IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES ROBINS, aka HA'IM AL MATIN SHARIF Petitioner/Appellant, vs. RENEE BAKER, Warden, Ely State Prison, Respondent/Appellee	)	CASE NO. 65063

BRIEF OF *AMICUS CURIAE* THE INNOCENCE NETWORK IN SUPPORT OF APPELLANT

Appeal from Order Dismissing Petition for Writ of Habeas Corpus (Post-Conviction)

Eighth Judicial District Court, Clark County

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DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1

The undersigned counsel of record certifies and discloses as required by NRAP 26.1(a) that the Innocence Network, an affiliation of over sixty member organizations, has no parent corporations and that there are no publicly held companies that own 10% of more of its stock. The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. Cynthia L. Alexander (Nev. Bar. No. 6718) of the law firm Snell & Wilmer L.L.P., and Edmund Polubinski III (*pro hac vice* admission pending) and David Newman (*pro hac vice* admission pending) of the law firm Davis Polk & Wardwell LLP are the only attorneys appearing for the Innocence Network in this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Dated: August 15, 2014

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By: _____

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The Innocence Network (the "Network") respectfully submits this brief as *amicus curiae* in support of Petitioner/Appellant Charles Robins ("Appellant").

IDENTITY OF AMICUS

The Innocence Network is an affiliation of over sixty organizations dedicated to providing pro bono legal and investigative services to individuals for whom evidence discovered post-conviction can provide proof of innocence. Its member organizations represent hundreds of prisoners with innocence claims in all fifty states, Puerto Rico, and the District of Columbia, as well as Australia, Canada, the United Kingdom, Ireland, New Zealand, the Netherlands, France, Italy, and South Africa.[1] The Network and its members are also dedicated to

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[1] The member organizations include the Alaska Innocence Project, Arizona Justice Project, Arizona Innocence Project, Association in Defense of the Wrongly Convicted (Canada), California Innocence Project, Center on Wrongful Convictions, Committee for Public Counsel Services Innocence Program, Connecticut Innocence Project, Duke Center for Criminal Justice and Professional Responsibility, The Exoneration Initiative, Georgia Innocence Project, Griffith University Innocence Project (Australia), Hawaii Innocence Project, Idaho Innocence Project, Illinois Innocence Project, Innocence and Justice Project at the University of New Mexico School of Law, Innocence Network UK, Innocence Project, Innocence Project of France, Innocence Project at UVA School of Law, Innocence Project New Orleans, Innocence Project Northwest Clinic, Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of Texas, Irish Innocence Project at Griffith College (Ireland), Innocence Project New Zealand, Innocence Project South Africa, Italy Innocence Project, Justicada Reinvidicada – Puerto Rico Innocence Project, Kentucky Innocence Project, Knoops' Innocence Project (Netherlands), Life After Innocence, Michigan Innocence Clinic, Mid-Atlantic Innocence Project, Midwest Innocence Project, Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project, North Carolina

improving the accuracy and reliability of the criminal justice system in future cases. Drawing on lessons from cases in which the system convicted innocent individuals, the Network promotes further study and advocates reform to improve the truth-seeking functions of the criminal justice system in an effort to prevent future wrongful convictions.

As an affiliation of the nation's leading advocates against wrongful convictions, the Network has a strong interest in ensuring that wrongfully convicted defendants are not improperly prevented from presenting newly discovered evidence that could demonstrate their actual innocence and the unconstitutionality of their convictions. Here, the Network is concerned that the court below misapplied Nevada law when it denied an evidentiary hearing to a petitioner in the face of unrebutted declarations from two highly-regarded experts in the fields of pediatric radiology and forensic pathology that fundamentally

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Center on Actual Innocence, Northern California Innocence Project, Office of the Public Defender (State of Delaware), Office of the Ohio Public Defender, Wrongful Conviction Project, Ohio Innocence Project, Osgoode Hall Innocence Project (Canada), Oklahoma Innocence Project, Pennsylvania Innocence Project, Reinvestigation Project (Office of the Appellate Defender), Resurrection After Exoneration, Rocky Mountain Innocence Center, Sellenger Centre Criminal Justice Review Project (Australia), Texas Center for Actual Innocence, Thomas M. Cooley Law School Innocence Project, Thurgood Marshall School of Law Innocence Project, University of Baltimore Innocence Project Clinic, University of British Columbia Law Innocence Project (Canada), University of Miami Law Innocence Clinic, Wake Forest University Law School Innocence and Justice Clinic, Wesleyan Innocence Project, West Virginia Innocence Project, Wisconsin Innocence Project, Witness to Innocence, and Wrongful Conviction Clinic.

undermine key medical evidence presented by the State at trial. The Network also respectfully submits that a fuller appreciation of the history of wrongful homicide convictions in similar cases based on subsequently discredited medical conclusions may assist the Court in its consideration of this appeal. The Network has a pending Motion for Leave to file an Amicus Brief in the Nevada Supreme Court in connection with this case.

