

26162-E

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

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

SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS
UNDER ARTICLE 11.071

This is a death-penalty case with an execution date of October 16, 2025.

Gretchen Sims Sween
Counsel of Record
Texas Bar No. 24041996
712 Upson Street
Austin, Texas 78763
(214) 557-5779
(512) 551-9448 fax
gsweenlaw@gmail.com

Callie Heller
Texas Bar No. 24101897
Western District of Oklahoma
Federal Defender Office
Capital Habeas Unit
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102
(405) 609-5975
(405) 609-5932 fax
Callie.Heller@fd.org

Pro Bono Counsel for Robert Leslie Roberson III¹

ORAL ARGUMENT REQUESTED

¹ Applicant Robert Roberson is also represented pro bono by Vanessa Potkin and Jane Pucher of The Innocence Project and Donald Salzman of Skadden, Arp, Slate, Meagher, and Flom LLP, attorneys all in good standing in the jurisdictions where they are licensed to practice law.

REQUEST FOR ORAL ARGUMENT

Robert Leslie Roberson III (Robert or Roberson) has previously requested oral argument in this matter, including in his pending 5th habeas application (labeled “06”) and in a Motion for Oral Argument filed on July 24, 2025, in the 03-05 writ proceedings. He renews the request here considering the serious and complex issues that have been raised in this matter of significance to the State’s criminal jurisprudence. The new Judicial Misconduct claims (Claims 1 & 2) and Actual Innocence claim (Claim 3) in this application further underscore the need for a public airing to “resolve the question of Applicant’s claim of actual innocence in a way that inspires confidence in the Court and the judiciary.” *Ex parte David Wood*, WR-45,746-04, Slip Op. at 50 (Tex. Crim. App. July 30, 2025) (Schenck, P.J., concurring in part and dissenting in part).

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OVERVIEW

“All the rights sacred to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous judiciary.”

Andrew Jackson

New evidence of judicial misconduct has surfaced, exposing structural error introduced at the outset of this case. This new evidence was not available when Robert Roberson filed his previous (and still pending) habeas application on February 19, 2025. It was not available to him until June 17, 2025. *See* EX1 (Affidavit of Lacey Morgan Hull).²

In *Ex parte Young*, the Court of Criminal Appeals recognized that the belated discovery of judicial misconduct can expose a structural error and require granting habeas relief in the wake of a successive writ application. This is because of the bedrock requirement that the public have “confidence in the impartiality of our judges and the proceedings over which they preside.” *Ex parte Young*, No. WR-65,137-05, 2021 WL 4302528 *4 (Sept. 22, 2021) (unpub.) (citation omitted). That principle should operate with even greater force in a case in which the habeas applicant has brought voluminous evidence of his innocence. Claim 1 alleges constitutional violations of Robert Roberson’s Sixth Amendment right to a trial before a tribunal untainted by the appearance of bias and the Fourteenth Amendment

² “EX” refers to exhibits in an Appendix filed with this subsequent application.

right to due process arising from the undisclosed role the Anderson County Judiciary³ played in the circumstances that resulted in (1) disregarding Texas law governing parental rights and (2) the improper authorization of the withdrawal of life support from Robert’s daughter Nikki without his knowledge or consent. The latter appears to have been done to enable arresting Robert for capital murder, which occurred before any reasonable investigation of Nikki’s medical condition.

Moreover, a reexamination of the Clerk’s Record of this case has revealed that the member of the Anderson County Judiciary who personally stripped Robert of his parental rights after Nikki’s death then injected himself into the criminal case—entering a foundational order appointing counsel—when that judge (Jerry Calhoon) should have played no role in the case at all as his son (Mark Calhoon) was then Anderson County’s Chief Felony Prosecutor, pursuing the criminal case against Robert. These facts suggest a glaring lack of impartiality now compounded by the revelation that the Anderson County Judiciary played a direct role in the untoward circumstances that ended Nikki’s life so that her father could be charged with

³ The term “Anderson County Judiciary” refers collectively to the four judges who then presided over the district courts with jurisdiction over Anderson County cases and their agents. During the relevant time, Judge James Parsons presided over the 3rd District Court; Judge Sam Bournias presided over the 87th District Court; Judge Jerry Calhoon presided over the 349th District Court; and Judge Bascom Bentley presided over the 369th District Court. However, all had concurrent jurisdiction over any cases filed in one of these four courts. All of these judges are now retired or deceased.

murder. Judge Calhoon violated Robert’s Sixth Amendment right to counsel willing to honor the constitutionally protected autonomy-right to maintain his innocence (Claim 2). Even if this claim were deemed procedurally defaulted, the constitutional error could and should be *authorized* and then later reviewed on the merits if Robert Roberson’s innocence claim (Claim 3) is found to satisfy the preponderance-of-evidence standard in Article 11.071, section 5(a). *See Ex parte Reed*, 271 S.W.3d 698, 733 (2008) (explaining “[t]o obtain review of the merits of a procedurally barred claim, an applicant must make a threshold, *prima facie* showing of innocence by a preponderance of the evidence.”). For all the reasons explained in his pending 06 Application, Robert has made at least a *prima facie* showing of actual innocence by a preponderance of the evidence.

Robert Roberson is innocent; he was accused and convicted using a since-discredited Shaken Baby Syndrome diagnosis.

Robert Roberson is scheduled to be executed on October 16, 2025, for a “crime” that did not occur. Robert is an innocent man with Autism who was condemned because he brought his beloved daughter Nikki to the only hospital in rural Anderson County seeking help and doctors presumed that he had caused Nikki’s medical crisis. This mistaken presumption was based on inadequate information about Nikki’s medical condition, prejudgments of her father’s neurodivergent response to the stress caused by her medical crisis, outrageous and baseless allegations of sexual abuse, and a since-discredited medical theory: Shaken

Baby Syndrome (SBS). The SBS diagnosis was made based on the demonstrably false assertion by Nikki's maternal grandparents (Larry and Verna Bowman) that she had been "totally well" up until 10 PM the night before she later ceased breathing while sleeping at her father's house. Precisely because Nikki had *not* been "totally well," her father had taken her to doctors *three times* that week, and these doctors prescribed serious medications, as established by the medical records that no one at the time bothered to review. EX2.

In an article published in a local paper about a month after Nikki's death, the Anderson County DA was quoted as weighing whether to seek the death penalty, noting he had "found only one other incident in Texas where the death penalty was sought in a 'shaken baby' case." EX3. The article emphasized that the case against Robert was viewed as a shaken baby case; the article reported since-discredited beliefs about how shaking an infant or child can tear blood vessels in the back of the eye and thus the presence of retinal hemorrhage proves that shaking occurred. Those beliefs, later shared *ad nauseum* with Robert's jury, have been entirely discredited by evidence-based science. The State's post-2016 arguments that this case was tried as anything other than an SBS case is contrary to the record. *See, e.g.*, EX4 (SBS references in 2003 trial record).

Since Robert was wrongly accused and convicted in 2002-03, the SBS opinions put before his jury have been disproven by modern, evidence-based

science. Nikki died from a virulent viral and bacterial pneumonia, combined with dangerous, respiratory-suppressing drugs now known to be entirely improper for a child Nikki's age and in her condition. She also experienced an unwitnessed fall out of bed in the night, likely while struggling to breathe in her sleep, which may have resulted in the single bump on her head—the only evidence of trauma of any kind. The injury was so minor it did not even cause a hairline fracture—let alone amount to a life-threatening head injury. She did not die from trauma—inflicted by shaking or otherwise. She died from the complications of her undiagnosed pneumonia that progressed to the point of septic shock and a severe bleeding disorder (DIC). These facts have been established by recently presented, uncontroverted evidence from highly qualified medical specialists and the *objective* physical evidence, such as CT scans, medical records, materials collected during the autopsy, and post-mortem test results, which explain her internal symptoms, mistaken, at the time, as signs of shaking and inflicted trauma. *See* 06 Application.

There has been a great deal of misinformation circulated about what Nikki's condition was—including offensive suggestions that her “skull was bashed in,” that her face had been “battered,” and that she had sustained sexual abuse—for which there was/is no evidence.⁴ This misinformation campaign began soon after the Court

⁴ *See, e.g.*, <https://www.texastribune.org/2024/10/29/robert-roberon-shaken-baby-texas-death-row-evidence/>;
<https://www.statesman.com/story/news/politics/state/2024/12/20/robert-roberon->

of Criminal Appeals’ remand of the 03 proceeding, when State’s counsel obtained an affidavit from the medical examiner claiming she had not opined about “shaking” as a cause of Nikki’s condition, quite contrary to the trial record. *See* EX4 (excerpts from 2003 trial re SBS). The 03 proceeding was, to date, the only opportunity Robert has had to develop a record to support his claim of innocence. But that proceeding was fraught with improprieties and ended with the entry of exceptionally misleading Findings from a judge who has since recused herself. *See, e.g.*, EX53 (Applicant’s Objections to Habeas Court’s Findings of Fact and Conclusions of Law).

For instance, during the 03 proceeding, State’s counsel introduced into evidence—not the *actual* autopsy photos admitted during the 2003 trial that are in the medical examiner’s file—but deceptive blow-ups full of shadows and other distortions to create the false impression that Nikki was covered with bruises. 9EHRR23-27.⁵ These grossly dishonest photos were created 20 years after-the-fact to further a false narrative that, despite the hospital’s SBS diagnosis and the SBS testimony at trial, this is not an SBS case. This kind of revisionist history should never have been countenanced. Unfortunately, it is part of a pattern of severe due

case-update-texas-house-committee-hearing-ken-paxton-testimony-blocked/77055283007/; <https://www.npr.org/2024/10/24/nx-s1-5162792/texas-ken-paxton-statement-robert-roberon>.

⁵ *But see* medical examiner’s admission that the bruises on Nikki, even after two days of medical triage, were “minimal.” 9EHRR181.

process violations to which Robert has been subjected in the years-long quest to prove his innocence and to obtain relief from a scientifically unsound conviction.

New evidence of yet more due process violations has only recently surfaced.

New evidence now shows that the massive injustice of this SBS conviction was facilitated by ***judicial*** misconduct, resulting in structural error. The basic background facts are these:

In November of 2001, a custody lawsuit involving Nikki was resolved after the parties to that lawsuit (the Robersons and the Bowmans) ***agreed*** that Robert should be named Nikki's sole managing conservator and ***agreed*** that her name should be changed to "Roberson." The parties' agreement was memorialized on the record, in court, by the parties' lawyers and blessed by an Anderson County judge, Jerry Calhoun, on behalf of the 3rd District Court of Anderson County. *See* EX5 (Custody Docket); EX6 (Hearing transcript 11.16.2001).

Upon being named Nikki's sole managing conservator, Robert was the only person legally authorized to make major medical decisions affecting her. *See* TEX. FAMILY CODE sec. 153.132 ("Unless limited by court order, a parent appointed as sole managing conservator of a child has the rights and duties provided by Subchapter B and the following ***exclusive*** rights: ... (2) the right to consent to medical, dental, and surgical treatment involving invasive procedures[.]") (emphasis added).

On January 31, 2002, after Robert took Nikki to Anderson County's only hospital seeking help, he was presumed guilty of causing her condition and improperly excluded from all subsequent decisions affecting her medical care. He was not consulted when she was transferred to Children's Medical Center of Dallas (CMCD) for further treatment and, when he learned about the transfer, he was expressly told he was "not allowed" to visit her. EX7 (CMCD medical records).

On February 1, 2002, CMCD was falsely informed by the Bowmans that Nikki had been "totally well" the night before and that they had the legal right to authorize (1) removing her from life support and (2) donating her organs. *Id.* The same false information was conveyed to the medical examiner's office. EX8 (SWIFS Investigative Narrative).

Based on the only CMCD records ever produced, Robert was left with the impression that CMCD had simply taken the Bowmans' word for it after Verna Bowman represented that she was Nikki's "mother/grandmother" and signed all of the medical authorizations related to Nikki. New evidence now suggests, however, that CMCD did not simply take the Bowmans' word for it. *See* EX1. New evidence establishes that CMCD followed its internal protocols and contacted the Anderson County Judiciary, seeking confirmation. Then one or more agents of the judiciary provided false information that the Bowmans had the authority to make the momentous decision to authorize withdrawing Nikki from life-sustaining care. At

the very least, public officials in Anderson County acted recklessly in misinforming CMCD and disregarding Robert's parental rights. These actions were, at the very least, reckless, because all four Anderson County district court judges had concurrent jurisdiction over the custody case, ready access to the custody case court records over which the Anderson County Judiciary had control, and Judge Calhoon had personal knowledge of his own order adopting the parties' agreement whereby Robert was made sole managing conservator, an order that was not superseded until days after Nikki's death (by Judge Calhoon).

Shortly after CMCD pronounced Nikki dead around 7:00 PM on February 1, 2002, an Anderson County detective was notified, and he obtained an arrest warrant expressly relying on the SBS diagnosis that had been made at CMCD that morning. EX41. The arrest warrant was obtained from the Anderson County judge who then presided over Robert's criminal trial (Bascom Bentley) instead of the judge elected to serve Anderson County's 3rd District Court where the case was filed (James Parsons).⁶ When Judge Bentley signed an arrest warrant alleging capital murder, made possible by the improper removal of life support, the criminal case was initiated. Robert was arrested that same night, even before an autopsy.

⁶ On information and belief, Judge Parsons recused himself, likely because he, as well as Anderson County Judges Calhoon and Bournias, had presided over some component of the Anderson County custody lawsuit affecting Nikki. However, no paperwork has ever been produced documenting how responsibility for the capital murder case shifted from Judge Parsons to Judge Bentley.

The autopsy, performed the next morning, was based on woefully inadequate, biasing information provided by the same Anderson County detective who had obtained the arrest warrant and then sat in on the autopsy. EX8.

Notably, this is not a circumstance where someone was arrested before an autopsy was performed because the person had been observed shooting or stabbing someone and thus there was little uncertainty about cause and manner of death. The *presumption* that a crime had occurred was based entirely on (1) Robert's inability to explain Nikki's complex medical condition; (2) his "flat" "odd" demeanor at the hospital; and (3) the (now thoroughly discredited) SBS diagnosis made at CMCD based on the false information that Nikki had been "totally well."

In a case that hinged on medical opinions, a thorough, unbiased autopsy was especially important. But here, the medical examiner did not even wait for the limited testing she herself had ordered; nor did she obtain any of Nikki's medical records, including the CT scans made of her head in a case reputedly involving head trauma.⁷ The autopsy was anything but thorough or independent. *See, e.g.*, EX9 (Joint Statement of Pathologists).

⁷ These exculpatory head scans, which no court has yet acknowledged, were inexplicably locked up in the courthouse basement, unavailable to Robert Roberson, until 2018. Eventually, the scans were digitized and assessed by Dr. Julie Mack, the only radiologist to do so. The head scans rebut the notion of "multiple impacts" to the head and the conclusion of fatal head trauma.

Three days after life support had been withdrawn from Nikki without her father's knowledge or consent, and after he had already been presumed guilty and arrested, Larry Bowman filed a motion in the Anderson County custody lawsuit. The motion sought (1) to terminate Robert's conservatorship and (2) to give Larry Bowman the right to dispose of Nikki's body. EX10. The next day, February 5, 2002, Larry Bowman filed an Amended Motion, adding Nikki's mother Michelle as a party, although Michelle had had no relationship with Nikki since CPS had removed her from Michelle's custody while she was still in the hospital after giving birth. EX11; EX17; EX54.

On February 5, 2002, without notice or a hearing, Robert was also summarily stripped of his parental rights and of his presumption of innocence by Anderson County Judge Jerry Calhoon entering an order granting the Bowmans' motion. EX12. Judge Calhoon's order was entered minutes after an Answer was filed on Robert's behalf. That filing made clear that Robert was claiming innocence of any wrongdoing and had not yet been appointed an attorney in the criminal case. EX13.

It is now apparent that Judge Jerry Calhoon did not simply act improperly and with the appearance of bias against Robert in granting the Bowmans' motion filed in the custody lawsuit. Judge Calhoon should have recused himself entirely once Robert was accused of a crime because Judge Calhoon's son (Mark Calhoon) was Anderson County's Chief Felony Prosecutor prosecuting the criminal case against

Robert. But instead of recusing, Judge Calhoon entered a foundational order in the criminal case, presuming to appoint counsel for Robert. EX14. Judge Calhoon acted in this ultra vires manner knowing that the Anderson County Judiciary had played a direct role in providing false information to CMCD, enabling Nikki’s illegal removal from life support and her father’s arrest.⁸

The role of the Anderson County Judiciary in the removal of life support from his daughter was never disclosed to Robert, who had no way to ascertain it. This fact has only recently come to light because of a dialogue between third parties—CMCD and a Texas lawmaker—about a bill proposed in the 2025 legislative session. *See* EX1. The lawmaker, Lacey Morgan Hull, is a Republican member of the Texas House of Representatives for District 138, representing a portion of west Houston, a district with no connection to any aspect of this case. *Id.*

The law was violated by representatives of the entity that is supposed to ensure a lawful process: the judiciary.

⁸ Texas takes the regulation of end-of-life decisions very seriously. It is, for instance, a crime for someone to give false information with the intent to cause life-sustaining treatment to be withheld or withdrawn from another person: “A person is subject to prosecution for criminal homicide under Chapter 19 (Criminal Homicide), Penal Code, if the person, with the intent to cause life-sustaining treatment to be withheld or withdrawn from another person contrary to the other person’s desires, falsifies or forges a directive or intentionally conceals or withholds personal knowledge of a revocation and thereby directly causes life-sustaining treatment to be withheld or withdrawn from the other person with the result that the other person’s death is hastened.” TEX. HEALTH & SAFETY CODE, sec. 166.048(b).

The new information that Representative Hull obtained from CMCD while engaged in official legislative business (and conveyed to Robert Roberson's counsel on June 17, 2025) raises yet more questions about the miscarriage of justice evident in this case. But there is virtually no way, considering the passage of time and the death of key witnesses, that a full explanation can be obtained regarding what members of the Anderson County Judiciary knew, when they knew it, and what they specifically did related to the termination of Nikki's life. Before filing this habeas application, undersigned counsel contacted the CMCD legal department seeking any extant documents relevant to this issue identified by Representative Hull. However, counsel was informed that CMCD could not produce anything related to Nikki without a HIPAA authorization from Nikki's estate or a court order or subpoena. *See* EX15. CMCD confirmed the meeting with Representative Hull but would not confirm whether responsive documents exist absent a HIPAA release. *Id.* Because Robert was stripped of his parental rights, he cannot provide a HIPAA release. Moreover, neither a court order nor a subpoena can be obtained unless and until the Court of Criminal Appeals authorizes habeas claims for further development. *See* TEX. CODE CRIM. PROC. art. 11.071, sec. 5.

Robert, a cognitively impaired father with undiagnosed Autism and a 9th-grade special-ed education, is facing a looming execution date with very serious questions unanswered regarding recently uncovered judicial misconduct. This misconduct

occurred during the hours before, and the days following, Nikki's tragic death, a death that was caused by her medical condition and the dangerous, contra-indicated medications her doctors had prescribed. This undisclosed misconduct irreparably tainted the legal proceedings in both the custody lawsuit and the capital case where Robert is poised to be the first person in history executed based on the discredited SBS hypothesis.

Accordingly, we bring the following new claims on Robert Roberson's behalf:

- **Claim 1:** Roberson's Conviction Was Obtained Before a Tribunal Tainted by the Appearance of Bias, Where the Failure to Recuse Caused Structural Error and the Deprivation of Due Process Guaranteed by the Federal Constitution.
- **Claim 2:** When a Judge Who Should Have Disqualified and Recused Himself Instead Reached into the Criminal Case Being Prosecuted by His Son to Appoint Counsel for the Accused, Not Only Was the Right to Due Process Violated But Also Roberson's Sixth Amendment Autonomy-Right to Maintain His Innocence.
- **Claim 3:** Robert Roberson Is Actually Innocent.

