted. *Id.* ¶¶3, 6, 34, 44.

Both cases involve the absence of any evidence that the child's neck had sustained any injuries. *Id.* ¶57.

In both cases, State experts testified that the child's illness at the time of death was irrelevant. Both children apparently had pneumonia; however, the signs of Nikki's pneumonia were only discovered during preparations for the evidentiary hearing in the -03 proceeding—and the severity of that illness has now at last been categorically proven by a highly qualified expert in lung diseases. EX26. Nikki's pneumonia was neither diagnosed at the time of her death nor disclosed to Robert's jury in 2003; but even if it had been, SBS proponents (like Drs. Squires and Urban) likely would have told the jury that her medical condition was irrelevant, as occurred in *Butts*, because that is what the medical community then believed. EX45 ¶¶35, 63, 64.

In both cases, the State's trial experts called witnesses who repeatedly told the jury that only abusive head trauma could cause retinal hemorrhages. As Dr. Squires testified in 2003: "the retinal hemorrhages are just further— It's one more thing that really let's you know that those eyes were being shaken and that the blood vessels broke." 42RR109. In *Butts*, the Ohio reviewing court noted that "'[r]etinal hemorrhages were presented to the jury [in 2003] as the 'smoking gun' of SBS.'" *Id.* ¶95. The Ohio reviewing court underscored that "even the state now agrees that "such testimony was incorrect and can no longer be supported by science.'" *Id.* Thus,

the "'shift in understanding by the medical community [on retinal hemorrhages, alone] raises a strong probability of a different result on retrial.'" *Id.*

In describing the changes in medical understanding since the 2003 trial, the Ohio court relied on some of the same experts who provided expert opinions, reports, and testimony here: Dr. Mack, pediatric radiologist, and Dr. Auer, neuropathologist. *Compare id.* at ¶¶8, 42, 44, 51, 91 *with* EX27; EX29; 8EHRR.

The Ohio court agreed "that the medical community consensus" now "differs drastically" from that in 2003 and recognized that the shift in the medical community's understanding did not begin until well after the verdict. But, today, the medical consensus has shifted in multiple, material ways, including the need for a differential diagnosis and the recognition that lucid intervals are possible, that short falls and naturally occurring disease can cause the triad, and that biomechanical studies have demonstrated the kind of injuries that shaking can cause (neck injuries) and cannot cause (the triad). *Id.* ¶¶44-64.

The Ohio court ultimately concluded that Butts had presented "new advancements" reflecting "a quantum leap in the medical community's understanding of non-abusive mechanisms that can mimic abusive head trauma and development of standards that require medical providers to consider and, where appropriate, explore alternative diagnoses before finding the cause to be abuse, trauma, or shaking." *Id.* at ¶70. This new evidence created "a strong probability that

a jury would have reached a different result had his proffered evidence been admitted at trial." *Id.*.

The significant change in scientific understanding at issue in both the Butts and Roberson cases recently led an appellate court in New Jersey to affirm a trial court's finding that SBS/AHT is actually "junk science" as "no study has ever validated the hypothesis that shaking a child can cause the triad of symptoms associated with [SBS/]AHT." EX46: *State of New Jersey v. Darryl Nieves*, 476 N.J. Super. 609 (2023), cert. granted (affirming trial court's decision to exclude expert testimony about SBS/AHT after finding "a real dispute in the larger medical and scientific community about" its validity). The New Jersey court also cited favorably these findings:

- "[SBS/]AHT is a flawed diagnosis because it originates from a theory based upon speculation and extra extrapolation instead of being anchored in facts developed through reliable testing."
- SBS/AHT is "prejudicial because it 'evoke[s] a sense of horror that affect[s] the sensibilities of any competent juror,' undermining the jurors' ability to fairly weigh the evidence."

Id. at 615-616.

The same changed science that has been acknowledged in Ohio, New Jersey, and at least 15 other jurisdictions should have been persuasive but were ignored in Roberson's case—even as it was recognized in Roark's case, thereby undermining the cogency of *Ex parte Roark*.

Andrew Roark was convicted in 2000 using the same SBS hypothesis used to convict Robert. Yet the SBS premises that were put before both men's juries as scientific fact are no longer accepted—even by proponents of the current version of SBS/AHT. In both cases, the prosecution relied on the **very same** CAP, Dr. Squires, formerly of Dallas Children's. More specifically, Dr. Squires testified in both trials for the State about her SBS diagnoses, providing graphic descriptions of the violent shaking she imagined had occurred.

Roberson has provided a chart showing that Squires' testimony in these two SBS cases was virtually identical. EX12. And he argues that the inconsistent application of Article 11.073 in the Roberson and Roark cases cannot be reconciled with the facts.

Roark's counsel, Gary Udashen, has provided an affidavit explaining the tortured history of his team's efforts to obtain information from Dr. Squires. EX13. Dr. Squires' reluctance to revisit her outdated SBS testimony in extraordinarily serious cases further undermines the credibility of her trial testimony. The history Udashen provides shows Squires' long-standing reluctance to cooperate: "The process of convincing Dr. Squires to speak to anyone about the Roark case was **laborious and took many years**. Despite the fact that Dr. Squires had provided testimony that had resulted in Roark being convicted an imprisoned, she was **totally uncooperative** with both the District Attorney's Office and Mr. Roark's team. In

fact, Dr. Squires **refused for years to even discuss** Mr. Roark's case with myself or my team." *Id.* at 2-3 (emphasis added). Udashen further explains how the intervention of the Dallas County DA's Office eventually compelled her to make a modest recantation via affidavit—so as to avoid being subpoenaed and required to return to Texas to testify. *Id.* Just as she was uncooperative in *Roark*, when approached recently by Roberson's counsel, Dr. Squires refused to even review Nikki's records or her 2003 testimony. *See* EX54.

Dr. Squires' modest recantation about one of many issues in the Roark writ proceeding was hardly dispositive of the Court's conclusions in *Ex parte Roark*. The Court held that the entire SBS hypothesis about which Squires had opined at length in Roark's (and Roberson's) trial is inconsistent with contemporary scientific understanding.

This Court, having joined those jurisdictions that have rightly recognized that the SBS/AHT hypothesis is untethered to any validated science, should now apply the reasoning of *Ex parte Roark* and the additional scientific developments since that case was decided to **this** case. The integrity of this state's jurisprudence, not to mention the interest of justice, demands it.

Considering the tidal wave of new scientific studies eviscerating the State's trial and post-conviction SBS/AHT cause-of-death hypothesis, relief is plainly warranted.

III. <u>Claim 3: Roberson Has Been Deprived of a State-Created Liberty Interest in Violation of Federal Constitutional Law.</u>

A truth-seeking vehicle like Article 11.073 and all the new evidence in the world are meaningless if the law's intent and a mountain of new evidence are disregarded or, worse, intentionally misrepresented based on a cynical belief that no one is "minding the store" by examining the actual record. The Court is urged to consider that it has been misled about the case against Roberson. Otherwise, a man will be executed for a crime that did not occur. That would completely undermine the value of *Ex parte Roark* and cast a dark shadow over the integrity of Texas's criminal legal system.

A. Overview

Article 11.073 created a new right for Texas prisoners, a vehicle for challenging convictions based on outdated science. The law was expressly enacted to make it easier for innocent people, convicted using problematic forensic evidence, to obtain relief from these wrongful convictions. EX7; EX49.

Before Article 11.073 was enacted, court decisions had articulated a need for guidelines to deal with new forensic evidence in post-conviction cases, *i.e.*, when evaluating new forensic evidence after all initial appeals had been exhausted. *See, e.g.*, *Robbins I*, 360 S.W.3d at 454; *Ex parte Henderson*, 384 S.W.3d 833. Additionally, the law was a response to various scandals, exposés, and exonerations

related to unreliable forensic science. *See, e.g.*, *Robbins II*, 478 S.W.3d at 695-700 (Cochran, J., concurring).

Before Article 11.073, there was no mechanism to address situations where scientific advancements and evolving expert opinions showed that the evidence used to obtain a conviction had been destabilized. Before Article 11.073, post-conviction relief was only available if someone could prove a legal claim of actual innocence or show an extreme violation of federal constitutional rights, both of which entail an onerous evidentiary burden. The task gets more daunting with decades-old convictions, as critical evidence may have gone missing and witnesses may be dead, difficult to locate, unwilling to communicate, or simply unable to recall the circumstances of previous testimony.

Generally, incarcerated people are not in a position to develop new evidence. For Roberson, the task has been even more daunting as the State's theory that a crime occurred depends entirely on medical opinions—which lay people, including lawyers and judges, are not necessarily equipped to assess, let alone deconstruct. That task requires recourse to yet more medical and scientific expertise and extensive research to be able to identify what kinds of experts are required and who appropriately qualified experts might be.

This is not an endeavor that anyone on Texas's death row can do by himself. Yet Texas law does not give death-sentenced people any right to funds for an attorney

or investigative resources or experts to develop potential claims for a subsequent state habeas application. Only **after** claims are authorized by the Court of Criminal Appeals does any right to counsel attach. *See* TEX. CODE CRIM. PROC. art. 11.071, sec. 6(b-1).

The challenge of unwinding convictions based on seriously problematic forensic evidence is, by no means, a problem unique to Texas. *See* National Research Council, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (Aug. 2009). But Texas was the first to enact a legislative solution. *See* Trevor Rosson, *A New Remedy for Junk Science: Article 11.073 and Texas's Response to the Changing Landscape in the Forensic Sciences*., 48 ST. MARY'S L.J. 465, 467 (2017). After a series of failed bills, in 2013 the Texas Legislature passed Senate Bill 344, later codified as Texas Code of Criminal Procedure Article 11.073, and amended it in 2015 to make it even more accessible. Colloquially, Article 11.073 is known as the "junk science writ law," but, importantly, there is no burden to prove that trial testimony was "junk science." Article 11.073 applies "to relevant scientific evidence that: (1) was not available to be offered by a convicted person at the convicted person's trial; or (2) contradicts scientific evidence relied on by the state at trial." TEX. CODE CRIM. PROC. art. 11.073(a).

Article 11.073 created a "liberty interest" that Texas prisoners are entitled to pursue.

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution entitles those with such liberty interests a right to reasonable procedures to seek to vindicate those liberty interests. But with each of Roberson's multiple attempts to rely on Article 11.073, his attempts to obtain relief pursuant to that liberty interest have been unfairly thwarted. That extreme obstruction entitles him to relief under the federal Constitution. The failure to apply the law as written, imposing a heightened burden contrary to the statute's plain language and to legislative intent, and, seemingly, a reliance on unadjudicated and false "facts" are circumstances that have violated Roberson's federal constitutional right to due process.

B. Legal Standard

To obtain relief under Article 11.073, a person must show that (1) new, relevant scientific evidence is currently available and was not available at the time of their trial, (2) the new science would be admissible under the Texas Rules of Evidence, and (3) they likely would not have been convicted if this new scientific evidence had been presented at their trial. TEX. CODE CRIM. PROC. art. 11.073(a) & (b). People seeking relief must also comply with specific procedural requirements codified in Texas Code of Criminal Procedure Article 11.07 Section 4 and Article 11.071 Section 5.

The **federal** right to due process in proceedings seeking to exercise a state-created liberty interest has been recognized by many courts. *See, e.g.*, *District*

Attorney's Office for the Third Judicial District v. Osborne, 557 U.S. 52 (2009). *See also Redd v. Guerrero*, 84 F.4th 874, 898 (9th Cir. 2023) (recognizing that "[s]tate laws governing postconviction relief can… give rise to a liberty interest protected by federal due process"); *Howard v. City of Durham*, 68 F.4th 934, 947–48 (4th Cir. 2023) (holding that NC law created a liberty interest for plaintiffs to demonstrate innocence during post-conviction proceedings, which is "entitled to protection under the Due Process Clause"); *Armstrong v. Daily*, 786 F.3d 529, 551 (7th Cir. 2015) (allowing plaintiff's civil suit to proceed, in part, because actions by a "state actor" amounted to a "deprivation of [plaintiff's] liberty without due process of law"); *Morrison v. Peterson*, 809 F.3d 1059, 1064–65 (9th Cir. 2015) (holding, in a section 1983 challenge to California's postconviction DNA procedures, that the prisoner had a state law "liberty interest in demonstrating his innocence with new evidence .... because California law provides a right to be released from custody pursuant to a writ of habeas corpus when there is no legal cause for imprisonment"); *Newton v. City of New York*, 779 F.3d 140, 151 (2d Cir. 2015) (finding the defendant "prevented [the appellant] from vindicating his liberty interest in violation of his Fourteenth Amendment right to due process").