SUMMARY OF ARGUMENT

Under clearly established Nevada law, Appellant is entitled to an evidentiary hearing. See Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002). Appellant has offered declarations from highly credentialed experts in the fields of pediatric radiology and forensic pathology that fundamentally undermine key medical evidence presented by the State at trial. This new evidence, if credited, would negate the medical certainty expressed by the State's trial witness that Brittany Smith's injuries were the result of abuse and that her death was the result of intentional homicide. Had the jury been presented with this evidence, it is more likely than not that no reasonable juror would have voted to convict Appellant, much less voted to impose the death penalty. See Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). Under those circumstances, the district court erred in concluding without an evidentiary hearing that Nevada's procedural bars

precluded consideration of Appellant's habeas petition. This Court should reverse and remand for the evidentiary hearing required by Nevada law.[2]

The death of Brittany Smith is both tragic and heartbreaking. The Innocence Network in no way seeks to minimize that fact or to diminish in any way the importance of reaching a resolution in which justice is done. To the contrary, hard experience in many other cases around the country – cases involving similarly tragic deaths of children – teaches that the need to achieve justice makes it especially important in cases like this one to safeguard the availability of appropriate post-conviction relief. In particular, recent experience in cases involving suspected shaken baby syndrome and abusive head trauma make clear that reliance on incomplete or faulty medical evidence can lead – and, indeed, has led – to numerous wrongful convictions. In such cases and in cases like this one, it is especially crucial that courts faithfully apply the law and permit evidentiary hearings to consider new credible medical evidence like that presented in Appellant's petition.

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[2] The Network is aware that Appellant asserts broader grounds for relief on appeal. Consistent with the explanation above concerning the Network's interest in this appeal (see Identity of Amicus, supra), this brief addresses only the issue of Appellant's entitlement to a hearing under his "gateway" claim under Mann and Pellegrini.

ARGUMENT

I. The District Court Erred in Not Holding an Evidentiary Hearing on the New Medical Evidence Presented by Appellant

This Court "has long recognized a petitioner's right to a post-conviction evidentiary hearing when the petitioner asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief." Mann, 118 Nev. at 354, 46 P.3d at 1230. A claim is "not 'belied by the record' just because a factual dispute is created" by the post-conviction affidavits, but rather when it is "proven to be false" by the record. Id. "Where, as here, something more than a naked allegation has been asserted, it is error to resolve the apparent factual dispute without granting the accused an evidentiary hearing." Vaillancourt v. Warden, Nevada State Prison, 90 Nev. 431, 432, 529 P.2d 204, 205 (1974); see also Mann, 118 Nev. at 356, 46 P.3d at 1231 (holding that it is "improper for the district court to resolve a factual dispute . . . without conducting an evidentiary hearing"); accord Milton v. Miller, 744 F.3d 660, 673 (10th Cir. 2014) (remanding federal habeas petition to district court to "conduct an evidentiary hearing and resolve th[e] disputed issues of fact"); Goodwin v. Johnson, 132 F.3d 162, 178 (5th Cir. 1997) (same).

At this "gateway stage," House v. Bell, 547 U.S. 518, 538 (2006), Appellant seeks, in light of the newly presented medical evidence, to avoid the procedural bars against judicial consideration of delayed and successive Nevada state habeas

petitions. See NRS 34.726; NRS 34.810. These procedural bars are excused upon a showing that failure to consider the petitioner's claim amounts to a "fundamental miscarriage of justice." Pellegrini, 117 Nev. at 887, 34 P.3d at 537 (citing Mazzan v. Whitley, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996)). This standard is met where "the petitioner makes a colorable showing he is actually innocent of the crime or is ineligible for the death penalty." Id. (citing Mazzan, 112 Nev. at 842, 921 P.2d at 922).

This standard, while "demanding," "does not require absolute certainty about the petitioner's guilt or innocence" and does not require a showing of "conclusive exoneration." House, 547 U.S. at 538, 553. Rather, a petitioner claiming such a miscarriage of justice must show that in light of the new evidence, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt. See Pellegrini, 117 Nev. at 887, 34 P.3d at 537 (citing Schlup v. Delo, 513 U.S. 298, 327 (1995)). Or, "to remove the double negative," the petitioner must show that "more likely than not any reasonable juror would have reasonable doubt." House, 547 U.S. at 538. A petitioner claiming ineligibility for the death penalty, by contrast, must show "by clear and convincing evidence" that no reasonable juror would have found him death-eligible. Pellegrini, 117 Nev. at 887, 34 P.3d at 537 (citing Sawyer v. Whitley, 505 U.S. 333, 336 (1992)).

In this case, Appellant's "specific factual allegations" under Mann are the conclusions of Dr. Patrick D. Barnes and Dr. John Plunkett, two highly-qualified medical experts, who unequivocally conclude that Brittany suffered from infantile scurvy. Dr. Barnes, who is Board Certified in Diagnostic Radiology and Neuroradiology, is an accomplished pediatric neuroradiologist who serves as the Chief of Pediatric Neuroradiology and Co-Director of Pediatric MRI & CT at the Stanford University Medical Center and has co-founded the Child Abuse Task Force, Suspected Child Abuse and Neglect Team at the Stanford University Medical Center. (18AA4288, ¶¶ 1-2.) Dr. Plunkett, who is Board Certified in Anatomical Pathology, Clinical Pathology, and Forensic Pathology, has personally performed over 3,000 autopsies, including over 200 on children under the age of two. (18AA4430, ¶¶ 1-2.)

