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

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CASES

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Estelle v. McGuire,
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Ex parte Brown,
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Ex parte Carty,
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Ex parte Chaney,
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Ex parte Chavez,
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Ex parte Elizondo,

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Ex parte Garland Leon Martin Aka Butch Martin,

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Ex parte Henderson,

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Ex parte Kelley,

2019 WL 5788034 (Tex. Crim. App. Nov. 6, 2019).....81

Ex parte Lave,

2013 WL1449749 (Tex. Crim. App. April 10, 2013) 19

Ex parte Mayhugh,

512 S.W.3d 285 (Tex. Crim. App. 2016).....81, 103

Ex parte Miles,

359 SW.3d 647 (Tex. Crim. App. 2012).....19

Ex parte Newton,

2009 WL 2184357 (Tex. Crim. App. July 22, 2009).....19

Ex parte Roark,

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Ex parte Robbins,

360 S.W.3d 446 (Tex. Crim. App. 2011).....107

Ex parte Robbins,

478 S.W.3d 678, 704 (Tex. Crim. App. 2014).....108

Ex parte Robbins,

560 S.W.3d 130, 161 (Tex. Crim. App. 2016).....108

Ex parte Roberson,

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Ex parte Roberson,

2016 WL 3543332 (Tex. Crim. App. June 16, 2016) 56

Ex parte Roberson,

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Ex parte Settle,

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Ex parte Tercero,

2015 WL 5157211 (Tex. Crim. App. Aug. 25, 2015) 19

Ex parte Weinstein,

421 S.W.3d 656, 665 (Tex. Crim. App. 2014).....84, 103

Ex parte Wyatt,

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Ford v. Wainright,
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Gimenez v. Ochoa,
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Graham v. Florida,
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Han Tak Lee v. Glunt,
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Herrera v. Collins,
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House v. Bell,
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Jones v. Barnes,
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Martinez v. Ryan,
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Nixon v. Florida,
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Roberson v. State,
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Rochin v. California,
342 U.S. 165 (1952).....136

Sissoko v. State,
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Spencer v. Texas,
385 U. S. 554 (1967).....119

State ex rel. Holmes v. Court of Appeals,
885 S.W.2d 389 (Tex. Crim. App. 1994) 135

State of New Jersey v. Darryl Nieves,
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State of Ohio v. Alan Butts,
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State v. Morrison,
470 Md. 86 (2020) 110

Townsend v. Burke,
334 U.S. 736 (1948).....84

Turner v. State,
570 S.W.3d 250 (Tex. Crim. App. 2018) 130

United States v. Berry,
624 F.3d 1031 (9th Cir. 2010) 119

United States v. Read,
918 F.3d 712 (9th Cir. 2019) 132

STATUTES

Texas Code of Criminal Procedure Article 11.071 ..... 13, 17

Texas Code of Criminal Procedure Article 11.073 ..... 55, 108

Texas Family Code Section 261.3017 13

OTHER AUTHORITIES

AAP, *Shaken Baby Syndrome: Rotational Cranial Injuries—Technical Report*, Comm. on Child Abuse and Neglect, 108 Pediatrics (July 2001) 6

A.N. Guthkelch, *Problems of Infant Retino-Dural Hemorrhage with Minimal External Injury*, 12 HOUS. J. HEALTH L. & POLICY (2012) 37

Arabinda Kumar Choudhary, et al., *Consensus statement on abusive head trauma in infants and young children*, 48 Pediatric Radiology, 1048 (May 23, 2018) (2018 AAP Consensus Statement) 38

C. Brook, *Evidence for significant misdiagnosis of abusive head trauma in pediBIRN data*, For. Sci. Int'l: Synergy (2023) 45

C. Brook, *Retino-dural hemorrhages in infants are markers of degree of intracranial pathology, not of violent shaking*, Ann. Child Neur. Soc. 00(00)(2024) 45

C. Brook, *Retino-dural hemorrhages in infants are markers of degree of intracranial pathology, not of violent shaking*, Ann. Child Neur. Soc. 00(00) (2024) 34

C. Brooks, et al., *26 cm fall caught on video causing subdural hemorrhages and extensive retinal hemorrhages in an 8-month-old infant,* Clinical Case Reports (July 2024). 45

Christine N. Cea, *Autism and the Criminal Defendant*, 88 ST. JOHN'S L. REV. 495 (2014).....96

C.M. Berryessa, *Brief Report: Judicial Attitudes Regarding the Sentencing of Offenders with High Functioning Autism* 48 J. AUTISM AND DEVELOPMENTAL DISORDERS (2016).....97

C.M. Berryessa et al., *Impact of Psychiatric Information on Potential Jurors in Evaluating High-functioning Autism Spectrum Disorder (hfASD)*, 8 JOURNAL OF MENTAL HEALTH RESEARCH AND INTELLECTUAL DISABILITIES (2015).....97

C.M. Berryessa, *Judicial Perceptions of Media Portrayals of Offenders with High Functioning Autistic Spectrum Disorders*, 3 INT'L J. CRIMINOLOGY AND SOCIOLOGY (2014).....97

C.M. Berryessa, *Judiciary Views on Criminal Behaviour and Intention of Offenders with High-functioning Autism*, 5 JOURNAL OF INTELLECTUAL DISABILITIES AND OFFENDING BEHAVIOUR (2014) 97

D. Vaslow, *Chronic Subdural Hemorrhage Predisposes to Development of Cerebral Venous Thrombosis and Associated Retinal Hemorrhages and Subdural Bleeds in Infants*, 35 Neuroradiology Journal (2022) 39

David Moran, et al. *Shaken Baby Syndrome, Abusive Head Trauma, and Actual Innocence: Getting it Right*, HOUS. J. HEALTH L. & POL'Y 12, NO. 2 (2012) 10

Deborah Turkheimer, *Science-Dependent Prosecution and the Problem of Epistemic Contingency: A Study of Shaken Baby Syndrome*, 62 ALA. L. REV. (2011).....38

DL Chadwick et al., *Shaken Baby Syndrome: A Forensic Pediatric Response*, 101 PEDIATRICS (1998) 36

Gina Gomez de la Cuesta, *A Selective Review of Offending Behavior in Individuals with Autism-Spectrum Disorders*, 1 J. LEARNING DISABILITIES & OFFENDING BEHAV. (2010) 93

Göran Elinder et al., *Traumatic Shaking: The Role of the Triad in Medical Investigations of Suspected Traumatic Shaking*, Report No. 255E (Oct. 2016), available in English translation in 2018 32

How Do Doctors Diagnose Autism? WebMD (Nov. 11, 2018) 91

I. Blumenthal, *Shaken Baby Syndrome*, 78 POSTGRADUATE MEDICAL J. (2002) 37

I. Thiblin et al., *Medical Findings and Symptoms in Infants Exposed to Witnessed or Admitted Abusive Shaking: A Nationwide Registry Study*, 15 PLOS ONE (2020) 41

I. Thiblin, et al., *Retinal Hemorrhage in Infants Investigated for Suspected Maltreatment is Strongly Correlated with Intracranial Pathology*, 111 Acta Paediatrica (2022) 39

Irene Scheimberg et al., *Nontraumatic Intradural and Subdural Hemorrhage and Hypoxic Ischemic Encephalopathy in Fetuses, Infants, and Children up to Three Years of Age: Analysis of Two Audits of 636 Cases from Two Referral Centers in the United Kingdom*, 16 Pediatric Development Pathology (2013) 42

J. Andersson, et al., *External Hydrocephalus as a Cause of Infant Subdural Hematoma: Epidemiological and Radiological Investigations of Infants Suspected of being Abused*, 126 Pediatric Neurology (2021) 39

J. Mack, et al., *Anatomy and Development for the meninges: Implications for Subdural Collections and CSF Circulation*, 39 PEDIATRIC RADIOLOGY (2019) 41

J. Tibballs and N. Bhatia, *Medical and Legal Uncertainties and Controversies in "Shaken Baby Syndrome" or Infant "Abusive Head Trauma,"* J. LAW & MED. (May 2024) 34

Jason Tougaw, *Neurodiversity: The Movement*, PSYCH. TODAY (April 18, 2020) . 90

K. Brennan-Marquez, et al., *Judging Demeanor*, 109 MINN. L. REV. (March 2024) 89

K Wester, et al., *Re-evaluation of Medical Findings in Alleged Shaken Baby Syndrome and Abusive Head Trauma in Norwegian Courts Fails to Support Abuse Diagnoses*, 111 Acta Paediatrica (2022) 45

Lincoln Caplan, *The Death Penalty in Texas and a Conflict of Interest*, THE NEW YORKER (Dec. 3, 2015) 55

M. Chris Fabricant, JUNK SCIENCE AND THE AMERICAN CRIMINAL JUSTICE SYSTEM (Akashic Books 2022) 35

M. Hajiaghamemar, et al., *Infant Skull Fracture Risk for Low Height Falls*, 133 International Journal of Legal Medicine (2019) 45

M.L. Howe et al., MEMORY AND MISCARRIAGES OF JUSTICE (Abingdon, UK: Routledge 2018) 81

Mayada Elsabbagh et al., *Global Prevalence of Autism and Other Pervasive Developmental Disorders*, 5(3) AUTISMRES. 160 (2012) 90

Mental Illness vs. Autism and Other Developmental Disorders, ARROW PASSAGE 89

N. Aoki, *Infantile Acute Subdural Hematoma with Retinal Hemorrhage Caused by Minor Occipital Impact Witnessed by an ICU Nurse: a Case Report*, 4 Journal of Pediatric Neurology and Neuroscience (2020) 44

National Institute of Justice, *The Slow but Steady March Towards a More Reliable Forensic Science* (Dec. 7, 2022).....34

Oxford Centre for Evidence-Based Medicine, *Levels of Evidence*, March 2009 ..33

Pamela Colloff, *He Was Sent to Prison for Killing His Baby. What if He Didn't Do It?*, NEW YORK TIMES MAGAZINE (July 21, 2024) 7

Peter Hess, *Apparent New Rise in Autism May not Reflect True Prevalence*, SPECTRUM (Sept. 26, 2019) 89

Perlin, Michael L. and Cucolo, Heather, '*Something's Happening Here/But You Don't Know What It Is': How Jurors (Mis)Construe Autism in the Criminal Trial Process*, 82 UNIV. PITTSBURGH L. REV. 586 (2021).....95

S.M. Zahl, et al., *Examining Perinatal Subdural Haematoma as an Aetiology of Extra-Axial Hygroma and Chronic Subdural Haematoma*, Acta Paediatrica (2019).....39

What is Autism Spectrum Disorder? CTRS FOR DISEASE CONTROL & PREVENTION (March 25, 2020) 90

W. Squier, *Infant Retinal Haemorrhages Correlate with Chronic Subdural Haemorrhage, not Shaking*, 111 Acta Paediatrica (2022).....39

RECORD CITATION KEY

In the Application below, the following abbreviations are used:

"RR" refers to the Reporter's Record of the 2003 trial. The first number is the volume; the second number is the page.

"SX" refers to an exhibit that was offered into evidence at trial by the State.

"DX" refers to an exhibit that was offered into evidence at trial by the defense.

"EHRR" refers to the Reporter's Record of the 2018 & 2021 evidentiary hearing in the -03 writ proceeding. The first number is the volume; the second number is the page.

"APPX" refers to an exhibit that was offered into evidence by the habeas applicant during the -03 evidentiary hearing.

"EX" refers to an exhibit in the Appendix of evidentiary proffers filed with this subsequent habeas application.

INTRODUCTION

In 2003, an Anderson County jury in Palestine, Texas convicted and sentenced to death Robert Leslie Roberson III (Robert) for allegedly murdering his chronically ill, two-year-old daughter, Nikki Curtis, in 2002. In fact, Nikki died from a virulent double pneumonia that had progressed to the point of sepsis.[1] Robert did not harm Nikki in any way. There was no crime—only the tragic natural death of a little girl.

Nikki was seriously ill for a week before she died—coughing, vomiting, suffering from diarrhea, with a high fever (up to 104.5 degrees). When Robert took her to multiple doctors, she was diagnosed with a "respiratory infection," "likely viral" and given prescriptions. Early in the morning on January 31, 2002, Robert found Nikki had fallen out of bed. He comforted her, and they both fell back asleep. Hours later, Robert awoke to find Nikki had stopped breathing and turned blue. After he brought Nikki to the hospital, CAT scans were made of her head and doctors observed a set of internal head conditions: subdural bleeding, brain swelling, and retinal hemorrhages ("the triad"). At that time, the medical consensus permitted presuming that a child with the triad must have been the victim of an inflicted head injury caused by a combination of "shaking" and "blunt impact." And whoever was with the child when she collapsed was considered the perpetrator. That medical

[1] The term "double pneumonia" in this Application refers to the fact that Nikki had both a chronic viral interstitial pneumonia and an acute bacterial bronchopneumonia, as explained at length below.

consensus, central to Robert's conviction, was known as "Shaken Baby Syndrome" (SBS), later renamed "Abusive Head Trauma" (AHT). The version of SBS/AHT used to convict Robert has since been entirely discredited.

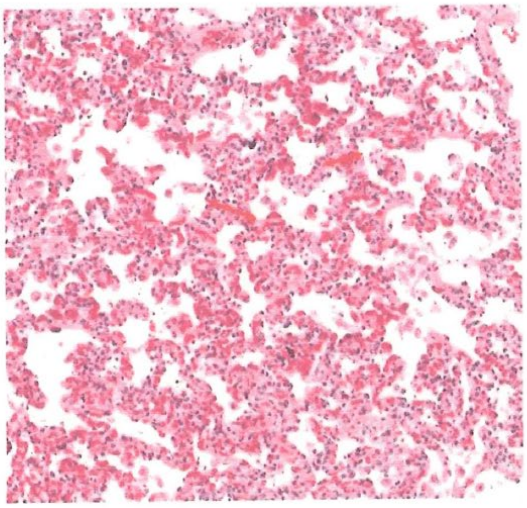
Brian Wharton was the lead detective with the Palestine police department who investigated Nikki's death in 2002. He testified for the State in Robert's 2003 trial. Medical experts had informed Detective Wharton that Nikki's condition was caused by violent shaking and inflicted head trauma. He accepted the SBS diagnosis made by the child abuse expert in the Dallas hospital where Nikki was transported. Based on that diagnosis, Detective Wharton authorized Robert's arrest—even before an autopsy was performed. Since then, Detective Wharton has learned about the evolution in the medical understanding of SBS/AHT. He insists that no crime occurred and 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." EX2; *see also* EX1; EX3.

Three new expert opinions, reflecting different medical specialties, can now explain precisely ***how*** Nikki died. These correlated opinions were only possible because of new evidence that emerged over the course of Robert's previous (-03) habeas proceeding. This new evidence was thus not available when his -03 Application was filed in 2016.

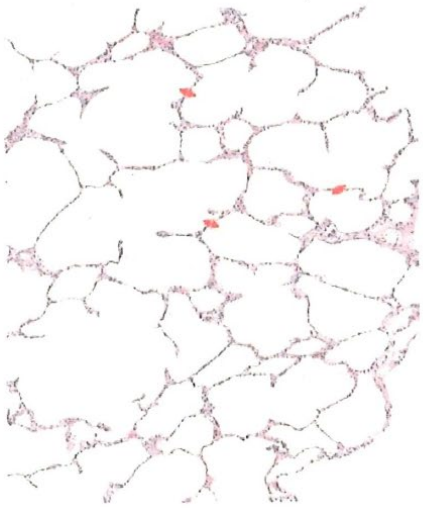
The first new expert, Dr. Francis Green, is an expert in lung pathology with over 46 years of experience. Dr. Green recently reviewed Nikki's medical history and examined her lung tissue under a microscope. His detailed report explains how two different types of pneumonia—a viral and a bacterial infection—were ravishing Nikki's lungs. Dr. Green is the only forensic lung specialist to ever examine Nikki's lungs. His examination and reproductions of precisely what he observed under a microscope show the specific bases for his findings that interstitial viral pneumonia 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 shows that Nikki's pneumonia started many days, if

not weeks, before her final hospitalization and cannot be explained by Nikki being on a ventilator after her collapse. This evidence from a highly qualified specialist rebuts the opinions the State's experts provided in the -03 proceeding that Nikki's lung condition was only a function of time spent on a ventilator. *See* EX5.

The second new expert is Dr. Keenan Bora, an expert in medical toxicology and emergency room medicine. He has 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.[2] Promethazine is a drug no longer prescribed to children Nikki's age and in her condition because it impairs their ability to breathe and can be fatal. EX19. Dr. Bora has explained that promethazine would have exacerbated the respiratory problems caused by Nikki's undiagnosed pneumonia. Dr. Bora has also noted that the second promethazine prescription contained codeine, a narcotic that would have further compounded Nikki's breathing challenges. Dr. Bora emphasized evidence that Nikki had a severe infection (her double pneumonia) that developed into sepsis and then septic shock. He concluded that Nikki's prescription medications were far beyond any appropriate therapeutic dose and likely hastened her respiratory depression and death. *See* EX7.

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[2] Promethazine is marketed under the brand name "Phenergan." Nikki's medical records show that her doctors repeatedly prescribed Phenergan to her, including two times on consecutive days the week she collapsed.

The third new expert, Dr. Julie Mack, is a pediatric radiologist. She has concluded that CAT scans of Nikki's head, taken upon her arrival in the Palestine hospital, show that she had only a single minor impact site on her head. Dr. Mack based her opinion on CAT scans discovered in the courthouse basement in 2018—on the day the -03 evidentiary hearing was supposed to begin. These scans were lost for 15 years. But as interpreted by the only type of expert qualified to read them, these scans corroborate Robert's 2002 report that Nikki had fallen out of bed in the night and possibly hit her head. The medical examiner testified in 2003 at 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.[3] But the incontrovertible radiological evidence shows only ***one*** impact site on Nikki's head. The medical imaging further shows 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 the shaking and beating testimony of the medical examiner. As Dr. Mack has now explained, the short fall with head impact might not have been fatal if experienced by a healthy child; but Nikki was profoundly ill.

[3] The medical examiner presented the same multiple-impacts opinion during the 2021 evidentiary hearing.

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

At the time of Robert's trial, no medical expert considered the combination of pneumonia, dangerous medications, and a short fall as explaining Nikki's condition and subsequent death. Because of the mistaken, outdated SBS/AHT medical consensus associated with the triad, none of the State's experts considered any non-inflicted causes. Back in 2002-2003, the standard of care allowed doctors to ***presume*** abuse whenever the triad was present. Yet that is no longer the case, and new evidence proves that Nikki's condition, including intracranial bleeding and light bruises, resulted from a severe lung infection and a bleeding disorder triggered by that infection, which led to a systemic failure known as sepsis.

A year before Robert's trial, the American Academy of Pediatrics (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.[4] That presumption is indefensible today and no longer

[4] AAP, *Shaken Baby Syndrome: Rotational Cranial Injuries—Technical Report*, Comm. on Child Abuse 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.").

represents the medical consensus, as explained further below. But at the time of Robert's trial, 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), the SBS hypothesis was seen as dispositive, with or without evidence of impact, even when a child, like Nikki, had a history of serious medical issues.[5]

The standard of care today is exactly the opposite. Now, physicians must consider all potential natural illnesses (including pneumonia) and accidental injury (including short falls) before they can allege abuse. This new consensus is even recognized by the AAP and the most ardent supporters of the SBS/AHT hypothesis.

Because the 2002-2003 standard of care permitted presuming abuse in Nikki's case, the physicians did not explore any alternative explanations for her condition. For example, the medical examiner who performed Nikki's autopsy and testified in Robert's 2003 trial did not obtain Nikki's medical records and did not know that Nikki had been extremely ill with a dangerously 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

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A 2020 AAP position paper acknowledged that "[f]ew pediatric diagnoses have engendered as much debate" as SBS/AHT.

[5] *See, e.g.*, Pamela Colloff, *He Was Sent to Prison for Killing His Baby. What if He Didn't Do It?*, NEW YORK TIMES MAGAZINE (July 21, 2024) (describing a National Center on Shaken Baby Syndrome conference where a prosecutor subjected doctors who challenged the SBS gospel to ridicule and name-calling).

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.

The jury that decided Robert's fate heard a constant drumbeat from prosecutors—during voir dire, opening statement, 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 and the shocking images taken during the autopsy.[6] The medical examiner decided Nikki's death was a "homicide" caused by "blunt force head injuries"; but at trial, she defined the mechanism of injury with nearly two dozen references to violent shaking and the forces reputedly generated by shaking. Even defense counsel conceded that the medical evidence made this a "classic shaken baby case," a reflection of the entrenched nature of the SBS/AHT hypothesis at that time. EX36.

The three new, correlated expert opinions, which could only have been developed after the -03 proceeding closed, establish that Nikki died a natural death. The -03 Application, filed in 2016, explained the evolution in the understanding of SBS/AHT as of that date and how the core principles underlying the hypothesis were no longer valid. But the vital evidence needed to explain ***how*** Nikki died only

[6] The jury also heard throughout voir dire and much of trial that Nikki had been sexually abused—although the allegations were not supported by any credible evidence. *See* CLAIM I, below.

became available piecemeal over years after the -03 filing up to the present. The new evidence supporting this new Application shows that Nikki died of a virulent double pneumonia, exacerbated by dangerous medications, an illness that had progressed to the point of sepsis. That condition triggered her accidental fall from bed in the night and subsequent collapse. This new evidence, which comprehensively explains Nikki's condition, was hindered for years—not simply by the slow progression of science—but also because:

- the CAT scans of Nikki's head were unavailable because they were locked up in a courthouse closet until August 2018, unbeknownst to Robert's counsel; this evidence is central to refuting the medical examiner's erroneous belief that Nikki had sustained multiple impacts to her head;

- despite due diligence, habeas counsel encountered significant obstacles in obtaining access to key autopsy slides, medical imaging, and other medical evidence essential to ascertaining the true causes of Nikki's death; and

- it took both time and resources to identify, retain, and develop opinions from a range of doctors with highly specialized experience so that the complex cause of Nikki's death could be fully explained.