C. Roberson's Attempts to Rely on Article 11.073 Have Been Inexplicably and Unreasonably Rebuffed.

In 2002-2003, when Roberson was arrested, tried, and convicted using an SBS cause-of-death theory, SBS was accepted as medical gospel. By 2016, when his first

subsequent habeas application was filed, the controversy around SBS (which had, by then, been rebranded as AHT) had become quite pronounced. Since then, the version of SBS and other false testimony used to obtain Roberson's conviction has been entirely discredited. Yet no court has yet fairly considered his changed-science claims.

Roberson has tried three times to rely on Article 11.073; the procedural history shows a glaring deprivation of due process and seeming reliance on arbitrary factors such as false representations of the record to justify denying him relief.

1. First attempt to rely on Article 11.073

In 2016, Roberson was poised to become the first person executed for a conviction based on SBS and, despite numerous requests, he had yet to be appointed any attorney willing to investigate the problems with the SBS causation theory or his insistence that he had not done anything to harm his daughter Nikki. EX50.

Eventually, his desperate *pro se* quest for pro bono help succeeded. He obtained new counsel in April 2016 who agreed to investigate the reputed science used to convict him.

On June 8, 2016, his first subsequent state habeas application (-03) was filed, relying primarily on Article 11.073. The application, supported by several volumes of evidentiary proffers, was submitted to the trial court and to the Court of Criminal Appeals, along with a motion seeking to stay his then-pending execution.

Mere days before the scheduled execution, the Court stayed the execution and entered an order remanding all claims "to the trial court for resolution." *Ex parte Roberson*, 2016 WL 3543332 (Tex. Crim. App. June 16, 2016) (unpub.).

After the remand order, the State eventually filed an Answer, attaching one item: an affidavit from Dr. Urban, the medical examiner who had performed Nikki's autopsy and testified for the State at trial. In her affidavit, Dr. Urban denied that she had opined about "shaking" as a cause of Nikki's death and emphasized her view that the subdural blood she had seen during the autopsy amounted to evidence of "multiple impact sites." APPX100; *but see* 43RR75-86 (Dr. Urban's trial testimony replete with discussion of "shaking" and SBS terminology).

In the first hearing before the trial judge, Deborah Oakes Evans,[32] State's counsel took the position that no further proceedings were necessary and asked Judge Evans to summarily reject all of the voluminous evidentiary proffers, rely solely on Dr. Urban's affidavit, and recommend that all relief be denied. Judge Evans, however, recognized that the remand order indicated that Roberson at least had a right to develop a factual record in support of his claims.

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[32] When Roberson's -03 proceeding was remanded, the trial court was presided over by Judge Mark Calhoon, one of two trial prosecutors who had obtained Roberson's conviction and son of a former judge who had presided over Nikki's custody proceedings. Therefore, through some process, the case was assigned to Judge Evans, then the elected judge in the 87th district court, whose jurisdiction included Anderson County.

From that day forward, neither State's counsel nor the medical examiner have been willing to engage in any extra-judicial discussion of the changed science and the new medical evidence amassed since 2016 showing that the 2002 conclusions regarding cause and manner of death were wrong.

An evidentiary hearing commenced on August 14, 2018, but was abruptly shut down that same day after long-lost CT scans of Nikki, which the medical examiner had never considered and the District Attorney had never looked for, were rediscovered in the courthouse basement by the new District Clerk. 2EHRR85-87.

The presentation of evidence finally resumed from March 8-17, 2021, following multiple delays related to seeking access to core medical records and expertise, as well as the COVID pandemic. During the evidentiary hearing, Roberson put on multiple expert and lay witnesses, including affidavits and/or live testimony from the following experts, thoroughly discrediting the medical testimony about the cause of Nikki's death that had been put before the jury in 2003: forensic pathologist Dr. John Plunkett; forensic pathologist Dr. Harry Bonnell; pediatric forensic pathologist Dr. Janice Ophoven; biomechanical engineer Dr. Kenneth Monson; forensic pathologist Dr. Carl Wigren; and neuropathologist Dr. Roland Auer.

During the evidentiary hearing, voluminous new evidence was adduced about scientific advancements that debunked the State's SBS trial causation theory **and** the

opinion that a homicide had occurred. Experts also testified that Nikki seemed to have had infected lungs, likely interstitial viral pneumonia, and dangerous levels of respiratory-suppressing prescription drugs in her system at the time of her death, circumstances that likely explained why she ceased breathing at some point after the short fall from bed reported by her father when he brought her to the local ER for treatment. Extensive testimony, supported by the long-lost CT scans, debunked the notion that Nikki's internal head condition—the triad of symptoms long associated with SBS—had been caused by violent shaking or blunt impacts to the head. For instance, the habeas judge heard new, unrebutted scientific evidence that:

- It is now established fact that many phenomena can cause the triad (such as hypoxia, infections, genetic disorders, accidental short falls with head impact), and thus abuse cannot be presumed and a differential diagnosis is required.

- Biomechanical injury studies have shown that shaking would cause neck injuries, which Nikki did not have, not the triad.

- Children can experience a lucid interval of hours or even days before subdural bleeding creates pressure on the brain, causing a collapse, eviscerating the SBS presumption that whoever is with a child when they become unresponsive must have caused the condition.

- Short falls can produce serious, even fatal injuries in young children and thus such reports must be taken seriously and included in the differential diagnosis.

- No sound science supports the version of the SBS hypothesis used to convict Roberson.

The habeas judge also heard new evidence from multiple experts that Nikki's death was not a homicide.

Roberson's causation experts—Drs. Auer, Ophoven, Wigren, and Monson—all relied on a report from the only radiologist to provide evidence in the -03 proceeding. These experts concluded that the radiological evidence showed conclusively that Nikki had sustained a single impact to the right back of her head where a "goose egg" had formed and a small subdural bleed had commenced. They opined that the single impact was consistent with Roberson's report that Nikki had fallen out of bed and inconsistent with Dr. Urban's testimony regarding multiple impact sites.

In light of current scientific understanding and material new information about Nikki's condition at the time of her collapse, these experts concluded that Nikki's death was **not** caused by abuse but by natural and accidental causes:

- **Dr. Janice Ophoven**, a licensed M.D. since 1971, board certified in forensic pathology and anatomic pathology with special training and experience in pediatrics and pediatric pathology, concluded that Nikki's death should not have been designated a homicide, in part because there is no scientific basis for looking at an impact site and concluding whether it was intentionally inflicted or the result of an accidental fall. Dr. Ophoven opined that Nikki's internal condition simply meant that she had suffered irreversible damage from oxygen deprivation. Dr. Ophoven explained that anyone who stops breathing and has their heart stop is at risk for the same constellation of internal head conditions. If the brain is deprived of oxygen, brain swelling occurs. Then, as pressure against the brain increases, bleeding into the eyes, which are connected to the brain, can occur. Dr. Ophoven was confident that the precipitating event was not "shaking" or "multiple impacts" to the head. Moreover, she explained that Dr. Urban's autopsy pictures, to which the jury

had been subjected, were misleading because they did not reflect Nikki's condition when she was brought to the ER but were taken during the autopsy, performed after multiple intervening events had affected Nikki's internal and external condition. 3EHRR13-81; APPX2.

- **Dr. Ken Monson** explained the relevant scientific literature and studies showing that the SBS/AHT assumptions about how shaking would cause internal head injuries but no neck injuries have been falsified. He also explained how the laws of physics and modeling are utilized to study the injury-impact of falls with head impacts. Dr. Monson explained how a teddy bear, such as that used as a demonstrative during Roberson's trial, weighing less than a pound, is not a comparable model in any relevant respect to a 28-pound toddler like Nikki and thus misled the jury. 5EHRR22-108.

- **Dr. Carl Wigren**, a forensic pathologist who has performed thousands of autopsies and is a member of the American Academy of Forensic Sciences, concluded that Nikki's death was not a homicide based on: (1) the report of a fall off of a bed; (2) the evidence (CT scans and autopsy photographs) showing only a single impact site to the back of Nikki's head that was consistent with the report that she had sustained a short fall; (3) evidence in the toxicology report of dangerous quantities of Phenergan/promethazine now known to suppress the nervous system, in Nikki's bloodstream at the time of autopsy; (4) evidence that, shortly before her collapse, she had been prescribed Phenergan in two forms and cough syrup with Codeine, a narcotic that metabolizes into morphine and further suppresses the nervous system; (5) evidence that the fall occurred while she was in an unsafe and unfamiliar sleep environment, a bed that consisted of a mattress and box springs recently propped up on layers of cinder blocks, some of which were sticking out from under the box springs; and (6) evidence that Nikki had undiagnosed pneumonia. Dr. Wigren concluded that these factors had come together to cause an "unfortunate accident," "absolutely not" a homicide, and opined that SBS/AHT played no role in causing Nikki's death. 5EHRR157-244; 6EHRR25; APPX92; APPX95.

- **Dr. Roland Auer**, a neuropathologist board certified in the United States and Canada, who is both a medical doctor and a Ph.D. scientist, the author of a leading forensic neuropathology treatise and over 130 scientific articles in peer-reviewed journals, and a researcher with extensive experience with head trauma, hypoxia, hypoxic ischemia, and pediatric pneumonia, independently identified factors relevant to assessing the cause of Nikki's death. He

> concluded that her death could not reasonably be deemed a homicide. As a specialist in brain pathology, Dr. Auer clarified that trauma sufficient to cause internal brain damage would leave external markers on the skin in the form of corresponding bruises/contusions and likely corresponding skull fractures. He found no evidence suggesting significant trauma to Nikki's head, only one minor impact, "no support for multiple impact sites neither on the brain nor in the skull nor in the scalp," and "no evidence for multiple impact sites whatsoever" but instead found evidence in Nikki's lung tissue of **advanced interstitial viral pneumonia**. He explained that interstitial viral pneumonia causes hypoxia by disrupting the lung tissue and, if untreated, a cascade of symptoms will result in brain death: oxygen-deprived blood vessels leak into the dura; the blood accumulating outside of the brain causes swelling and increased intracranial pressure; the pressure inside the skull in turn causes retinal hemorrhages. He also noted that the drugs Nikki had been prescribed before her collapse—Phenergan, which depresses respiration, and Codeine, an opiate—would have done nothing to address her undiagnosed pneumonia but would have further hindered her ability to breath. 8EHRR55-56. 8EHRR8-144; APPX124; APPX110.

By contrast, the State relied on two witnesses at the hearing. The first was Dr. Urban who admitted she had never considered Nikki's medical history or a host of other material factors and could not identify anything she had learned in the intervening years to warrant revisiting her 2002 opinions. 9EHRR121, 127. The second was Dr. James Downs, a member of the "Shaken Baby Alliance," an SBS/AHT advocacy group that teaches prosecutors how to obtain convictions based on the SBS/AHT hypothesis. 10EHRR112-15.

In an attempt to rebut Dr. Auer's comprehensive findings, including his conclusion that Nikki's death was caused by her undiagnosed interstitial viral pneumonia, Dr. Downs repeatedly claimed that Nikki's lungs were "normal little kid lungs" and he saw "no pneumonia." 10EHRR74, 76, 212, 220, 242. Dr. Downs also

(falsely) asserted that he did not believe he had "ever missed" pneumonia in an autopsy "since they're pretty much readily apparent grossly." 10EHRR221. Yet, as Dr. Auer testified, interstitial viral pneumonia is **not** "readily apparent grossly" and identifying its effect on lung tissue requires special training that forensic pathologists do not receive. 8EHRR89, 100. Moreover, during cross-examination, Dr. Downs was confronted with an appellate decision granting habeas relief to a man who had been sentenced to death for intentionally causing the death of his infant son. Based in part on new evidence that the child had pneumonia at the time of his death, the court had found that Dr. Downs, who had performed the child's autopsy, had **missed the pneumonia**, which was not mentioned in his autopsy report or trial testimony. *See Ward v. State*, 382 So.3d 574 (Ala. Crim. App. 2020).