For the reasons set forth in more detail below, Robert Roberson respectfully asks that the Court of Criminal Appeals stay his execution and grant a new trial or, at the very least, expedite authorization of the new claims raised here, as well as the claims contained in the still-pending 06 Application filed on February 19, 2025.

**NEW BASES FOR RELIEF NOT REASONABLY AVAILABLE WHEN PREVIOUS
APPLICATION WAS FILED**

Under Texas law, the Court of Criminal Appeals is the sole arbiter of whether any applicant can move forward with seeking habeas relief requested in a subsequent

application. TEX. CODE CRIM. PROC. art. 11.071, sec. 5(a). For new claims to be authorized, an applicant must allege “specific facts” showing that “the factual or legal basis” was unavailable when his previous habeas application was filed. *Id.* The new judicial misconduct claim is supported, most notably, by an affidavit from Representative Lacey Morgan Hull, signed on June 30, 2025. EX1.

Robert could not have obtained the information in Representative Hull’s affidavit on his own. The affidavit contains specific facts obtained in Representative Hull’s official capacity while conducting official legislative business in a closed meeting requested by CMCD.

Twenty-three years after Nikki’s death, on February 18, 2025, Representative Hull held a meeting with representatives of CMCD and members of her staff to discuss, at CMCD’s request, a bill Representative Hull had sponsored. *Id.* ¶11. This meeting (about which Robert Roberson had no knowledge) was held as his counsel was preparing to file the 06 Application based on yet more new medical evidence establishing that Nikki’s condition was caused by disease progression (including a blood-clotting disorder arising from her undiagnosed pneumonia) and accidental causes (the prescription of contra-indicated medication and a short fall out of bed), not by any abuse.

In her affidavit, Representative Hull reports that, during the 2025 meeting, it was represented to her as fact that, *before* CMCD removed Nikki from life support,

CMCD had followed their protocols and verified the legal conservatorship of Nikki by contacting the court of jurisdiction in Anderson County and receiving information that Nikki's maternal grandparents were the legal guardians with authority to make end-of-life decisions affecting her. *Id.* ¶11. A decision to remove a child from life-sustaining care, as a matter of established law, is left to managing conservators. *See* TEX. FAMILY CODE sec. 153.132.

On February 1, 2002—the day life support was withdrawn—CMCD could not have determined from the public docket for the custody lawsuit affecting Nikki who had been named managing conservator. The docket shows only that an agreement had been reached and adopted by the Anderson County court on November 16, 2001. EX5. That same docket shows that, days *after* life support was withdrawn, Robert's conservatorship was, in essence, terminated by Anderson County Judge Calhoon in response to a motion filed by the Bowmans on February 4, 2002, and amended on February 5, 2002, styled: "Motion for Termination of Conservatorship and for Final Disposition of the Body of the Child Which Was Subject of This Suit." EX10; EX11. Of course, CMCD could have had no knowledge on February 1st what would transpire on February 4th and 5th; but subsequent events show that the Bowmans, their attorney, and, at the very least, Judge Jerry Calhoon, all recognized that Robert, not the Bowmans, had been Nikki's managing conservator on February 1, 2002. As the sole managing conservator, he was the only person who was then legally

authorized to make a decision about withdrawing life support. If the Bowmans had had that authority on February 1, 2002, then there would have been no need for them to file the disturbing “Motion for Termination of Conservatorship and for Final Disposition of the Body of the Child Which Was Subject of This Suit” several days *after* Nikki’s death.

Representative Hull perceived that the February 18, 2025, meeting in her office was “the first time” that CMCD became aware that it “had been misinformed by Anderson County about who had authority to withdraw life-sustaining treatment from Mr. Roberson’s daughter Nikki when that action was taken.” *Id.* ¶16.

A few months after Representative Hull’s meeting with CMCD, and soon after the recent regular legislative session ended, on June 17, 2025, Representative Hull contacted Robert Roberson’s attorney, Gretchen Sween, and conveyed Hull’s “understanding of CMCD’s position that they had been informed by representatives of Anderson County that the maternal grandparents had legal authority to authorize withdrawing life-sustaining treatment from Mr. Roberson’s daughter when that action was taken on February 1, 2002.” *Id.* ¶17. That is, Robert’s counsel first became aware of a fact that would give rise to the new judicial misconduct claim approximately four months *after* the still-pending 06 Application was filed on his behalf on February 19, 2025.

Next, undersigned counsel acted expeditiously to confirm whether any pleadings or other information in the custody suit clarified who specifically had misinformed CMCD that the Bowmans had the legal right to authorize ending life-sustaining care for Nikki. After obtaining and reviewing what was characterized as the entire custody suit docket from the Anderson County District Clerk's Office, it became clear that the docket contains: no record of communications between the Anderson County Judiciary and CMCD; no record of Robert's parental rights being terminated until *after* Nikki's death; and no record of him being afforded any opportunity to be heard before his rights were terminated. Additionally, a review of the custody record prompted counsel to scour the Clerk's Record for any information about how the criminal case had come to be assigned to Judge Bentley. That review revealed that Judge Jerry Calhoon had been the judge to select and appoint the defense attorney for indigent Robert Roberson in the criminal case. It was not previously recognized that Judge Calhoon had played any role in the criminal case because he quite obviously should have recused himself since his son Mark Calhoon was Chief Felony Prosecutor pursuing the criminal case against Robert. The nondiscretionary act of selecting and appointing the attorney who ultimately provided *no* defense against the State's SBS causation theory violated the Sixth Amendment right to conflict-free counsel.

In addition to the new evidence from Representative Hull, records documenting important aspects of the case's history are included in the Appendix to this application.

PROCEDURAL HISTORY

Robert Roberson was convicted and sentenced to death in Anderson County in February of 2003, little more than a year after losing his daughter.

The post-conviction history of this case is recounted in multiple recent filings and is incorporated here by reference. We also note that Robert is alive today only because the Texas Supreme Court temporarily stayed his execution on October 17, 2024. But that stay was later lifted.

Thereafter, on February 19, 2025, a subsequent habeas application (labeled 06) was filed on his behalf as well as a Suggestion to Reconsider in the 03-05 writ proceedings. These pleadings are all pending before the Court of Criminal Appeals.

Despite the pending appeals, on June 16, 2025, the State, now represented by the Office of Attorney General (OAG), filed a "Motion Requesting Execution Date" in the trial court. On June 17, 2025, an Objection and Motion to be Heard were filed in the trial court on Robert's behalf. The State's motion was heard on July 16, 2025, before a new presiding judge, the Honorable Austin Reeve Jackson of Smith County. Judge Jackson was assigned to this case after the 06 Application was filed because

the Anderson County judge who had been presiding since 2016, Judge Deborah Evans, voluntarily recused herself in November of 2024.

In the July 16, 2025, hearing, over Robert Roberson's objection, an execution date was set for October 16, 2025. Thereafter, on July 24, 2025, an Emergency Motion for Stay of Execution and a Motion for Oral Argument were filed in the 03, 04, 05, and 06 proceedings. These motions are also still pending.

STATEMENT OF FACTS

Many of the key facts relevant to pending claims—including the Actual Innocence claim—have been outlined in other pleadings. Those other pleadings explicate: (1) the fundamental problems with the unscientific cause-of-injury hypothesis (SBS) used to obtain the conviction; (2) the vast new medical and scientific evidence showing the non-criminal causes of Nikki's condition; and (3) the significant errors and omissions in the 2002 autopsy, which the medical examiner has, inexplicably, been unwilling to revisit. Here, the focus is on the facts relevant to the new official misconduct claims, including the important context of the custody dispute in Anderson County over Robert's daughter Nikki. This tortured history is relevant to assessing the recently discovered improprieties surrounding the disregard of Robert's parental rights, which enabled an unlawful withdrawal of life support from Nikki and then her father's arrest for capital murder even before an autopsy.

I. The Anderson County Judiciary

From the time the custody suit affecting Nikki was initiated in November of 1999, through the conclusion of her father Robert's capital murder trial in February 2003, Anderson County had four district courts: the 3rd (Judge James Parson presiding), the 87th (Judge Sam Bournias presiding), the 349th (Judge Jerry Calhoon presiding), and the 369th (Judge Bascom Bentley presiding). The custody suit was filed in the 3rd District Court, as was the capital murder case. The custody case was assigned Cause No. 38,338. EX5.

Because Anderson County is a small, rural county, two of its four judges also serve other neighboring counties, and all four of the district court judges have concurrent jurisdiction over all cases filed in any one of the four courts. The docket for the custody lawsuit indicates that, during the two years the custody case was pending, at least three of the four judges presided over various hearings: the Honorable James Parson, the Honorable Sam Bournias, and the Honorable Jerry Calhoon. *Id.* Judge Calhoon is the father of Mark Calhoon, who was then Anderson County's Chief Felony Prosecutor who pursued the capital case against Robert. In 2007, Mark Calhoon became one of Anderson County's four district court judges,

presiding over the same court (the 3rd District Court) in which Robert was tried and where all of his state habeas proceedings, per state law, had to be initiated.⁹

On information and belief, Judge Parsons, who was the presiding judge for the 3rd District Court during Robert's trial, recused himself. It is unknown how responsibility for presiding over the capital murder case shifted to Judge Bentley. However, Bentley is the judge who issued the arrest warrant on February 1, 2002, and then presided up through the time when Robert's first subsequent habeas application (labeled 03) was filed in June 2016 until Judge Bentley's retirement in 2017.¹⁰

II. Nikki's Early Life

A. Summary

Nikki was born to a young, unmarried woman whose circumstances rendered her completely unsuited to care for, or make decisions affecting, Nikki; thus, CPS removed Nikki from her mother at birth and placed Nikki with her maternal grandfather and step-grandmother, Larry and Verna Bowman. With the Bowmans, Nikki experienced a highly dysfunctional home environment that was repeatedly

⁹ Judge Mark Calhoon has recused himself from all of Robert Roberson's post-conviction appeals.

¹⁰ Judge Bentley retired from the bench in 2017 before any writ proceedings were held and has since passed away. EX16.

investigated by CPS during the two years before Robert, her biological father, was named sole managing conservator by an Anderson County court.

Nikki was chronically ill from birth as the Bowmans well knew. Nikki's health issues commenced long before Robert had more than incidental contact with her. The Bowmans were informed, during Nikki's final medical crisis, that Robert had taken her to both the ER and to her pediatrician two days in a row. The Bowmans were in possession of the serious medications she was prescribed during those doctor visits. Yet after Nikki's father brought her to the hospital for what proved to be the final time, the Bowmans falsely reported that Nikki had been "totally well" the night before her collapse. This false report was made while they also claimed to be legally authorized to make major medical decisions affecting Nikki when the Bowmans knew they had no such legal authority. The Bowmans authorized CMCD to withdraw life-sustaining care from Nikki on February 1, 2002, and then, days after Nikki was pronounced dead, filed a motion seeking to terminate Robert's conservatorship and obtain the right to dispose of Nikki's body.

B. Nikki's First Year

"Nikki Curtis" was born to Michelle Bowman in a Fort Worth hospital on October 20, 1999. Michelle, an unmarried 22-year-old, was then struggling with drug addiction and homelessness. Michelle did not identify a father at the time of Nikki's birth; instead, Michelle named the child after her latest boyfriend (Nick

Curtis) who had brought her to the hospital. He was not the biological father and played no further role in Nikki's life. EX2; EX54.

While Michelle Bowman was still in the hospital recovering from Nikki's birth, CPS intervened. CPS would not allow Michelle to leave the hospital with Nikki because Michelle had already had two previous children removed from her care. EX54. CPS contacted Michelle's father, Larry Bowman, in Palestine, Texas and asked if he and Michelle's stepmother, Verna Bowman, would take Nikki since they had recently taken in Michelle's two-year-old son Matthew and CPS had already completed a home study on them. *See id.*; *see also* EX17. Larry Bowman agreed.

Meanwhile, Robert Roberson had heard about Michelle's pregnancy from her mother (Diane Beggs) and thought he might be the father because he had had a brief relationship with Michelle while in Fort Worth working a construction job. After Robert had suggested they get married, Michelle had gone off with someone else. When Nikki was born, however, he asked his mother, Carolyn Roberson, also of Palestine, Texas, to contact the Bowmans, as he was then in a trusty camp for the parole violation of leaving the county to work.¹¹ He "wanted to straighten his life

¹¹ Robert had been sent to prison for burglary and writing hot checks, offenses related to a drug addiction. As he acknowledges, he "had a problem with drugs then." EX18. He had no history of violent behavior, which is why he was initially given only probation; he ended up serving time for non-violent probation violations. He has no history of any violence during his years of incarceration. He is a graduate of

out and learn to be a father.” EX18. Within days of Nikki’s birth, Carolyn Roberson called Larry Bowman, explained Robert’s belief that he was Nikki’s father, and asked to be able to visit the baby; Mr. Bowman initially agreed. EX19.

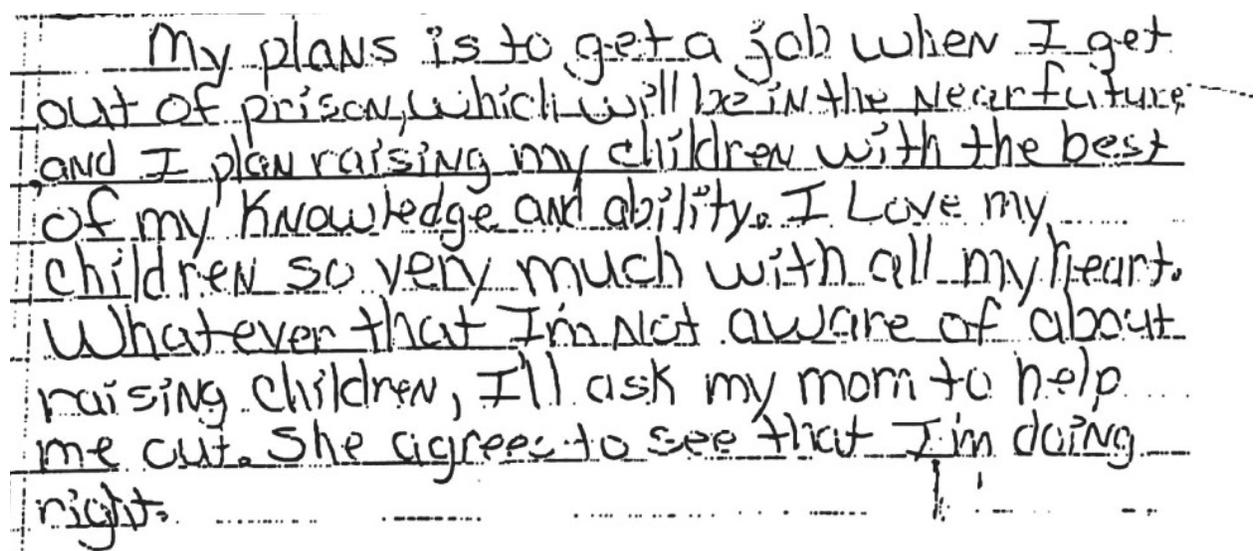
When Nikki was just eight days old, Verna Bowman took her to a pediatrician. Nikki had congestion and a fever, and both “left and right TMs,” *i.e.*, eardrums, were described as “full” and “fiery red.” This was the first of many infections that would plague Nikki and prove resistant to multiple strains of antibiotics. EX2. Nikki experienced multiple, increasingly serious medical issues that resulted in nearly 50 interactions with medical-care providers over the course of her short life, as indicated by the red squares on this calendar:

the first faith-based program on death row and was 1 of 12 men allowed out of his cell each day as part of an experimental “group recreation” program launched at the TDCJ Polunsky Unit two years ago. He was only removed from this program after the current execution date was set, per TDCJ policy.

Oct 1999 S M T W T F S 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31	Nov 1999 S M T W T F S 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30	Dec 1999 S M T W T F S 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31	Jan 2000 S M T W T F S 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31	Feb 2000 S M T W T F S 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29	Mar 2000 S M T W T F S 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31	Apr 2000 S M T W T F S 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30
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For instance, Nikki’s medical records document multiple episodes of breathing apnea that required taking her to the Palestine Regional ER where it was reported that the child was “*not breathing*”, “*child was blue.*” *Id.* On one occasion, Mrs. Bowman described having heard “a kind of a funny cry and turned around and [Nikki] was lying on her back on the floor again” *not breathing*. The pediatrician speculated this may be seizure activity. *Id.* Mrs. Bowman’s description of what she heard before Nikki stopped breathing is markedly similar to what Robert later described hearing when he woke up to find Nikki on the floor a few hours before she later ceased breathing again in her sleep the morning she was rushed to the hospital for the last time. When that occurred, Robert, who had only recently been granted custody, did not have Mrs. Bowman’s knowledge of Nikki’s alarming

medical condition. The cause of this life-threatening propensity to cease breathing was never determined. EX2. Because Robert was incarcerated in a trusty camp during Nikki's first year of life, Robert was not available to participate in her care. However, he sent a letter to CPS early on expressing his interest in raising Nikki with his mother's help:

A photograph of a handwritten note on lined paper. The text is written in cursive and reads: "My plans is to get a job when I get out of prison, which will be in the near future and I plan raising my children with the best of my knowledge and ability. I Love my children so very much with all my heart. Whatever that I'm not aware of about raising children, I'll ask my mom to help me out. She agrees to see that I'm doing right." The note is written on a piece of lined paper with a dashed midline.

My plans is to get a job when I get out of prison, which will be in the near future and I plan raising my children with the best of my knowledge and ability. I Love my children so very much with all my heart. Whatever that I'm not aware of about raising children, I'll ask my mom to help me out. She agrees to see that I'm doing right.

EX20.

Robert only saw Nikki twice for about an hour each time during the first year of Nikki's life. EX18. These visits occurred when his mother brought Nikki to the Eastham Unit during two of her handful of visits with Nikki during that first year. Robert was "happy that she was my daughter. She smiled at me." *Id.*

Meanwhile, from Nikki's earliest days, acrimony between Verna Bowman and Carolyn Roberson erupted as a result of Mrs. Roberson's interest in visiting Nikki. The acrimony soon spawned multiple CPS investigations and a custody dispute.

Initially, someone contacted CPS and reported concerns that the Bowmans would not protect Nikki from sexual abuse because they had failed to protect their daughter Michelle, who had run away from the Bowmans' home as a teenager. An investigation of the Bowmans eventually resulted in an assessment of the care the Bowmans had been providing Nikki and her half-brother Matthew:

- “both children have had accidents, Nikki falling down the stairs, Matthew falling off his tractor, and it is questionable how much supervision they receive.”
- “this family [the Bowmans] is surrounded by people who have many risks involved”
- “the Bowmans have stated many times to this worker and to previous workers that they had no contact with Michelle [the mother], this is not the absolute truth. Michelle and Nick Curtis stopped by on their way out to Florida and Mrs. Bowman admitted that Michelle calls fairly regularly to check on the children.”
- “Maltreatment – Considerable – these children have been surrounded by risks their entire lives.”
- “whether or not the grandparents [Bowmans] are truly protective of the children or if they are protective of the children when it suits them to do so[,] it is questionable why the Bowmans did not tell [case] worker, that they do have contact with Michelle Bowman. I have reservations about ruling out this case, however, the allegations cannot be supported and therefore, reluctantly, will rule this case out.”

EX21.

Because the Bowmans had quickly soured on the idea of allowing Mrs. Roberson access to Nikki, Mrs. Roberson retained a well-respected Palestine

attorney, James Boone, who initiated a custody proceeding related to Nikki on behalf of Mrs. Roberson and her son Robert, Nikki's then-putative father.¹² The case was filed in the 3rd District Court in Anderson County (the same court where Robert would later be tried for capital murder).

The Robersons' Original Petition asked that Robert be recognized as Nikki's father, that he and his mother be named Temporary Managing Conservators, and that Carolyn Roberson, as grandmother, be granted, in the interim, the right to visit Nikki. EX22.

