IN THE
3RD DISTRICT COURT, ANDERSON COUNTY, TEXAS

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

MOTION TO VACATE UNLAWFUL EXECUTION WARRANT AND ALL RELATED ORDERS AND TO RECUSE JUDGE DEBORAH OAKES EVANS

Robert Leslie Roberson III, by and through counsel, files this Verified Motion to Vacate Unlawful Execution Warrant and All Related Orders and to Recuse Judge Deborah Oakes Evans. This motion is based on the following:

- Judge Evans, a retired judge, took judicial acts in this cause without compliance with the statutory requirements in section 75.001 of the Texas Government Code necessary to permit her to serve as an assigned judge; thus, all actions she has taken in this cause, including the setting of an execution date, are absolutely void for lack of jurisdiction.

- Additionally, pursuant to Rules 18a & 18b(b) of the Texas Rules of Civil Procedure, Judge Evans must voluntarily recuse herself or must be recused because her "impartiality might reasonably be questioned." TEX. R. CIV. PROC. 18b(b)(1).[1]

Because Judge Evans' assignment and then subsequent judicial acts were unlawful, Mr. Roberson moves to have the execution warrant and all related orders deemed null and void. Further, because she currently has no judicial authority to act, and for the additional reasons described below, Judge Evans should be recused from presiding in this cause.

In support of this motion, Mr. Roberson respectfully shows the following:

[1] The Texas Rules of Civil Procedure governing recusal apply to both civil and criminal proceedings. *See Fuelberg v. State*, 410 S.W.3d 498, 508-09 (Tex. App.—Austin 2013, no pet.).

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INTRODUCTION

Mr. Roberson is an indigent, disabled father, diagnosed with Autism Spectrum Disorder in 2018. He has maintained his innocence since first being wrongly accused of causing his daughter Nikki's death in 2002 based on a "Shaken Baby Syndrome" diagnosis. He has been fighting to be heard from Texas's death row since 2003. This case is truly a matter of life and death—with a pending execution date of October 17, 2024. That date was set by Judge Evans, a retired judge sitting by assignment, without first permitting Mr. Roberson a hearing. *See* EX1-EX3. Thereafter, Judge Evans again denied Mr. Roberson a hearing on his Motion to Withdraw Execution Date even after he provided support for the fact that hearings on such motions are routine and that such motions are generally granted under the circumstances that were presented to her. *See* EX4-EX7.

Now it has come to light that Judge Evans failed to follow the required statutory procedure for a retired judge to become eligible to accept assignments to preside over cases in lieu of elected judges. Because this is a jurisdictional issue that cannot be remedied retroactively, all actions that Judge Evans has taken in this matter are null and void. She cannot and should not serve as the presiding judge.

Moreover, the following factors, viewed in the totality, suggest the appearance of a lack of impartiality, a statutory basis for recusal:

- the opaque process whereby Judge Evans—who presided over Mr. Roberson's previous habeas proceeding and recommended that he be denied a new trial—was assigned to this matter even before any case was pending;

- the deep personal relationships Judge Evans has with numerous individuals who have been involved in Mr. Roberson's case over the years, including an attorney (now judge) who originally prosecuted the case, the judge who terminated Mr. Roberson's parental rights, and the current Anderson County District Attorney who opposed habeas relief and sought the pending execution date; and

- arbitrary rulings in Mr. Roberson's previous habeas proceeding and in a markedly similar "Shaken Baby" case involving many of the same people, to which Judge Evans was also purportedly assigned, after her retirement, when she had no authority to act as a judicial officer.

The totality of the circumstances, including the seriousness of this case, require prompt reassignment to an impartial judge who can vacate the unlawfully entered execution warrant and related orders, which Judge Evans signed absent lawful authority.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

I. Background of Mr. Roberson's Case

Mr. Roberson is from Palestine in Anderson County, Texas. He moved back there after learning he had a daughter, Nikki, who had been removed from her mother by CPS at birth. After he established his paternity, Nikki's maternal grandparents agreed that he should be awarded custody of Nikki, and Judge Jerry Calhoon entered an Agreed Order to that effect. This occurred in November 2001, soon after Nikki's second birthday, just two months before her tragic death. EX8; EX9.

Nikki was chronically ill much of her short life and severely ill during the last week before her collapse on January 31, 2002. Mr. Roberson took Nikki to the Emergency Room in the Palestine Regional Medical Center on January 28th and then to her pediatrician the next day, January 29th, who recorded her temperature as 104.5 degrees. These two different doctors on two consecutive days prescribed Phenergan—first in suppository form and then in cough syrup along with codeine, a narcotic. These medications are no longer recommended for children Nikki's age and in her condition.[2] When the Phenergan and codeine were prescribed, Nikki was diagnosed

[2] Phenergan now contains FDA "black box warnings" against prescribing it to children Nikki's age and in her condition, because it can suppress breathing and cause death, as explained in a new expert report from a medical toxicologist. *See* EX10.

with "respiratory illness, likely viral."[3]

When Mr. Roberson woke up on January 31st to find his daughter unconscious with blue lips, he took her back to the same ER where the same doctor who had seen her two days earlier handled the case. A CAT scan was taken, revealing a constellation of internal head conditions then associated with Shaken Baby Syndrome. Abuse was presumed. No one investigated Nikki's medical history or recent illness or examined her infected lungs. Mr. Roberson was accused, tried, and sentenced to death based on the Shaken Baby cause-of-death hypothesis—a hypothesis that his own appointed lawyer conceded throughout the trial even though Mr. Roberson always maintained his innocence and rejected multiple plea deals. The case was prosecuted by former Anderson County District Attorney Doug Lowe and current Anderson County District Judge Mark Calhoon.[4] The Anderson County trial judge was the Honorable Bascom Bentley.

Mr. Roberson was arrested, based on the Shaken Baby hypothesis, even before an autopsy was performed. After Nikki was taken off life support without his knowledge, his parental rights were terminated by Judge Jerry Calhoon without a hearing. EX8.

In the years since Mr. Roberson's conviction in 2003, the Shaken Baby hypothesis that was presented to his jury as scientific fact has been completely discredited by evidence-based science. Across the country, similarly accused parents have been exonerated or granted new trials.[5]

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[3] Later examinations of Nikki's lung tissue by an expert in lung pathology revealed that she had very severe pneumonia at the time, but the pediatrician (and later the medical examiner) missed it, as described in a new report. EX11.

[4] 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. According to an article in the *Palestine Herald*, she left the office in 2006 after "5½ years"—and thus was employed there since at least 2001. *See* EX12. Based on the face of the trial transcripts, however, she did not play a public-facing role in Mr. Roberson's trial.

[5] *See, e.g.*, National Registry of Exonerations, Exoneration Detail List, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspxa for individuals in at least 18 states who have been exonerated following Shaken Baby convictions.

In 2016, the last time Mr. Roberson was facing an execution date, Mr. Roberson finally obtained new counsel willing to investigate his innocence. 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. The Court of Criminal Appeals (CCA) 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 3rd 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. Judge Evans, then the presiding judge in the 87th District Court, assumed responsibility for the proceeding instead. There is no known record of the recusal or of an assignment order because, per Judge Evans, all elected judges who sit in Anderson County have concurrent jurisdiction over cases in each others' courts.[6] There is no record of how it was determined that Judge Evans, as opposed to another presiding judge with jurisdiction over Anderson County cases (the 369th or 349th District Courts) would assume responsibility for Mr. Roberson's habeas proceeding.

An evidentiary hearing in the 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. *See* EX13.

[6] According to the district courts' websites, the presiding judge of the 87th District Court is elected to serve Anderson, Freestone, Leon, and Limestone Counties; the presiding judge of the 369th District Court is elected to serve Anderson, Cherokee, and Leon Counties; presiding judge of the 349th District Court is elected to serve Anderson and Houston Counties.

