

**IN THE  
TEXAS COURT OF CRIMINAL APPEALS**

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EX PARTE ) Trial Cause No. 26,162  
ROBERT LESLIE ROBERSON III, )  
 ) Writ Cause No. WR-63,081-03, -04  
APPLICANT. )

**EXECUTION DATE  
OCTOBER 17, 2024**

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**EMERGENCY MOTION FOR STAY OF EXECUTION  
BASED ON NEW GROUNDS**

Robert Leslie Roberson III, through counsel, respectfully moves this Court to enter a stay of his execution, which is currently scheduled for October 17, 2024. This Motion is filed, not for the purpose of delay, but so that justice can be served. It is based on the following three new grounds:

- A habeas case is pending before this Court, *Ex parte Roark*, that involves the **same** issue of whether the “science” used to obtain the conviction (the since discredited Shaken Baby Syndrome hypothesis) has changed so as to merit a new trial. The Roark and Roberson cases are markedly similar. Yet Roberson came to this Court with an adverse recommendation from the convicting court in rural Anderson County and the Roark case thereafter came to this Court with a favorable recommendation based on an **agreement** on the State’s part that a new trial was warranted. As this Court is likely to issue an opinion in *Roark* at any time, Mr. Roberson should not be executed when a change in Texas law might provide him a new avenue for obtaining habeas relief.
- An outpouring of bipartisan support from Texas lawmakers, eminent doctors and scientists, disability rights groups, and innocence groups demonstrates that there can be no confidence in the integrity of an execution in the face of

so much new evidence that no crime even occurred—evidence that has not yet been considered by any court. *See Appendix A* (Support Letters).

- A Suggestion to Reconsider on the Court’s Own Initiative has been filed. It is based primarily on Texas lawmakers’ recent letter of support sent to the Texas Board of Pardons and Paroles and Governor Abbott expressing the opinion that the legislative intent underlying Article 11.073 has not been fulfilled with respect to Mr. Roberson’s case and that he should have been awarded a new trial.

In support of this Emergency Motion, we respectfully show the following:

### **BASIC FACTUAL BACKGROUND**

#### **I. The Underlying Case**

Robert Roberson’s daughter Nikki experienced chronic health challenges in her short life, including a history of unresolved infections and breathing apnea. In the last week of her life, Nikki suffered from a respiratory infection, vomiting, and diarrhea. She was taken to the emergency room on January 28, 2002, and was prescribed Phenergan in suppository form.<sup>1</sup> The next day, she developed a high fever—measured at 104.5 at her pediatrician’s office—and was given another prescription for Phenergan, this time combined with codeine. The FDA now restricts administering Phenergan and codeine to children because of risks with induced breathing difficulties and death.

On the night of January 30, 2002, Robert retrieved Nikki from her grandparents’ house, took her home, and put her to bed. In the early morning of

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<sup>1</sup> Phenergan is the brand name for promethazine.

January 31, 2002, Robert was awoken by a strange cry and found Nikki on the floor at the foot of the bed. After comforting Nikki, the two eventually fell back asleep. But when Robert awoke later that morning, he found Nikki unconscious with blue lips.

Robert tried to revive Nikki then rushed to the local ER, but her eyes were already fixed and dilated (a grave sign of brain death). Despite efforts to reverse Nikki's condition, she died in Dallas on February 1, 2002, after being transferred to the Children's Medical Center and then taken off life support. A child abuse pediatrician in Dallas, upon finding a triad of medical conditions then associated with Shaken Baby Syndrome (SBS), diagnosed abuse. That abuse diagnosis was used to arrest Robert even before an autopsy was performed on February 2, 2002.

In 2002-2003, when Robert was accused, tried, and convicted, the medical consensus permitted *presuming* that a child had sustained inflicted head trauma whenever three internal head conditions were found: (1) bleeding under the dura membrane outside of the brain (aka subdural hematoma); (2) brain swelling; and (3) retinal hemorrhages. The assumption was that, where this "triad" of symptoms was present, a child *must* have been the victim of intentionally inflicted abuse involving shaking and perhaps blunt impact and that whoever had been caring for that child when the symptoms became manifest *must* have been the culprit—absent some verified major trauma such as a car wreck or a fall from a multistory building.

Moreover, the medical community then believed that short falls, like the one Robert had described, could never cause severe injury or death. Based on the presumption that the triad was indicative of abuse, and the belief that short falls could not explain Nikki's collapse, no other explanation for her death was even considered.

In light of the triad, no one considered Nikki's recent illness relevant. No one investigated her lungs or the medications she had been prescribed.

The Shaken Baby hypothesis used to convict Robert has since been entirely discredited by evidence-based science. Today, the medical consensus is that many naturally occurring phenomena, such as Nikki's pneumonia, can cause the triad of intracranial conditions. Today, even those who still believe that shaking, with or without impact, can produce the triad have accepted that a differential diagnosis is required and that abuse can only be a diagnosis of exclusion.

Recognizing the pronounced social problem of premature and insufficiently substantiated allegations of child abuse, in March 2021, Texas law changed to reflect an understanding of problems of bias and unfairness with professional "child abuse specialists," like Dr. Squires—the child abuse specialist who made a Shaken Baby diagnosis in and then testified in both the Roberson and Roark cases. The new law requires giving parents and caregivers, like Mr. Roberson, access to their own experts when they are accused by hospital personnel, as Mr. Roark and Mr. Roberson

were accused by Dr. Squires. *See* TEX. FAM. CODE sec. 261.3017 (amendments effective Sep. 1, 2021). This law was enacted following “high-profile exposés of medically fragile children wrongfully separated from blameless parents” and critiques of “child abuse specialists’ conflict of interests and lack of impartiality.”<sup>2</sup> One impetus behind the new law was growing public awareness of the extreme damage caused when children are ripped from their families and needlessly placed into foster care based solely on the recommendation of child abuse pediatricians, like Dr. Squires.<sup>3</sup>

Today the medical consensus holds that all accidental and natural conditions must be excluded as possible causes of the triad *before* any abuse or inflicted trauma can be considered. In short, support for the Shaken Baby principles that formed the basis of Robert’s prosecution have eroded entirely.

## **II. Facts Relevant to the Case’s Current Posture**

The case was prosecuted in 2002-2003 by former Anderson County District Attorney Doug Lowe and current Anderson County District Judge Mark Calhoon.<sup>4</sup> The Anderson County trial judge was the Honorable Bascom Bentley, now deceased.

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<sup>2</sup> *See* Sara Tianao, *New Texas Law Curtails Power of Pediatricians Contracted by CPS*, available at <https://imprintnews.org/top-stories/new-texas-law-curtaills-power-of-pediatricians-contracted-by-cps/59273>.

<sup>3</sup> *See* <https://www.nbcnews.com/news/us-news/do-no-harm>.

<sup>4</sup> On information and belief, current Anderson County District Attorney Allyson Mitchell was employed in former District Attorney Doug Lowe’s office when Mr. Roberson was charged in 2002 and tried in 2003. Based on the face of the trial transcripts, however, she did not play a public-facing role in Mr. Roberson’s trial.

In 2016, the last time Mr. Roberson was facing an execution date, his desperate pleas to appoint new counsel willing to investigate his innocence, memorialized in letters to courts over the years, were finally answered. A subsequent habeas application was filed in Anderson County on his behalf relying, in part, on Texas's new "junk science writ," Article 11.073 of the Texas Code of Criminal Procedure. This Court stayed his then-pending execution and remanded all four of his claims, including his changed-science and Actual Innocence claims, "to the trial court for resolution." *Ex parte Roberson*, 2016 WL 3543332 (Tex. Crim. App. June 16, 2016) (unpub.).

By that time, Judge Bentley had retired, and the presiding judge in the convicting court—the 3<sup>rd</sup> District Court in Anderson County—was then (and still is) the Honorable Mark Calhoon. But because Judge Calhoon had been one of the two attorneys who had prosecuted Mr. Roberson, he was disqualified from presiding over the writ proceeding. At some point, Judge Evans, then the presiding judge in the 87<sup>th</sup> District Court, assumed responsibility for the proceeding instead.