The Robersons had few resources, and Carolyn Roberson, a grandmother and retired postal worker, was already caring for four children, including Robert's two special-needs children from a marriage that had ended in divorce and whose mother (Della Lucretia Gray) had permanently abandoned them to the care of Robert's family. Yet the Robersons wanted to help support Nikki too because they believed Robert was her father and that was the right thing to do. EX19; EX18. Therefore, the Robersons were willing to spend scant resources to obtain Mr. Boone's services to obtain a legal right to help raise Nikki.

¹² According to a recent obituary, Mr. Boone was a revered lawyer who launched a solo practice in Palestine in 1979 and continued working up into his 80s. He was also a U.S. Army captain and active in his church, St. Philip's Episcopal in Palestine, where he served as an elder and served on the Vestry. EX23.

Larry Bowman responded to the custody suit by asserting that the Robersons had “no legal standing,” thus contesting Robert’s paternity claim and the Robersons’ request for visitation rights. Attorney Boone then filed a “Petition to Establish Parentage” on Robert’s behalf. The purpose was to obtain an order for paternity testing, which the court ultimately entered. EX24; EX25. Notably, in the vast majority of cases in which paternity testing is ordered it is because a reputed father is *denying* that he is the father of a child so as to avoid legal responsibility. Here, the reputed father (Robert) was seeking permission to *prove* that he was legally responsible so that he could participate in his daughter’s life.

Paternity test results were eventually conveyed to the Anderson County court, showing 99.9% certainty that Robert Roberson was Nikki’s father. EX26. This result was not surprising since Nikki had her father’s blues eyes and looked quite like him. The next day, a bench warrant issued requiring Robert to be brought from the Eastham Unit trusty camp for a hearing to be held in Anderson County in the custody case to obtain temporary orders defining the conservatorship of Nikki. EX5.

During an evidentiary hearing held in Anderson County, Carolyn Roberson sought a court order to permit her to visit Nikki because the Bowmans had been refusing to allow her to do so. Robert was present and called as a witness. In testifying, he exhibited a vocal tick, a symptom of a then undiagnosed, but life-long,

developmental disorder: Autism Spectrum Disorder. *See* EX19¹³ at 27-43 (Robert repeatedly using the filler phrase “and stuff”). Notably, this is the identical vocal tick observed decades later by a lawmaker during a visit with Robert, which was then explained by an Autism expert during a legislative hearing as a common symptom of the disorder often misinterpreted as flippancy. *See* EX27 at 148-49.¹⁴

¹³ The transcript of the 05.26.2000 evidentiary hearing was not reduced to writing until 05.29.2002, nearly four months after Nikki’s death.

¹⁴ The legislative hearing transcript includes this exchange between committee chairman Joe Moody and Autism expert Dr. Natalie Montford:

Chair Moody: I'm remembering when we were visiting with [Robert], and I think I've seen some interviews where, um, i-it'll utilize the-the phrase multiple times "*and stuff,*" "*and stuff,*" "*and stuff.*" And I think if anyone's talking to-to s-- to someone, they go, “Well, that sounds kinda flippant. We're talking about something very serious here. We're sitting in-- we're sitting, uh, with a gentleman on death row who is-- at that time he was, I think, uh, two weeks out from his execution, ... can you help explain that kind of thing?”

Dr. Montfort: Absolutely.... So there’s two things kind of that may be at play here. So one is this repetitive use of language. So I have a phrase that’s worked in some places, and it may even be kinda close to working, but you you’re right, without the- any changes in emotion, when the same phrase is applied over, and over, and over again, especially that phrase, can sound kind of uncaring, or flippant, or, you know, I mean, I just was doing stuff, right? It’s like, “Well, did you hear me? Did you take my s—my word seriously? I need a-a thoughtful answer.” And really this is not a thoughtless answer. There-there's a host of literature that even describes how people with autism learn language differently. [S]ometimes people with autism might repeat the last word or repeat a phrase that feels good or sounds good to them. And it can serve several purposes, but one of them can be self-soothing. So in a stressful setting like talking to people in authority, or talking to people that have a lot to do with your fate or decisions that affect how things unfold for you in the future could be highly stressful. And so you may see more of that self-stimulatory behavior.

In addition to Robert and Carolyn Roberson, Attorney Boone called several witnesses during the evidentiary hearing in the custody case, mostly from Mrs. Roberson's church. Larry Bowman was the sole witness for the Respondent. EX19.

The hearing resulted in Temporary Orders granting Mrs. Roberson the right to visit Nikki every other Saturday for a few hours without supervision; the issue of who would be named managing conservator was left to be resolved later. EX28. The custody docket summarized the outcome as follows:

MOVANT GRANDMOTHER & ALLEDGED BIOLOGICAL FATHER W/ATTY JIM BOONE; MATERNAL GRAND F & STEP GRAND MW/ATTY-HEARING BEGAN 2:00 P.M. - STOPPED 4:10 P.M. WHEN COURT FINDS PARTY (BIOLOGICAL MOTHER) CITED BY PUBLICATION HAS NO ATTY - TO MAINTAIN STATUS QUO BOWMAN'S NAMED JMC'S - W/G.P. CAROLYN ROBERSON - PATERNAL G.P's TO HAVE ACCESS AND VISITATION W/CHILD NIKKI - 1s, 3rd & 5th SATURDAYS FROM 10:00 TO 3:00 UNSUPERVISED - RESET AFTER ATTY AD LITEM APPT AND CPS INQUIRY. SAM BOURNIAS, JUDGE

EX5 (capitalization retained).

Thereafter, the Bowmans repeatedly violated the terms of the Temporary Orders by denying Mrs. Roberson visits with Nikki. Mrs. Bowman began keeping a journal to document her interactions with the Robersons. In the first entry, Mrs. Bowman noted:

I told Mrs. Robertson [sic] about Nikki having allergies and showed her Nikki's allergy med. (Claritin). Also I told her when she drenches Nikki in Vanilla Fields Cologne she is doing to Nikki what she is doing to me. (as I am highly allergic to that brand and anything similar to it).

EX29. There is no mention in *any* of Mrs. Bowman's journal entries about concerns that Nikki was having nightmares or experiencing abuse when she visited the Robersons, as Mrs. Bowman later claimed.¹⁵

The journal and other records show that Mrs. Bowman repeatedly invoked Nikki's fragile health as a reason to deny Mrs. Roberson her visits. For instance, because Nikki was continuing to have serious health issues, including alarming breathing apnea episodes when she would cease breathing, collapse, turn blue, and have to be revived, Mrs. Bowman obtained a letter from Nikki's pediatrician recommending that Nikki not be moved between caregivers at that time:

¹⁵ During the post-conviction investigation, Mrs. Bowman's journal was found in the Anderson County DA's case file, but the journal was not shared with Robert or his jury during his trial.

Pediatric Associates of Palestine

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

August 24, 2000

To Whom It May Concern:

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

Sincerely,



Dr. Karen Ostrom
Pediatric Associates

EX30. Later, the Bowmans asked Carolyn Roberson to sign an "Acknowledgement" that, due to Nikki's "constant supervision for her apneic episodes" she should not be changing environments between caregivers. Both Carolyn Roberson and Larry Bowman signed the Acknowledgement, which had been typed up by Verna Bowman:

Saturday, October 7, 2000

I understand that the doctor stated that Nikki is under constant supervision for her apneic episodes. I also understand that the doctor feels that she does not need to change environments until her physical condition is corrected. I also understand that the doctor does not feel that she needs to have her care shifted between different caretakers until this condition is under control. Therefore I accept full responsibility for Nikki's health and well being while she is under my care.

Signed by: Mrs. Carolyn Roberson Carolyn B. Roberson 10-7-2000
Signed by: Larry Bowman Larry Bowman

EX31.

After Robert returned home to Palestine and began trying to visit Nikki along with his mother, every other Saturday for a few hours, Mrs. Bowman started insinuating to Nikki's pediatrician that Nikki was starting to have nightmares that Mrs. Bowman attributed to her time with the Robersons. The pediatrician referred Mrs. Bowman to a social worker, Georgeann Mitchell, who officed in the same building as the pediatric practice. Mrs. Bowman told social worker Mitchell that she was Nikki's "mother" and claimed that Nikki had begun having nightmares following "visits to her paternal grandmothers [sic] where her bio-dad is present." Mrs. Bowman informed Ms. Mitchell that "bio-dad" had previously been in prison and graphically described behavior attributed to 20-month-old Nikki that Mrs. Bowman believed raised concerns about sexual abuse. According to Ms. Mitchell's

notes, which the Anderson County DA's Office subpoenaed after Nikki's death, the therapist observed nothing to support Mrs. Bowman's sexual abuse speculations during any of nine "play therapy" sessions. Instead, Ms. Mitchell repeatedly concluded that Nikki "exhibited pleasant affect and mood and normal behavior that could be expected from a 20-month child." EX32.

Meanwhile, the pediatrician had alerted CPS about Mrs. Bowman's allegations. A CPS worker contacted, among others, James Boone, attorney for Carolyn and Robert Roberson. Attorney Boone adamantly stated that the Robersons "had been examined by CPS several times and they have passed all the tests." *Id.* He further stated "that if Nikki had been molested at all, it ***had to be from the Bowmans because she lived with the Bowmans.***" *Id.* In his view, as an attorney with decades of family-law experience at that point, he felt that "if the child should be taken away, she should be taken from both sets of grandparents. As reported by CPS, Attorney Boone stated that ***the Robertson's [sic] were as clean as they could be.*** He stated that he didn't have a problem with Nikki being supervised during her contacts with Mr. Bowman and he stated that ***he wanted the Bowmans examined thoroughly to insure that the child was completely safe.***" *Id.* (emphasis added).

By this time, Robert had gotten a small rental house at 901 N. Perry Street in Palestine.



His new girlfriend, Teddie Cox, and her daughter Rachel moved in. As her aunt Patricia Conklin explained, Rachel had “gone through some terrible things” with her father (Edward Cox). EX33. Around this time, Cox was charged with (and eventually convicted of) sexually abusing Rachel, an exceedingly stressful matter that was playing out in the background during the short time Teddie and Rachel lived with Robert and was still being litigated when Robert was falsely accused of having caused Nikki’s death and then tried for capital murder. *Id.*

Robert had known Teddie’s older sister Patricia most of his life. When he learned what had happened to Patricia’s niece Rachel, he had offered to help Teddie and Rachel move back to Palestine to get away from Cox. Robert had gotten a job delivering newspapers for the *Palestine Herald*. He “started with one paper route and then added two more.” EX18. According to Patricia, her young “daughters enjoyed going along with him during the evening routes and would argue over who

would get to sit with him in the front seat.” EX33. Also, Robert occasionally took Nikki, Teddie’s daughter Rachel, and her cousin Courtney. Patricia said of Robert that he “does not have a mean bone in his body” and is “a little slow.” But she “had no fear at all about [her] daughters spending time with Robert.” EX33. In his entire life up until Nikki’s death, no one had ever suggested that Robert had hurt anyone—especially a child.¹⁶

C. Nikki’s Final Months

On October 20, 2001, Nikki turned two years old. The Roberson family threw a birthday party for her. Thomas, Robert’s youngest brother, was still living at home at that time. He recalled the event and how “[e]veryone thought she was so sweet and cute.” EX34.

¹⁶ Allegations, seemingly manufactured for his 2003 trial, were made for the first time by his estranged wife, Della Lucretia Gray. Ms. Gray had said nothing resembling her 2003 trial testimony about Robert during their 1991 divorce proceedings or in any contemporaneous reports to family, doctors, law enforcement, etc. Moreover, she, not Robert, had entirely abandoned the two children they had had together. She never even tried to visit their children, let alone seek custody, as she had to admit during cross-examination in 2003.



About a month later, on November 16, 2001, another hearing was held in the custody suit before Judge Jerry Calhoun. A transcript of the proceeding suggests that only the parties' lawyers were present. EX6.¹⁷ The purpose of the hearing was to memorialize an *agreement* to resolve the custody dispute over Nikki with *Robert being awarded full custody*. It is unclear how this agreement was reached, but Thomas Roberson recalled "we were all so happy for him." EX34. And Patricia Conklin, who had been present during many of Robert's visits with Nikki, also recalled how happy Robert and Teddie were. Patricia saw in Robert "a loving father. He was attentive, encouraged Nikki to play, and was never dismissive or short with her." Patricia never saw him "do anything hurtful" or even spank Nikki. EX33.

¹⁷ The transcript of the 11.16.2001 proceeding was not reduced to writing until 05.29.2002, nearly four months after Nikki's death.

Patricia’s only concern was her niece Rachel, who then lived with Robert and Teddie and “sometimes [had] trouble controlling her anger.” *Id.*



If the Bowmans genuinely believed that Nikki had been abused in any way during her limited visits with the Robersons, or if the Bowmans had any legitimate basis for believing that Robert had seriously harmed *anyone* in his past or since returning to Palestine, it is unthinkable that they would have simply agreed that Robert should have full custody. That is, the Bowmans genuinely believed Robert was the best person to be Nikki’s primary caregiver, and Mrs. Bowman had intentionally made false, unsubstantiated allegations to try to defame Robert during CPS interviews.¹⁸ Otherwise, she and her husband simply did not want to be

¹⁸ Under Texas law, falsely accusing someone of child abuse is a felony. *See* TEX. FAM. CODE § 261.107. Yet statistics suggest that a large percentage of reports of child abuse prove to be false. Some of those false allegations are made by medical professionals, which is one reason why the Texas Legislature enacted Senate Bill

bothered with Nikki's care any longer. Either way, their conduct vis-à-vis Nikki raises serious concerns that were never investigated or aired in a court proceeding because of the Bowmans' decision to relinquish custody to Robert.

Per the agreement between the Bowmans and the Robersons, which was captured in an official transcript prepared by an Anderson County court reporter, ***Robert was named sole managing conservator of Nikki.*** EX6. During the 11.16.2001 hearing to memorialize the agreement, Daniel Scarbrough, the Bowmans' attorney, described these additional terms of the agreement:

- Grandfather Larry Bowman would be named a possessory conservator with visitation on the second and fourth weekends of every month;
- Grandmother Carolyn Roberson would also be named a possessory conservator with visitation the first weekend of every month; and
- If the Bowmans moved out of the county, they would then only have visitation once a month.

Id. Further, per the parties' agreement, the Bowmans' attorney expressly asked the court, Judge Calhoon presiding, "to change the last name of the child [Nikki] to Roberson, which is the father's last name." *Id.*

1578 in 2021 without any dissenting votes. EX1 ¶3. As Representative Hull explains, the new law was prompted by "concern about child abuse pediatricians (CAPs) employed by hospitals rushing to presume abuse when caregivers bring children in for medical care. *Id.* The goal was to give "parents accused of child abuse by CAPs in a CPS investigation the right to a second medical opinion—regardless of ability to pay—and the right to present a conflicting opinion to a judge in family court." *Id.* Had this law been in effect in 2002 when Robert was accused, he would have at least had access to an expert of his own.

The Bowmans' attorney further represented to Judge Calhoon that Nikki's mother (Michelle) had been given notice of the agreement and of the hearing. But she failed to appear. Per the Bowmans' attorney, the parties also agreed that Michelle should pay \$100/month in child support (likely recognizing that this requirement would be symbolic, as Michelle had no resources).

Judge Calhoon ended the hearing by stating: "That agreement will be accepted by the Court and made and adopted by the Court." Counsel was then asked to submit a written order "to that effect." *Id.*

The docket does not indicate that a written order was signed but confirms: "AGREEMENT REACHED ANNOUNCED AND ADOPTED BY THE COURT." EX5 (capitalization retained). Therefore, as of November 16, 2001, the Anderson County Judiciary had determined that it was in Nikki's best interest for Robert Roberson to be her sole managing conservator. And, as a matter of state law, a child's managing conservator is the sole person with authority to make major medical decisions affecting that child. *See* TEX. FAMILY CODE sec. 153.132 (defining "Rights and Duties of Parent Appointed Sole Managing Conservator").

Nikki's medical records reflect that she continued to have health struggles. For instance, on December 7, 2001, she was brought to the doctor's office "with a history of a rash in the buttocks and diaper area and a lot of cough and congestion." She was assessed as follows: "Purulent Rhinitis with a cough, which is not too

significant, in addition, it looks like she was folliculitis and probably some infectious component to that in the diaper area.” EX2. Although her cough was described as “not too significant,” her doctor, Dr. John Ross, prescribed *codeine*, a narcotic. Nikki was only 26 months-old at the time. (In 2017, the FDA issued warnings that codeine was not recommended for children under the age of 12, warnings which have since been revised upward to age 18.)¹⁹

On January 28, 2002, Robert and his mother took Nikki to the Palestine Regional ER and reported that she had been sick for a week with fever, diarrhea, vomiting, congestion. ER physician Dr. Konjoyan prescribed Phenergan/promethazine in suppository form as well as Imodium. *Id.* Later that night, Nikki’s fever shot up to 103 degrees F.

The next morning, January 29, 2002, Robert took Nikki to her pediatrician’s office. EX2. In the pediatrician’s office, Nikki’s temperature was measured at **104.5 degrees F**. She was assessed as follows: “Fever, may be viral etiology or may be **unresolved upper respiratory infection.**” Dr. John Ross prescribed Phenergan/promethazine in cough syrup form with *codeine*, both of which would be contra-indicated for a respiratory infection. *Id. See, e.g.,* EX35 (FDA black box warning).

¹⁹ *See, e.g.,* <https://newsnetwork.mayoclinic.org/discussion/new-fda-warning-dont-give-children-codeine/>.

The Bowmans met Robert and Nikki at the pediatrician’s office because they had agreed to keep Nikki for three days while Robert’s girlfriend Teddie was in the hospital for a hysterectomy, a development that was very upsetting to her as she was only 27 years old. EX33. According to Teddie’s sister Patricia, Robert “was very patient with [Teddie] and was going to take care of her when she got out of the hospital.” *Id.* Robert picked up Nikki’s prescriptions and delivered them to the Bowmans; then, back at his house, between paper routes, he wanted “to make it easier for [Teddie] to get in and out of the bed” when she got home from the hospital after the operation. EX18. His solution was to prop up the only bed in the house (which consisted of a mattress and box springs) on cinder blocks. *Id.*



The next day, January 30, 2002, Robert called the Bowmans to check on Nikki. He was told that Mrs. Bowman was now sick too. That night, the Bowmans called the hospital looking for Robert. When Robert learned of this, he called back. The Bowmans directed him to come get Nikki although it was already quite late. Robert reached their house out in the country around 10:00 PM. As Robert recalled, “Nikki did not want to go. I did not know if she had been sleeping or what. But she was crying.” EX18. She was, after all, a two-year-old who was sick and it was well past her bedtime. But when Robert arrived, Larry Bowman carried the crying, sick child to Robert’s car, directing him to take her. Robert then drove Nikki home, got her ready for bed, and they both fell asleep around 11:00 PM while a movie was playing. *Id.* Larry Bowman later claimed that they wanted Robert to fetch Nikki late at night because she was used to sleeping in the same bed with the Bowmans; he implied that this would disturb Mrs. Bowman because of the way Nikki was “like a little brush hog or something just going around and around” in the Bowmans’ bed. 6EHRR171-72.

Around 5:00 AM, Robert was awoken by what he later described as a “strange cry” and found Nikki on the floor at the foot of the bed. He saw small specks of blood on her mouth, which he wiped off with a cloth. But he did not see anything else wrong. They both eventually fell back to sleep. However, when Robert woke up again about 9:00 AM, Nikki was not breathing, and her lips were blue. He was

scared. He grabbed her face to try to wake her up. He then tried to get her dressed because it was January and cold outside.²⁰ Robert took Nikki to the Palestine Regional ER where Teddie met him in the parking lot in a wheelchair; when they tried to get inside, the ER entrance was blocked. But they eventually got in and found a nurse, who took Nikki from them. EX18.