Nikki's medical condition was complicated, as evidenced by her doctors' struggle to understand her history of breathing apnea, her many unresolved infections, and, ultimately, her fatal pneumonia. A complete medical understanding required a multidisciplinary approach with input from different kinds of medical specialists. Meanwhile, science has continued to evolve—dramatically since the 2002 SBS abuse diagnosis was made. Numerous scientific studies, unavailable in

2016, or even during the -03 evidentiary hearing, show that SBS/AHT has never been validated by evidence-based medicine and new, statistical analyses show that SBS/AHT has been significantly over-diagnosed.

The SBS hypothesis was first subjected to scientific scrutiny by biomechanical engineers whose expertise involves applying the laws of physics to understand the injury-potential of different kinds of mechanisms. Later, experts in many other disciplines—including forensic pathologists, neurosurgeons, radiologists, hematologists, infectious disease experts, emergency room physicians and host of other specialists—began to express deep skepticism about the SBS/AHT hypothesis.[7] These specialists have published a vast body of case studies, research papers, and commentaries, documenting the emerging concern about the lack of evidentiary support for the principles underlying the SBS/AHT hypothesis.[8] The origins of SBS, the shift to the more nebulous term AHT, while still relying on the core SBS premises, and a comprehensive explanation of current scientific

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[7] *See* David Moran, et al. *Shaken Baby Syndrome, Abusive Head Trauma, and Actual Innocence: Getting it Right*, HOUS. J. HEALTH L. & POL'Y 12, NO. 2 at 209-312 (2012).

[8] In 2009, the AAP published a position paper that urged doctors to cease describing the condition as "Shaken Baby Syndrome" and use instead the phrase "Abusive Head Trauma" or AHT. The name changed, but the principles underlying the terms had not. Moreover, AHT remains a circular term, labeling cases as inflicted or abusive based on the SBS/AHT premises when the differential diagnosis requires the exclusion of all other possible explanations, including disease, genetic conditions and accident, before alleging abuse.

understanding are described in a new multidisciplinary treatise published late last year: Keith A. Findley, et al., ed., SHAKEN BABY SYNDROME: INVESTIGATING THE ABUSIVE HEAD TRAUMA CONTROVERSY (Cambridge Univ. Press 2023) (hereafter 2023 Treatise). This new treatise, the first of its kind, is part of the new evidence, not available in 2016, relied on in this Application.

Today, even those who still believe (absent scientific proof) that shaking a child can produce a subdural bleed, brain swelling, or retinal hemorrhages (without injuring the neck) have accepted that a differential diagnosis is required before SBS/AHT can be diagnosed. Terrible injustices, arising from an unvalidated hypothesis that invited presuming child abuse, have been unwound in SBS/AHT cases in many other jurisdictions. Even as this Application was being finalized, the Michigan Supreme Court issued a decision on July 25, 2024, ordering a new trial in a 2005 SBS case, the most recent judicial recognition that changes in scientific understanding make convictions like Robert's wholly unreliable in retrospect. *See* EX48.

A recent Actual Innocence case is instructive. *See* EX45, *Jones v. State*, 2021 WL 346552 (Md. Ct. Spec. App. Feb. 2, 2021). *Jones* was an SBS case tried in 1999. The deceased child, like Nikki, was chronically ill throughout his short life. He was diagnosed with, and hospitalized for, pneumonia soon before his death. Yet, because of the SBS beliefs of that era, the child's medical history was entirely discounted—

just as it was in Nikki's case. After the intracranial triad of subdural bleeding, brain swelling, and retinal hemorrhages was observed, abuse was "diagnosed" and the child's father was thereafter convicted of murder. But the very same month in which the -03 habeas court rejected the notion that the relevant science has changed since Robert's 2003 trial, an appellate court in Maryland reached the opposite conclusion:

> The current research shows that (i) subdural hematoma, (ii) retinal hemorrhage, and (iii) cerebral edema [brain swelling] are attributable to a wide variety of both natural and accidental causes. Because [the child's] medical conditions were quickly dismissed as potential causes of the constellation of symptoms that [he] presented, such evidence would be especially important when there is a history of illness, hospitalization, and an absence of external injuries.

Id. at *20.

The *Jones* case is one of many examples of parents and caregivers who were convicted using the SBS/AHT hypothesis and have since been exonerated, had their convictions vacated, or had their sentences commuted. *See* EX18. There is now widespread recognition that medically fragile children have been wrongfully separated from blameless parents due to presumptions that child abuse occurred, prompting legal reform. For instance, the Texas Legislature has recognized the need for reforms related to child abuse allegations, given the serious consequences for children, parents, and caregivers when child abuse is alleged. In 2021, the Texas Legislature unanimously amended the Family Code to allow parents accused by "child abuse specialists" (like the doctor who made the SBS diagnosis in this case)

to obtain a second medical opinion—regardless of ability to pay—before any child is taken from her parent. *See* TEX. FAM. CODE sec. 261.3017.

Understanding Nikki's case required specialized expertise. It has taken years to amass this multidisciplinary expertise and considerable pro bono resources to pursue it.[9] This Application presents five new claims:

1. New Evidence Establishes That The Conviction Was Obtained Using Material, False Testimony

2. New Medical and Scientific Evidence Establishes a Right to Relief under Article 11.073

3. Robert's Right to Due Process Is Violated by a Conviction Based on Subsequently Discredited Medical Opinions and Considering the Overwhelming New Evidence of Innocence

4. Robert's Sixth Amendment Autonomy-Right Was Violated By Trial Counsel Overriding His Explicit Objective To Maintain His Innocence

5. New Medical and Scientific Evidence Establishes Robert's Actual Innocence

Authorizing an Actual Innocence claim for further development does not require proof of new, previously unavailable evidence. *See* TEX. CODE CRIM. PROC. sec. 5(a)(2). Robert's Actual Innocence claim nonetheless relies on new, previously unavailable evidence, which establishes that Nikki died of chronic viral interstitial

[9] Death-sentenced individuals are not entitled to appointed counsel or resources to pursue subsequent state habeas applications. Texas law only requires appointment of counsel if and when claims in a subsequent application are authorized for further development. TEX. CODE CRIM. PROC. art. 11.071, sec. 6 (b-1)-(b-2).

pneumonia with a secondary bacterial bronchopneumonia, an illness so severe that it led to sepsis, a system-wide failure to fight off infection. Her fatal condition was exacerbated by double prescriptions for Phenergan/promethazine prescribed to her on two consecutive days by two different doctors, along with codeine.

In short, Nikki died because she stopped breathing due to her undiagnosed double 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 fatal pneumonia.

Nikki's death was not a crime. Nikki's infected lungs were straining for oxygen—for days or even weeks. Unaware of her pneumonia, doctors prescribed medications that further suppressed her ability to take in life-sustaining oxygen. When a body experiences oxygen-deprivation, blood vessels outside of the brain will leak. Cardiac arrest can follow. When the heart ceases pumping oxygenated blood to the brain, after 10-12 minutes, the brain will shut down, irrevocably.

That is what happened to Nikki. Robert awoke on January 31, 2002, and found Nikki comatose and blue from oxygen-deprivation. He took her to the ER where

medical personnel revived her heart, but she was already brain dead. Once Nikki's brain had shut down, blood being pumped by the resuscitated heart could no longer enter her brain. That blood pooled outside of her oxygen-deprived, swollen brain. Because the medical consensus at the time permitted presuming abuse, no one considered Nikki's medical history, much less conducted the painstaking examination of her lung tissue performed by Dr. Green two decades later. The tragic consequences of Nikki's progression to sepsis were viewed as signs of a head injury—presumed to have been "inflicted."

In his 2003 trial, the State relied on tenets of the now-discredited SBS hypothesis to prove its "abuse" narrative—without any pushback from the defense. Robert's appointed attorney conceded that it was a "classic shaken baby" case—although Robert himself consistently maintained he had done nothing to hurt Nikki and did not understand what had happened to her. EX37. Moreover, no one understood Robert's seemingly blank reaction to Nikki's grave condition and misinterpreted his lack of affect as callousness. Only in 2018, after the -03 Application was filed, did a neuropsychologist conduct a comprehensive evaluation and diagnose Robert with Autism Spectrum Order, a disability that explains his non-neuro-typical response to Nikki's collapse.

Robert Roberson, a disabled father summarily deprived of his parental rights and then long denied any meaningful defense or due process, should have his new

claims authorized. A court of law must consider the new evidence of his innocence before Texas perpetrates an irreversible injustice.

SECTION 5(A) IS SATISFIED

A. Legal Standard

The last subsequent habeas application was filed on June 16, 2016, the germane date for assessing whether the claims here overcome the procedural bar in Texas Code of Criminal Procedure, art. 11.071, sec. 5(a). Section 5(a) dictates that a claim in a subsequent habeas application will be authorized for further development only if "the current claims and issues have not been and could not have been presented … in a previously considered application … because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application[.]" TEX. CODE CRIM. PROC. art. 11.071 § 5(a)(1).

Alternatively, section 5(a)(2) requires demonstrating that, "by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt[.]" *Id.* § 5(a)(2).

Section 5(a) is satisfied as to each claim alleged in this Application, as summarized here and developed further below.

B. New Case-Specific Evidence Unavailable Before June 2016

In addition to scientific research published after 2016, CLAIMS I, II, III and V rely on new expert opinions specific to this case. These experts' assessments were only possible after habeas counsel obtained core pieces of evidence, unavailable when the -03 Application was filed: (1) long-lost CAT 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, Robert's legal team did not receive some components of the autopsy file until 2024 (x-rays taken during the 2002 autopsy).[10] These materials were essential to assessing how and why Nikki died—and undeniably required expert assistance to interpret. Moreover, due to the interdisciplinary nature of Nikki's medical problems, as some experts reviewed the existing materials, they spotted issues requiring counsel to identify and retain additional experts with specialized knowledge for consultation, before, eventually, the truth about Nikki's death could be established.

That process unfolded over the past eight years after this Court remanded Robert's case. Thereafter, the habeas court authorized some expert funding. The initial experts eventually identified missing radiology scans and realized that post-mortem lung tissue slides needed to be studied. Lengthy delays ensued between 2016 and the 2021 evidentiary hearing due to protracted discovery proceedings, barriers to access to key evidence, and the surprise discovery of CAT scans in a courthouse

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

closet in 2018, on the day the evidentiary hearing was supposed to begin. Thereafter, proceedings were further delayed by the COVID-19 pandemic.[11]

After enlisting distinctly qualified experts who have undertaken a thorough reassessment of the autopsy, the new evidence assembled here, building upon the record developed between 2016 and 2021, shows that Nikki died of natural and accidental causes. Many of the numerous obstacles that have hindered ferreting out the truth are directly attributable to state actions. This Court has previously authorized claims in successor habeas applications where barriers burdening the quest for the truth were, intentionally or inadvertently, attributable to state actors.[12] The Court should do so in this case.

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[11] For example, while preparing to testify in the proceeding that had been delayed by COVID-19, forensic pathologist Dr. Wigren created a chart of findings associated with the autopsy file that had been produced piecemeal over time. EX12. He examined a toxicology report that had not been included in the autopsy report introduced at trial. EX11. Dr. Wigren looked up the drugs identified in the toxicology report and observed that at least one, promethazine, had nothing to do with Nikki's final medical treatment; he then cross-referenced the child's medical records and observed that she had been prescribed "Phenergan," the brand name of promethazine, in two forms: suppositories on one day; and then, the very next day, in cough syrup. He also noticed with alarm that the Phenergan cough syrup had also included codeine, a narcotic. Dr. Wigren, like Dr. Urban, the medical examiner, did not have special training in medical toxicology. But he consulted a treatise the night before he prepared to testify and highlighted during his testimony that the promethazine levels appeared to him to be significantly elevated and were potentially dangerous, based on his experience but not any particular expertise. He recommended further investigation. 5EHRR201-209, 227-228, 239; 6EHRR29.

[12] *See, e.g., Ex parte Newton*, 2009 WL 2184357 (Tex. Crim. App. July 22, 2009) (unpub.); *Ex parte Wyatt*, 2012 WL 1647004 (Tex. Crim. App. May 9, 2012) (unpub.); *Ex parte Miles*, 359 SW.3d 647 (Tex. Crim. App. 2012); *Ex parte Settle*,

FACTUAL BACKGROUND

A. Nikki's Medical History

Robert's daughter Nikki was born to a drug-addicted, homeless woman (Michelle Bowman) supporting herself through prostitution; in the hospital, she was denied custody, and Child Protective Services (CPS) gave Nikki to her maternal grandparents, Verna and Larry Bowman. 43RR100-111. No father was identified at the time. Michelle had already had two boys taken from her, both born with special needs. 6EHRR149-153. Michelle's first child Christopher was born with fetal alcohol syndrome and a seizure disorder; he was so developmentally impaired that the Bowmans gave him up to become a ward of the state. Michelle's second child Matthew also had fetal alcohol syndrome and a seizure disorder. 43RR104-108.

Nikki's medical records show that she was sick throughout her short life. Her first reported infection occurred a few days after her birth. She then had many unresolved infections that proved resistant to multiple strains of antibiotics. She had severe ear infections that persisted even after she had had tubes surgically implanted in both ears. She suffered from unexplained "breathing apnea," starting before age

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2011 WL 2586406 (Tex. Crim. App. June 29, 2011) (unpub.); *Ex parte Tercero*, 2015 WL 5157211 (Tex. Crim. App. Aug. 25, 2015) (unpub.); *Ex parte Carty*, 2015 WL 831586 (Tex. Crim. App. Feb. 25, 2015) (unpub.); *Ex parte Lave*, 2013 WL1449749 (Tex. Crim. App. April 10, 2013) (unpub.).

one, which caused her to suddenly cease breathing, collapse, and turn blue. APPX9; APPX10; APPX14.

Robert did not know the full scope of Nikki's medical history of chronic illness because he was not involved in her early life. But when he learned that she might be his daughter, he made clear that he wanted to be involved. EX50. For nearly two years, the Bowmans, Nikki's maternal grandparents, were the primary caregivers. After Robert established his paternity and sought custody, the Bowmans agreed that he should be awarded custody, and the court agreed, soon after Nikki's second birthday.

On January 28, 2002, two months after Robert obtained custody, he and his mother took 27-month-old Nikki, who had been vomiting, coughing, and having diarrhea for five days, to the local ER. The attending ER doctor prescribed potent drugs, including Phenergan in suppository form. Phenergan now has an FDA black-box warning against prescribing it to children Nikki's age and in her condition. EX19.

Later that night, Nikki's temperature shot up to 103.1 degrees., Robert took Nikki back to the doctor the next morning (January 29th), where Nikki's temperature was measured at 104.5 degrees. But the pediatrician sent them home, issuing a second prescription for Phenergan, this time in cough syrup along with codeine—an opioid that the FDA now restricts for children under 18 due to the risks of inducing

breathing difficulties or death. APPX9; 4EHRR182; 5EHRR237.

While Robert went to fill the prescriptions, the Bowmans took Nikki to their house. They had agreed to keep her for two nights while Robert's live-in girlfriend, Teddie Cox, was in the hospital. 43RR152. But the next night (January 30th), the Bowmans called Robert and asked him to pick up Nikki because Mrs. Bowman had also become ill. 6EHRR165-166, 176, 178. Around 9:30 PM, Robert drove out to the Bowman's house in the country to retrieve Nikki and brought her back to his house in Palestine where he got her ready for bed.

B. Nikki's Final Collapse

When they arrived home the night of January 30th, Robert put Nikki to bed, which was a mattress and box springs on two layers of cinderblocks. This was Robert's solution to make things easier for his girlfriend Teddie, due home from the hospital the next day after a hysterectomy. Per the Bowmans' instructions, Nikki was used to sleeping in the same bed with them. 6EHRR172. So, he got Nikki a snack, and they fell asleep watching a movie. EX37; APPX7.

In the early morning hours, a "strange cry" woke Robert up. He found Nikki on the floor at the foot of the bed. He did not witness her fall. But after checking to see if she was okay, he saw a small speck of blood on her mouth and wiped it off with a washcloth. EX37; EX1; APPX7. They both eventually fell back asleep.

But, later that morning, January 31st, Robert woke up to find Nikki

unconscious and blue. He grabbed Nikki's face to try to revive her, then brought her to the local ER. EX37; APPX7. This was the same ER where Robert had taken Nikki three days earlier; and she was again seen by the ER doctor who had prescribed Phenergan suppositories. 42RR80-81; APPX14. Medical staff observed that Nikki's eyes were "fixed and dilated," a grave sign of brain death. A "code blue" was initiated, and she was intubated around 9:50 AM. The doctor managed to restart her heart, but no medical heroics could resuscitate her brain, which had been deprived of oxygen for too long. 41RR112; 6EHRR96-97; 8EHRR62.

Hospital staff felt a bump on the back of Nikki's head. But there were no other signs of significant external injury. They shaved her head, and she was sent to radiology at 10:10 AM. A lung scan revealed that she had not been intubated properly; the breathing tube had to be pulled out and reinserted, likely tearing her frenulum, a thin membrane inside the mouth above the teeth. 42RR87; 8EHRR113; 6EHRR123-125. Regardless of the botched intubation, Nikki had already shown signs of extreme oxygen-deprivation when her father woke up when his alarm went off around 9:00 AM. Her blue lips were a sign of hypoxia, that is, oxygen-deprivation. EX5. It only takes 10-12 minutes of oxygen-deprivation for the brain to shut down—forever. Thereafter, blood pumped from the heart to the skull could not enter the brain itself, causing blood to pool outside the brain under its fibrous covering, called the dura. EX8.

Another CAT scan of Nikki's head revealed a small subdural bleed near the "goose egg" on the back of her head. The image also showed that her brain had swollen and shifted to one side. But there were no skull fractures, neck injuries, or broken bones of any kind.

A nurse alerted the police that she suspected abuse. Various members of the hospital staff and lead detective Brian Wharton then pressed Robert to explain Nikki's condition. Robert tried to explain Nikki's collapse, reporting that she had been sick and describing her strange cry and apparent fall out of bed during the night, which he had not witnessed. *Id.*; APPX7. Hospital staff did not know that Robert had Autism and were suspicious of his flat affect, which they judged as reflecting a lack of emotion about his daughter's condition. 41RR50-160.[13]

But based on the CAT scan of Nikki's head, showing bleeding under the dura and brain swelling, the ER doctor discounted her recent illness and insisted that Nikki's condition "did not result from a fall out of bed[,]" "[t]hat would basically be impossible[,]" "extremely implausible," "very implausible," "very unlikely." 42RR80-87. This opinion reflected the prevailing medical consensus at the time that, absent a major trauma event, like a car accident, intracranial bleeding and brain swelling must have been caused by abuse.

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[13] *See* CLAIM I below discussing Robert's Autism, diagnosed after the -03 Application was filed.

The "abuse" accusation was inflamed by a local nurse, who held herself out as a "Sexual Assault Nurse Examiner" (SANE), although she was not actually SANE-certified. 41RR141. She summoned the police to Nikki's hospital room and then took it upon herself to perform a sexual assault exam on the comatose child. 6EHRR105-06. This nurse then told colleagues and investigators that she saw signs of "anal tears," an observation not corroborated by any other treating physician or the medical examiner. Nor was the nurse's leap from purported "anal tears" to "sexual abuse" ever substantiated by any evidence. APPX62; APPX6. Nikki had had diarrhea for over a week and been prescribed suppositories, which fully explains the condition of Nikki's anal region. But at trial, the nurse doubled-down on her false accusation by incorrectly testifying that diarrhea would not cause the tender skin in a child's anal region to crack or "tear." 41RR127-28. Then, in a highly inflammatory and prejudicial false accusation, the nurse insinuated that Robert was a "pedophile," explaining to the jury that pedophiles prefer anal penetration to vaginal penetration, stating: "So that's not, you know a particular area that a pedophile wants to go." 41RR129.

Meanwhile, the Bowmans told law enforcement and medical personnel that Nikki had been "totally well" when Robert had picked her up from their house the night before. That demonstrably false report—considering Nikki's documented

hospital/doctor visits in the preceding days—buttressed the presumption that Nikki's condition could and should be blamed on Robert. APPX103.

C. Robert's Background

Robert, who had dropped out of school after ninth grade, had been a special needs student. With notable speech delays, he was given some therapy and other services available to poor folks in rural East Texas. But his Autism was not diagnosed in childhood—and it was this condition that caused hospital staff and law enforcement, who did not know Robert, to misjudge his appearance as unfeeling. EX14.

After falling through the cracks at school, Robert had tried to better himself by joining the military. But he was a sensitive person who had come through a rough childhood with a father prone to verbal and physical abuse. Not cut out for the military, he essentially went from boot camp to marriage at age 19. He and his young wife, both struggling with addiction, had two special needs children; and after a divorce soon thereafter, they agreed that Robert's mother should assume custody. EX49. Robert, with little education and an undiagnosed disability, spent several years thereafter floundering, while maintaining close ties to his disabled children. EX37.

In early 1999, Robert had a brief relationship with Michelle Bowman, a young woman from his hometown (Palestine); he suggested marriage and she then moved

on. After Robert learned that Michelle had given birth to Nikki and that she might be his daughter, he fought to turn his life around. He got a job delivering newspapers for the *Palestine Herald* and, with the help of friends, acquired a small rental house. His new girlfriend, Teddie Cox, and her child Rachel, moved in, after recently escaping an abusive male, then in jail for sexually abusing Rachel. Part of building a new family involved welcoming Nikki over for visits. EX37.