After the hearing record was prepared, the parties submitted proposed Findings. The applicant's proposal, summarizing the key evidence in the new 13-volume record, was 302-pages long. **Appendix B**. The State's proposal was 17-pages long; it relied primarily on the 2003 trial testimony, denied that the tenets of SBS/AHT had changed since 2003, and maintained that Nikki had died from inflicted head trauma despite the absence of evidence of external injuries, which is why the SBS diagnosis had been made in the first place. **Appendix C**.

After the Court of Criminal Appeals issued a directive to Judge Evans to wrap up the proceeding, she issued her Findings on February 14, 2022, 20 years to the day

when Robert was sentenced to death. These Findings largely tracked the State's proposal, including its typographical and grammatical errors. **Appendix D**. Soon thereafter, Judge Evans announced plans to retire at the end of the year.

One cannot read Judge Evans' Findings and have any understanding of the vast new evidence that had actually been adduced. The Findings reflect extreme indifference to accurately reporting even the handful of facts that are mentioned. The Findings do not track the governing law or apply the law to any relevant facts.

The Findings assert that Roberson had not adduced any "new evidence," a conclusion that cannot be squared with the new 13-volume habeas record. That record includes whole categories of new evidence, including testimony from six highly qualified experts establishing, *e.g.*:

- The medical opinions regarding the SBS hypothesis used to convict Roberson are contrary to evidence-based science, and its premises have all been rebutted by empirical research.

- Nikki died of natural and accident causes, not from abuse.

- There were no "multiple impacts" to the head as proven by the long-lost CT scans but only a single bump on the head, consistent with a short fall.

- An expert in brain pathology and head trauma found no evidence of fatal head trauma but instead an accumulation of subdural blood outside the brain caused by hypoxia, explained by the Nikki's undiagnosed pneumonia.

- The trial record was replete with false testimony as to what could and could not have caused Nikki's death in light of contemporary scientific understanding.

- The highly prejudicial suggestions of possible sexual abuse from an nurse who was not SANE-certified as she claimed were completely contrary to the evidence and the training an actual SANE would receive.

Instead of engaging with the vast body of new evidence demonstrating how the science used to obtain Roberson's conviction had **changed**, Judge Evans did not even acknowledge the new evidence and instead reached conclusions based primarily on the very trial testimony that had been challenged as incompatible with current scientific understanding. *See* **Appendix D** ¶¶19, 21-37, 40-41, 64-67, 77-88 (relying on the trial testimony of the State's causation experts and local Palestine doctors and nurses). Indeed, the primary basis for the recommendation that relief be denied was the indefensible conclusion that SBS/AHT had not changed in any material way since the 2003 trial.

The Findings were also replete with errors suggesting a lack of basic care in dispensing with serious claims. For instance, the Findings stated that "SBS/AHT is still Accepted by American Pediatric Association." *Id.* ¶15. Presumably, Judge Evans meant the "American Academy of Pediatrics" (AAP). What the unrebutted evidence showed, however, is that even the AAP's position on SBS has changed **significantly** since Roberson's trial.[33]

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[33] In 2001, the AAP published a position paper informing doctors that shaking or shaking with impact (and thus child abuse) could be "presumed" based on the triad alone, thus permitting a default diagnosis of abuse. AAP, *Shaken Baby Syndrome: Rotational Cranial Injuries—Technical Report*, Comm. on Child Abuse

Yet about a year after those Findings were submitted to the Court of Criminal Appeals along with the record, the Court of Criminal Appeals summarily adopted Judge Evans' Findings and denied relief without providing any explanation or citing any of Roberson's new evidence *Ex parte Roberson*, 2023 WL 151908 (Tex. Crim. App. Jan. 11, 2023) (unpub.).

2. Second attempt to rely on Article 11.073

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and Neglect, 108 Pediatrics 206 (July 2001) ("Although physical abuse in the past has been a diagnosis of exclusion, data regarding the nature and frequency of head trauma consistently support the need for a presumption of child abuse when a child younger than 1 year has suffered an intracranial injury.").

Dr. Squires actually invoked that 2001 position paper during Roberson's 2003 trial as supporting her opinions. At that time, the medical community had simply accepted the unvalidated hypothesis that, whenever the triad was found, unless there was evidence of a massive trauma event (such as a high-speed auto accident or a fall from a multi-story building), shaking, with or without evidence of impact, had caused the child's condition, even when a child, like Nikki, had a history of serious medical issues.

By 2009, the AAP revised its position, recommending that doctors stop saying "Shaken Baby" and instead use the more vague term AHT because of the mounting, evidence-based critique of SBS. At that time, the AAP also admitted, that other things—such as pneumonia, DIC, and short falls with head impact—could cause the SBS triad, meaning the triad could not be treated as "diagnostic" of abuse as had been the view when Dr. Squires made the SBS diagnosis.

A 2020 AAP position paper acknowledged that "[f]ew pediatric diagnoses have engendered as much debate" as SBS/AHT. AAP, *Abusive Head Trauma in Infant and Children*, 145 Pediatrics 4 (April 1, 2020).

Today, even the AAP, the most ardent defender of the SBS/AHT hypothesis, recognizes that a thorough investigation and a differential diagnosis is **required** before abuse can be posited.

After he was denied relief, Roberson's counsel continued to seek resources and develop new evidence of the discredited SBS causation theory, new expert opinions rebutting the opinions of both Dr. Urban and Dr. Downs that Judge Evans had relied on in the -03 proceeding, and new evidence of the actual cause of Nikki's death. Thereafter, Roberson's counsel also repeatedly sought to have a non-adversarial meeting with both DA Mitchell and SWIFS, hoping to present the new evidence—even offering to have key experts flown to SWIFS for such a meeting. But these requests were summarily denied. *See, e.g.*, EX3.

Instead of agreeing to meet to discuss the new evidence establishing Roberson's actual innocence, DA Mitchell sought a new execution date. Upon learning of her intentions, Roberson's counsel filed a motion seeking to be heard before an execution date was set, explaining their plan to file a subsequent state habeas application. Also, on April 24, 2024, a "Suggestion to Reconsider on Court's Own Initiative and Motion to Hold for Adjudication of *Ex Parte Roark*" was filed on Roberson's behalf in the -03 proceeding based on (1) the trial court's recommendation in Andrew Roark's similar SBS case that he be awarded relief under Article 11.073 based on the same changes in the scientific understanding of SBS since his trial; (2) a new Texas law (TEX. FAM. CODE sec. 261.3017) recognizing problems of bias and unfairness with professional "child abuse specialists" (like Dr. Squires) requiring that parents be given access to their own experts when they are

accused by hospital personnel; and (3) a demonstration that the Findings upon which the Court had relied were demonstrably and materially misleading.

On June 17, 2024, the State filed a "Motion Requesting Execution Date" in the trial court. The next day, an "Opposition to Anderson County DA's Motion Requesting Execution Date" was filed in the trial court on Roberson's behalf, reurging the request for a hearing. The State then filed an opposition to Roberson's first-filed Motion to be Heard. Without permitting a hearing, Judge Evans came out of retirement to sign an order setting an October 17, 2024, execution date.

Once again, Roberson was poised to become the first person executed for a conviction based on the discredited SBS hypothesis.

On August 1, 2024, a second subsequent habeas application was filed on Roberson's behalf under Article 11.073, relying on intervening changes in the relevant science **since 2016** (when the first attempt to rely on Article 11.073 was filed) as well as on new evidence corroborating that Nikki died of a severe, undiagnosed pneumonia exacerbated by inappropriate respiratory-suppressing medications prescribed during her final days by doctors who had missed her pneumonia.

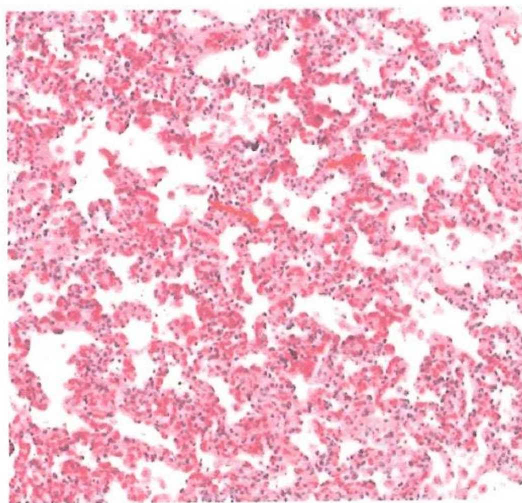
The -04 application was supported by, *inter alia*, three new expert reports, reflecting different medical specialties. These correlated opinions were only possible because of evidence that had emerged over the course of the previous habeas

proceeding and thereafter. This new evidence was thus not available when the -03 application was filed.

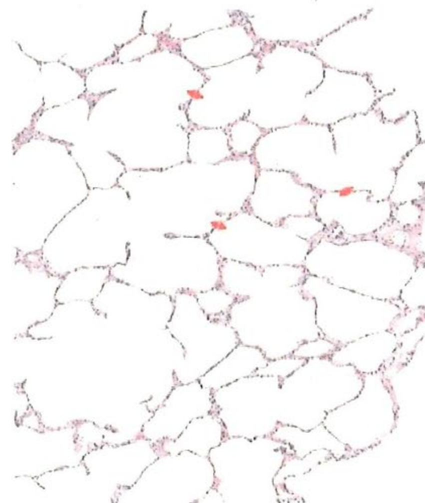
The first new expert, Dr. Francis Green, is an expert in lung pathology with nearly 50 years of experience. Dr. Green had reviewed Nikki's medical history and examined her lung tissue under a microscope. His detailed report explained how two different types of pneumonia—a viral and a bacterial infection—were ravishing Nikki's lungs. He found that interstitial viral pneumonia had substantially thickened the cell walls of the tiny air sacs in Nikki's lungs, where oxygen is absorbed into the bloodstream. As those interstitial cell walls thickened, Nikki's ability to breathe was greatly inhibited and, eventually, her brain and other organs were starved of oxygen. *See, e.g.*:

3. Chronic Interstitial Pneumonia

Nikki Curtis Interstitial Pneumonia



Normal Interstitium



Dr. Green's detailed analysis showed that Nikki's pneumonia started many days, if

not weeks, before her final hospitalization. This evidence from a highly qualified specialist also rebutted the opinions of the State's experts in the -03 proceeding suggesting that Nikki's lung condition was only a function of time spent on a ventilator. EX26.

The second new expert was Dr. Keenan Bora, an expert in medical toxicology and emergency room medicine. He had concluded that a post-mortem toxicology report shows that Nikki had dangerously high levels of promethazine in her system, likely explained by the fact that two different doctors prescribed the drug on two consecutive days. Dr. Bora explained that promethazine would have exacerbated the respiratory problems caused by Nikki's undiagnosed pneumonia. Dr. Bora also noted that the second promethazine prescription was in cough syrup that included Codeine, a narcotic that would have further compounded Nikki's breathing challenges. Dr. Bora emphasized evidence that Nikki had a severe infection (pneumonia) that developed into sepsis and then septic shock. He concluded that these drugs likely hastened her respiratory depression and death. EX28.

The third new expert opinions were from Dr. Julie Mack, a Harvard-trained pediatric radiologist. She concluded that CT scans of Nikki's head, taken upon her arrival in the Palestine hospital, showed that she had only a single impact site on her head, *i.e.*, a "goose egg." These scans corroborated Roberson's report that Nikki had fallen out of bed and possibly hit her head a few hours before he woke up to find her

unresponsive. But the medical examiner had testified in the 2003 trial that Nikki had sustained **multiple** impacts to her head, which, along with "shaking," was the "blunt force trauma" that she concluded had killed Nikki. But the incontrovertible radiological evidence showed only **one** impact site on Nikki's head. The medical imaging further showed that this one minor impact site is associated with a small subdural bleed and no corresponding skull fractures, entirely consistent with an accidental fall out of bed and entirely inconsistent with Dr. Urban's shaking and impact testimony. As Dr. Mack explained, the short fall with head impact might not have been fatal if experienced by a healthy child; but Nikki was profoundly ill. EX27.

