BEFORE THE GOVERNOR OF THE STATE OF TEXAS AND THE TEXAS BOARD OF PARDONS AND PAROLES

IN RE ROBERT LESLIE ROBERSON III,

Petitioner.

PETITION FOR COMMUTATION OF DEATH SENTENCE TO A LESSER PENALTY, OR, IN THE ALTERNATIVE, A 180-DAY REPRIEVE, AND REQUEST FOR AN INTERVIEW AND HEARING ON THE MATTER

Robert Leslie Roberson is scheduled for execution on October 17, 2024

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TO THE GOVERNOR AND THE HONORABLE MEMBERS OF THE TEXAS BOARD OF PARDONS AND PAROLES:

Robert Leslie Roberson III requests that the Texas Board of Pardons and Paroles ("Board") recommend, and the Governor grant, commutation of death sentence to a lesser penalty. In the alternative, Mr. Roberson requests that the Board recommend, and the Governor grant, a reprieve of execution for 180 days so the Board and Governor may give this application appropriate consideration. Mr. Roberson requests an interview, and a hearing on the matter.[1]

INTRODUCTION

Robert Roberson is innocent.
Evidence that his jury never heard proves no crime occurred.

Robert Roberson is an innocent man. This is not a case where the State got the wrong person. Instead, a crime was alleged—but none actually occurred.

Robert was convicted of capital murder and sentenced to death after his chronically ill two-year-old daughter, Nikki, died. He was arrested before Nikki was even taken off life support. He was barred from visiting her in the hospital. His parental rights were summarily terminated without a hearing. He was

[1] Citation note: "RR" refers to the Reporter's Record of the 2003 trial; "EHRR" refers to the Reporter's Record of the 2018-2021 evidentiary hearing; "CR" refers to the Clerk's Record. The first number in the citation is the volume number; the second number is the page number or range.

thrown in a jail suicide cell, without access to a lawyer. When a lawyer was finally appointed for him because he was indigent, that lawyer, without doing any investigation, insisted that the State was right: Robert must have shaken his daughter and caused her condition, regardless of his insistence that he loved his little girl and would not have done anything to harm her.

We now know that his conviction was based on three grave mistakes. First, when Robert brought Nikki to the hospital, medical personnel rushed to judge him based on incorrect presumptions and ignorance of her actual medical condition. Second, law enforcement accepted the doctors' assumptions that her condition was caused by abuse and did not investigate further. Third, hospital staff and law enforcement, who did not know Robert, viewed his non-neurotypical demeanor, a symptom of his Autism, as reflecting a lack of feeling regarding his daughter's plight—a far cry from the truth.

Robert—a poor, single father with an undiagnosed developmental disability (Autism)—had fought to obtain custody of his chronically ill little girl.

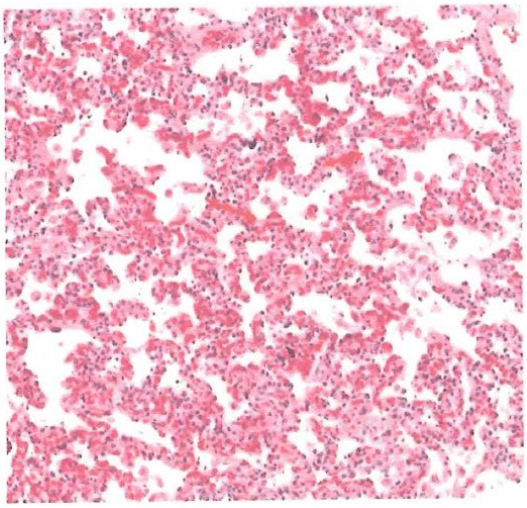
Robert w Nikki, Fall 2001

Nikki died just two months after he was awarded custody. Nikki's death, however, was not a crime—unless it is a crime for a parent to be unable to explain complex medical problems that even trained medical professionals failed to understand at the time.

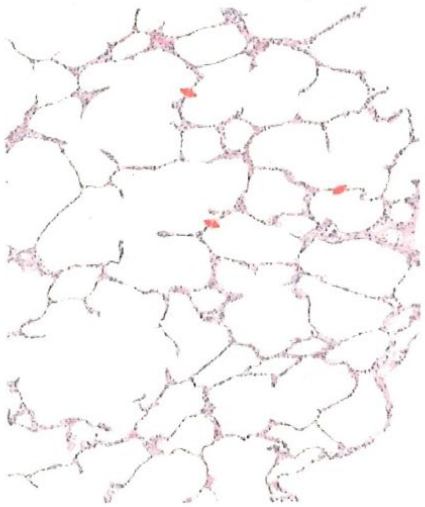
We now know that Nikki's lungs were severely infected and straining for oxygen—for days or even weeks before her collapse. A recent reexamination of lung tissue collected during her autopsy has revealed that both a chronic interstitial viral pneumonia and a secondary acute bacterial pneumonia were ravishing her lungs, causing sepsis and then septic shock.[2]

3. Chronic Interstitial Pneumonia

Nikki Curtis Interstitial Pneumonia



Normal Interstitium



Images of Lung Tissue under a Microscope

[2] *See* EX2 (Affidavit of Dr. Francis Green).

In the days before her collapse, Robert repeatedly took Nikki to the local Emergency Room (ER) and to her pediatrician in rural Palestine, Texas, seeking help. But unaware of her severe pneumonia, doctors sent her home with medications that would only have made her condition worse. As an expert in medical toxicology has now explained, the medications prescribed to her—Phenergan (the brand name for promethazine) and codeine—would only have further ***suppressed*** Nikki's ability to take in oxygen.[3] Codeine is a narcotic, not recommended for anyone under age eighteen; Phenergan now has FDA "black box warnings" against prescribing it to children Nikki's age and in her condition precisely because it can suppress breathing and result in death:

WARNINGS

PHENERGAN SHOULD NOT BE USED IN PEDIATRIC PATIENTS LESS THAN 2 YEARS OF AGE BECAUSE OF THE POTENTIAL FOR FATAL RESPIRATORY DEPRESSION.

POSTMARKETING CASES OF RESPIRATORY DEPRESSION, INCLUDING FATALITIES, HAVE BEEN REPORTED WITH USE OF PHENERGAN IN PEDIATRIC PATIENTS LESS THAN 2 YEARS OF AGE. A WIDE RANGE OF WEIGHT-BASED DOSES OF PHENERGAN HAVE RESULTED IN RESPIRATORY DEPRESSION IN THESE PATIENTS.

CAUTION SHOULD BE EXERCISED WHEN ADMINISTERING PHENERGAN TO PEDIATRIC PATIENTS 2 YEARS OF AGE AND OLDER. IT IS RECOMMENDED THAT THE LOWEST EFFECTIVE DOSE OF PHENERGAN BE USED IN PEDIATRIC PATIENTS 2 YEARS OF AGE AND OLDER AND CONCOMITANT ADMINISTRATION OF OTHER DRUGS WITH RESPIRATORY DEPRESSANT EFFECTS BE AVOIDED.

These potent, respiratory-suppressing drugs certainly were not designed to treat a toddler's severe respiratory illness, *i.e.*, pneumonia.

[3] *See* EX3 (Affidavit of Dr. Keenan Bora).

Robert awoke on January 31, 2002, and found his two-year-old child comatose and blue. He frantically tried to wake her, to no avail. He then took her back to the ER. The medical personnel revived her heart, but her eyes were already "fixed and dilated," a grave sign of brain death. Nikki's oxygen-deprived brain had swollen and shifted, putting pressure on her eyes. Thereafter, the blood being pumped by the resuscitated heart could only pool inside the skull, outside of the brain. When a CAT scan was taken, revealing a triad of internal head conditions—a subdural bleed, brain swelling, and retinal hemorrhages—doctors presumed (1) that Nikki had sustained a traumatic head injury and (2) that her father, as the only person with her at the time of her collapse, must be responsible.

No one at the time investigated the condition of Nikki's lungs or considered what may have caused her to cease breathing.

No one considered Nikki's medical history, which included chronic infections that multiple strains of antibiotics had failed to resolve and alarming "breathing apnea" spells when she would inexplicably cease breathing, collapse, and turn blue from oxygen-deprivation.

No one considered that, just two days before, her fever had been measured at ***104.5 degrees F*** in the pediatrician's office.

Certainly, no one conducted a painstaking examination of the lung tissue of this child on Medicaid. That new examination, by a lung pathologist with

nearly 50 years of experience studying lung disease, has finally revealed the truth about Nikki's tragic death. The ***consequences*** of Nikki's undiagnosed double pneumonia,[4] as it progressed to sepsis and then cardiac- and pulmonary-arrest, were viewed in isolation and interpreted as signs of a head injury, presumed to have been "inflicted."

An expert in neuropathology (the study of brain injury and head trauma) has now explained that, when a body experiences oxygen-deprivation, tiny blood vessels outside of the brain will leak.[5] Cardiac arrest can follow. When the heart ceases pumping oxygenated blood to the brain, the brain will shut down after just 10-12 minutes, irrevocably. When the heart is revived, blood pumping from the heart will rush to the brain but is unable to enter, causing blood to pool outside of the brain. For decades, doctors were taught that abuse could be presumed whenever they observed that kind of internal head condition (bleeding outside the dura membrane covering the brain, brain swelling, and/or bleeding into the eyes) in an infant or toddler like Nikki. More specifically, they were taught to presume abuse in the form of violent shaking, perhaps accompanied by blunt impact. But contemporary, evidence-based science has debunked that hypothesis, formerly known as "Shaken Baby Syndrome" and then "Shaken

[4] In this petition, we use the term "double pneumonia" as shorthand for the fact that Nikki had two types of pneumonia: a chronic interstitial viral pneumonia that was colonizing her lung tissue and a secondary bacterial bronchopneumonia that was causing her lung cells to slough off and die. *See* EX2.

[5] *See* EX5 (Report of Dr. Roland Auer).

Impact Syndrome" and now, more generally, "Abusive Head Trauma" (SBS/AHT).

In the years since Nikki's death, scientific inquiry has demonstrated that (1) inflicted head trauma ***cannot*** be presumed based on this triad of symptoms because both accidental short falls with head impact and many naturally occurring illnesses, like pneumonia, can cause the same symptoms; (2) no evidence has yet emerged from any biomechanical study to show that shaking can actually cause ***any*** component of the triad, instead any injury from shaking would be to the neck; and (3) the triad of internal head conditions associated with SBS—but actually caused by many other phenomena—can commence hours or even days before a child becomes symptomatic, thus completely nullifying the premise that the adult with the child when she collapsed must have caused her condition.