Seeing that Nikki's lips were blue from oxygen deprivation and her eyes were fixed and dilated, Nurse Gurganus knew they had a "Code Blue" situation. Hospital records show that by 9:30 AM resuscitation measures had commenced. EX2. Per photos later taken by ER nurse Sims, there was no blood and minimal signs of external injury on Nikki—only light bruises on one side of her face and a minor abrasion on her chin. Most noteworthy was the blue tint to her skin and lips. Had her medical records been considered, the Palestine hospital staff would have seen that Nikki had previously been brought to their hospital by Mrs. Bowman for multiple episodes where Nikki had inexplicably ceased breathing, collapsed, turned blue, and had to be revived. EX4.

Palestine Regional hospital staff restarted Nikki's heart, which then experienced tachycardia, and they intubated her. But after she was sent to radiology for CT scans, it was noted that the breathing tube had been inserted incorrectly and

²⁰ According to the neuropsychologist who diagnosed Robert with Autism in 2018, this kind of "odd" behavior is entirely consistent with someone with this disorder for whom following routines is critical. 7EHRR68-152.

had to be pulled out and reinserted. CT scans of Nikki's head showed a single, minor impact site on the back of her head (swollen tissue) with no skull fractures. There was also a small corresponding subdural bleed as well as extensive brain swelling and herniation, suggesting her brain had been deprived of oxygen when her breathing was arrested. A decision was made to shave Nikki's head, revealing the bump on the back of her head. EX2.

Palestine Regional staff and law enforcement repeatedly asked Robert to explain what had happened to Nikki. Repeatedly, Robert told all he could remember, including the strange cry he had heard around 5:00 AM, which woke him up. He described finding Nikki lying on the floor at the foot of the bed, apparently having fallen in her sleep. No one believed that a fall out of bed could explain Nikki's internal condition; therefore, they treated the father, whom they described as "odd" and "not normal," with suspicion. No one checked Nikki's medical history—including her records from visits to both the Palestine Regional ER and her pediatrician within the last three days when her temperature had climbed to 104.5 degrees, she had been assessed with a respiratory virus, and she had been prescribed serious, respiratory-suppressing medications. EX2.

At some point, Georgeann Mitchell, the same social worker whom Verna Bowman had hired to do "play therapy" with Nikki, conducted an interview with Robert. Later, Ms. Mitchell gave law enforcement an undated, typed statement

describing her perception of Robert's behavior and affect. EX36 (markings in version obtained from the DA's file). (Georgeann Mitchell did not testify at trial and her role and history with the Bowmans was not disclosed at the time.) It is unknown why Ms. Mitchell was at the hospital or who asked her to interview Robert. But an email found in the DA's file shows that Detective Joe Berreth was aware of Mitchell's statement and encouraged people on the prosecuting team to read what it said about Robert's demeanor at the hospital. EX37.

Ms. Mitchell, like other witnesses who did testify, described Robert as acting "suspicious" based on (1) his inability to explain Nikki's medical condition; (2) his focus on "unnecessary details"; and (3) the perception that his flat affect was "odd" and "not normal" for a distraught parent. Ms. Mitchell described him responding to questions with "endless detail with no apparent purpose" and criticized his "slumped posture" and "lack of direct eye contact"—all behavior explained by his then undiagnosed Autism Spectrum Disorder. EX36.

Because of the seriousness of Nikki's condition, arrangements were made to transport Nikki from the Palestine Regional hospital to Children's Medical Center of Dallas (CMCD). Verna Bowman, who did not have legal standing to do so, signed the "Permission for Transport and Treatment" authorizing Nikki's transport from the Palestine Regional ER to CMCD and a release of "any and all medical records" related to Nikki's treatment. EX7. While those arrangements were made, Robert was

either at the Palestine Regional hospital or meeting with the police; in other words, he was available to authorize Nikki's transport. But he was deprived of his right to do so because Verna Bowman misrepresented her authority and Palestine Regional staff failed to verify who had the legal duty/right to authorize making these decisions.

Meanwhile, a Palestine Regional nurse, Andrea Sims, who had been the one to call the police, took it upon herself to perform a sexual assault exam on comatose Nikki. No such exam had been requested by law enforcement. Nor was there any evidence to suggest there had been any sexual abuse. Moreover, Sims was not certified to perform SANE exams. But Sims did so, while also taking non-medical-grade Polaroids, some of which show various ungloved hands (including Sims') pulling at Nikki's bare bottom looking for something. Sims then began telling both hospital staff and law enforcement that she had seen evidence of "anal tears." EX38.

Sims was apparently unaware that Nikki had been brought to the same hospital two days before because of diarrhea for over a week and unaware Nikki had been prescribed both Phenergan suppositories and Imodium for this condition. *See* EX2. Although Sims's opinions were never endorsed by any other medical professional, she later played an outsized role in Robert's trial as a witness for the State, offering outrageous, highly prejudicial opinions about the proclivities of "pedophiles." She was allowed to testify in this manner even though DPS testing of a sexual assault kit

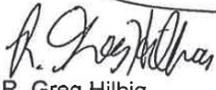
and the bedding from Robert's house had yielded *no evidence* of any sexual contact—facts not shared with his jury. *See, e.g.:*

1. Sexual assault evidence collection kit from victim

Requested Analysis
Process the items for any trace evidence associated with sexual assault.

Results of Analysis
No semen was detected on the anal swabs and debris collection swabs.
No spermatozoa were detected on the anal smear slides.
No trace evidence was detected the debris collection paper.

We are unable to retain this evidence. Please make arrangements to pick it up at your earliest convenience.


R. Greg Hilbig
Criminalist
Texas DPS Garland Laboratory

EX39 (markings on copy found in DA's file).

During cross-examination, Nurse Sims made several admissions: that she was not actually SANE-certified as she had claimed during her direct examination; that her report contain “exaggerations”; and that the skin tears she claimed to see in Nikki’s anal region, which no one else considered to be indicative of abuse, were “superficial.” 41RR142. But that could not possibly counter the damage caused by her extreme, baseless opinions, which she began circulating at the hospital while Nikki was lying in a coma. EX38.

While Robert was being excluded from discussions about plans affecting Nikki, Robert agreed to take police officers (Detectives Wharton and Munoz) to his house on Perry Street to show them where Nikki had fallen out of bed. He also showed them the washcloth he had used to wipe specks of blood from her mouth.

The officers looked for signs of violence but found nothing. EX38. But they collected the washcloth:



Afterwards, Robert went with the officers to the police station and again told everything he knew. EX18; EX38.

No records have ever been produced related to the transport of Nikki from Palestine Regional to CMCD by emergency vehicle. Therefore, it is impossible to know what occurred during transit, such as whether Nikki had a seizure (which might explain the mystery of why she had a large quantity of anti-seizure medication in her system at the time of her death although the hospital records do not show that

this medication was given to her.)²¹ CMCD records show that, soon after Nikki's arrival at CMCD, a social worker with CMCD conferred with a CPS worker in Palestine who reported "that pt's father has been questioned by the Palestine police & that both CPS & police are investigating." EX7.

When Robert learned that Nikki was being transferred to CMCD, he said he was going to drive to Dallas to be with her. But Palestine police officers told him he could not do that. Then, someone from CMCD called him and told him the same thing. He "did not understand why [he] could not go to Dallas to see [his] daughter Nikki." EX18. There was no legal basis for preventing him, her father and legal guardian, from being with his child. A CMCD record states only that a CPS worker was "requesting pt's father not allowed to visit." EX7. A further record indicates that, after speaking with "pt's grandmother," *i.e.*, step-grandmother Verna Bowman, a Dallas CPS worker gave a directive that the father "is not to visit," again, absent any legal authority to do so. The case was then referred to CMCD's "REACH" department to make a child abuse assessment. *Id.*

CMCD records indicate that hospital personnel, including the REACH pediatrician Janet Squires, were not provided any information about Nikki's present illness or medical history. They were told only that Nikki had reportedly sustained a

²¹ This issue was one of several identified for the first time in 2024 by medical toxicologist Dr. Keenan Bora, whose report was attached to previous filings but which no court has yet considered.

fall while in her father's custody. The only external injuries noted in CMCD paperwork are the tissue swelling/bump on the back of Nikki's head and a small chin abrasion, entirely consistent with a fall out of bed.²² CMCD records indicate *no injuries* to neck, chest, abdomen, genitalia, extremities, or posterior. *Id.*

CMCD records also indicate that someone provided Robert Roberson's name and contact information as the "Guarantor" for treatment; that same form identifies Verna Bowman as "grandmother" and describes her as stating that Nikki "has Medicaid" but she "does not have card." *Id.*

Verna and Larry Bowman were the only relatives to sign CMCD "Release of Information," "Admission Agreement," and "Consent for Treatment" forms. Verna Bowman identified herself as Nikki's "mother/grandmother." *Id.* Mrs. Bowman was in fact Nikki's step-grandmother who, at that time, had no legal authority to make decisions affecting Nikki's care. Moreover, Mr. Bowman had agreed to relinquish his status as temporary managing conservator back on November 16, 2001. Thus, on January 31, 2002, Nikki's sole managing conservator was her father Robert Roberson, who was not consulted. EX6. The only record of any communication with

²² The unaddressed question was: what had caused Nikki to fall out of bed and then later stop breathing? Without any investigation, that question was summarily answer with the false presumption that abuse had occurred followed by an SBS diagnosis.

Robert is a CMCD social worker's note stating that Robert had been told he was "not allowed" to visit Nikki at CMCD. EX7.

III. Nikki's Last Day

CMCD records indicate that medical personnel were unaware of Nikki's extensive medical history or recent illness. Instead, CMCD records document that Mrs. Bowman misled hospital staff, conveying that Nikki was "a child in good health until yesterday AM when she was brought [to Palestine Regional ER] unresponsive with fixed and dilated pupils." *Id.* That description was demonstrably false: Nikki had been severely ill for over a week. She was lethargic, vomiting, experiencing diarrhea, respiratory distress, and congestion. Her fever was measured as high as 104.5 degrees in the pediatrician's office on January 29, 2002. On January 28th and 29th, she was prescribed powerful, respiratory-suppressing drugs no longer given to child her age and in her condition, including a narcotic, codeine. EX2.

CMCD inquired about removing Nikki from life support. Under Texas law, that decision could only be made by the child's legal guardian.

According to a CMCD "Death Summary" by Barry Nicks, M.D., "Nikki's sedation and paralysis was discontinued for initiation of the brain death protocol" the morning of February 1, 2002. EX7.

According to newly disclosed information, CMCD cut off life-sustaining care only after being informed, falsely, by agents of the Anderson County Judiciary that

the maternal grandparents (the Bowmans) had the legal right to make that decision. EX1. The Bowmans then authorized terminating life support absent legal authority to do so.

Nikki was pronounced dead at 7:04 PM. EX7. That very night, an arrest warrant was obtained (with an incorrect date, indicating a rushed process). The warrant was obtained by an Anderson County detective (Joe Berreth) from an Anderson County judge (Bascom Bentley). The latter would thereafter preside over Robert's trial. The arrest warrant stated that "at approximately 7:22 PM, Dr. Andrew Gormley of Childrens [sic] Medical Center of Dallas contacted investigators via telephone stating that Nikki Curtis had been removed from life support and has been pronounced deceased at 7:04 PM this date." EX41.

The application for the arrest warrant, signed by Detective Berreth, accused Robert Roberson of "capital murder." *Id.* The application expressly relied on the "REACH Consult Note" that had been prepared by Dr. Janet Squires, CMCD's in-house "child abuse pediatrician" or "CAP." *Id.* Dr. Squires' note described her SBS diagnosis. She found that Nikki's condition was the result of "massive rotation forces," *i.e.*, shaking; and Dr. Squires described Nikki's condition as "the picture of shaken impact syndrome." *Id.* When Dr. Squires later testified during Robert's trial for the State, she told the jury that "shaken impact syndrome" was the same thing more commonly known as "shaken baby syndrome." 42RR106. ("There's a very

well known, well described entity in children and it goes by several terms. Most of the lay public knows [the] term shaken baby syndrome. And what, and if I may just for a minute, explain shaken baby....”). As has been recognized in *Ex parte Roark*, the name associated with SBS has changed repeatedly over the years as science-based critiques of its basic assumptions emerged.

Dr. Squires’ note also indicated that the maternal grandparents (Bowmans) had told her “that they were the guardians until November of last year when the father became the guardian.” EX41. (It does not appear that the Bowmans conveyed that they had *agreed* that Robert should be named sole managing conservator.) Dr. Squires’s note also shows that Mrs. Bowman misinformed the doctor that Nikki had been “totally well” until 10:00 PM on January 30, 2002, when the Bowmans had last seen Nikki. *Id.* The Bowmans do not appear to have conveyed to Dr. Squires or any other medical personnel any of the following:

- Because of a protracted illness, Nikki had been to both the Palestine Regional ER and her pediatrician’s office within days of her collapse;
- Nikki’s temperature had been measured as high as 104.5 degrees F on January 29th (2 days earlier) during a doctor’s visit;
- Nikki had been prescribed and was taking, while in the Bowmans’ custody, Phenergan suppositories, Imodium, Phenergan cough syrup with codeine, a narcotic;
- Nikki had a history of serious health issues dating back to the first days of her life, including antibiotic-resistant infections and unexplained breathing apnea episodes that had prompted a neurological workup;

- Nicki’s half-brother Christopher had Fetal Alcohol Spectrum Disorder and her half-brother Matthew had a seizure disorder;
- Nikki’s pediatrician had diagnosed her with a respiratory infection, “likely viral” on January 29th but then prescribed contra-indicated respiratory-suppressing medications (Phenergan and codeine).

After obtaining an arrest warrant using Dr. Squires’ “shaken impact syndrome” aka “shaken baby syndrome” diagnosis, Anderson County police officers went to Robert’s house and arrested him. Detective Berreth told Robert that he better confess to killing Nikki and threatened him with “getting the needle” (*i.e.*, the death penalty). Robert was then placed alone in a suicide cell where he stayed for about 45 days. EX18.

IV. Judgment without Investigation

At 2:17 AM, a few hours after his arrest, Robert was written up by jail personnel because “he just sat there and didn’t even acknowledge they were talking to him.” EX42. The “Incident Report” described Robert as having “no expressions when talking,” behavior explained by his Autism Spectrum Disorder, about which his jailers knew nothing. *Id.* Writing up someone for showing “no expression” is itself unusual but also demonstrates the focus of those involved in pursuing criminal charges against Robert on his neurodivergent behavior in a time of great stress.²³

²³ The Anderson County DA’s Office has in its file a TDCJ “Clinic Note” related to Robert from 1992 showing that similar symptoms had been observed in the past. Someone in the DA’s Office even highlighted the comments “affect is flat”

Robert’s so-called “odd,” emotionally flat affect was a recurrent theme at trial, which the jury was urged to view as a sign of his guilt. *See, e.g.*, EX38.

Later that morning, February 2, 2002, unbeknownst to Robert, Nikki’s body was transported from CMCD to the Dallas County medical examiner for an autopsy. That office’s records show that the medical examiner was (falsely) informed that “Mr. Bowman, grandfather, has legal rights.” EX8. Pursuant to that belief, a call was made to the Bowmans who “approved of organ donation.” *Id.* The medical examiner (Dr. Jill Urban) did not investigate any aspect of Nikki’s medical history before conducting the autopsy; but the one-page “Investigation Narrative” prepared for the medical examiner’s office shows that she was told a series of biasing assertions, provided by Anderson County law enforcement: (1) that a child abuse diagnosis had been made at the CMCD; (2) that the decedent’s father had already been arrested for capital murder; and (3) that an Anderson County nurse believed she had seen signs of sexual abuse (an opinion that no other medical professional ever endorsed). *Id.* Detective Berreth, who had obtained the arrest warrant from Judge Bentley, then arrested Robert in Palestine, and then provided this biasing information to the

and “emotionally flat.” The 1992 Clinic Note also described Robert’s “rapid[,] forced speech, poorly modulated, filled with anxiety” and that he is “friendly” but “leaves the impression that he is detached somewhat.” EX43. In other words, the symptoms of Robert’s Autism were observed decades before he was ever properly assessed and diagnosed, including over ten years before Nikki’s death. EX44.

medical examiner's office, then drove back to Dallas the next morning to sit in on the autopsy.

Dr. Urban performed the autopsy and determined the cause and manner of death that same day without acquiring any of Nikki's medical records. Dr. Urban did not even review records from multiple medical visits that very week, including those related to Nikki's recent, unresolved respiratory infection (now known to be severe viral and bacterial pneumonia that had triggered a blood-clotting disorder and progressed to the point of septic shock). Dr. Urban did not review any of the CT scans of Nikki's head or lungs taken at Palestine Regional or CMCD. Similarly, Dr. Urban did not wait for any test results, including toxicology screens, which showed a high level of promethazine (Phenergan) still in Nikki's system at the time of the autopsy. *See, e.g.*, EX9.

That same day, February 2, 2002, Robert signed an "Application for Court Appointed Attorney" in the Anderson County jail. The application shows that he was then receiving Aid to Families with Dependent Children, Food Stamps, and Medicaid. Although he had a job delivering newspapers, he plainly had no money to hire a lawyer to defend him against a capital murder charge. EX14.

On February 4, 2002, *three days after Nikki's death*, Larry Bowman's attorney, Daniel Scarbrough, filed a document called "Motion for Termination of

Conservatorship and for Final Disposition of the Body of the Child Which Was Subject of This Suit” in Nikki’s custody case. EX10.

The motion cited the fact of Robert’s arrest for capital murder as the basis for the court to grant the requested relief. The motion demonstrated that the Bowmans knew that they had not had the right to make decisions affecting Nikki’s medical and end-of-life care when they had authorized CMCD to take Nikki off life support. But the motion also included the assertion that the agreement “that the biological father, ROBERT ROBERSON be named sole managing conservator” “has never been entered into the Court’s file.” *Id.* According to both an official court transcript and the court’s docket, the agreement designating Robert sole managing conservatorship had been adopted by the court on November 16, 2001. EX5; EX6. Moreover, the Bowmans would have had no reason to file a motion to terminate Robert’s conservatorship and gain control over Nikki’s body if Larry Bowman were still temporary managing conservator.

The next day, *four days after Nikki’s death*, Larry Bowman, now purportedly with his estranged daughter Michelle Bowman, filed a pleading styled “First Amended Motion for Termination of Conservatorship and for Final Disposition of the Body of the Child Which Was Subject of This Suit.” EX11. Even though Larry Bowman had previously claimed that Michelle’s parental rights had already been terminated, her rights were asserted as a basis for granting the Bowmans’ motion.

Id. The amended motion also repeated the confusing statement that the agreement to name Robert as sole managing conservator “has never been entered into the Court’s file.” *Id.* But the agreement had plainly been adopted by Judge Calhoon, as noted in the Anderson County court docket, although no written order had ever been entered, either due to the court’s or the attorneys’ oversight. EX6.

Later, that day, Attorney Boone filed an Answer on Robert’s behalf, objecting to the improper form of the Bowmans’ motions and noting that, while Robert had “been accused of a crime,” he “does not have an attorney appointed at this time to represent him, and *he has stated that he is innocent of any wrong doing.*” EX13 (emphasis added).

Nevertheless, Judge Calhoon signed an order granting the Bowmans’ motion to terminate Robert’s sole managing conservatorship. EX12 (Order on Final Disposition). The Order on Final Disposition awarded Michelle Bowman, as “the natural mother of the child,” “the right to make all decisions as to the final disposition of” Nikki’s body although Michelle had played no role in Nikki’s life since CPS had taken Nikki from Michelle at the hospital soon after Michelle gave birth. Perplexingly, the Order on Final Disposition states that it was entered after “hearing evidence[.]” *Id.* Yet no transcript has ever been produced of a hearing of any kind before Robert was summarily stripped of his parental rights. Additionally, the court’s timestamps show that the Order on Final Disposition was entered 23

minutes after Attorney Boone had filed the Answer on Robert's behalf. EX6. No docket entry suggests that a hearing took place.