Dr. Mack had also finally been able to review a series of chest x-rays of Nikki, including ones only produced to Roberson's counsel in 2024. Dr. Mack concluded that these chest x-rays corroborated Dr. Green's conclusion that Nikki had a fatal lung infection (pneumonia). *Id.*

When Roberson was accused and tried, no medical expert considered, and thus the jury did not hear, medical testimony explaining how the combination of pneumonia, respiration-suppressing medications, and a short fall thoroughly explained Nikki's condition. Because the version of SBS was then widely accepted, even though it had never been validated, none of the State's trial experts considered any other evidence.

The -04 application explained that the medical examiner who had performed Nikki's autopsy and testified in Roberson's 2003 trial did not even obtain Nikki's medical records and thus did not know that Nikki had been extremely ill with a high fever and respiratory distress in the days leading up to her collapse. Although a post-mortem toxicology report showed that Nikki had a large quantity of promethazine in her system, the medical examiner did not investigate what promethazine was, much less any role it may have played in Nikki's death. Further, the medical examiner did not review any of the medical imagining taken of Nikki's head or lungs during her final hospitalizations. Finally, the medical examiner did not account for the effect on Nikki's body of two days of extensive medical intervention from the time she arrived at the hospital until the autopsy was performed—including the fact that she had had a pressure monitor surgically screwed into the top of her head, causing additional bleeding and bruising before Nikki was transported to SWIFS.

The -03 application had explained the evolution in the understanding of SBS as of that date (2016) and how the core principles underlying the hypothesis were no longer valid. But the vital evidence needed to explain precisely **how** Nikki died only became available piecemeal **after** the -03 application was filed.

The -04 application explained all this—how these new expert assessments were only possible after habeas counsel obtained core pieces of evidence, unavailable when the previous application was filed, including: (1) long-lost CT

scans and x-rays of Nikki taken during her final hospitalizations; and (2) a complete autopsy file, including access to lung tissue slides made during the autopsy. Despite multiple discovery requests, subpoenas, and PIA requests, Roberson's legal team did not receive some components of the autopsy file until 2024 (x-rays taken during the 2002 autopsy).[34] After enlisting distinctly qualified experts who undertook a thorough reassessment of medical records, the new evidence assembled in the -04 application showed, incontrovertibly, that Nikki had died of natural and accidental causes.

In addition to evidence of the change in scientific understanding and the actual causes of Nikki's death, the -04 application included new evidence that Brian Wharton, lead detective with the Palestine police, who had investigated Nikki's death in 2002 and testified for the State in the 2003 trial, had entirely disavowed his previous opinions. He explained that he had unquestioningly accepted the SBS diagnosis made by the child abuse expert at Dallas Children's where Nikki was transported, then, based solely on that diagnosis, had authorized Roberson's arrest—even before an autopsy was performed. Wharton acknowledged learning in the interim of the evolution in the medical understanding of SBS. He attested to his

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[34] Some key medical records remain missing, such as earlier scans of Nikki's head when she was being assessed for possible neurological problems in September 2000 because of an alarming history of breathing apnea.

belief today that no crime occurred. He has publicly urged relief for Robert to prevent a horrible miscarriage of justice, the execution of an innocent man: “I am asking for those who care deeply about justice to urge another look at this case.” EX31.

Yet instead of considering this new evidence, which established that no crime had occurred, on September 11, 2024, the Court summarily dismissed the -04 application, stating only the following: “We have reviewed the application and find that the allegations do not satisfy the requirements of Article 11.071, Section 5. *See* Tex. Code Crim. Proc. art. 37.071, § 5(a). Accordingly, we dismiss the application as an abuse of the writ without reviewing the merits of the claims raised. *See* id. art. 37.071, § 5(c).”

Perplexingly, “Article 37.071 section 5” does not exist; Article 37.071 only goes to section 2. Also “Article 37.071” is a statute that deals only with death-penalty **trials**—it covers the mandatory jury instructions for death-penalty cases and has nothing to do with habeas proceedings. In other words, the decision did not cite any existing state law as a basis for refusing to review substantive evidence of Actual Innocence.

Moreover, the decision did not explain how the -04 application did not satisfy “Article 11.071, Section 5,” the other statute cited.

3. Third attempt to rely on Article 11.073

After the Court dismissed, without considering, all of the claims in the -04 application, yet another subsequent habeas application (-05) was filed pursuant to Article 11.073—based on new law announced in *Ex parte Roark*, a notably similar SBS case, involving an applicant prosecuted in the same era as Roberson based on the same since-discredited medical opinions.

In *Ex parte Roark*, the Court had concluded "that Article 11.073 applies and Applicant has met his burden for relief"; found "that scientific knowledge has evolved regarding SBS and its application in Applicant's case"; and concluded that "[t]he admissible scientific testimony at trial today would likely yield an acquittal." *Ex parte Roark*, *supra*, at *23.

The Roark and Roberson cases are indistinguishable in all material respects. Most critically, the cause-of-injury theory was the same—a version of SBS that has not withstood scientific scrutiny. The **very same** CAP, Dr. Squires, diagnosed SBS in both cases and testified at length for the State about her SBS diagnosis in both trials.[35] In *Ex parte Roark*, the Court aptly recognized that the case against Roark was an entirely "circumstantial case"—devoid of eyewitnesses to what had

[35] One difference is that the 13-month-old child in *Roark* did not die as Roberson's 27-month-old daughter Nikki did. Thus, there was no medical examiner in *Roark*. Here, the medical examiner never considered a host of critical variables.

transpired during the limited window when a man was alone with a child he was caring for when she experienced a medical crisis. *Id.* at *25. Additionally, the Court noted, "the most persuasive evidence in trial was medical testimony," which was in fact "[t]he only way to assign criminal responsibility" to the defendant. *Id.* The -05 application emphasized that this same rationale should apply equally to Roberson's case.

The similarities between the Roark and Roberson cases are strikingly similar even at a more granular level. For instance, in both cases, the defendant reported the child had experienced a short fall out of bed—a report dismissed, in both cases, as not credible because the medical community did not believe short falls could cause the "triad" of injuries. *Id*. at *15. In both cases, Dr. Squires testified that shaking had to have caused the triad. *Id.* at *5-*7. In both cases, the children had experienced episodes of breathing apnea—but the child in *Roark* experienced an episode that was caught before it resulted in her death. By contrast, Roberson's daughter had experienced multiple episodes of breathing apnea before lapsing into a comma on January 31, 2002, when she stopped breathing in her sleep before her father woke up and found her unresponsive.

Despite the factual similarities between the Roark and Roberson cases, Texas courts have treated the cases diametrically differently.

The -05 application described how numerous courts in other jurisdictions have relied on the same change in scientific understanding recognized in *Ex parte Roark* to grant relief to individuals prosecuted under an SBS/AHT theory. But the -05 application was dismissed without any written opinion (with 4 judges dissenting).

D. The Lawmakers Responsible for Article 11.073 Believe Roberson Has Been Denied Due Process and Deserves Habeas Relief.

Yet more evidence of the due process violation emerged when the House Committee recently convened hearings to investigate how the judicial system had failed to grant Roberson relief.

On October 16, 2004, the House Committee held a seven-hour hearing titled: "Criminal procedure related to capital punishment and new science writs under Article 11.073, Code of Criminal Procedure." EX4. The purpose of the hearing was to explore the House Committee's concern that, despite the Legislature's intent that Article 11.073 protect the constitutional rights of defendants when there has been a change in scientific or medical understanding, the law had not been providing a pathway for relief, particularly in death-penalty cases like Roberson's. The House Committee heard testimony that, to date, no death-sentenced defendant has yet been granted relief based on Article 11.073 although this first-in-the-nation statute was enacted over a decade ago inspired by failures to grant relief in a death-penalty case. *Id.*; *see also* EX49.

The hearing, which focused on Roberson's case, raised what lawmakers described as worrying questions about the accuracy and reliability of the process that has led to him being repeatedly denied habeas relief. The hearing testimony exposed the serious disconnect between (1) the evidentiary hearing record developed in the -03 proceeding and (2) the district court's Findings.

On October 21, 2024, the House Committee planned to hear from Roberson himself. However, due to the intervention of the OAG, which was purporting to represent TDCJ, Roberson was blocked from appearing.[36]

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[36] One Republican member of the House Committee wrote a letter for the record expressing well-founded outrage about the OAG's efforts to thwart the truth-seeking mission related to the Roberson case:

> Chairman Leach and [Co-chair Moody] have provided exceptional leadership, and our fellow members have acted with the utmost care and diligence in this historic matter. They have acted without regard to their ego or political standing and have only sought, as we all do in the Texas House, to seek the truth and the right course of action.
>
> The same cannot be said for the partisan and political agitators outside the Texas Legislature (Legislature), who have become vocal and unwelcome distractions in this process. Without cause or reason, they have unfairly maligned the work being conducted by this Committee and opined brazenly on this issue without regard for the sensitive and delicate nature of the subject at hand.
>
> There are those who will cry foul that certain filings by the Office of Attorney General (OAG) and other members of the Texas House who believe Mr. Roberson is guilty were not include[d] in the final report. Let the record show I believe those claims lack any tangible merit[.]

Yet the second hearing went forward. Over the course of a nine-hour hearing, the House Committee heard testimony from a wide array of witnesses, including:

- Phil McGraw, Ph.D. a/k/a Dr. Phil, who reviewed the trial record and the new medical reports, found overwhelming evidence that Roberson's daughter had been chronically ill, a fact ignored during a trial that was replete with "Shaken Baby" references, and he voiced the belief that Roberson has been denied basic due process;

- Novelist John Grisham, who has studied and written about Roberson's case (EX51, explained why this case constitutes a particularly concerning instance of an innocent person potentially facing execution for a crime that did not occur;

- Former Texas Court of Criminal Appeals Judge Elsa Alcala, described the historic resistance to granting habeas relief and the cases that prompted enactment of Article 11.073, which was supposed to make obtaining relief in cases like Roberson's **easier**;

- Terre Compton, who had served on the jury that convicted Roberson in 2003 based on the State's SBS hypothesis, explained her current belief that Roberson never would have been convicted if the information now known was put before the jury and expressed a belief that he is innocent.

Following these hearings, the House Committee issued a report describing its investigation and findings. EX7. The House Committee's conclusion was that Article 11.073 has not been properly applied in Roberson's case—to a shocking degree:

> This committee's thorough review of the record confirms that Robert was convicted based on SBS, and to twist matters to claim otherwise is disingenuous, especially when the state's own lead investigator and a

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EX7. Importantly, the OAG has never represented the State in any of Roberson's state habeas proceedings. And the OAG seems to lack a basic understanding of the record, perhaps because of ill-advised reliance on the local District Attorney. *See* Materiality section, below.

> juror who heard that evidence at trial see it that way. And to continue to hold that the new scientific developments since trial wouldn't have made a difference when a juror has explicitly told this committee that she wouldn't have convicted if she knew then what she knows now is beyond the pale.

Id. at 35-36.

The new evidence amassed to support Roberson's habeas claims led a large, diverse, bipartisan contingent to rally behind him as part of ensuring the integrity of Article 11.073. EX52. Having looked at the new evidence and the plain text of Article 11.073, lawmakers across the political spectrum—as well as doctors and scientists, former judges, Autism and parental rights advocates—simply do not understand why he has been denied a new trial. EX16-EX25.

E. The Unreasonable Deprivation of a State-Created Liberty Interest Violated Roberson's Federal Right to Due Process.

Individuals facing the prospect of death are supposed to be afforded heightened reliability under long-settled constitutional law. *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (The "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case."). As the Supreme Court of the United States has written, "The very nature of [habeas proceedings] demands that [they] be administered with the initiative and flexibility essential to insure that miscarriages of justice within [their] reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 291 (1969). Capital cases require heightened procedural safeguards because the sentence is final and irreversible.