We have new medical evidence, specific to this case, showing the complete ***lack*** of support for the conclusion that Nikki sustained a fatal head injury, inflicted or otherwise.[6] Her condition was the result of the natural progression of a serious, undiagnosed illness and then medical intervention that unintentionally exacerbated her condition.

In Robert's 2003 trial, the prosecution relied on tenets of the now-discredited SBS hypothesis to prove its "abuse" narrative—without any

[6] *See* EX4 (Affidavit of Dr. Julie Mack); EX5.

pushback from the defense, reflecting just how widely accepted SBS was at the time, even though the hypothesis had never been validated by scientific testing. Robert's appointed attorney conceded throughout trial that it was a "classic shaken baby" case—although Robert himself consistently maintained he had done nothing to hurt Nikki and did not understand what had happened to her. EX6 (Declaration of Robert L. Roberson).

Robert was judged based on his seemingly blank reaction to Nikki's grave condition, which was interpreted as callousness. While family and friends close to Robert long knew that he had a disability of some kind, only in 2018 did a neuropsychologist conduct a comprehensive evaluation and diagnose Robert with Autism Spectrum Disorder. That life-long, developmental disability explains his non-neurotypical response to the extraordinary stress of waking up to find his beloved daughter unconscious, then rushing to obtain medical care, only to learn that it was too late.

We urge consideration of the new reports from highly credentialed medical experts, reflecting different medical specialties, that together comprehensively explain how Nikki died of ***natural and accidental causes***.[7] The State's representatives in Anderson County and the reviewing courts have unaccountably failed to consider this new evidence, which entirely rebuts the view that Nikki's death can be deemed a homicide. Robert, a disabled father, who

[7] *See* EX2-EX5.

was summarily deprived of his parental rights and then long denied any meaningful defense or due process, comes to this Board seeking justice at last. He does not simply ask for mercy. He prays that reason will finally prevail. There was no crime. There should be no execution.

WIDESPREAD BIPARTISAN SUPPORT FOR CLEMENCY

Robert's case has attracted widespread support from eminent scientists, doctors, faith leaders, innocence and autism advocacy groups, former judges, Texas legislators, best-selling novelist John Grisham, and the lead detective who testified for the prosecution at trial.

Even the lead detective, who investigated Nikki's death as a homicide and directed that Robert be arrested and charged based on a doctor's "Shaken Baby" hypothesis, has been speaking out on Robert's behalf because he now believes in Robert's innocence. Former detective Brian Wharton's remarkable letter to the Board lays bare this truth:

> We have failed to hear Robert's righteous plea of innocence. We rushed to judgment. We were wrong, the jury was misinformed, and Robert is not guilty of any crime. If we are truly a nation of laws, a people who love justice in the most meaningful sense of that word, then Robert Leslie Roberson III must be set free.

EX7.

For many months now, Mr. Wharton, who testified in the 2003 trial for the State, has been describing how this conviction haunted him for years. He has admitted to the numerous factors that were never considered and to his sincere

belief that justice was ***not*** done. *See* EX9-EX10. Mr. Wharton even took the extraordinary step of visiting Robert on death row to seek forgiveness for his role in Robert's conviction. A heart-wrenching video of their first encounter since Robert was sent to death row in 2003 speaks to the injustice of Robert's situation more poignantly than mere words could ever capture. We urge the Board to pause and watch this video and reflect on this powerful example of courage and principle. *See* *Opinion | The Death Penalty Is Never Fair - The New York Times (nytimes.com); see also* EX11 (flash drive containing this and other short videos).

Over the years, Mr. Wharton has seen how the SBS hypothesis has proven to be devoid of scientific underpinnings. That disturbing history is referenced by Dr. Patrick Barnes of Stanford University Medical Center in an OpEd expressing profound concern about Robert's conviction based on the SBS hypothesis. Dr. Barnes himself once accepted the hypothesis uncritically—and then recognized how it had been discredited by evidence-based science. EX12.

No informed doctor today would presume abuse based on a triad of internal head conditions, as occurred in Robert's case; and informed individual doctors examining this case do not understand how the judicial system has failed to provide a remedy.

As a letter from 34 eminent scientists and medical doctors from around the world explains: "Today, no reputable medical doctor would fail to conduct a thorough, multi-disciplined exploration of all possible causes of death because it

is now known that many phenomena—including accidental short falls and naturally occurring disease—can cause the same intracranial conditions that 'mimic' inflicted head injury." But in the era when Robert was accused and convicted, conventional medical thinking gave doctors permission to skip consideration of any other factors and ***presume*** shaking and inflicted head trauma—an approach that has since been completely rejected as unsound. These professionals urge Texas not to make an "irreversible mistake" by executing Robert in the face of the evidence-based science that now proves Nikki's death was not a homicide at all. EX15.

John Grisham, best-selling novelist and Innocence Project board member, has written repeatedly and extensively about Robert's case, endeavoring to alert Texans before a terrible wrong is perpetrated in their name: executing an innocent man. EX14.

Indeed, a tremendous cross-section of advocacy groups and concerned citizens in Texas and around the world have voiced outrage about Robert's case and are crying out for clemency. If he were to become the first person executed based on the discredited Shaken Baby hypothesis, the damage would extend far beyond the personal injustice Robert has sustained. *See, e.g.*, EX21; EX22.

A stunning set of 84 bipartisan, elected representatives in Texas have joined together to speak out. Led by the Texas House of Representatives' Criminal Justice Reform Caucus, these Texas lawmakers have expressed "grave

concern that Texas may put Mr. Roberson to death for a crime that did not occur." Their public statement emphasizes how, "[m]ore than a decade ago, the Texas Legislature passed Senate Bill 344, which allowed challenges to convictions that were based on disproven or incomplete science. That law passed with unanimous support of the Texas House because we recognized that innocent people are sometimes wrongfully convicted based on scientific evidence that later turns out to be wrong." They are "dismayed to learn that this law has not been applied as intended and has not been a pathway to relief—or even a new trial—for people like" Robert.[8] These lawmakers can see that "significant scientific and medical evidence now shows that his daughter Nikki, who was chronically ill, died of a combination of natural and accidental causes, not the debunked shaken baby syndrome hypothesis that State used to convict [him]." EX16.

These lawmakers also note how Senate Bill 1578, which passed with overwhelming bipartisan support in 2021, "now ensures that parents have the right to a second expert medical opinion after allegations of child abuse. Had these events occurred today, [Robert] would have been legally entitled to an additional medical review at his request." With moral clarity they have stated: "It should shock all Texans that we are barreling towards an execution." They urge "prevent[ing] our state from tarnishing its reputation" as a leader in

[8] Former Texas Court of Criminal Appeals (CCA) judge, the Honorable Elsa Alcala, has likewise expressed dismay that Robert was "wrongfully convicted and sentenced to death 20 years ago and [yet his] efforts to seek relief under Texas's 'junk science' law [Article 11.073] have failed thus far." EX13.

addressing wrongful convictions—by failing to stop this execution. EX16.

Several letters emphasize the role that Robert's disability—only understood and diagnosed as Autism Spectrum Disorder long afterwards—played in prejudging him. The Autism Society of America and Autism Society of Texas—joined by Autism Speaks, Coalition of Texans with Disabilities, Family to Family Network, Texans for Special Education Reform, Texas Parent to Parent, and The Arc of Texas—point to the rush to judge Robert for his non-neurotypical response to extreme stress. They recognize this as an example of criminalizing his disability. They detail the demonstrable wrong of construing symptoms of Robert's Autism as evidence of his guilt and decry how law enforcement, medical professionals, and the prosecution unwittingly held his developmental disorder against him. EX17.

A striking number of advocacy organizations concerned about parental rights here in Texas have also weighed in: Family Freedom Project, Parent Guidance Center, Texas Association of Family Defense Attorneys, America's Party of Texas, Texas Family Defense Committee, Republican Liberty Caucus of Texas, Libertarian Party of Texas, Texas Young Republican Federation, and Bob Smilie of Fully Informed Jury Association. They express horror that Robert was presumed guilty of child abuse by default and stripped of his rights as Nikki's father before her autopsy was even performed. He was denied access to his daughter during her final hospitalization and barred from making end-of-life

decisions. In urging clemency, they note "Mr. Roberson's case is littered with egregious errors, inaccuracies, and a blatant disregard for his rights as a parent." EX18.

Additionally, the director of Witness to Innocence, a group formed and run by exonerees who have been saved from death rows around the country, has written to express disbelief that Robert is precariously close to execution considering the widespread recognition that the Shaken Baby hypothesis used to convict him has been discredited. "While the guilt or innocence of the individuals who come to you for clemency may sometimes be hard to ascertain, what we can be certain of is that our judicial system can and does make mistakes. There are gaps and constraints in our process, as well as human error, that have led to thousands of exonerations." Witness to Innocence reminds the Board that at least 200 people sentenced to death for crimes they did not commit have already been exonerated. "These numbers represent real people"—just like Robert. EX19. The horrifying prospect that Texas is close to executing an innocent man is also underscored by the 23 active bishops in the Texas Catholic Conference of Bishops, who have entreated the Board to take a morally and rationally informed stance and vote for clemency: "We beg for a full review of Robert's case, considering how more than two decades' worth of research can provide new insights into the death of his chronically ill, two-year-old daughter Nikki." EX20.

Finally, individuals who know Robert personally have emphasized their belief in his innocence based on their direct experience of his kindness, gentle disposition, sincere religious faith, and his profound gratitude for any and all compassion that has been extended to him, even as he has been trapped in an unfathomable nightmare for over two decades. EX23. As a letter from the founder of "Fight to Forgive Ministries" notes: "I can confidently say [Robert] is one of the kindest men I have ever encountered…. If there is anyone who can be characterized as having a 0% risk to society, it is Robert. I would trust him with my own children and would welcome him as part of our ministry team without hesitation." EX23. Similar testaments to Robert's character and kindness are described in the final section below.

Texas must not become the first and only Government to kill one of its citizens as a punishment for a "crime" that did not occur—but was instead presumed based on the Shaken Baby hypothesis that actual science has since roundly discredited.

CASE BACKGROUND

There was a rush to judge a father whose beloved child was experiencing a medical crisis.