The Order on Final Disposition demonstrates that, at least by that date, the Anderson County Judiciary knew that the Bowmans did not have legal authority to authorize removing Nikki from life-sustaining care when the Bowmans did so—but someone within the Anderson County Judiciary had falsely told CMCD that the Bowmans had legal authority to make that decision. EX1.

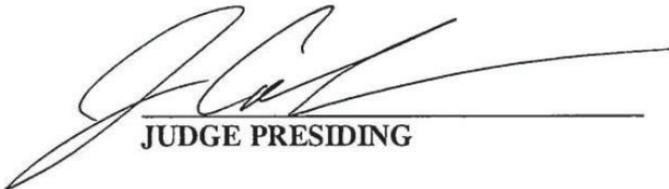
It has recently been discovered that, the same day that Judge Calhoon signed the Order on Final Disposition, Judge Calhoon took action in the criminal case. Undersigned counsel only realized that Judge Calhoon had entered an order in the criminal case after obtaining the complete custody file related to Nikki and then re-reviewing the Clerk's Record and discovering an order with Judge Calhoon's (illegible) signature on it.²⁴

See Judge Calhoon's (illegible) signature on Order on Final Disposition entered in the custody suit:

²⁴ The need to review the custody case file only ripened after it was disclosed to undersigned counsel that the Anderson County Judiciary had played a direct, undisclosed role in the unlawful termination of Nikki's life support.

After hearing evidence in same, the Court is of the opinion that the natural mother of the child, GWENDOLYN MICHELLE BOWMAN, has the right to make all decisions as to the final disposition of the body of NIKKI MICHELLE CURTIS BOWMAN. Therefore, IT IS ORDERED that said motion be and is hereby GRANTED.

SIGNED this 5 day of February, 2002.


JUDGE PRESIDING

EX12.

Compare with Judge Calhoon's (illegible) signature on "Magistrates [sic] Findings and Order on Application for Court Appointed Attorney Anderson County, Texas" (Order of Appointment) entered in the separate criminal case that same day:

The Counsel Coordinator is hereby directed to immediately inform the above appointed counsel of said appointment and to forward a copy of this order to said counsel.

The Anderson County Sheriff's Office is hereby ordered that is said accused remains in custody, to forthwith serve on the above accused a copy of the findings of the Appointing Authority, and in any event, to fill out and make a return indicating the time and date of such service, if any and return a copy to said appointing authority by personally returning the same or by depositing said copy in the box provided the District Judges' Office in the Anderson County Auditor's office

Signed and ordered this 5 day of Feb, 2002.


Presiding Judge

EX14.

With the entry of the Order of Appointment, Judge Calhoon appointed local Palestine attorney Steve Evans to represent Robert. Because Robert was indigent, he had to have a lawyer appointed to represent him.²⁵ The Order of Appointment directed the Sheriff's Office to deliver the order to the accused; and a cover letter on "District Judges' Office" letterhead shows that a copy was to be mailed to Steve Evans' P.O. Box. *Id.* There is no evidence that any hearing was held in which Robert was made aware of Judge Calhoon's decision to take action in the criminal case being prosecuted by his son Mark Calhoon such that Robert could have made a contemporaneous objection.

V. The Prosecution

Steve Evans, the Anderson County attorney whom Judge Calhoon appointed, took the position from the outset of the representation that his client was guilty because Evans considered the case to be a "classic" example of Shaken Baby Syndrome. Attorney Evans shared with all potential jurors during jury selection his view that this was a shaken baby case or acquiesced as one of the prosecutors did so. *See* 7RR-38RR. Then Attorney Evans shared his view that this was indeed a "shaken baby" case with the seated jurors during Opening Statements. 41RR57-61. During trial, Attorney Evans expressly *endorsed* the SBS opinions of Dr. Squires of CMCD

²⁵ *See Gideon v. Wainwright*, 372 U.S. 335 (1963); *see also* EX14.

and of Dr. Urban the medical examiner, even though his client had consistently told him that he did not shake or otherwise harm Nikki. 42RR120; EX18. Evans's "defense strategy" was to argue that, although his client (to whom he barely spoke), was guilty of a crime, it did not warrant the death penalty. EX18.

During Robert's 2003 trial, his lawyers put on no experts to counter the State's SBS hypothesis. The only two experts to testify about the cause of Nikki's death were the State's witnesses: Dr. Squires (the CAP at CMCD who had diagnosed SBS) and Dr. Jill Urban (the medical examiner who had performed the truncated autopsy the next day).²⁶ Both Drs. Squires and Urban provided extensive testimony consistent with a version of SBS that has since been entirely discredited.²⁷

The State's medical experts told Robert's jury that, in their view, the shaking had to have been very violent, involving "shearing" forces equivalent to those

²⁶ The two local doctors who had treated Nikki days before her collapse also testified as fact witnesses: Dr. Konjoyan of Palestine Regional and Dr. Ross who owned the pediatric practice that had seen Nikki many times since she was 8-days old. Both testified that they did not believe a short fall could explain Nikki's condition. Both had prescribed Phenergan/promethazine to her that week; and Dr. Ross had also prescribed codeine. Because of the SBS consensus beliefs at that time, the defense did not question these doctors about the respiratory-suppressing effects of Phenergan and codeine that had been prescribed or how they may have played a role in causing Nikki's death.

²⁷ The extensive testimony Dr. Squires gave about SBS in the Roberson trial was virtually identical to her testimony in the case of Andrew Roark, who has since been exonerated. EX55 (chart comparing her testimony in the two SBS trials).

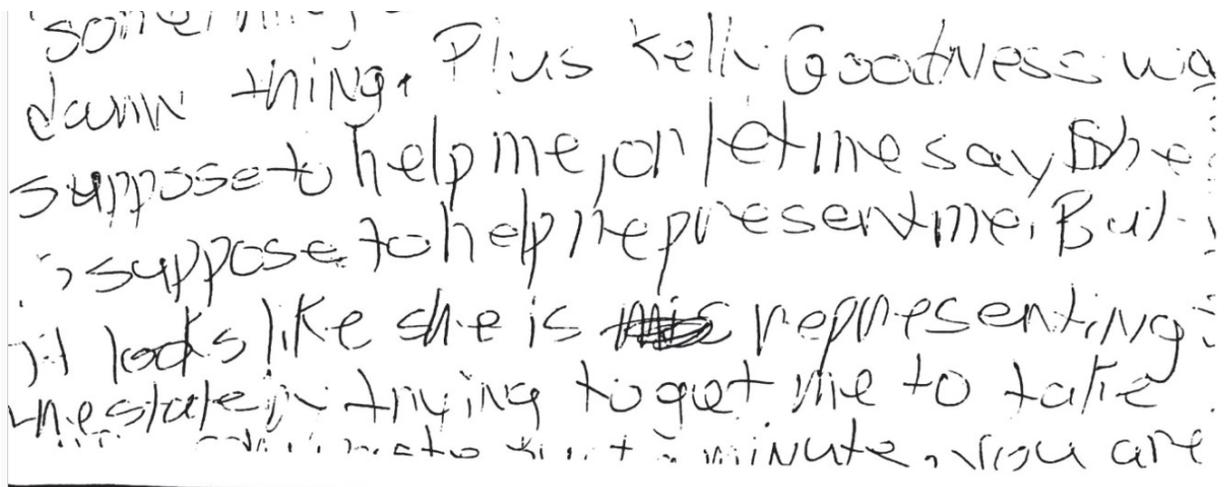
generated in a massive car accident or a fall from a multi-story building. 42RR109.²⁸ And, in their view, shaking, possibly with blunt impact that left no significant external markers, had to have caused Nikki’s internal head condition *because of the* absence of external injury. Therefore, in their view, it could be presumed that unwitnessed abuse involving shaking had occurred. EX4. Robert’s jury was also told by those witnesses and by multiple local medical-care providers that a short fall and her recent illness could not explain any aspect of Nikki’s condition, another belief that has since been disproven by evidence-based science.²⁹

The only “defense” Robert’s trial counsel provided was that Robert was so cognitively impaired he could not have known what he was doing. Evans tried to make this argument again in the punishment phase, relying on an inexperienced

²⁸ As biomechanical engineering expert Dr. Ken Monson explained in the 03 evidentiary hearing, it has since been proven that even very strong adults (like football players) shaking anatomically accurate replicas of infants—let alone a 30-pound toddler like Nikki—have been unable to generate sufficient forces to cause *any* aspect of the SBS triad. By contrast, there is now overwhelming evidence-based science that accidental short falls with head impact and many naturally occurring diseases and genetic disorders *can* cause these symptoms. See 03-06 Applications and all evidence supporting them.

²⁹ See, e.g., [Subdural hemorrhages and severe retinal hemorrhages in a short fall with a rotational component - Journal of the American Association for Pediatric Ophthalmology and Strabismus \(JAAPOS\)](#); [26 cm fall caught on video causing subdural hemorrhages and extensive retinal hemorrhages in an 8-month-old infant - PMC](#). See also Patrick D. Barnes, *Imaging of the Central Nervous System in Suspected or Alleged Nonaccidental Injury, Including the Mimics*, 18 TOPICS IN MAGN. RESON. IMAGING 53 (2007) (reporting some of the first research showing that the triad of internal head conditions then thought to be “diagnostic” of shaking was associated with other naturally occurring phenomena).

psychologist who had mostly worked for the prison system. She, having been told that Robert must have caused Nikki's death by shaking her, bragged on the stand about bullying him to "come clean" and admit that he had "lost it," when in fact Robert had never made any such admission. *See* 7EHRR85-137 (post-conviction neuropsychologist identifying six different ethical problems with the methodology and opinions of defense punishment-phase expert Kelly Goodness). Robert has consistently maintained that he did not understand what had happened to Nikki but he had done nothing to harm her, which is why he had turned down multiple plea offers. EX18. Robert also wrote the following note to his lawyers, pretrial, about Kelly Goodness, expressing his belief that she was working for the State:



'something' -
down thing. Plus Kelly Goodness was
suppose to help me, or let me say she
suppose to help me represent me. But
it looks like she is ~~the~~ representing
the state in trying to get me to take
a plea to get a minute, you are

Id. at Exhibit 1.³⁰

³⁰ Attorney Evans was aware of Robert's notes before trial because they were confiscated from Robert's jail cell by an investigator with the Anderson County DA's Office. That improper raid became the subject of one of the few pretrial hearings in the case. 40RR. After that pretrial hearing, Robert's papers were locked away in the

The jury did not hear from Robert himself because his lawyers advised him not to testify, contrary to his desire to do so.³¹ EX18. Robert sat defenseless in court while people said many things about him that were not true, making him feel “shocked and hurt, very sad and disappointed” because he had been “very devoted to taking care of” his girlfriend Teddie, her troubled daughter Rachel, and Nikki. *Id.* The defense’s only witness was Patricia Conklin, who testified briefly about how her sister Teddie struggles with telling the truth. Teddie testified for the State after being threatened with having her child Rachel taken from her by CPS. EX33. Additionally, Patricia testified that the only person she had ever seen harm Nikki was Teddie’s daughter Rachel. Patricia attested that she had never seen Robert be anything other than loving and kind with Nikki. 44RR10-22.

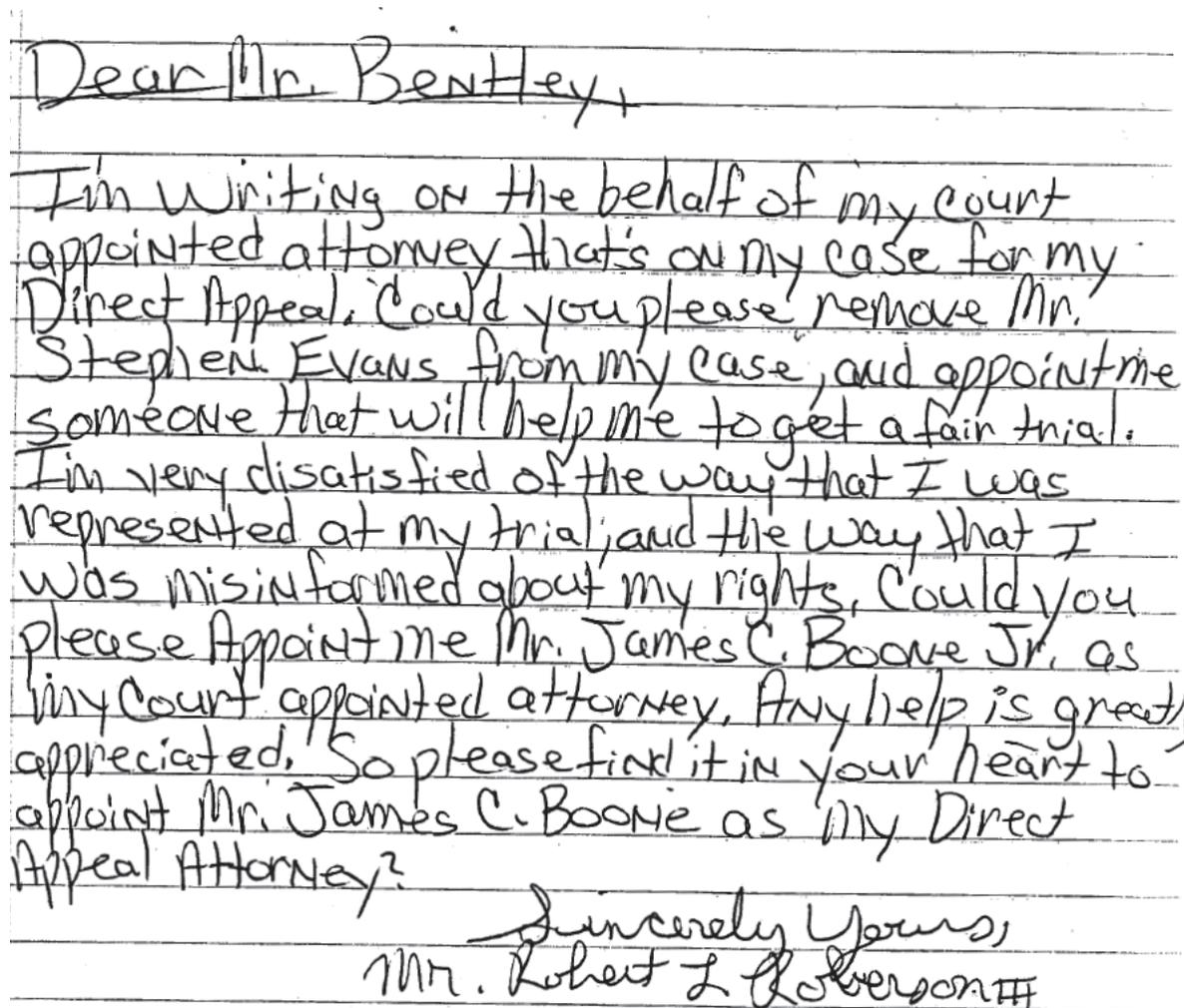
VI. Seeking Counsel to Pursue Innocence Claim for Years Thereafter

After Robert was sentenced to death, the attorney whom disqualified Judge Calhoun had appointed, Steve Evans, arranged to have himself appointed to represent Robert in his direct appeal. Robert had no say in this. The appeal would be based entirely on a trial record built upon Evans’ constitutionally impermissible

courthouse basement, along with the exculpatory CT scans of Nikki’s head and transcripts from hearings in the custody case. These materials were not produced until 2018.

³¹ Similarly, this past year, agents of the OAG repeatedly blocked efforts to bring Robert to the Texas Capitol to allow him to testify before the House Committee on Criminal Jurisprudence. *See, e.g.*, (<https://www.house.texas.gov/videos/20938>).

concession that the State's SBS cause-of-death hypothesis at trial was correct. During that appeal, Robert, then on death row, sent a letter to Judge Bentley begging to have someone other than Evans represent him, someone who would actually listen to him and get him a fair trial:



Dear Mr. Bentley,

I'm writing on the behalf of my court appointed attorney that's on my case for my Direct Appeal. Could you please remove Mr. Stephen Evans from my case, and appoint me someone that will help me to get a fair trial. I'm very dissatisfied of the way that I was represented at my trial, and the way that I was misinformed about my rights. Could you please Appoint me Mr. James C. Boone Jr. as my court appointed attorney. Any help is great appreciated. So please find it in your heart to appoint Mr. James C. Boone as my Direct Appeal Attorney?

Sincerely Yours,
Mr. Robert L. Robertson

EX45. Robert's letter to Judge Bentley is in the Anderson County Clerk's Record with a handwritten note showing that someone sent it to Steve Evans on February 23, 2006. *Id.* But Judge Bentley disregarded the request to replace Evans (and all similar requests that followed over the years).

For his initial state habeas, Attorney Evans recommended James Volberding. 49RR50. Judge Bentley complied. Volberding ultimately filed a state habeas application that largely reurged the same claims that had been raised in Evans' direct appeal, which the Court of Criminal Appeals deemed non-cognizable as habeas claims. As in the direct appeal, there was no challenge to the State's SBS cause-of-death hypothesis and no Actual Innocence claim in the all-important initial state habeas application.³² Attorney Volberding then arranged to have himself improperly appointed to represent Robert in federal habeas over Robert's objection.

Meanwhile, Robert continued to express his longstanding desire to assert his innocence. For instance, Robert sent a letter to the federal district court objecting to Volberding's appointment and asking to "appoint me some good Federal Attorneys to properly defend me on my Actual Innocence." EX46.

Volberding even acknowledged to the court that he was disregarding Robert's long-standing request to pursue his actual innocence:

Roberson asks assurance that a claim of actual innocence will be presented to this Court. Counsel will present a claim of actual innocence, but in a different form than Roberson may prefer. Among the claims to be presented is one asserting that Roberson is factually innocent, not because he was not at the scene, which carries difficulties given the testimony, but that ***this has never been more than a shaking baby case***, hyped up by emotion and a patently false child rape

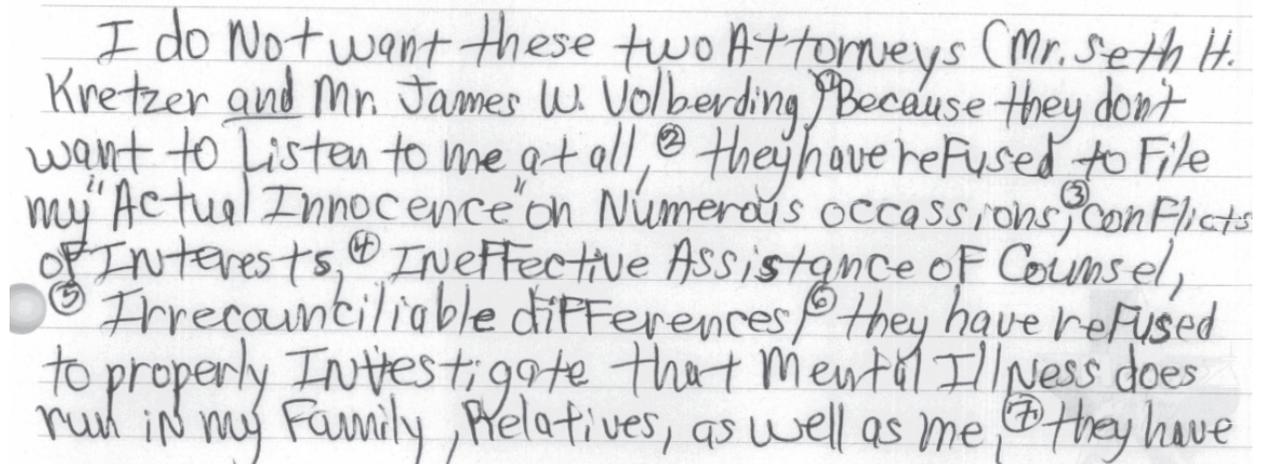
³² The initial state habeas application focused on prosecutorial misconduct allegations based on raiding Robert's jail cell and confiscating privileged materials, pursuing a baseless sexual assault allegation, and misinforming the jury about why the count based on those allegations was dropped right before jury deliberations.

allegation into capital murder to placate small town sentiments, and therefore lacking the requisite proof of determined intent to kill necessary for execution.