An evidentiary hearing in the -03 writ proceeding finally commenced on August 14, 2018, but was continued that same day after long-lost CAT scans taken of Nikki during her final hospitalizations were discovered in a locked closet in the courthouse basement. Considering the significance of this evidence, Mr. Roberson's counsel moved to continue the evidentiary hearing, which State's counsel joined.

Judge Evans granted the motion and agreed to serve as Special Master so that the newly discovered evidence, including the CAT scans, could be copied and produced to both parties.

But instead of serving as a Special Master, the task was delegated to an investigator in the Anderson County DA's office. This county employee took the x-ray film to a photocopy shop in Tyler. The resulting "copies" were wholly inappropriate for review by a radiologist. Mr. Roberson's counsel then took responsibility for finding a vendor capable of converting X-ray film into modern digitized images. That information was provided to the court, and, eventually, appropriate reproductions of the X-rays were made and produced.<sup>5</sup>

The evidentiary hearing resumed on March 8, 2021, at the end of the COVID lockdown. There was a total of eight more days of testimony. Mr. Roberson's counsel presented six experts, establishing the considerable changes in scientific understanding relevant to the testimony put before his jury in 2003, identifying numerous errors and omissions in the autopsy, and outlining evidence that Nikki did *not* die of an inflicted head injury caused by shaking or otherwise but died instead from natural and accidental causes.

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<sup>5</sup> Despite multiple subpoenas and PIA requests over the years, some of Nikki's medical images were not produced until this year and some have never been produced. But a pediatric radiologist was finally able to study all available lung and head scans and correlate her findings with the findings of a lung pathologist and a neuropathologist. She concluded that there was no radiological evidence of anything more than a single, minor head impact, no skull fractures, but extensive evidence of severely diseased lungs.

After the evidentiary hearing record was prepared, the parties submitted proposed Findings of Fact and Conclusions of Law (FFCL). Mr. Roberson's proposed FFCL, summarizing the key evidence in the new 13-volume record, was 302-pages long. The State's proposal, submitted by the Anderson County DA's Office, was 17-pages long and relied primarily on the 2003 trial testimony; the State's proposal denied that the tenets of Shaken Baby had changed much since 2003 and maintained that Nikki had died from inflicted head trauma. The State's proposal did not acknowledge any of Mr. Roberson's vast new evidence of changes in scientific understanding and the accidental and natural causes of Nikki's death.

On February 14, 2022, the same date when Mr. Roberson had been sentenced to death nearly 20 years earlier, Judge Evans issued her FFCL. Her FFCL largely tracked the State's proposal, including its typographical and grammatical errors, finding that Shaken Baby is "still an accepted mechanic [sic] of death" and adopting the State's position that Nikki died from inflicted head trauma. Thereafter, the case was submitted to this Court, ending Judge Evans' jurisdiction over the case. She subsequently retired from the bench, effective December 31, 2022.

This Court, relying on Judge Evans' FFCL, summarily denied Mr. Roberson relief. *Ex parte Roberson*, 2023 WL 151908 (Tex. Crim. App. Jan. 11, 2023) (unpub.).

In October of 2023, the Supreme Court of the United States declined to

consider Mr. Roberson's petition for writ of certiorari, thereby terminating the appeals in the -03 writ proceeding over which Judge Evans had presided at the trial level and in which she had recommended that Mr. Roberson be denied a new trial. *See Roberson v. Texas*, 144 S. Ct. 129 (mem.) (2023).

Unbeknownst to Mr. Roberson, approximately a month later—which was 1 year and 9 months after Judge Evans' jurisdiction over Mr. Roberson's writ proceeding ended and 10½ months after Judge Evans had retired from the 87<sup>th</sup> District Court—a Request for Assignment form was completed on her behalf related to Mr. Roberson. She thereby asked to again be assigned to his “case,” using the trial cause number that had been closed for many years. When this request was made, Mr. Roberson had no case pending in Anderson County—or in any other court, state or federal. The assignment document was not served on Mr. Roberson, and he did not learn of its existence until many months later when the Anderson County DA's Office attached it to a pleading opposing Mr. Roberson's request for a hearing.

Between the time when the assignment to Judge Evans was made and the time when Mr. Roberson finally learned of that assignment, the following occurred:

- Mr. Roberson sought pro bono resources to continue the fight to prove his innocence. The national Innocence Project studied the case and agreed to join as co-counsel, believing that Mr. Roberson is actually innocent and that no crime had occurred, only the tragic death of a very ill little girl. Additionally, Donald Salzman, an attorney with the multi-national law firm, Skadden Arps Slate Meagher & Flom LLP, who has extensive experience litigating and obtaining exonerations in Shaken Baby cases also joined as co-counsel.

- DA Allyson Mitchell was apprised of these developments and was asked to meet with new counsel, but she declined the invitation. DA Mitchell was also informed of plans to prepare a subsequent habeas application on Mr. Roberson’s behalf pursuant to Texas Code of Criminal Procedure Article 11.071, section 5 based on yet more new evidence of the change in scientific understanding since 2016, of the actual causes of Nikki’s death, and of Mr. Roberson’s Actual Innocence.
- Brian Wharton, the lead Palestine police detective who had investigated Nikki’s death, also endeavored (unsuccessfully) to meet with DA Mitchell. He testified for the State during Mr. Roberson’s 2003 trial. But in the intervening years, he came to believe that they were wrong, that the Shaken Baby diagnosis they had relied on to arrest and convict Mr. Roberson had been discredited, and that they had not done a sufficient investigation. Since the DA would not meet with him, he began speaking out publicly about his view that they got this case wrong, that Mr. Roberson is innocent, and that he should not be in prison. *See, e.g.*, Mr. Wharton’s Opinion Video, NEW YORK TIMES, available at <https://www.nytimes.com/2024/07/30/opinion/death-penalty-texas.html>.
- In performing due diligence in advance of filing a subsequent habeas application, Mr. Salzman, a new member of Mr. Roberson’s legal team, arranged to do a file review in the Anderson County DA’s office in early April of this year. While he was in DA Mitchell’s office, she announced her intent to seek an execution date imminently.
- On April 9, 2024, Mr. Roberson’s counsel filed “Motion for Notice and Opportunity to Be Heard Before Any Execution Date Is Set.” The motion explained the plan to file a subsequent application based on yet more new evidence.
- On June 17, 2024, the Anderson County DA’s Office filed a “Motion Requesting Execution Date.”
- The next day, Mr. Roberson’s counsel filed an “Opposition to Anderson County DA’s Motion Requesting Execution Date” again requesting a hearing.
- The DA’s Office then filed an opposition to Mr. Roberson’s first-filed Motion to Be Heard—which is when Mr. Roberson’s counsel first became aware that

the case had been assigned to Judge Evans post-retirement, seven months before any case existed.

Without permitting a hearing, on July 1, 2024, Judge Evans signed an order setting an October 17, 2024, execution date and entering an execution warrant. These actions resulted in Mr. Roberson being removed from an experimental “group rec” program on death row and confined on “death watch” under 24-hour surveillance. An Objection to this violation of due process was filed on Mr. Roberson’s behalf but was never ruled upon.

On August 1, 2024, Mr. Roberson filed a subsequent habeas application (the -04 Application) in the trial court. That same day, a “Motion to Withdraw Execution Date” was filed on Mr. Roberson’s behalf—again expressly asking for a hearing in the trial court.

On August 8, 2024, the Anderson County DA’s Office filed “State’s Opposition to the Defendant’s Motion to Recall the Execution Warrant,” signed by DA Mitchell, claiming, contrary to statutory law, that the district court had no authority to grant the Motion to Withdraw Execution Date. The opposition cited three cases, none of which supported the DA’s argument.

In response to the flagrant misrepresentation of controlling law in a death-penalty case, Mr. Roberson filed a Reply—attaching the three inapposite mandamus cases that the DA had cited and explaining why they did not support the DA’s claim that the district court had no authority to grant the Motion to Withdraw Execution

Date. Mr. Roberson again requested a hearing on the contested motion.