A. Robert's Child Was in Medical Distress When He Sought Help; Her Condition Was Blamed on Him Without Any Meaningful Investigation.

A few months after her second birthday, Nikki, a toddler with her father's

blue eyes and dark hair, collapsed during the early morning of January 31, 2002, never to wake again. Her father Robert discovered her limp body. As he tried to rouse her, he saw that she was not breathing and her lips had turned blue. In shock, he took her to the local ER, where staff observed that her eyes were "fixed and dilated," a sign of brain death. They managed to restart her heart, but no medical heroics could resuscitate her brain.

Hospital staff noticed a bump on the back of her head. But there were no other signs of external injury. They shaved her head and sent her to radiology for scans. A CAT scan revealed a small internal bleed outside the subdural membrane that covers the brain, near the minor "goose egg" on the back of her head. The image also showed that her brain had swollen and shifted to one side. But there were no skull fractures, neck injuries, broken bones, bloody abrasions, or other signs of battery. Her condition did not suggest abuse, but medical staff immediately looked with suspicion upon the awkward-looking father, who seemed to show no emotion. Law enforcement was immediately called in.

Various members of the hospital staff and the lead detective assigned from the Palestine Police Department, Brian Wharton, pressed Robert for an explanation. All he could tell them was that Nikki had been sick for a week and, in the night, he had heard a "strange cry" and woke up to find Nikki on the floor at the foot of the bed. Detective Wharton asked if Robert would show them where Nikki had fallen out of bed. Robert agreed to take the police to his house on Perry

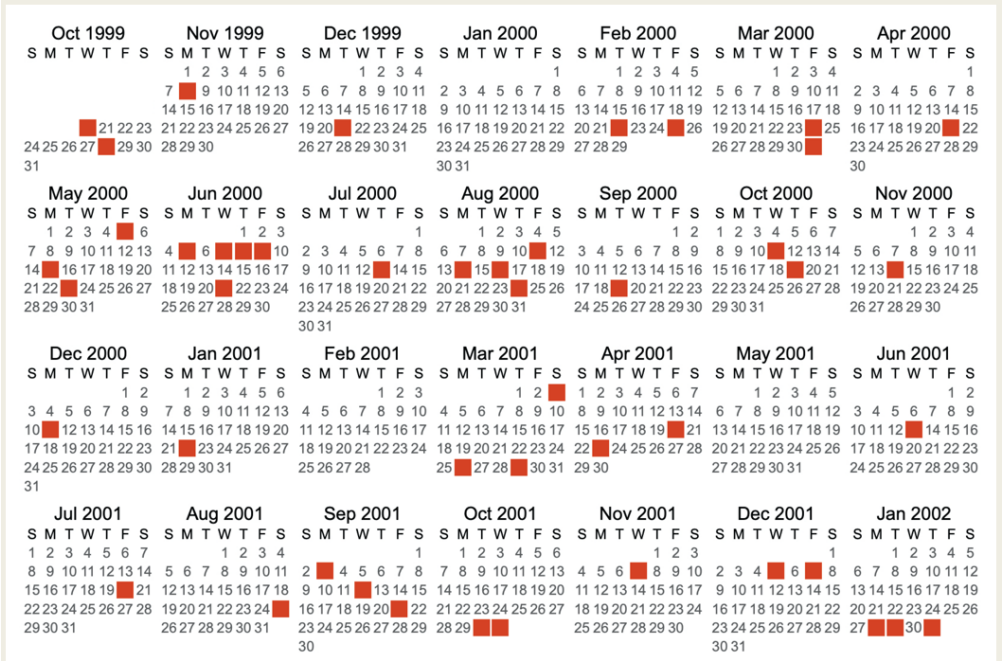
Street, a small rental property near the courthouse square in rural Palestine, Texas. Detective Wharton looked all through the house for some signs of violence, blood on the walls, but there was nothing. The only blood was a small speck on a washcloth that Robert showed them, which they never would have noticed on their own. EX9.

Robert explained to the detectives that he had wiped this speck of blood from Nikki's mouth after he discovered her on the floor, but he had not seen anything else wrong with her. After comforting her, they had both eventually fallen back to sleep. But Nikki never woke up again. *Id.*; EX6. Detective Wharton did not know what to make of this situation. He had seen plenty of crime scenes, and this did not look like one. He also had no training in mental health issues so did not understand why Robert did not seem to comprehend how serious his daughter's condition was. EX9.

Robert made clear he wanted to go to Dallas to visit Nikki—because the local hospital was transferring her to Children's Medical Center, hoping the big city hospital might be better equipped to treat her. But Robert was told he was not "allowed" to go be with his own child. EX6.

The following day, February 1, 2002, Detective Wharton's team went back and arrested Robert—relying solely on an affidavit provided by Dr. Janet Squires, a pediatrician at Children's Medical Center. The affidavit states that Nikki's maternal grandparents had claimed that the child was "totally well"

when they last saw her around "10:00 PM" the night before her collapse, which Nikki's medical records show was false; Nikki was far from "well." Her fever had been measured at 104.5 degrees in her doctor's office the day before and she had been prescribed potent medications, which the grandmother was ostensibly giving her. Moreover, the grandmother was aware of her many interactions with doctors over the course of Nikki's short life:



Red indicates each day Nikki visited a doctor

But no one looked into Nikki's medical history or recent illness. Instead, Dr. Squires concluded, based on the SBS beliefs of that era, that "[t]he only reasonable explanation" for Nikki's condition "is trauma." Dr. Squires further declared that "the medical findings," including "very obvious" retinal hemorrhages, "fit a picture of shaken impact syndrome." EX24. She claimed there was "some flinging or shaking component which resulted in subdural

hemorrhaging and diffuse brain injury." *Id.* She also noted a single "area of impact in the right back of the head." *Id.* After that time, "Shaken Impact Syndrome" was another name being used to describe "Shaken Baby Syndrome," which has since been rebranded as "Abusive Head Trauma," a medical diagnosis of child abuse.

After Dr. Squires made her SBS diagnosis, which was used as the basis to arrest Robert, Nikki was taken off life support and pronounced dead. She was then transferred to the Southwestern Institute of Forensic Sciences (SWIFS) in Dallas, which houses the medical examiner's office. On February 2, 2002, Dr. Jill Urban performed the autopsy. Before she did so, records show that she was told by a member of Detective Wharton's team that Robert had already been arrested for capital murder. That same law enforcement officer then sat in on the autopsy. EX25. These are circumstances now known to create pronounced bias.[9]

When Dr. Urban performed the autopsy, she had only been certified as a medical examiner for a year and a half. 9EHRR8-9, 117, 154.[10] But Nikki's

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[9] *See, e.g.*, National Academies of Sciences, Engineering, and Medicine, Description: Advancing the Field of Forensic Pathology: Lesson Learned from Death in Custody Investigations, *available at* https://www.nationalacademies.org/our-work/advancing-the-field-of-forensic-pathology-lesson-learned-from-death-in-custody-investigations (documenting the effects of implicit bias on medical examiners' conclusions regarding cause and manner of death).

[10] Dr. Janet Ophoven, who has specialized in pediatric pathology for many decades, explained that it is very uncommon for medical examiners' offices to do autopsies on children Nikki's age: "[P]ediatric cases represent less than 10 percent of the total population" and autopsies on 2-year-olds are even rarer. 3EHRR65. But Dr. Urban, despite her limited experience at that time, claimed at trial that autopsies on children Nikki's age were "common." 9EHRR156. Certainly, it was a uniquely horrifying

autopsy was already the 456th that SWIFS had performed in 2002 as of February 2nd. That stunning volume suggests why Dr. Urban may have felt rushed. 9EHRR86. She subsequently admitted that she did not consider ***any*** of the following in reaching conclusions about the cause and manner of Nikki's death:

- Nikki's medical history, including the records of her recent illness the week of her collapse and the drugs that had been prescribed to her by both a pediatrician and an ER doctor;

- The local Palestine ER records related to Nikki's admission and treatment the day of her collapse;

- The CAT scans taken of Nikki's head when she was admitted to the Palestine ER the morning of her collapse;

- The EMS records reflecting Nikki's treatment in transport from Palestine to Dallas;

- A medical reference book to determine whether Nikki's organs were of an abnormal weight at autopsy (which both the lungs and the brain were);

- The scene where Nikki collapsed, including: the fact that the bed where she had been sleeping was a mattress and box springs propped up on cinder blocks;

- The expertise of a biomechanical engineer or biomechanical research regarding the injury-potential of short falls;

- Data about the potential height, trajectory, or impact surface associated with the reported fall, trajectory of the fall, or the impact surface;

- The relevance of Nikki's height, weight, and age to determine whether it was physically possible to generate sufficient force through shaking her to cause any aspect of the condition observed in autopsy;

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experience for the jurors to have to view autopsy photos of a child with her scalp cut open and pulled over the back of her skull. EX26 (Declaration of Terre Compton, juror).

- The wash rag and bedding obtained from the scene containing very small specks of blood;

- Any information regarding "promethazine" a drug found in high quantities in Nikki's system, as identified by a toxicology report that Dr. Urban had requested but did not wait for; and

- All of the intervening medical treatment, transports, and medications that were applied to Nikki after she arrived at the ER the morning of January 31st until she arrived at SWIFS on February 2nd, including having a pressure monitor surgically implanted in her head.

9EHRR64, 107-109, 138-140, 145-146, 153-154, 161-163, 166-167, 183-185.

Because Dr. Urban did not consider any of this information, when preparing her autopsy report, she did not account for how any of these factors may have affected Nikki's condition: Dr. Urban saw subdural blood and simply assumed that Nikki had died from an inflicted head injury. In her autopsy report, Dr. Urban labeled the cause of death "blunt force head injuries" and the manner "homicide." EX25. Later, during trial, Dr. Urban repeatedly told the jury that the "blunt force head injuries" had been inflicted by an unknown combination of "shaking" and "blows." EX27.

Dr. Urban reached her conclusions, captured in her autopsy report, the same day that she performed the autopsy. She also signed the death certificate that same day. EX28. The toxicology report itself was not disclosed before trial or discussed before the jury. In a pretrial hearing with defense counsel, Dr. Urban was asked only about a short list of drug results that were added to the autopsy report:

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

EX29 at 17.