D. The Truncated Investigation

When Detective Wharton asked if Robert would show them where Nikki had fallen, Robert took the police to his house. Detective Wharton looked all around for signs of violence, blood on the walls, but there was nothing. The only blood was a small speck on a washcloth that Robert showed them, which they never would have noticed on their own. EX1. Detective Wharton also had no training in mental health issues so did not understand why Robert did not seem to comprehend the severity of his daughter's condition, *id.*, now explained by Robert's recent Autism diagnosis. *See* CLAIM I, below.

Robert declared he wanted to go to Dallas to visit Nikki—because the local hospital was transferring her to Children's Medical Center, hoping the big city hospital might be better equipped to treat her. But Robert was told he was not "allowed" to go see his own child. EX37.

The next day, February 1, 2002, Wharton's team arrested Robert—relying solely on an affidavit provided by a child abuse expert at Children's Medical Center, Dr. Janet Squires. Dr. Squires' affidavit relied on Nikki's grandparents' false report that Nikki had been "totally well" when they last saw her around "10:00 PM" the night before her collapse. Dr. Squires concluded that: "The only reasonable explanation" for Nikki's condition "is trauma." She further explained that "the medical findings," including "very obvious" retinal hemorrhages, "fit a picture of shaken impact syndrome." APPX103. She found there was "some flinging or shaking component which resulted in subdural hemorrhaging and diffuse brain injury." *Id.* When this affidavit was drafted, "shaken impact syndrome" was another name being used to describe "Shaken Baby Syndrome," now referred to as "Abusive Head Trauma," a medical diagnosis of child abuse.

After Dr. Squires made the SBS diagnosis that was used to arrest Robert, and without any input from Robert, Nikki was taken off life support and pronounced dead. SX48. She was then transferred to the Dallas County medical examiner's office housed in SWIFS. On February 2, 2002, Dr. Urban performed an autopsy. Before she did so, records show that she was told by a member of Detective Wharton's team that Robert had already been arrested for capital murder. There is no evidence that any other medical examiner from SWIFS participated in the autopsy. APPX99.

When Dr. Urban performed the autopsy, she had only been certified as a medical examiner for a year and a half and thus had limited experience performing autopsies on a child Nikki's age. 9EHRR8-9; EHRR117; 9EHRR 154. Pediatric cases represent less than 10% of the total population, and autopsies on 2-year-olds are even rarer. 3EHRR65. Dr. Urban and the other SWIFS medical examiners were dealing with a high volume of autopsies in 2002, as Nikki's was already the 456th as of February 2, 2002, the day of Nikki's autopsy. 9EHRR86.

Dr. Urban subsequently admitted that she did not consider any of the following before reaching conclusions regarding cause and manner of death: (1) Nikki's medical history from birth, 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; (2) the Palestine Regional ER records related to Nikki's admission and treatment the day of her collapse; (3) the CAT scans taken of Nikki's head at Palestine Regional ER on January 31, 2002; (4) the EMS records reflecting Nikki's treatment in transport from Palestine to Dallas; (5) the scene where Nikki collapsed, including the bed propped up on cinder blocks; (6) the washcloth and bedding obtained from the scene containing very small specks of blood that are inconsistent with a beating; (7) any information regarding "promethazine" a drug found in Nikki's system per a toxicology report that Dr. Urban had requested; or (8) the medical treatment, transports, and medications that were applied to Nikki after

she arrived at the ER on January 31st until she arrived at SWIFS for an autopsy on February 2nd, including having a pressure monitor surgically implanted in her head. Dr. Urban also did not consult with a biomechanical engineer or review any biomechanical research regarding the injury-potential of short falls, applying Nikki's height, weight, age to determine whether it was physically possible to generate sufficient force through shaking her to cause the injuries observed. 9EHRR64-185.