Thereafter, Mr. Roberson's counsel followed up with the Anderson County court coordinator about obtaining a date for a hearing on the Motion to Withdraw Execution Date. On August 14, 2024, undersigned counsel received an email stating "The Court [Judge Evans] has reviewed the Motion to Withdraw the Execution date, the reply, and the response and is not setting a hearing on the same."

On August 18, 2024, Mr. Roberson filed a Motion to Reconsider Denial of Hearing on Withdrawing the Execution Date, attaching over 20 examples of Orders entered by trial courts in recent Texas death-penalty cases in a similar posture. That motion was never ruled on.<sup>6</sup>

On September 11, 2024, this Court dismissed the -04 Application, stating that Mr. Roberson's five new claims did not satisfy state law procedural requirements and so the merits would not be considered. More specifically, the order stated: "We have reviewed the application and find that the allegations do not satisfy the requirements of Article 11.071, Section 5. *See* TEX. CODE CRIM. PROC. art. 37.071,

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<sup>6</sup> A hearing has just been set for October 15, 2024, on a motion filed in the trial court: Motion to Vacate Unlawful Execution Warrant and to Recuse Judge Deborah Oakes Evans. This motion was filed as soon as undersigned counsel confirmed the key factual grounds for the jurisdictional challenge to Judge Evans' authority; the request for her recusal is based on multiple factors that, viewed in the totality, suggest the appearance of a lack of impartiality. Mr. Roberson had no control over the selection of the date for this hearing, which was selected by the Presiding Judge for the Tenth Administrative Judicial Region after Judge Evans and the Anderson County court coordinator delayed apprising the Presiding Judge of the motion and of Judge Evans' decision not to voluntarily recuse.

§ 5(a).”<sup>7</sup>

On September 17, 2024, Mr. Roberson filed a petition seeking clemency from the executive branch, an effort supported by hundreds of individuals and advocacy groups. Among those supporters is a bipartisan group of at least 86 elected members to the Texas House of Representatives, who submitted a letter directly to the Board and Governor. *See Appendix A* at Exhibit 16.

### **NEW GROUNDS FOR A STAY**

New grounds argue strongly in favor of staying Robert Roberson’s October 17<sup>th</sup> execution date.

#### **I. Texas Could Soon Join Other Jurisdictions and Recognize that the Shaken Baby Hypothesis Is Junk Science.**

Another Texas case pending in this Court could soon vindicate Mr. Roberson’s arguments that the Shaken Baby hypothesis, used to accuse and convict him, is totally unreliable. **Therefore, the execution date should be stayed to await the imminent decision from this Court in *Ex parte Roark*.**

##### **A. The SBS testimony in the Roark and Roberson cases was virtually identical.**

In Mr. Roark’s Article 11.073 proceeding in which the State *conceded* the falsity of identical expert testimony upon which the State relied to obtain Mr.

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<sup>7</sup> This statement is confusing because Article 37.071 is a statute that deals only with death-penalty trials, not habeas proceedings—and there is no section 5 in that statute; it only goes to section 2.

Roberson’s conviction. *See Ex parte Roark*, WR-56,380-03 (submitted Dec. 6, 2023). The Court has been considering the merits of *Ex parte Roark* since December of 2023. That consideration commenced nearly 11 months *after* the Court denied Mr. Roberson relief in his habeas proceeding involving numerous overlapping issues.

Both convictions (of Mr. Roark and of Mr. Roberson) hinge on the same hypothesis that a child was the victim of intentionally inflicted violent shaking and head trauma known as “Shaken Baby Syndrome” aka “Shaken Impact Syndrome” aka “SBS”; both cases were tried in the same era (2000 and 2003, respectively) when a version of SBS, now universally rejected, was viewed as medical orthodoxy; and both trials featured the *very same child abuse expert*, Dr. Janet Squires. In both cases, she opined that three medical findings, sometimes referred to as the “triad”—(i) subdural bleeding, (ii) cerebral edema aka brain swelling, and (iii) retinal hemorrhage—permitted *presuming* that abusive shaking, perhaps with blunt impact, had occurred. The version of SBS put before Mr. Roark’s and Mr. Roberson’s juries, which permitted presuming inflicted trauma, has since been rejected—because numerous other phenomena, including accidental short falls with head impact and naturally occurring disease, such as pneumonia, can cause the same constellation of

intracranial symptoms.<sup>8</sup> Likewise, the presumption, embraced by Dr. Squires and others at that time, that the adult with a child when she became symptomatic had to be the “perpetrator” of inflicted head injury, has also been proven false. The cascade of symptoms—subdural bleeding, brain swelling, retinal hemorrhages—can develop over many hours or even days before reaching a crisis point when a child collapses, seemingly for no reason.

Although the Roark case involved a 13-month-old who sustained brain damage but lived, and Mr. Roberson’s daughter Nikki was a 27-month-old who died, much of Dr. Squires’ trial testimony about the cause of the girls’ condition is virtually identical—and none of it would withstand scrutiny today. In each case, Dr. Squires speculated<sup>9</sup> before the jury based on inferences the medical community then believed were reasonable. Her testimony described violent shaking with the child’s head flopping back and forth after which the child was, perhaps, flung down, and

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<sup>8</sup> Mr. Roberson adduced voluminous evidence-based science to support this, including the research of Dr. Patrick Barnes, head of pediatric radiology at Stanford University who had testified *for the prosecution* in the infamous Louise Woodward “British nanny” SBS case but later established through scientific study that his own previous testimony had been incorrect. *See, e.g., Imaging of Nonaccidental Injury and the Mimics: Issues and Controversies in the Era of Evidence-Based Medicine.* 4EHRR46; APPX30. His article surveyed a number of conditions, circumstances, and mechanisms that can create the same internal head conditions (subdural blood, brain swelling, and retinal hemorrhages) associated with SBS and thus shows that this triad cannot be used to diagnose trauma, let alone inflicted trauma. *Id.*

<sup>9</sup> No one saw Mr. Roberson with Nikki during the last 12 hours of her life after her maternal grandparents urged him to pick up his sick child around 9:30 at night and take her to his house. Before Nikki’s death, which was immediately blamed on him, no one had ever reported him harming Nikki—or any other child. Indeed, his extensive school, military, child custody, and TDCJ records do not include *any* instances of aggressive or violent acts. *See* 7EHRR128-129.

left with a massive brain injury. This gruesome, unchallenged hypothetical had to have profoundly affected Mr. Roberson's and Mr. Roark's juries. It was presented to both juries as established fact: that a doctor could look at the child's internal head condition and posit that abuse had occurred without further investigation.

But today, while no one believes that violently shaking an infant is harmless, no study has ever shown that shaking can cause *any* of the internal head conditions associated with SBS (subdural hematoma, brain swelling, retinal hemorrhage). For instance, 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. *See 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). It is well understood today that shaking, if it causes physical injury, would be experienced first and foremost in a child's neck. (Mr. Roberson's daughter Nikki had no neck injuries of any kind.)

But the basic premise underlying SBS was that doctors could assume that violent shaking had occurred whenever they saw one or more of the internal head conditions known as the "triad." That premise is simply wrong.