Seemingly, Dr. Urban never "looked it up" nor further investigated promethazine because she made no mention of the toxicology results at trial—results that numerous, more experienced experts have recently insisted should have been taken into account.[11]

B. Robert's Jury Heard a Litany of False Information.

The State indicted Robert on two counts of capital murder. It alleged that (1) he had "intentionally or knowingly" caused the death of "a person under the age of six" based on the Shaken Baby hypothesis; and ***absent any credible evidence***, the State also alleged that (2) he had killed his child "in the course of committing or attempting to commit the offense of aggravated sexual assault."

[11] The errors and omissions in Dr. Urban's autopsy were described in post-conviction testimony and/or expert reports provided by these pathologists with specialized training and decades of experience: Dr. Janice Ophoven, Dr. Harry Bonnell, Dr. Carl Wigren, Dr. Roland Auer, and Dr. Francis Green.

1CR2-4. Throughout jury selection, the State specifically invoked Shaken Baby terminology and invited each potential juror to consider just how "violent" the shaking would have to be to cause a child's death. *See, e.g.,* 7RR40, 88-89; 8RR23-25; 19RR20-21, 66-67. The State also emphasized with each potential juror its allegation that Robert killed Nikki after committing sexual abuse—although the lead detective has admitted that there was ***no evidence*** to support these allegations. *See, e.g.*, 7RR25-27, 67, 75, 127; 8RR10; 19RR22, 57; EX21.

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

The State presented testimony from local medical staff, including doctors who had treated Nikki in the days before her collapse. They emphasized how Robert had not displayed appropriate emotion and that a short fall and Nikki's recent illness could not have caused her condition. The State elicited the most extensive testimony from a local nurse who had designated herself a Sexual Assault Nurse Examiner (SANE), although she had never been certified as a

SANE. She claimed to have seen "anal tears" that no one else saw and did not consider that Nikki had had diarrhea for over a week and had been prescribed suppositories two days before by the same ER doctor who saw her the day of her collapse. This nurse's graphic testimony about "anal penetration" and her view of the proclivities of "pedophiles" was totally untethered to reality—and self-evidently prejudicial. But, ultimately, the State's theory as to why Nikki's death should be viewed as a homicide hinged on the testimony of Dr. Squires and Dr. Urban, who relied on the tenets of SBS/AHT as generally accepted in 2003.

The jury heard unchallenged "scientific" testimony, ***now known to be false***, that the triad of internal head conditions observed in Nikki permitted presuming that abuse had occurred, in the form of violent shaking.

The jury heard unchallenged "scientific" testimony, ***now known to be false***, that shaking can cause internal head injuries without injuring the neck.

The jury heard unchallenged "scientific" testimony, ***now known to be false***, that shaking induces immediate brain damage and thus no lucid interval is possible—allowing prosecutors to accuse whoever was with the child when she collapsed.

The jury heard unchallenged "scientific" testimony, ***now known to be false***, that neither Nikki's illness nor a short fall could explain any aspect of her condition.

* * * *

Just before the jury was charged, the State abandoned the count of capital murder based on the sexual assault allegation. 44RR3. Yet the State continued to argue that there was evidence of a sexual abuse based solely on the testimony of the self-appointed SANE who was not actually SANE-certified. 46RR58-60. Aside from the baseless opinion of this unqualified nurse, there was absolutely no evidence of sexual abuse.

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

Without the benefit of the avalanche of evidence that has been developed since trial, a juror has come forward and attested, in convincing detail and under penalty of perjury, about her significant doubts about the integrity of the trial:

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

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

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

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

- "We were not told about pneumonia."

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

EX26.

In retrospect, the trial was a complete travesty.

C. The Criminal Justice System Failed Robert at Every Turn.

Robert spent years asking for his appointed lawyers to pursue his innocence, only to be ignored and mocked. EX6; EX30-35.

The same defense lawyer, who had ignored Robert's insistence that he had done nothing to harm Nikki and who had conceded at trial that this was a "classic shaken baby case," was appointed to represent Robert in his direct appeal, over Robert's objection. The CCA affirmed the conviction and death sentence in an opinion that described at length the Shaken Baby trial testimony. *Roberson v. State*, No. AP-74,671 (Tex. Crim. App. June 20, 2007) (unpub.).

The trial lawyer recommended that his friend be appointed to pursue an initial state habeas application. The resulting application did not include any claims challenging the State's cause-of-death theory. The convicting court, presided over by the same judge who had tried the case, denied an evidentiary hearing. The State filed its proposed Findings of Fact and Conclusions of Law (FFCL). Then, two days later, the judge signed the same document without changes, not even scratching out the word "proposed" in the caption. The CCA later denied all relief. *Ex parte Roberson*, Nos. WR-63,081-01, WR-63,081-02,

2009 WL 2959738 (Tex. Crim. App. Sept. 6, 2009) (unpub.).

Right after relief was denied, Robert wrote a letter to the federal district court again requesting new counsel. But the court granted the state habeas lawyer's request to stay on as federal counsel, despite the patent conflict of interest. Robert wrote another letter asking for new appointed counsel willing to pursue his innocence, to which his lawyer responded defending his representation and denigrating his client's wish to prove his innocence. The federal district court again declined to appoint substitute counsel. EX31; EX32.

A federal habeas petition was filed, but the lawyer raised no claims about the Shaken Baby cause-of-death hypothesis that was, by then, being widely challenged.[12] Less than a year after the federal district court denied the federal habeas petition, the Fifth Circuit denied an appeal. Soon thereafter, the Anderson County DA's Office sought and secured an execution date for June 21, 2016.

Meanwhile, Robert continued to send urgent requests asking for a lawyer willing to investigate his innocence. EX35.

Just three months before his scheduled execution, the Fifth Circuit finally

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[12] *See, e.g.*, A.N. Guthkelch, Problems of Infant Retino-Dural Hemorrhage with Minimal External Injury, 12 HOUS. J. HEALTH L. & POLICY (2012) (one of original proponents of SBS hypothesis explaining why he had retreated from his own unverified hypothesis, acknowledging that subdural and retinal bleeding, with or without brain swelling, had been observed in many accidentally and naturally occurring circumstances and recognizing that forces generated by humans and laboratory machines shaking anatomically accurate dummies had proven insufficient to cause disruption of human tissue or to create any component of the SBS triad).

appointed new federal habeas counsel, who recruited new state habeas counsel.

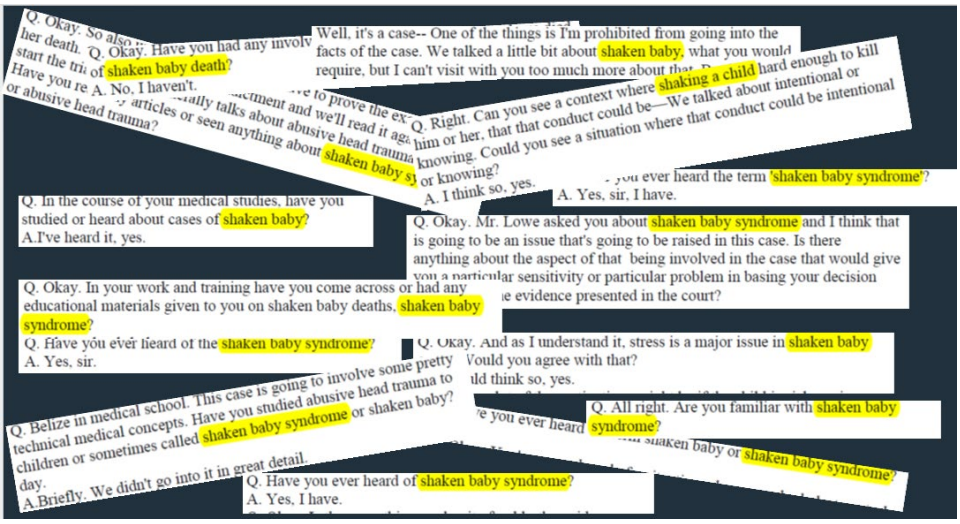
On June 8, 2016, Robert's new state habeas counsel, one of the undersigned, filed a habeas application supported by four volumes of evidentiary proffers. The application raised, for the first time, a claim of Actual Innocence and relied, in part, on a new procedural vehicle enacted specifically to address convictions based on subsequently discredited or changed scientific understanding. *See* TEX. CODE CRIM. PROC. art. 11.073. Mere days before Robert's scheduled execution date, the CCA granted the motion to stay his execution and entered an order remanding all claims "to the trial court for resolution." *Ex parte Roberson*, WR-63,081-03, 2016 WL 3543332 (Tex. Crim. App. June 16, 2016).

After the remand order, the State filed an Answer, attaching just one item: an affidavit from Dr. Urban, the medical examiner who had performed Nikki's autopsy in February 2002 and testified for the State at trial in February 2003. The affidavit denied that she had opined about "shaking" as a cause of Nikki's death and emphasized her view that the subdural blood she had seen during the autopsy amounted to evidence of "multiple impact sites." *But see* EX27 (showing Dr. Urban's extensive trial testimony about shaking as the cause of Nikki's internal head condition).

The presentation of new evidence finally commenced in the Anderson County courthouse on August 14, 2018, but was abruptly stopped that same day

after long-lost CAT scans of Nikki were found locked up in the courthouse basement. The evidentiary hearing resumed in March 2021 with a total of nine days of testimony, including the presentation of six highly qualified experts supporting the claims that the "science" used to convict Robert had undergone a sea change, that the State had relied on material false testimony, and that he was actually innocent.

After the hearing record was prepared, the parties submitted proposed FFCL. Robert's proposal summarizing the key evidence in the new 13-volume record was 302-pages long. The State's proposal was 17-pages long and did not acknowledge the new evidence amassed during the proceeding, which showed how the core tenets of SBS/AHT had changed and how Nikki had died of natural and accidental causes. The State's proposed FFCL relied primarily on the 2003 trial testimony while misrepresenting the few components of the new evidentiary record that it cited. For instance, the State took the position that its trial causation theory had ***not*** been SBS/AHT. That position cannot be reconciled with the barrage of references, from jury selection through closing arguments, to "shaking" that the jury heard had caused Nikki's death:



Excerpts from 2003 trial transcript

EX27.

Meanwhile, the State also insisted that the scientific view of SBS/AHT had not changed since 2003 because SBS/AHT "is still a recognized diagnosis in the medical field." On February 14, 2022, the convicting court issued its FFCL, recommending that habeas relief be denied. The convicting court's FFCL largely tracked the State's proposal, including its typographical and grammatical errors and the finding that SBS is "still an accepted mechanic [sic] of death." After Robert's objection to the ruling and appeals were denied, his current execution date was set—without granting any of his multiple requests for a hearing.