Dr. Urban's autopsy report states a conclusion that Nikki's death was caused by "blunt force head injuries" and the manner "homicide." APPX12. At trial, Dr. Urban opined that the "blunt force head injuries" had been inflicted by an unknown combination of "shaking" and "impacts." 43RR74. Dr. Urban reached her conclusions, captured in her autopsy report, the same day that she performed the autopsy, before the results of toxicology testing she had requested were available. EX11. She also signed the death certificate that same day. APPX101. The toxicology report itself was not disclosed before trial or discussed before the jury. The disclosed autopsy report included only the following notation on the last page:

```
Blood:  Alcohols and Acetone - negative.
        Cannabinoid Screen - negative.
        Drug Screen - 0.05 mg/L lidocaine.
                      0.40 mg/L promethazine.
                      9.2  mg/L phenytoin.
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APPX12.

In a pretrial hearing with defense counsel, Dr. Urban was asked about the short list of drug results that were found in Nikki's bloodstream, post-mortem:

> Q [trial counsel]. I noticed in the drug results -- where was that there was a medication that showed -- okay. Lidocaine, I would imagine that was probably administered during hospital treatment -- of the hospital treatment. Promethazine, what would that have been?
>
> A [Dr. Urban]. I don't remember . I - -
>
> Q. Okay.
>
> A. I don't remember if it is a - -
>
> Q. Oh, okay.
>
> A. - - I do - - if it is an anti seizure medication. I know I would have to look it up.

EX57 at 17. Dr. Urban does not seem to have later looked up "promethazine" or further investigated as she made no mention of this issue at trial.

Dr. Urban's behavior was consistent with the prevailing medical consensus at the time. Nikki's condition looked like head trauma resulting in death. No further inquiry was considered necessary at the time. Today, a multidisciplinary investigation into natural disease and/or accidental causes, through a differential diagnosis, is the prevailing standard of care. Moreover, AHT is now a diagnosis of exclusion. Nikki's current pneumonia diagnosis—supported by images of her lung tissue as seen under a microscope, her markedly elevated post-mortem toxicology

levels of promethazine, and corroborating radiology images—establishes that she died of natural and accidental causes.

E. The Evolution of SBS/AHT Theory and the Current Consensus that Discredits its Core Principles

1. Overview

In 2002-2003, when Robert was arrested, tried, and convicted using an SBS and blunt force cause-of-death theory, SBS was accepted as medical gospel. In 2016, when his last writ application was filed, the controversy around SBS (which had, by then, been rebranded as AHT) had become quite pronounced. But since June 2016, the complete absence of any scientific underpinning for SBS/AHT has been exposed. In addition to the new case-specific, cause-of-death evidence in the reports of highly qualified specialists, Robert's claims are based on post-June 2016 advances in scientific understanding.

These advances include the first and only "meta-study" of the published articles that purported to support the SBS/AHT hypothesis. *See* EX20.[14] While each individual study may report measurements that have some degree of error, meta-

[14] Göran Elinder et al., *Traumatic Shaking: The Role of the Triad in Medical Investigations of Suspected Traumatic Shaking*, Report No. 255E (Oct. 2016), available in English translation in 2018, https://pubmed.ncbi.nlm.nih.gov/30146789/.

analytic results are considered the most trustworthy source within evidence-based medical literature.[15]

This first meta-study was undertaken by an agency of the Swedish government in response to widespread concern about the lack of scientific support for the core SBS/AHT assumptions that: (1) shaking can cause certain intracranial conditions (the triad) and (2) if those conditions are found, they are proof of shaking. This first and only comprehensive, systematic, peer review of articles claiming to support the SBS/AHT hypothesis was only available after the -03 Application was filed.

The Swedish meta-study identifies significant defects in the literature endorsing SBS/AHT as an explanation for many tragic infant and child deaths. This unprecedented scholarship found ***no*** high-quality scientific studies supporting the SBS/AHT hypothesis or any meeting the criteria for sound science. Moreover, the Swedish meta-study identified specific methodological problems with each individual study. An appendix to the meta-study highlights the absence of any uniform diagnostic criteria for SBS/AHT, unlike other medical conditions. The meta-study critiques the circular reasoning at the heart of the SBS/AHT concept—which assumes that the presence of subdural bleeding, brain swelling, and retinal

[15] Oxford Centre for Evidence-Based Medicine, *Levels of Evidence*, March 2009.

hemorrhages proves that violent shaking/impact and thus abuse occurred, so whenever those conditions are observed, abuse is presumed.

Reviewing courts in other jurisdictions have recognized the Swedish meta-study as compelling "new evidence" relevant to an Actual Innocence claim warranting habeas relief from AHT convictions. *See, e.g.*, EX45, n.26. And new scholarship challenging the current version of SBS/AHT continues to emerge. *See, e.g.*, 2023 Treatise (first multidisciplinary documentation of the failures of the SBS/AHT causation hypothesis); EX21;[16] EX22.[17]

Critically, current medical standards do not support the version of SBS that was "diagnosed" by Dr. Squires in 2002, without any differential diagnosis, and then used to convict Robert in 2003.

2. Origins of the SBS/AHT Hypothesis

Science does not undergo sea changes overnight; and forensic science is particularly slow to respond to evidence-based challenges. *See, e.g.*, National

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[16] C. Brook, *Retino-dural hemorrhages in infants are markers of degree of intracranial pathology, not of violent shaking*, Ann. Child Neur. Soc. 00(00): 1-7 (2024).

[17] J. Tibballs and N. Bhatia, *Medical and Legal Uncertainties and Controversies in "Shaken Baby Syndrome" or Infant "Abusive Head Trauma,"* J. LAW & MED. 151-184 (May 2024) (analysis critiquing use of the triad to diagnose "severe deliberate shaking with or without head trauma," despite the exceptionally poor quality of the reputed scientific studies supporting the hypothesis, and recommending "abandonment of the inherently inculpatory diagnostic terms 'shaken baby syndrome' and 'abusive head trauma'").

Institute of Justice, *The Slow but Steady March Towards a More Reliable Forensic Science* (Dec. 7, 2022) (describing slow progress in forensic sciences attributable largely to (1) resistance to change in the forensics community as a whole and (2) the time it takes for the broader scientific community to fully understand the field). For instance, as this Court well knows, the controversy around forensic bitemark analysis (aka "odontology") gradually evolved from being a subject of debate to now being universally recognized by the scientific community as inherently unreliable. *See Ex parte Chaney*, 563 S.W.3d 239 (Tex. Crim. App. 2018); *see also* M. Chris Fabricant, JUNK SCIENCE AND THE AMERICAN CRIMINAL JUSTICE SYSTEM (Akashic Books 2022).

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 no external signs of impact or head trauma. Importantly, Guthkelch expressly stated that his shaking explanation was a "hypothesis."[18] Caffey not only embraced Guthkelch's hypothesis, Caffey argued, absent any scientific testing, that, if an infant has subdural bleeding, retinal

[18] 2023 TREATISE at 12.

hemorrhages, and perhaps brain injury and/or rib fractures, then the infant was likely shaken and thus abuse could be "diagnosed."[19]

By the 1990s, a core tenet of the SBS hypothesis—the triad of conditions with which the SBS hypothesis became associated (subdural and retinal hemorrhage and brain swelling)—had become entrenched although never validated biomechanically, forensically, or medically.[20] 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.[21] Thus, the triad, or even just one component of the triad, was treated as diagnostic of child abuse.[22] 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 characterize any other explanation

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[19] *Id.* at 12, 161–62.

[20] *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).

[21] *Id.*

[22] 2023 TREATISE at 13–14. A leading treatise on child mistreatment published during that era stated that "SBS usually produces a diagnostic triad of injuries that includes brain swelling, subdural hemorrhage, and retinal hemorrhages. This 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).

as a lie.[23]

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.[24]

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.[25] And yet innocent parents and caregivers, like Robert, continued to be charged and imprisoned based on this medical hypothesis that had never been validated.

3. All Tenets of the SBS Hypothesis Used to Convict Robert Have Been Discredited

In 2002-2003, when Robert's chronically ill daughter collapsed and he was then charged, tried, and convicted of causing her death, the State relied on SBS and

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

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

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

a blunt force trauma theory to convict Robert. By the time of Nikki's death, SBS had become a "medical diagnosis of murder,"[26] and reports of recent illnesses or short-distance falls were considered false explanations intended to conceal abuse. All of the SBS tenets put before Robert's jury as "fact" have since been falsified. Yet no differential diagnosis was undertaken in Nikki's case.

First and foremost, no medical expert today would "diagnose" SBS/AHT without a differential diagnosis, whereby all relevant circumstances and conditions are identified and all other potential causes of the triad are first ruled out before a parent is accused. By 2009, even the AAP acknowledged that doctors must perform a "differential diagnosis" to rule out medical conditions, which, by then, had been proven to cause the same triad. And the consensus medical opinion within the AAP today is that SBS/AHT is a diagnosis of "exclusion."[27]

a. Today the medical consensus recognizes that many phenomena can cause the triad, and a differential diagnosis is essential

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[26] Deborah Turkheimer, *Science-Dependent Prosecution and the Problem of Epistemic Contingency: A Study of Shaken Baby Syndrome*, 62 ALA. L. REV. 513, 516 (2011).

[27] Arabinda Kumar Choudhary, et al., *Consensus statement on abusive head trauma in infants and young children*, 48 Pediatric Radiology 1048, 1048 (May 23, 2018) (2018 AAP Consensus Statement). Notably, the 2018 AAP position statement does not reflect the consensus of the broader medical community and was drafted by the most vocal defenders of the SBS/AHT hypothesis.

It is now recognized that the triad is not specific to trauma, let alone inflicted trauma. Some of the non-traumatic, naturally occurring causes of the triad include "coagulation disorders, meningitis, sinus or cortical vein thrombosis, vascular malformations, tumors, and metabolic diseases," as well as hypoxia and accidental short falls with head impact.[28] New studies, unavailable in 2016, have demonstrated that the components of the triad seem to be a causal chain triggered by hypoxia (oxygen-deprivation), which is caused by many naturally occurring conditions.[29]

Dr. Guthkelch, an original proponent of the SBS hypothesis, went on to note: "In reviewing cases where the alleged assailant has continued to proclaim his/her innocence, I have been struck by ***the high proportion of those in which there was a significant history of previous illness*** or of abnormalities of structure and function

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[28] 2023 TREATISE at 35; *see also* EX23, Norrell Atkinson, et al., *Childhood Falls with Occipital Injuries*, 34 Pediatric Emergency Care 837-41 (2018) **(**eight cases of witnessed accidental falls onto back of child's head all produced subdural and retinal hemorrhages, with one resulting in death).

[29] EX24, D. Vaslow, *Chronic Subdural Hemorrhage Predisposes to Development of Cerebral Venous Thrombosis and Associated Retinal Hemorrhages and Subdural Bleeds in Infants*, 35 Neuroradiology Journal 53-66 (2022); EX25, I. Thiblin, et al., *Retinal Hemorrhage in Infants Investigated for Suspected Maltreatment is Strongly Correlated with Intracranial Pathology*, 111 Acta Paediatrica 800-08 (2022); EX26, W. Squier, *Infant Retinal Haemorrhages Correlate with Chronic Subdural Haemorrhage, not Shaking*, 111 Acta Paediatrica 714-15 (2022); EX27, J. Andersson, et al., *External Hydrocephalus as a Cause of Infant Subdural Hematoma: Epidemiological and Radiological Investigations of Infants Suspected of being Abused*, 126 Pediatric Neurology 26-34 (2021); EX28, S.M. Zahl, et al., *Examining Perinatal Subdural Haematoma as an Aetiology of Extra-Axial Hygroma and Chronic Subdural Haematoma*, Acta Paediatrica (2019).

of the nervous system, suggesting that ***the problem was natural or congenital, rather than abusive***. Yet these matters were hardly, if at all, considered in the medical reports."[30] In 2002-2003, Nikki's patently serious illness was not considered and her chronic viral pneumonia, acute bacterial bronchopneumonia, and the resulting sepsis were not identified, let alone considered.

b. Today it is widely recognized that violent shaking would cause neck injuries, and no study has shown that shaking can cause the triad

Contemporary biomechanics teaches that any head acceleration generated by shaking would be experienced first and foremost in the neck; thus, the neck is not "protected" during shaking, as SBS proponents surmised (and as both Dr. Squires and Dr. Urban attested during Robert's 2003 trial). 5EHRR102. Nikki had no neck injuries of any kind, which biomechanical engineers maintain makes it "very unlikely" that shaking caused any aspect of her condition. 5EHRR99, 101.

Additionally, experts in biomechanical engineering now universally agree that it is "literally impossible" to cause subdural bleeding through shaking, and no study has demonstrated that shaking can produce any of the intracranial conditions long associated with SBS. 5EHRR98-131. Recent studies, unavailable in 2016, confirm that shaking simply cannot generate the forces required to cause such conditions.[31]

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[30] Guthkelch, at 204 (emphasis added).

[31] 2023 TREATISE at 232 ("[T]here are no definitive experimental studies of the proposed mechanism of SBS that demonstrate that shaking, in any form, can produce the intracranial findings associated with the triad[.] Further, shaking should cause

A study published in 2020 evaluated 36 infants subjected to either admitted or witnessed shaking (with or without blunt force head impact). Of these infants, none who had been purportedly shaken exhibited any element of the triad.[32]

Similarly, no scientific basis supports the hypothesis that violent shaking can "shear" an infant's brain cells. Nor can shaking cause a subdural bleed or retinal hemorrhages by "rupturing" the tiny "bridging veins" in the dura membrane, as was the prevailing view in 2003 and as both Dr. Squires and Dr. Urban testified in 2003. 3EHRR45-46; 4EHRR37, 142, 146. Instead, bridging veins are easily ruptured during the autopsy process.[33] The "ruptured bridging veins" concept, conveyed to Robert's jury as fact, is another example of the "acceptance-before-validation pattern" underlining each facet of the SBS hypothesis.[34]

In 2022, Thiblin et al. published an important study further undercutting the presumption that retinal hemorrhages are a marker of shaking/child abuse. The study instead strongly supports the conclusion that retinal hemorrhages are caused by

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precursor trauma to the torso and cervical spine that is typically not observed in cases of alleged SBS/AHT.")

[32] EX29, I. Thiblin et al., *Medical Findings and Symptoms in Infants Exposed to Witnessed or Admitted Abusive Shaking: A Nationwide Registry Study*, 15 PLoS ONE 8–9 (2020).

[33] 2023 TREATISE at 40. It is "unavoidable" for bridging veins and other blood vessels to be cut during an autopsy's opening of the head; then the resulting leakage has been mistakenly considered evidence of subdural bleeding. *Id.* at 34.

[34] *See, e.g.*, EX30, J. Mack, et al., *Anatomy and Development for the meninges: Implications for Subdural Collections and CSF Circulation*, 39 PEDIATRIC RADIOLOGY 200–210 (2019).

increased intracranial pressure—which, in turn, is caused by many things.[35] For example, retinal hemorrhages are now understood as a common secondary consequence of hypoxia, rather than "reflect[ing] mechanical damage to the eye caused by severe acceleration-deceleration forces."[36]

Furthermore, subdural bleeds and fluid collections are now known to occur during infancy for a host of reasons. These subdural bleeds can recur after healing membranes, which contain numerous blood vessels, form around the subdural blood, a condition called "chronic subdural collections" that are now associated with seizures and other adverse health outcomes that have nothing to do with abuse.[37]

The commonality observed in numerous studies of infants and children who died with the triad of intracranial conditions is hypoxia (oxygen-deprivation). Oxygen-deprivation itself can cause the tiny vessels in the dura membrane to leak and causes encephalopathy, aka brain swelling.[38] 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 made her especially vulnerable to

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[35] EX25.

[36] 2023 TREATISE at 18.

[37] *Id.* at 19.

[38] Irene Scheimberg et al., *Nontraumatic Intradural and Subdural Hemorrhage and Hypoxic Ischemic Encephalopathy in Fetuses, Infants, and Children up to Three Years of Age: Analysis of Two Audits of 636 Cases from Two Referral Centers in the United Kingdom*, 16 Pediatric Development Pathology 149, 149, 155 (2013).

cardiac and pulmonary arrest. *See* EX5.

In sum, most cases diagnosed as SBS/AHT are likely cases where hypoxia, not trauma, let alone inflicted trauma, caused the triad of intracranial conditions long presumed to "prove" abuse.

c. Today documented cases of short falls, corroborated by video recordings, have conclusively shown that short falls with head impact can cause serious, even fatal, injuries and children can experience a lucid interval of hours or days before subdural bleeding causes collapse

In 2003, only a few outliers in the medical community were considering whether short falls with head impact could seriously injure a child. By then, forensic pathologist John Plunkett had published a paper, *Fatal Pediatric Head Injuries Caused by Short-Distance Falls*, challenging a core SBS belief: that only an extremely violent, inflicted injury, not something like an accidental short fall, could cause the SBS/AHT triad. Dr. Plunkett's paper identified 18 cases of child fatalities in the Consumer Product Safety Commission's database that had been classified as short-fall accidents and thus verified that short falls can, under some circumstances, be fatal. 4EHRR25-26; APPX24. But Dr. Plunkett and his research were denigrated by the larger medical community for years. APPX3; 5EHRR29-30.

Biomechanical research ultimately validated Dr. Plunkett's research—as this Court and other MEs have recognized. *See* APPX3; *Ex parte Henderson*, 246 S.W.3d 690, 692 (Tex. Crim. App. 2007) (noting that "affidavits and/or reports

submitted by Drs. John J. Plunkett, Peter J. Stephens, Janice J. Ophoven, and Kenneth L. Monson" had described "recent advances in the area of biomechanics and physics suggest that it is perhaps possible that [child's] head injuries could have been caused by an accidental short-distance fall," noting that medical examiner Dr. Bayardo had acknowledged the change in scientific understanding, and granting habeas relief in pre-Article 11.073 era).[39]

Moreover, more contemporary scientific studies, published well after the -03 Application was filed, have demonstrated that short falls can cause the exact kind of single impact and subdural bleeding and retinal hemorrhages observed in Nikki (as seen in the CAT scans taken of her head); but, previously, those intracranial conditions were viewed as "proof" of shaking/inflicted injury.[40] A very recent case study (July 2024) of a short fall captured on video is now available on the Internet as a clinical guide; the study involves an 8-month-old who fell backward from a short height, landed on his buttocks, then hit the back of his head on a vinyl floor.

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[39] Three of the experts (Drs. Plunkett, Ophoven, and Monson) whose affidavits this Court relied on in 2007 in remanding claims in *Henderson* to develop evidence of changed science in a child-death case also provided evidence in Robert's -03 proceeding. But that evidence of changed science, reflecting further advances since 2007, was disregarded by Robert's habeas court in 2022.

[40] EX23 (eight cases of witnessed accidental falls onto back of child's head all produced subdural and retinal hemorrhages, with one resulting in death); EX31, N. Aoki, *Infantile Acute Subdural Hematoma with Retinal Hemorrhage Caused by Minor Occipital Impact Witnessed by an ICU Nurse: a Case Report*, 4 Journal of Pediatric Neurology and Neuroscience 47-50 (2020).

"Acute subdural hemorrhages were found along with extensive, too many to count intra-[retinal hemorrhages] in both eyes …. of the type often associated with abusive head trauma"[41]—and yet there plainly was no abuse.

Even defenders of the SBS/AHT hypothesis now concede that short falls with head impact can be dangerous.[42] The new understanding is that the danger associated with a short fall with head impact is magnified when a child, like Nikki, is ill and having issues with balance and breathing. EX7; EX5; EX6.

Trial testimony from multiple medical professionals stating that a short fall could not have caused any aspect of Nikki's condition was false. 5EHRR27-28, 104-05. New studies—including ones published in 2023 and 2024—demonstrate that many cases of presumed SBS/AHT were in fact the result of accidents.[43]

d. Recent new science published in the past two years shows SBS/AHT has been considerably over-diagnosed

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[41] EX32, C. Brooks, et al., *26 cm fall caught on video causing subdural hemorrhages and extensive retinal hemorrhages in an 8-month-old infant,* Clinical Case Reports (July 2024).

[42] EX33, M. Hajiaghamemar, et al., *Infant Skull Fracture Risk for Low Height Falls*, 133 International Journal of Legal Medicine 847-62 (2019).

[43] EX35, C. Brook, *Evidence for significant misdiagnosis of abusive head trauma in pediBIRN data*, For. Sci. Int'l: Synergy 6 (2023); EX21, C. Brook, *Retino-dural hemorrhages in infants are markers of degree of intracranial pathology, not of violent shaking*, Ann. Child Neur. Soc. 00(00): 1-7 (2024).

A 2022 study reevaluating the evidence adduced in a set of SBS/AHT cases concluded that the evidence failed to support any of the initial abuse diagnoses.[44]

Likewise, recent statistical analyses of historical data of children diagnosed with SBS/AHT—published in 2023 and 2024—also indicate considerable over-diagnosis of SBS/AHT. These analyses utilized the "PediBIRN" database, aka the "Pediatric Brain Injury Research Network," established by a long-standing defender of the SBS/AHT hypothesis and child abuse pediatrician.[45] The hope was that the database would enable "screening" for AHT. Instead, an objective and statistically significant analysis of the data has now shown that (i) abuse is over-diagnosed in the presence of subdural hematomas and retinal hemorrhages, (ii) witness and caregiver accounts of non-AHT causes of head injuries are generally reliable, and (iii) contrary to the claims of AHT proponents, subdural hematoma and retinal hemorrhages are markers of the degree of intercranial pathology, not proof of inflicted violence.[46]

This new scholarship by Dr. Chris Brook compared the findings in independently witnessed non-AHT cases to those in cases that were diagnosed as AHT but were not independently witnessed. Dr. Brook's 2023 paper found that the

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[44] *See, e.g.*, EX34, K Wester, et al., *Re-evaluation of Medical Findings in Alleged Shaken Baby Syndrome and Abusive Head Trauma in Norwegian Courts Fails to Support Abuse Diagnoses*, 111 Acta Paediatrica 779-92 (2022).

[45] Dr. Kent Hymel has long published articles with AAP and elsewhere supporting the SBS/AHT hypothesis and his publications are featured on the National Center on Shaken Baby Syndrome website: https://dontshake.org/learn-more#2015.

[46] *Id*. at 1.

diagnostic criteria used to diagnose AHT were commonly found in witnessed accidents. The paper also concluded that a significant percentage of these cases involving accidents, witnessed by neutral observers, had been misdiagnosed as AHT.[47]

Dr. Brook's 2024 paper found that the PediBIRN data suggest that the clinical findings widely considered to be indicative of abuse are instead markers of the degree of intracranial pathology. As the severity of the intracranial pathological conditions increases, the rate of accidents misdiagnosed as AHT rises rapidly.[48] That is, the more severe the accidental injury, the more likely the caregiver is to be wrongly accused of abuse. Dr. Brook found that the misdiagnosis of undetected or unknown medical conditions, or evidence of other phenomena now known to cause subdural hematoma or retinal hemorrhages, such as the hypoxic cascade, suggest misdiagnoses are likely even more widespread.[49]

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[47] EX35 at 1, 5.
[48] EX21 at 1-7.
[49] *Id*.

SUBSTANTIVE PROCEDURAL HISTORY

A. Robert's Trial

The State indicted Robert on two counts of capital murder: alleging that (1) he had "intentionally or knowingly" caused the death of "a person under the age of six" and (2) he had killed his child "in the course of committing or attempting to commit the offense of aggravated sexual assault." 1CR2-4. Throughout jury selection, the State specifically invoked SBS and invited each potential juror to consider just how "violent" the shaking would have to be to cause a child's death. *See, e.g.,* 7RR40, 88-89; 8RR23-25; 19RR20-21, 66-67. The State also emphasized with each potential juror its allegation that Robert killed Nikki after committing sexual abuse. *See, e.g.*, 7RR25-27, 67, 75, 127; 8RR10; 19RR22, 57.

In its opening statement, the State invited the jury to imagine violent shaking, and said that medical experts would testify in support of the State's view "that Nikki died or rather was the victim of child physical abuse consistent with the picture of what they call shaken impact syndrome." 41RR53-55. In the defense opening, despite Robert insisting to his attorneys that he had not harmed Nikki in any way, his counsel agreed with the prosecution that this was a "shaken baby" case and did not challenge the State's theory regarding cause of death during any phase of trial, instead arguing only that, because of his cognitive impairments, Robert lacked any intent to kill. *See, e.g.*, 41RR57-61. This enormously prejudicial and erroneous

concession by Robert's defense counsel is a further indication of the powerful sway of the prevailing medical consensus in 2003 that Nikki's intracranial symptoms could only be explained by abuse.

The State presented testimony from local medical staff, including doctors who had treated Nikki in the days before her collapse, emphasizing how Robert had not displayed appropriate emotion and that a short fall and Nikki's recent illness could not have caused her condition. 42RR14-19. The State elicited extensive testimony, spanning more pages of the trial transcript than any other witness, from the uncertified-SANE nurse who claimed she had seen "anal tears," graphically described "anal penetration," and offered her view of the proclivities of "pedophiles." 41RR127-42. But the State's causation and *mens rea* theory hinged on the testimony of two experts relying on the tenets of SBS as generally accepted in 2003. These subsequently discredited tenets were presented as scientific fact.

- **The jury heard unchallenged, but subsequently discredited, "scientific" testimony that, where the triad is present, shaking can be presumed as the mechanism of injury.**

Dr. Squires testified that the "medical findings" were "a picture of shaken impact syndrome," which she defined as synonymous with what the "public" knew as "shaken baby syndrome." 42RR106. Asked specifically about the significance of Nikki's triad, Dr. Squires testified that the triad meant that Nikki must have been violently shaken:

> Q: All right. And the items we talked about, the subdural hemorrhages, the retinal hemorrhages, and the brain swelling; what are they indicative of?
>
> A: 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. We see children fall out of windows and all sorts of things and we know what an impact injury looks like and when you see this much damage deep to the brain, then you see subdural blood. The reason subdural blood is so important is there are little blood vessels that go between the bone and the dura. And when you shake a baby those blood vessels break and you get blood over the top of the brain. So whenever we see lots of subdural blood, I don't mean localized right under a fracture, but all over, usually that's indicative of this shaking. 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.

42RR107-08. Dr. Squires also invoked the 2001 AAP position paper, which told pediatricians that they did not have to consider anything other than abuse upon seeing the triad. 42RR116-117; APPX23.