A side-by-side comparison of some of Dr. Squires’ trial testimony establishes overwhelmingly that Mr. Roark’s and Mr. Roberson’s cases involve the same false, pseudo-scientific SBS opinions. *See, e.g.:*

| <b>Squires’ <i>Roark</i> Trial Testimony</b> <sup>10</sup>   | <b>Squires’ <i>Roberson</i> Trial Testimony</b> <sup>11</sup>  |
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| <p>“my diagnosis was a life threatening injury to the brain, ... and I said there’s no documentation of a significant trauma event [such as a car accident] which would explain these findings. So, my diagnosis says without a history of significant trauma given at the time of presentation the findings indicate physical child abuse.” (58-59)</p>   | <p>“Q What you wrote is when you saw her, she wasn't going to live, and your diagnosis was massive brain injury and your only explanation was trauma. And medical findings is a picture of shaken impact syndrome. All right. It’s a pretty significant diagnosis, doctor. Can you explain to us then what shaken impact syndrome is?” (105)</p>   |
| <p>“The retina is the membrane at the back of the eye, and there’s a big disc where these blood vessels come out. And when you look back there – hemorrhages mean little broken blood vessels, there’s little blood blobs that are coming around there. And usually they’re hard to see with just an ophthalmoscope. Usually we have to get the ophthalmologist to come, who uses a special instrument and dilates the eyes.</p> <p>In this case, you could see these big blobs of blood. And the significance are that they are broken blood vessels and there’s several things that can cause them, but it is very -- and particularly the kind that we saw are associated with major trauma. They are</p> | <p>“This child had very obvious retinal hemorrhages. When you look in the back of the eyes with the ophthalmoscope there’s all these little blood vessels. And in multiple places her blood vessels had broken and you’d just see little blood—blobs of blood there. And sometimes we doctors can’t see it. The specialists has to come with a special scope. These were very obvious. Everybody could see them, so it’s on every note that she had retinal hemorrhages. And I remember looking at them. I remember showing someone else what retinal hemmorrhages [sic] looked like, so it was very obvious.” (104)</p> |

<sup>10</sup> This testimony is in a supplemental exhibit transmitted to this Court in *Ex parte Roark* on November 28, 2023, which is Volume 5 of the Reporter’s Record.

<sup>11</sup> This testimony is in Volume 42 of the Reporter’s Record for Mr. Roberson’s trial.

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| <p>actually very, very classically seen in the Shaken Baby Syndrome.” (61)</p>  |   |
| <p>“The brain itself was very abnormal, full of brain swelling. There was shift across the midline showing that there were big pressure changes inside the head.” (66)</p>  | <p>“The brain was so swollen that the brain was starting to push through the bottom of the skull and that will kill you because your brain stem no longer can function. So that’s called uncal herniation and it was very obvious on this CAT scan.” (102-03)</p>   |
| <p>“My diagnosis was Shaken Baby Syndrome which is a form of child physical abuse.... And what you see-- the main injury is to the brain itself, where the brain tissue itself has shearing injuries....</p> <p>The baby’s head -- Our head is about a seventh of our weight, but a baby is a quarter of their weight and they have very weak neck muscles. And, so, when baby is shaken their head flops back and forth like this (indicating), and the rotational forces through the brain literally sort of shear the tissues of the brain. And then there is some -- sometimes there is hemorrhaging, sometimes it swells and blood can't get through, so the damage is really the brain damage.</p> <p>Overlying that is often some blood, and the blood results from the tearing of the bridging veins that go between the brain and the membranes, the dura and the bony parts. So, when you shake a baby these blood vessels get broken and then there's blood over the top of the brain. And both of them can cause damage, but by far the most part of the damage is the brain itself.” (68-69)</p> | <p>“Most of the lay public knows term shaken baby syndrome. And what, and if I may just for a minute, explain shaken baby. When one human being is much smaller than-- Let me say it this way. Children are uniquely at risk that if you take a child and you shake them, their head will go back and forth very forcefully and you know that you can cause major brain injury doing that. And one of the features is that you might not be able to see anything on the outside and have all these significant brain injury. And the reason babies are so prone to that, there’s lots of reasons, but mainly it’s because they’re so small compared to how big whoever it is shaking them. In addition, their heads are big compared to their bodies, their neck muscles are weak, and they don’t—They’re not conscious enough to protect their neck. In addition their brains have higher water content. So for all those reasons, shaken baby has been a well described entity.” (106-07)</p> |

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| <p>“So, I knew that she had gone from a normal child to a child with major neurological dysfunction and then x-ray findings of brain injury. And it was – Then the x-rays are absolutely classic for shaken baby, and then there were retinal hemorrhages, which go along with it. And putting it all together it is a very classic case of Shaken Baby Syndrome.” (70)</p>   | <p>“Q [by defense counsel]. In many respects what you saw with this child are classically consistent with injuries from rotational force; is that correct?</p> <p>A. Yes.” (120)</p>  |
| <p>“Some experts believe that most of the time children when they’re shaken like this that at some point they’re slammed against something, and that often maybe a lot of the damage is done when this head is moving back and forth and then suddenly slams into something, which can be something soft like a mattress where you might not see any fractures or anything. And some experts would call this shaken impact.</p> <p>In my education and attending meetings, to me it seems that at the current time most experts don’t think you have to have an impact, although that probably happens most of the time.” (70-71)</p> | <p>“Now, some people think that with shaken baby that the most part of the damage is that they’re often shaken and then thrown against something. And at the time when the head is moving back and forth very, very vigorously and then all of a sudden it stops against something; that at that moment is probably when a lot of the damage is being done because these shearing forces actually go through the brain itself. 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, when I would consider most of the experts do think that shaking alone, if done vigorously, will kill a child, but most children are shaken and then thrown against something. And it's in the whole context of the head being vigorously shaken back and forth and then slammed against-- It can be a mattress, so that maybe there’s no signs of trauma at all and yet as that head is moving and then suddenly stops, those shear forces go through it and cause tremendous damage to the brain, deep in the brain.” (106-07)</p> |

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| <p>“But we think it’s unique to young children because it takes some other force or person, big and strong enough to do it. And then as I described before, the big head, the weak neck muscles, make the baby uniquely at risk for this. Really it’s the fact, we think, there’s someone big and strong enough to do this to the young child.” (72)</p>      | <p>“And the reason babies are so prone to that, there’s lots of reasons, but mainly it’s because they’re so small compared to how big whoever it is shaking them. In addition, their heads are big compared to their bodies, their neck muscles are weak, and they don’t-- They’re not conscious enough to protect their neck.” (106)</p>   |
| <p>“It is thought that it is very vigorous shaking, again with a baby almost where the baby’s head is just really flopping back and forth very hard. And there has been a lot of studies on how, you know, the dynamics. And there’s – It’s hard to define it in how many radiance of force, but it’s a very violent, vigorous force that it takes.” (73)</p> | <p>“And at the time when the head is moving back and forth very, very vigorously and then all of a sudden it stops against something; that at that moment is probably when a lot of the damage is being done because these shearing forces actually go through the brain itself.” (106)</p>   |
| <p>“Nothing in the course of the normal interactions between a child giver and a baby should result in these massive life-threatening brain injuries.... I think no reasonable person -- no person would see this interaction and think that this could be a normal caregiver child action.” (73-74)</p>  | <p>“It’s a very violent forceful act. It is not something that ever happens accidentally. It is not something that you see in normal children who are cared for by reasonable adults. It’s a very violent act.” (114)</p>   |
| <p>“And the most dangerous thing that can happen is if this swollen brain pushes the brain down through the opening, and that term is called herniation, and that’s what will kill somebody. That’s the most common thing that kills a child right then and there is the whole brain swells up and that will cut off the breathing centers.” (82)</p>         | <p>“The most significant thing was that the brain had shifted. Your skull is closed, the bones are closed and so if the brains swells sometimes the brain starts shifting. And it had shifted across the midline and at the base of the brain it looked like what we call herniation. The brain was so swollen that the brain was starting to push through the bottom of the skull and that will kill you because your brain stem no longer can function.” (102-03)</p> |

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| <p>“there’s a lot of things that cause retinal hemorrhages, but when you see these retinal hemorrhages it is very classic and it is literally thought now that the eyes themselves, in this rotational motion, that the retina is actually -- they separate sometimes a little bit and you tear blood vessels.” (101)</p>  | <p>“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.” (108)</p>  |
| <p>“After this injury this child would not have been neurologically normal. Very quick. It would be hard to date this, to say four hours, or six hours, or twelve hours with great certainty, but after this injury she wouldn’t have been normal....</p> <p>When you sustain this amount of injury, you don’t walk and talk and do normal things. And any person seeing a child after this would have known she was abnormal.... But after this injury no child would be perceived to be neurologically normal.” (108, 109)</p> | <p>“It is my assessment in this child that 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. However, she could live for several hours and might not totally stop breathing long enough-- She certainly could live for hours after the event, but she would never have talked, walked, and been thought to be normal by anybody.” (108-09)</p> <p>“Well, I mean, this child would not talk, would not walk. Usually they’re very-- Usually they’re very hard. They’re not normally neurological. Often times they’re having trouble breathing.” (110)</p> <p>“She would not have talked normally. I don’t know how you want to define nonresponsive. She might not have been totally comatose. She could have been-- She could have been seizing. She could have been gurgling. But she would not have done normal things.” (124-25)</p> |
| <p>“Q Are there things that she could have impacted with that wouldn’t leave a mark?”</p>  | <p>“It can be a mattress, so that maybe there’s no signs of trauma at all and yet as that head is moving and then</p>  |