Now Robert again faces the prospect of being ***the first person executed for a "crime" based on the discredited Shaken Baby hypothesis***.

THE NEW EXCULPATORY EVIDENCE

A. The Junk Science Used to Convict Robert Has Been Discredited, and the Actual Cause of Nikki's Death Is Now Known.

It is now clear that Robert was hastily accused, convicted, and sentenced for a crime that did not occur. He was accused of an act of violence that no one observed but was ***presumed*** based on a discredited methodology.

There is now widespread recognition in the scientific and medical community that SBS was an unscientific hypothesis from the outset, which was nevertheless treated as medical gospel at the time of Nikki's death and Robert's trial. Indeed, the way this unvalidated hypothesis took hold within the medical establishment has resulted in widespread injustice. *See, e.g.*, Deborah Tuerkheimer, FLAWED CONVICTIONS: "SHAKEN BABY SYNDROME" AND THE INERTIA OF INJUSTICE (Oxford Univ. Press 2014); Keith A. Findley, et al., ed., SHAKEN BABY SYNDROME: INVESTIGATING THE ABUSIVE HEAD TRAUMA CONTROVERSY (Cambridge Univ. Press 2023).

There is now a new scientific consensus: a doctor cannot responsibly presume that an infant or child was "shaken" or otherwise abused based on the presence of a triad of internal head conditions—because those ***same*** conditions are associated with a host of naturally occurring illnesses, including pneumonia, as well as accidental short falls with head impact.[13]

[13] No one contends that forcefully shaking an infant is acceptable. But as experts in the field of biomechanical engineering have instructed, no study has ever demonstrated that a human can generate sufficient force through shaking to produce a subdural hematoma or any internal head injuries. *See, e.g.*, I. Thiblin et al., *Medical Findings and Symptoms in Infants Exposed to Witnessed or Admitted Abusive Shaking: A Nationwide Registry Study*, 15 PLOS ONE 8–9 (2020). If anything, shaking would injure the neck and spinal cord. Nikki had no injuries of that nature.

The week before Nikki died, she had been sick with a persistent cough, vomiting, diarrhea, and wheezing. When Robert took her to the Palestine ER on January 28, 2002, a doctor prescribed Phenergan/promethazine, as Nikki's doctors had done previously. But that drug is now known to be unsafe for children Nikki's age and with respiratory issues—precisely because it suppresses respiration. The next day, Nikki's fever spiked, and Robert took her to her pediatrician's office—where her temperature was measured at 104.5 degrees. The pediatrician diagnosed her with "respiratory illness, likely viral" and sent her and Robert home—with another prescription for Phenergan/promethazine, this time with codeine—an opiate wholly inappropriate for children under age eighteen.

New medical and scientific evidence—including detailed reports from experts with unassailable credentials—shows that Nikki died of severe viral and bacterial pneumonia that progressed to sepsis and then septic shock. ***There was no homicide.*** Experts from a range of medical specialties have explained exactly how Nikki died:

- **Dr. Francis Green**, an **expert in lung pathology** with over 46 years of experience, recently reviewed Nikki's medical history and her lung tissue under a microscope. His detailed report explains that Nikki's lungs were infected with two different and virulent types of pneumonia—a chronic viral and an acute bacterial infection—which decimated Nikki's lung tissue, starving her brain of oxygen, and causing her death. Dr. Green's detailed analysis shows that Nikki's pneumonia must have started many days or even weeks before her final hospitalization, progressed to sepsis and caused a pronounced clotting disorder (DIC), making her more prone to internal bleeding. His report also makes clear that Nikki's lung

condition could not have been caused by inflicted trauma nor can it be explained by the fact that she was on a ventilator during her final hospitalization, thoroughly rebutting the prosecution's theory that Nikki died of an inflicted head injury. EX2.

- **Dr. Keenan Bora**, an **expert in medical toxicology and emergency room medicine**, has concluded that a post-mortem toxicology report shows that Nikki had dangerously high levels of promethazine in her system, likely because the drug was prescribed by two different doctors on two consecutive days in two different forms. Promethazine is a drug no longer prescribed to children Nikki's age and in her condition because it impairs their ability to breathe and can be fatal. Dr. Bora has concluded that this drug exacerbated Nikki's breathing problems and likely hastened her death from her pneumonia infection, which her body was unable to fight off, leading to sepsis and then septic shock. EX3.

- **Dr. Julie Mack**, an **expert in pediatric radiology**, has concluded that the initial CAT scans of Nikki's head show only a single minor impact site on her head, not multiple impacts as the medical examiner suggested at trial. Dr. Mack reviewed CAT scans discovered in the courthouse basement in 2018 after being lost for 15 years. As interpreted by the only type of expert qualified to read them, the scans corroborate Robert's statement at the hospital that Nikki had fallen out of bed and possibly hit her head. Dr. Mack has also reviewed chest scans of Nikki, some produced to Robert's counsel only in 2018 and others only in 2024. Dr. Mack has concluded that these chest images corroborate Dr. Green's conclusion that Nikki died of a fatal lung infection (pneumonia). EX4.

- **Dr. Roland Auer**, a medical doctor and Ph.D. research scientist and **expert in neuropathology**, has concluded that Nikki's death could not reasonably be deemed a homicide. Dr. Auer explained that trauma sufficient to cause internal brain damage would leave external markers on the skin in the form of corresponding bruises/contusions and likely corresponding skull fractures. He found no evidence suggesting significant trauma to Nikki's head, only one minor impact, as confirmed by Dr. Mack's analysis. The bump on the back of Nikki's head (captured in the CAT scans) is entirely consistent with a fall out of bed and was, in any event, insufficient to explain why Nikki stopped breathing and died. He has found that her pneumonia and the inappropriate medications she was prescribed fully explain her death. EX5.

The current medical consensus is that intracranial bleeding cannot be

deemed proof of inflicted head trauma. Intracranial bleeding can be caused by accidental head trauma sustained in a short fall with head impact or by a host of naturally occurring phenomena associated with oxygen-deprivation—such as pneumonia.[14]

But back in 2003, Dr. Squires had told Robert's jury that Nikki's death could ***only*** be explained by "violent shaking" that produced a "massive brain injury." 42RR107; 42RR120. Dr. Squires acknowledged the lack of external signs of injury on Nikki: "no scars, no unusual bruising or anything." 42RR96. That is one reason, consistent with medical views at that time, Dr. Squires concluded

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[14] *See, e.g.*, Norrell Atkinson, et al., *Childhood Falls with Occipital Injuries*, 34 Pediatric Emergency Care 837-41 (2018) **(**eight cases of witnessed accidental falls onto back of child's head all produced subdural and retinal hemorrhages, with one resulting in death); D. Vaslow, *Chronic Subdural Hemorrhage Predisposes to Development of Cerebral Venous Thrombosis and Associated Retinal Hemorrhages and Subdural Bleeds in Infants*, 35 Neuroradiology Journal 53-66 (2022); I. Thiblin, et al., *Retinal Hemorrhage in Infants Investigated for Suspected Maltreatment is Strongly Correlated with Intracranial Pathology*, 111 Acta Paediatrica 800-08 (2022); W. Squier, *Infant Retinal Haemorrhages Correlate with Chronic Subdural Haemorrhage, not Shaking*, 111 Acta Paediatrica 714-15 (2022); J. Andersson, et al., *External Hydrocephalus as a Cause of Infant Subdural Hematoma: Epidemiological and Radiological Investigations of Infants Suspected of being Abused*, 126 Pediatric Neurology 26-34 (2021); S.M. Zahl, et al., *Examining Perinatal Subdural Haematoma as an Aetiology of Extra-Axial Hygroma and Chronic Subdural Haematoma*, Acta Paediatrica (2019); J. Mack, et al., *Anatomy and Development for the Meninges: Implications for Subdural Collections and CSF Circulation*, 39 PEDIATRIC RADIOLOGY 200–210 (20190; Irene Scheimberg et al., *Nontraumatic Intradural and Subdural Hemorrhage and Hypoxic Ischemic Encephalopathy in Fetuses, Infants, and Children up to Three Years of Age: Analysis of Two Audits of 636 Cases from Two Referral Centers in the United Kingdom*, 16 Pediatric Development Pathology 149, 149, 155 (2013); N. Aoki, *Infantile Acute Subdural Hematoma with Retinal Hemorrhage Caused by Minor Occipital Impact Witnessed by an ICU Nurse: a Case Report*, 4 Journal of Pediatric Neurology and Neuroscience 47-50 (2020); C. Brooks, et al., *26 cm fall caught on video causing subdural hemorrhages and extensive retinal hemorrhages in an 8-month-old infant,* Clinical Case Reports (July 2024).

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

Dr. Urban, who performed the autopsy the day after Dr. Squires' SBS diagnosis, testified at trial regarding signs of "shaking" and "multiple impacts." The "shaking" hypothesis has been debunked by empirical science. As for Dr. Urban's "multiple impacts" opinion, the new report regarding the radiological evidence, interpreted by pediatric radiologist Dr. Mack, and the expert opinions of Dr. Auer, an expert in head and brain injury, show that Dr. Urban's opinion is not evidence-based. The combination of Nikki's undiagnosed pneumonia, medications prescribed to her that suppress breathing, an accidental fall, and the extensive triage performed when she had already experienced brain death entirely explain Nikki's condition, including the intracranial bleeding.

The robust scientific and medical evidence developed in the years since Robert's last execution date was stayed up to the present shows that no reasonable juror would convict him and that Robert can categorically prove his innocence.

B. There Was No Other Credible Evidence That Robert Ever Hurt Nikki—Or Anyone Else.

At trial, aside from the SBS cause-of-death theory and the baseless and profoundly prejudicial sexual abuse allegations, the State relied in the guilt-phase on decidedly unreliable testimony from a handful of lay witnesses to encourage the jury to see Robert as capable of violently shaking and otherwise

abusing his daughter. But when he was charged in this case, there was no record that he had ever been violent toward ***anyone***.

Some of the State's evidence was "demeanor" evidence from the medical staff who encountered Robert when he brought Nikki in for care. These witnesses, who had no history with Robert, did not know that he had Autism and misjudged symptoms of his disability as an indication that he was unmoved by his daughter's grave condition. The evidence supporting Robert's belated diagnosis is described at length below—showing how and why the symptoms of his disability were misconstrued as signs of "guilt."