Far from taking "painstaking care," the state courts' decisions have flouted the seriousness of the constitutional violations Roberson raised in his subsequent habeas applications.

With Articles 11.071 § 5(a) and 11.073, Texas law recognizes the importance of affording capital petitioners meaningful review of new claims after initial appeals have failed. *Cf. Stutson v. United States*, 516 U.S. 193, 196 (1996) (recognizing that "judicial efficiency and finality" must give way to a "certain solicitude for [the] rights" of criminal defendants). Yet Roberson has faced more obstacles and received less process than habeas applicants who have utilized Article 11.073 to overturn convictions in non-death-penalty cases. Statistics bear out this arbitrariness. **No one on Texas's death row** has succeeded in using this new law to obtain a new trial—despite more than satisfying the procedural requirements delineated in state law. *See* EX49 ("The TCCA has never granted 11.073 relief to a person sentenced to death, as compared to granting relief to 31% of people who seek relief and are serving non-death sentences."). As things stand, *Ex parte Roark* cannot be viewed as a sign that the Texas judiciary is a champion of science. Instead, *Ex parte Roark*, which will inevitably be juxtaposed against Roberson's case, shows that Article 11.073 is being inconsistently and arbitrarily applied.

Roberson faces the ultimate penalty when litigants in other SBS cases around the country have obtained relief—another indication of arbitrariness. Again, *Ex*

parte Roark seemed to bring Texas in line with legal developments in other jurisdictions that have recognized the baseless nature of many SBS/AHT convictions.[37] But the Court of Criminal Appeals' failure to apply its own opinion in an obviously similar case injects intolerable arbitrariness into Texas law.

There is a myth that has been propagated that Roberson has had the benefit of "extensive review." But the Court's decisions belie that assumption.

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[37] *See, e.g.*, *State v. Edmunds*, 746 N.W.2d 590, 595, 598-99 (Wis. Ct. App. 2008) (finding new evidence related to SBS/AHT controversy "[was] entirely different in character from the evidence offered" at trial as it showed "a shift in mainstream medical opinion" and granting new trial); *Commonwealth v. Epps*, 53 N.E.3d 1247, 1268 (Mass. 2016) (finding "substantial risk of a miscarriage of justice where the jury heard no scientific or medical expert challenging the majority views on [SBS/AHT] and short falls, and where new research has emerged since the time of trial that would lend credibility to the opinion of such an expert" and granting new trial); *People v. Bailey*, 41 N.Y.S.3d 625, 627 (App. Div. 2016) (holding that "advancements in science and/or medicine may constitute newly discovered evidence" and "defendant established . . . that 'a significant and legitimate debate in the medical community has developed in the past ten years over whether infants [and toddlers] can be fatally injured through shaking alone'" and affirming lower court ruling vacating SBS/AHT conviction) (alteration in original, citation omitted); *Jones v. State*, No. 0087, 2021 WL 346552, *11-20 (Md. Ct. Spec. App. Feb. 2, 2021) (surveying changes in SBS/AHT's original tenets in light of scientific developments and finding that petition for writ of actual innocence should be granted); *Kaiser v. State*, ___ N.W.3d ___, 2024 WL 1080968 (Minn. March 13, 2024) (finding that SBS/AHT testimony from State's expert witnesses was false testimony that child's medical condition was the result of intentionally inflicted head trauma); *see also Del Prete v. Thompson*, 10 F. Supp. 3d 907, 951 (N.D. Ill. 2014) (finding petitioner convicted for 2002 death of child in SBS case had satisfied *Schlup v. Delo*, 513 U.S. 298 (1995) gateway materiality standard for constitutional claims).

First, whatever review was conducted in 2022 of the -03 proceeding involved complete deference to a trial judge's Findings that cannot be squared with the actual habeas record and, in any event, are now inconsistent with Texas law announced in *Ex parte Roark*.

Second, the Court itself did not claim to have reviewed or considered any of the new claims or new evidence submitted in 2024 in the -04 and -05 applications. Those applications were simply dismissed without explanation. The Court's seeming application of a procedural bar, without any explanation, violated Roberson's due process rights as it cannot be squared with the facts or the state law cited.

The quest for justice seems to have gone off the rails when State's counsel in the Anderson County DA's Office submitted materially misleading and outright deceptive proposed Findings to a judge who has now implicitly acknowledged she should have recused herself long ago. *See* **Appendix B**, **Appendix C**, **Appendix D**; EX34. That judge adopted the State's wholly unreliable proposed Findings virtually verbatim. But Findings are not supposed to be instruments to hoodwink the Court of Criminal Appeals into denying relief by misrepresenting what is actually in the record.

Certainly, the Supreme Court of the United States has criticized the practice of courts adopting a party's proposed Findings wholesale as raising due process concerns. *See Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985); *see also*

Jefferson v. Upton, 560 U.S. 284, 294 (2010). Those due process concerns are exponentially elevated when the Findings are demonstrably false and misleading.

Moreover, while state law gives habeas courts discretion over the **methods** for developing and receiving evidence to resolve contested factual claims, *see, e.g.*, TEX. CODE CRIM. PROC. art. 11.071, § 9(a), state law and due process demand fact-finding procedures that are adequate for reaching "reasonably correct results." *Ex parte Davila*, 530 S.W.2d 543, 545 (Tex. Crim. App. 1975) (citing *Townsend v. Sain*, 372 U.S. 293, 316 (1963)). Deferring to one party's proposed Findings, which bear no resemblance to the record that was created, cannot be deemed a fact-finding procedure "adequate for reaching reasonably correct results." *Davila*, 530 S.W.2d at 545.

Throughout Roberson's quest for habeas relief, State's counsel has been unwilling to even acknowledge the new evidence, instead clinging to the trial narrative and non-evidence in the DA's file that was so unreliable it was not even put before the jury in 2003. EX55 (B. Wharton's response to misinformation). Since 2016, State's counsel has relied almost exclusively on the opinion of medical examiner Jill Urban, who performed the autopsy on Nikki on February 2, 2002, and reached conclusions regarding cause and manner of death that same day.[38] In the -

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[38] As noted above, the State did not produce Dr. Squires but instead retained Dr. Downs, a member of the "Shaken Baby Alliance," an SBS/AHT advocacy group.

03 proceeding, Dr. Urban declined to revisit her trial opinions even though she claimed, contrary to the trial transcript, that she had not attributed Nikki's condition to "shaking." *See, e.g.*, 43RR78-79, 43RR80-82.

Recognizing that scientific understanding has changed should not hinge on the whims of one medical examiner. It is the epitome of arbitrariness when individual medical examiners in some, but not all, jurisdictions can admit that their opinions in SBS/AHT cases have not withstood the test of time and when many, but not all, courts can do the hard work of reviewing new evidence and acknowledging significant changes in the scientific understanding of SBS/AHT.[39]

Roberson filed detailed habeas applications with voluminous new scientific evidence to show his ability to prove his right to relief under Article 11.073 **and** his

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10EHRR112-15. Judge Evans' Findings extensively invoke Dr. Downs, whose patently outlandish testimony cannot withstand scrutiny. *See* **Appendix B** at 195-212.

[39] *See, e.g.*, *State v. Hunter*, No. B 0600596 (Ohio Com. Pl. May 10, 2023) (granting habeas relief after medical examiner, who had relied on SBS/AHT hypothesis at trial, recognized new evidence that child's injuries were consistent with a short fall and that the anal and rectal wounds, previously used to support a sexual assault conviction, had been medically inflicted by hospital staff); *People v. Liebich*, No. 2-13-0894, 2016 WL 1222198 (Ill. App. Ct. Mar. 28, 2016) (2002 SBS conviction vacated where medical examiner admitted that medical records revealed a condition that could have started two-year-old's decline days before child's collapse); *Johnson v. Felker*, No. CV-07-357-RHW, 2010 WL 1904858 (E.D. Cal. May 10, 2010) (2002 SBS conviction vacated after medical examiner acknowledged that, in light of new scientific evidence, child's head injuries could have been caused by accidental fall).

actual innocence. He has proffered overwhelming medical evidence that his daughter died from natural and accidental causes, not from SBS/AHT. Yet the Court simply rejected these applications without any meaningful review of the evidence, thereby implicating the federal constitutional right to due process. *See, e.g.*, *Florida v. Powell*, 559 U.S. 50, 56 (2010). ("[I]t is . . . important that ambiguous or obscure adjudications by the state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of the state action."); *Stutson*, 516 U.S. at 196 (holding that a state court's vague ruling can threaten a criminal defendant's "liberty and due process interests").

The merits of Roberson's "changed science," innocence, and false testimony claims have never received fair consideration despite a law expressly enacted to solve the kind of problem his case epitomizes. The House Committee has now made it clear that it feels the state-created liberty interest established by Article 11.073 has not been honored here. EX7; EX18. This unreasonable deprivation of a state-created liberty interest has violated Roberson's federal right to due process.

MATERIALITY

The trial record shows that the case was tried as a Shaken Baby case from beginning to end. Those who have studied the record, such as the bipartisan members of the House Committee, have easily seen that. Likewise, those who have studied the post-conviction record recognize that overwhelming evidence has been amassed

since 2016 that completely dismantles the notion that Roberson was guilty of any crime.

I. <u>This Court Has Been Misled about the Record.</u>

The only discussion of Roberson's case that has issued from any member of this Court since his Article 11.073 litigation began in 2016 is a concurrence dated October 10, 2024, by Judge Yeary, a dissenter in *Ex parte Roark*. *See Ex Parte Robert Leslie Roberson*, WR-63,081-03, 04 at 2-3 (Oct. 10, 2024) (Yeary J. concurring).

The concurrence was filed in support of the Court's rejections, without written decisions, of all of Roberson's pending filings as of that date. Judge Yeary's concurrence issued the day after this Court's landmark decision in *Ex parte Roark*. Judge Yeary's concurrence reveals profound misconceptions about the Roberson record that may explain why the Court has repeatedly denied him relief.

A. Unreliable Messenger about the Contents of the Record

New evidence shows why members of this Court may have misconceptions about the record. During a public hearing before the House Committee on October 16, 2024—the day before Roberson was scheduled to be executed—State's counsel in this cause, Anderson County District Attorney Allyson Mitchell (DA Mitchell), testified. During her testimony, she showed a striking lack of familiarity with the underlying record. EX4.

DA Mitchell presides over the office that drafted proposed Findings that were slightly modified and then signed by the habeas judge in 2022, recommending that habeas relief be denied. The Court of Criminal Appeals then adopted those Findings as its own in 2023. *See* **Appendix C**; **Appendix D**; *Ex parte Roberson*, 2023 WL 151908 (Jan. 11, 2023). DA Mitchell's office also authored subsequent filings in both courts urging Roberson's execution.

Despite DA Mitchell's key role, her testimony in the October 16th hearing revealed little knowledge of the State's trial case or the evidence adduced during the 11.073 evidentiary hearing and thereafter. EX4 at 96-122.[40] Repeatedly, DA Mitchell responded to both general and specific questions about the trial and 11.073 proceeding by demurring, saying she could not answer or simply did not know. *See id.*

For example, she could not answer key questions—such as whether the medical examiner had admitted to never having reviewed Nikki's medical history and never considering the CT scans of Nikki's head. DA Mitchell also did not know whether those scans showed multiple impact sites or not. *Id*.

DA Mitchell exhibited a similar lack of familiarity with the new evidence of Roberson's innocence. She testified that she had not even reviewed the expert report

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[40] A recording is also available at https://house.texas.gov/videos/20862.

of Dr. Francis Green, a lung pathologist who has concluded that Robert's daughter Nikki died of pneumonia, not any inflicted trauma. *Id*. at 104. DA Mitchell also had not read the report of Dr. Keenan Bora, a medical toxicologist who concluded that Nikki had toxic levels of Phenergan/promethazine in her system *Id*. at 107 (saying of Dr. Bora "I don't recognize the name"). Additionally, she suggested, incorrectly, that the FDA black box warnings for Phenergan do not apply to Nikki because she was over two years old when she died, a claim refuted by Dr. Bora's report and the black box warnings themselves. *Id*. at 117-18; EX41.