These experts concluded to a reasonable degree of medical certainty that based on all of the evidence available at the time of Brittany Smith's death, including radiographic imaging, Brittany was suffering from an undiagnosed and untreated disease – infantile scurvy – that would explain how all of Brittany's observed injuries and death could be natural or accidental rather than the product of abuse. Drs. Barnes and Plunkett opined that scurvy uniquely and consistently manifests in cerebral edema (which according to the trial evidence was the cause of

Brittany's death), subdural hemorrhaging, and musculoskeletal abnormalities. (18AA4291-93, ¶¶ 10, 14, 16, 19; 18AA4436, ¶¶ 18.)

With regard to injuries to Brittany's leg, which at trial were presented to the jury as proof of abuse by Appellant, Dr. Barnes concluded that "(1) Brittany Smith had scurvy; (2) the scurvy resulted in a subperiosteal hemorrhage, which produced a large callus and ultimately caused the fracture to Brittany's right femur; and (3) the large callus formation evident in the radiographic images of Brittany's right leg was caused by scurvy and it was not a callus formed in response to an earlier fracture to Brittany's leg." (21AA5019-20, ¶ 4.) Dr. Barnes concluded that the evidence clearly demonstrates that "Brittany had multiple musculoskeletal abnormalities which are uniquely associated with infants suffering from scurvy." (Id. at ¶ 5.) Finally, Dr. Plunkett concluded that, given Brittany's underlying condition of untreated scurvy, her acute thoracic and abdominal injuries may have been caused by attempts to perform CPR. (18AA4436, ¶ 18.)

These specific factual allegations critically undercut the medical examiner's trial testimony, which was the cornerstone evidence on which the State relied in both the guilt and penalty phases. The State's medical examiner, Dr. Nina Hollander, testified unequivocally at Appellant's trial that it was her medical opinion that the injuries sustained by Brittany were the result of abuse. Dr. Hollander's testimony was crucial to Appellant's conviction. Because there were

no witnesses to whatever caused Brittany's fatal cerebral edema, Dr. Hollander's testimony served to establish both that Appellant was in fact the cause of that injury and that he had the *mens rea* to commit murder. Throughout its closing argument, the prosecution asserted that there was "no question" that Brittany Smith died due to blows to the head, and that she had suffered a broken leg and broken back and multiple contusions and internal hemorrhages due to abuse, because the jury had "heard the expert Dr. Hollander testify to those facts." (8AA1859; 8AA1861 ("you know she was abused because bruises aren't normal, broken legs aren't normal").) The State used Dr. Hollander's testimony that the autopsy reflected a serious blunt force to infer intent and premeditation. (8AA1875.) Dr. Hollander's testimony was also used to support the aggravating factor of "torture" that the jury found in sentencing Appellant to death. (9AA2149.)

Critically, there is no evidence whatsoever that Dr. Hollander ever recognized the likelihood that Brittany had scurvy. She does not appear even to have considered the possibility, much less factored it into her conclusions, which she expressed to the jury with such certainty and on which the prosecution relied so heavily in its arguments. The possibility of untreated infantile scurvy – and the alternate explanation that it would provide for many or all of Brittany's injuries – was never presented to the jury.

In this light, Appellant's new evidence – that Brittany Smith suffered from scurvy, that competent medical professionals in 1988 would have considered the possibility of scurvy in drawing conclusions about Brittany's injuries and death, and that in fact all of Brittany's injuries were consistent with scurvy alone or accidental injury complicated by scurvy – fundamentally undermines Dr. Hollander's conclusions. In particular, the new evidence contradicts Dr. Hollander's ultimate diagnoses of battered child syndrome and blunt force trauma as the cause of Brittany's death, and her medical certainty as to the cause of Brittany's various injuries:

- Leg fracture (6AA1332-33)
- Fibrosis encasing the left ureter (6AA1332)
- Subdural hemorrhage and cerebral edema (6AA1329)
- Tear in 11th thoracic vertebra (6AA1332)
- Subgaleal hemorrhage underneath scalp (6AA1327)
- Minor bruises and internal hemorrhages (6AA1326-27)

In the face of Dr. Barnes and Dr. Plunkett's conclusions, no reasonable juror could credit Dr. Hollander's testimony – at least as presented at trial – especially since she does not appear even to have considered the possibility that Brittany suffered from infantile scurvy, let alone ruled it out as proper diagnostic procedure would have required. Likewise, Dr. Barnes and Dr. Plunkett's conclusions would

cause any reasonable juror to question Dr. Hollander's conclusion that the only possible cause of Brittany's death was intentional homicide, and reasonably to doubt that Appellant murdered Brittany with "willful, deliberate and premeditated" blunt force to her head, NRS 200.030(1)(a), or that such killing involved the aggravating circumstance of "torture," NRS 200.033(8), warranting the death penalty.

Of course, one cannot determine on the current record how Dr. Hollander or the State would respond to Dr. Barnes and Dr. Plunkett's as-yet-unanswered findings. Nor can one determine how Dr. Barnes or Dr. Plunkett might respond on cross examination or how they would respond to new or revised opinions submitted by experts for the State. But that is precisely why an evidentiary hearing is called for here, under the standard set forth in Mann: because Appellant's new evidence, "if true," would cause a reasonable juror to "have reasonable doubt" as to Appellant's guilt. House, 547 U.S. at 538. And it most certainly would have caused a reasonable juror to "have a reasonable doubt" concerning Appellant's death eligibility, given the evidence demonstrating that Brittany's injuries are consistent with scurvy, without any "torture" by Appellant.