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| <p>A Yes.</p> <p>Q What types of things?</p> <p>A Particularly soft surfaces where it gives on impact. So, particularly cushions, beds, mattresses, possibly floors, although that is a firmer -- it depends on how much it gives and of which force there was impact.” (113)</p> | <p>suddenly stops, those shear forces go through it and cause tremendous damage to the brain, deep in the brain.” (107)</p> |
|---|---|

Although Dr. Squires and others repeatedly referred to Nikki as a “baby,” she was in fact a 27-month-old toddler who weighed nearly 30 pounds; toddlers’ necks and brains are markedly different from infants’. But the identical, now discredited tents of SBS were applied to the condition of the a 13-month-old in Roark’s case and to 27-month-old toddler in Roberson’s case as if these two children were anatomically and medically indistinguishable.

Critically, none of this “expert” testimony can withstand scrutiny in light of contemporary scientific understanding. Yet in Mr. Roberson’s trial, his appointed counsel approached Dr. Squires with nothing but softballs because, from the outset, he *agreed* that Nikki’s death was a Shaken Baby case—despite Mr. Roberson repeatedly rejecting plea deals and maintaining his innocence. *See, e.g.*, 41RR53-

55.<sup>12</sup> Dr. Squires' SBS diagnosis and testimony in Mr. Roberson's and Mr. Roark's cases is no longer viewed as sound science.

**B. The SBS hypothesis the State relied on in the Roark and Roberson cases has been discredited.**

The idea that “shaking” might explain the mystifying deaths of some infants was first proposed in the 1970s in anecdotal articles by Dr. John Caffey, a radiologist, and Dr. Norman Guthkelch, a neurosurgeon. These physicians hypothesized that shaking might have caused “subdural hematoma,” *i.e.*, bleeding under the dura membrane covering the brain, and, in turn, the deaths of infants absent any obvious explanation for the internal bleeding (such as a high-speed car accident or fall from a great height). APPX20; APPX21; 3EHRR45; 4EHRR12, 17-18. This hypothesis, formerly called “Shaken Baby Syndrome,” became widely accepted absent any evidence or testing to support it. 3EHRR93; 8EHRR17-18.

Gradually, the SBS hypothesis was applied to older and older children, although their brains and neck muscles are quite different from infants'. 3EHRR46-47; 4EHRR18. By 2001, the American Academy of Pediatrics (AAP), the leading organization of pediatricians, published a position paper stating that violent shaking was not only a form of child abuse but could be “diagnosed” whenever the SBS triad

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<sup>12</sup> By contrast, during Mr. Roark's trial, his retained counsel vigorously cross-examined Dr. Squires and tried to keep her from opining beyond the scope of her expertise. *See, e.g., Roark*, 5RR12-40.

was observed. 4EHRR20; APPX22. The 2001 AAP paper was not a scientific study, but a document used to educate the organization's members regarding its leadership's views. 4EHRR20.

In 2002-2003, when Mr. Roberson's daughter inexplicably collapsed and he was charged, tried, and convicted using the SBS hypothesis, the prevailing view in the medical community was that, whenever a child presented with the triad (1) the child must have been the victim of either violent shaking alone or shaking with impact; and (2) whoever had been caring for the child when the symptoms manifested must have been the culprit—absent some verified major trauma such as a car wreck or a fall from a multistory building. That is, by the time of Nikki's death, SBS had become a “medical diagnosis of murder.”<sup>13</sup> Any reports of recent illnesses or short falls were dismissed as false explanations intended to conceal abuse.

After significant problems with the SBS hypothesis started to reach the larger medical community, in 2009, the AAP recommended dropping the “Shaken Baby” term, directing doctors to use the broader, undefined term “Abusive Head Trauma” aka “AHT” instead. The AAP also abandoned the presumption that the presence of the triad could be used to “diagnose” abuse, recognizing evidence-based research that had proven that other naturally occurring conditions (including infections,

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<sup>13</sup> Deborah Turkheimer, *Science-Dependent Prosecution and the Problem of Epistemic Contingency: A Study of Shaken Baby Syndrome*, 62 ALA. L. REV. 513, 516 (2011).

genetic disorders, etc.) as well as accidental short falls with head impact could cause the same intracranial conditions. But the larger problem remained: a lack of evidence to support the notion that the internal triad of subdural bleeding, brain swelling, and retinal hemorrhages could ever prove that inflicted trauma had occurred.

Before his death, Dr. Guthkelch expressed horror that his unverified hypothesis had been used to imprison parents. He acknowledged that subdural and retinal bleeding, with or without brain swelling, have been observed in accidentally and naturally occurring circumstances. 10EHRR130. Dr. Guthkelch also recognized that forces generated by humans and laboratory machines shaking a dummy had proven “insufficient to cause disruption of human tissue” or any aspect of the SBS triad. 10EHRR131; 4EHRR64; APPX34F.

By now, evidence-based research has thoroughly debunked the SBS hypothesis used to convict Mr. Roberson (and Mr. Roark). *See, e.g.,* Keith A. Findley, *et al.*, ed., Shaken Baby Syndrome: Investigating the Abusive Head Trauma Controversy (Cambridge Univ. Press 2023) (documenting the failures of the SBS/AHT causation hypothesis in the first multidisciplinary treatise on the subject).

The invalidity of the SBS hypothesis used to accuse and convict Mr. Roberson had become so obvious that, after Mr. Roberson’s 2016 habeas application was filed, the Anderson County DA’s Office tried to distance itself from SBS, claiming this

was not really a Shaken Baby case but simply a case of “blunt force” head trauma.<sup>14</sup> This argument, however, is belied by a trial record replete with descriptions of “shaking” from both of the State’s causation experts (Dr. Janet Squires and medical examiner Dr. Jill Urban). Violent shaking was the way they explained Nikki’s intracranial condition; it was also how the State’s trial experts explained the absence of anything but minor external injuries (none of which could reasonably be presumed “inflicted”). The State’s trial experts also used words like “rotational forces” and “shearing,” biomechanical terms commonly used in SBS cases. Yet actual biomechanical engineers have rejected the premise that “shearing” forces generated through shaking can cause the triad—because actual scientific study has failed to support that proposition.

No objective reader of the trial transcripts could fail to see that both the Roark and Roberson cases were “classic” SBS cases in the worst sense: cases presented to the jury as if they were grounded in science when we now know there is no underlying science to support the testimony that the jury heard.

Recognizing that scientific understanding has changed should not hinge on the whims of one DA’s Office or whether a medical examiner is willing to revisit decades-old opinions and look at overwhelming new evidence from far more

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<sup>14</sup> Simultaneously, and inconsistently, State’s counsel has also argued that the “science” associated with SBS has not changed, just the name: “Abusive Head Trauma.” This is the position reflected in Judge Evans’ Findings of Fact and Conclusions of Law (FFCL) upon which this Court relied in denying Mr. Roberson a new trial.

experienced and qualified medical experts. Indeed, it is the epitome of arbitrariness when individual medical examiners in some, but not all, jurisdictions can admit that their opinions in SBS cases have not withstood the test of time and when many, but not all, courts can do the hard work of reviewing new evidence and acknowledging the significant change in the scientific understanding of SBS.<sup>15</sup>

**C. Mr. Roberson produced more, not less, evidence than Mr. Roark to prove, not only his “changed science” claim but also his actual innocence.**

The Roark case, now before this Court, emphasizes five principles that are defined as “false testimony,” four of which are also part of the false testimony put before Mr. Roberson’s jury. Those false tenets are:

- Short distance falls cannot cause subdural hematomas.
- Shaking alone can cause this injury.
- There cannot be a lucid injury after a child is injured.
- Retinal bleeding is proof of shaking.