Moreover, DA Mitchell did not recall reading anywhere that Nikki had a clotting disorder, despite evidence presented in Dr. Green's report (attached to the -04 application) and neuropathologist Dr. Auer's report (introduced into evidence in the -03 proceeding) showing that Nikki's illness had resulted in a blood clotting disorder, which further explains the volume of intracranial blood observed during the autopsy two days after she collapsed—a condition that Dr. Urban had misconstrued as evidence of "multiple impact sites." *Id.* at 111 (responding to question about a possible clotting disorder "I do not remember reading that or seeing that in any of the prior hearings or transcr-- or, uh, original jury trial. I'd have to refer back to see.").

DA Mitchell could not even recall what kind of expertise the State's own post-conviction expert, Dr. Downs, supposedly had. Yet she repeatedly referred lawmakers to him as some purported all-purpose authority. *See, e.g.*:

> Chair Moody: Okay. So was-- so Dr. Downs is the-the-the expert that you relied on to state that Nikki did not have pneumonia?
>
> Ms. Mitchell: That and among other things, yes, sir.
>
> Chair Moody: Okay. And is Dr. Downs a-a lung expert or a lung pathologist?
>
> Ms. Mitchell: He is, let me see here, and I can ask-- answer that question. He has a lot of titles behind his name.

Id. at 104.

Because DA Mitchell did not even know what kind of expertise her own retained expert supposedly had, she plainly did not remember that Dr. Downs had no special training in lung pathology, neuropathology, radiology, medical toxicology, hematology, or neuropsychology—yet, during the -03 evidentiary hearing, he had offered up opinions related to all of these fields in a manner so absurd it is difficult to see how anyone could claim to believe him. Yet both DA Mitchell in her proposed Findings to the habeas judge and then in testifying before the House Committee, claimed that Dr. Downs had all the answers. That is, notwithstanding DA Mitchell's inability to explain to the House Committee what Dr. Downs' field actually is, she repeatedly invoked him as **the** medical authority. *Id.* at 100, 101, 104, 105, 106, 107, 109, 113.

In addition to her admitted ignorance about core issues in this case, DA Mitchell also revealed a fundamental misunderstanding of the underpinnings of *Roark*. When asked directly if she thought the understanding of SBS has changed **in any way** since Roberson's 2003 trial, DA Mitchell answered flatly: "No sir, I believe the concept is still there, I believe there's alternative theories about how children abused in this way can happen. Shaken baby, which is now called abusive head trauma, is widely recognized nationally and internationally as a viable medical diagnosis" *Id*. at 102. That is a fundamental (and dangerous) misreading of *Ex parte Roark*. *See Ex parte Roark*, *supra*, at *46-*48 (identifying "new knowledge in the medical and scientific community" that undermines all core tenets of the SBS/AHT hypothesis).

The Committee's frustration was impossible to miss:

- "We are taking our job very seriously and I would have expected, with all due respect, for you to have answers to our questions…. it is incumbent on us to invite you back and get answers to these questions[.]" EX4 at 113.
- "Just to be clear, you're referencing evidence that no less than 30 times in this hearing, you have said that you-you have no knowledge of at the moment. Is that correct?" *Id.* at 119.

Indeed, DA Mitchell's lack of command of the basic facts led several committee members to invite her to return to testify once she had taken time to review the trial and post-conviction records so that she could meaningfully answer

fundamental questions about the medical evidence; DA Mitchell responded: "I would have to check my schedule." *Id.* at 112-13.

The October 16th hearing also revealed a concerning lack of candor regarding State's counsel's interactions with its key trial witness, Dr. Squires.

As explained above, Dr. Squires was the CAP who made the SBS diagnosis in 2002 that was used to arrest Roberson; and she was the SBS expert who testified at length for the State in his 2003 trial. She is also the same SBS expert who opined about SBS in virtually identical terms in Roark's 2000 trial.

On October 16th, Representative Harrison asked DA Mitchell if she had "spoken to Dr. Squires" since she was the one who had made "the original diagnosis" and testified about SBS. This exchange ensued:

> Ms. Mitchell: I've not spoken directly with her, but someone in my office has.
>
> Representative Harrison: Do you know if that person has spoken with her now and as to whether she believes that … the implications of the shaken baby … syndrome hypothesis have evolved in the … two decades since this was at trial?
>
> Ms. Mitchell: In initial conversations with her in preparation for the Article 11 [sic] hearing, she stood by her original diagnosis, um, that Nikki was shaken, but also I believe, and I'd have to double-check, that she, in fact, also recognized the blunt force injuries that Dr. Urban had found.

Id. at 114.

Two things are problematic about DA Mitchell's statements—new evidence further undermining the credibility of pleadings she has submitted to this Court in this case and thus further evidence of due process violations.

First, this summary is inconsistent with the trial record. It was Dr. Urban who agreed **with Dr. Squires** that Nikki's condition was consistent with the SBS hypothesis. EX39. Their testimony differed with respect to Dr. Urban's (incorrect) view that there was evidence of "multiple impact" sites. Dr. Squires was the only person to testify at trial about the CT scans of Nikki's head, because, as Dr. Urban admitted years later, she never looked at that critical piece of objective medical evidence. Because Dr. Squires had consulted with a radiologist, she acknowledged at trial that the CT scans showed only a single impact site on the head—with no corresponding fracture. Dr. Squires even posited that the bump on the head "happened at a different time" from the shaking she envisioned because "the actual brain injury, we do not feel is explained by a simple impact." 42RR107. For her, the subdural blood, brain swelling, and retinal hemorrhages—the triad associated with SBS—was proof of shaking in part because the CT scans showed only one minor impact site on the head, which had not even caused a hairline fracture.

Second, DA Mitchell's recent testimony to the House Committee about Dr. Squires **directly contradicts** statements her deputy made before the habeas court

during Closing Arguments in the -03 evidentiary hearing. State's counsel, in 2022, denied even being able to find Dr. Squires:

> And I want to actually address something that was brought up that made it seem like someone was playing hide the ball with this Court in the fact that Dr. Squires is not here. We actually told this when we were asked; **we could not locate Dr. Squires**. She had retired and moved to Pennsylvania. We put two investigators on it and could not locate her.

SuppEHRR85 (emphasis added).

Counsel for Andrew Roark has submitted an affidavit (EX13) that makes clear that Dr. Squires could indeed be located—but was exceeding reluctant to talk. She only ended up signing an affidavit recanting part of her *Roark* SBS testimony because of years of efforts and under threat of subpoena. The Dallas County DA's Office committed to getting information from her because she would not even talk to the defense team. EX13. It is not credible that, during the same period when these two cases were in habeas proceedings before trial courts (in Dallas County and Anderson County, respectively) that the Anderson County DA's Office could not do a Google search or contact their counterparts in the Dallas County DA's Office to learn Dr. Squires' whereabouts. *See also* EX54 (describing information used to locate Dr. Squires and additional resources showing the likelihood the State could have easily located her during the -03 proceeding).

The real question is: why would DA Mitchell's deputy have made this misrepresentation of fact before the habeas judge?

Dr. Squires' trial testimony—in which she unequivocally stated this was a Shaken Baby case—suggests that her testimony in 2021 would have undermined the State's attempt to retroactively recharacterize this case as something other than an SBS case, a disingenuous move that Roberson's counsel called out before the habeas court in January 2022:

> Dr. Squires' [SBS] hypothesis was used to obtain the conviction. Over and over again at trial she was presented as the child abuse expert. That was, in fact, her designation. She came from Dallas, and she told the jury about shaken baby syndrome. She told about how this makes the head go back and forth violently. It's the shaking that causes the disruption internally and that the head is being -- the brain's being moved. The vessels are being ruptured. That is why it's shaking even though there's very little sign of trauma on the outside.
>
> And what I wonder is where is Dr. Squires now? The State didn't call her, and I think the State-- and put on the record, the prosecutors who have been representing the State in this proceeding did not try this case, and I sense that they have some discomfort with the concept that this is a shaken baby case because there is absolutely no way to avoid the fact that it is a controversial hypothesis that has since been proven wrong…. Dr. Squires, there's no way you can deny if you read the trial transcript, she thought this was a shaken baby case. That's what she testified. That's what she convinced the jury. That enough should be proof the science has changed, that they don't want Squires here.

SuppEHRR20-21.

A problem for the State since 2016 is that, Dr. Urban, in defending the conclusions in her 2002 autopsy report, was no longer willing to own her 2003 trial testimony about shaking. Indeed, she recanted her 2003 shaking testimony without acknowledging the obvious: she had told Roberson's jury that she could not

distinguish between "injuries" caused by "shaking" or "blows." 43RR85-86. Thus, if Dr. Squires stood by her SBS testimony (since rejected in *Ex parte Roark*), that meant an obvious inconsistency between the State's two causation experts at trial.

The State tried to paper over this glaring problem with Dr. Downs, whose role was to agree with Dr. Urban's "multiple impacts" claim while dismissing everything Roberson's six experts had found by claiming to be some kind of all-purpose expert. After repeatedly telling the habeas court that he did not find this to be a "shaking case," Dr. Downs then turned on a dime and opined that he believed Nikki's injuries were caused by shaking after all: "I think a shaking-type motion did occur here because I have multiple impacts, and that argues a back-and-forth motion in order to get repeated impacts." 10EHRR148.

Also, once Dr. Downs was shown Dr. Squires' trial testimony stating that the presence of subdural blood is "indicative of shaking," he deferred to her entirely, stating that Dr. Squires "sees more of these cases or saw more of these cases than I do." 10EHRR153-54. In other words, Dr. Downs ultimately deferred to Dr. Squires as having superior expertise when she opined in 2003 that "the retinal hemorrhages are just further -- it's one more thing that really lets you know that those eyes were being shaken and that the blood vessels broke." 10EHRR154. But Dr. Squires' trial opinions represent SBS beliefs that have all since been falsified by science, including

the concept that shaking can cause blood vessels in the dura and the eyes to break and cause subdural and retinal hemorrhage.

But critically, the argument that Nikki died from **any** abuse—inflicted via shaking or otherwise—has been dismantled by testimony and sworn reports from multiple highly qualified experts and by Dr. Urban's own admissions showing that her 2002 conclusions were (1) contrary to objective evidence of which she was then unaware and (2) rested on the since-discredited SBS tenets.

B. Misconceptions about the Record Reflected in Judge Yeary's Concurrence

1. Misconception that Roark's case is materially different from Roberson's

Judge Yeary's concurrence was issued the day after *Ex parte Roark*, in which he dissented. The concurrence states: "This is not just a shaken baby case," thereby partially conceding some connection between the core issue in the Roark and Roberson cases. But in truth, there are no material differences between the two cases.

In *Ex parte Roark*, the Court recognized that the case against Roark was an entirely "circumstantial case." The theory that a crime had occurred depended on medical testimony. Moreover, a core component of that medical testimony came from Dr. Squires. And the Court has now held that her testimony was unreliable, that the SBS hypothesis put before the jury is unscientific, and that Roark would not

likely be convicted today if his jury heard testimony reflecting the change in scientific understanding.

The Court further recognized that a decision was made (years after the Roark and Roberson trials) to change the name from SBS to "Abusive Head Trauma" **because** science had invalidated all of the core SBS premises. As the Court put it: "Essentially, science has evolved to a degree that has removed 'Shaken' from 'Shaken Baby Syndrome.' This is evident from the need to vague the terms to 'Impact Syndrome' and then to 'Abusive Head Trauma.'" *Ex parte Roark*, *supra*, at *23.

But the similarities between the Roark and Roberson cases go beyond the State's reliance, at trial, on Dr. Squires and the SBS cause-of-injury hypothesis.

Both Roark and Roberson reported that a child in their care had sustained a short fall and had recently been ill. In both cases, the caregiver could not otherwise explain the child's condition when they sought help from medical professionals.