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. She also agreed to serve as Special Master so that the newly discovered evidence, including the CAT scans, could be copied and produced to both parties. *Id.*

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.[7] *Id.*

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.

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. EX15. The State's proposal was 17-

[7] 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. EX14.

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. EX16. 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. EX17. Thereafter, the case was submitted to the CCA, ending Judge Evans' jurisdiction over the case. She subsequently retired from the bench, effective December 31, 2022.

A few weeks after Judge Evans' retirement, the CCA, relying on Judge Evans' FFCL, summarily denied Mr. Roberson relief. *Ex parte Roberson*, 2023 WL 151908 (Tex. Crim. App. Jan. 11, 2023) (unpub.).

Mr. Roberson is now seeking clemency from the executive branch, an effort supported by hundreds of individuals and advocacy groups, including a bipartisan group of 86 elected members to the Texas House of Representatives. *See* EX18; EX19.

II. Facts Relevant to Judge Evans' Post-Retirement Qualification to Serve

Unbeknownst to Mr. Roberson, on November 9, 2022, Judge Evans wrote to the Chief Justice of the Supreme Court of Texas stating that she would be retiring from the bench and asserting: "I hereby elect to continue to serve as a judicial officer of the State of Texas under the provision of Section 75.001, Texas Government Code." EX20. This letter was submitted 52 days before her actual retirement. The Chief Justice acknowledged receipt of Judge Evans' letter on

November 16, 2022. *Id.*

Undersigned counsel learned of these letters on September 18, 2024, and promptly made a Judicial Rule 12 records request seeking ***all*** documents related to Judge Evans election to serve as a judge post-retirement to ensure that no other records existed. The custodian of such records produced no further records.

Under section 75.001 of the Texas Government Code, a retired judge may elect to serve as a judicial officer, by assignment, if the retired judge makes an election "not later than the 90th day ***after*** the date of the person's retirement in a document addressed to the chief justice of the supreme court" of Texas. TEX. GOV. CODE sec. 75.001(b)(1) (emphasis added). Only "retirees," as defined in the statute, may make this election. *Id.* sec. 831.001 (explaining "'Retiree' means a person who receives an annuity based on service that was credited to the person."). The statute does not provide for active judges to make an election that will then become effective post-retirement. No records indicate that Judge Evans made the necessary election when her right to do so ripened post-retirement.

III. Facts Suggesting the Appearance That Judge Evans Lacks Impartiality

A. The process whereby Judge Evans came to be assigned over this matter was not transparent and resulted in summary denials of Mr. Roberson's repeated attempts to be heard about a matter of life-and-death.

Unbeknownst to Mr. Roberson, approximately 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 87th District Court, on November 14, 2023, a Request for Assignment form was completed related to Mr. Roberson. EX21. But at that time, Mr. Roberson had ***no case pending*** in Anderson County—or in any other court, state or federal. The Request for Assignment form was completed a month after the Supreme Court of the United States had declined to consider Mr.

Roberson's petition for writ of certiorari, thereby terminating the appeals in the 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).

The Request for Assignment form was prepared by an Anderson County court coordinator, seemingly on behalf of Judge Amy Thomas Ward, by then the elected judge presiding over the 87th District Court. EX21. However, the form is not signed by Judge Ward.

The Request for Assignment form identifies "State of Texas v. Robert Roberson III" cause no. "26162" as the case for which an assignment was being sought. But at that time, "26162" was the cause number for Mr. Roberson's 2002-2003 ***trial***, a matter that had been dormant for years and was not the cause number associated with the writ proceeding.

The Request for Assignment form states that the request was being made because "Judge Evans heard the trial and wants to stay with the case." *Id.* However, Judge Evans had not "heard the trial" but had instead presided over a postconviction writ proceeding many years after the 2002-2003 trial—starting in 2016 and continuing until February 2021. The form does not explain how Judge Evans' desire was conveyed to Judge Ward and/or the court coordinator who completed the form. Neither Mr. Roberson nor his counsel were apprised of this Request for Assignment.[8] But, according to the form, the Request for Assignment was emailed to the Tenth Administrative Judicial Region on November 14, 2023. *Id.*

On November 16, 2023, the Honorable Alfonso Charles, Presiding Judge for the Tenth Administrative Judicial Region, responded to the Request for Assignment by entering an order assigning Judge Evans to what he likely did not know was a closed case. EX22 ("Assignment Order"). The Assignment Order states that Judge Evans was assigned "until plenary power expires

[8] Undersigned counsel only become aware of the existence of this form on September 18, 2024.

or the undersigned terminates the assignment in writing[.]" *Id.* The Assignment Order was not served on Mr. Roberson or his counsel of record. Counsel did not see the Assignment Order or know of its existence until it was attached to a responsive pleading filed by the Anderson County DA's Office on June 20, 2024—***seven months after the fact***. *See* EX2. The copy of the Assignment Order, attached to the DA's pleading, does not have a file stamp. It had been shared with the Anderson County DA's Office, but not with Mr. Roberson.

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, Don Salzman, an attorney with the multi-national law firm, Skadden 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.*, EX23; EX24; *see also* 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" in the cause number for the previous writ proceeding, ***not*** in cause number 26162, which had not been used for filings in the previous writ proceeding. The Motion to Be Heard explained the plan to file a subsequent application based on yet more new evidence.[9] EX1.

When the new case was opened on April 9, 2024, and knowing nothing of the Assignment Order signed back on November 16, 2023, Mr. Roberson's counsel also made inquiries of the Anderson County District Court's Office to determine who would be presiding and specifically asked if Judge Ward, the elected judge presiding over the 87th District Court, would be hearing the matter. Counsel received no answer to these queries. Likewise, Mr. Roberson's request for a hearing before any execution date was set went unanswered.

On June 17, 2024, the DA's Office filed a "Motion Requesting Execution Date." EX25. The next day, Mr. Roberson's counsel filed an "Opposition to Anderson County DA's Motion Requesting Execution Date" again requesting a hearing. EX26. 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. EX2.

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. EX3. 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. EX9. An Objection to this violation of due

[9] That subsequent habeas application was ultimately filed on August 1, 2024, but the CCA refused to authorize the claims, stating, without explaining, that the 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, § 5(a)." This is confusing as Article 37.071 is a statute that deals only with death-penalty ***trials***—and there is no section 5 in that statute; it only goes to section 2.

process was filed on Mr. Roberson's behalf. EX27.

On August 1, 2024, the promised subsequent habeas application was filed 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. EX4.

On August 8, 2024, the 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. EX28.

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. *See* EX5. Mr. Roberson again requested a hearing on the contested motion. *Id.*

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." EX6. On August 18, 2024, Mr. Roberson filed a Motion to Reconsider Denial of Hearing on Withdrawing the Execution Date. EX7. However, Mr. Roberson has not, to this day, been allowed a hearing.

B. Judge Evans' close personal relationships with judges involved in the underlying facts and with the current DA, Allyson Mitchell, create an appearance that Judge Evans lacks impartiality.

Judge Evans has numerous deep connections to individuals in rural Anderson County who

have played a significant role in the matters that have adversely affected Mr. Robert's fate.