Dr. Squires further explained the then-prevailing view of the only real controversy with respect to SBS:

> 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. I will say that most ... experts do think that shaking alone, if done vigorously, will kill a child, but most children are shaken and then thrown against something.

42RR106-07.

Dr. Urban also relied on the SBS hypothesis, testifying that Nikki's "[s]ubdural hemorrhage is something that we see in injuries that are caused in children this age by blunt force and also by shaking or blunt impact injuries." 43RR75-76. Dr. Urban explained that the bleeding occurred "when that brain moves back and forth in the front of the skull" and that the bleeding caused "the swelling or edema." 43RR76, 81. She then highlighted Nikki's retinal hemorrhages as "something that is typically seen in a blunt force or shaking type of injury." 43RR76. She testified that, "[w]hen 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." 43RR79. Dr. Urban was repeatedly asked by the prosecutor to describe to the jury the mechanism of injury she believed had occurred in Nikki's case, over and over she used shaking terminology. EX36.

- **The jury heard unchallenged, but subsequently discredited, "scientific" testimony that shaking can cause internal head injuries without injuring the neck.**

Nikki had no neck or spinal injuries of any kind and few bruises. To explain the absence of external injuries, Dr. Squires relied on a central tenet of SBS at that time, suggesting "there's no signs of trauma at all and yet as that head is moving and then suddenly stops, these shear forces go through it and cause tremendous damage to the brain, deep in the brain." 42RR107. She also opined that "babies are … so

small compared to how big whoever it is shaking them…. [T]heir heads are big compared to their bodies, their neck muscles are weak." 42RR106.

Likewise, Dr. Urban testified that Nikki, a two-year-old child, had anatomical features, such as a "weak neck," that made her more vulnerable to shaking. 4EHRR76-78.[50] Dr. Urban suggested that, "if the child is shaken, it's this very large object sitting on a fairly weak neck. And, you know, the weakness in the neck protects the neck from getting hurt, but it really just doesn't protect the head[.]" 43RR82.

- **The jury heard unchallenged, but subsequently discredited, "scientific" testimony that shaking induces immediate brain damage with no lucid interval possible before the onset of symptoms.**

Consistent with another SBS tenet, Dr. Squires opined that the imagined shaking would have produced an obvious, instant change in Nikki's level of consciousness, thus allowing an inference that Robert, the person with her when she collapsed, must have caused Nikki's condition by shaking her:

> after the event that caused all this deep brain injury she would not have been normal. And any reasonable person would know that she wasn't normal…. [S]he would never have talked, walked, and been thought to be normal by anybody.

[50] Yet Nikki was not an infant with weak neck muscles; she was a two-and-a-half-year-old.

42RR108-09. Similarly, Dr. Urban testified at trial that, after being shaken, Nikki's injuries would have been immediately apparent—reflected in "a change in the level of consciousness." 43RR81.

- **The jury heard unchallenged, but subsequently discredited "scientific" testimony that a short fall could not have explained any aspect of Nikki's condition**.

All of the local medical personnel and law enforcement witnesses who testified at trial rejected the idea that a short fall could have explained Nikki's condition—yet another core SBS tenet. *See, e.g.*, 41RR66, 69, 89, 99, 123-125; 42RR17-18, 83-85, 108; 43RR156. Dr. Urban also rejected the concept that a short fall could have played any role in causing Nikki's condition; thus, she did not seek any information about the reported fall or otherwise investigate the circumstances preceding Nikki's collapse. 5EHRR215.

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Just before the jury was charged, the State abandoned the count of capital murder based on the sexual assault allegation. 44RR3. Yet the State continued to argue that there was evidence of a sexual assault based solely on the testimony of the nurse who was not actually SANE-certified and whose opinions both Drs. Squires and Urban had declined to endorse. 46RR58-60.

B. Post-Trial Proceedings

The jury convicted Robert of capital murder on the lone count before it. 47RR-49RR. The punishment-phase began the next day; Robert was sentenced to death on February 14, 2003.

The same defense lawyer who had conceded that this was a Shaken Baby case represented Robert on direct appeal. This Court affirmed in an opinion, describing the SBS trial testimony at length. *Roberson v. State*, No. AP-74,671 (Tex. Crim. App. June 20, 2007) (unpub).

James Volberding, a lawyer recommended by trial counsel, pursued an initial state habeas application, which did not include any claims challenging the State's SBS cause-of-death theory. The habeas court recommended denying habeas relief without an evidentiary hearing, and this Court later denied all relief and simultaneously dismissed a 2005 *pro se* filing as an unauthorized successive application. *Ex parte Roberson*, 2009 WL 2959738 (Tex. Crim. App. Sept. 6, 2009) (unpub.).

Right after relief was denied, Robert wrote to the federal district court requesting new appointed counsel. But the court granted Volberding's request to stay on as federal counsel, despite the conflict of interest suggested by the double representation. *See Martinez v. Ryan*, 566 U.S. 1 (2012). Robert repeatedly sought new appointed counsel willing to pursue his innocence, but his requests were denied.

EX38-EX44.

A federal habeas petition was filed but did not include any claims related the SBS cause-of-death hypothesis that was, by then, being widely challenged. On September 30, 2014, the federal district court denied the federal habeas petition. Less than a year later, the Fifth Circuit denied an appeal.

Soon thereafter, the State sought and secured an execution date for June 21, 2016.

Meanwhile, Robert was sending urgent requests seeking new counsel.[51] Three months before his scheduled execution, the Fifth Circuit finally appointed new federal habeas counsel, who recruited new state habeas counsel.

C. The -03 Proceeding

On June 8, 2016, Robert's new state habeas counsel, one of the undersigned, filed the -03 Application, which relied, in part, on a new procedural vehicle enacted specifically to address convictions based on subsequently discredited or changed scientific understanding. *See* TEX. CODE CRIM. PROC. art. 11.073. That application, supported by several volumes of evidentiary proffers, was submitted to this Court, along with a motion seeking to stay Robert's then-pending execution.

Mere days before Robert's scheduled execution date, this Court stayed the

[51] The conflict of interest with his appointed counsel was so pronounced that it became the subject of media scrutiny. *See* Lincoln Caplan, *The Death Penalty in Texas and a Conflict of Interest*, THE NEW YORKER (Dec. 3, 2015).

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 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. APPX12; APPX19. Contrary to her trial testimony, the 2016 affidavit 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* EX36.

The -03 evidentiary hearing commenced on August 14, 2018, but was continued that same day, and then resumed from March 8-17, 2021, due to various delays not attributable to the habeas applicant. *See* EX44. After the hearing record was prepared, the parties submitted proposed Findings of Fact and Conclusions of Law (FFCL). The applicant's proposed FFCL summarizing the key evidence in the new 13-volume record was 302-pages long. The State's proposal was 17-pages long and relied primarily on the 2003 trial testimony, denying that the tenets of SBS/AHT had changed since 2003 and maintaining that Nikki had died from inflicted head trauma.

After this Court issued a directive to the trial court to wrap up the proceeding, on February 14, 2022, the trial court issued its FFCL, which largely tracked the

State's proposal, including its typographical and grammatical errors, finding that SBS is "still an accepted mechanic [sic] of death" and adopting the State's position that Nikki died from inflicted head trauma.

About a year later, this Court summarily adopted the habeas court's FFCL and denied relief. *Ex parte Roberson*, 2023 WL 151908 (Tex. Crim. App. Jan. 11, 2023) (unpub.).

On May 11, 2023, Robert's counsel filed a Petition for a Writ of Certiorari in the Supreme Court of the United States. Multiple amici urged the Court to consider the case: the Center for Integrity in Forensic Sciences, Concerned Physicians and Scientists, Retired Federal Judges, the Innocence Project of Texas, and Witness to Innocence. But, on October 2, 2023, the Supreme Court declined to consider the petition.

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

The investigation to support the instant Application continued, however. But before it could be filed, the Anderson County DA announced an intent to seek an execution date. Therefore, on April 4, 2024, Robert's counsel filed a motion seeking to be heard before any execution date was set, explaining the intent to file this subsequent application based on new evidence. Then, on April 24, 2024, Robert's counsel filed a Suggestion to Reconsider on the Court's Own Initiative in the -03

proceeding, which, to date, remains pending.

On June 17, 2024, the State filed a Motion Requesting Execution Date in the trial court. The next day, Robert's counsel filed an Opposition to Anderson County DA's Motion Requesting Execution Date in the trial court again requesting a hearing. The State then filed an opposition to Robert's first-filed Motion to be Heard. Without permitting a hearing, the trial court signed an order setting an October 17, 2024, execution date.

This Application follows.

NEW PREVIOUSLY UNAVAILABLE EVIDENCE ESTABLISHES NIKKI DIED OF NATURAL AND ACCIDENTAL CAUSES

The complete body of new evidence, only available after 2016, establishes what did and did not cause Nikki's death.

A. New Evidence Shows Nikki's Death Was Not Caused by Inflicted Head Trauma–Imaging of Nikki's Head Shows a Single Minor Impact Site

Nikki's CAT scans reveal only a single minor impact site on the back of her head, with no corresponding fractures—consistent with Robert's report that Nikki fell out of bed while sleeping before she later ceased breathing.

The CAT scans of Nikki's head, taken soon after admission to the Palestine Regional ER on January 31, 2002, were rediscovered in the courthouse basement in 2018. Eventually, both parties had access to digitized copies of the images and the opportunity to consult with a radiologist. EX44. The only radiologist to interpret these images—the most objective evidence of the condition of Nikki's head upon admission to the hospital—is pediatric radiologist Dr. Julie Mack, board certified by the American Board of Radiology.[52]

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[52] Dr. Mack graduated from Harvard Medical School, is currently licensed to practice medicine in Pennsylvania. She did her residency at Baylor University Hospital where she first began her training in medical imaging, known as radiology. At Penn State Hershey Medical Center, she interprets medical imaging studies. She has published in the field of pediatric radiology, has presented at conferences concerning pathology and radiology, and researched and written about SBS/AHT as it relates to radiology. EX6 at Exhibit B.

For several reasons, the initial Palestine Hospital ER radiology images are the best objective evidence of the condition of Nikki's head at the relevant time.

First, Nikki's condition was dynamic and evolved over the course of the two days she spent in the hospital before she was taken off life support and pronounced dead. The small amount of subdural blood outside of her brain, captured in the CAT scans, continued to grow after Nikki's heart was resuscitated when her brain had already become non-perfused (*i.e.*, dead). EX8.

Second, Nikki's pneumonia, which progressed to sepsis, is a risk factor for Disseminated Intravascular Coagulation (DIC). DIC is a form of abnormal blood coagulation. With this disorder, blood in small vessels become destabilized and can cause bleeding anywhere in the body. Nikki's hospital records show that she had DIC. EX5; EX7. This condition can mean that anyone handling the child—including her father trying to revive her and then medical personnel trying to save her life—may inadvertently worsen internal bleeding.

Third, the autopsy process itself, during which Dr. Urban made incisions in Nikki's scalp, would have caused further bleeding.

Dr. Urban presumed that the condition she observed underneath Nikki's scalp on February 2nd was Nikki's condition when she was admitted to the ER on January 31st. That was incorrect—as the CAT scans now demonstrate. By Dr. Urban's own admission, she never looked at the CAT scans. 9EHRR109. The principal basis for

Dr. Urban's conclusion that the intracranial bleeding was evidence of "multiple impacts" is not defensible. By the time of the autopsy, Nikki's condition had been deteriorating for two days; and the medical intervention itself would have necessarily increased the internal bleeding and the blood flow to a non-perfused brain where it accumulated under the dura and scalp, outside of the brain. EX5; EX7; EX8.

Dr. Mack's new evidence directly contradicts Dr. Urban's testimony, at trial and in the -03 proceeding, that Nikki had multiple impact sites on her head, Dr. Urban's basis for believing that Nikki died of inflicted head trauma.

Dr. Mack's expert opinions also rebut Dr. Urban's testimony, at trial and during the -03 proceeding, that the large volume of subdural blood observed during the autopsy was proof of "multiple impacts." The CAT scans that Dr. Mack read show that "[t]he volume of blood is ***not*** large, and the small volume present is corroborated by descriptions of the pathology" regarding Nikki's infection and DIC. EX6 (emphasis added).

Dr. Mack further opined that the "single impact" is precisely the kind of "insult" that "can occur after short falls as a direct result of impact." Moreover, Dr. Mack, explained, after such a fall, "[i]n some cases, the subdural hemorrhage will be minor and unassociated with any brain swelling." But when the child is ill and straining for oxygen, as Nikki was, the condition can prove fatal. *Id.*

This new evidence illustrates that the single bump on the back of Nikki's head almost certainly occurred from the short, unwitnessed fall out of bed—or before that. But the bump is associated only with a small subdural bleed—not the large volume of blood Dr. Urban observed two days later during the autopsy. That large volume of blood is explained by the oxygen-deprivation caused by Nikki's pneumonia, her DIC, and the medical intervention to try to reverse her condition. It is ***not*** proof of inflicted head injury.

B. New Evidence Interpreting Overlooked Chest X-Rays Correlate with the Finding That Nikki's Lungs Were Diseased

Radiologist Dr. Mack has now been able to interpret all available images made of Nikki's lungs, some of which were not produced until this year. Dr. Mack's objective was to correlate the radiology images with other relevant information, particularly the pathological findings of Dr. Green, discussed below, per best clinical practice. EX6. Dr. Mack's recent assessment is yet more new evidence that Nikki's lungs were diseased and worsened during her final hospitalizations:

- A chest x-ray taken in Palestine on January 31st "shows an endotracheal tube" placed "too low" and shows "perihilar infiltrates (increased density/opacification in the regions around the lung hila)," which is associated with "viral lung disease."

- A chest x-ray made after Nikki was transferred to Children's Hospital "shows persistent predominantly perihilar streaky opacification, more pronounced than on prior chest x-ray."

- A chest x-ray made on February 1st "at 0111 hours shows worsening opacification of the lungs (increasing density where there should be air)."

- "A follow up chest x-ray on 2/1/02 at 0334 hours shows continuing worsening of the opacification, bilateral and more diffuse in distribution."

Id.

Dr. Mack explained that the "increasing opacification" in the lung images could "represent edema (fluid leaking into the lungs unrelated to pre-existing lung disease)" or reflect the progress of pre-existing illness because "increasing opacification of the lungs is not specific for edema." To make an accurate determination, she (and any qualified radiologist) needed input from a lung pathologist. Upon consulting with lung pathologist Dr. Green, who had identified viral lung disease and a necrotizing bacterial bronchopneumonia in Nikki, Dr. Mack was confident "the cause of the increasing opacification seen over the course of several chest x-rays is not simply edema related to resuscitation efforts." Dr. Mack also emphasized Dr. Green's DIC finding as "most likely related to sepsis and a complication of her long standing lung disease." *Id*.

C. New Evidence Proves Nikki Died of a Severe Double Pneumonia That Progressed to the Point of Sepsis

The jury did not hear anything about Nikki having pneumonia. But now, for the first time, a highly qualified lung pathologist, Dr. Francis Green, has evaluated the lung pathology evidence and provided a comprehensive assessment of the state of Nikki's lungs, concluding that Nikki died of pneumonia. EX5.

Dr. Green is a board certified anatomical pathologist who has specialized in diseases of the lung since 1978.[53] As noted in his 2024 report, Dr. Green found "that Nikki's death was caused by a severe, undiagnosed viral pneumonia, the onset of which occurred at least a week to several weeks before her collapse." *Id.* Dr. Green's opinions have been corroborated by Dr. Mack's analysis and conclusions concerning the now-available lung imaging.

Dr. Green made a comprehensive study of Nikki's lung tissue and found irrefutable proof of a chronic interstitial viral pneumonia, noting her history of chronic infections that had resisted multiple strains of antibiotics. He also found that the pneumonia had features of "a chronic viral infection complicated by a secondary

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[53] Dr. Green is Emeritus Clinical Professor in the Department of Pathology & Laboratory Medicine of the Cumming School of Medicine, University of Calgary. In addition to being a university professor he has held a clinical appointment as head of autopsy services at the regional tertiary medical center, where he specialized in autopsy and lung pathology. He has had academic and clinical appointments continuously since 1969 in medical schools in the United Kingdom, the United States, and Canada, for whom he has designed and taught courses on Lung Pathology, Lung Cells and Morphometry, Pulmonary Defense Mechanisms, Advanced Respiratory Physiology and Principles of Medicine. EX5 at Exhibit 1.

Dr. Green has specialized in diseases of the lung since 1978. He became a Diplomate in the American Board of Pathology (Anatomic) in 1984 and, during his nearly six-decade long career, he has received numerous awards for outstanding research into the origins and pathogenesis of lung diseases. For decades, he has advised national and international committees and governmental entities on the causes of lung disease and ways to prevent or treat them. *Id*.

He has published 215 peer-reviewed articles in peer-reviewed medical journals and edited authoritative texts and two books in the field of lung pathology. Among his numerous publications are scientific articles relevant to pediatric lung disease and viral lung infections, such as the illness he identified in Nikki. *Id*.

bacterial pneumonia" so advanced that it had caused part of her lung tissue to "necrotize," *i.e.*, slough off and die. *Id.*

Dr. Green documented the devastation wrought by Nikki's pneumonia throughout her respiratory tract. Her lung tissue shows the effects of the chronic interstitial viral pneumonia, which had caused Nikki's lung tissue to thicken, hindering her breathing and ultimately cutting off oxygen to her brain and other vital organs. EX5, Figure 7. Dr. Green explained that the thickening in Nikki's lung tissue was largely due to lymphocytes (a form of small white blood cells), and he stated that the lymphocytic inflammation exhibited in Nikki's lung tissue was characteristic of interstitial viral pneumonia. EX5.

Dr. Green further demonstrated that Nikki's lung tissue shows a bacterial infection, tracheitis, at the level of her thyroid gland and enlarged mucous glands, a finding indicative of Nikki's body's response to chronic (weeks to month) infection. *Id.*, Figure 1. Nikki's trachea showed acute ulceration from infection, and abnormal regeneration of her mucosa, inflammatory changes, and disorganized epithelium and atypical nuclei and that are characteristic of an active viral infection. *Id*., Figures 2-4.

Her lung tissue, stained during the autopsy to reveal microscopic details, also shows lymphocytic bronchiolitis, which Dr. Green described as typical of a viral infection. *Id*., Figure 5.

The lung tissue further shows how the cilia, small hair-like fibers lining the alveoli (tiny air-sacs in the lungs) and Nikki's trachea, had sloughed off after dying. Per Dr. Green, this is a classic sign of a severe bacterial bronchopneumonia, on top of Nikki's viral pneumonia. EX5.

Dr. Green explained that the subdural blood observed during the autopsy, misinterpreted as the product of trauma, is explained by the oxygen-deprivation that Nikki experienced because of her pneumonia and her disease-related DIC. *Id.* The subdural blood does not support a conclusion that Nikki died of blunt force head injuries; it is explained by looking beyond her head to her infected lungs and understanding the anatomical relationship between the cardiovascular system and the brain. *See id.*; *see also* EX8.

Neither of the State's experts in the -03 proceeding (Dr. Urban and Dr. Downs) have any specialized training in lung pathology.[54] By contrast, Dr. Green has spent decades treating, researching, and publishing extensively about lung pathology. Their unprincipled rejection of the reality that Nikki's lungs were infected with fatal viral and bacterial bronchopneumonia is refuted by photographic images made of Nikki's actual lung tissue collected during the autopsy, as seen under a microscope.

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[54] Dr. Urban performed the 2002 autopsy; Dr. Downs is affiliated with the Shaken Baby Alliance, an organization that teaches prosecutors how to obtain SBS convictions. Both are forensic pathologists but with no special training in lung disease, radiology, head trauma, or medical toxicology, the specializations needed to understand Nikki's complex condition.

Dr. Green's report also explains the evidence supporting the DIC finding. Utilizing a new objective scoring system, published in 2022, Dr. Green reviewed the hospital's blood test results, and identified clinical and laboratory evidence that Nikki had DIC. This new method for diagnosing DIC is based on a score for abnormalities in several tests, based on platelet counts, prothrombin, time–international normalized ratio (PT-INR) and D-dimer levels in critically ill patients:

Table 4. Quick DIC diagnostic criteria.

	Cut-Off Value	Points
PT-INR	≥ 1.2	1
Platelet count	$\leq 12.0 \times 10^{10}/L$	1
D-dimer	≥ 10.0 μg/mL	2
Underlying diseases * due to DIC		1
Total	≥ 3 points	Possible DIC

DIC, disseminated intravascular coagulation; PT-INR, prothrombin time–international normalized ratio; * severe infections, hematological malignancy, solid cancer, aneurysm, obstetric diseases, critical illness such as trauma, shock and inflammation, multiple organ failure, etc.

Id.

Dr. Green explained that Nikki's blood results—taken shortly after her admission to Children's Hospital in Dallas—are "highly suggestive," a total of "4 out of 5," for DIC. *Id.* When a patient has DIC, the clotting of blood in small blood vessels may exceed the anticoagulant systems, resulting in widespread bleeding. Therefore, Nikki's DIC would have contributed to any bleeding later observed during autopsy. The medical records and laboratory tests, which were not considered relevant at the time, now confirm that, upon admission to hospital, Nikki was

seriously ill with pneumonia that had advanced to sepsis, which, in turn, spawned DIC.

Dr. Green further found that Nikki's death may have been hastened by the combination of medications that were prescribed to her, which would have further suppressed her breathing. Nikki's medical records indicate that she had a high fever and was diagnosed with a "respiratory illness," "possibly viral," two days before her collapse. These same records indicate that she was prescribed Phenergan/promethazine in two forms: suppositories and cough syrup. The cough syrup also included codeine, which metabolizes in the body to morphine. Both promethazine and codeine contain properties that suppress respiration. These medications, in combination with Nikki's pneumonia, would likely have hastened her death. EX5.

Dr. Green, whose credentials as a specialist in lung disease are unassailable, has now entirely rebutted the habeas court's 2021 endorsement of the State's experts' insistence that there was no pneumonia to "see" except, perhaps, "ventilator pneumonia." Dr. Green looked but found "no evidence" of ventilator pneumonia, known as "VAP." As Dr. Green explained, ventilator injuries may result from physical injury to the lungs due to prolonged high pressures and high oxygen tensions; but he found no signs of these sorts of mechanical injuries in Nikki's lungs. Moreover, a diagnosis of VAP requires that the patient be intubated and stable for a

minimum of four days on the ventilator. Nikki was only on a ventilator for 36 hours. Furthermore, she was basically dead-on-arrival at the hospital, with fixed, dilated pupils, indicating that she had already been deprived of oxygen longer than necessary to induce brain death (approximately 10-12 minutes). In that state, she was not susceptible to VAP. *Id.*

Dr. Green was adamant: "The condition of Nikki's lung tissue cannot be reconciled with the conclusion that her death was caused by blunt force head injuries, inflicted or otherwise." *Id.* He attributed the subdural blood observed during the autopsy to "the oxygen deprivation that she experienced because of her pneumonia. Oxygen deprivation can cause vessels in the dural membrane to leak. If oxygen deprivation persists, the subdural blood can accumulate and cause encephalopathy or brain swelling." *Id.* He emphasized that this condition is not specific to trauma. "Considering the severe pneumonia and DIC," Dr. Green found "no basis for suggesting that the subdural bleeding and brain swelling was caused by [head] trauma." *Id.*

D. New Evidence Shows Nikki's Respiratory Distress Was Exacerbated by Excessive Doses of Inappropriate Prescription Medications

The jury did not hear from a medical toxicologist or see the toxicology report that was part of the autopsy file, which was not disclosed until well after the -03 Application was filed. EX11.

During the -03 evidentiary hearing, forensic pathologist Dr. Carl Wigren

suggested that the belatedly produced toxicology report raised concerns. He looked up the drugs listed in the toxicology report and saw that there seemed to be a dangerously high level of promethazine in Nikki's system at the time of autopsy. Nikki's medical records also showed that, in the days right before her collapse, she had been given two different prescriptions for Phenergan, which is promethazine, including one mixed with codeine, which metabolizes into morphine, an opiate. EX12; 5EHRR225-238; 6EHRR25.

During the -03 proceeding, Dr. Wigren and Dr. Auer urged additional investigation into the possibility that the promethazine played a role in Nikki's death EX12; EX10. But the State's witnesses dismissed the toxicology results as irrelevant to understanding Nikki's death. The trial court apparently agreed, as no discussion of these respiratory-suppressing medications or the expert testimony regarding their significance is in the -03 FFCL. The only reference in the FFCL is this brief comment summarizing Dr. Wigren's testimony: "Nikki was impaired due to opiate and promethazine." FFCL at 5.

After obtaining the necessary resources, pro bono, to identify and obtain a qualified specialist in medical toxicology, undersigned counsel asked Dr. Keenan Bora to undertake a comprehensive review of the drugs given to Nikki and the results of the various toxicology screens. His assessment is in his 2024 report. EX7.

Dr. Bora is a board-certified emergency room physician who is also board

certified in medical toxicology.[55] Dr. Bora found that the Phenergan/promethazine levels in Nikki's body, per the post-mortem toxicology report, would have severely compromised her respiratory ability, contributing to her death. *Id.*

Phenergan now carries an FDA "black box warning" against prescribing it to children Nikki's age and in her condition. EX19. Dr. Bora noted that the first FDA-mandated black box warning came out in November 2004, after Nikki's death, warning against prescribing it to children less than two years of age. But, he explained, this does not mean that the drug is safe for someone 27-months-old, like Nikki. Moreover, he found that Nikki was "most certainly" administered significantly more promethazine than she should have been. He made a conservative calculation working backwards from the post-mortem level and his knowledge of the drug's half-life. He found that "even the lowest calculated level" indicated she had been given an amount "significantly higher than any therapeutic concentration expected," which he believed "could certainly be explained by the dual prescriptions" written by different doctors on January 28th and January 29th in 2002. He instructed that "the clinical impact of too much promethazine would be respiratory depression (not breathing as much) as well as potentially ataxia (unsteady