In both the Roark and Roberson cases, hospital staff viewed the caregiver with suspicion because of perceived inconsistencies between his explanations and medical imaging that showed the child had a serious internal head condition (a triad of subdural bleeding, brain swelling, and retinal hemorrhages), which was presumed to have been caused by inflicted head trauma in the form of violent shaking and

perhaps blunt impact. The medical community then believed that short falls or illness could not explain those conditions, a belief now known to be false.

2. Misconception that evidence supports a conclusion that Nikki was beaten

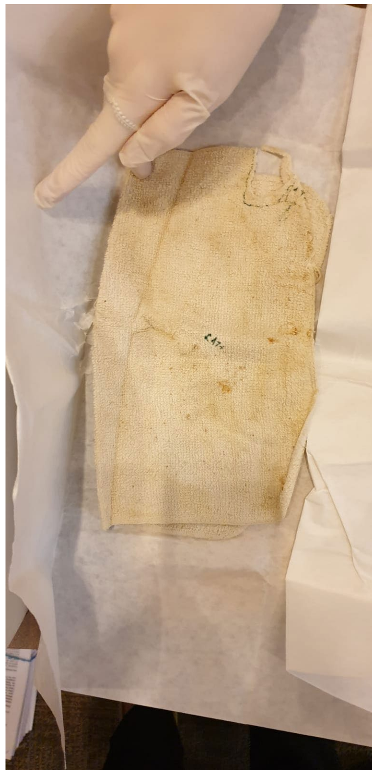
Judge Yeary's concurrence refers to "multiple traumas." But there was no significant trauma to Nikki's head or body. As demonstrated with uncontroverted and overwhelming evidence in the -03 proceeding, Nikki had only one minor impact site on her head—a "goose egg" captured in the CT scans that were locked up in the courthouse basement for 15 years, inaccessible to Roberson. The scans show that the single bump on the back of Nikki's head is associated with a small subdural bleed, but no fracture or external bleeding. Dr. Ophoven, a forensic pathologist with decades of experience with pediatric autopsies, demonstrated that the autopsy photographs themselves show that much of Nikki's condition, as observed during the autopsy, was caused by what happened while she was being treated in the hospital during the two days **after** she was brought to the hospital and **before** the autopsy:

> you can see discoloration of the skin of her scalp that reflects the blood that has moved there from her ongoing bleeding. **This isn't a bruise**. This is discoloration from the bleeding that's underneath there. There's **no impact sites**. . . . There are three -- four incisions in her skin there [made by Dr. Urban], all of which are going to produce bleeding, and one of them -- the one that -- where the tube [from the pressure monitor] is going into the skin is actually where the tube enters the skull.
>
> So they [hospital staff] had to drill into the bone of the skull, which is going to keep bleeding, and the skin is going to keep bleeding from her

> problems with clotting. So seeing blood all underneath the scalp skin there, that was done by the doctors. **That's not injury**.

3EHRR73-74.

Judge Yeary's concurrence makes a comment about "blood on Nikki's mouth." But no one at the hospital observed any blood on Nikki's mouth—or anywhere else. The only blood were small specks on a washcloth that Robert gave to the lead detective to show what he had wiped off Nikki's mouth a few hours before waking up to find Nikki unconscious:



Detective Wharton acknowledged that they would not have noticed this small amount of blood if Roberson had not made them aware of it; they looked for blood and any other sign of violence at the house and found known. And at the hospital,

Nikki did not look like a battered child. That is why they accepted the Shaken Baby hypothesis to explain the complete mismatch between Nikki's exterior and her internal head condition of subdural bleeding, brain swelling, and retinal hemorrhages, then known as the Shaken Baby "triad." EX30.

Judge Yeary's concurrence states that the evidence is consistent with a theory that Nikki was beaten. That is incorrect. First, the "shaking" theory played a dominant role at trial precisely because there was no sign of any significant external injury. A conviction would have been impossible without SBS. But the post-conviction evidence also exposed the baseless nature of the references to imagined "blows." If there had been any battery, it would have been evident on Nikki's exterior. But there was a complete absence of any significant bruises, cuts, bleeding, broken bones, not even a hairline fracture when she was admitted to the hospital. One cannot inflict "blows" to a child's head sufficient to cause internal bleeding and leave no marks on her exterior. That is why medical personnel were confused when she was brought to the hospital unconscious and blue. It was her father's inability to explain her condition, his perceived "odd" behavior (because he has Autism), and the fact that Nikki had signs of brain death (eyes fixed and dilated) that staff **presumed** foul play.

Because it was a Code Blue situation the morning of January 31, 2002, when Nikki was brought to the hospital, no one took medically appropriate pictures of

Nikki at that time. At some unidentified point, a local nurse, who was not SANE-certified, took it upon herself to do a sexual assault exam on the comatose child and took some amateur photos. Those photos show, for instance, multiple pairs of hands—**not wearing gloves**—tugging at Nikki's bare buttocks looking for something. Those poor-quality photos were introduced into evidence at trial during the nurse's testimony, which was largely untethered to reality. It consisted of her free associations about "anal tears" that no one else had seen, sexual abuse allegations for which there was no evidence, and her outrageous views about the proclivities of pedophiles.[41] Her testimony, completely contrary to SANE training, was thoroughly debunked in the -03 habeas proceeding. 6EHRR60-137.

But even this nurse's unprofessional and poor-quality photos **do not show a battered child**. The lack of evidence of any battery is why one of the prosecutors asked Dr. Urban at trial to explain why they could not see on the outside corresponding injuries to match what Dr. Urban found **under** Nikki's scalp inside her head:

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[41] Notably, this nurse was unwilling to defend her trial testimony, claiming when undersigned counsel endeavored to subpoena her in 2018 that she had "no memory" of Roberson or testifying in his death-penalty trial. Her highly prejudicial testimony is another thing State's counsel has tried to run from, pretending that it is irrelevant because the State dropped the sexual assault charge that it argued throughout trial. No fair-minded person could suggest that the nurse's false sexual abuse opinions were anything but unfairly prejudicial in the extreme, as the House Committee has recognized. EX7.

> [Prosecutor]. [L]et's talk about-- There **really is a large discrepanc**y, at least in my mind, **between what you see on the outside and what you see on the inside**. You described a lot of different impact sites, multiple blows to Nikki's head. **And you really don't see that when you look at the pictures of her face.** Can you explain to us why that is?
>
> [Dr. Urban]. Well, again, I think that's because just of the way children are built. You know, like I said, they've got a lot [sic] fat. There's a lot of fat between, say, the skin and actual bones of the skull and that can absorb a lot of energy that's inflicted on the skin. The same thing, the skin is also very elastic. It's almost more stretchable in little children and that's another reason why you can actually get a great deal of injury to the head and not see anything on the outside because all that force is transmitted inwards without actually disrupting the skin.

43RR89 (emphasis added). But children are not, in fact, more resistant to bruising or abrasions; that is an unscientific suggestion.

Judge Yeary's concurrence emphasizes the fact that Dr. Urban identified the cause of death as "blunt force injuries"; but that is precisely the characterization made in virtually all Shaken Baby cases involving a death. At trial, she defined the **mechanism** of injury with nearly 30 references to violent shaking and the forces reputedly generated by shaking. EX39. Indeed, the jury that decided Roberson's fate heard a constant drumbeat—during voir dire, opening statements, testimony from treating physicians and a child abuse expert, and closing argument—that only violent shaking combined with inflicted impact could explain Nikki's death. But the post-conviction evidence established that there was **no** evidence of significant trauma to her head at all. This evidence includes the opinions of a board certified

neuropathologist, Diplomate in the National Board of Medical Examiners of the United States who is an expert in head trauma and a Ph.D. scientist. EX29.

At trial, Dr. Urban pointed to bruises on top of Nikki's head and told the jury this was an "impact site" and proof of "blows." But that precise spot was **where a pressure monitor had been surgically screwed into Nikki's skull during her hospitalization**. Those bruises did not exist when Nikki was brought in by her father.

Dr. Urban's own autopsy photos show a surgical pin on the top of Nikki's head where the pressure monitor was removed before she was transferred to SWIFS for the autopsy. But that information was not shared with the jury. The jury was given the false impression that Nikki's condition at the time of the autopsy was the same as her condition upon arrival in the Palestine ER. But that was "highly misleading," as noted by Dr. Janice Ophoven, an expert with decades of experience with pediatric autopsies. APPX2 at 16; *see also* EX2. But back in 2002, precisely because of the then-accepted tenets of SBS, Dr. Urban saw subdural blood under Nikki's scalp, saw Dr. Squires' Shaken Baby diagnosis, and presumed an inflicted head injury. She did not look at the medical records so did not identify Nikki's DIC or see that she had been resuscitated after already experiencing brain death.

Judge Yeary's concurrence also makes a statement about a trial "defense expert" who reputedly obtained a "confession" from Roberson that he may have "lost it" and "shook" Nikki without remembering. This psychologist, who testified

only in the punishment-phase, **started** with the premise that this was a Shaken Baby case and that Roberson was guilty. She then boasted on the stand that she had bullied Robert, who has Autism, until she got an answer she would accept.[42] Indeed, Robert's trial lawyer overrode his client's consistent reports that he had not done anything to hurt Nikki and did not understand what had happened to her (which is why he rejected multiple plea deals). EX50. From jury selection onward, defense counsel proclaimed that this was a "classic Shaken Baby" case and provided no alternative explanation for Nikki's death. *See, e.g.,* 46RR15.

The larger point is: science does not support the belief that shaking causes the kind of internal head conditions that Nikki and the child in Roark had; but science **has** shown that accidental short falls with head impact and a host of naturally occurring illnesses can cause the triad. That is why, today, an AHT diagnosis **requires** a differential diagnosis. This is a complete paradigm shift since Roberson's 2003 trial.

Most importantly, Judge Yeary's concurrence suggests a misapprehension that the State's abuse trial narrative was somehow left untouched after the -03 evidentiary hearing. The record completely belies that assumption. The new science and new

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[42] This psychologist's testimony were exposed as so fraught with ethical problems that the State did not refer to her at all in its proposed Findings. *Compare* **Appendix B** at 236-244 *with* **Appendix C**.

causation evidence adduced shows that Nikki died because she stopped breathing due to her undiagnosed pneumonia and respiratory-suppressing medications. Oxygen-deprivation and clotting disorders, both of which Nikki had, are now known to produce a cascade of intracranial conditions (subdural bleeding, brain swelling, retinal hemorrhages) that "mimic" the symptoms associated with accidental and inflicted head trauma. The intracranial conditions noted during her final hospitalizations do not prove that Nikki sustained an inflicted head injury. Instead, Nikki's lungs show that she had a severe pneumonia. And, as noted above, her body was not battered. Aside from the minor goose egg, the only trauma to her head was from the treatment she received while hospitalized and steps performed during the autopsy itself—verified by medical records, photos, and expert testimony.

II. <u>There Was and Is No Credible Evidence That Robert Was a Person Capable of Hurting Anyone.</u>

The new evidence that forms the basis for the new legal claims is material and supports granting relief on each claim. In fact, no credible evidence supports the contention that Robert did anything to harm his daughter whom he went to great lengths to care for despite being a disabled person with few resources. EX50; EX14; EX15.

At trial, aside from the SBS cause-of-death theory, the State tried to paint Robert as a monster capable of violently shaking his child. Primarily, the State relied on the baseless sexual abuse speculation from the uncertified "SANE," an extreme

travesty of justice. The State also tried to manufacture support for a narrative that Robert did not care about Nikki and had previously mistreated her. There was no evidence at all to support that fiction—until **after** Nikki's death when his very impaired girlfriend of a few months was pressured by law enforcement, CPS, and the DA's Office to describe how Robert had previously "shaken" Nikki.

A. The Testimony of the Very Impaired Teddie Cox Was Not Credible.

One must pause and wonder: if this was not really a Shaken Baby case and there was evidence of a battery, why was Robert's intellectually disabled girlfriend, Teddie Cox, pressured relentlessly to "admit" that she had previously seen him "shake" Nikki and lie that Nikki would "shake" whenever she saw him? But see:

DX7 (Nikki sleeping in her father Robert's arm).