In announcing her retirement, Judge Evans identified "a number of judicial mentors who were always willing to offer guidance and assistance" to her when she became a district judge. EX29. Her judicial mentors include "former 87th Judicial District Judge Sam Bill Bournias, … Judge Bascom W Bentley (369th), Judge James M. Parsons (3rd), Judge Jerry Calhoon (349th)" whose guidance she described as "invaluable." *Id.* All of these judges played a direct rule in adjudicating the custody case affecting Mr. Roberson's daughter Nikki or his death-penalty trial and initial quest for habeas relief:

- Judge Sam Bill Bournias presided over proceedings in the custody dispute involving Mr. Roberson's daughter Nikki, which led to him being granted custody.
- Judge Bascom W. Bentley presided over Mr. Roberson's 2002-2003 trial and his initial state habeas proceeding in which he denied an evidentiary hearing. Two days after the State filed proposed FFCL in that proceeding, Judge Bentley signed the same document without changes, not even scratching out the word "proposed" in the caption.
- Judge James M. Parsons also presided over proceedings in the custody suit over Nikki.
- Judge Jerry Calhoon signed the final order on the agreement to award custody of Nikki to Mr. Roberson and then, after her death, signed an order allowing her maternal grandparents to control "disposition of the body of the child" and signed an order terminating Mr. Roberson's parental rights without notice to him. Judge Jerry Calhoon is also the father of trial prosecutor, now Anderson County District Judge, Mark Calhoon, who prosecuted Mr. Roberson.

EX8. During Mr. Roberson's previous habeas proceeding, over which Judge Evans presided, her relationships with these individuals, who all played a significant role in the underlying case, were not disclosed to Mr. Roberson.

Additionally, Judge Evans is close personal friends with the current District Attorney for Anderson County, Allyson Mitchell, who was employed by the Anderson County DA's Office when Mr. Roberson was prosecuted in 2002-2003 and has been in charge of the Anderson County DA's Office throughout its efforts to oppose his quest for a new trial and to prove his innocence.

DA Mitchell made the motion to seek Mr. Roberson's October 17th execution date, which Judge Evans granted while denying Mr. Roberson's request for a hearing on that motion.

Judge Evans presided over DA Mitchell's swearing in ceremony in 2015. Judge Evans and DA Mitchell are friends on Facebook, socialize together, and have reportedly traveled together with their families to Europe. EX30 at 12. Soon after their joint European vacation, DA Mitchell hired Judge Evans' son, Brian Evans, to work in the Anderson County DA's Office.[10] A few months into his job as DA Mitchell's assistant, Brian Evans and DA Mitchell tried a case together—over which Judge Evans presided. Yet none of them—neither DA Mitchell, nor Brian Evans, nor Judge Evans—disclosed to the defendant, an indigent, black man with palpable mental illness named Richard Gross, that the judge was the mother of one of the prosecutors and thus was required by law to recuse herself. *Id.*[11] *See* TEX. R. CIV. PROC. 18(b)(8) ("a judge ***must recuse in any proceeding in which the judge*** **or the judge's spouse, or** ***a person within the first degree of relationship to either of them*****, or the spouse of such a person,** ***is acting as a lawyer in the proceeding***.") (emphasis added). This rule does not require showing an appearance of a lack of impartiality; it creates an absolute requirement for recusal.

During Mr. Gross's trial before Judge Evans, DA Mitchell stated on the record that she would be assisted by Brian Evans, "a misdemeanor attorney in [her] office" who had only been a prosecutor for about "six months." She did not tell the jury that her new employee was Judge Evans' son—nor did Judge Evans. Instead, DA Mitchell stated: "I like it when I have people in my office that don't have as much experience as say me or some of our other fellow prosecutors

[10] Brian Evans became licensed to practice law in November of 2012 but then practiced civil law.

[11] That failure to disclose a disqualifying conflict of interest became the subject of a writ proceeding filed on Mr. Gross's behalf in 2020. Judge Evans voluntarily recused from that habeas proceeding.

to help with the cases. My mom always taught me the best way is to be exposed to something to learn from it. So you're going to be hearing from Brian some during this trial as well." *Id*. at 13-14.

Despite Brian Evans' lack of experience, soon after participating in his first felony trial, presided over by his mother, he ran for County Attorney in neighboring Freestone County, one of the other small rural counties where his mother, Judge Evans, was then also presiding as an elected judge. In January of 2016, Brian Evans told voters during a candidate forum that his (one and only) felony trial in neighboring Anderson County in front of his mother showed that there would be no conflict of interest if he were elected. EX31. However, after he won the primary election, his mother's court was "flooded" with motions from defense attorneys asking Judge Evans to voluntarily recuse herself from "every criminal case … in Freestone District Court once your son takes office." *See* EX32.

In addition to the close relationships described above, Judge Evans has long been colleagues and shared chambers with Judge Mark Calhoon, current presiding judge in the 3rd District Court, who was one of the two-man prosecutorial trial team who obtained Mr. Roberson's conviction and death sentence in 2003. Thereafter, Judge Calhoon presided over the only other known Shaken Baby case prosecuted in Anderson County, the case of Billy Wayne Hasel. *See Ex parte Hasel*, Case Number 31066-A (3rd District Court, Anderson County). A recent habeas proceeding related to Mr. Hasel's efforts to expose the lack of science supporting the State's cause-of-death hypothesis and to prove his innocence was recently presided over by Judge Evans, post-retirement.[12] The process that led to that assignment also lacked transparency and seems to have

[12] Mr. Roberson's counsel became aware of Mr. Hasel's case by accident while undertaking due diligence in preparing the subsequent habeas application filed on August 1, 2024, under

resulted in significance due process violations, ending with Judge Evans summarily signing FFCL drafted by DA Mitchell, recommending that Mr. Hasel, like Mr. Roberson, be denied a new trial.

C. Judge Evans' arbitrary rulings in Anderson County's two Shaken Baby cases further suggest a lack of impartiality.

Judge Evans has presided over the habeas proceedings of Anderson County's only known Shaken Baby cases, and in both instances, issued rulings that are inconsistent with due process and suggest a lack of impartiality.

As with this case, Judge Evans was assigned, post-retirement, but when she had no judicial authority to act, to preside over Mr. Hasel's Shaken Baby habeas proceeding. Mr. Hasel's habeas proceeding was initiated on January 2, 2023, under Article 11.07, seeking relief from a non-death-penalty capital conviction. Mr. Hasel's habeas application raises, among other things, a "changed science" claim under Article 11.073 and an Actual Innocence claim, as did Mr. Roberson's recent habeas application. *See* EX33.

Mr. Hasel's habeas proceeding was pending in the 3rd District Court, over which Judge Calhoon presides—and Judge Calhoon had presided over the trial. But filings in Mr. Hasel's case show a very confusing chronology as to how Judge Evans came to preside over that writ proceeding instead of Judge Calhoon when, under Articles 11.071 and 11.07, the default rule is that the trial judge presides over any habeas proceeding arising from a conviction in that judge's court.

On August 29, 2023, Judge Evans sent a letter to Mr. Hasel's counsel representing that she had been assigned to the case and that she understood it involved "shaken baby syndrome/abusive head trauma[.]" EX34. She also stated that she expected the supplemental record to be complete

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Articles 11.071 and 11.073 based on yet more new evidence that his daughter's death was not a homicide.

by the beginning of October—little more than a month from the date of her letter. *Id*. Judge Evans' letter to counsel is on letterhead suggesting she was still the presiding judge in the 87th District Court, although she had left the bench nine months before that date.

On October 12, 2023, the case docket includes a notation that "the Presiding Judge" had entered an Order of Assignment, but the Order itself is not in the clerk's record. EX35.