The State leaned heavily on Robert's ex-girlfriend, Teddie, an intellectually impaired, unstable woman who, soon before trial, overdosed on drugs, attempted suicide, and was confined to a psychiatric hospitalization. In the wake of Nikki's death, she had a CPS investigation opened on her too although she was in the hospital recovering from a hysterectomy at the time. When she testified, she was wildly inconsistent, but strong on one point: Robert had never hurt her in any way. However, she was repeatedly asked leading questions, urging her to describe how he had previously shaken Nikki. 42RR175-77, 185-86, 190-91. She was all over the place and, ultimately, admitted on the stand that she would change her story about Robert depending on "how [she] feel[s]" at the moment. 43RR11, 36, 48. Teddie's own sister, Patricia, testified at trial that Teddie had pronounced problems with truthfulness. 44RR10-22. Patricia also attested that

she had only observed Robert being loving and caring with Nikki and had never seen him be unkind to her. *Id.*

The farfetched efforts at trial to paint Robert as a person capable of violence (that had not occurred) were unprincipled. But the new evidence establishes there was no crime at all—and thus belies the contorted efforts to portray Robert as a monster who shook his two-year-old to death.

Robert is the furthest thing from a monster. He is a gentle soul who, despite having every reason to be angry, has had a virtually pristine disciplinary record during his many years in prison. Because of his record of peacefulness, he was selected to be in the very first faith-based program on death row. He not only graduated but, thereafter, he was 1 of only 13 men selected to participate in an experimental "group rec" program that allowed him to move freely on the pod in community with others on death row whom the State of Texas had identified as no threat to anyone. Terry Solley, the minister who created the faith-based program and guided Robert through his studies, has told this Board that he knows what an innocent man in prison looks like, that he is convinced of Robert's innocence, and that he believes that executing Robert would be a terrible mistake. EX11; EX23. Another minister, Kevin Ramsby, who himself has been "a victim of horrific violent crime," has expressed anguish about Robert's current circumstances. He says, "Robert is one of the kindest men I have interacted with in my 30 years of ministry" and maintains "there is no one less likely to harm

another." EX23.

Similarly, the former lead detective Brian Wharton, who investigated Nikki's death as a murder in 2002 and testified for the prosecution against Robert in 2003, has been speaking out. In a *Dallas Morning News* editorial, he urged the public to see what he sees: that he and others got it wrong, as scientific advances now show. The new evidence demonstrates that Robert is innocent. EX8. Mr. Wharton, now a Methodist pastor, has also come to understand how Robert's flat affect following Nikki's collapse was a symptom of his disability, not guilt. EX17. He recently took the courageous step of visiting Robert on death row and forging a relationship with him: "I have come to know a man who is kind and full of grace, simple and true." *Id.*

C. The Demeanor Evidence Used to Convict Robert Arose from Ignorance of His Belatedly Diagnosed Autism.

It is now known that Robert is a person living with Autism Spectrum Disorder, a neurological and developmental disorder that has, since birth, affected how he interacts with others, communicates, and learns. Robert's disability directly contributed to his wrongful conviction when investigators assumed his flat demeanor during pronounced stress (a manifestation of his Autism) was a sign of culpability. This Board has the power to show mercy to a man who will always be profoundly impacted by his disability and who has worked hard to better himself and his community despite those challenges.

Robert was a "special needs" student before dropping out after ninth grade.

With notable speech delays, he was given some speech therapy and other services available to poor folks in rural East Texas. But he was never properly assessed, and his Autism was not diagnosed in childhood. As advocates from the Autism Society of America and the Autism Society of Texas explain in their joint letter to this Board, "delayed diagnosis is all too common, particularly for people who grow up in poverty and with unstable family circumstances." EX17.

After falling through the cracks at school, Robert had tried to better himself by joining the military.

But he was a sensitive person who had come through a rough childhood with a father prone to verbal and physical abuse. Not cut out for the military, he essentially went from boot camp to marriage at age 19. He and his young wife, both struggling with addiction, had two special needs children. During a divorce proceeding soon thereafter, they agreed that Robert's mother should assume custody. EX39. Robert, with little education and an undiagnosed disability, spent several years thereafter floundering, while maintaining close ties to his disabled children. EX6.

In early 1999, Robert had a brief relationship with Michelle Bowman, a young woman from his hometown (Palestine). After he suggested marriage, she quickly moved on to a new boyfriend. But when Robert later learned that Michelle had given birth to Nikki and that she might be his daughter, he fought to turn his life around. He got a job delivering newspapers for the *Palestine*

Herald and, with the help of friends, acquired a small rental house. His new girlfriend, Teddie Cox, and her child Rachel, moved in, after recently escaping an abusive male, then in jail for sexually abusing Rachel. Part of building a new family involved welcoming Nikki over for visits. EX6.

Two short months later, when Robert brought Nikki to the hospital for the last time, he repeatedly explained that she had been sick for over a week and described her strange cry and apparent fall out of bed during the night, which he had not witnessed. But hospital staff, who did not know he had Autism, viewed his flat affect with suspicion, judging it as a sign of callousness about his daughter's condition. Those hasty judgments were patently wrong. Robert loved his little girl and was thrown into a state of shock when he woke up to find her unconscious. *Id*.

As professional advocates for people on the Autism spectrum have explained to the Board:

> Because Autism produces deficits in social and emotional processing, people who fall on the Autism spectrum may ***seem*** "odd," "calm," "nonchalant," "unemotional," "detached," or "uncaring" to the neurotypical public, ***particularly in times of stress***. These are the very terms trial witnesses used to describe Mr. Roberson's response to Nikki's death. Tragically, the jury was unaware of Mr. Roberson's Autism and did not hear from any qualified expert witness who could explain that his outward lack of emotional response ***masked intense distress***.

EX17 (emphasis added).

Only in 2018, did a qualified neuropsychologist conduct a comprehensive evaluation and diagnose Robert with Autism Spectrum Disorder, a disability that explains his non-neurotypical response to Nikki's collapse. Autism is a developmental disability, not a mental illness.[15] More specifically, Autism is "a life-long neurodevelopmental condition interfering with the person's ability to communicate and relate to others"[16] in "neuro-typical" ways.[17] The most common symptoms are lack of eye contact, aversion to touch, dependence on routine and repetitive actions, impaired ability to communicate or relate to others, difficulty understanding people's feelings, and other distinct behavioral patterns.[18]

Neuropsychologist Dr. Diane Mosnik was retained to help counsel understand some of Robert's behavior—communications ticks, repetitive actions, eye flutter, and vocal stammer—and to learn whether he suffered from any neuropsychological condition or brain damage that might impact his ability to handle stress or that would explain his affect. EX40. Dr. Mosnik conducted a diagnostic interview, administered a battery of tests, and conducted interviews

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

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

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

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

with collateral witnesses who knew Robert during the developmental period.[19] Additionally, Dr. Mosnik reviewed extensive social history records and materials related to the trial. She noted that Robert's medical history included an "abundance" of documentation indicating that he had sustained brain damage and had brain dysfunction. After undertaking her independent assessment, Dr. Mosnik "conclusively" diagnosed Robert with Autism Spectrum Disorder. EX37; EX38.

Dr. Mosnik explained that Autism is a "neurodevelopmental condition," evident before the age of 18, which continues throughout life. Autism is not the same thing as mental retardation (now known as intellectual disability). However, autistic people have significant deficits in the areas of social and emotional processing, social perception, and understanding social relationships. There is often, as she found ample evidence of with Robert, a significant "disconnect between what they are feeling and expression of feelings." EX38 at 98-99. They also can exhibit repetitive movements, interests, and speech, and tend to have a strong preference for routine and structured, simplistic environments. *Id*.

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

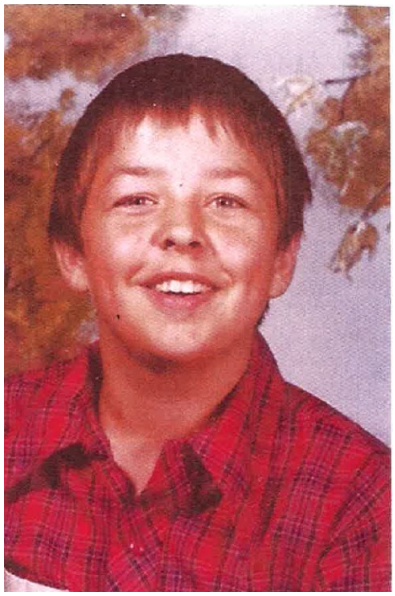
Dr. Mosnik described clear characteristics of Autism that she tested for and observed in Robert: impairment in all manner of social exchanges, impaired ability to interpret facial expressions, impaired ability to express emotion in what is perceived as "normal" fashion. *Id*. at 104-109. Dr. Mosnik's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

Dr. Mosnik explained that people with Autism can easily get "off topic" and focus on minutia. Also, Robert, like many people with Autism, has an idiosyncratic speech pattern, and his speech and writing are characterized by repetition. Additionally, testing revealed that Robert's speech patterns were very stilted and child-like, and his writing is characterized by very simplistic grammar and syntax. *Id*. at 107-08.

Laypeople who do not have expertise in Autism can easily misjudge autistic people because their social behavior is inconsistent with "normal" expectations for various social contexts.[20] *See also* EX9; EX11. Robert's reaction to an unanticipated crisis—***a misalignment between internal emotion and outward expression***—was not evidence of indifference but, rather, a classic manifestation of his Autism. EX38.

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

Dr. Mosnik also reviewed post-conviction testimony from Casey Brownlow, who knew Robert when they were both in the seventh grade in Palestine, Texas.



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

Mr. Brownlow explained that he lost track of Robert after he dropped out of school at some point during high school. 7EHRR53. Many years later, Mr. Brownlow reconnected with Robert and they exchanged some letters, which Mr.

Brownlow described as like those he "would get from his sons from summer camp. . . . Smiley faces at the end of sentences. Sad faces at the end. Very childlike. Very childlike. Sweet in an innocent kind of way." 7EHRR56-57. Mr. Brownlow also noted that all of Robert's letters were very similar and repetitious. 7EHRR57.

Mr. Brownlow's testimony corroborated other information learned from interviewing family members: that Robert had limited friendships and had been bullied and teased at school and pushed around in the school setting. Dr. Mosnik also learned from his mother that Robert was delayed in his speech, required speech therapy, and had engaged in repetitive behaviors as a child. EX38.