In its opinion denying Appellant's petition, the district court, which did not even address the Mann standard, misconstrued the effect of Dr. Barnes and Dr. Plunkett's new evidence in its relevant findings of fact. The district court's

opinion stated: "Even if scurvy was a required cause of Brittany's death, the new experts do not opine that scurvy was a superseding cause such that Robins' abuse of Brittany, which was observed by eyewitnesses and to which he admitted, was in no way the proximate cause of her death." (21AA5059-60.)[3] These findings indicate that the court below fundamentally misapprehended the fact that Dr. Barnes and Dr. Plunkett reached conclusions that were directly at odds with aspects of Dr. Hollander's testimony that were crucial to the State's case at both the guilt and penalty phases of Appellant's trial.

The district court appears to have focused on the fact that Appellant's experts did not exclude abuse as one possible explanation for Brittany's injuries and death, and thus reasoned that Dr. Hollander's trial testimony reaching that conclusion remained uncontradicted. That is wrong. Dr. Barnes and Dr. Plunkett identified a crucial medical fact that Dr. Hollander did not take into account – directly contradicting Dr. Hollander's conclusion that intentional abuse was the

[3] To the extent that this finding of fact suggests that the district court believed there were eyewitnesses to Appellant abusing Brittany by striking her in the head shortly before her death (which was the prosecution's theory of how Brittany died), or that Appellant admitted to having done so, that is false. As the prosecutor admitted during closing arguments, "nobody knows exactly what it was that he did or how he did it." (8AA1860.) What Appellant and other trial witnesses testified to was Appellant's purportedly abusive behavior toward Brittany months prior to her death, which behavior Appellant testified was not abusive or malicious and which in any case was not the basis of his murder conviction. Challenges to the reliability of the eyewitness testimony, though beyond the scope of this submission, are detailed in Appellant's brief. (See Appellant Br. at 24-38, 83-90.)

only possible cause of Brittany's injuries, fundamentally undermining the basis for her conclusions about the circumstances of Brittany's death, and negating many of the inferences that the jury would have needed to draw from Dr. Hollander's testimony in convicting Appellant and imposing the death penalty. Given that there was no eyewitness testimony that Appellant struck Brittany in the head or other direct evidence concerning the circumstances of Brittany's death, Dr. Hollander's forensic certainty that nothing else besides intentional abuse could have caused Brittany's injuries was the cornerstone of the prosecution's case. In light of Appellant's newly discovered and starkly conflicting expert evidence, that certainty – the central evidentiary basis for a finding of guilt – no longer exists.

Since the "central forensic proof connecting [Appellant] to the crime . . . has been called into question, and [Appellant] has put forward substantial evidence pointing to" an alternative cause of Brittany's death, "it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt." House, 547 U.S. at 554. Because Appellant's new factual allegations – based on the new expert evidence and not belied by the record – would entitle him to pass through the gateway and permit consideration of his successive habeas petition on the merits, Nevada law requires an evidentiary hearing at which to test that new evidence. See Mann, 118 Nev. at 354, 46 P.3d at 1230.

II. Judicial Experience With Wrongful Convictions in Analogous Cases, Including Those Involving Alleged Shaken Baby Syndrome, Counsels in Favor of Careful Consideration of New Medical Evidence That Undermines Medical Evidence Presented at Trial

Brittany Smith's death – whatever its cause – was undeniably a horrible tragedy. But it is precisely because stories like Brittany's summon a strong desire to find unambiguous fault and seek retribution that full consideration of new, credible medical evidence is necessary to ensure that such tragedies are not compounded by wrongful convictions or death sentences.

It is well documented by psychologists that people have a cognitive bias in favor of "mak[ing] sense of seemingly random catastrophes," and thus construct a causal chain that places blame on someone who can be punished for the harm. Deborah Tuerkheimer, Flawed Convictions: "Shaken Baby Syndrome" and the Inertia of Justice 13 (Oxford University Press 2014) (quoting Jerry M. Burger, Motivational Biases in the Attribution of Responsibility for an Accident: A Meta-Analysis of the Defensive-Attribution Hypothesis, 90 Psychological Bulletin 496, 510, 511 (1981)). Where an infant is "readily situated as [a] crime victim, the drive to locate an offender only gains force." Id. at 14. The understandable desire to place blame for the crushing tragedy of an infant's death is powerful, and can "interfere with efforts to rationally evaluate the facts," which might otherwise point away from wrongdoing as a clear-cut explanation. Id. This is precisely why it is important to not rush to conclusions and to carefully consider new medical

evidence that fundamentally undermines the science on which the conviction was based.