EX47 (emphasis added).

In one letter to Volberding that Robert sent, cc'ing the federal court, Robert wrote: "I'm informing you that I do want you to file my (Actual Innocent) Claim for me." EX48. Neither Volberding nor the court responded. Robert also asked the Fifth Circuit to "remove my Court Appointed Attorneys" because "my Attorneys refuses to File my 'Actual Innocence' Claims." *Id.*

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



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

EX49; EX50.

Robert finally obtained conflict-free counsel—on the brink of an execution date in 2016—willing to investigate his claimed innocence.

Now, after years of fighting for basic due process, it is clear that a foundational error was perpetrated at the outset when an order was entered in the criminal case by a disqualified judge (Jerry Calhoon) whose son (Mark Calhoon) served as a lead prosecutor after the Anderson County Judiciary engaged in a misrepresentation that allowed for the unlawful removal of Robert's daughter's life support.

NEW CLAIMS FOR HABEAS RELIEF

I. Claim 1: Roberson's Conviction Was Obtained Before a Tribunal Tainted by the Appearance of Bias, Where the Failure to Recuse Caused Structural Error and the Deprivation of Due Process Guaranteed by the Federal Constitution.

A. Legal Overview

A bedrock constitutional guarantee is the right to a trial before a tribunal that is not only impartial but *appears* impartial. *See, e.g., In re Murchison*, 349 U.S. 133, 136 (1955) (“to perform its high function in the best way ‘justice must satisfy the appearance of justice’”); *United States v. Jordan*, 49 F.3d 152, 155 (5th Cir. 1995) (“fundamental to the judiciary is the public’s confidence in the impartiality of our judges and the proceedings over which they preside.”); *Metts v. State*, 510 S.W.3d 1, 8 (Tex. Crim. App. 2016) (“Regardless of any actual bias harbored by [the trial court judge], the appearance of impropriety” requires recusal). New evidence, that Robert Roberson could not have previously obtained on his own, shows that he was denied this fundamental right.

On February 1, 2002, members of the Anderson County Judiciary acted at least recklessly by providing false information to the hospital charged with caring for Robert's daughter Nikki, enabling removing her from life support without his knowledge or consent. In the process, Robert's parental and constitutional rights were violated. This action by the Anderson County Judiciary was undertaken so that Nikki could be pronounced dead and her father could then be charged and arrested for the crime of capital murder.

On February 1, 2002, CMCD could not have learned who had legal authority to authorize terminating life support by simply consulting the public docket in the custody suit. EX5. From that docket, CMCD could only have learned that the dispute affecting Nikki had been resolved by agreement of the parties on unspecified terms approved by Judge Calhoon on the record on November 16, 2001. *Id.* To know the *contents* of the agreement, someone would have had to either (1) obtain and review the transcript of the 11.16.2001 court proceeding or (2) confer with the presiding judge (Jerry Calhoon) and obtain assurances that he had an accurate memory of the agreement the court had adopted or (3) confer with the attorneys-of-record for both parties and determine whether they agreed on what the contents of the agreement were. There is no evidence any of that occurred.

However, there is now evidence that, on or before the morning of February 1, 2002, CMCD contacted the Anderson County Judiciary, which directed CMCD to

the Bowmans as the persons with the legal right to authorize removing life-sustaining care from Nikki—which was false and which the Anderson County Judiciary knew or should have known was false. Then, several days later, Judge Calhoon entered an order, without affording Robert due process, whereby his parental rights were summarily terminated after-the-fact. Then, Judge Calhoon, who should have already recused himself to avoid the appearance of impropriety, injected himself into the criminal case being prosecuted by his son Mark Calhoon. The foundational order that Judge Calhoon entered, appointing counsel to the indigent defendant Robert Roberson, resulted in him being represented by a lawyer who provided no meaningful defense and who flagrantly disregarded his client’s clear and consistent claim of innocence. The resulting trial was exceptionally unfair, a process broken from the outset by judges who disregard the presumption of innocence, the law governing parental rights, and the law governing recusal.

There remain numerous factual gaps, which will likely be impossible to fill at this juncture. The presiding judge at trial (Bentley) and Robert’s family-law attorney (Boone) are both deceased; other principal witnesses are elderly and retired. But the new evidence alone exposes improprieties and a lack of appearance of impartiality, requiring relief.

Relief in the form of a new trial before an unbiased tribunal is imperative under Texas law as well as under Sixth Amendment fair-trial and Fourteenth

Amendment due-process jurisprudence. *See, e.g., Metts v. State*, 510 S.W.3d 1, 8 (Tex. Crim. App. 2016); *In re Murchison*, 349 U.S. 133 (1955). At the very least, the new claims should be authorized for further factual development.³³

All facts alleged above and in the pending 06 Application are incorporated here by reference.

B. Due Process Requires an Impartial Tribunal.

The Fifth, Sixth, and Fourteen Amendments to the U.S Constitution and Article 1, sec. 19 of the Texas Constitution guarantee a fair trial as foundational to due process of law. Most fundamentally, a fair trial requires an impartial judge. *See, e.g., Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (“It is axiomatic that ‘[a] fair trial in a fair tribunal is a basic requirement of due process.’”) (quoting *In re Murchison*, 349 U.S. at 136); *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). That

³³ Further fact-finding related to the new judicial misconduct claims would be considerably constrained because of the amount of time the information in question has been withheld, the deaths of Judge Bentley and Attorney Boone, and the retirement of virtually all other principals involved in the core facts. A remand would at least afford an opportunity to subpoena the CMCD records and take the depositions of retired Judges Calhoon, Parsons, and Bournias, the Bowman’s family law attorney Daniel Scarbrough, the retired District Clerk, and retired detective Joe Berreth (whom records show received the call from CMCD after Nikki was pronounced dead and who then obtained the arrest warrant from now-deceased Judge Bentley). It is, of course, unknown how reliable anyone’s memory would be considering the events occurred over 23 years ago and considering the problematic gap in the contemporaneous records. But these claims should be considered as an appendage to the Actual Innocence claim.

is, “the floor established by the Due Process Clause clearly requires a fair trial in a fair tribunal.”

Under the U.S. Constitution, the Texas Constitution, and the Texas Code of Judicial Conduct, judges must avoid both actual impropriety and the appearance of impropriety because of the core role the judge plays in any trial. That is, “[t]he role of the judiciary is central to American concepts of justice and the rule of law.... [J]udges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system.” TEXAS CODE OF JUDICIAL CONDUCT PREAMBLE. “Our system of law has always endeavored to *prevent even the probability* of unfairness.” *In re Murchison*, 349 U.S. at 136 (emphasis added). *Accord Jordan*, 49 F.3d at 155 (“fundamental to the judiciary is the public’s confidence in the impartiality of our judges and the proceedings over which they preside.”).

These principles are why recusal rules exist. Indeed, the Supreme Court has held that due process requires a judge to recuse under circumstances where “experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.” *Caperton*, 556 U.S. at 877 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). The question is “not whether the judge is actually, subjectively biased,” *id.* at 881, but instead whether the “situation is one ‘which would offer a possible temptation to the average . . .

judge to . . . lead him not to hold the balance nice, clear and true.” *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986). As the Supreme Court has explained, “[e]very procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.” *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). The Supreme Court has recognized that “[s]uch a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.” *Murchison*, 349 U.S. at 136. “But to perform its high function in the best way ‘justice must satisfy the appearance of justice.’ ” *Id.* (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

In sum, even absent evidence of actual bias, due process requires a judge to recuse where the facts, viewed objectively, could reasonably give rise to a suspicion of bias, partiality, or impropriety. When a judge fails to recuse when it would have been objectively reasonable to do so, a litigant is denied due process. *See Williams v. Pennsylvania*, 136 S.Ct. 1899, 1910 (2016) (holding “[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).

C. The Appearance of Bias and Impropriety Is Now Objectively Obvious.

Robert Roberson’s right to an impartial tribunal was violated because the Anderson County Judiciary was, at the very least, presumptively biased against him.

The judiciary’s *direct* role—in disregarding his parental rights and providing false information to hasten his daughter Nikki’s death through the unlawful removal of life support, which enabled charging him with murder before any meaningful investigation was undertaken—evidences a clear appearance of bias. *See Buntion v. Quarterman*, 524 F.3d 664, 672 (5th Cir. 2008) (noting that having a judge who “is biased against the defendant or has an interest in the outcome of the case” violates the Fourteenth Amendment right to due process and “[a] likelihood or appearance of bias can disqualify a judge as well”) (citing *Taylor v. Hayes*, 418 U.S. 488, 501 (1974)). “A criminal defendant tried by a partial judge is entitled to have his conviction set aside, no matter how strong the evidence against him.” *Edwards v. Balisok*, 520 U.S. 641, 647 (1997) (citations omitted). And here, the conviction hinged entirely on a medical hypothesis—a version of SBS that no reasonably informed medical professional would endorse today because it was never validated and has since been entirely discredited by evidence-based science. *See* 06 Application.

The most basic notion of a “fair trial” means that a judge must serve as a neutral arbiter and cannot be directly implicated in the underlying facts of the case. Here, the Anderson County Judiciary played a direct role in the causal chain involving disregarding the law governing parental rights, providing false information in the context of an end-of-life decision, hastening Nikki’s death to

enable her father's arrest, terminating Robert's parental rights without any due process after Nikki was dead, and then failing to ever disclose the judiciary's role in this causal chain. These shocking facts affected the very structure of the proceeding that resulted in Robert's conviction and death sentence.

Now, over 23 years later, it would likely be impossible to determine who specifically within the Anderson County Judiciary (of the four district court judges and agents then under their supervision) made the reckless misrepresentation to the CMCD that resulted in hastening Nikki's death. Likewise, it would be impossible to determine when and how Judge Bentley, now deceased, learned the specifics. It is, however, now known that Judge Calhoon knew of these improprieties when he stripped Robert of his parental rights without due process and then reached into the criminal case to enter the Order of Appointment on the same day. Collectively, the objective evidence establishes a palpable appearance of partiality toward the State that must be attributed to the two presiding judges who played critical roles in Robert's trial, Judges Calhoon and Bentley.

D. The Appearance of Judicial Bias and Impropriety, Reflected in the Anderson County Judiciary's Undisclosed Role in the Underlying Facts, Violated Roberson's Right to Due Process.

The Anderson County Judiciary's reckless decision to misinform CMCD about the Bowmans having legal authority to sanction removing Nikki from life support when it knew or should have known that her father was Nikki's sole

managing conservator suggests bias against Robert Roberson. Separately, Judge Calhoun's disregard of the presumption of innocence when he stripped Robert of his legal rights as a father under state law and as a citizen under the Texas and U.S. Constitutions suggests bias against Robert Roberson. Additionally, Judge Calhoun's unlawful entry of a foundational order in the criminal case when he was disqualified and should have recused suggests bias against Robert Roberson. It is impossible now to know what Judge Bentley knew at any point while presiding over the criminal case for nearly 15 years. But the appearance of partiality created by the failure to disclose the role the Anderson County Judiciary had played in the end of Nikki's life taints the fairness of the entire case. Judge Bentley, like all of Anderson County's four judges, should have recused himself.

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”). Again, 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)).

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 appearance-of-impartiality 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.³⁴

Furthermore, “[a] judge must recuse in any proceeding in which . . . the judge has personal knowledge of disputed evidentiary facts concerning the proceeding[.]” TEX. R. CIV. PROC. 18b(b)(3). In part, this is because the Rules of Evidence prohibit a presiding judge from testifying as a witness; thus, not requiring the judge to recuse himself would deprive a party of a necessary witness. TEX. R. EVID. 605. Judges

³⁴ 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.

cannot oversee cases when they themselves have become witnesses, without violating due process. *In re Murchison*, 349 U.S. at 138 (recognizing that “it is difficult if not impossible for a judge to free himself from the influence of what took place” and his own memory and interpretation of events). Facts about the custody dispute were at issue in Robert’s trial and were quite relevant to the credibility of one of the State’s key witnesses (Verna Bowman). Judge Bentley was a witness with respect to who gave false information to CMCD regarding the Bowmans on behalf of Anderson County and why. Yet these circumstances were not disclosed, suggesting an impropriety. *Williams*, 136 S.Ct. at 1905 (“no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.”) (quoting *Murchison*, 349 U.S. at 136).

Most critically, Judge Calhoun’s and Judge Bentley’s failure to recuse here amounted to a violation of the federal constitutional right to due process. When the facts, viewed objectively, can reasonably give rise to a *suspicion* of bias or impropriety, recusal is warranted. *Id.* at 1910 (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).

Because of the direct role the Anderson County Judiciary played in the rampant improprieties surrounding the end of Nikki’s life and the disregard for the presumption of innocence, all appearance of impartiality has been eviscerated.

Under such circumstances, as a matter of Texas and federal constitutional law, recusal was required. *In re Murchison*, 349 U.S. at 137. The failure to recuse is an injury of constitutional dimensions, requiring a new trial.

E. Evidence of Actual Bias Also Abounds.

The evidence of actual bias is not just speculative. The new evidence establishes this sequence of events:

- CMCD did not remove Nikki from life support until it obtained information from the Anderson County Judiciary about who had authority to authorize removing Nikki from life support.
- The Anderson County Judiciary knew at the time that the Bowmans did not have legal authority to authorize withdrawing life-sustaining care from Nikki because the Anderson County Judiciary had **named** Robert Roberson Nikki's sole managing conservator two months earlier.
- CMCD informed officials in Anderson County after Nikki was pronounced dead around 7:00 PM on February 1, 2002, and that same night, a detective with the Palestine police (Berreth) obtained an arrest warrant from an Anderson County judge (Bascom Bentley) citing CMCD CAP's SBS diagnosis.
- Palestine Detective Berreth used the arrest warrant to arrest Robert that same night, then provided biasing information to the medical examiner and sat in on the slipshod autopsy the next morning.
- Four days after Nikki's death, the Anderson County Judiciary (Judge Calhoon, presiding), terminated Robert's parental rights without Robert having counsel to defend him against the criminal allegations being used to justify stripping him of his parental rights, without him knowing of the role the Anderson County Judiciary had played in Nikki's removal from life support, and without any opportunity to oppose the Bowmans' improper motions.

By February 5, 2002, when Robert's parental rights were terminated after-the-fact and without due process, every member of the Anderson County Judiciary should have known that the Bowmans had had no legal authority on February 1, 2002, to authorize withdrawing life-sustaining care from Nikki since the Anderson County Judiciary had access to, and supervisory authority over, its district court records. Yet the fact that the Anderson County Judiciary had misinformed CMCD about who had the right to make major medical decisions affecting Nikki on February 1, 2002, was never disclosed to her sole managing conservator, Robert Roberson, or documented in any public record.

Judge Calhoon's critical role, immediately thereafter, reflects extreme bias. Judge Calhoon was disqualified by virtue of his son Mark Calhoon's role as Anderson County's Chief Felony Prosecutor, yet Judge Calhoon took it upon himself to select and appoint Robert's defense counsel. Alone, this disregard of an obvious conflict of interest indicates a bias against Robert Roberson. *See* TEX. R. CIV. PROC. 18b(b)(7) (providing that "[a] judge must recuse in any proceeding in which: the judge or the judge's spouse, or a person within the third degree of relationship to either of them ... (A) is a party to the proceeding . . . ; (B) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding."). Judge Calhoon's central role in appointing Robert's defense counsel is objectively unreasonable. The lawyer whom Judge Calhoon appointed provided

no substantive defense to the capital murder charges that Judge Calhoon's son pursued zealously against Robert Roberson. *See* Claim 2, below.

Similarly, Judge Bentley comported himself in a manner reflecting bias. For instance, as an experienced judge, he recognized the high risk of a mistrial if the prosecution went forward with a sexual assault allegation and then failed to prove-up such a prejudicial charge: "You know when you get off into sexual assault herein lies the problem. If you produce evidence, but it doesn't rise to the level to carry your burden on that, you know, we've built error into the case already." 41RR18. But Judge Bentley did not explore what the supposed evidence of sexual assault was outside of the jury's presence. All the prosecution had was the baseless speculation of one Palestine nurse—Andrea Sims—who pretended to be SANE-certified when she did not in fact have that certification. Her baseless speculation, when Nikki was lying in a coma in the Palestine ER, was made without considering the fact that Nikki had had diarrhea for over a week and a doctor had prescribed suppositories three days before in the very hospital that employed Nurse Sims. The prosecution knew by trial that *no* medical professional at CMCD or the medical examiner had endorsed Nurse Sims' opinions. The prosecution knew by trial that CMCD's Dr. Squires, the CAP who had made the SBS diagnosis, believed the red skin around Nikki's anus was something "every mother knows" about—suggesting it was a common issue with children still in diapers. 42RR100, 120. The prosecution also knew by trial that

the DPS analysis of the sexual assault kit that Nurse Sims had collected and all of the bedding collected from Robert's house had yielded *no* evidence of sexual contact. EX39. But the prosecution, led by Mark Calhoun, went forward with the sexual assault allegation anyway—relying entirely on the unqualified, highly biased Nurse Sims—which should have prompted Judge Bentley to grant a mistrial, which he refused to do.

Thereafter, the prosecutors dropped the sexual assault allegation when the charge was given to the jury. Then, on appeal, they claimed “no harm” from the denial of a mistrial because the jury had never decided the sexual assault allegation. That “no harm” argument is completely contrary to basic common sense. As lead detective Brian Wharton has acknowledged, once the jury *heard* the allegation of “anal tears,” regardless of the truth, it was “very prejudicial” in terms of presuming Robert's guilt. EX38. Detective Wharton has also expressed shock that the sexual assault allegation was presented at trial at all since there was *no evidence* to support it developed in the investigation that he led. *See id.*; *see also* EX40. Judge Bentley should have appreciated this obvious unfairness too.

The trial itself exposes other indications that Judge Bentley was laboring under a bias against Robert Roberson from the outset. For instance, during the punishment-phase, Judge Bentley threatened Robert's mother Carolyn Roberson with contempt of court and jail time because she was quoted in the paper by a

reporter who overheard her saying that “the year prior has been a tremendous drain on her family. It’s been like a nightmare”; that “her son is innocent and that the girl’s death was an accident”; and that Nikki’s “daddy did love her and she loved him”; and that [“h]er daddy loved her very much.” For having been overheard defending her son, *whom she believed to be innocent*, Judge Bentley threatened Mrs. Roberson with “contempt and placing [her] in the Anderson County Jail.” 48RR2-6.³⁵

Then, directly after sentencing Robert to death, while the jury was still present, Judge Bentley issued a scathing rebuke direct at Robert, who stood mutely and powerlessly by. Judge Bentley admitted that he had been holding himself back “throughout this trial.” 49RR48. As part of the injudicious outburst, Judge Bentley ordered that Robert’s family, starting with his mother, be investigated by the DA’s Office, law enforcement, and CPS:

Mr. Roberson, I have nothing to say to you except that I agree with the jury a hundred percent and I would be derelict if I didn’t say this. There is one thing. I have refrained throughout this trial and that is the horror of story after story of people testifying that their children had been sexually assaulted, brutalized, everybody-- That is a common thread for almost everyone that testified in here about children. CPS, I recommend and the District Attorney’s office and law enforcement to investigate immediately the homes of these children that the testimony involved concerning the assaults and abuse and I would start with the defendant’s mother, first of all. And I don’t think that any stone should be left unturned. What happened to Nikki is more than a tragedy. And what

³⁵ An attorney named Pam Fletcher was appointed to represent Mrs. Roberson after she was threatened with contempt; Ms. Fletcher is now Judge Fletcher, who presides over Anderson County’s 349th District Court, formerly presided over by Judge Jerry Calhoon.

has happened to all these other children is unspeakable. But I recommend that and if I have the authority I'll order it. And I'd look at Mrs. Roberson first. I believe there's five children living with her. There's other people that have children living with them and that was a common thread. Every child has been exposed to too much.