Dr. Mosnik found no evidence in Robert's voluminous records that he had any history of aggressive or violent acts. Although his ex-wife, who had not seen him or their children in over ten years, was flown in from out of state by the prosecution to make accusations during the 2003 trial, there were no records corroborating any of her claims; instead, there was evidence that she had forfeited custody of the special needs children they had had together and never visited them again. *Id*.

Considering this new, credible insight into Robert's demeanor, the State's reliance at trial on his affect and presumed "odd" behavior following Nikki's collapse is not only unfairly prejudicial but false.[21] The lead detective and one of

[21] *See, e.g.*, Perlin, Michael L. and Cucolo, Heather, '*Something's Happening*

the State's key trial witnesses, Brian Wharton, who testified at trial about his perception of Robert's blunted and odd behavior, has now completely disavowed his former testimony. EX7-EX11.

Mr. Wharton was Chief of Detectives in Palestine, Texas in January 2002 when Nikki was brought to the hospital and he took charge of the investigation. He has acknowledged that he has "long been troubled by this case" and does "not believe that justice was served." At the time, he had a hunch that Robert "had some kind of disability or mental illness," and he noted that everyone interviewed at the hospital discussed Robert's behavior as being "odd." But he had not been trained in mental health or developmental issues. He saw a "lack of emotion" and "a lack of understanding" and had no prior experience with Robert—and certainly could not have known about his Autism Spectrum Disorder diagnosis, as it was not made until years later. EX9.

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

Here/But You Don't Know What It Is': How Jurors (Mis)Construe Autism in the Criminal Trial Process, 82 UNIV. PITTSBURGH L. REV. 586 (2021).

did not investigate further and looked at Robert through the lens of someone who had abused his daughter. *Id.*

Neither the State's witnesses nor the jury heard about Robert's Autism. And studies have confirmed what should be intuitive: if jurors are unaware of a defendant's Autism diagnosis, there is a higher chance that negative demeanor evidence is held against him—even subconsciously.[22] Unfair assumptions are made about a perceived "lack of remorse or empathy" that "can be particularly harmful[.]"[23] In this case, Robert's jury was expressly told, by multiple witnesses, that he should be viewed with suspicion and disbelieved because his reaction to his daughter's condition was not "normal." His assertion "I love my little girl. I would never mean to hurt her" was mocked. 41RR73. But the seeming mismatch between his outward appearance and his feelings of deep love and concern for his daughter was a direct manifestation of his disability.

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

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

THE NEED FOR EXECUTIVE INTERVENTION

Despite decades of wrongful conviction on death row, Robert stands out as a pillar of faithful, peaceful living who is widely beloved.

Executive clemency now stands as one of the few safeguards left that can stop the State of Texas from executing an innocent man. The justice system has, thus far, failed Robert: failed to prevent a decades-long wrongful incarceration and failed to properly apply Texas's vaunted "new science writ" law to his new evidence.

Hopes were high that the 2021 evidentiary hearing would finally rectify this grave error, because his case exemplifies the kind of conviction that Article 11.073 of the Texas Code of Criminal Procedure was meant to address. As a new report explains, when enacted, Texas's new science law was seen as a "revolutionary step forward for people who were wrongfully convicted based on flawed forensics." EX36 (Texas Defender Service, *An Unfulfilled Promise: Assessing the Efficacy of Article 11.073*, July 2024). But the courts charged with applying the new law to the facts of Robert's case have failed to do so. His copious new evidence has been ignored, and the legislative intent behind the law is not being honored. Indeed, the first systematic study of Article 11.073 cases shows that "[t]he CCA ***has never granted 11.073 relief to a person sentenced to death***, as compared to granting relief to 31% of people who seek relief and are serving non-death sentences." *Id*. at 2 (emphasis added).

Although facing the most serious sentence available under criminal law, and although individuals facing the prospect of death are supposed to be afforded ***heightened reliability*** under long-standing constitutional law, Robert has faced more obstacles and less success than habeas applicants who have utilized Article 11.073 to overturn convictions in non-death-penalty cases. Also, he, who faces the ultimate punishment, has been denied relief in Texas whereas litigants in non-capital SBS cases around the country have obtained relief. *See id*. at 24 ("[S]ince 1992, over 30 parents and caregivers in 18 states have been exonerated after being wrongfully convicted under the shaken baby hypothesis.").[24]

Another recent study shows that the factors before the Board in this case include those most frequently cited in ***grants*** of executive clemency throughout the modern death-penalty era. *See* Death Penalty Information Center, *Analysis: Why Executive Officials Grant Clemency* (July 2024).[25] The top three factors cited are: an excessive sentence; possible innocence; and mitigation factors. *Id*. Robert's innocence is the primary reason this Board should recommend, and the Governor should grant, executive clemency. His developmental disability—here a mitigating factor explaining how an innocent man was misjudged during a time of tremendous stress and convicted—is also a compelling reason to show mercy.

Despite the tragic death of his young daughter and his subsequent

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[24] Citing National Registry of Exonerations, Exoneration Detail List, numbers at that time, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspxa.

[25] *Available at* https://deathpenaltyinfo.org/news/analysis-why-executive-officials-grant-clemency.

wrongful conviction and death sentence, Robert has never let the seeds of resentment take root. Instead, by word and by deed, he demonstrates his innate goodness. His faith in God, his commitment to compassionate connection with others, and his genuine gratitude in the face of adversity have sustained him during his wrongful incarceration.

During the past decade, Robert has grown tremendously, building relationships with caring people who have seen what is readily apparent beneath the surface of his disability: a tender hearted, self-effacing, guileless Innocent who believes in the goodness of others.

Taking every opportunity to strengthen his relationship with his Lord Jesus Christ, Robert has successfully completed numerous rigorous Bible study programs. Most recently, Robert has received completion certificates in the following programs: "Kingdom Divided," a nine-month Bible Study Fellowship awarded June 7, 2023; "The Truth Project," by Focus on the Family awarded August 3, 2022; and "Matthew Study," a 30-week Bible Study Fellowship awarded May 2022. EX41. But Robert did not wait until 2022 to seek out opportunities to strengthen his faith. His student transcript from ECS Ministries, a program that provides correspondence Bible study courses to prisoners, shows that Robert completed almost 60 different courses between 2003 and 2015. *Id*.

Robert has complemented his Bible studies with Christian-based courses

offering leadership and life-skills training. He received a certificate of completion for "Overcomers," a recovery support program offered to prisoners, on March 1, 2022; "The Bridges to Life," a restorative justice program, on March 15, 2022; "Authentic Manhood," a program offered to male prisoners encouraging that they take initiative for others, on October 28, 2022; and "Beyond Success," a transformational leadership development program, on April 27, 2023. *Id*.

The Field Ministers who worked closely with Robert have attested to Robert's authentic kindness and selflessness. Terry Solley, who created the first-of-its-kind faith-based program for death row, served as Robert's Field Minister for three years. He is now the Executive Director of Texas Prison Outreach. Mr. Solley felt compelled to share his insight and observations about Robert:

> I found Robert to be a person of remarkable humility, kindness, and integrity. He participated in and graduated from an 18-month faith-based program that I helped establish and maintain. His commitment to this program was evident in his demeanor and actions; he was a stabilizing presence and a source of encouragement for others. In the time I spent with Robert, he consistently demonstrated a deep sense of morality and a sincere dedication to personal growth and the well-being of those around him.

EX23. Luis Gomez, a Field Minister serving the Polunsky Unit, shares a similar view of Robert. Mr. Gomez got to know Robert while teaching the Voyager Program, which focuses on developing a sense of empathy and connection with others. Mr. Gomez recalls that, with Robert, he "consistently saw a caring and considerate individual willing to set aside personal desires for the sake of others." *Id.*

Robert's unwavering faith has strengthened his ability to maintain genuine compassionate connections with people he has gotten to know while incarcerated. The Reverend Doctor Carolyn Willis, one of Robert's spiritual advisors, has been close with Robert for around nine years and visits Robert every other month. She describes Robert as "one of the kindest people" she has ever met. According to Reverend Doctor Willis:

> [Robert's] compassion and care are amazing to me as he is aways more concerned about how I am doing than him sharing how he feels. When I visit Robert, he insists on saying a prayer or two for me. I am the minister, yet he wants to pray for me, my ministry, and my health. His prayers are absolutely beautiful and have almost brought me to tears on numerous occasions.

Id. Likewise, Denise Culley, Director of Jesus's Prayer Ministry, recognizes that Robert has a "Beautiful Heart and Spirit" and is "full of God's Love and Joy." Since 2010, Robert has assisted Ms. Culley's ministry by writing letters, sending cards to its members, and helping other prisoners. *Id.*

Guided by his abiding faith, Robert is a deeply grateful man. Those who know him are astounded by his gratitude in the face of adversity. Jason Fulton, who assisted as pro bono counsel during Robert's 2021 evidentiary hearing, remembers that Robert expressed gratitude during every interaction they had together:

> Grateful for time, for conversation, for the human touch of a simple handshake. He was grateful to the prison for giving him access to a Bible study, grateful for each of the very limited things he had and for the people that interacted with him and supported him. Robert is grateful—he sees and focuses on the good things in his life.

Id. Similarly, Merel Pontier, a lawyer who has been friends with Robert for the last four years, emphasizes Robert's gratitude:

> For Robert, the glass is always half full, not half empty. In that regard, he has taught me a lot. Robert has changed my perspective on life by constantly reminding me of the fact that we always have something to be grateful and thankful for, we always have something to fight for no matter what life throws at us.

Id. As a former volunteer intern on Robert's case from the Netherlands remembers, "[a]lthough there are so m[any] reason[s] for him to be negative, he always tries to focus on the good." *Id.*

Robert's gratitude and faith are the foundation of his generosity of spirit. While most people in his situation would myopically focus on their own circumstances, Robert always thinks of others. Mr. Fulton recognized this quality during his representation of Robert:

> Although very interested in his case and in our efforts to represent him, [Robert] was equally concerned for those around him. He worried about his family, talked of other inmates and the people he corresponded with. During his incarceration, [Robert] has made substantial efforts to contribute positively to the prison community. . . . For someone with every reason to be inward focused and to feel abandoned and alone, Robert instead thinks of others, how he could bless them, how he might use his time in prison or his release to support and help his family.

Id.