Forensic errors are not, unfortunately, unprecedented. Unvalidated or improper forensic science is the second-greatest contributor to the subset of wrongful convictions that are overturned by DNA testing. The Innocence Project, Understand the Causes: Unreliable or Improper Forensic Science, http://www.innocenceproject.org/understand/Unreliable-Limited-Science.php (last visited Aug. 13, 2014). In 49% of DNA exonerations, unvalidated or improper forensic science contributed to the wrongful conviction. Id. In 60% of 156 DNA exonerations reviewed in one study, "forensic analysts called by the prosecution provided invalid testimony at trial – that is, testimony with conclusions misstating empirical data or wholly unsupported by empirical data." Brandon L. Garrett & Peter J. Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L. Rev. 1, 2 (2009).

A. The Evolving Medical Understanding of Shaken Baby Syndrome

Reliance on invalid scientific testimony has proven particularly costly in cases of alleged shaken baby syndrome ("SBS"),[4] as the evolving medical

[4] As discussed in more detail below, the phrase "shaken baby syndrome" has been superseded by the broader category of "abusive head trauma." See Deborah Tuerkheimer, Science-Dependent Prosecution and the Problem of Epistemic Contingency: A Study of Shaken Baby Syndrome, 62 Ala. L.Rev. 513, 516 n.23 (2011); see also Shaken Baby Syndrome Given New Name: Pediatrics Group

understanding of SBS has fatally undermined a once-certain diagnosis that had led inexorably to criminal convictions. Numerous exonerations of defendants wrongfully convicted of shaking or otherwise abusing babies to death have involved "false or misleading forensic evidence." See The National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited Aug. 13, 2014). Courts have recognized that the new medical understanding of SBS "arguably suggests that a claim of shaken baby syndrome is more an article of faith than a proposition of science." Del Prete v. Thompson, 10 C 5070, 2014 WL 296094, at *44 n.10 (N.D. Ill. Jan. 27, 2014).

The SBS hypothesis, first stated in 1971 by A. Norman Guthkelch, a British pediatric neurosurgeon, Tuerkheimer, Flawed Convictions, supra, at 1, postulates that

> if an adult violently shakes an infant for four or five oscillations during a period of three to ten seconds, the rapid acceleration and deceleration of the infant's brain within the skull can cause the infant's death. . . . The rotational movement of the brain within the cranial cavity generates shearing forces which tear the bridging veins in the brain. In turn, the tearing can cause bleeding, brain swelling, and death.

Urges Use of Diagnostic Term "Abusive Head Trauma," NBCNews.com, Apr. 27, 2009, available at http://www.nbcnews.com/id/30425052; Lauren Quint, Note, Bridging the Gap: An Application of Social Frameworks Evidence to Shaken Baby Syndrome, 62 Hastings L.J. 1839, 1841 n.5 (2011).

Edward J. Imwinkelried, Shaken Baby Syndrome: A Genuine Battle of the Scientific (and Non-Scientific) Experts, 46 1 Crim. L. Bull. ART 6 (2010) (citations omitted).

By the late 1990s, "SBS had become entrenched in establishment medicine . . . and criminal law." Tuerkheimer, Flawed Convictions, supra, at 5. As the SBS hypothesis became better known, prosecutions for shaking babies to death increased dramatically. See Deborah Tuerkheimer, The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts, 87 Wash. U. L. Rev. 1, 9 (2009) (fewer than 15 appeals of SBS convictions between 1984, the first reported appeal, and 1989, compared to 315 between 2000 and 2004). As of 2009, approximately 200 defendants a year were being convicted of SBS, with an estimated 1500 convictions since 1990. Id. at 10.

The classic SBS diagnosis allowed blame to be assigned based solely on the presence of injuries known as the "triad" – (1) bleeding beneath the outermost layer of membranes that surround the brain (subdural hematoma), (2) bleeding in the retina (retinal hemorrhage), and (3) brain swelling (cerebral edema) – without any additional evidence of abuse. Tuerkheimer, Flawed Convictions, supra, at 5. Because doctors "routinely testif[ied] to complete certainty regarding guilt" based solely on the triad, criminal prosecutions lacking any other evidence against the defendant became routine. Id. at 6.

In the paradigmatic SBS prosecution, medical testimony served to establish each element of the crime charged: since the triad could only be caused by abuse, the act of shaking necessarily caused the injury or death; since the triad could not have been produced accidentally, but only through sufficiently violent shaking, presence of the triad demonstrated the requisite *mens rea*; and since the child would have collapsed immediately upon the infliction of abuse, the last person to have been with the child (the defendant) would have been the shaker. See Keith Findley et al., Examining Shaken Baby Syndrome Convictions in Light of New Medical Scientific Research, 37 Okla. City U. L. Rev. 219, 223 (2012). The typical evidentiary record of an SBS case was summarized by a New York court in 2011:

> It is undisputed that the victim sustained subdural hematomas, retinal hemorraghing and cerebal edema, commonly referred to as the triad symptoms indicative of Shaken Baby Syndrome (SBS). The People's expert witnesses testified that, in the absence of evidence of external trauma, those symptoms in a baby can be caused only by shaking the baby with great force. The People's experts further testified that there can be no "lucid interval" between the shaking and the baby's death or disability. Thus, because the victim lost consciousness while in the exclusive care of defendant, it was reasonable for the jury to conclude that defendant shook the victim, causing his death.