On August 26, 2024, over a year after Judge Evans gave notice to Mr. Hasel's counsel that she had been assigned to Mr. Hasel's habeas proceeding, Judge Calhoon filed a notice of voluntary recusal in Mr. Hasel's writ proceeding, which was then file-stamped on August 27, 2024. EX36. It is unclear why Judge Calhoon signed a document at that point related to his recusal in Mr. Hasel's case when Judge Evans had, by then, been presiding for over a year. However, it is noteworthy that Judge Calhoon completed the form a few days after undersigned counsel submitted a Public Information Act (PIA) request to the Tenth Administrative Judicial District seeking information as to how and when Judge Evans had been assigned to Mr. Roberson's and Mr. Hasel's writ proceedings. *See* EX37.[13]

Although the CCA had expressly authorized Mr. Hasel's 11.07 proceeding for further factual development related to all of his claims, filings in his case indicate that Judge Evans denied virtually all of his counsel's request for funding—for an investigator or for any experts. Yet Mr. Hasel's case, like Mr. Roberson's, hinges on medical and scientific expertise. The decision to deny Mr. Hasel all funding became the subject of a mandamus proceeding; but because funding in habeas proceedings is considered a matter of discretion, not a ministerial task, mandamus relief was denied. Thereafter, without holding an evidentiary hearing—because Mr. Hasel argued no fair

[13] Undersigned counsel never received any response to that PIA request. Yet Chapter 552 of the Texas Government Code requires a response within 10 days.

hearing was possible without access to qualified experts—Judge Evans signed the State's proposed FFCL, recommending that Mr. Hasel be denied a new trial. Those FFCL were submitted to the CCA seemingly without being served on Mr. Hasel. His case was then submitted to the CCA, where it is currently pending, and where Mr. Hasel's counsel has objected to the failure to serve him and has asked for additional time to object to the substance of Judge Evans' FFCL, which, for one thing, incorrectly stated that an evidentiary hearing was "waived" without acknowledging that the habeas applicant made the choice under duress due to being denial essential funding.

ARGUMENT & AUTHORITIES

Judge Evans has been acting ultra vires, because she did not follow the requisite statutory process to accept assignments post-retirement. An order must be entered vacating all orders signed by Judge Evans when she had no judicial authority to act as a judicial officer. *See* TEX. GOV. CODE sec. 75.001(b)(1).

Additionally, considering all relevant facts and circumstances, Mr. Roberson respectfully asks that Judge Evans voluntarily recuse herself or be recused after a hearing is held before a neutral arbiter unencumbered by biases adverse to Mr. Roberson that create an appearance of a lack of impartiality. Recusal is mandatory here because a judge shall recuse "in any proceeding in which . . . the judge's impartiality might reasonably be questioned[.]" TEX. R. CIV. PROC. 18b(b)(1). Texas appellate courts have interpreted this subsection (and its predecessor) as requiring an inquiry into "whether a reasonable member of the public at large, knowing all the facts in the public domain concerning the judge's conduct, would have a reasonable doubt that the judge is actually impartial." *See Kirby v. Chapman*, 917 S.W.2d 902, 908 (Tex. App.—Fort Worth 1996, no writ) (applying *Rogers v. Bradley*, 909 S.W.2d 872, 879 (Tex. 1995)); *Duffey v. State*, 428 S.W.3d 319, 325 (Tex. App.—Texarkana 2014, no pet. h.) (finding trial judge's *ex parte* meeting

with family members without attorneys present would have caused a member of the public at large to "have a reasonable doubt as to the trial judge's impartiality"). Texas law does not require proof of actual bias. That is, "beyond the demand that a judge be impartial is the requirement that a judge ***appear*** to be impartial so that no doubts or suspicions exist as to the fairness or integrity of the court." *Sears v. Olivarez*, 28 S.W.3d 611, 613–14 (Tex. App.—Corpus Christi 2000, no pet.) (citing *Aetna Life Ins. v. Lavoie*, 475 U.S. 813 (1986) (emphasis added)).

I. Because Judge Evans Did Not Comply with the Statutory Process to Be Eligible to Accept Assignments, Judge Evans' Order Setting Mr. Roberson's Execution Date and Her Issuance of an Execution Warrant Are Null and Void and Must Be Vacated.

Judge Evans never made a proper election to serve as a judicial officer post-retirement. Under the Texas Government Code section 75.001, a retired judge may elect to serve as a judicial officer, by assignment, if she makes an election "not later than the 90th day ***after*** the date of the person's retirement in a document addressed to the chief justice of the supreme court" of Texas. TEX. GOV. CODE sec. 75.001(b)(1) (emphasis added). Only "retirees," as defined in the statute, may make this election. *Id.* sec. 831.001 (explaining "'Retiree' means a person who receives an annuity based on service that was credited to the person."). Judge Evans, who sent her election letter to the Chief Justice ***before*** she retired, was not then a "retiree" eligible to make an election. EX20. The statute's plain language demonstrates that her attempt to make a preemptive, pre-retirement election was invalid.

Instead of following the statutory process, Judge Evans sought an assignment related to Mr. Roberson when no case was pending and then exercised power in this case over which she was not eligible to preside.[14] Her assignment, made before this case even existed, is null and

[14] Asserting, in advance, one's interest in serving as a judicial officer post-retirement does not mean that one is eligible to do so. That is likely why the law requires that a ***retiree*** judge, after retiring, must follow the proper procedure by both expressing a desire to serve and certifying

void—and all orders entered since her assignment on November 16, 2023, must be deemed null and void. *See French v. State*, 572 S.W.2d 934 (Tex. 1977).

Both *Lone Star Industries, Inc. v. Ater*, 845 S.W.2d 334 (Tex. App.—El Paso 1992, reh'g overruled) and *Houston General Ins. Co. v. Ater*, 843 S.W.2d 225 (Tex. App.—El Paso 1992, reh'g overruled), are directly on point. These cases involved a retired judge who was found to have been improperly assigned to hear cases because he had not followed the statutory process. In these cases, the court of appeals found all of his orders in the assigned cases void. These are thoroughly reasoned, well-substantiated cases of first impression that have never been overruled. They represent settled law—on the books for over 30 years before Judge Evans sent her pre-retirement letter to the Chief Justice.[15]

In *Lone Star* and *Houston General*, the court of appeals found that the judge, who had made an election ***before*** retirement ***just as Judge Evans did***, did not comply with the governing statue. The court of appeals also found that his status as a senior judge was not rectified when, thereafter, he formally requested senior status—***after*** the judge had already been appointed to preside over the cases in question. The court of appeals in *Lone Star* and *Houston General* held that the actions taken by the judge before he became a "retiree" were void in all respects—because he had no authority to enter them in the first place.[16]

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eligibility. If a document exists showing that Judge Evans made an election within 90 days after becoming a retiree, it was not produced in response to a Judicial Rule 12 request. *See* EX20.

[15] At this point, it would be impossible for Judge Evans to comply with section 75.001 to begin the process anew because it is well past 90 days since her retirement. There is no retroactive remedy. She would have to petition Texas's Supreme Court to determine whether she is eligible to accept assignments going forward.