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<sup>15</sup> See, e.g., *State v. Hunter*, No. B 0600596 (Ohio Com. Pl. May 10, 2023) (granting habeas relief after medical examiner, who had relied on SBS/AHT hypothesis at trial, recognized new evidence that child’s injuries were consistent with a short fall and that the anal and rectal wounds, previously used to support a sexual assault conviction, had been medically inflicted by hospital staff); *People v. Liebich*, No. 2-13-0894, 2016 WL 1222198 (Ill. App. Ct. Mar. 28, 2016) (2002 SBS conviction vacated where medical examiner admitted that medical records revealed a condition that could have started two-year-old’s decline days before child’s collapse); *Johnson v. Felker*, No. CV-07-357-RHW, 2010 WL 1904858 (E.D. Cal. May 10, 2010) (2002 SBS conviction vacated after medical examiner acknowledged that, in light of new scientific evidence, child’s head injuries could have been caused by accidental fall).

Both Mr. Roark and Mr. Roberson showed how significant problems with the tenets of SBS started to reach the larger medical community, such that the AAP, in 2009, abandoned the SBS name and switched to the undefined term “Abusive Head Trauma” aka “AHT.” The name change, however, did not resolve the bigger problem that became increasingly evident over time: *no evidence-based research supports the SBS/AHT hypothesis.*<sup>16</sup>

To rebut Dr. Squires’ trial testimony and show how the relevant science has changed, the *Ex parte Roark* evidentiary record includes a great deal of expert testimony similar to that which Mr. Roberson presented in his -03 habeas proceeding,<sup>17</sup> including:

- an affidavit from forensic pathologist Dr. John Plunkett, who also provided an affidavit in Mr. Roberson’s habeas proceeding about how his profession gradually began to consider the science-based findings in the field of biomechanical engineering, showing that short falls can cause the triad and be fatal and, by contrast, shaking has not been shown to produce the kind of force necessary to cause subdural bleeding but instead would, in the first instance, injure the neck;
- testimony from board-certified pediatrician Dr. John Galaznik, who opined similarly to board-certified pediatrician and pediatric forensic pathologist Dr. Janice Ophoven in Mr. Roberson’s habeas proceeding, about the change in scientific understanding of SBS even within the AAP and about the circumstances that led to rebranding SBS to AHT; and

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<sup>16</sup> See generally 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)

<sup>17</sup> Mr. Roberson’s writ record is far more extensive, including a 13 volume Reporter’s Record, with Volume 11 consisting of over 2,240 pages of exhibits.

- an affidavit from biomechanical engineer Chris VanEe analogous to testimony from biomechanical engineer Ken Monson who testified in Mr. Roberson’s habeas proceeding about (1) the lack of scientific evidence that shaking has ever caused a subdural hematoma but would instead injure the neck and (2) the forces that can be generated in a short fall with head impact that can, as opposed to shaking, cause the triad.

But Mr. Roberson went further than Mr. Roark, adducing unrebutted medical evidence from an array of highly qualified experts, explaining what had likely happened to his daughter Nikki—rebutting the conclusion that her death was a homicide.

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

- **Dr. Janice Ophoven**, a licensed M.D. since 1971, board certified in forensic pathology and anatomic pathology with special training and experience in pediatrics and pediatric pathology, concluded that Nikki’s death should not have been designated a homicide, in part because there is no scientific basis for looking at an impact site and concluding whether it was intentionally inflicted or the result of an accidental fall. Dr. Ophoven opined that Nikki’s internal condition simply meant that she had suffered irreversible damage from oxygen deprivation. Dr. Ophoven explained that anyone who stops breathing and has their heart stop is at risk for the same constellation of internal head conditions. If the brain is deprived of oxygen, brain swelling occurs. Then, as pressure against the brain increases, bleeding into the eyes, which are connected to the brain, can occur. Dr. Ophoven was confident that the precipitating event was not “shaking” or “multiple impacts” to the head. Moreover, she explained that Dr. Urban’s autopsy pictures, to which the jury had been subjected, were highly misleading because they did not reflect Nikki’s condition when she was brought to the ER but were taken during the autopsy, performed after multiple days of medical intervention had affected Nikki’s internal and external condition. 3EHRR13-81; EX45.

- **Dr. Ken Monson**, an expert in biomechanical engineering who directs the Head Injury & Vessel Biomechanics Lab at the University of Utah, explained the relevant scientific literature and studies showing that the SBS/AHT assumptions about how shaking would cause internal head injuries but no neck injuries have been falsified. He also explained how the laws of physics and modeling are utilized to study the injury-impact of falls with head impacts. Dr. Monson explained how a teddy bear, used as a demonstrative exhibit during Robert’s trial, weighing less than a pound, is not a comparable model in any relevant respect to a 28-pound toddler like Nikki and thus misled the jury. 5EHRR22-108.
- **Dr. Carl Wigren**, a forensic pathologist who has performed over 2,000 autopsies and is a member of the American Academy of Forensic Sciences, concluded that Nikki’s death was not a homicide based on numerous factors, including: (1) the report of a fall off of a bed; (2) the evidence (CAT scans and autopsy photographs) showing only a single impact site to the back of Nikki’s head that was consistent with the report that she had sustained a short fall; (3) evidence in the toxicology report of dangerous quantities of Phenergan/promethazine now known to suppress the nervous system, in Nikki’s bloodstream at the time of autopsy; (4) evidence that, shortly before her collapse, she had been prescribed Phenergan in two forms and cough syrup with codeine, a narcotic that metabolizes into morphine and further suppresses the nervous system; and (5) evidence that Nikki had undiagnosed pneumonia. Dr. Wigren concluded that these factors had come together to cause an “unfortunate accident,” “absolutely not” a homicide, and opined that SBS/AHT played no role in causing Nikki’s death. 5EHRR157-244; 6EHRR25; APPX92; APPX95.
- **Dr. Roland Auer**, a neuropathologist board certified in the United States and Canada, who is both a medical doctor and a Ph.D. scientist, the author of a leading neuropathology treatise and over 130 scientific articles in peer-reviewed journals, and a researcher with extensive experience with head trauma, hypoxia, hypoxic ischemia, and pediatric pneumonia, independently identified factors relevant to assessing the cause of Nikki’s death. He concluded that her death could not reasonably be deemed a homicide. As a specialist in brain pathology, Dr. Auer clarified that trauma sufficient to cause internal brain damage would leave external markers on the skin in the form of corresponding bruises/contusions and likely corresponding skull fractures. He found no evidence suggesting significant trauma to Nikki’s head, only one minor impact, “no support for multiple impact sites neither on the brain nor in

the skull nor in the scalp,” and “no evidence for multiple impact sites whatsoever” but instead found evidence in Nikki’s lung tissue of *advanced interstitial viral pneumonia*. He explained that interstitial viral pneumonia causes hypoxia by disrupting the lung tissue and, if untreated, a cascade of symptoms will result in brain death: oxygen-deprived blood vessels leak into the dura; the blood accumulating outside of the brain causes swelling and increased intracranial pressure; the pressure inside the skull in turn causes retinal hemorrhages. He also noted that the drugs Nikki had been prescribed before her collapse—Phenergan, which depresses respiration, and codeine, an opiate—would have done nothing to address her undiagnosed pneumonia but would have further hindered her ability to breathe. 8EHRR55-56. 8EHRR8-144; APPX124; APPX110.