Tuerkheimer, Flawed Convictions, supra, at 7 (quoting People v. Hersey, 925 N.Y.S.2d 314, 315 (App. Div. 4th 2011)). Medical diagnosis of the triad, even in the absence of any other corroborating evidence, could decisively lead to

conviction. Keith A. Findley et al., Shaken Baby Syndrome, Abusive Head Trauma, and Actual Innocence: Getting It Right, 12 Hous. J. Health L. & Pol'y 209, 226 (2012) ("SBS quickly became a criminal category of res ipsa loquitur . . . and resulted in quick, easy and virtually routine convictions . . . based solely on the medical testimony of prosecution experts.").

In the last decade and a half, however, new research has severely undercut the classic SBS diagnosis and the certainty of the convictions resulting from it. Beginning with the rise of "evidence-based medicine" in the late 1990s, which required doctors to "derive their research from methods that are scientific and statistically rigorous," the SBS literature came under heightened scrutiny. Tuerkheimer, Next Innocence Project, supra, at 12. The resulting determinations found that the medical research published before 1998 contained "inadequate scientific evidence to come to a firm conclusion on most aspects of causation, diagnosis, treatment, or any other matters pertaining to SBS." Id. (quoting Mark Donohoe, Evidence-Based Medicine and Shaken Baby Syndrome: Part I: Literature Review, 1966-1998, 24 Am. J. Forensic Med. & Pathology 239, 241 (2003)). Specifically, "'[s]erious data gaps, flaws of logic, [and] inconsistency of case definition' meant that 'commonly held opinion that the finding of [subdural hematoma] and [retinal hemorrhage] in an infant was strong evidence of SBS was unsustainable.'" Id. at 12-13.

The current understanding of SBS reflects "widespread, if not universal, agreement that the presence of the triad alone – or its individual components – is not enough to diagnose abuse." Findley et al., Getting it Right, supra, at 213. Each element of a crime formerly determined by the triad – *actus reus*, *mens rea*, and identity of the perpetrator – has come under question. As to the *actus reus*, biomechanical research has shown that even vigorous shaking of an infant may not, by itself, generate the amount of force required to cause brain injury or retinal bleeding. See, e.g., id. at 236 (citing A.K. Ommaya et al., Biomechanics and Neuropathology of Adult and Paediatric Head Injury, 16 Brit. J. Neurosurg. 220, 226, 232-33 (2002)); Ann-Christine Duhaime et al., The Shaken Baby Syndrome: A Clinical, Pathological, and Biomechanical Study, 66 J. Neurosurg. 409, 414 (1987). Indeed, recognizing that "SBS was a more precise label than the science allowed," the American Academy of Pediatrics adopted in 2009 the vaguer term, "Abusive Head Trauma" ("AHT"), in place of SBS. Tuerkheimer, Flawed Convictions, supra, at 21. AHT includes "hitting the child on the head, crushing the child, throwing the child onto a hard or soft surface, or any other conceivable manner of harming the head." Findley et al., Getting it Right, supra, at 220.

Still, whether termed SBS or AHT, many triad-only diagnoses and their resultant criminal convictions cannot survive the deficiencies laid bare by the developing science. While trauma other than shaking is now recognized as a

possible cause of triad injuries, the level of force required is unclear. Tuerkheimer, Flawed Convictions, supra, at 22. If the necessary force is minimal, then the requisite *mens rea* can no longer be proven simply by presence of the triad; in fact, since 2001, researchers have found that, contrary to prior dogma, accidental short falls could provide the impact necessary to cause the triad. Id. at 22 (citing, among others, John Plunkett, Fatal Pediatric Head Injuries Caused by Short-Distance Falls, 22 Am. J. Forensic Med. & Pathology 1, 10 (2001)). Further, the notion that the last person with the child before the collapse must have been the perpetrator – because there could be no lucid period after the abuse – has been disproved. Now, in the wake of documented periods of lucidity prior to collapse, doctors acknowledge that the child may remain conscious and seem "reasonably well" after the suspected abuse. Id. at 24 (citing, among others, M.G.F. Gilliland, Interval Duration Between Injury and Severe Symptoms in Nonaccidental Head Trauma in Infants and Young Children, 43 J. Forensic Sci. 723 (1998)).

Crucially, the differential diagnosis of the triad has expanded over the past decade to include many natural, non-traumatic causes of the injuries previously thought to be the result of abuse. Id. at 25. These abuse "mimics" include: prenatal and perinatal conditions, including birth trauma; congenital malformations; genetic conditions; metabolic disorders; coagulation disorders; infectious disease; vasculitis and autoimmune conditions; oncology; toxins and

poisons; nutritional deficiencies; complications from medical-surgical procedures; motor vehicle crashes; and playground injuries. Findley et al., Getting it Right, supra, at 214 (citing Andrew P. Sirotnak, Medical Disorders that Mimic Abusive Head Trauma, in Abusive Head Trauma in Infants and Children: a Medical, Legal, and Forensic Reference, 191-226 (G.W. Med. Publ'g 2006); M. Denise Dowd, Epidemiology of Traumatic Brain Injury: Recognizing Unintentional Head Injuries in Children, in Abusive Head Trauma in Infants and Children: a Medical, Legal, and Forensic Reference, 11-14 (G.W. Med. Publ'g 2006)).