[55] After obtaining an MD from Drexel University College of Medicine, Dr. Bora completed a three-year residency in emergency medicine and then went on to complete a two-year fellowship in medical toxicology. This area of medicine focuses on understanding medications, drugs, overdoses, withdrawal states, poisonings, and drug interactions. *Id.*

gate) making it more likely for her to fall over." EX7.

Contrary to the opinion offered by Dr. Downs during the -03 evidentiary hearing, Dr. Bora does not believe that post-mortem redistribution artificially elevated her Phenergan/promethazine levels. While drugs can, under some circumstances, be redistributed after death, Phenergan would be expected to redistribute, at most, 5%—far less than would account for Nikki's dangerously high post-mortem level of promethazine. Moreover, promethazine would not go into her bloodstream after she died, as Dr. Downs speculated. The high levels found in Nikki's blood are best explained by the double prescriptions issued by two different doctors on consecutive days. *Id.*

Dr. Bora also explained that Nikki had been given a Phenergan/promethazine prescription with codeine on January 29, 2002. Codeine, whose "main active metabolite" is morphine, metabolizes much faster than promethazine "with levels of codeine and morphine both usually being undetectable within 24 hours from the last dose." Therefore, as Dr. Bora explained, if Nikki had received codeine at the same time as the promethazine (as was prescribed), the codeine could easily have been out of her system and undetectable at the time of her death while still having had a serious effect on her by suppressing her ability to breathe. *Id.*

Dr. Bora noted that, per her medical records, Nikki plainly had a respiratory infection "and numerous signs that her body was not fighting it off well"—including

high heart rate, low blood pressure, and fever, indications of septic shock. He found that the best explanation for her death is "severe sepsis." As his report explains: sepsis is a condition in which a patient has either a bacterial or viral infection (and we now know Nikki had both) and the body is trying to fight it off. Septic shock is the stage just before death when the patient has trouble keeping blood pressure up. Dr. Bora explained that sepsis is associated with extremely high mortality rates. Approximately 50 percent of infant patients with septic shock and 20 percent of patients with severe sepsis die during their hospitalizations. EX7 at 5.

Furthermore, sepsis is known to cause problems with the coagulation system and makes patients bleed easier—and it is now known that Nikki had DIC. Sepsis, combined with either a fall out of bed or a seizure could certainly have caused both an intracranial bleed as well as leaky capillaries in the small vessels in the eyes. He also noted that, in the hospital, Nikki was put on a drip of a medication that is rarely, if ever, used now: papaverine. This medication is noteworthy because it causes blood vessels to dilate and stretch out slightly, which would have made Nikki even more susceptible to small internal bleeds. *Id.*

Additionally, Dr. Bora found that the drugs Nikki had been prescribed would have "decreased her seizure threshold (made seizures more likely)" as well as "caused her to be uncoordinated and more likely to fall and hit her head." *Id.*

During the -03 proceeding, the State's expert, Dr. Downs, testified that

Nikki's alanine transaminase (AFT) were elevated and speculated that this was related to Nikki's liver malfunctioning, which he attributed to the effects of trauma. 10EHRR49. Dr. Bora instructed that, after death, aspartate aminotransferase (AST) or ALT, which are held in the liver, are released into the bloodstream, which elevates AFT. Contrary to the views of Dr. Downs, Dr. Bora instructed that Nikki likely experienced liver damage because she was in septic shock. While AST can be elevated if a person has blood clots and hematomas from trauma directly to the liver, Nikki's autopsy, performed by Dr. Urban, adduced no evidence that Nikki's liver was injured in any way by trauma; thus, there is no evidence that AST and ALT were elevated as a result of trauma. In short, her AST and ALT went up because Nikki was dying of sepsis, not because she had experienced trauma to the liver (or anywhere else). Moreover, patients who have bacterial or viral infections that lead to severe sepsis or septic shock are more likely to bruise, bleed, and hemorrhage by a variety of pathways. *Id.*

Dr. Bora's expert opinions correlate with, and expand upon, those of Dr. Green and Dr. Mack. As Dr. Bora concluded, Nikki may not have died from a Phenergan/promethazine overdose alone, but the level of Phenergan/promethazine almost certainly played a significant role in her death by exacerbating her respiratory challenges, which would have been compounded by the codeine she was prescribed while her body was struggling to fight off an advanced infection (*i.e.*, her

pneumonia).

E. Nikki's Brain Condition Was Not Caused by Trauma

The new evidence from the head CAT scans found in a courthouse closet, and Dr. Green and Dr. Bora's new evidence that Nikki died because of a double viral and bacterial pneumonia exacerbated by toxic doses of promethazine are corroborated by evidence from neuropathologist Dr. Roland Auer.[56] Dr. Auer concluded that Nikki's death could not reasonably be deemed a homicide. EX8; EX10.

Dr. Auer explained 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, as confirmed by Dr. Mack's analysis. EX8; EX6. The bump on the back of Nikki's head (captured in the CAT scans) is entirely consistent with a fall out of bed and was, in any event,

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[56] Dr. Auer is both a research scientist with a Ph.D. in medical science and medical doctor certified in neuropathology by boards in both the United States and Canada. He is the author of a leading neuropathology treatise, Forensic Neuropathology and Associated Neurology, and has over 130 scientific articles in peer-reviewed journals. He is employed full time as a professor at the Royal University Hospital in the Department of Pathology and Laboratory Medicine at the University of Saskatchewan, where he teaches courses in clinical neuropathology to medical residents and medical students. He has spent over 30 years performing autopsies and conducting research in laboratories. As a neuropathologist, Dr. Auer focuses on the brain, spinal cord, related nerves and muscles, and the eyes. His particular field of study is brain damage, including the effect of ischemia (lack of blood flow) on the brain, and epilepsy, trauma, and neurotoxicology. EX9.

insufficient to explain why Nikki stopped breathing and died. *Id.*

The second impact site Dr. Urban noted was on the right side of Nikki's head—but that was where a pressure monitor had been surgically attached to Nikki's skull during her final hospitalization. Hospital records show that the pressure monitor was drilled into Nikki's skull to monitor her brain, a process that causes bleeding into the scalp, further altering what would later be observed at the time of autopsy. APPX10. As Dr. Auer explained, there is no reasonable basis for suggesting that the bruising associated with the pressure monitor, inserted by hospital staff, is evidence of a "blow" inflicted before Nikki arrived at the hospital. EX10 at 125. Dr. Urban did not reveal to the jury that a pressure monitor had been surgically affixed to Nikki's head or acknowledge the source of the corresponding bruising; she claimed, misleadingly, that it was the site of a "blow."[57]

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[57] Dr. Urban also pointed to a torn frenulum inside Nikki's mouth as another reputed "impact site," which Dr. Urban attributed to a "blow." A frenulum is a small fold of skin beneath the tongue or between the lip and gum. Yet when she performed the autopsy, 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 ER because it was initially misplaced, as Dr. Mack has now verified. APPX5; EX6. A torn frenulum is common when a child is intubated. EX10 at 113. The staining 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. *Id.* at 114. Moreover, a torn frenulum does not support the fatal head trauma finding. *Id.* at 123-25. 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

Finally, Dr. Urban suggested that areas of darker blood she observed in what she called the "subscalpular" area were proof of different impact sites. But Dr. Urban, per standard autopsy practice, had made an incision at the back of Nikki's head and then pulled Nikki's scalp back, which is how Dr. Urban observed the "subscalpular" blood. The autopsy process itself rearranged the dark subgaleal blood at the incision site; thus, that darker blood, which was moved around, could not reasonably be construed as evidence of "multiple impact sites." 5EHRR212-13.

In short, there is no evidence to support the "multiple impacts" opinion; and the single minor impact captured in the imaging of Nikki's head does not explain Nikki's death. EX10.

Further, the current medical consensus is that intracranial bleeding is not proof of inflicted head trauma. Intracranial bleeding can be caused by accidental head trauma sustained in a short fall or by a host of naturally occurring phenomena associated with hypoxia (oxygen-deprivation). *See* CLAIM II.

Dr. Squires told the jury that Nikki's death could only be explained by "violent shaking" that produced a "massive brain injury." 42RR107; 42RR120. Dr. Squires acknowledged the lack of external signs of any injury on Nikki: "no scars, no unusual bruising or anything." 42RR96. That is one reason, consistent with medical views at

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would have been some sign of this on her face; but there wasn't—no abrasion, swelling, bruise, or disruption of skin.

that time, she concluded that the case was "a picture of shaken impact syndrome" aka "shaken baby syndrome." 42RR105-06.

Dr. Urban, who performed the autopsy the day after Dr. Squires' SBS diagnosis, testified at trial regarding signs of "shaking" and "multiple impacts." Even removing "shaking" from the equation, Dr. Urban's "multiple impacts" opinion cannot withstand scrutiny, per the new radiological evidence described above as well as the expert opinions of a neuropathologist (*i.e.*, expert in head and brain injury). EX8.

F. SBS/AHT Was *the* Causation Theory That Permitted the State to Allege That a Crime Had Occurred; No Other Credible Evidence Supported the Conviction

The new evidence described above, which forms the basis for the legal claims delineated below, is material and supports granting relief on each claim. No other credible evidence supports the contention that Robert did anything to harm his child. At trial, aside from the SBS cause-of-death theory and the baseless sexual abuse allegations debunked below, the State relied in the guilt-phase on decidedly unreliable "bad conduct" testimony from Robert's estranged girlfriend Teddie Cox, her daughter Rachel Cox (age 10), and Teddie's minor niece Courtney Berryhill (age 11). They each claimed that, at some unidentified time in the past, they had seen Robert "shake" and otherwise mistreat Nikki. 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 Gray. Their testimony was unsupported by any contemporaneous evidence, reflected pronounced bias, and suffered from severe credibility problems. For instance, none of the allegations were reported until well ***after*** Robert's arrest—and only under pressure from state actors who told these witnesses that Robert had killed Nikki by violently shaking her. Their stories reflected inconsistencies and notable exaggerations.

The stories told at trial by Teddie Cox, Rachel Cox, and Courtney Berryhill, contradicted themselves and each other about when and how Robert had supposedly "shaken" Nikki, undermining their individual and collective credibility. When being interrogated by child protective authorities, police, and prosecutors, it is understandable that these vulnerable individuals, who loved Nikki as Robert did, would be devastated by her death—and scared by the authorities' insistence that Robert ***must*** have caused Nikki's death. Indeed, Teddie was told that she too was going to be the subject of a CPS investigation as she was urged to provide information implicating Robert.

Teddie was an intellectually impaired, impoverished woman who, soon before trial, overdosed on drugs, attempted suicide, and was confined to a psychiatric hospitalization. When she testified, she was not in a position to take care of her daughter Rachel, then living with a grandmother. She admitted that Robert had never hurt her in any way, but she was repeatedly asked to describe how he had shaken

Nikki. 42RR175-77, 185-86, 190-91. Her response to leading questions was 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 own 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.*

As for the minors related to Teddie, she herself described her troubled daughter Rachel as someone she "could not trust." 43RR19. Certainly, Rachel was a highly vulnerable girl. Not long before Robert's trial, she had had to testify in a different trial about being sexually abused by her biological father. This proceeding, in which Teddie and Courtney also testified, had resulted in a mistrial. 43RR5.

Robert's ex-wife Della Gray, who had not seen him 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 outlandish abuse allegations she described during Robert's trial are completely undermined by the fact that she never reported any such incidents—either when they supposedly

occurred or during the divorce proceedings conducted years before Nikki's birth when she would have been highly motivated to adduce evidence that Robert was a bad father. *Id.*; *see also* EX37.

The testimony of these witnesses, which is facially incredible, certainly does not diminish the materiality of new evidence establishing that Nikki died of a severe double pneumonia, inappropriate prescription medications, and a short fall. *See also* EX44 (describing attempts to engage Teddie, Rachel, and Courtney regarding trial testimony they no longer remember); *see also, 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).[58] The new 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) is a mere smokescreen.

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[58] *See also* M.L. Howe et al., MEMORY AND MISCARRIAGES OF JUSTICE (Abingdon, UK: Routledge 2018) (explaining how children's memory regarding abuse is especially susceptible to ex post facto manipulation, even by well-intentioned adult interlocutors).

CLAIMS

A. Claim I: New Evidence Establishes That the Conviction Was Obtained Using Material, False Testimony

1. Overview

Robert was convicted based on false evidence that materially prejudiced the fairness of his trial and inflamed the jury against him. The State has recently tried to distance itself from the SBS hypothesis it employed in 2002-2003 to arrest and convict Robert by trying to reframe this case as a "blunt impact only" case. But the State's position is belied by the trial record riddled, from beginning to end, with references to "Shaken Baby Syndrome," "shaking," and "shaking" as indistinguishable from "impact." EX36. Robert's trial and the jury's verdict were based on the SBS/AHT principles, *id*., that even ardent defenders of the hypothesis concede are no longer valid.

During the -03 proceeding, the medical examiner, Dr. Urban, repeated her trial testimony that she believed the cause of Nikki's death was blunt force injury but claimed, contrary to her trial testimony, that shaking was not necessarily involved. *See* 9EHRR117; 9EHRR204; 9EHRR208 ("I don't know that there is a shaking component here."). However, at least 30 times during her trial testimony, the jury heard descriptions of violent shaking or the opinion that shaking was a means whereby Nikki had been injured. EX36. Additionally, the State's retained expert in the -03 proceeding, Dr. Downs, repeatedly attested that, although he continues to

believe that shaking can cause brain damage, absent any evidence to support that hypothesis, he does not believe there was shaking in this case. *See, e.g.*, 10EHRR95-97, 111, 136, 1144.[59] However, the State cannot in good faith argue now that that Robert was not convicted using a Shaken Baby causation theory while simultaneously arguing that the extensive trial testimony about shaking as the cause of Nikki's condition (from Drs. Squires and Urban) is somehow not false.

The new evidence, all of which is incorporated here by reference, shows how the principles underlying the SBS/AHT hypothesis have been completely debunked since the -03 Application. But in addition to the erroneous SBS cause-of-death hypothesis, the Reporter's Record is filled with entire categories of false testimony. Any of these false narratives warrant a new trial; the compendium exposes a proceeding devoid of integrity—even if it were understandable that the State, then laboring under the misassumption that Nikki had been violently shaken and battered to death, may have felt justified to push the envelope, painting Robert as a monster capable of such violence. New evidence shows that he, one of the first graduates of TDCJ's inaugural faith-based education program on Texas's death row, was both

[59] But thereafter, Dr. Downs abandoned his insistence that this is "not a shaking case" after he was presented with Dr. Squires' trial testimony asserting that shaking was, in her opinion, the primary mechanism of injury; Dr. Downs deferred to Dr. Squires as "the expert," while revealing that he did not seem to know what her trial testimony had been. For this and a myriad other reasons, the habeas court should have found Dr. Downs' opinions unreliable.

wrongfully accused and gravely misjudged during a truncated investigation. *See, e.g.*, EX1; EX37.

2. Legal Standard

Ex parte Chabot, 300 S.W.3d 768 (Tex. Crim. App. 2009), holds that that the State's presentation of false testimony can violate a defendant's due process rights—even if the falsity was unknown at the time. *Ex parte Chavez*, 371 S.W.3d 200 (Tex. Crim. App. 2012), holds that prevailing on such a claim requires showing only that "the testimony, taken as a whole, [gave] the jury a false impression." *Id.* at 208. *See also Townsend v. Burke*, 334 U.S. 736, 740-41 (1948) (finding conviction based on "materially untrue" information violates due process "whether caused by carelessness or design"). More specifically, habeas relief based on the use of false evidence is warranted where an applicant shows that false evidence (1) was presented at trial and (2) was material to the jury's verdict. *Ex parte Weinstein*, 421 S.W.3d 656, 665 (Tex. Crim. App. 2014).

3. The State Relied on False Testimony at Trial

The vast majority of the State's trial case consisted of three categories of false testimony: (1) testimony from medical professionals, relying primarily on now-discredited SBS tenets, stating that neither the short fall Robert described nor Nikki's recent illness could possibly explain any aspect of her condition but that the constellation of intracranial conditions were produced by an unknown combination

of inflicted "shaking" and "impact"; (2) testimony from numerous witnesses, who had no knowledge of Robert's Autism, about their perceptions that his flat affect indicated a lack of feeling and thus a reason to suspect him; and (3) a lie about sexual abuse pushed by a local nurse acting, on her own initiative, as a "Sexual Assault Nurse Examiner" or "SANE" although she had never been certified as such and did not follow any aspect of the training associated with that certification, allegations trumpeted by prosecutors throughout jury selection and trial only to be dropped from the charge at the last minute.

a. The State relied on false testimony regarding a version of SBS/AHT entirely disavowed by science

The now-discredited tenets of SBS that the State relied on at trial have been discussed at length above. A summary is provided here.

First, the jury was falsely told that the SBS triad proves that Nikki had an inflicted head injury and that her recent medical history was irrelevant. It is now a consensus opinion, even among those who still believe that SBS/AHT is a legitimate diagnosis, that SBS/AHT is a diagnosis of "exclusion." *See* CLAIM II. Only after June 2016, when Robert's new legal team began to obtain resources to hire appropriate experts and to fight for access to the full autopsy file and to Nikki's missing medical records, was it possible to undertake a differential diagnosis. Multiple experts have now opined about the importance of her extensive medical history. Medical records show a failure to resolve Nikki's chronic infections that resisted multiple strains of

antibiotics; a failure to find the cause of multiple episodes when she would cry out, cease breathing, collapse, and turn blue; a failure to diagnosis her raging pneumonia that progressed to the point of sepsis during her last week of life when her fever reached 104.5 degrees; and a failure to recognize that giving her double prescriptions for Phenergan along with codeine could be deadly, especially for a toddler struggling with a respiratory infection. EX5-EX8.

Second, the jury was falsely told that there were "multiple impact sites" on Nikki's head. The long-lost CAT scans, rediscovered in 2018, prove that Nikki sustained only a single, minor impact site to the back right of her head, which, as Dr. Mack has explained, is where a small, subdural bleed was evident upon admission to the hospital. EX6. The large volume of blood observed two days later during the autopsy was the result of medical intervention, not proof of "multiple impacts." Likewise, the jury was misled to believe that Nikki's condition as reflected in autopsy photos—showing a large volume of blood beneath her scalp—was her condition at the time when she was brought to the hospital the morning of January 31, 2002. EX8.

New evidence from multiple experts (Drs. Green, Bora, Mack, and Auer) who carefully reviewed Nikki's medical records, shows that Nikki had DIC, a clotting disorder which causes internal bleeding. Nikki was subjected to extensive medical treatment to see if her condition could be reversed—all of which affected her blood

circulation because her heart and breathing were revived after she had 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 "detoured" around the outside of the brain until she was taken off life support. What the medical examiner saw under Nikki's scalp on February 2, 2002, was not the small subdural bleed captured in the CAT scans on January 31, 2002. Yet the jury was shown gruesome autopsy photos of the child's scalp cut open and peeled back to reveal a large volume of blood and told, falsely, that this blood was proof of "shaking" and "blows." *See* EX5; EX6; EX8.

Third, the jury was falsely told that a short fall could not explain any aspect of Nikki's condition and that that was a reason to disbelieve everything that Robert reported. As one juror has attested, she interpreted the expert trial testimony to mean Robert must have been lying about what happened to Nikki. EX4. Today, because short falls captured on video have been proven to result in serious injury and even death, and in light of the new evidence that Nikki died from pneumonia, Robert's explanation that Nikki fell from the bed is not only credible, it is relevant to understanding the single minor bump on her head and is entirely consistent with the new evidence that she was severely ill and thus more vulnerable to a fall and to internal bleeding as she struggled against the pneumonia and inappropriate prescription medications that ultimately killed her. *See* EX23; EX32.

Fourth, the jury was misinformed about the nature and significance of medications prescribed to Nikki before her final hospitalization. At trial, the pediatrician who had prescribed promethazine and codeine to a child with a 104.5 fever and breathing trouble told the jury that the medications were inconsequential. 42RR10-12, 25-30. A 2024 analysis by a medical toxicologist of the belatedly disclosed toxicology report shows the amount of promethazine still in Nikki's bloodstream at autopsy was a toxic level. EX7.

Robert is entitled to relief on his false testimony claim regardless of whether the State offered a false causation theory in good faith.

b. The State relied on false testimony that Robert's demeanor suggested guilt

A great deal of the trial consisted of various witnesses, who had no prior experience with Robert or knowledge of his developmental challenges, offering lay opinions about his "odd" or "off" demeanor during the investigation of Nikki's condition. *See, e.g.*, 41RR69; 41RR73; 41RR86; 41RR93; 41RR121-122. Those lay opinions were presented as further evidence of Robert's guilt. Those opinions were false testimony because they have no basis in science and are completely undermined by an accurate understanding of Robert's developmental and cognitive disabilities.

First, there is no scientific basis for assumptions based on "demeanor" especially when a person is experiencing a great shock or is under stress. That is, a

person's true emotional state cannot be "detected" from a single pattern of facial movements, physiological signals, or vocal signals; and attempts to interpret "guilt" from a person's behavior have proven to be as accurate as a coin toss—that is, entirely random.[60] Today, we are far more cognizant of the fact that humans respond to stress and significant traumatic circumstances in a host of ways.[61] There is no sound basis for perceiving demeanor and affect and then intuiting "guilt."

Second, well after the -03 Application was filed, Robert was assessed by a qualified neuropsychologist and diagnosed, for the first time, with Autism Spectrum Disorder.[62] His social history records show that he was identified as a special needs child, and given some resources through Medicaid, including therapy for speech impairments, but he was never properly assessed. Autism is a developmental disability, not a mental illness.[63] More specifically, Autism is "a life-long

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[60] *See* K. Brennan-Marquez, et al., *Judging Demeanor*, 109 MINN. L. REV. (March 2024).

[61] Autism, for instance, is being diagnosed far more often—not because of increased rates but likely because of greater awareness. *See, e.g.*, Peter Hess, *Apparent New Rise in Autism May not Reflect True Prevalence*, SPECTRUM (Sept. 26, 2019).

[62]Back in 2016, after Robert finally obtained new counsel (with an execution date pending), it was plain that he had some kind of impairment. Initially, a mental health expert was asked to look at the raw data of the WAIS-III IQ test that had been given to Robert back in 2002 to see if he might have intellectual disability. Although some issues with the scoring were detected, he did not seem to have an IQ score in the intellectual disability range. Therefore, intellectual disability was ruled out. EX44.

[63] *Mental Illness vs. Autism and Other Developmental Disorders*, ARROW PASSAGE, https://www.arrowpassage.com/mental-illness-vs-autism/.

neurodevelopmental condition interfering with the person's ability to communicate and relate to others"[64] in "neuro-typical" ways.[65] The most common symptoms are lack of eye contact, aversion to touch, dependence on routine and repetitive actions, impaired ability to communicate or relate to others, difficulty understanding people's feelings, and other distinct behavioral patterns.[66]

In 2018, while the -03 proceeding was pending, a neuropsychologist, Dr. Diane Mosnik,[67] was retained to assist counsel in better understanding some of Robert's behavior—communications ticks, repetitive actions, eye flutter, and vocal stammer—and to learn whether he suffered from any neuropsychological condition or brain damage that might impact his ability to handle stress or that would explain

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[64] Mayada Elsabbagh et al., *Global Prevalence of Autism and Other Pervasive Developmental Disorders*, 5(3) AUTISMRES. 160 (2012), at 160.

[65] Jason Tougaw, *Neurodiversity: The Movement*, PSYCH. TODAY (April 18, 2020) (noting that neurodiversity encapsulates the idea that each brain is different, and some are more different than others).

[66] *See What is Autism Spectrum Disorder?* CTRS FOR DISEASE CONTROL & PREVENTION (March 25, 2020), https://www.cdc.gov/ncbddd/autism/facts.html (outlining symptoms, diagnosis, causes and treatment for Autism).

[67] Dr. Diane Mosnik is a clinical neuropsychologist, forensic psychologist, and forensic neuropsychologist in private practice. She has been licensed since 2001 in Texas and a few years thereafter in Wisconsin. She was selected to participate in a special program for clinical neuropsychology at the Chicago Medical School with medical students where she was trained to read EEGs and neuroimaging, among other things. She has served as a professor at the Baylor College of Medicine, teaching medical students, neurology residents, psychiatry residents, psychology interns and fellows; she has also worked in the Texas Medical Center. Dr. Mosnik has been accepted as an expert by state and federal courts in Texas and Wisconsin and has testified over 30 times. EX14; EX15.

his affect. Dr. Mosnik conducted a diagnostic interview, administered a battery of tests, and conducted interviews with collateral witnesses who knew Robert during the developmental period.[68] EX13.

Additionally, Dr. Mosnik reviewed extensive social history records and materials related to the trial. She noted that Robert's medical history included an "abundance" of documentation indicating that he had sustained brain damage and had brain dysfunction. EX14. After undertaking her independent assessment, Dr. Mosnik diagnosed Robert with Autism Spectrum Disorder, aka Autism, after ruling out all other potential diagnoses found in the Fifth Edition of the Diagnostic and Statistical Manual. *Id.*