By contrast, the State relied on just two witnesses in Mr. Roberson’s -03 habeas proceeding. The first was Dr. Urban who admitted that she had never considered Nikki’s medical history. She also acknowledged that a lot of her cases “run together” (suggesting she had not carefully reviewed her previous testimony in Mr. Roberson’s case) and could not identify anything she had learned in the intervening years that would make her doubt her 2002 findings. 9EHRR121, 127. The second was Dr. James Downs, a member of the “Shaken Baby Alliance,” an SBS/AHT advocacy group that teaches prosecutors how to obtain convictions based on the SBS/AHT hypothesis.<sup>18</sup> 10EHRR112-15. In an attempt to rebut Dr. Auer’s comprehensive findings, including his conclusion that Nikki’s death was caused by her undiagnosed viral pneumonia, Dr. Downs repeatedly claimed that Nikki’s lungs

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<sup>18</sup> Dr. Downs’ wife is a board member of the Shaken Baby Alliance, an entity founded by an elementary school educator, not a medical expert; the organization promotes SBS/AHT as a sound medical diagnosis and has a financial/fundraising interest in seeing challenges to SBS/AHT reliability fail. 10EHRR112-15.

were “normal little kid lungs” and he saw “no pneumonia.” 10EHRR74, 76, 212, 220, 242. Dr. Downs also (falsely) asserted that he did not believe he had “ever missed” pneumonia in an autopsy, “since they’re pretty much readily apparent grossly,” 10EHRR221. Yet, as Dr. Auer testified, interstitial viral pneumonia is *not* readily apparent “grossly” and identifying its effect on lung tissue requires special training that forensic pathologists do not receive. 8EHRR89, 100. Additionally, during cross-examination, Dr. Downs was confronted with a court opinion granting habeas relief to an inmate sentenced to death in Alabama for intentionally causing the death of his infant son. Based in part on new evidence that the child had pneumonia at the time of his death, the court found that Dr. Downs, who had performed the child’s autopsy, had entirely missed the child’s pneumonia. *See Ward v. State*, CR-18-0316, 2020 WL 4726486, -- So.3d -- (Ala. Crim. App. Aug. 14, 2020). Dr. Downs had no response.

In Mr. Roberson’s habeas proceeding, all of the autopsy findings were explained by Nikki’s deadly respiratory infection (aka viral pneumonia); the respiratory-suppressing medications she was given because her pneumonia had not been diagnosed; her apparent short fall out of bed hours before her final collapse; and then the medical intervention she sustained after she had already experienced brain death.

But all of this new evidence was simply disregarded. In fact, the State insisted Nikki did not have pneumonia, that the drugs prescribed to her were all irrelevant to understanding her death, and that there were no problems with the 2003 trial. Yet during that trial, the jury had heard *no* alternative explanation for Nikki's tragic death. The jury only heard the deeply disturbing SBS hypothesis used to explain horrifying autopsy photos of blood in the subdural space inside his daughter's head. The "shaking" narrative was pounded relentlessly before the jury without any resistance from appointed defense counsel.

Importantly, the word "pneumonia" does not appear anywhere in the autopsy report or trial record. Yet during Mr. Roberson's habeas proceeding, counsel for the State inexplicably argued that the newly discovered evidence of pneumonia in Nikki's lung tissue was "nothing new" because pneumonia, the disease, was a thing that existed in 2003. Article 11.073, however, does not require that evidence be adduced of a phenomenon that did not exist for it to be considered a change in scientific understanding from testimony used at trial to obtain a conviction. As explained above, no expert questioned the SBS hypothesis at trial. Even Mr. Roberson's counsel overrode their autistic client's protestations of innocence and conceded that Nikki's death was a Shaken Baby case because that was the dominant medical view in 2002-2003. Today, no reputable medical doctor would testify as Dr. Squires and Dr. Urban did.

The trial judge in Anderson County recommended denying Mr. Roberson relief in 2021 based, in part, on the view that, because some doctors still believe in the legitimacy of the discredited SBS hypothesis, the science conveyed to the jury during Mr. Roberson's trial has not changed. That position cannot be squared with the plain language of, or the legislative intent behind, Article 11.073. Nor can that position be squared with the voluminous evidence Mr. Roberson adduced showing how and when the relevant science changed, how testimony seemingly offered by qualified medical experts at trial is indefensible today, and how significant, evidence-based explanations account for his daughter Nikki's collapse. That new evidence *completely debunks the notion that Nikki's death was a homicide*.

After his -03 habeas proceeding closed, Mr. Roberson has amassed yet more new evidence: correlated opinions from additional medical specialists from multiple disciplines, including a lung pathologist, a medical toxicologist, and a pediatric radiologist. Collectively, their reports explain all aspects of Nikki's condition and death, establishing, beyond any doubt, that she died of a severe undiagnosed pneumonia that progressed to the point of sepsis, a demise likely accelerated by the wholly inappropriate medications she was prescribed during her final days that would only have made it harder for her to breathe. *See -04 Application, EX5-EX8*. Yet no court has yet considered this new evidence.

Mr. Roberson's fate should not depend on the fact that the county where his case was tried has a District Attorney unwilling to examine and engage with the new scientific evidence showing that the cause-of-death testimony used to convict Mr. Roberson in 2003 is patently wrong—as opposed to the Dallas County, where the CIU stepped in and reviewed the matter in *Ex parte Roark*.

## **II. Outpouring of Support for a New Trial for Mr. Roberson**

Since Robert's -03 habeas application was filed in 2016 and his claims were authorized for further development, the science debunking the Shaking Baby hypothesis has evolved even further. Also, when the -03 habeas proceeding commenced, Robert had no ability to access essential medical records and resources to unpack the exceedingly complex nature of his daughter's condition so that a comprehensive differential diagnosis could be undertaken. The expertise needed to do so *took years* of due diligence and litigation, undertaken largely pro bono, to identify and obtain.

New medical evidence now shows that no crime occurred; Nikki died, not from abuse in the form of shaking or inflicted impact, but because she ceased breathing in her sleep as a consequence of a viral interstitial pneumonia with secondary bacterial bronchopneumonia, a double infection exacerbated by dangerous medications doctors, unaware of her pneumonia, prescribed to her during the last week of her life.

Three new reports from highly qualified experts with different medical specialties now explain precisely how Nikki died, yet Mr. Roberson's efforts to have this new evidence considered have thus far failed—to the dismay of a wide array of objective observers.

Notably, at least 86 Texas lawmakers, spanning the political spectrum, have submitted a letter to the Board and the Governor urging clemency for Mr. Roberson. Article 11.073 was enacted specifically to address cases just like Mr. Roberson's—and yet the courts have failed to apply it as intended:

More than a decade ago, the Texas Legislature passed Senate Bill 344 [Article 11.073], which allowed challenges to convictions that were based on disproven or incomplete science. That law passed with the unanimous support of the Texas House because it recognized that innocent people are sometimes wrongfully convicted based on scientific evidence that later turns out to be wrong.

Our first-in-the-nation law provides Texas courts with a way to reexamine convictions that are inconsistent with modern scientific principles. They can overturn convictions if they find a jury would likely not have convicted if it had been given relevant, admissible scientific evidence that was not available to the defense at the time of the trial or that contradicts scientific evidence used by the State at trial.

We have been dismayed to learn that this law has not been applied as intended and has not been a pathway to relief—or even a new trial—for people like Mr. Roberson. In his case, significant scientific and medical evidence now shows that his daughter Nikki, who was chronically ill, died of a combination of natural and accidental causes, not the debunked shaken baby syndrome hypothesis the State used to convict Mr. Roberson.

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It appears that both the trial court and the Court of Criminal Appeals refused to acknowledge or engage with this voluminous new scientific evidence and instead simply denied Mr. Roberson a new trial.

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The fact is that the science has changed, and new evidence developed since 2016 not only contradicts the hypothesis the State relied on during Mr. Roberson's 2003 trial but also provides a clear and plausible alternative medical diagnosis for Nikki's actual cause of death.

Yet the courts have not honored the law's intent, closing the pathway to relief the Legislature created.

#### **Appendix A** at Exhibit 16.

These lawmakers feel so strongly about Mr. Roberson's innocence that several recently traveled to death row to meet with Mr. Roberson in person to convey their support:<sup>19</sup>

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<sup>19</sup> See, e.g., S. Briggs, *Amid calls for clemency, Texas lawmakers visit Robert Roberson ahead of upcoming execution*, Houston Chronicle, available at <https://www.msn.com/en-us/news/other/amid-calls-for-clemency-texas-lawmakers-visit-inmate-robert-roberon-ahead-of-upcoming-execution/ar-AA1rBjGm?ocid=BingNewsSerp>.