[16] The precise holding in *Lone Star* is as follows: "[We] hold that a retiree judge must comply with Section 75.001 before he or she is qualified to be assigned or accept assignment. Accordingly, we conclude that Judge Ater, although otherwise eligible for senior judge status, was not qualified to be assigned and to accept assignments prior to July 18, 1992 when he made the statutorily required election and that all actions taken by Judge Ater prior to that date are therefore

As *Lone Star* explains:

> ***The judicial acts of a retired judge who has not met the statutory requirements to be an assigned judge at the time he purports to act are absolutely void.*** *Akin v. Tipps*, 668 S.W.2d 432, 434 (Tex. App.—Dallas 1984, no writ); *cf. Indemnity Insurance Company of North America v. McGee*, 163 Tex. 412, 356 S.W.2d 666 (1962); *Postal Mut. Indemnity Co. v. Ellis*, 140 Tex. 570, 169 S.W.2d 482, 484 (1943) ("It is settled that the disqualification of a judge, ... affects his very jurisdiction and power to act, and cannot be waived.") ***Since the question of the qualification of a retired judge to serve on assignment is a jurisdictional question, it cannot be waived and can be raised at any time.*** *Tullos v. Eaton Corporation*, 695 S.W.2d 568 (Tex.1985); *Public Utility Commission of Texas v. J.M. Huber Corporation*, 650 S.W.2d 951, 955 (Tex. App.—Austin 1983, writ ref'd n.r.e.); *Lee v. State*, 555 S.W.2d 121, 124 (Tex. Crim. App. 1977).
>
> As provided by Section 74.054(a)(2), a judge who may be assigned by the presiding judge of an administrative region in which the assigned judge resides includes "a district or appellate judge who is a retiree under Subtitle D or E of Title 8, 4 who has consented to be subject to assignment, and who is on the list maintained by the presiding judge under this chapter [.]" The retiree gets on the presiding judge's list by meeting the requirements of Section 74.055, and, we presume, by making a request to the presiding judge that he or she be included on the list.
>
> However, ***compliance with Section 74.055 does not make the retiree qualified to serve as a judicial officer. It merely gets the retiree on the presiding judge's list of those available for assignment. To be qualified, the retired judge must be a retiree as defined by Section 831.001 et seq. or Section 836.001 et seq. and must make the election required by Section 75.001. The latter section provides that a retiree may make the election to be a judicial officer by submitting a "document" to the Chief Justice of the Supreme Court within ninety days after his retirement, in which case his status as a judicial officer is automatic, Section 75.001(a) and (b)(1), or if he waits until after the ninetieth day to make the election, he must petition the Supreme Court, in which case the election becomes effective only on approval of his petition by the Supreme Court.*** Section 75.001(b)(2) and (c). 5 It is clear that this section requires a written "election" by the retiree judge to be a judicial officer. The retiree who makes the election under Section 75.001 is designated a senior judge. It is only after his election becomes effective that the retiree is, as a retired district or county court at law judge, subject to assignment by the presiding judge. Section 75.002(a)(3).

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null and void. It follows that since he was not qualified for assignment until July 18, 1992, assignments made prior to that date were also a nullity. Therefore, actions taken by him after July 18 in the various suits, including the hearing held on August 27, 1992 and the order of September 9, 1992 overruling the Relators' objections to the assignment, if based on the original assignments, were also void and of no effect." 845 S.W.2d at 337 (internal citations omitted).

845 S.W.2d at 336-37 (emphasis added).

Importantly, "nothing in the law" permits making an election "retroactive to the date of retirement." *Id.* at 337. That is, the failure to follow the statutory process caused a jurisdictional breach that can only be remedied by vacating all actions the judge took when she lacked judicial authority and thereafter starting afresh.

Because Judge Evans did not comply with Section 75.001 of the Texas Government Code, she was not qualified to be assigned to act as a judicial officer in this matter or otherwise. Thus, the process whereby she was purportedly assigned ***preemptively*** in this case (before it existed) was entirely untethered to state law. Moreover, there was no statutory basis for ***ever*** making the assignment to her when no case even existed. That she may have expressed, behind the scenes, that she "wants to stay with the case" when/if there was another case affecting Mr. Roberson, does not excuse the breach of a mandatory statutory process. EX21. Indeed, those actions only add to the appearance of bias against Mr. Roberson.

After Judge Evans is recused, a neutral arbiter should consider the governing law and the facts recounted here and enter an Order voiding her order granting the State's motion to set an execution date and vacating the unlawful execution warrant. These are ultra vires actions, taken when she had no judicial authority to act as a judicial officer.

II. The Totality of the Circumstances Would Reasonably Prompt An Informed, Objective Observer to Question Judge Evans' Impartiality.

Multiple factors strongly suggest that Judge Evans is not able to fairly adjudicate this important case and that her impartiality can reasonable be questioned. These factors include:

- the opaque process whereby Judge Evans—who presided over Mr. Roberson's previous habeas proceeding and recommended that he be denied a new trial—was assigned to this matter even before a case was pending;

- the deep personal relationships Judge Evans has with numerous individuals who have been involved in Mr. Roberson's case over the years, including an attorney (now judge) who originally prosecuted the case, the judge who terminated Mr. Roberson's parental rights after the death of his daughter, and the current District Attorney who opposed habeas relief and sought the pending execution date; and

- the arbitrary rulings in Mr. Roberson's previous habeas proceeding and in a markedly similar "Shaken Baby" case involving many of the same people and to which Judge Evans was also purportedly assigned when she had no authority to accept assignments.

Mr. Roberson does not argue that Judge Evans is actually biased, as that is not the standard. He argues that, "in light of all the circumstances," the "larger context" creates the appearance that she may be acting to protect the perceived reputational interests of colleagues instead of overseeing a quest for the truth. *Ex parte Ellis*, 275 S.W.3d 109, 113 (Tex. App.—Austin 2008 en banc denied, no pet.) (emphasizing "[a] recusal determination must be made in light of all the circumstances and not on isolated facts divorced from the larger context."). The larger context creates an appearance such that Judge Evans' "impartiality might reasonably be questioned[.]" TEX. R. CIV. PROC. 18b(b)(1). That appearance in turn undermines confidence that Mr. Roberson has received or can receive a fair hearing before her, a circumstance not only detrimental to Mr. Roberson but also to the community at large and the integrity of the criminal justice system.

A. The process whereby Judge Evans was assigned to this cause lacked transparency.

As explained above, because Judge Evans was not eligible to accept assignments when she was assigned to preside over Mr. Roberson's (then non-existent) case, the assignment is void.

The Request for Assignment form completed on or around November 14, 2023, requesting assignment to Mr. Roberson's "case," describes the reason for the request as follows: "Judge Evans heard the trial and wants to stay with the case." EX21. At least four things are facially problematic about this document. First, Judge Evans did ***not*** preside over Mr. Roberson's 2003 trial. She presided over a postconviction proceeding that was initiated in 2016. Second, the desires of a

retired judge are not a statutorily recognized basis for assigning a case to a retired judge. Third, at that time—November 2023—Mr. Roberson had no matter pending in the 87th District Court or in any other court. Fourth, the elected judge who was supposedly requesting the assignment, Judge Ward, did not sign the document. *See id.*

Judge Charles, likely unaware of the improprieties, signed the Assignment Order, which is hand-stamped with the date November 16, 2023. EX22. The Assignment Order states that Judge Evans is assigned "until plenary power expires or the undersigned terminates the assignment in writing" over "Cause No. 26162 State of Texas vs. Robert Roberson III." *Id*. But the case style and cause number in the Assignment Order were then associated only with the 2002-2003 trial and had been inactive for nearly two decades. Meanwhile, the Assignment Order was not served on Mr. Roberson or his counsel of record, thus precluding him from inquiring about the unorthodox process that had led to Judge Evans being preemptively assigned. Counsel did not see the Assignment Order or know of its existence until it was attached to a responsive pleading filed by Anderson County ADA Scott Holden opposing Mr. Roberson's request for a hearing before an execution date was set. That pleading was filed and served on June 20, 2024—***seven months after*** the Assignment Order was entered. *See* EX2. The Assignment Order is not file-stamped and thus does not appear to have ever been filed with the Anderson County District Clerk's Office. Yet it was plainly shared with the Anderson County DA's Office. It is unclear if any of Anderson County's elected judges were privy to the facts regarding the opaque process whereby retired Judge Evans was purportedly assigned to preside over this case instead of any of them.