The newly developed differential diagnosis of the triad has led even Dr. Guthkelch, the neurosurgeon who first articulated the SBS hypothesis, to counsel both the medical and legal establishments to limit the use of triad-based diagnoses in criminal prosecutions, acknowledging that they have resulted in transparently wrongful convictions:

> [B]oth medical science and the law have gone too far in hypothesizing and criminalizing alleged acts of violence in which the only evidence has been the presence of the classic triad . . . . Often, there seems to have been inadequate inquiry into the possibility that the picture resulted from natural causes. 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 of the nervous system, suggesting that the problem was natural or congenital, rather than abusive.

A.N. Guthkelch, Problems of Infant Retino-Dural Hemorrhage with Minimal External Injury, 12 Houston J. Health L. & Pol'y 201, 203-04 (2012).

Recognizing the danger of erroneous SBS/AHT convictions, courts have deemed the "shift in mainstream medical opinion" to constitute "newly discovered evidence," invalidating convictions that were based on the now-outdated medical testimony. See e.g., State v. Edmunds, 746 N.W.2d 590, 599 (Wis. 2008) (reversing conviction and remanding for new trial because "there is a reasonable probability that a jury, looking at both the new medical testimony and the old medical testimony, would have a reasonable doubt as to Edmunds's guilt").

Here, newly discovered evidence of Brittany's infantile scurvy, like the enhanced medical understanding of SBS/AHT, invalidates the prior, faulty medical conclusions that led to Appellant's conviction and death sentence. Dr. Guthkelch's admonishment in the SBS/AHT context that there has been "inadequate inquiry into the possibility that the picture resulted from natural causes" rather than abuse sounds just as urgently in this case, where the differential diagnosis of Brittany's condition supports Appellant's claim that he is innocent of having struck Brittany in the head before she died; scurvy alone, or scurvy in conjunction with accidental trauma, may have caused Brittany's fatal injuries.

B. Exonerations of Defendants Convicted of Shaken Baby Homicides

The significant number of SBS/AHT convictions called into question by new medical evidence demonstrates that judicial errors are quite possible in these sensitive and tragic cases of the apparently violent deaths of small children, but that exoneration of the wrongfully convicted is possible so long as procedural avenues to relief are not unfairly closed. A few illustrative examples, set out below, demonstrate the importance of allowing new evidence to be presented in support of colorable actual innocence claims. Just as the evolving understanding of SBS/AHT showed that the symptoms of abuse that inculpated these defendants were not enough to support their convictions, the evidence Appellant seeks to present to the district court may well demonstrate that the failure of the State's witnesses to recognize the underlying medical condition consistent with all of Brittany Smith's symptoms likewise renders Appellant's conviction unreliable.

1. Audrey Edmunds

In October 1995, stay-at-home mother Audrey Edmunds was babysitting seven-month-old Natalie Beard. Natalie's mother mentioned that Natalie had been fussy in the morning and had taken less than half her morning bottle, but was otherwise normal. Edmunds left Natalie in a bedroom with a bottle of baby formula. Within the hour, Natalie was limp and unresponsive, and Edmunds called the paramedics. Natalie died later that evening. The physicians performing the

autopsy discovered a presentation of the classic SBS triad, but no outward signs of abuse. At trial, medical experts testified that the symptoms that presented in Natalie were the hallmark presentation for SBS, and the prosecution argued that Natalie's health record – including numerous trips to the hospital for lethargy, irritability, vomiting and ear infections, all symptoms that can indicate brain injury – was not relevant because her symptoms presented a clear case of abuse, and Edmunds was the last person to be with Natalie. In November 1996, Edmunds was convicted and sentenced to 18 years in prison. In 2003, the Wisconsin Innocence Project, a member of the Network, took the case. In 2008, after an evidentiary hearing questioning the medical underpinnings of the SBS diagnosis, the Court of Appeals of Wisconsin overturned Edmunds's jury conviction and ordered a new trial because, after Edmunds's presentation of the conflicting medical evidence, "a jury would be faced with competing credible medical opinions in determining whether there is a reasonable doubt as to Edmunds's guilt." Edmunds, 746 N.W.2d at 599. The State dismissed the charges later that year. See The National Registry of Exonerations: Audrey Edmunds, http://www.law.umich.edu/special /exoneration/Pages/casedetail.aspx?caseid=3201; Melanie R. McManus, Oh, Baby, Madison Magazine (July 2009), http://www.madisonmagazine.com/Madison-Magazine/July-2009/Oh-Baby; Bluhm Legal Clinic Center on Wrongful

Convictions: Audrey Edmunds, http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/wi/audrey-edmunds.html.

2. Drayton Witt

In June 2000, Drayton Witt's girlfriend's five-month-old son Steven, who had recurring health problems, suffered a seizure. The baby arrived at the hospital in cardiac arrest, and was revived but died soon after. Despite Steven's medical history, a physician's report from the morning of his death indicated the symptoms that traditionally pointed to a diagnosis of SBS. Witt, the last person to have custody of Steven, was convicted of second-degree murder in February 2002 and sentenced to 20 years in prison. In 2008, the Arizona Justice Project, a member of the Network, began reexamining Witt's case. By May of 2012, a new trial was granted and in October 2012 the charges were dismissed due to the significant development in the medical and scientific community's understanding of SBS in the 12 years since Steven's death. See The National Registry of Exonerations: Drayton Witt, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4043; Emily Bazelon, The Exoneration of Drayton Witt, Slate (Oct. 2012), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/10/what_the_exoneration_of_arizona_father_drayton_witt_means_for_shaken_baby.html.