49RR48-49.³⁶

Of course, the ability to raise concerns about judicial bias suggested by the face of the trial record was waived long ago by Robert's patently deficient initial habeas counsel. But the new evidence of the Anderson County Judiciary's *direct* involvement at the outset in an undisclosed conveyance of materially false information to CMCD, which Judge Bentley never disclosed, are facts utterly inconsistent with any objective notion of impartiality.

Moreover, a recently unearthed tribute to Judge Bentley, published in the local paper soon after his retirement, quotes Judge Bentley making several comments about both "the Roberson case" and death penalty cases generally that do nothing to dispel the perception that he harbored a bias against Robert Roberson. *See* EX16 (*Behind the Bench: Longtime judge retires after more than 30 years*) (explaining "he

³⁶ For a beloved judge to have made these pronouncements in open court, at the conclusion of one of the community's most high-profile and painful cases, must have affected the then-new attorney in the DA's Office, ADA Allyson Mitchell. ADA Mitchell is now DA Mitchell, who has been fighting against habeas relief for Robert Roberson since 2016. Mitchell was involved in the 2003 trial, but not in a public-facing way. *See, e.g.*, 48RR6 (showing that ADA Mitchell was in court when Robert's mother was berated by Judge Bentley and that ADA Mitchell was handling issues for the State behind the scenes).

liked being on the bench for capital murder cases, when the punishment of death was on the table”; quoted as saying “Most everyone is for the death penalty but would prefer someone else do it”; and stating of the Roberson case that he wished he could “finish what he started”). Judge Bentley’s comments are particularly striking as they were made knowing that the case was ongoing and that Robert’s long-standing claim of innocence had finally been raised—after a delay that cannot be attributed to Robert himself. *See* Claim 2, below.

Again, due process requires that a trial judge not just be impartial, but that he avoid the *appearance* of partiality so that defendants and others in the courtroom can have an objective and reasonable faith that they are party to a fair proceeding. *See United States v. Microsoft Corp.*, 253 F.3d 34, 115 (D.C. Cir. 2001) (explaining that “[d]eference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges,” “justice must satisfy the appearance of justice.”) (quoting Code of Conduct for United States Judges, Canon 1 cmt. (2000)). In other words, due process is violated when circumstances surrounding a trial court “might create an impression of possible bias.” *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 149 (1968).

Once aware of the Anderson County Judiciary’s direct role in underlying facts (disregarding the law governing parental rights to hasten the removal of Robert’s

daughter from life support and then his arrest for murder), no defendant, litigant, or observer could reasonably believe that the trial court could be impartial. The 2003 trial cannot now be considered a proceeding that was, by any stretch of the imagination, “fundamentally fair.” Accordingly, Robert Roberson’s conviction and death sentence resulting from such an apparently biased and unfair proceeding must be vacated.

The newly uncovered evidence involves shocking violations of Mr. Roberson’s due process rights. Life support was withdrawn from his daughter, without his knowledge or consent, arising from the presumption that he had perpetrated a horrible crime and thus the law governing parental rights did not matter. This conduct was perpetrated by the very judiciary that then presided over his trial. The damage of such a circumstance is incalculable. “The United States Supreme Court has repeatedly held that a violation of the right to an impartial judge is a structural error that defies harm analysis.” *Abdygapparova v. State*, 243 S.W. 3d 191, 209 (Tex. App.—San Antonio 2007, pet. ref’d). This is because a biased trial judge affects the entire “framework within which the trial proceeds” and prevents the criminal trial from “reliably serv[ing] its function as a vehicle for determination of guilt or innocence.” *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991); *see also Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997) (acknowledging structural errors recognized by *Fulminante*).

F. Parallels with *Ex parte Young* Abound.

Although the specifics are obviously different, the structural problem that has now been revealed is reminiscent of the one the Court of Criminal Appeals recognized in *Ex parte Young*, No. WR-65,137-05, 2021 WL 4302528 (Tex. Crim. App. Sept. 22, 2021). *Ex parte Young* raised claims for habeas relief based on belated revelations that a former prosecutor on the case had played a dual, undisclosed role as a paid judicial clerk advising the judge who had presided over Young's case. That fact pattern supported Young's claims that his "due process rights to an impartial judge and a fair trial" had been violated and caused structural error. *Id.* at *4.

The Court of Criminal Appeals concluded that Young's claims met the requirements of Article 11.071, sec. 5, remanded for further proceedings, and soon thereafter granted relief in the form of a new trial. Importantly, *Ex parte Young* did not involve a substantial claim of Actual Innocence, as is the case here. But in both cases, an underlying conflict, casting doubt on the neutrality of the judiciary, violated the right to due process, requiring a new trial. *See id.* ("fundamental to the judiciary is the public's confidence in the impartiality of our judges and the proceedings over which they preside.") (quoting *United States v. Jordan*, 49 F.3d 152, 155 (5th Cir. 1995)). *See also Ex parte Lewis*, 688 S.W.3d 351 (Tex. Crim. App. 2024) (Richardson, J. concurring) (expressing outrage about the palpable impropriety of dual role played by member of DA's Office prosecuting matters while also working

for presiding judge); *Wilson v. Midland County, Texas*, 89 F.4th 446, 459 (5th Cir. 2023) (referring to the conflict of interest in *Ex parte Young* as “utterly bonkers”).

Here, because there was never a disclosure nor a recusal by Judge Bentley, the entire proceeding that followed was a miscarriage of justice. *Metts*, 510 S.W.3d 1 (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 State’s consent to defendant’s jury-trial waiver acted as counsel for the State and was therefore disqualified from subsequently presiding over hearing on motion to revoke deferred adjudication community supervision).

The recent revelations suggest that judicial actors were, in essence, serving as adjuncts of law enforcement, disregarding the presumption of innocence and providing misinformation that enabled Nikki’s removal from life support to precipitate her father’s arrest for murder. Tellingly, the person in charge of law enforcement’s investigation in this case, Detective Brian Wharton, has completely disavowed it. EX52 (Wharton OpEd in *Dallas Morning News*). But to date, no Anderson County official has disclosed the specific and direct role the Anderson County Judiciary played in pre-judging Robert and, under color of law, violating parental rights law by telling CMCD that the Bowmans had legal authority to decide whether to withdraw life-sustaining care from Nikki when that was demonstrably false as the Anderson County Judiciary well knew, as it had named Robert Nikki’s

sole managing conservator little more than two months before her final illness. EX5; EX6.

Had these facts been disclosed and had Robert had constitutionally competent counsel, it is inconceivable that he would not have been able to recuse all of Anderson County's district judges and obtained a transfer of his case to an unbiased community.

It may be understandable that members of a small, tightknit group of judges in a rural community like Anderson County were blinded by the tragic circumstances of a young child such that they might have impulsively acted in an unlawful manner, prejudging her father before any meaningful investigation had occurred. The rush to judgment may be especially understandable when most of this small set of otherwise-honorable judges had played roles in the custody lawsuit involving this very child. When that child arrived in the town's only hospital (for the last of many times) it must have been horrifying to think: Did we miss something? Did we leave her in a vulnerable position by granting full custody to the father who had fought to be in her life? Was it especially easy to prejudge Robert Roberson because he has cognitive impairments and a life-long developmental disability (Autism), which has caused "odd" vocal ticks and stammers and neurodivergent behavior, especially in times of high stress?

But that blindness in the face of an excruciating situation is inconsistent with the fundamental judicial function. Judge Calhoon's failure to recuse when his son was the prosecutor, and Judge Bentley's failure to disclose the specific role played by the Anderson County Judiciary, which acted contrary to law in a way that directly affected the fate of both the child and her father, are circumstances at odds with the basic notion of due process. They should have recused. Due process exists to protect even the poor, disabled, and powerless from a rush to judgment and the appearance of bias. The lack of due process resulted in the wrongful conviction of a father whose very ill little girl died tragically from circumstances utterly beyond his control.

II. Claim 2: When a Judge Who Should Have Disqualified and Recused Himself Instead Reached into the Criminal Case Being Prosecuted by His Son to Appoint Counsel for the Accused, Not Only Was the Right to Due Process Violated But Also Roberson's Sixth Amendment Autonomy-Right to Maintain His Innocence.

A. Legal Overview

Soon after Robert was accused and arrested, Anderson County Judge Jerry Calhoon took a series of actions that violated Robert's right to due process. But one action in particular was monumentally consequential, violating his Sixth Amendment right to an attorney who would honor his autonomy-right to maintain his innocence. Until recently, it was not recognized that Judge Calhoon had presided over *any* aspect of the criminal case. But upon re-reviewing the Clerk's Record

looking for any documentation of communications between the Anderson County Judiciary and CMCD, an order was unearthed with Judge Calhoon's signature on it. *See* EX14 (including "Magistrates [sic] Findings and Order on Application for Court Appointed Attorney Anderson County, Texas" hereafter "Order of Appointment").

There was previously no reason to suspect that Judge Calhoon had played any role in Robert's criminal case, which was prosecuted by Judge Calhoon's son Mark Calhoon. Precisely because Judge Calhoon's son Mark Calhoon was prosecuting the case, Judge Calhoon should have recused himself—from the custody case once it raised criminal allegations and most certainly from the criminal case itself.

Texas law makes clear that judges should not preside over cases involving a party or lawyer to whom the judge is closely related. This includes the parent-child relationship. *See* Article V, Section 11 of the TEXAS CONSTITUTION ("Disqualification of Judges" - "No judge shall sit in any case wherein the judge may be interested, or *where either of the parties may be connected with the judge, either by affinity or consanguinity*, within such a degree as may be prescribed by law, or when the judge shall have been counsel in the case.") (emphasis added). *See also* TEX. CODE CRIM. PROC. art. 30.01. ("CAUSES WHICH DISQUALIFY." "No judge or justice of the peace shall sit in any case where he may be the party injured, or where he has been of counsel for the State or the accused, or *where the accused or the party injured may be connected with him by consanguinity or affinity within*

the third degree, as determined under Chapter 573, Government Code.”) (emphasis added); See TEX. R. CIV. P. 18b(b)(8) (identifying among the “Grounds for Recusal and Disqualification of Judges” a 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.*”).

The Court of Criminal Appeals has repeatedly held that the recusal rules in the Texas Rules of Civil Procedure apply in criminal cases. See *Arnold v. State*, 853 S.W.2d 543, 544 (Tex. Crim. App. 1993) (stating that the recusal rules for district court judges apply “to criminal cases absent ‘any explicit or implicit legislative intent indicating otherwise’”); see also, e.g., *Ex parte Thuesen*, 546 S.W.3d 145 (Tex. Crim. App. 2017); *Ex parte Sinegar*, 324 S.W.3d 578, 581 (Tex. Crim. App. 2010).

The failure of a judge to recuse when the judge has a statutory conflict of interest can constitute a violation of the Code of Judicial Conduct. See TEX. CODE JUD. CONDUCT, Canon 2A, reprinted in TEX. GOV’T CODE, tit. 2, subtit. G app. B (requiring judges to avoid the appearance of impropriety in all of the judge’s activities and “comply with the law and . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”). Additionally, a judge’s failure to recuse where his involvement creates even the “appearance” of impropriety violates a litigant’s right to due process. *Caperton*, 129 S.Ct. 2252

(2009). *See also, e.g., Williams*, 136 S.Ct. at 1910 (emphasizing the importance of avoiding the “appearance” of any bias and finding that death-sentenced defendant’s right to due process had been violated where Chief Justice in post-conviction appeal had failed to recuse when he had been the district attorney who signed a form authorizing pursuit of the death penalty in the original trial even though he had not prosecuted the case himself).

Judge Calhoon affirmatively reached into the criminal case after Robert had been jailed. Judge Calhoon entered a foundational order—when Robert had no counsel to object to Judge Calhoon taking this action. This action alone violated his Sixth Amendment right to counsel. *See, e.g., Brewer v. Williams*, 430 U.S. 387 (1977) (clarifying that, once adversarial proceedings have been initiated against a defendant, he has a right to legal representation, and “[t]here can be no doubt that judicial proceedings ha[ve] been initiated” when the accused has been confined by the government). This constitutional error in turn caused structural error: counsel who blatantly disregarded Robert’s clear desire to maintain his innocence in violation of the Sixth Amendment.

Even if the Court of Criminal Appeals concludes that this claim was defaulted because the basis could have been previously ascertained through the exercise of reasonable diligence, the constitutional error should still be authorized and considered in light of the Actual Innocence claim, pending in the 06 Application and

reasserted below, supported by overwhelming evidence. *See Ex parte David Wood*, WR-45,746-04, Slip Op. at 48 (Tex. Crim. App. July 30, 2025) (Schenck, P.J., concurring in part and dissenting in part) (noting that leaving claims “unresolved on procedural grounds makes little sense” in a case involving “a sentence of death and material questions of guilt”) (citing *McQuiggin v. Perkins*, 596 U.S. 383, 392-93 (2013)).

B. A Rush to Judgment Resulted in a Set of Improper Judicial Orders Entered by a Conflicted Judge.

Days after Robert had been accused, arrested, and jailed, Judge Calhoon took a series of actions that resulted in depriving Robert of his Sixth Amendment right to counsel willing to pursue his primary, constitutionally protected objective: maintaining his innocence.

By February 1, 2002, when Robert was arrested, it had become clear that the custody lawsuit implicated a criminal case. But even if Judge Calhoon was somehow not directly involved in the Anderson County Judiciary conveying false information to CMCD so that Nikki could be removed from life support, declared dead, and then her father charged with murder, by February 4th, when the Bowmans’ filed their motion seeking to terminate Robert’s conservatorship, Judge Calhoon knew that Robert had been accused of a crime. The motion plainly stated: “The father of the child, ROBERT ROBERSON is currently in the Anderson County Jail under a

\$1,000,000.00 bond for the capital murder of NIKKI MICHELLE CURTIS BOWMAN ROBERSON.” EX10; EX11.

Additionally, Judge Calhoon knew that the Anderson County District Attorney’s Office,³⁷ wherein his son Mark Calhoon served as Chief Felony Prosecutor, would be prosecuting the case. Therefore, by at least February 4, 2002, when the Bowmans’ motion was filed, Judge Calhoon knew that he was disqualified under Rule 18b; thus, to avoid the appearance of impropriety, he should have done nothing further in the custody case, let alone anything in the criminal case.

That is, as of February 1st, or at the latest, by the time the Bowmans’ motion was filed on February 4th of 2002, Judge Calhoon knew that he should refrain from wielding any further judicial power affecting Robert Roberson. *See* TEX. R. CIV. P. 18b(b)(8) (identifying among the “Grounds for Recusal and Disqualification of Judges” a 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.*”); *see also Mosley v State*, 141 S.W.3d 816 (Tex. App.—Texarkana 2004 pet. ref’d)³⁸ (“Under Rule of Civil Procedure 18b(2)

³⁷ On information and belief, that small office then consisted of only 4-5 lawyers including: the elected District Attorney Doug Lowe, Chief Felony Prosecutor Mark Calhoon, current DA/then ADA Allyson Mitchell, and possibly 1-2 other lawyers.

³⁸ Because the Court of Criminal Appeals “refused” the petition in *Mosely*, under Texas law, the case is considered binding precedent, as if it were a decision of the higher court.

judges must disqualify themselves from proceedings in which their impartiality might reasonably be questioned or, as in this case, *where the judge’s son or daughter becomes an attorney in the case.*”) (emphasis added). In such a circumstance, a party is not required to file a motion identifying this kind of disqualifying fact as a prerequisite to a judge recusing. *See, e.g., Dunn v. County of Dallas*, 794 S.W.2d 560, 562 (Tex. App.—Dallas 1990, no writ). In any event, Robert had no way of raising this issue as he was completely excluded from the process whereby counsel was selected and appointed for him. There is certainly no evidence that the familial relationship between Judge Jerry Calhoon and Chief Felony Prosecutor Mark Calhoon was disclosed to Robert Roberson in open court; nor is there evidence that Robert made a knowing and intelligent waiver of the conflict (if such a waiver is even permissible).

Instead of recusing, Judge Calhoon first entered the Order on Final Disposition of Nikki’s body, effectively stripping Robert of his parental rights. EX11. The Order on Final Disposition, which seems to have been a proposed order submitted with the Bowmans’ motion, does not provide any rationale. But the only argument made in the Bowmans’ motion was that Robert’s conservatorship should be terminated because Nikki had died of “severe head trauma,” her father was incarcerated in the Anderson County jail having been charged with “capital murder” of Nikki, and her body was being held at a funeral home that was “awaiting

instructions for final disposition of the body[.]” *Id.* By granting the motion and entering the Order on Final Disposition, Judge Calhoon was plainly presuming Robert was guilty.³⁹

The same day that Judge Calhoon granted the Bowmans’ motion, summarily terminating Robert’s parental rights, Judge Calhoon went further. He entered the Order of Appointment in the criminal case, appointing local Palestine attorney Steve Evans to represent Robert. EX14. Judge Calhoon was not the presiding judge in the 3rd District Court, where the case was filed; and his colleague Judge Bentley had been the judge to issue the arrest warrant on February 1, 2002, and would go on to preside over the trial.⁴⁰ Therefore, there is no basis for arguing that Judge Calhoon acted out of some necessity.

The acts of selecting and appointing indigent defense counsel were *not* ministerial; these were discretionary—and hugely consequential—decisions.

³⁹ Because Nikki had died four days before, there can be no argument that summarily terminating Robert’s parental rights without due process was somehow necessary because he was incarcerated and thus could no longer care for Nikki.

⁴⁰ Judge Bentley was not the presiding judge for Anderson County’s 3rd District Court either. No records are in the Clerk’s Record showing why Judge Parsons, the 3rd District Court’s presiding judge, was not involved in any aspect of the criminal case initiated against Robert in Judge Parsons’ court. Seemingly, he recused himself. As argued above, Judge Bentley too should have recused because of the role the Anderson County Judiciary had played in enabling the unlawful override of Robert’s parental rights, paving the way for the unlawful removal of life support. However, Judge Calhoon’s involvement does not simply suggest an “appearance” of bias. He was statutorily disqualified; thus, there was no legitimate basis for him to insert himself into the criminal case.

On information and belief, Steve Evans was and is a local Palestine attorney who routinely accepts indigent defense appointments but also had, before this appointment, worked for the Palestine Regional Medical Center, the hospital that had repeatedly treated Nikki, including twice during the last week of her life. This is the hospital where her pneumonia was missed and from which she was sent home with prescriptions for Phenergan and Imodium. EX2. Attorney Evans accepted the appointment from a judge who was statutorily required to recuse himself—knowing that the client could not have waived the issue on his own from jail.

C. By Appointing Counsel When He Was Required to Recuse Himself, Judge Calhoon Not Only Created the Appearance of Impropriety and a Lack of Impartiality, He Deprived the Accused of His Sixth Amendment Autonomy-Right to Counsel Who Would Honor His Assertion of Innocence.

The entry of an order by a judge who was statutorily disqualified and should have recused himself is no mere “technicality.”⁴¹ Texas law expressly identifies disqualifying circumstances because of the bedrock constitutional mandate that those accused of crimes be afforded a fair trial before a tribunal without any *appearance* of impropriety or partiality. See *Ex parte Young*, 2021 WL 4302528 at

⁴¹ See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224-25 (1953) (Jackson Robert, J., dissenting) (“Procedural fairness and regularity are of the indispensable essence of liberty.... Let it not be overlooked that due process of law is not for the sole benefit of an accused. It is the best insurance of the Government itself against those blunders which leave lasting stains on a system of justice but which are bound to occur on *ex parte* consideration.”).

*4 (citing *In re Murchison* for the proposition that “A fair trial in a fair tribunal is a basic requirement of due process.”). The entry of the Order of Appointment by a disqualified judge paved the way for disregarding Robert’s consistent claim of innocence *for years*.