There is a constitutionally grounded presumption that a duly elected district court judge has both the authority and obligation to resolve matters filed in his or her court. *See Oncor Elec. Delivery Co. LLC v. Chaparral Energy, LLC*, 546 S.W.3d 133, 138 (Tex. 2018) (citing Tex. Const.

art. 5 § 8). Mr. Roberson's current habeas case was filed in the convicting court: the 3rd District Court in Anderson County. However, as noted above, the judge who currently presides over the 3rd District Court is Mark Calhoon, who has a conflict of interest because he was one of the two trial prosecutors who sought and obtained Mr. Roberson's conviction and death sentence. Therefore, Judge Calhoon seems to have voluntarily recused himself in the previous habeas proceeding in 2016 and, most likely, would have done so again. But, again, Mr. Roberson was never served with records of these actions, nor were any filed with the Anderson County District Clerk's Office.

Ordinarily, when a judge recuses, the matter goes to the Presiding Judge for the Administrative Region to assign a replacement. *See* TEX. GOV'T CODE § 24.002. However, according to previous representations made by Judge Evans when she was the presiding judge of the 87th District Court and took over Mr. Roberson's previous habeas proceeding in 2016, all judges elected to serve in Anderson County have "concurrent" jurisdiction and so no formal assignment in the wake of a recusal was required in 2016. Currently, there are three other elected district court judges, aside from Judge Calhoon, who preside over cases in Anderson County: Judge Amy Thomas Ward, current presiding judge of the 87th District Court; Judge Michael Davis, current presiding judge of the 369th District Court; and Judge Pam Foster Fletcher, current presiding judge of the 349th District Court. Yet, well before any case was even filed, a court coordinator filed out a form to have a non-existent case assigned to Judge Evans, who was by then a retired judge, but with no judicial authority to accept assignments. *See* Argument I, above.

Mr. Roberson initiated the instant proceeding by filing, on April 9, 2024, a Motion To Be Heard before any execution date was set. EX1. Then Judge Calhoon seemingly voluntarily recused again. Then responsibility for the case should have been assumed by one of the elected district court judges: Judge Amy Thomas Ward of the 87th District Court, Judge Michael Davis of the 369th

District Court, or Judge Pam Foster Fletcher of the 349th District Court. But that did not occur—although it is axiomatic that a district court judge has jurisdiction to decide issues regarding the scope of his/her own jurisdiction. *In re General Motors Corp.*, 296 S.W.3d 813, 827 (Tex. App.—Austin 2009, orig. proceeding).

Pursuant to local practice and state law, only if ***all*** of these elected judges indicated that they were unable to preside because, for instance, all had some disqualifying conflict of interest, should the case have then been referred to the Administrative Judge for the Tenth Region to then assign another judge. *See* TEX. GOV'T CODE § 24.002. There is no statutory basis for a retired judge to ask to be assigned to a specific case and for that request to be granted—let alone when the request involves a case that did not yet exist.[17]

This opaque process whereby Judge Evans came to preside over a case that did not yet exist, in a manner contrary to local practice and state law, and without any notice to Mr. Roberson, all suggests that Judge Evans' "impartiality might reasonably be questioned[.]" TEX. R. CIV. PROC. 18b(b)(1).

B. Judge Evans' personal relationships with numerous people involved in Mr. Roberson's case over the years adds to the appearance of a lack of impartiality.

Numerous relationships connect Judge Evans to others involved in the underlying facts of Mr. Roberson's case, suggesting a predisposition against fair consideration of his Actual Innocence. That is, Judge Evans has acknowledged in other contexts long-standing relationships with current and former Anderson County prosecutors and judges connected to the origins of this

[17] Mr. Roberson submitted a PIA request for non-confidential information as to how this assignment was made. EX37. But as of the date of this motion, counsel has received no response to the request made on August 23, 2024. Because Judge Evans could be a necessary witness as to how the statutory process was circumvented, this amounts to an additional basis for her recusal. *See* TEX. R. CIV. PROC. 18b(b)(3) (requiring recusal where "the judge has personal knowledge of disputed evidentiary facts concerning the proceeding").

case. Some of the relevant people with whom she is or has been close include:

- Judge Evans' judicial mentor Sam Bill Bournias, who presided over proceedings in the custody dispute involving Mr. Roberson's daughter Nikki, which led to him being granted custody;

- Judge Evans' judicial mentor Bascom W. Bentley, who presided over Mr. Roberson's 2002-2003 trial and his initial state habeas proceeding in which he denied an evidentiary hearing and adopted the State's proposed FFCL wholesale;

- Judge Evans' judicial mentor James M. Parson, who also presided over proceedings in the custody suit over Mr. Roberson's daughter Nikki;

- Judge Evans' judicial mentor Jerry Calhoon, who signed the final order on the agreement to award custody of Nikki to Mr. Roberson and then, after her death, signed an order allowing her maternal grandparents to control "disposition of the body of the child" and signed an order terminating Mr. Roberson's parental rights without notice to him;

- Current Anderson County DA Allyson Mitchell, whom Judge Evans swore into office, who then employed Judge Evans' son, who then co-counseled a trial with DA Mitchell in front of Judge Evans without disclosing the disqualifying conflict of interest, and who is a close friend who travels and socializes with Judge Evans; and

- Judge Evans' former Anderson County judicial colleague Mark Calhoon, who is the son of one of her judicial mentors (Jerry Calhoon) and who was one of the trial prosecutors who prosecuted Mr. Roberson, and who thereafter presided as judge over Anderson County's other Shaken Baby case.

These relationships amount to yet another red flag indicating that Judge Evans' "impartiality might reasonably be questioned." TEX. R. CIV. PROC. 18b(b)(1).

C. Arbitrary rulings in this and a markedly similar Shaken Baby case further suggest the appearance of bias.

Mr. Roberson has repeatedly asked for, and been denied, hearings on contested motions involving an extremely serious matter: an execution date.

First, he asked for a hearing on his motion trying to prevent the setting of an execution date, arguing that setting a date would result in the needless proliferation of litigation because he was preparing to file a subsequent habeas application under Article 11.071, section 5. EX1. Yet he

was denied a hearing, and Judge Evans summarily set an execution date. EX3.

Next, he asked for a hearing on a motion to withdraw the execution date that had been set without a hearing demonstrating that he had filed a subsequent habeas application under Article 11.071, section 5, as promised. *See* EX4; EX5. Yet he was again denied a hearing, this time in an email message from a court coordinator. EX6.

Then, he again asked for a hearing on a Motion to Reconsider Denial of Hearing on Withdrawing the Execution Date (Motion to Reconsider), his most recent pleading in the trial court, filed on August 18, 2024. EX7. In that Motion to Reconsider, his counsel explained and provided legal and evidentiary support as follows:

First, the Motion to Reconsider explained that Article 43.141(d) of the Texas Code of Criminal Procedure expressly permits the convicting court to withdraw an execution date and an execution warrant under the circumstances then present. There is no statutory requirement that the CCA first authorize claims in a subsequent habeas application before a trial court can exercise the authority granted in Article 43.141(d). Of course, no trial court can consider the merits of claims in a subsequent habeas application under Article 11.071 without the CCA first authorizing it to do so. *See* TEX. CODE CRIM. PROC. art. 11.071, sec. 5(a) & (c). However, Article 11.071, section 5 has nothing to do with whether the convicting court can grant a motion to withdraw an execution date.

Mr. Roberson made clear that he was ***not*** asking Judge Evans to consider the merits of any of his new claims. He was asking for the October 17, 2024, execution date to be withdrawn while the CCA decided whether to authorize further factual development under Article 11.071. The convicting court has express statutory authority to do so:

> The convicting court may modify or withdraw the order of the court setting a date for execution in a death penalty case if the court determines that additional proceedings are necessary on:

> (1) a subsequent or untimely application for a writ of habeas corpus filed under Article 11.071 (Procedure in Death Penalty Case)[.]

TEX. CODE CRIM. PROC. art. 43.141(d).