3. Shirley Ree Smith

In 1996, seven-week-old Etzel Glass died during the night while sleeping in a room with Shirley Ree Smith, his grandmother. Based only on minimal subdural hemorrhaging – there was no retinal bleeding, no brain swelling, and no fracture or abrasions – the coroner found the cause of death to be SBS. In December 1997, Smith was convicted and sentenced to 15 years to life. In 2012, after Smith's successful appeal to the Ninth Circuit was reversed by the U.S. Supreme Court on procedural grounds (notwithstanding that, due to the medical evidence, "[d]oubts about whether Smith [was] in fact guilty are understandable," Cavazos v. Smith, 132 S. Ct. 2, 7 (2011)), Governor Jerry Brown of California commuted Smith's sentence, citing "significant doubts" surrounding the conviction. See Cavazos, 132 S. Ct. at 4; Shirley Ree Smith Commutation of Sentence, Order granted by Gov. Edmund G. Brown, Jr. of the State of Cal. (Exec. Dep't Apr. 6, 2012), available at http://www.propublica.org/documents/item/332164-smith-shirley-ree-commutation-4-6-2012; Emily Bazelon, Jerry Brown Shows Mercy to Shirley Ree Smith, Slate (Apr. 2012), http://www.slate.com/articles/news_and_politics/crime/2012/04/jerry_brown_pardons_shirley_ree_smith_in_an_old_sad_shaken_baby_case_.html.

4. Jennifer Del Prete

In 2002, Jennifer Del Prete was babysitting four-month-old Isabella Zielinski. While Del Prete was babysitting Isabella, Isabella became unresponsive and was sent to the hospital, where she was treated but never fully recovered, and died 10 months later. The triad of SBS symptoms was observed during her treatment, and after Isabella's death, Del Prete was charged for murder on the theory that Del Prete must have shaken the child 10 months earlier. Del Prete was convicted of first-degree murder in 2005, and sentenced to 20 years in prison. After permitting an evidentiary hearing regarding Del Prete's claim of actual innocence, in January 2014 the United States District Court for the Northern District of Illinois concluded that Del Prete's new medical evidence "undercut[] the prosecution's theory at Del Prete's criminal trial," and gave rise "to abundant doubt, not merely reasonable doubt, regarding Del Prete's guilt." Del Prete, 2014 WL 296094, at *43. Moreover, the court stated that "even if one were to disregard all of this, the testimony indicating that even minor trauma could have caused bleeding from [Isabella's] chronic subdural hemorrhage and further injury would undermine a claim of criminal responsibility on Del Prete's part and further give rise to reasonable doubt regarding her guilt." Id. The court therefore held that Del Prete had "established that it is more likely than not that no reasonable juror would have found her guilty of murder beyond a reasonable doubt." Id. at *44. Because

no reasonable juror who heard all of the relevant evidence regarding SBS in her case could find her guilty beyond a reasonable doubt, the court ruled that her procedurally defaulted habeas petition should be heard on the merits. Id. at *45; see Deborah Tuerkheimer, Finally, a Judge Calls Shaken Baby Diagnosis an "Article of Faith", Slate (May 2012), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/05/shaken_baby_syndrome_in_the_courts_a_judge_finally_calls_the_diagnosis_an.html.

Amicus here is only asking this Court to provide the Appellant an opportunity to present the medical evidence that supports his colorable claim of actual innocence. Particularly in the light of Appellant's death sentence and the repeated examples of exoneration of defendants convicted of killing small children based upon incomplete evidence relating to the science of infant head trauma, the Innocence Network submits that the new medical evidence in this case should be presented at a hearing to the district court, which can then determine on a fuller record whether there is sufficient doubt as to Appellant's conviction or death sentence to allow consideration of his habeas claims on the merits.

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CONCLUSION

For the foregoing reasons, the Network respectfully requests that this Court reverse and remand to the district court to hold an evidentiary hearing.

Dated: August 15, 2014

SNELL & WILMER L.L.P.

By: _____

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CERTIFICATE OF COMPLIANCE

I hereby certify that the MOTION FOR LEAVE OF COURT TO FILE AMICUS CURIAE BRIEF ON BEHALF OF THE INNOCENCE NETWORK complies with the typeface and type style requirements of NRAP 32(a)(4)-(6), because this brief has been prepared in a proportionally spaced typeface using a Microsoft Work 2010 processing program in 14-point Times New Roman type style.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it contains approximately 51,527 words.

Finally, I hereby certify that I have read the MOTION FOR LEAVE OF COURT TO FILE AMICUS CURIAE BRIEF ON BEHALF OF THE INNOCENCE NETWORK and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be

found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Executed this 15th day of August, 2014.

/s/ Cynthia L. Alexander
Cynthia L. Alexander, Esq.

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this date, I caused to be served a true and correct copy of the foregoing BRIEF OF **AMICUS CURIAE BRIEF ON BEHALF OF THE INNOCENCE NETWORK** by the method indicated:

__X__ U. S. Mail

_____ U.S. Certified Mail

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