The only other evidence the State was able to adduce to suggest that Robert had ever hurt **anyone** was punishment-phase evidence from his estranged ex-wife

Della Lucretia Gray—who had left Texas and completely abandoned their two special needs children years before Nikki was born.[43] The testimony of these women was unsupported by any contemporaneous evidence, reflected pronounced bias, and suffered from severe credibility problems.

Teddie's sister, Patricia Conklin, has now come forward and confirmed, in a sworn statement, that she **and** Teddie were pressured by CPS with the threat of having their children taken from them if they did not "get on board" with accusing Robert. EX14. Patricia, unlike Teddie, has a profession (LVN) and lives a stable life. As Patricia puts it, she is "a stronger person than [her] sister and had a better understanding of her rights…. But Teddie is different. She has never been a strong person." *Id.* ¶13. To this day, Teddie "struggle[s] with mental problems and has never really been stable." *Id.* ¶20.

It is difficult to imagine someone more vulnerable to pressure from state actors

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[43] Ms. Gray's testimony, on its face, was infused with bias and patent credibility problems. She, who had not seen Robert or their children since their divorce was final in 1991, was brought in from out of state by the prosecution. She admitted on the stand to a history of drug use, drinking, and having lost custody of their special needs children—and never, in the intervening years, even seeking to visit them. She also admitted that she only came back to Texas in 2003 to make Robert "pay" by testifying against him. 47RR28-32. The farfetched abuse allegations she described during Robert's trial were never before reported—either when they supposedly occurred or during the divorce proceedings conducted years before Nikki's birth when Ms. Gray would have been highly motivated to adduce evidence that Robert was a bad father. Instead, **she** gave up custody of their kids. *Id.*; *see also* EX53; EX50.

than Teddie: an intellectually impaired, impoverished woman who was recovering from a hysterectomy at the time of Nikki's death. Soon before trial, she overdosed on drugs, attempted suicide, and was confined to a psychiatric hospitalization. At the time of trial, she was too unstable to care for her daughter Rachel, who had been taken in by a grandmother. And these are all facts Teddie **admitted** during Robert's trial.

Teddie also admitted that Robert had never hurt her in any way. But she was repeatedly pressed to describe how she had seen him shake Nikki. 42RR175-77, 185-86, 190-91. Her response to leading questions on this topic were inconsistent with statements she had previously made and, ultimately, she admitted on the stand that she would change her story about Robert depending on "how [she] feel[s]" at the moment. 43RR11, 36, 48. Teddie's sister, Patricia, testified at trial that her sister had pronounced problems with truthfulness. 44RR10-22. Patricia also attested that she had only observed Robert being loving and caring with Nikki and had never seen him be unkind to her. *Id.*

Patricia has now provided a much fuller view of the circumstances Teddie and her daughter Rachel were experiencing both before and after Nikki's tragic death.

Teddie gave birth to her daughter Rachel when Teddie was just seventeen. The father was a man named Edward Cox. Patricia had "a bad gut feeling" about Cox from the outset and shared her concerns with Teddie "numerous times." EX14 ¶8.

But Teddie got with him anyway. Teddie finally decided to leave him only after it became clear that he had been sexually abusing Rachel.[44] *Id.* Around this same time, Robert had return to Palestine and was trying to get custody of Nikki. When he learned what had happened to Patricia's niece Rachel, Robert is the one who helped Teddie and Rachel get away from Cox. *Id.* ¶9. Robert had gotten a job delivering newspapers, and Patricia's mother helped him get a small rental house, where Teddie and Rachel moved in with him. Nikki started coming over for visits at the house during the few months before he was awarded custody. *Id.* ¶10.

Around this same time, Teddie found out she was going to need a hysterectomy and was very upset because, of course, it meant she would not be able to have any more children. Patricia recalls Robert being very patient with Teddie and supporting her and Rachel, who was having trouble managing her anger. *Id.* ¶7. In fact, as Patricia noted during Robert's trial, Rachel was the only person she ever saw hurt Nikki, certainly not Robert. 44RR15; EX14 ¶11.

Patricia also reports that Teddie had been diagnosed with schizophrenia and would not always take her prescription medication. *Id.* ¶14. After Nikki died, Teddie was, quite understandably, "very, very upset[.]" *Id.* She and Robert both loved Nikki.

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[44] These facts are confirmed by public records showing that Cox was charged with sexually assaulting Rachel in Nacogdoches County where he was then living with Teddie and Rachel. His first trial ended in a mistrial. Following a second trial, he was convicted and reminds in TDCJ custody to this day.

But Teddie was “very confused and did not know what to believe.” *Id.* ¶15. They were “all being told by law enforcement and CPS that Robert had caused Nikki’s death.” *Id*. Meanwhile, Teddie did not have a job. Robert had been supporting her and Rachel with his paper routes. *Id.* ¶14. Additionally, Teddie’s husband (Cox) was in jail awaiting trial. Teddie, Rachel, and Patricia all ended up testifying in Cox’s second trial (after the first one ended in a mistrial)—soon after all had had to testify in Robert’s trial. *Id.* ¶¶17-18.

Because Patricia herself was a witness, she did not observe Teddie’s testimony. But she later learned that Teddie had told Robert’s jury that Nikki was so afraid of him she would not come near him. Patricia is very clear: that was completely false. She saw Robert with Nikki “many times.” *Id.* ¶19. What she saw was “Robert being loving and caring with Nikki and with [her] own children.” *Id.* In Patricia’s experience, he “does not have a mean bone in his body. He is a little slow. But [she] never saw him be mean to anyone, verbally or physically, during all the years [she] knew him.” *Id*. With Nikki, Patricia observed “a loving father,” “attentive,” “never dismissive, or short with her,” “never hurtful.” *Id.* ¶6. She “never even saw him spank her.” *Id.*

Patricia saw Robert as a decidedly positive force in her family, “night and day from Ed Cox.” *Id.* ¶9. She remembers how her own daughters “enjoyed going along” with Robert during his evening paper routes; they “would argue over who would get

to sit with him in the front seat." *Id.* She had "no fear at all about [her] daughters spending time with Robert." *Id.*

Teddie had no personal knowledge of what happened the last week of Nikki's life because she herself was in the hospital while Robert was taking Nikki to various doctors trying to get help for her. Teddie's facially unbelievable trial testimony about him and Nikki certainly does not diminish the materiality of the vast new evidence establishing that Nikki died of a severe pneumonia and inappropriate prescription medications that led a short fall out of bed, sepsis, and DIC—and, ultimately, respiratory and cardiac arrest. *See, e.g.*, *Ex parte Mayhugh,*, 512 S.W.3d 285 (Tex. Crim. App. 2016) (granting habeas relief on Actual Innocence upon recognizing that children's allegations of abuse were ultimately not credible and had been induced by pressure from adults); *Ex parte Kelley*, 2019 WL 5788034 (Nov. 6, 2019) (granting habeas relief on Actual Innocence claim in case where law enforcement had exerted pressure that elicited an outcry from a second child to increase perceived credibility of a different child's outcry regarding otherwise unsubstantiated sexual abuse).

The new credible evidence establishes there was no crime at all; the farfetched efforts at trial to paint Robert as a person capable of violence (that had not occurred) were a chimera.

B. Those Who Actually Know Robert Have Consistently Describe a Kind, Gentle Man.

Unlike her sister Teddie, Patricia has known Robert since he was a teenager. EX14 ¶3. Robert's younger brother Thomas has known Robert his entire life. Thomas was living with their parents in Palestine when Robert moved back home and worked to earn custody of Nikki. Thomas remembers how Robert "decided to step up," "vowed to turn his life around and learn to be a good father." EX15 ¶3. Thomas saw Robert struggle to find work but "got a job delivering newspapers so he could support himself and Nikki." *Id*. Thomas remembers going with his mother and with Robert to pick up Nikki from the Bowmans for visits; then the Robersons threw a big party when she turned two: "Everyone thought she was so sweet and cute. Then the next month, the Bowmans agreed that Robert should have custody of Nikki. We were all so happy for him." *Id.* ¶¶4-5.

When Nikki died and Robert was accused, "it destroyed [their] whole family. No one who knew Robert well believed he was capable of harming any child." *Id.* ¶1. To this day, Thomas is "convinced that [Robert] could not have done what he was accused of doing." *Id.* While Thomas is certainly not an authority on SBS or Nikki's medical history, he knows Robert: "He was always my supporter when we were growing up. He was someone who stood up for kids who were being picked on by others. I never saw him hurt or say a mean word to any child—and that includes the two disabled kids he had before Nikki who our family raised without any

involvement from their mother." *Id.* ¶2.

Although Thomas describes Nikki getting sick, Robert being accused, and the whole family being destroyed as "one long nightmare," he attests that, to this day, "Robert has fought to bring the family back together and to pray for all of us. He has been a model of forgiveness. I find it hard to see how he has been able to do that with how hard his life has been." *Id.* ¶2, ¶6.

The perception of Robert's character that both Patricia Conklin and Thomas Roberson have is based on a lifetime of experience with him. But their perceptions are entirely consistent with those of other friends and spiritual advisers. To a one, they attest to Robert's faithful, peaceful, and loving nature. EX25.

But the patent injustice of this case has also inspired a host of entities and individuals who have never met Robert to speak out and write in support of a new trial for him. This support includes written entreaties from:

- 34 eminent scientists and doctors from around the world;
- 8 organizations that advocate for people with Autism and their families;
- 8 groups that advocate for parental rights;
- Witness to Innocence, a non-profit organization led by exonerees from death row;
- 70 attorneys who have represented people wrongfully accused of child abuse;
- nearly 100 family members of those wrongfully accused in SBS cases; and

- 86 members of the Texas House of Representatives and 12 members of the Texas Senate.

EX17-EX24.

A letter was also submitted to TBPP by Brian Wharton, the former lead detective on the Palestine police force who investigated Nikki's death as a homicide, arranged for Robert's arrest, and then testified extensively for the State during Robert's 2003 trial. Wharton now firmly believes that he and his team conducted an inadequate investigation and got it wrong. He believes that unvalidated "science" was used as a substitute for a robust investigation into the many other non-criminal explanations for Nikki's death. He has become a strong advocate for Robert's innocence. *See* EX16; *see also* EX30; EX32; EX4 at 4-24.

If the lead detective, the person trained to conduct criminal investigations, believes there was no crime, surely the Court should consider that material evidence, along with the overwhelming medical evidence that Nikki's death was the result of accidental and natural causes, and grant habeas relief at long last.

CONCLUSION & PRAYER

For the foregoing reasons, Robert Roberson respectfully suggests that the Court RECONSIDER on its own initiative its decision to deny relief in the -03 proceeding and find that he is Actually Innocence or GRANT habeas relief in the form of a new trial. *See* TEX. R. APP. P. 79.2(d) (authorizing the Court to reconsider the denial of an 11.071 habeas corpus application "on its own initiative."). This Court

has previously recognized the advisability of reconsidering the denial of habeas relief because of intervening changes in the underlying facts or governing law. *See, e.g.*, *Ex parte Fierro*, WR-17,425-03 & WR-17,425-06, 2019 WL 6896993 (Tex. Crim. App. Dec. 18, 2019) (unpub.) (reopening -03 writ on Court's own initiative and granting habeas relief); *see also Ex parte Moreno*, 245 S.W.3d 419, 422 (Tex. Crim. App. 2008).

Alternatively, Robert Roberson prays that the Court AUTHORIZE the new claims in this habeas application under Article 11.071 section 5 and Article 11.073 and REMAND for further proceedings in the trial court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Tex. R. App. P. 9.4(i)(2)(A). According to the word-count function of the computer program used to prepare this document, the brief contains 36,702 words, excluding the items that need not be counted per Tex. R. App. P. 9.4(i)(1).

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Undersigned counsel represents that the foregoing was served on counsel of record for the State in this cause via the Texas efile system and on Mr. Roberson's additional pro bono counsel by email as follows:

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