Because the DA's Office had failed to articulate a valid reason for denying the Motion to Withdraw Execution Date, the motion should have been granted. And because the DA's Office actively misrepresented the controlling law in its briefing, a hearing was certainly warranted.

The Motion to Withdraw Execution Date was not heard or granted although Mr. Roberson had demonstrated that hearings in similar circumstances in death-penalty cases around the state are routinely granted as are motions to withdraw an execution date when a subsequent habeas application has been filed. EX7. Mr. Roberson provided Judge Evans with over 20 examples of trial court orders that had been entered in recent years withdrawing or modifying an execution date after a hearing. *See, e.g.*:

- *Ex parte Swearingen*, 9th District Court, Montgomery County (2007);
- *Ex parte Hines*, Criminal District Court No. 2 District Court, Dallas County (2012);
- *Ex parte McCarthy*, 292nd District Court, Dallas County (2013);
- *Ex parte Avila*, 41st District Court, El Paso County (2013);
- *Ex parte Brown*, 351st District Court, Harris County (2013);
- *Ex parte Cubas*, 178th District Court, Harris County (2013);
- *Ex parte Cubas*, 178th District Court, Harris County (2014);
- *Ex parte Pruett*, 156th District Court, Bee County (2014);
- *Ex parte Pruett*, 156th District Court, Bee County (2015);
- *Ex parte Williams*, 178th District Court, Harris County (2015);
- *Ex parte Edwards*, 195th District Court, Dallas County (2016);
- *Ex parte Cardenas*, 37th District Court, Hidalgo County (2017);

- *Ex parte Swearingen*, 9th District Court, Montgomery County (2017);
- *Ex parte Garcia*, 283rd District Court, Dallas County (2018);
- *Ex parte Gutierrez*, 107th District Court, Cameron County (2019);
- *Ex parte Mays*, 392nd District Court, Henderson County (2019);
- *Ex parte Trevino*, 290th District Court, Bexar County (2020)
- *Ex parte Gonzales*, 454th District Court, Medina County (2021);
- *Ex parte Gutierrez*, 107th District Court, Cameron County (2021);
- *Ex parte Hernandez*, 346th District Court, El Paso County (2021);
- *Ex parte Chanthakoummane*, 380th District Court, Collin County (2021);
- *Ex parte Canales*, 5th District Court, Bowie County (2023);
- *Ex parte Cantu*, 380th District Court, Collin County (2023).

Id. at Exhibit B.

Mr. Roberson is the only party to this litigation with due process rights guaranteed by the U.S. and Texas Constitutions, and he is the only party at risk of irreparable harm in the form of an immoral and unconstitutional execution. He had every right to at least be heard in open court before his motions were summarily and inexplicably denied. Now Mr. Roberson has learned that Judge Evans had ***no*** judicial authority to serve as a judge because she did not follow the statutory procedure—and thus her order setting a date for his execution should be held ***null and void***. *See* Argument I, above.

This whole process demonstrates that Judge Evans' "impartiality might reasonably be questioned[.]" TEX. R. CIV. PROC. 18b(b)(1).

Judge Evans' rulings in Anderson County's other Shaken Baby habeas proceeding would also raise serious concerns about a lack of impartiality in an objective observer. Her purported

assignment in Mr. Hasel's case also involved an opaque process inconsistent with the notion of due process. The similar treatment that these two indigent habeas applicants have received is noteworthy because of the striking similarities between the two cases. These similarities include, but are not necessarily limited to, the following facts:

- Both cases involve the death of a two-year-old child who had been the subject of custody disputes and previous CPS involvement. (In Mr. Roberson's case, the CPS involvement predated his involvement in his daughter's life.)

- In both cases, the child had been alone with a male parent/caregiver when the child experienced a medical crisis. The child was then, in both cases, brought to the Palestine Regional Medical Center (PRMC) Emergency Room for treatment, where the children had previously been treated for medical issues.

- Both children had head scans taken that revealed a triad of conditions previously considered proof that a baby was violently shaken: subdural bleeding, brain swelling, and bleeding into the eyes; but neither child had any fractures or other external signs of significant injury.

- With both children, the PRMC arranged to have the child transported to the Children's Medical Center in Dallas.

- In both cases, a doctor with REACH (Referral Evaluation of At-Risk Children), employed by Children's Medical Center in Dallas, was asked to make an assessment. In both cases, the REACH doctor found, based on the triad, that the child had sustained an inflicted head injury.

- In both cases, the child was transported, post-mortem, to SWIFS in Dallas for an autopsy where the Chief Medical Examiner was (and remains) Dr. Jeffrey Barnard. Dr. Barnard performed the autopsy on the child in Mr. Hasel's case, whereas Dr. Barnard's subordinate, Dr. Urban, performed the autopsy on Mr. Roberson's daughter.

- Both medical examiners concluded that the child's death was caused by blunt force head injuries. But Dr. Barnard, in 2011, concluded that the manner of death in the Hasel case was "undetermined" and later admitted to being aware of studies showing that short falls with head impact could cause fatal head trauma, but suggested he did not believe that research. His subordinate, Dr. Urban, in 2002 found the manner of death in Mr. Roberson's to be "homicide" and in the 2003 trial relied on tenets of the Shaken Baby hypothesis to support her conclusion.

- Both cases were investigated by Palestine police as homicides. However, the lead detective investigating Nikki's death, Brian Wharton, left the police force and has been speaking out publicly about his belief that law enforcement got it wrong in Mr. Roberson's case, that

they did not investigate anything else after being given the Shaken Baby diagnosis, and that he believes Mr. Roberson is innocent because there was no homicide.

- Both cases were pursued as capital murder cases based on the Shaken Baby/Abusive Head Trauma cause-of-death hypothesis, but in Mr. Hasel's case the State waived pursuit of the death penalty.

- In both cases, medical experts for the State testified that they did not believe that a short fall could explain any aspect of the child's condition.

- In both cases, the ***only*** medical experts who testified at trial were State's experts.

- In both cases, the indigent defendant had to rely on the same appointed defense counsel, an Anderson County attorney named Steve Evans. In Mr. Roberson's case, Mr. Evans conceded throughout the trial that it was a "classic shaken baby case," despite Mr. Roberson's consistent statements that he had not done anything to hurt his daughter and was innocent.

- In both cases, the lead prosecutor was former Anderson County DA Doug Lowe.

- Mr. Lowe's co-counsel in Mr. Roberson's case, Mark Calhoon, was the judge who presided over Mr. Hasel's case.

- Both habeas cases have raised "changed science" claims challenging the tenets of the Shaken Baby/Abusive Head Trauma hypothesis used at trial; and both habeas applicants have cited, among other things, the CCA's previous findings in *Ex parte Henderson*, 384 S.W.3d 833 (Tex. Crim. App. 2012), and a Dallas court's recent findings in *Ex parte Roark*, WR-56,380-03, 2021 WL 4186719 (Tex. Crim. App. Sept. 15, 2021), to support the proposition that the scientific understanding has changed considerably since Mr. Roberson's conviction in 2003 and further since Mr. Hasel's conviction in 2014.

In Mr. Hasel's case, the record indicates that he has been denied virtually any funding—for an investigator or for any experts—in a case that hinges on medical expertise. It is impossible to conceive how Mr. Hasel could develop the factual basis for his claims under Articles 11.07 and 11.073, as the CCA ordered, without the ability to retain consulting and testifying experts. Also, extensive investigation into the child's medical history to spot issues would be essential—something that a lawyer without special training in the appropriate medical fields could not do.