Dr. Mosnik explained that Autism is a "neurodevelopmental condition," evident before the age of 18, which continues throughout life. Dr. Mosnik explained that Autism is not the same thing as mental retardation (now known as intellectual disability). However, Autistic people have significant deficits in the areas of social and emotional processing, social perception, and understanding social relationships. They also can exhibit repetitive movements, interests, and speech, and tend to have

[68] Her pre-assessment investigation was far more extensive than is common before Autism Spectrum Disorder can be diagnosed. *How Do Doctors Diagnose Autism?* WebMD (Nov. 11, 2018), https://www.webmd.com/brain/autism/how-do-doctors-diagnose-autism (noting that as there is no lab test for Autism, doctors primarily rely on behavior observation as well as listening to concerns of parents with regards to behavior, speech, etc).

a strong preference for routine and a very structured, simplistic environment. These deficits had to have been apparent during the developmental period in order to make a diagnosis. EX14 at 93-95.

Dr. Mosnik described clear characteristics of Autism that she tested for and observed in Robert: impairment in all manner of social exchanges, impaired ability to interpret facial expressions, impaired ability to express emotion in what is perceived as "normal" fashion. *Id*. at 104-109. Dr. Mosnik's testing revealed that Robert has the social problem-solving skills equivalent to those of an 11 year-old child. *Id*. at 105.

Dr. Mosnik explained that people with Autism can easily get "off topic" and focus on minutia. Dr. Mosnik noted that Robert, like many with Autism, has an idiosyncratic speech pattern, and his speech and writing are characterized by repetition. Additionally, her testing revealed that Robert's speech patterns were very stilted and simplistic. His writing is characterized by a very simplistic grammar and syntax except when he is copying technical information from other sources. *Id*. at 107-08.

Beyond a battery of neuropsychological tests, Dr. Mosnik reviewed the trial testimony of Kelly Gurganus, Robin Odem, Andrea Sims, Brian Wharton, and Teddie Cox, all of whom described their perception of Robert's behavior as odd or abnormal. Dr. Mosnik noted that laypeople who do not have expertise in Autism can

interpret the behavior of someone with Autism as inappropriate. Autistic people are easily misjudged because their social behavior is inconsistent with "normal" expectations for various social contexts.[69] As an example, Dr. Mosnik pointed to Robert's attempt to dress an unconscious child instead of immediately rushing to the hospital—a behavior that seems very atypical if one does not understand his deficits and how Autistic people, like Robert, rely on routine and structure to function. Instead of emotional indifference or some sign of guilt, that behavior demonstrated Robert's deficits in problem-solving and his reliance on routine. *Id.* at 116-117. Similarly, Andrea Sims, an ER nurse, testified at Robert's trial that most parents are "extremely upset" when coming to the hospital with sick or injured children; to her, Robert's behavior was odd because he was sitting in a chair, looking away from the door. Indeed, Robert's reaction—his failure to align internal emotion with outward expression and his flat and detached appearance—was not evidence of indifference but, rather, a classic manifestation of his Autism. *Id.* at 118 (citing 41RR121-122, 105-107).

Dr. Mosnik also reviewed testimony developed in the -03 evidentiary proceeding. Casey Brownlow, who had known Robert as a boy, testified that he had

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[69] *See* Gina Gomez de la Cuesta, *A Selective Review of Offending Behavior in Individuals with Autism-Spectrum Disorders*, 1 J. LEARNING DISABILITIES & OFFENDING BEHAV. 47 (2010) (noting potential risk factors for perceived offending behavior include perceived lack of empathy, distress as a result of routine change, and obsessive interests coupled with a lack of understanding consequences).

met Robert when they were both in the seventh grade in Palestine. 7EHRR49-50. Mr. Brownlow's relationship with Robert was largely limited to making eye contact with him in the hall. Mr. Brownlow explained that their exchanges were limited because Robert was "an outsider" who was "different from the rest of us," "almost like Forrest Gump." 7EHRR50-53. Robert was also treated differently, pushed around and bullied. 7EHRR51-52. Mr. Brownlow never saw Robert fight back or do anything "[o]ther than just taking it." 7EHRR52. Mr. Brownlow further noticed that Robert was "disheveled when he came to school[.] . . . His clothes at times didn't look clean, and he would oftentimes have bruises that you could see." 7EHRR55.

Mr. Brownlow explained that he lost track of Robert after he dropped out of school at some point during high school. 7EHRR53. Many years later, Mr. Brownlow reconnected with Robert and they exchanged some letters. Mr. Brownlow described Robert's letters as like those he "would get from his sons from summer camp. . . . Smiley faces at the end of sentences. Sad faces at the end. Very childlike. Very childlike. Sweet in an innocent kind of way." 7EHRR56-57. Mr. Brownlow also noted that all of Robert's letters were very similar and repetitious. 7EHRR57.

Dr. Mosnik cited Mr. Brownlow's testimony as corroborating other information she had learned from interviewing family members: that Robert had limited friendships and had been bullied and teased at school and pushed around in the school setting. 7EHRR89. She also learned from his mother that Robert was

delayed in his speech, required speech therapy, and had engaged in repetitive behaviors as a child. *Id.*

Dr. Mosnik found no evidence in Robert's voluminous records that he had a history of aggressive or violent acts. Although accusations were made at trial by his ex-wife, there were no records corroborating any of her allegations (and, instead, there was evidence that she had forfeited custody of the children they had had together). *Id*.

Considering this new, credible insight into Robert's demeanor, the State's reliance at trial on his affect and presumed "odd" behavior following Nikki's collapse is not only unfairly prejudicial but also false.[70] The lead detective and one of the State's key trial witnesses, Brian Wharton, who testified at trial about his perception of Robert's blunted and odd behavior, has now completely disavowed his former testimony. EX1.

Mr. Wharton was Chief of Detectives in Palestine, Texas in January 2002 when Nikki was brought to the hospital and he took charge of the investigation. He has acknowledged that he has "long been troubled by this case" and does "not believe that justice was served." At the time, he had a hunch that Robert "had some kind of disability or mental illness," and he noted that everyone interviewed at the

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[70] *See, e.g.*, Perlin, Michael L. and Cucolo, Heather, '*Something's Happening Here/But You Don't Know What It Is': How Jurors (Mis)Construe Autism in the Criminal Trial Process*, 82 UNIV. PITTSBURGH L. REV. 586 (2021).

hospital discussed Robert's behavior as being "odd." But he had not been trained in mental health or developmental issues. He saw a "lack of emotion" and "a lack of understanding" and had no prior experience with Robert—and certainly could not have known about his Autism Spectrum Disorder diagnosis, as it was not made until years later. *Id.*

Detective Wharton found Robert "passive and cooperative throughout" the investigation and said that he "told the same story at the police station about hearing Nikki cry out, finding her on the floor at the foot of the bed, and seeing a little blood on her mouth." *Id.* But they did not believe Robert or think his statement about Nikki being "sick recently" was relevant. Once Dr. Squires told them that Nikki's condition was the result of her being "violently shaken," they did not investigate further and looked at Robert through the lens of someone who had abused his daughter. *Id.*

Neither the State's witnesses nor the jury heard about Robert's Autism. And studies have confirmed what should be intuitive: that, if jurors are unaware of a defendant's Autism diagnosis, there is a higher chance that negative demeanor evidence may be held against him—even subconsciously.[71] Unfair assumptions are made about a perceived "lack of remorse or empathy" that "can be particularly harmful[.]"[72] In this case, Robert's jury was expressly told, by multiple witness, that

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[71] Christine N. Cea, *Autism and the Criminal Defendant*, 88 ST. JOHN'S L. REV. 495, 519 (2014).

[72] *Id.*

he should be viewed with suspicion and disbelieved because his reaction to his daughter's condition was not "normal;" that false testimony has been shown to lead jurors to incorrectly attribute criminality to behavior that is typical of individuals with Autism.[73] In reality, Robert's Autism meant that there was a "disconnect between [his] feelings and expression of feelings, what that looks like to the outside world, as well as [his] ability to perceive and understand" his emotions. EX14 at 99.

c. The State relied on false, highly prejudicial testimony about sexual abuse

In addition to the cause-of-death experts (Drs. Squires and Urban) and Detective Brian Wharton, the State's "star witness" at trial was a local ER nurse named Andrea Sims who claimed to be SANE-certified, although she was not. She was allowed to testify at great length about her unsubstantiated and outrageous views that Nikki had been sexually abused. In the -03 Application, Robert's counsel raised a claim about Sims' false testimony, but without the benefit of access to a qualified expert. This Court remanded the false testimony claim for further factual

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[73] C.M. Berryessa, *Judiciary Views on Criminal Behaviour and Intention of Offenders with High-functioning Autism*, 5 JOURNAL OF INTELLECTUAL DISABILITIES AND OFFENDING BEHAVIOUR 97 (2014); C.M. Berryessa, *Judicial Perceptions of Media Portrayals of Offenders with High Functioning Autistic Spectrum Disorders*, 3 INT'L J. CRIMINOLOGY AND SOCIOLOGY 46 (2014); C.M. Berryessa et al., *Impact of Psychiatric Information on Potential Jurors in Evaluating High-functioning Autism Spectrum Disorder (hfASD)*, 8 JOURNAL OF MENTAL HEALTH RESEARCH AND INTELLECTUAL DISABILITIES 140 (2015); C.M. Berryessa, *Brief Report: Judicial Attitudes Regarding the Sentencing of Offenders with High Functioning Autism* 48 J. AUTISM AND DEVELOPMENTAL DISORDERS 2770 (2016).

development—but not one shred of the new evidence adduced related to the highly prejudicial false sexual abuse testimony was mentioned in the -03 habeas court's FFCL.

Detective Wharton has recently attested that he believes the prosecution's use of Sims' unsubstantiated sexual abuse allegations was flat-out wrong. EX1. After Sims first made her allegations, based on something he himself could not see, he personally arranged for the collection of evidence for a sexual assault kit. Nothing came back from the DPS testing to support Sims' speculation. *Id.*; *see also* APPX61; APPX62. Wharton asserted that he was quite uncomfortable when the DA's Office went forward at trial with the sexual abuse allegations because he saw no evidence to support them. He also, quite sensibly, noted that "if Nurse Sims was allowed to tell jurors that she had seen 'anal tears,' that would be very prejudicial." Beyond Nurse Sims, there was "nothing supporting her opinion." *Id.*

In additional to Detective Wharton's recent disavowal, expert testimony, obtained in 2021 from Kim Basinger, a registered nurse and a certified Sexual Assault Nurse Examiner (SANE)[74] shows that Sims' testimony was not only

[74] Kim Basinger specializes in trauma and is a very experienced and certified SANE authorized to perform sexual assault exams on adults, adolescents, and children. She was among the first five nurses to receive the certification in 1998 through the Attorney General's Office of Texas. She has been a SANE trainer for the Attorney General's Office since 2002, when she also became certified by the International Association of Forensic Nursing. She has performed approximately 400 SANE exams on adults and 800-900 on children. She attends many trainings

inconsistent with SANE training, it violated basic nursing ethics and was distinctly false. *See* EX16. At trial, Sims offered several bases to support her opinion that Nikki had been anally penetrated, none of which Nurse Basinger found to be remotely sound.

First, Sims speculated that the dilation of Nikki's anus was not normal, yet Nikki was in a comatose state and thus was far from normal. As Nurse Basinger explained, when a patient has been intubated and given any sedatives or is unconscious, that process causes anal dilation. Additionally, "[a]ny insult to the central nervous system … can cause the anus to relax and dilate"—and it was already obvious that Nikki had brain damage at the time Sims performed the SANE exam. EX16. Sims' speculation that anal dilation was proof of trauma was false.

Second, Sims testified that she saw "anal laxity," which she asserted was caused by sexual assault. Yet, as Nurse Basinger explained, suppositories and enemas can cause anal laxity, and Nikki had received suppositories in the days before her collapse. Additionally, Nurse Basinger, after evaluating Sims' own photographs, saw neither anal laxity nor even an indication of complete dilation. *Id.* Sims' testimony about anal laxity was false.

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and conferences and is often a presenter. Courts have accepted her as an expert on SANE exams many times; and she has testified at the request of both the prosecution and the defense. EX16; EX17.

Third, Sims testified that she saw "anal tears" and offered her belief that such tears are "only" caused by a sexual assault. Yet, as Nurse Basinger (and other healthcare providers) recognized, the skin in the anal region is especially vulnerable to tearing aka cracking. Nurse Basinger noted that many things can cause that area to tear: chronic constipation, passing hard-formed stool, and diarrhea. A child is especially vulnerable to the skin tearing in that region if, like Nikki, there was diarrhea over a period of time, which can cause "a lot of irritation down there"; that irritation then causes the skin to crack, *i.e.*, tear. From Sims' testimony, it was unclear if she had read Nikki's recent medical records and seen that she had had diarrhea for over a week before her hospitalization. *Id*. Sims' testimony that only sexual assault could explain skin tears in the anal region was false.

Fourth, Sims testified at trial about Nikki having a torn frenulum, which Sims described as another sign of sexual assault. Nurse Basinger explained that a frenulum is a small piece of skin, with one example being found where the upper lip connects to the gumline. *Id*. But Sims had not even seen the inside of Nikki's mouth because she was intubated and masked throughout the time Sims had contact with her. Sims only learned later that a torn frenulum was observed during the autopsy. She then told the jury that intubation would not tear a frenulum. 41RR136-137. Yet, as Nurse Basinger explained, when intubated, the tube is held tightly against the patient's lip and, if rocked back and forth, can cause the frenulum to tear. Nurse Basinger opined

that she has seen frenulums torn in intubation attempts, either from the tube or from the instrument that is used to be able to see the vocal cords, which is a metal blade attached to a flashlight-like handle. That metal blade goes in the mouth, over the tongue, and then is lifted up during the intubation process. EX16. Nurse Basinger's opinion rebuts Sims' opinion and is consistent with that provided by other medical experts. *See, e.g.,* 8EHRR113; *see also* APPX115 (*Diagnosing Abuse: A Systematic Review of Torn Frenulum and Other Intraoral Injuries*, a medical article emphasizing that one of the things that can tear a frenulum is intubation and cautioning against rushing to conclusions regarding abuse). Sims' testimony that intubation could not have caused a torn frenulum was false.

Nurse Basinger noted that the results of the sexual assault exam that Sims had performed ultimately showed no semen, no spermatozoa, and no trace evidence to support the conclusion that there had been some kind of sexual abuse. EX16.

Nurse Basinger further observed that Sims' testimony referencing "a pedophile" and how they do not want to go to a particular area of a child's body was inappropriate, especially since pedophilia is a psychiatric diagnosis that nurses are not qualified to make. *Id*. Sims' testimony that Nikki was sexually abused and her insinuations about pedophiles was highly inflammatory, wholly improper, and patently false.

Overall, Nurse Basinger concluded that, if Sims had taken the SANE training, then she did not apply that training in this case and her conclusions were unreliable. Additionally, Nurse Basinger noted that Sims' SANE exam paperwork (APPX6) was replete with errors. EX16 (noting that Nurse Sims recorded Nikki's temperature as "9"; described her cardiovascular system as "normal" although Nikki had stopped breathing and her resuscitated heart had experienced tachycardia; described her neurological system as "normal" when she was brain dead and unresponsive). Sims also included in the paperwork a drawing that was an "overexaggeration" of the anal tears that she claimed to have seen, but which no treating physician or medical exmainer saw. *Id.*

For all of these reasons, Nurse Basinger concluded that the opinions that the jury heard from Sims regarding sexual abuse were unreliable, prejudicial, and were decidedly false. *Id*.

The false sexual abuse allegations infected every part of Robert's trial. During individual voir dire, jury panel members were asked their views about sexual predators and whether they could be fair if they heard evidence that a two-year-old girl had been sexually assaulted. Then the jury heard the false and completely unfounded, now discredited, opinion from Nurse Sims insinuating that Robert had anally and orally penetrated his daughter and that he was a pedophile. There is no possibility that jurors exposed to that graphic false testimony could have fairly and

impartially consider the evidence related to Nikki's death. No trial involving the death of a child in which the defendant is falsely accused of sexual abuse of that child can be deemed a fair trial. *Cf Ex parte Mayhugh,*, 512 S.W.3d 285 (Tex. Crim. App. 2016) (finding, based on new evidence, that women who had been falsely accused of child sexual abuse were actually innocent). On this basis alone, Robert should be awarded a new trial.

4. The False Testimony Was Material

The false evidence, which resulted in the jury's guilty verdict, was not just material to the State's case—it was the State's case. Individually and collectively, the false testimony was material and deprived Robert of a fair trial.

To show that the State's presentation of false testimony is material, an "applicant has the burden to prove by a preponderance of the evidence that the error contributed to his conviction or punishment." *Chabot*, 300 S.W.3d at 771 (quoting *Fierro*, 934 S.W.2d at 374-75). False testimony is material if there is a "reasonable likelihood" that it affected the judgment of the jury. "[A]n applicant who proves, by a preponderance of the evidence, a due-process violation stemming from a use of material false testimony necessarily proves harm because a false statement is material only if there is a reasonable likelihood that the false testimony affected the judgment of the jury." *Weinstein*, 421 S.W.3d at 665. The standard of materiality is the same for knowing and unknowing use of false testimony. *Chavez*, 371 S.W.3d at

207. Therefore, the question is whether it was reasonably likely that the false SBS cause-of-death hypothesis, the false testimony that Robert's demeanor demonstrated guilt, and the false sexual abuse allegations affected the judgment of the jury.

As detailed above, this was a toddler death case where the State relied on the now-discredited SBS hypothesis to characterize Nikki's death as a murder. The only compelling evidence suggesting that there had been a crime at all—as opposed to a family tragedy—was the State's medical evidence that has now been exposed as false by a new scientific paradigm. There is far more than a reasonable likelihood that the false SBS testimony affected the jury. The State's false testimony suggested that Nikki must have died from inflicted head trauma. But in truth, new evidence proves that natural and accidental causes entirely explain her death and entirely discredits the presumption of any inflicted injury.

Likewise, the State's false testimony about Robert's demeanor suggesting guilt and the baseless sexual abuse allegations further illustrate why there can be no faith in the integrity of the jury's verdict.

Indeed, after the -03 evidentiary hearing, Juror Terre Compton came forward and has attested, in convincing detail and under penalty of perjury, about her memory of what was—and was not—put before the jury to explain Nikki's death:

- "I remember that the only explanation the defense had at trial was that Nikki had fallen out of bed. I also remember that the bed was just a mattress and box springs on concrete blocks, so it was not very high off the ground. So, the explanation of a fall did not make sense to me compared to what we were

shown to be Nikki's injuries. We also had to look at Nikki's autopsy pictures that were horrific. I remember one picture showed the skin pulled off of her scalp and a lot of blood underneath."

- "Because the explanation of a fall seemed inconsistent with the autopsy pictures, I felt that there must be some other explanation. The explanation that we were given by the State was shaken baby syndrome."

- "I had heard of shaken baby syndrome before the trial and just accepted it as true during the trial. Even the defense counsel agreed during the trial that Nikki's death had been caused by out of control shaking."

- "Since then, with my experience raising children, I have realized that shaking should cause injury to the neck, like whiplash in a car crash. One of the first things they tell you when leaving the hospital with a newborn is to protect the neck. As I recall, there was no injury to Nikki's neck. Also, Nikki was not an infant. She was about 2-3 years old. The injuries we saw were under her scalp, and we were told that injuries to her brain had caused her death."

- "Aside from the pictures, what convinced me of guilt were the sexual abuse allegations. I remember a nurse testifying about seeing anal tears and interpreting that as a sign of sexual assault. This nurse held herself out as an expert in sexual assault and mentioned having performed many, many exams in the past. These allegations made Mr. Roberson seem capable of child abuse and influenced the way I looked at him."

- "Mr. Roberson did not testify. I remember thinking that if he was accused of these things, he should want to clear his name. We were not told that he had autism."

- "We were not told that Nikki had any significant health problems. We were just told that she had not been feeling well as if it were no big deal."

- "We were not shown any CAT scans of her head or chest."

- "We were not told about pneumonia."

- "We were not told about any prescriptions Nikki had been given soon before her death."

EX4. This new evidence, only available years after the -03 Application was filed, is compelling proof of the materiality of the State's false testimony from a juror.

In a case that hinged on medical evidence, there can be no question that the State's false testimony affected the integrity of the verdict. The false portrait has been exposed by an avalanche of new evidence. Relief is absolutely warranted.

B. Claim II: New Medical and Scientific Evidence Establishes a Right to Relief under Article 11.073

All facts alleged above are incorporated here by reference.

1. Overview

Contemporary medical standards do not support the medical and scientific evidence that was used to accuse, convict, and sentence Robert 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 the -03 proceeding must be rejected as scientifically unsound. *See* subsection 3, below.

2. 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 legal system, on the other hand, "embraces the adversary process to achieve 'truth,' for the ultimate purpose of attaining an authoritative, final, just, and socially acceptable resolution of disputes." The judicial system normally accepts that "opinions grounded in science carry their own tests for reliability and usefulness, thus inspiring special confidence in judgments based on them." This disconnect between changing science and reliable verdicts that can stand the test of time has grown in recent years as the speed with which new science and revised scientific methodologies debunk what had formerly been thought of as reliable forensic science has increased. 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, Robert 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).

In *Moore v. Texas*, 581 U.S. 1 (2017), the United States Supreme Court held that courts must apply current medical standards in assessing claims based on medical conditions. *See id.* at 20-21 (vacating this Court's judgment because outdated medical standards "pervasively infected" the analysis of whether Moore had intellectual disability and thus was entitled to *Atkins* relief). Just as the medical community now accepts that SBS/AHT diagnoses can only be assessed after all other potential natural and accidental causes of the triad have been considered and excluded, courts have recognized that the current standard now requires a diagnosis-of-exclusion framework. *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").

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). A "differential diagnosis," which is discussed in the Factual Background section above, is the 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.*

Current medical standards treat SBS/AHT as a "diagnosis of exclusion," a diagnosis that is only available after all other possible medical conditions and causes have been considered and excluded.

3. 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, not last, 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 shaking and thus an intentionally inflicted head injury. 4EHRR23; 8EHRR129.

As the new evidence detailed above shows, Nikki had a fatal double pneumonia. The promethazine medications prescribed to her on consecutive days 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 pulmonary arrest. EX5. 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 had been given, and accounting for the accidental fall out of bed. None of these factors were even identified, let alone considered by those who diagnosed "abuse."

The SBS/AHT hypothesis operative in 2002-2003 assumed that violent shaking/impact would lead to immediate brain damage and thus a change in consciousness—a premise that 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.

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. 5EHRR27-28, 104-05. That incorrect understanding led to the improper branding of Robert as a liar whose description of Nikki's final hours should be rejected.[75] New studies—including ones published in 2023 and 2024—demonstrate that many cases of presumed SBS/AHT were in fact the result of accidents.[76] More importantly, the report of Nikki's fall our of 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. One such

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[75] 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). 41RR57-58. 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.

[76] *See* EX35; EX21.

case, which led to an exoneration this year, is markedly similar. *See* EX46, *State of Ohio v. Alan Butts*, 2023 WL 4883377 (Ohio Ct. App. Aug. 1, 2023).[77]

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; Mr. 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 the -03 Application, which was admitted into evidence, explaining how his opinions were treated as outliers at the time of Robert's 2003 trial. APPX3.

Both 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 symptoms (subdural bleeding, brain swelling, and retinal hemorrhage) then viewed as

[77] *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.

conclusive proof that the child had been violently shaken and sustained blunt impact that could be deemed inflicted. EX46 ¶¶3, 6, 34, 44.

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

Both cases involve the rejection, at trial, of the proposition that a short fall could have played any role in causing or explaining the child's condition. *Id.* ¶55.

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. EX5. 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, SBS proponents (like Drs. Squires and Urban) likely would have told the jury that her pre-existing medical condition was irrelevant, as occurred in the *Butts* case. EX46 ¶¶35, 63, 64. Because that is what the medical community then believed.

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. Julie Mack, pediatric radiologist, and Dr. Roland Auer, neuropathologist. *Compare id.* at ¶¶8, 42, 44, 51, 91 *with* EX6; EX8; EX10.

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, by today, the medical consensus has shifted in multiple, material ways: with respect to the need for a differential diagnosis, 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 Mr. 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 *Butts* and Robert's case 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." EX47, *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 was acknowledged in Ohio but rejected in Robert's case here in Texas, is actually being treated inconsistently within Texas itself. *See Ex parte Roark*, WR-56,380-03 (submitted Dec. 6, 2023).