Donna Drake Farmer, who has become a mother figure to Robert, has been awed by Robert's generosity. Ms. Farmer's son went to school with Robert, and she began corresponding with Robert in 2016. They have since become

extraordinarily close:

> Space is too limited here to convey what knowing and loving Robert has meant to me. . . . He probably knows more of my concerns and worries than my birth children do. He reminds me constantly that prayer changes things. His prayers for me as I tended to my husband's dementia disease and dying gave me such peace in the chaos surrounding me. And there, he has sat on Texas Death Row. Every call or letter ends with him sending love to allllllll my family individually by name!

Id. And while Robert has very few material possessions, he never misses a friend's birthday; he sends handmade cards, using their favorite colors. *Id.*

Simply stated, Robert is a good and faithful man. He has been able to endure what most people could not. Those who know him best recognize what a humble, gentle, and earnest person he is and how it is "difficult to conceive how such character has survived over twenty years on death row." *Id.* Robert's faith, compassion, gratitude, and resilience in the face of his wrongful conviction and death sentence, are sources of inspiration for all those who have been touched by his friendship. In the wake of losing a cherished daughter, while wrongfully incarcerated he also lost his father and then his beloved mother and has agonized over the fate of his adult special needs children whom he longs to protect and nurture while he still has time to reclaim a life for himself and his family, which has been battered by so many wanton cruelties.

Robert with family before Nikki's passing, Fall 2001

The many who love him now pray in unison that mercy will be bestowed. "What doth the Lord require of thee, but to do justly, and to love mercy, and to walk humbly with thy God?" Micah 6:8. There is no justice, only a terrible, irrevocable sin, if this innocent man is executed.

The State's case against Robert can be likened to a three-legged stool:

One leg was the presumption that his non-neurotypical reaction to a tragedy was a sign of guilt, not a common manifestation of his disability.

One leg was the now debunked Shaken Baby hypothesis and the resistance to allowing scientific advances into the courthouse.

One leg was the lack of due diligence in the initial investigation, the autopsy, and the representation he, a poor man, received from appointed lawyers throughout trial and his mandatory appeals.

Remove any leg and the case would topple. But by now, all three legs have

been exposed as illusory. There is no support whatsoever for the case against him.

PRAYER FOR CLEMENCY

For the foregoing reasons, Robert Roberson requests that the Board recommend, and the Governor grant, commutation of death sentence to a lesser penalty, or in the alternative, a reprieve of 180 days so the Board and the Governor may give this application appropriate consideration. Mr. Roberson also requests an interview and a hearing on this matter.

Respectfully submitted, this 17th day of September, 2024,

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Attorneys for Robert Leslie Roberson III

REQUIREMENTS OF TITLE 37 OF TEXAS ADMINISTRATIVE CODE § 143.42

1. Name of Applicant

Robert Leslie Roberson III, TDCJ #999442, is incarcerated at the Polunsky Unit in Livingston, Texas. Mr. Roberson's execution is scheduled for October 17, 2024.

2. Identity of Applicant's Agents

Attorneys Gretchen Sims Sween, a solo practitioner in Austin, and Callie Heller, associated with the Western District of Oklahoma Federal Defender Office in Oklahoma City, Oklahoma, are presenting the application on behalf of Mr. Roberson.

3. Certified Copies of Documentation

Certified copies of the indictment, jury charge and verdict, judgment and sentencing order, order of execution, and warrant of execution are attached as Exhibit 1.

4. Brief Statement of the Offense

No offense occurred. On February 1, 2002, 2-year-old Nikki Curtis was taken off life support, after being hospitalized when she was discovered unconscious. Mr. Roberson was arrested based on a "Shaken Baby" diagnosis made without consideration of her extensive medical history, her recent illness, or a middle-of-the-night fall from bed. Given Mr. Roberson's flat affect at the hospital, a symptom of his Autism, hospital staff and police believed he lacked emotion and interpreted that as a sign of guilt. Based on the then-prevailing Shaken Baby Syndrome hypothesis, as well as the since-falsified belief that her father's description of a short fall and Nikki's illness could not explain her condition, it was assumed that Mr. Roberson must have shaken his daughter to death.

A self-described, though uncertified, Sexual Assault Nurse Examiner further speculated that Nikki had been sexually abused, saying she saw signs of "anal tears" no one else saw. She did not know or consider that the child had suffered from diarrhea for over a week before the hospitalization and had been prescribed Phenergan suppositories two days before by the same ER doctor. Although no doctor or other evidence supported the local nurse's highly prejudicial speculation, the Anderson County District

Attorney indicted Mr. Roberson for capital murder committed during the course of committing or attempting to commit aggravated sexual assault as well as murder of a child under the age of six years. But the State dropped the sexual assault charge just before the case was submitted to the jury.

After a separate punishment hearing, the jury answered the special issues in a manner requiring death. On February 14, 2003, the 3rd Judicial District Court of Anderson County, Texas entered a judgment sentencing Mr. Roberson to death.

5. Brief Statement of Appellate History

The same local trial attorney, who had conceded that this was a "Shaken Baby" case, was appointed to represent Mr. Roberson on appeal, over his objection. The CCA affirmed his conviction and sentence in *Roberson v. State*, No. AP-74,671 (Tex. Crim. App. Jun. 20, 2007) (unpub.).

An attorney recommended by the trial attorney was appointed for Mr. Roberson's initial state habeas application, which did not raise any claims related to the State's cause-of-death theory. The convicting court denied an evidentiary hearing. Two days after the State filed proposed FFCL, the same judge who had presided over the trial signed the same document without changes, not even scratching out the word "proposed" in the caption. The CCA adopted the convicting court's findings in *Ex parte Roberson*, Nos. WR-63,081-01, WR-63,081-02, 2009 WL 2959738 (Tex. Crim. App. Sept. 16, 2009) (per curiam) (unpub.).

The same state habeas attorney arranged to be appointed federal counsel, over Mr. Roberson's objections. That attorney filed a habeas corpus application in federal court pursuant to 28 U.S.C. §§ 2241, 2254, which did not raise an Actual Innocence claim, despite Mr. Roberson's repeated requests. The United States District Court for the Eastern District of Texas denied the application. *Roberson v. Director*, TDCJ-ID, 2014 WL 5343198 (E.D. Tex. Sept. 30, 2014). The decision was affirmed by the United States Court of Appeals for the Fifth Circuit. *Roberson v. Stephens*, 619 F. App'x 353 (5th Cir. 2015). The United States Supreme Court denied certiorari review of the Fifth Circuit's opinion denying relief, *Roberson v. Stephens*, 577 U.S. 1033 (2015), as well as certiorari review of proceedings in the Fifth Circuit attempting to remove conflicted counsel from Mr. Roberson's case. *Roberson v. Stephens*, 577 U.S. 1150 (2016).

In 2016, the convicting court in Anderson County, Texas set an execution date for Mr. Roberson of June 21, 2016. Thereafter, Mr. Roberson obtained new counsel and, relying on Article 11.073, known as the "junk science writ," a subsequent state habeas application was filed, for the first time challenging the Shaken Baby cause-of-death theory that had been used to convict him and raising Actual Innocence. On June 16, 2016, the CCA stayed the scheduled execution date and remanded all of his new habeas claims to the convicting court for further development, finding they satisfied 11.071(5) and 11.073. *Ex parte Roberson*, No. WR-63,081-03, 2016 WL 3543332 (Tex. Crim. App. June 16, 2016) (unpub.).

At that time, the 3rd Judicial District Court, the convicting court, was presided over by the Hon. Mark Calhoon, who had to recuse himself because he had been one of the two attorneys who had prosecuted Robert and because Judge Calhoon's father, who had also been a judge in Anderson County, had presided over the proceeding involving custody of Nikki and the post-death termination of Robert's parental rights without a hearing. Another Anderson County district judge, Deborah Oakes Evans, assumed responsibility.

Judge Evans eventually presided over an evidentiary hearing beginning in August of 2018 and concluding in March of 2021.[26] Thereafter, Judge Evans adopted the State's seventeen-page proposed FFCL, rather than Mr. Roberson's 302-page version supported by the new 13-volume post-conviction record, and recommended that the CCA deny relief. The CCA summarily adopted Judge Evans' FFCL, without mentioning any of the new evidence, most of which was not mentioned in Judge Evans' recommendation. *Ex parte Roberson*, No. WR-63,969-03 (Tex. Crim. App. Jan. 11, 2023) (unpub.). The United States Supreme Court denied certiorari review. *Roberson v. Texas*, 144 S. Ct. 129 (mem.) (2023). A Suggestion to Reconsider on the Court's Own Initiative, filed in April 2024, was denied via a one-sentence "postcard notice" on September 4, 2024.

Meanwhile, on July 1, 2024, despite Mr. Roberson's pending motion requesting a hearing before the setting of any execution date, the convicting court again set an execution date for Mr. Roberson, this time for October 17, 2024.

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[26] The hearing was continued the same day it started, after the new Anderson County District Clerk found case-related evidence in a locked closet in the courthouse basement; these materials included some of Nikki's CAT scans that had been missing from her hospital records for years.

On August 1, 2024, a subsequent application for a writ of habeas corpus was filed in the CCA, supported by numerous evidentiary proffers, including four new expert reports from medical specialists from a range of disciplines. A motion to stay the execution was filed as well. Additionally, in the convicting court, a motion to withdraw the execution date was filed and a hearing was requested.

On September 11, 2024, the CCA denied the motion to stay the execution and dismissed the subsequent habeas application without considering the merits, claiming it did not satisfy the procedural requirements of section 5 of Article 11.071.

6. Brief Statement of Legal Issues

Mr. Roberson is actually innocent of the offense for which he was convicted and sentenced to death. His execution would therefore be cruel and unusual and violate his due process rights under the Eighth and Fourteenth Amendments. He was convicted and sentenced to death based on pseudo-science that has since been discredited and based on false testimony sponsored by the prosecution, further violating his due process rights. His trial counsel conceded his guilt against his express wishes, in violation of his Sixth Amendment autonomy and fair trial rights.

7. Requested Length of Reprieve

180 days.

8. Grounds for Commutation and/or Reprieve

Each of the following warrants relief: Mr. Roberson's actual innocence of any offense as demonstrated by new evidence from multiple highly qualified medical experts; the discredited science that supported the conclusion that a homicide had occurred as opposed to the tragic natural death of a very ill child; his mental limitations, including his Autism, that caused law enforcement and hospital staff to misjudge him when he sought help for his daughter; and his model citizenship and kind, humble spirit exhibited during two decades of wrongful incarceration.