Throughout the representation, Attorney Evans disregarded his client’s protestations of innocence in violation of his Sixth-Amendment autonomy right to determine this fundamental issue. *See McCoy v. Louisiana*, 138 S. Ct. 1500 (2018) (reminding that “it is the defendant’s prerogative, not counsel’s, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt.”).

Attorney Evans never investigated Nikki’s medical history or the role her final illness may have played in causing her condition.⁴² At the time, Evans’ concession may have seemed reasonable because the mistaken mainstream belief in the medical community was that SBS was a legitimate diagnosis backed by science—thus

⁴² Pretrial, Attorney Evans did inquire about a post-mortem toxicology report showing a high level of promethazine (aka Phenergan) still in Nikki’s system, an issue never addressed by medical examiner Jill Urban. But Attorney Evans was misled by Dr. Urban during a transcribed telephone conference as she incorrectly suggested that promethazine was something Nikki had been given during her final hospitalization. *See* EX51 (transcript of pretrial meeting with Dr. Urban). The toxicology results were not discussed in the autopsy report itself, which Dr. Urban prepared the same day as the autopsy—several days before the toxicology report issued.

partially explaining why there was no “ineffective assistance of counsel” claim in Robert’s initial state habeas proceeding. Evidence-based science has since completely falsified the SBS opinions put before Robert’s jury as “fact,” as he has shown through evidentiary proffers and post-conviction testimony adduced in the 03-06 proceedings.

Even though Attorney Evans cannot be faulted for failing to predict how science would thereafter evolve, Attorney Evans’ complete and explicit concession that the State’s SBS theory was correct and his rejection of his client’s assertion of innocence caused structural error (and actual harm).

Attorney Evans shared his view that Nikki’s death was a “classic” instance of SBS throughout jury selection, in Opening Statements, throughout the presentation of evidence shaping all of his (minimal) cross-examination, and, most detrimentally, in instructing all of the defense punishment-phase witnesses to start with the *presumption* that Robert was indeed guilty of having violently shaken his daughter to death. As if more proof were needed, the extreme prejudice Evans’ concession-strategy caused is the way State’s counsel continues to this day to rely almost entirely on the trial record in arguing against habeas relief. But on its face, the trial record was developed without *any* adversarial testing of the State’s cause-of-death theory. That is, the State has yet to concede what should be patently obvious: when the appointed attorney for an indigent person entirely concedes that a crime occurred

and that their client perpetrated that crime and urges the jury to disbelieve his own client's explanation of what happened, then the trial record does not reflect anything resembling a fair process.

There is contemporaneous evidence that Robert was horrified by his attorneys' insistence that he must be guilty. In handwritten notes about his case, which were seized from his cell, pretrial, by the DA's office, Robert expressed alarmed that his appointed attorneys were not even trying to defend him:

- "My attorneys are not representing me professional!"
- "Lawyers [are] misrepresenting me."
- "[They] Falsely accusing me of things that I haven't done. So what's the deal anyway? You both need to get off your butts and represent me fairly. I thought that you both suppose to be working for me? So what's the problem anyways? I think I'm getting railroaded by you all getting me to say that I done something when I haven't done a damn a thing."

EX18 at Exhibit 1.

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

Several times my lawyers told me that the State would give me a plea deal if I would plead guilty. I did not want to do that because I did not do anything to hurt Nikki. I talked to my mama, and her advice was that if I didn't do anything, I should not take a plea deal. I was offered a plea deal at least three times. The last time I was offered to take a plea was at the courthouse during my trial.

I told my attorneys that I did not want to plead guilty. Steve Evans told me about the "shaken baby" and he seemed to believe it. He said

shaking was not enough to give me the death penalty, and he thought I should be glad about that. But I told him that I did not shake Nikki.

Id. at ¶¶21-22.

As his trial began, outside the jury’s presence, Robert was asked to put on the record that he had voluntarily rejected offers to plead guilty in exchange for a life sentence. 41RR2-3. Then Opening Statements began. Despite Robert’s consistent statements that he loved his little girl and had done nothing to hurt her, Attorney Evans told the jury that *Evans* accepted the State’s SBS explanation; indeed, Evans treated it as a foregone, medically sound conclusion. *See, e.g.:*

- “This is not a capital case and the evidence will not support it. This is, however, unfortunately *a shaken baby case*. The evidence will show that Nikki did suffer injuries that are totally consistent with . . . *shaken baby syndrome*.”
- “Every one of you [jurors] related that you had heard the term *shaken baby*, that it was an act of basically a lack of control of emotion. It’s a bad thing, but it’s not something that rises to the level of capital murder.”

41RR57-62 (emphasis added).

D. Even If This Claim Is Deemed Defaulted, the Constitutional Error Should Be Considered in Assessing the Claim of Actual Innocence.

Evans’ concession of the SBS cause-of-death hypothesis during the 2003 trial cannot be deemed “ineffective assistance” under *Strickland v. Washington* because Dr. Squires’ SBS opinions were then seen as mainstream. *See Ex parte Roark*, 707 S.W.3d 157 (Tex. Crim. App. 2024). But the complete absence of a defense—and a

trial record built on the appointed defense lawyer's insistence that his own client was guilty of perpetrating child abuse pursuant to the SBS hypothesis—resulted in a wholly unreliable trial record, all of which traces back to the improper actions taken by a judge who was statutorily disqualified and should have recused.

There is no ambiguity here about the disqualifying factor: Judge Calhoon is the father of prosecutor Mark Calhoon who represented the State in this very case. Mark Calhoon's role was no surprise, as he was then Anderson County's Chief Felony Prosecutor in a tiny office. Knowing that his son was representing the State against Robert Roberson, Judge Calhoon knew that he was statutorily precluded from presiding in the criminal case. He did not just fail to recuse; he entered the foundational Order of Appointment in the criminal case.

Robert had not yet been appointed counsel in the criminal case when Judge Calhoon stripped him of his parental rights after Nikki's death. *See* EX13. When Robert had no counsel to be able to object, Judge Calhoon reached into the criminal case, taking the nondiscretionary and critical act of selecting and appointing counsel for an indigent defendant being prosecuted by Judge Calhoon's son. EX14. Thereafter, Robert was saddled with appointed counsel who completely disregarded his Sixth Amendment autonomy-right to maintain and pursue his innocence.

Judge Calhoon—along with the rest of the Anderson County Judiciary—should have recused. But Judge Calhoon's actions did more than compound the

appearance of partiality described above. His ability to select the “advocate” who would engage in battle against Judge Calhoon’s own son was a serious conflict of interest that caused palpable harm. Mark Calhoon played a critical role in every aspect of the trial—including sponsoring one of the State’s most concerning witnesses: Nurse Sims, an interested fact witness who presented herself as an “expert” in sexual assault. Sims falsely claimed to be SANE-certified and offered baseless and highly prejudicial sexual abuse opinions to support an allegation that was then dropped right before the jury began deliberating—well after the damage had been done. Judge Calhoon, acting when he was not statutorily qualified to do so and had no proper basis for doing so, ensured that his son Mark Calhoon would be prosecuting someone with counsel unwilling to honor the accused’s Sixth Amendment right to maintain his innocence.

In *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), the Supreme Court considered a situation in which counsel conceded guilt during the guilt-phase of a capital trial despite the defendant “vociferously insist[ing] that he did not engage in the charged acts and adamantly object[ing] to any admission of guilt.” *Id.* at 1505. The Supreme Court held that “it is the defendant’s prerogative, not counsel’s, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt.” *Id.*

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

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

The Court of Criminal Appeals has since recognized that “a defendant faced with a *McCoy* issue should not be expected to object with the precision of an attorney.” *Turner v. State*, 570 S.W.3d 250, 276 (Tex. Crim. App. 2018) (citing *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963)). Instead, a *McCoy* claimant need

only present evidence that he “‘express[ed] statements of [his] will to maintain innocence.’” *Id.* (quoting *McCoy*, 138 S.Ct. 1508).

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

Critically, the facts in *Barbee* are quite distinguishable: in *Barbee*, there was no doubt that a murder had occurred; Barbee had no evidence pointing to an alternative perpetrator; and Barbee had no evidence that he had wanted his attorneys to pursue an Actual Innocence claim. Here, Robert has amassed substantial, persuasive evidence from highly qualified specialists that no crime occurred and that he is, in fact, innocent of any crime; instead, his daughter Nikki died of an unfortunate compendium of natural and accidental causes. *See* 06 Application (still pending). He has also adduced evidence that he consistently asked counsel to pursue an Actual Innocence claim but counsel overrode that objection because of their belief that SBS was the only legitimate explanation for Nikki’s death. *See* Statement of Facts, section VI, above.

In a concurrence in *Barbee*, Judge Walker explained “that, at a minimum, *McCoy* requires a showing that the defendant told counsel that he wants to pursue a strategy of asserting innocence.” *Id.* at 855 (Walker, J., concurring). And while *Barbee* had repeatedly asserted his innocence, there was no evidence that he asserted “an objective to maintain innocence and counsel overrode that objective by conceding guilt.” *Id.* Judge Walker noted that *Barbee*’s evidence was two letters whereby he had sought new counsel; but “[n]either letter even implies that [*Barbee*] wished to pursue an innocence strategy that counsel was overriding.” *Id.* at 856. By contrast, the letters relied on here plainly show Robert’s long-standing objective to maintain his innocence, unheeded before and after trial—*for years*. See EX18; EX45-EX50.

Importantly, *McCoy* itself distinguished a “concession of the defendant’s commission of criminal acts and pursuit of diminished capacity, mental illness, or lack of premeditation defenses” despite “the defendant repeatedly and adamantly insist[ing] on maintaining factual innocence” from “strategic disputes about whether to concede an element of a charged offense.” 138 S.Ct. at 1510. At trial, Robert’s lawyer pursued only a “lack of intent” defense to capital murder. His lawyer conceded the “commission” of the crime via shaking—a position completely incompatible with Robert’s assertion of innocence. *Id.*; cf. *United States v. Read*, 918 F.3d 712, 720 (9th Cir. 2019) (holding that *McCoy* was violated when counsel

conceded that the defendant committed the crime but put forth an insanity defense over the defendant's desire to claim that he was possessed by demons).

Robert repeatedly told his trial attorneys that *he did not shake Nikki, that he did not know what had caused her to cease breathing in her sleep, and that he wanted to maintain his innocence*. EX18. At the very least, this defaulted constitutional error should be considered via the gateway provided by his Actual Innocence claim. *See, e.g., Ex parte Reed*, 271 S.W.3d at 733.

III. Claim 3: Robert Roberson Is Actually Innocent.

Robert has consistently maintained his innocence since the day of Nikki's terrifying collapse. Robert, who was a special education student with undiagnosed Autism, did his best to explain the inexplicable. But the Palestine nurses mocked his assertion that "You know, I love my little girl. I would never mean to hurt her." 41RR73. He, who had no medical training and little education of any kind, could only speculate when he was pressed by hospital staff and law enforcement to come up with more information to explain his daughter's condition. He tried to explain that she had been ill and fallen from bed in the night, and that he had wiped some specks of blood from her mouth. He was dismissed as a liar. Moreover, his Autism symptoms were grossly misinterpreted as callous indifference. EX36; EX37.

Doctors at the local Palestine hospital did not believe Robert and assumed abuse had occurred. Then Dr. Squires at CMCD, who did not even speak with him,

diagnosed SBS based on the absence of external injuries and the intracranial triad (subdural hematoma, brain swelling, retinal hemorrhage). That diagnosis was then used to arrest Robert the night of February 1, 2002, shortly after Nikki was unlawfully removed from life support and before the autopsy was even performed. EX41. The investigation was over before it ever started.

For years, Robert sent plaintive letters to lawyers and courts begging for a lawyer who would investigate his innocence. To no avail.

Finally, in 2016, with an execution date looming, the 03 habeas proceeding was launched, raising changed-science and Actual Innocence claims. Although the Court of Criminal Appeals remanded the claims in the 03 Application for further factual development, at the end of that protracted proceeding, the habeas judge, who has since recused herself, made *no mention* in her Findings of *any* of the vast evidence adduced that supported the Actual Innocence claim. *See, e.g.*, EX53. But those misleading Findings were adopted by the Court of Criminal Appeals, which then denied relief in a two-page opinion that did not discuss any of the new evidence—including the evidence of innocence.

In the 04 habeas application, Actual Innocence was again pled and supported by additional evidentiary proffers constituting yet more new evidence of how the SBS hypothesis used to convict him had been discredited and new evidence that Nikki died from a combination of medical mistake and natural disease progression:

a missed pneumonia, contra-indicated prescription medications, and a short fall out of bed while her infected lungs struggled for oxygen. But those pleas were summarily denied based on an unexplained procedural bar.

The 06 Application, supported by yet more new evidence supporting the Actual Innocence claim, is still pending.

Robert Roberson now urges the Court to consider the new constitutional claims alleged above as an appendage to his Actual Innocence claim based on *all* of the voluminous, unrebutted evidence that has been adduced in the 03-06 proceedings, which is incorporated here by reference. *See Ex parte David Wood, above*, *15 (Presiding Judge Schenck noting, correctly, that “the existing statutory standard requires only a *prima facie* showing of actual innocence to support a remand in connection with a potentially viable constitutional claim”). Upon considering all of the post-conviction evidence of innocence, the Court should conclude that it is “more likely than not” that no reasonable juror would convict with “access to both the [credible] original evidence at trial and the new evidence[.]” *Id.* at *17. A considerable body of Robert Roberson’s post-conviction evidence has debunked every aspect of the State’s case—including the SBS hypothesis attested to by Drs. Squires and Urban, the “multiple impacts” opinion of Dr. Urban who never looked at the CT scans of Nikki’s head showing a single, minor impact site, and the highly prejudicial and baseless sexual assault allegations from a woefully biased and

unqualified nurse. He has *also* amassed overwhelming evidence to explain Nikki’s death, evidence that it took years to amass by consulting an array of highly qualified specialists working to unpack the complex medical situation, the likes of which has been confounding the pediatric community for decades now. *See, e.g.*, Keith Findley, et al, SHAKEN BABY SYNDROME: INVESTIGATING THE ABUSIVE HEAD TRAUMA CONTROVERSY (Cambridge Univ. Press 2024).

The existing statutory standard in Article 11.071, section 5 requires only a prima facie showing of Actual Innocence to support a remand in connection with a potentially viable constitutional claim. *Ex parte Brooks*, 219 S.W.3d 396 (Tex. Crim. App. 2007). *See also Schlup v. Delo*, 513 U.S. 298, 326 (1995) (settling on the preponderance standard in a death-penalty case involving a claim of constitutional error as a means of reaching the merits despite the successive nature of the habeas petition). *See also Ex parte David Wood, above*, at 27 (Schenck, P.J., concurring and dissenting) (explaining that the “Texas Constitution’s protection of the interest in life would at least demand preponderance standard set forth in *Schlup*, a variety of Texas statutes and other states’ constitutions and laws in death-penalty cases in which the successive habeas applicant is alleging that he is not guilty of the crime”) (footnote omitted); *see also id.* at 49 (observing that “our writ is open to the innocence argument, and, in my view, if that argument is viable under our state Constitution, then the *Schlup* gateway is irrelevant”).

An Actual Innocence finding is long overdue. *See Ex parte Franklin*, 72 S.W.3d 671, 678 (Tex. Crim. App. 2002): noting that affirmative evidence of innocence includes trustworthy witness recantations (*see, e.g.*, EX38 Declaration of former lead detective Brian Wharton), “exculpatory scientific evidence” (*see, e.g.*, expert reports from Drs. Michael Laposata, Francis Green, Keenan Bora, Julie Mack, Janice Ophoven, Harry Bonnell, John Plunkett, Roland Auer, and the Joint Statement of 10 independent pathologists), and “critical physical evidence” (*see, e.g.*, CT scans of Nikki’s head and lungs, post-mortem toxicology report, CMCD blood test results, and the autopsy photos).

CONCLUSION & PRAYER

For the foregoing reasons, Robert Roberson respectfully prays that the Court of Criminal Appeals STAYS his execution and GRANTS a new trial or, at the very least, EXPEDITES AUTHORIZATION and REMANDS the new claims raised here, as well as the claims contained in the still-pending 06 Application filed on February 19, 2025.

Understanding the procedure set forth in Article 11.071 for subsequent applications, counsel for Robert Roberson requests that the Court of Criminal Appeals consider taking extraordinary action under its inherent authority and, without the delay of further fact-finding and hearings, vacate his conviction so that he can be tried at long last before an impartial tribunal in accordance with due

process and the federal and Texas Constitutions. *See* TEX. R. APP. P. 78.3 (“The Court of Criminal Appeals may make any other appropriate order required by the law and the nature of the case”). This ongoing miscarriage of justice must cease.

The push to execute Robert Roberson does not honor his daughter Nikki or otherwise further the interests of justice. Indeed, shrouding the truth about how Nikki’s life ended and through what mechanisms—as well as the truth about her medical condition throughout her short life, including during the last days before her father woke up to the horror of finding his precious two-year-old daughter was not breathing—is an affront to Nikki’s memory. Justice is not served by executing an innocent father whose daughter was unlawfully removed from life support. Nor does it serve the memory of judges who otherwise served honorably if their legacy becomes entangled hereafter with the wrongful execution of an innocent man.

Respectfully submitted,

/s/ Gretchen S. Sween
Gretchen S. Sween, *Counsel of Record*
SBOT 24041996
712 Upson Street
Austin, Texas 78703
214.557.5779 (telephone)
gsweenlaw@gmail.com

Callie Heller
SBOT No. 24101897
Western District of Oklahoma
Federal Defender Office
Capital Habeas Unit
215 Dean A. McGee, Suite 707

Oklahoma City, OK 73102
405.609.5975
Callie.Heller@fd.org

*Pro Bono Attorneys for
Robert Leslie Roberson III*

CERTIFICATE OF COMPLIANCE

This brief complies with Tex. R. App. P. 9.4(i)(2)(A). According to the word-count function of the computer program used to prepare this document, the brief contains 27,760 words, excluding the items that need not be counted per Tex. R. App. P. 9.4(i)(1).

/s/ Gretchen S. Sween

CERTIFICATE OF SERVICE

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

Assistant Attorney General
Ellen Stewart-Klein
Ellen.Stewart-Klein@oag.texas.gov

Anderson County District Attorney
DA Allyson Mitchell
amitchell@co.anderson.tx.us

Vanessa Potkin
vpotkin@innocenceproject.org
Jane Pucher
jpucher@innocenceproject.org
THE INNOCENCE PROJECT

Donald P. Salzman
donald.salzman@skadden.com
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

Emma Rolls, Chief
Emma_Rolls@fd.org

WESTERN DISTRICT OF OKLAHOMA FEDERAL DEFENDER OFFICE

/s/ Gretchen S. Sween

STATE OF TEXAS

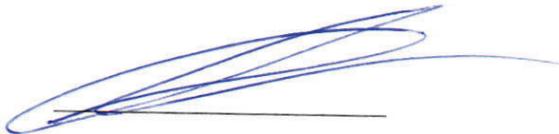
COUNTY OF TRAVIS

VERIFICATION

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

1. I am a member of the State Bar of Texas in good standing.
2. I am the duly authorized attorney for Robert Roberson, having the authority to prepare and to verify Mr. Roberson's Subsequent Application for a Writ of Habeas Corpus.
3. I have prepared and have read the foregoing Subsequent Application for Writ of Habeas Corpus, and I believe all allegations in it to be true to the best of my knowledge.

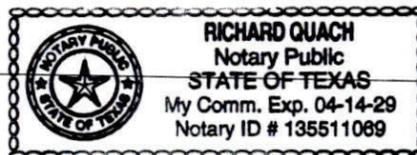
Signed under penalty of perjury:



Gretchen S. Sween

SUBSCRIBED AND SWORN TO BEFORE ME on 8/18, 2025.

NOTARY PUBLIC, STATE OF TEXAS



Sub 4-14-29