Andrew Roark was convicted in Dallas County in 2000 for the alleged injury of an infant in his care. He was convicted under 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 unvalidated belief that violent shaking can cause the triad of subdural bleeding, brain swelling, and retinal hemorrhages yet no neck or spinal cord injuries. In both cases, the prosecution relied on the ***very same*** "child abuse expert," Dr. Squires, formerly of Children's Medical Center of Dallas. More specifically, Dr. Squires testified in both trials for the State about her SBS diagnoses, providing vivid descriptions of the violent shaking she imagined had occurred.

A filing in the -03 proceeding, still pending before this Court, includes a chart showing that Dr. Squires' testimony in these two SBS cases was virtually identical.[78] Mr. Roark's case is now pending before this Court with the trial court's recommendation that he receive a new trial after the Dallas County Conviction Integrity Unit agreed that the scientific understanding of SBS has changed and that Dr. Squires' trial testimony no longer reflects contemporary scientific understanding.

[78] *See* Suggestion to Reconsider on the Court's Own Initiative.

By contrast, Robert faces execution because the prosecuting attorneys and trial court in Anderson County have denied that the "science" used to convict him has changed and resisted a new trial. This Court should address this intra-state inconsistency whereby very similar changed-science claims, brought using the same changed-science law (Article 11.073), have received diametrically different treatment in different counties.[79] This Court should join those jurisdictions that have recognized that the SBS/AHT hypothesis is untethered to any validated science and vacate Robert's conviction. *See, e.g.*, EX18; EX45-EX48. The integrity of this state's jurisprudence, not to mention the interest of justice, demands it.

This Article 11.073 claim is based on changes in science after the -03 Application was filed. 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.

C. Claim III: Robert's Right to Due Process Is Violated by a Conviction Based on Subsequently Discredited Medical Opinions and Considering the Overwhelming New Evidence of Innocence

All facts alleged above are incorporated here by reference.

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[79] This Court recently considered "changed science" and Actual Innocence claims in an Article 11.07 application raised in another SBS case tried in Anderson County. *See Ex parte Hasel*, WR-94,544-01 (Tex. Crim. App. March 29, 2023). The claims were authorized after a pro se litigant obtained counsel (Angela Moore) who briefed the Court about the discredited SBS/AHT science that had been used to convict her client of capital murder. *See* EX52.

1. Legal Standard

Long-standing federal constitutional law guarantees, on the most basic level, the right to a fundamentally fair trial based on reliable evidence. *See, e.g.*, *Spencer v. Texas*, 385 U. S. 554, 563–564 (1967) ("[T]he Due Process Clause guarantees the fundamental elements of fairness in a criminal trial"); *Chambers v. Mississippi*, 410 U. S. 284, 302 (1973) (holding that "the exclusion of . . . critical evidence . . . denied [the defendant] a trial in accord with traditional and fundamental standards of due process").

2. The Due Process Deprivation Merits Relief

Scientific and medical developments in the 21 years since Robert's trial have exposed the State's cause-of-death hypothesis as fundamentally unreliable. *See* CLAIMS I-II, V. The flaws in the SBS/AHT hypothesis could not have been exposed to the jury through "vigorous cross-examination," as it was then widely accepted despite the absence of validation. *United States v. Berry*, 624 F.3d 1031, 1040 (9th Cir. 2010).

Robert's jury was told a slew of falsehoods incompatible with ***contemporary*** scientific understanding. The jury was subjected to gruesome autopsy photos with Nikki's scalp pulled back revealing subdural blood and then told, falsely, that this blood had been caused by "shaking" and "impacts." The jury was falsely informed that Nikki had no neck injuries because a child's "weak neck" is somehow protected

during shaking. The jury was told that evidence of "impact sites" included the top of her head when that is where the hospital had screwed a pressure monitor into her skull—information not shared with the jury. The falsehoods shared with the jury included the monstrous lie about sexual abuse absent any credible evidence. This mass of false testimony, conveyed as scientifically valid, was used to convict an impaired, Autistic man working newspaper routes to earn a living. *See* 7EHRR64-129. That record has now been supplemented by substantial new evidence from eminently qualified specialists, *see* EX5-EX8, and numerous new scientific studies, *e.g.*, EX20-35. establishing his Actual Innocence. *See* CLAIM V.

Permitting Robert's conviction to stand, based on an abuse narrative that is demonstrably baseless, is contrary to the basic truth-seeking function that is supposed to animate criminal justice. Current medical standards treat SBS/AHT as a "diagnosis of exclusion," that is, a diagnosis only available once all other possible medical conditions and causes have been considered and excluded. That did not happen in 2002; nor has any court yet considered alternative explanations for Nikki's condition. The Supreme Court has been clear that prosecutions must take current medical standards into account when a medical diagnosis is critical to the case. *See Moore*, 581 U.S. at 20-21. Because neither the State nor any court has considered the incontrovertible fact that the SBS diagnosis made in 2002 is incompatible with the consensus diagnostic framework required today, *Moore* alone should require

relief.

Several federal courts have held that a conviction based on "scientific" evidence demonstrably falsified by scientific advances should be a basis for a due process claim. *See, e.g.*, *Gimenez v. Ochoa*, 821 F.3d 1136, 1144 (9th Cir. 2016) (recognizing that a due process claim based on faulty science, specifically, the SBS hypothesis, "is essential in an age where forensics that were once considered unassailable are subject to serious doubt."); *Han Tak Lee v. Glunt*, 667 F.3d 397, 407 (3d Cir. 2012) (holding that, if disproven, trial testimony based on unreliable science undermined fundamental fairness of petitioner's entire trial, making a prima facie case for habeas relief on due process claim). These Circuit Court decisions are consistent with holdings in Supreme Court cases. *See, e.g.*, *Dowling v. United States*, 493 U.S. 342, 352 (1990) (explaining that the introduction of faulty evidence is unconstitutional when "its admission violates 'fundamental conceptions of justice.'") (citation omitted); *Estelle v. McGuire*, 502 U.S. 62, 70 (1991) (considering whether admission of battered child syndrome evidence against defendant represented due process violation).

The Court should authorize this claim to vindicate the right to due process before Texas executes an innocent man.

D. Claim IV: Robert's Sixth Amendment Autonomy-Right Was Violated By Trial Counsel Overriding His Explicit Objective To Maintain His Innocence

Trial counsel conceded the State's SBS cause-of-death hypothesis, thereby violating Robert's autonomy right to maintain his innocence under *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018), new law decided two years after the -03 Application was filed.

1. Factual Basis

a. Robert consistently maintained his innocence

Robert's last few days with Nikki were a whirlwind of trips to the ER, her pediatrician, the pharmacy for prescriptions, and bouncing back and forth from the Bowmans, his girlfriend Teddie in the hospital, and then home to handle his paper routes. EX37; APPX9; APPX14. The night of January 30, 2002, the Bowmans asked Robert to come back to their house out in the country and pick up Nikki. Robert left the hospital and arrived at the Bowmans' after 9:30 PM. The Bowmans put the sick and exhausted Nikki in Robert's car. EX37; 43RR155. Robert was alone with Nikki from about 10 PM that night until he got her to the hospital by about 9:15 AM the next morning. Through multiple interviews, he consistently described what had transpired during those 11 hours culminating with the horror of waking around 9:00 AM to find Nikki unconscious with blue lips. APPX7; EX1; EX37.

Robert, who was a special education student with undiagnosed Autism, did his best to explain the inexplicable. "You know, I love my little girl. I would never mean to hurt her." 41RR73. But Robert, who had no medical training and little education of any kind, could only speculate when he was pressed by hospital staff and law enforcement to come up with more information to explain his daughter's collapse beyond a fall from bed in the night. His Autism symptoms were misinterpreted as indifference or worse.

Doctors at the local hospital did not believe Robert and assumed abuse had occurred. Then Dr. Squires at Children's Medical Center in Dallas made an SBS diagnosis and provided an affidavit explaining that diagnosis, which was used to arrest Robert the night of February 1, 2002, before the autopsy was even performed. APPX60.

In the months following his arrest, up through trial, Robert consistently maintained his innocence. There is contemporaneous evidence that he did not agree with his attorneys' decision to concede that he had done anything to hurt Nikki. In handwritten notes seized from his cell, pretrial, by the DA's investigator, Robert expressed alarmed that they were not trying to defend him:

- "My attorneys are not representing me professional!"
- "Lawyers [are] misrepresenting me."
- "[They] Falsely accusing me of things that I haven't done. So what's the deal anyway? You both need to get off your butts and represent me fairly. I thought

> that you both suppose to be working for me? So what's the problem anyways? I think I'm getting railroaded by you all getting me to say that I done something when I haven't done a damn a thing."

EX37 at Exhibit 1.

On January 22, 2003, a hearing was held about the privileged materials that the DA's investigator had seized from Robert's cell on December 18, 2002, while Robert was in court. 40RR2-56. The fundamental conflict with trial counsel, reflected in the seized notes, was not addressed on the record. But Robert has attested: "I did tell them that I was not happy at all about the way that they were representing me because they were trying to get me to take a guilty plea for something I did not do. I also felt like the doctor my attorneys hired, Kelly Goodness, seemed to be representing the State. She kept telling me that I must have hurt Nikki." EX37 ¶25.

Several times, Robert was offered a plea agreement, but he refused because he did not believe he had caused Nikki's condition and intended to maintain his innocence:

> Several times my lawyers told me that the State would give me a plea deal if I would plead guilty. I did not want to do that because I did not do anything to hurt Nikki. I talked to my mama, and her advice was that if I didn't do anything, I should not take a plea deal. I was offered a plea deal at least three times. The last time I was offered to take a plea was at the courthouse during my trial.
>
> I told my attorneys that I did not want to plead guilty. Steve Evans [defense trial counsel] told me about the "shaken baby" and he seemed to believe it. He said shaking was not enough to give me the death

> penalty, and he thought I should be glad about that. But I told him that I did not shake Nikki.

Id. at ¶¶21-22.

On February 3, 2003, Robert was asked to put on the record that he had voluntarily rejected offers to plead guilty in exchange for a life sentence. 41RR2-3. Then Opening Statements began. As Robert reported:

> I never gave Steve Evans permission to tell the jury that this was a "shaken baby" case or that I was guilty of hurting Nikki. He did not ask me. And I did not agree with what he did. I was scared and in shock the whole time. I was afraid to say anything in court because the bailiff told me that if there was any outburst they would put me in the back the whole time and I would have to watch my trial from back there.
>
> Before, during, and after my trial, I kept asking for someone to investigate my innocence, but no one would do this.

EX37 at ¶¶21-22.

b. Trial counsel overrode Robert's desire to maintain his innocence, conceding the SBS hypothesis without his consent

Despite Robert's consistent statements that he had not done anything to hurt Nikki, his lawyers accepted the State's SBS hypothesis as a foregone, medically sound conclusion. *See, e.g.*, defense counsel's statements before the jury:

- "This is not a capital case and the evidence will not support it. This is, however, unfortunately a shaken baby case. The evidence will show that Nikki did suffer injuries that are totally consistent with . . . shaken baby syndrome."

- "Every one of you [jurors] related that you had heard the term shaken baby, that it was an act of basically a lack of control of emotion. It's a bad thing, but it's not something that rises to the level of capital murder."

41RR57-62 (emphasis added).

c. For years afterwards, Robert continued to ask counsel to pursue his Actual Innocence

For Robert's direct appeal, the same lawyer was appointed who had conceded the State's SBS cause-of-death hypothesis at trial. During that appeal, Robert, then on death row, sent a letter to the trial judge urging him to appoint new counsel:

Dear Mr. Bentley,

I'm writing on the behalf of my court appointed attorney that's on my case for my Direct Appeal. Could you please remove Mr. Stephen Evans from my case, and appoint me someone that will help me to get a fair trial. I'm very disatisfied of the way that I was represented at my trial, and the way that I was misinformed about my rights. Could you

EX38.

For his initial state habeas, an attorney recommended by trial counsel was appointed: James Volberding. Volberding ultimately filed a state habeas application that largely argued the same claims raised in the direct appeal; there was no challenge

to the State's cause-of-death hypothesis or Actual Innocence claim.[80] That same attorney then arranged to have himself appointed to represent Robert in federal habeas. Meanwhile, Robert continued to express his longstanding desire to assert his innocence. For instance, Robert sent a letter to the federal district court objecting to Volberding's appointment and asking to "appoint me some good Federal Attorneys to properly defend me on my Actual Innocence." EX39.

Volberding conceded to the court that he was disregarding Robert's long-standing assertion of his actual innocence:

> Roberson asks assurance that a claim of actual innocence will be presented to this Court. Counsel will present a claim of actual innocence, but in a different form than Roberson may prefer. Among the claims to be presented is one asserting that Roberson is factually innocent, not because he was not at the scene, which carries difficulties given the testimony, but that this has never been more than a shaking baby case, hyped up by emotion and a patently false child rape allegation into capital murder to placate small town sentiments, and therefore lacking the requisite proof of determined intent to kill necessary for execution.

EX40.

In another letter to Volberding, cc'ing the federal court, Robert wrote: "I'm informing you that I do want you to file my (Actual Innocent) Claim for me." EX41.

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[80] The initial state habeas focused on prosecutorial misconduct allegations based on raiding Robert's jail cell and confiscating privileged materials, pursuing a baseless sexual assault allegation, and misinforming the jury about why the count based on those allegations was dropped right before jury deliberations.

Neither Volberding nor the court responded. Robert also asked the Fifth Circuit to "remove my Court Appointed Attorneys" because "my Attorneys refuses to File my 'Actual Innocence' Claims." *Id*.

Then, in March of 2016, with an execution date pending, Robert entreated both the state and federal courts to appoint new attorneys to pursue his Actual Innocence:

I do Not want these two Attorneys (Mr. Seth H. Kretzer and Mr. James W. Volberding) (1) Because they don't want to Listen to me at all, (2) they have refused to File my "Actual Innocence" on Numerous occassions, (3) conflicts of Interests, (4) Ineffective Assistance of Counsel, (5) Irrecounciliable differences, (6) they have refused to properly Investigate that Mental Illness does run in my Family, Relatives, as well as me, (7) they have

EX42; EX43.

Robert finally obtained conflict-free counsel—on the brink of an execution date. His Actual Innocence claim was then finally pursued. But at that time, June 2016, he had no legal basis for a Sixth-Amendment claim based on how his trial counsel had overridden the basic objective of his defense: to maintain his innocence.

2. *McCoy v. Louisiana* Is New Law Entitling Robert to Relief

In *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), the Supreme Court considered a situation in which counsel conceded guilt during the guilt-phase of a capital trial

despite the defendant "vociferously insist[ing] that he did not engage in the charged acts and adamantly object[ing] to any admission of guilt." *Id.* at 1505. The Supreme Court held that "it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt." *Id.* Thus, while counsel was entitled to make that decision when the defendant remains silent about the strategy, *see Nixon v. Florida*, 543 U.S. 174, 181 (2004), counsel cannot make that decision over the defendant's objection, *McCoy*, 138 S. Ct. at 1505.

McCoy announced that, when a defendant takes advantage of the Sixth Amendment right to counsel, s/he "need not surrender control entirely to counsel." *Id.* at 1508. While "[t]rial management is the lawyer's province, …[s]ome decisions, however, are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." *Id.* (citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983)). "Autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category." *Id.* "Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence" against him or "reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may [he] insist on maintaining her innocence[.]" *Id.*

And "because a client's autonomy, not counsel's competence, is in issue" neither the *Strickland* nor the *Cronic* standard applies. *Id.* at 1510-11. Instead, this Sixth Amendment violation is "structural" error and thus is not subject to harmless-error review. *Id.* at 1511.

This Court has since recognized that "a defendant faced with a *McCoy* issue should not be expected to object with the precision of an attorney." *Turner v. State*, 570 S.W.3d 250, 276 (Tex. Crim. App. 2018) (citing *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963)). Instead, a *McCoy* claimant need only present evidence that he "'express[ed] statements of [his] will to maintain innocence.'" *Id.* (quoting *McCoy*, 138 S.Ct. 1508).

This Court then discussed *McCoy* in dicta in *Ex parte Barbee*, 616 S.W.3d 836 (Tex. Crim. App. 2021). After suggesting that *McCoy* was not a previously unavailable legal basis that would allow a subsequent habeas claim, the Court proceeded to the merits of Barbee's *McCoy* claim and held that "the application fail[ed] to allege facts that, if true, would entitle [Barbee] to relief under *McCoy*." *Id.* at 845.

Critically, the facts in *Barbee* are quite distinguishable: in *Barbee*, there was no doubt that a murder had occurred; the applicant had no evidence pointing to an alternative perpetrator; and the applicant had no evidence that he had wanted his attorneys to pursue an Actual Innocence claim. Here, Robert has amassed

substantial, persuasive evidence from highly qualified specialists that no crime occurred and that he is, in fact, innocent of any crime; instead, his daughter Nikki died of an unfortunate compendium of natural and accidental causes. *See* CLAIMS I-III, V. He has also adduced evidence that he consistently asked counsel to pursue an Actual Innocence claim but counsel overrode that objection because of their belief that SBS was the only legitimate explanation for Nikki's death. *See* subsection 1, above.

In a concurrence in *Barbee*, Judge Walker explained "that, at a minimum, *McCoy* requires a showing that the defendant told counsel that he wants to pursue a strategy of asserting innocence." *Id.* at 855 (Walker, J., concurring). And while Barbee had repeatedly asserted his innocence, there was no evidence that he asserted "an objective to maintain innocence and counsel overrode that objective by conceding guilt." *Id.* Judge Walker specifically highlighted two letters seeking to remove counsel: "[n]either letter even implies that [Barbee] wished to pursue an innocence strategy that counsel was overriding." *Id*. at 856. By contrast, the letters relied on here all expressly show Robert's long-standing objective to maintain his innocence.

Importantly, *McCoy* itself distinguished a "concession of the defendant's commission of criminal acts and pursuit of diminished capacity, mental illness, or lack of premeditation defenses" despite "the defendant repeatedly and adamantly

insist[ing] on maintaining factual innocence" from "strategic disputes about whether to concede an element of a charged offense." 138 S.Ct. at 1510. At trial, Robert's counsel pursued only a "lack of premeditation defense"—that Robert lacked the intent necessary for capital murder—after conceding Robert's "commission" of the crime via shaking. *Id.*; *cf. United States v. Read*, 918 F.3d 712, 720 (9th Cir. 2019) (holding that *McCoy* was violated when counsel conceded that the defendant committed the crime but put forth an insanity defense over the defendant's desire to claim that he was possessed by demons).

Robert repeatedly told his trial attorneys that he did not shake Nikki, that he did not know what caused her to cease breathing in her sleep, and that he wanted to maintain his innocence. EX37. Relief under *McCoy*, new federal constitutional law, is warranted.

E. Claim V: New Medical And Scientific Evidence Establishes Robert's Actual Innocence

All facts alleged above are incorporated here by reference.

1. Overview

Since the -03 Application was filed, Robert's new legal team has fought for the necessary resources to retain essential experts and obtain access to the complete autopsy records so that an adequate investigation of Nikki's death could be undertaken. That robust investigation has led to a determination as to the precise

causes of Nikki's death—causes that are natural and accidental, not the result of any inflicted injury. The new evidence shows there was no homicide.

The new evidence, provided by a specialist in lung disease, reveals that Nikki had a severe interstitial viral pneumonia and a bacterial bronchopneumonia that had progressed to the point of sepsis. Her illness caused her to cease breathing, collapse, and turn blue from oxygen-deprivation. Her undetected interstitial pneumonia colonized her lung cells and produced a secondary bacterial pneumonia so deadly that parts of her lung cells had sloughed off and died. EX5.

Only recently (post 2020), has medical literature described the ways respiratory viruses interact with each other and with pathogenic bacteria to cause severe lung disease. Nikki had what is now understood as the most severe combination of viral plus bacterial disease, where the virus allowed bacteria to attach to the basement membrane and then penetrate the airway wall of her lungs. It is now understood that Nikki's viral inflammation increased the invasiveness of pathogenic bacteria, affecting her immune system by impairing neutrophil function, decreasing oxidative burst, and enhancing neutrophil apoptosis, thus increasing her susceptibility to bacterial superinfection. *Id.*

Nikki also had a pronounced clotting disorder, Disseminated Intravascular Coagulation (DIC), which explains the volume of intracranial blood observed during the autopsy two days after she collapsed. 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." EX5 (citing 2022 study). Sepsis is a systemic—*i.e.*, body-wide—response to the body's failure to fight off infections like pneumonia. *Id.*

Nikki's pneumonia was not diagnosed in the days leading up to her collapse when Robert 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 (Phenergan/promethazine and codeine) further suppressed respiration in Nikki's infected lungs struggling to take in sufficient oxygen. New 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. EX7.

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 infected lungs are impaired. EX5; EX7; EX8.

Additionally, the long-lost radiological images (some of which were only produced this year) establish irrefutably that Nikki had only a single minor impact site on her head, not the "multiple impacts" the medical examiner claimed. EX6. The

radiological images of Nikki's lungs also support the finding of significant lung disease.

At long last, expertise from multiple disciplines has been correlated to provide a comprehensive explanation for Nikki's death: she was a profoundly ill child whose diseased lungs gave out. No reasonable jury could possibly convict Robert considering the new evidence debunking the notion that Nikki sustained an inflicted injury of any kind. *See* EX5-8; EX2 (lead detective explaining his belief in Robert's innocence); EX4 (juror explaining her lack of confidence in the conviction).

2. 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, without deciding, "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).

3. 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 new, previously unavailable evidence establishing that Nikki's death was not a homicide. New evidence shows that Nikki was a chronically ill child, who suffered from numerous, unresolved infections. Before Nikki was even a year old, she began having 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. But that drug is now known to be unsafe for children Nikki's age and with respiratory issues—precisely because it suppresses respiration. The next day, Nikki's fever spiked, and Robert took her to her pediatrician's office—where her temperature was measured at 104.5 degrees. But the pediatrician sent her

and Robert home—with another prescription for Phenergan/promethazine, this time with codeine. APPX43.

New evidence shows that Nikki was ill with a highly dangerous form of 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. Considering the severity of Nikki's viral and bacterial pneumonia, as revealed by the autopsy slides, an expert in lung disease has concluded that this illness must have started a week and likely several weeks to months before her final collapse. Nikki died from this undiagnosed double pneumonia, which had developed into sepsis. Even if detected, 50% of children with severe sepsis die in the hospital. EX5.

When Nikki died, her intracranial symptoms and other conditions led medical personnel to presume abuse in the form of inflicted head trauma. Nikki's intracranial bleeding, her brain swelling, and her retinal hemorrhages, the SBS/AHT triad, and her light bruises were interpreted as abuse in light of the medical consensus at that time. No one then 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. New evidence shows that Nikki's intracranial

symptoms all derived from her severe double pneumonia and the medications she received. The latter exacerbated her respiratory challenges and made her woozy. In that condition, she was quite vulnerable to falling, and a short fall out of bed with a minor impact contributed to the cascade of fatal consequences that followed.

The 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 also causes internal 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.

No wonder the former lead detective Brian Wharton, who investigated Nikki's death as a murder and testified for the prosecution against Robert, has been speaking out. His editorial, recently published in the *Dallas Morning News*, urges the public to see what he sees: that he and others got it wrong, as scientific advances now show. The new evidence demonstrates that Robert is innocent. EX2.

No wonder that, even without access to all of the new evidence inventoried here, one of the jurors has come forward expressing grave concerns about the integrity of the verdict. EX4.

This Court, recognizing that executing an innocent person would violate the Eighth and Fourteenth Amendments to the U.S. Constitution, should make an actual innocence finding. 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 double pneumonia and medical care that unwittingly made her condition worse.

This case is akin to arson cases that hinge on "fire science" that has, in hindsight, proven to be indefensible. Upon recognizing that the State's causation theory is invalid, an essential element is missing; 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.

CONCLUSION

For all of the foregoing reasons, we pray that the Court grants habeas relief or at least authorizes CLAIMS I-V for further development.

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 33,576 words, excluding the items that need not be counted per Tex. R. App. P. 9.4(i)(1).

/s/ Gretchen S. Sween

CERTIFICATE OF SERVICE

Undersigned counsel represents that the foregoing was served on counsel of record for the State in this cause via the Texas efile system and by electronic mail as follows:

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/s/ Gretchen S. Sween

STATE OF TEXAS

COUNTY OF TRAVIS

VERIFICATION

BEFORE ME, the undersigned authority, on this day personally appeared Gretchen S. Sween, who upon being duly sworn by me testified as follows:

1. I am a member of the State Bar of Texas in good standing.

2. I am the duly authorized attorney for Robert Roberson, having the authority to prepare and to verify Mr. Roberson's Subsequent Application for a Writ of Habeas Corpus.

3. I have prepared and have read the foregoing Subsequent Application for Writ of Habeas Corpus, and I believe all allegations in it to be true to the best of my knowledge.

Signed under penalty of perjury:

Gretchen S. Sween

SUBSCRIBED AND SWORN TO BEFORE ME on 31st of July, 2024.

NOTARY PUBLIC, STATE OF TEXAS

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Notary Public
STATE OF TEXAS
My Comm. Exp. 04-07-26
Notary ID # 13369413-5