Without funding for properly qualified experts and time for those experts to access all relevant medical records for the child-decedent, no reliable fact-finding was possible. Indigent habeas applicants in prison (like Mr. Hasel and Mr. Roberson) do not generally have access to pro bono resources for counsel or experts. Thus, unless a court authorizes funding for essential experts and investigation, a habeas applicant alleging claims under Article 11.073 cannot receive due process and his claims, regardless of merit, cannot be fully developed or fairly adjudicated. In Mr. Roberson's previous habeas proceeding, over which Judge Evans presided before her retirement, she authorized funding for multiple experts. Therefore, she has firsthand experience of how expert testimony is essential in a child death case involving the controversial Shaken Baby hypothesis.

In Mr. Roberson's case, without making any adverse credibility findings, Judge Evans rejected the opinions of all of Mr. Roberson's experts that the scientific testimony used to convict him is incompatible with contemporary scientific understanding, that natural and accidental factors entirely explained his daughter's death, and that her death was not properly deemed a homicide. The vast majority of the evidence adduced through Mr. Roberson's experts and reflected in 13 volumes of new evidence was not even mentioned in Judge Evans' sparse FFCL. Those FFCL largely rubberstamped the proposed FFCL drafted by the Anderson County DA's Office, which primarily consisted of summarizing testimony of the State's trial and post-conviction experts.

The arbitrary decisions Judge Evans made in the two strikingly similar Anderson County Shaken Baby cases wherein the habeas applicants have asserted that they are actually innocent of any crime, further indicates that her "impartiality might reasonably be questioned." TEX. R. CIV. PROC. 18b(b)(1).

III. Recusal Is Required.

The Texas recusal rules do not require proof of bias but merely of the "appearance of a lack of impartiality"—evidence of which abounds here. *See* Argument II, above. Likewise, the Supreme Court of the United States has long underscored that, in the interest of due process, "[o]bjective standards may also require recusal whether or not actual bias exists or can be proved." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886 (2009). In short, even absent evidence of actual bias, recusal is warranted if the facts, viewed objectively, could reasonably give rise to a suspicion of bias or partiality. *Williams v. Pennsylvania*, 136 S.Ct. 1899, 1910 (2016) (finding that "[d]ue process entitles [petitioner] to 'a proceeding in which he may present his case with assurance' that no member of the court is 'predisposed to find against.'") (citation omitted).

Texas courts have repeatedly emphasized the compelling public policy interest in ensuring the appearance of an impartial judiciary. *See, e.g., Sun Exploration and Prod. Co. v. Jackson*, 783 S.W.2d 202, 206 (Tex. 1989) ("The judiciary must be extremely diligent in avoiding any appearance of impropriety and must hold itself to exacting standards lest it lose its legitimacy and suffer a loss of public confidence."); *CNA Ins. Co. v. Scheffey*, 828 S.W.2d 785, 792 (Tex. App.—Texarkana 1992, writ denied) ("Judicial decisions rendered under circumstances that suggest bias, prejudice or favoritism undermine the integrity of the courts, breed skepticism and mistrust, and thwart the principles on which the judicial system is based.") (citation omitted). "After all[,] the impartial standard has been adopted in order that the public, *i.e.*, the person on the street, might have confidence in the judiciary and to protect judges from unjustified complaints about their being partial in their decision." *Aguilar v. Anderson*, 855 S.W.2d 799, 804-805 (Tex. App.—El Paso 1997, writ denied) (Osborn, C.J., concurring). This impartiality-might-reasonably-be-questioned

standard is not unique to Texas because it is grounded in fundamental public policy concerns about preserving the integrity of the judicial process under the federal Constitution.[18]

Judge Evans cannot reasonably be expected to pass judgment with respect to her own role and motives in seeking, post-retirement, to secure an assignment that would affect Mr. Roberson's fate when no case was even pending. But the recent decisions to deny Mr. Roberson even access to the courthouse permit a reasonable assumption that her ability to be impartial is impaired in this case—decisions that now appear to have been made ***absent any lawful authority***.

Even assuming no unethical, ex parte communications occurred in the instant case between Judge Evans and the Anderson County DA's Office about working in tandem to expedite Mr. Roberson's execution, "the appearance of impropriety" is "palpable." *Metts v. State*, 510 S.W.3d 1, 8 (Tex. Crim. App. 2016) (holding judge who had previously, as prosecutor, appeared at a status hearing to waive defendant's right to a jury trial and had personally signed form documenting the State's consent to defendant's jury trial waiver acted as counsel for the State and was therefore

[18] *See, e.g., Watson v. State*, 934 A.2d 901, 907 (Del. Super 2007) (holding "the appearance of bias . . . was sufficient to doubt the Family Court judge's ability to weigh the truthfulness of the two contending antagonists' testimony impartially"); *Love v. State*, 569 So.2d 807, 810 (Fla. App. 1990) (finding ex parte communications violates appearance of impartiality); *Scott v. United States*, 559 A.2d 745, 754 (D.C. App. 1989) ("The appearance of partiality, and not only actual partiality, constitutes a statutory" basis for recusal); *People v. DelVecchio*, 544 N.E.2d 312, 317 (Ill. App. 1989) (identifying a "guiding principle is whether the average person, acting as judge, could not hold nice, clear, and true balance between the State and the accused"); *Giralt v. Vail Village Inn Assoc.*, 759 P.2d 801, 804 (Colo. App. 1988) (explaining trial court has duty "to eliminate every semblance of reasonable doubt or suspicion that a trial by a fair and impartial tribunal may be denied"); *Commonwealth v. Lemanski*, 529 A.2d 1085, 1088 (Pa. Super. 1987) ("Recusal is required whenever there is a substantial doubt as to a jurist's ability to preside impartially."); *Isaacs v. State*, 355 S.E.2d 644, 645 (Ga. 1987) ("The fact that a judge's impartiality might reasonably be questioned is sufficient for disqualification."); *Wiedemann v. Wiedemann*, 36 N.W.2d 810, 812 (Minn. 1949) ("The controlling principle is that no judge, when other judges are available, ought ever to try the cause of any citizen, Even though he be entirely free from bias in fact, if circumstances have arisen which give a bona fide appearance of bias to litigants."); *See also* 46 AM JUR. 2D, Judges § 86.

disqualified from subsequently presiding over hearing on motion to revoke deferred adjudication community supervision).

Before it is too late for Mr. Roberson, Judge Evans must now recuse or be recused because her "impartiality might reasonably be questioned" by an objective observer. TEX. R. CIV. PROC. 18b(b)(1). Mr. Roberson's life, the integrity of the State's criminal legal system, and the moral authority of the State of Texas to pursue the execution of its citizens are all at stake.

Mr. Roberson requests an expedited hearing on these matters.

CONCLUSION & PRAYER

The failure to remedy the jurisdictional breach and potentially biased tribunal at issue here would amount to yet another violation of the fundamental right to due process guaranteed by the U.S. and Texas Constitutions. And the stakes are incalculably high: the legitimacy of an execution date for a man with substantive evidence of Actual Innocence, which no court has ever considered. Mr. Roberson prays that Judge Evans will voluntarily recuse herself, as she must, or, after an expedited hearing, be ordered recused. It is now clear that Judge Evans was assigned to serve as a judicial officer when she had failed to comply with the statutory requirements that would have made her potentially eligible to accept assignments as a judicial officer post-retirement. Therefore, Administrative Judge Charles, who signed the Assignment Order, could and should "terminate[] the assignment in writing" forthwith. EX22. Then, after a qualified, neutral arbiter is assigned, Mr. Roberson further prays for entry of an Order voiding Judge Evan's Order granting the State's motion to set an execution date and vacating the unlawful Execution Warrant, entered when she had no authority to act as a judicial officer. Finally, Mr. Roberson prays for any additional relief that justice warrants.

Respectfully submitted,

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Certificate of Service

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