*Lawmakers meeting in chapel at Polunsky Unit w Robert Roberson, 09.27.2024*

Texas lawmakers also seem to have recognized that Mr. Roberson’s case embodies the kind of injustice they have worked to prevent by passing, in 2021, Republican-sponsored Senate Bill 1578, which passed both chambers of the Texas Legislature without any dissenting votes.<sup>20</sup> The bill amended Section 261.3017 of the Texas Family Code; Chapter 261 deals with “Investigation of Report of Child Abuse or Neglect.” Most critically, the bill added subsections (c-2) and (e), which give caregivers the right to their own expert and requires consideration of any alternative opinions adduced:

- (c-2) Before referring a child’s case under Subsection (c), the department shall provide to the child’s parent or legal guardian or, if represented by an attorney, the attorney of the parent or legal guardian written notice of the name, contact

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<sup>20</sup> See <https://legiscan.com/TX/text/SB1578/2021>.

information, and credentials of the specialist. The parent, legal guardian, or attorney, as applicable, may object to the proposed referral and request referral to another specialist. The department and the parent, legal guardian, or attorney, as applicable, shall collaborate in good faith to select an acceptable specialist from the proposed specialists; however the department may refer the child's case to a specialist over the objection of the parent, legal guardian, or attorney.

- (e) This section may not be construed to prohibit a child's parent or legal guardian or, if represented by an attorney, the attorney of the parent or legal guardian from otherwise obtaining an alternative opinion at the parent's, legal guardian's, or attorney's, as applicable, own initiative and expense. The department shall accept and consider an alternative opinion obtained and provided under this section and shall document its analysis and determinations regarding the opinion.

TEX. FAM. CODE sec. 261.3017 (c-2) & (e).

Of course, Mr. Roberson did not have the benefit of Senate Bill 1578 in 2002. The law was enacted nearly 20 years after he was sent to death row. But that is precisely a circumstance that should further weigh in favor of a stay. As a bipartisan group of lawmakers has emphasized, the way Mr. Roberson's case has been handled "is not just out of step with our new science writ law" but is also out of step with the progress made in 2021, "when the Legislature passed Senate Bill 1578, which now ensures that parents have the right to a second expert medical opinion after allegations of child abuse." **Appendix A** at Exhibit 16. As the lawmakers recognize, "[h]ad these events occurred today, Mr. Roberson would have been legally entitled to an additional medical review at his request." *Id.*

The way entire families have been devastated by overly aggressive and ultimately scientifically indefensible allegations of child abuse has only recently become a widely recognized social problem. *See, e.g., Take Care of Maya*, an acclaimed 2023 Netflix documentary about the anguish experienced by a family after a child abuse specialist and hospital personnel accused the mother of child abuse instead of investigating the validity of the child’s complex health issues.<sup>21</sup> *See also* “Torn Family Inc.,” non-profit founded to support caregivers “torn apart by false allegations of Shaken Baby Syndrome (a.k.a. Abusive Head Trauma).”<sup>22</sup>

Entities like the Parental Rights Foundation are urging clemency for Mr. Roberson because they recognize that the wrongs Texas’s new law was enacted to address would have protected him—had it existed 20 years ago:

Mr. Roberson’s conviction in the death of his daughter, Nikki, came at a time when a medical theory called ‘Shaken Baby Syndrome’ fueled prosecutions all over the nation. In many instances, like in Roberson’s, a single doctor [Dr. Squires] testified to a triad of symptoms as indicative of willful abuse. And many parents were sentenced to life in prison, or given the death penalty, on the basis of this theory and this singular testimony alone.

Since that time, thousands of these cases have been overturned, and not one of those executions has taken place. The ‘Shaken Baby Syndrome’ theory has been utterly debunked as the same triad of symptoms has been documented arising from naturally occurring causes time and time again. Thousands of innocent parents have been set free as further scientific evidence has rendered SBS theory bankrupt.

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<sup>21</sup> *See* <https://www.netflix.com/title/81349305>.

<sup>22</sup> Website *available at* <https://tornfamily.com/>.

## Appendix B.

The Parent Rights Foundation is correct that many “innocent parents have been set free” as the baselessness of SBS is being recognized. But Texas law has not yet been brought in line with legal developments in other jurisdictions that have recognized the baseless nature of the version of SBS/AHT used to obtain convictions circa 2000-2003.<sup>23</sup>

One recent Actual Innocence case is instructive. *See 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. The child 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

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<sup>23</sup> *See, e.g., State v. Edmunds*, 746 N.W.2d 590, 595, 598-99 (Wis. Ct. App. 2008) (finding new evidence related to SBS/AHT controversy “[was] entirely different in character from the evidence offered” at trial as it showed “a shift in mainstream medical opinion” and granting new trial); *Commonwealth v. Epps*, 53 N.E.3d 1247, 1268 (Mass. 2016) (finding “substantial risk of a miscarriage of justice where the jury heard no scientific or medical expert challenging the majority views on [SBS/AHT] and short falls, and where new research has emerged since the time of trial that would lend credibility to the opinion of such an expert” and granting new trial); *People v. Bailey*, 41 N.Y.S.3d 625, 627 (App. Div. 2016) (holding that “advancements in science and/or medicine may constitute newly discovered evidence” and “defendant established . . . that ‘a significant and legitimate debate in the medical community has developed in the past ten years over whether infants [and toddlers] can be fatally injured through shaking alone’” and affirming lower court ruling vacating SBS/AHT conviction) (alteration in original, citation omitted); *Jones v. State*, No. 0087, 2021 WL 346552, \*11-20 (Md. Ct. Spec. App. Feb. 2, 2021) (surveying changes in SBS/AHT’s original tenets in light of scientific developments and finding that petition for writ of actual innocence should be granted); *Kaiser v. State*, \_\_\_ N.W.3d \_\_\_, 2024 WL 1080968 (Minn. March 13, 2024) (finding that SBS/AHT testimony from State’s expert witnesses was false testimony that child’s medical condition was the result of intentionally inflicted head trauma); *see also Del Prete v. Thompson*, 10 F. Supp. 3d 907, 951 (N.D. Ill. 2014) (finding petitioner convicted for 2002 death of child in SBS case had satisfied *Schlup v. Delo*, 513 U.S. 298 (1995) gateway materiality standard for constitutional claims).

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 Mr. Roberson’s habeas judge rejected the notion that the relevant science has changed since his 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 Appendix C*. 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.

If this Court acts to bring Texas law in line with other jurisdictions around the country and adopts the recommendation that Mr. Roark deserves habeas relief, then the previous decision to deny Mr. Roberson relief should be reconsidered—before it

is too late. The Roark and Roberson cases involve essentially the same discredited science challenged using the same Texas law: Article 11.073. In both cases, the State even relied on the *same* child abuse specialist—as well as the *same* false SBS causation theory. A stay will allow this Court to assure that the legislative intent underlying Article 11.073 is being applied consistently throughout Texas. But if Mr. Roberson’s execution proceeds before that can be accomplished, a horrible miscarriage of justice will ensue.

### CONCLUSION

For all of the foregoing reasons, given the urgency and complexity of his case and the new grounds for entering a stay, Robert Roberson respectfully prays that this Court STAY his October 17, 2024, execution and consider taking the initiative to reconsider the denial of relief under Article 11.073 in the -03 proceeding and/or the dismissal of his new claims, including under Article 11.073, in the -04 proceeding.

Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

Tex. R. App. Proc. 9.4 does not contain a word-count limit for suggestions to reconsider habeas corpus applications on the Court's own initiative. This suggestion, however, contains 11,903 words, excluding the parts exempted by Tex. R. App. Proc. 9.4(i)(1). This brief complies with the typeface requirements of Tex. R. App. Proc. 9.4(e) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

*/s/ Gretchen S. Sween*

### **CERTIFICATE OF SERVICE**

I, the undersigned, declare and certify that I have served the foregoing Motion for Stay of Execution on:

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