No. _____

(CAPITAL CASE)

In the

Supreme Court of the United States

ROBERT LESLIE ROBERSON III,

Petitioner,

v.

TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Capital Case – No Execution Date

Petitioner Robert Roberson is an innocent man on Texas's death row. He was tried, convicted, and sentenced in 2003 for purportedly causing the death of his two-year-old daughter Nikki, a chronically ill child with a 104.5-degree fever soon before her collapse on January 31, 2002. Robert, who had an 8th-grade education and undiagnosed autism spectrum disorder, could not explain Nikki's condition to the satisfaction of hospital staff. The hypothesis used to convict him reflected the consensus in the medical community at the time: that, absent something like a massive car accident, a child in Nikki's condition must have been violently shaken and, possibly, struck against a blunt surface. "Shaking" (thus abuse) was thought to explain why a child, with no significant external signs of trauma, would have the following "triad" of internal symptoms: bleeding inside the head under the dura membrane, brain swelling, and retinal hemorrhages (bleeding in the eyes). The medical consensus was that naturally occurring illnesses or short falls with an impact to the head could not cause this triad. The medical consensus also presumed that whoever had been caring for the child when she lost consciousness must have been the culprit because the violent shaking would have caused immediate brain damage. Caregivers, like Robert, who denied doing anything to hurt the child, were perceived as callous liars. These premises were collectively known as "Shaken Baby Syndrome" (SBS).

Experts in the habeas proceeding below explained that, in the decades since trial, scientific inquiry has: exposed the lack of empirical evidence supporting SBS, challenged the circular nature of its premises, and emphasized the need for a "differential diagnosis" that looks at the child's medical history and rules out the numerous conditions now known to cause the same triad. The State did not rebut Petitioner's new evidence of Nikki's severe, undiagnosed pneumonia and of the respiratory-suppressing medications in her system, phenomena that can cause fatal hypoxia (oxygen deprivation), which in turn causes the triad previously thought to prove abuse. Nor could the State deny that the current scientific consensus recognizes that short falls with head impact can also cause the triad, a concept ridiculed at trial.

The Questions Presented are:

(1) Does a conviction, based on a causation theory presented to a jury as scientific fact and used to establish that a homicide occurred, violate due process when later medical and scientific understanding undermines all core premises previously associated with that causation theory?

(2) Are a habeas applicant's due process rights violated when (i) the habeas court ignores substantial, unrebutted new evidence that no homicide occurred and relies

instead on the outdated, unscientific evidence presented at trial as the basis for recommending that habeas relief be denied and (ii) the reviewing court uncritically adopts the habeas court's findings and conclusions without any analysis whatsoever?

PARTIES TO THE PROCEEDINGS BELOW

Both parties are identified in the case caption. Because neither party is a corporation, a corporate disclosure statement is not required.

RELATED PROCEEDINGS

- Trial: *State v. Roberson*, No. 26,162-A (3rd Dist. Ct., Anderson County, Texas 2003).
- Direct Appeal, affirmed: *Roberson v. State*, No. AP-74,671 (Tex. Crim. App. June 20, 2007) (not designated for publication).
- Petition for Writ of Certiorari, denied: *Roberson v. Texas*, 552 U.S. 1314 (2008).
- Initial State Habeas, relief denied: *Ex parte Roberson*, Nos. WR-63,081-01, WR-63,081-02, 2009 WL 2959738 (Tex. Crim. App. Sept. 16, 2009) (per curiam) (not designated for publication).
- Federal Habeas, relief denied: *Roberson v. Stephens*, 619 F. App'x 353 (5th Cir. 2015) (per curiam).
- Petitions for Writ of Certiorari off of federal habeas, denied: *Roberson v. Stephens*, 577 U.S. 1033 (2015); *Roberson v. Stephens*, 577 U.S. 1150 (2016).[1]

NOTE ABOUT CITATIONS

"RR" citations refer to the Reporter's Record of Petitioner's trial and "EHRR" refers to the Reporter's Record of his state habeas evidentiary hearing. The first number before the abbreviation refers to the volume number; and the number afterward is the page number or range within the volume. "SX" refers to an exhibit offered by the State in the habeas proceeding, and "APPX" refers to an exhibit offered by the habeas applicant.

[1] In that proceeding, two different petitions were filed on Mr. Roberson's behalf because he had asked to have his conflicted appointed counsel replaced, but that counsel declined to step aside.

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PETITION FOR WRIT OF CERTIORARI

To address the layers of due process violations below, Petitioner respectfully asks that the Court issue a writ of certiorari and undertake plenary review or summarily reverse the judgment of the Texas Court of Criminal Appeals (CCA). Petitioner pursued this subsequent state habeas proceeding after Texas enacted a new forensic science writ statute specifically intended to address wrongful convictions based on discredited science. In this proceeding, Petitioner established that: (1) the State relied on an uncontested SBS causation theory to obtain his conviction; (2) each of the SBS premises considered medical orthodoxy in 2003 have since been undermined by evidence-based science; (3) the jury heard misleading, highly prejudicial testimony from one nurse suggesting that Nikki was sexually abused, when no one else saw any signs of such abuse; and (4) the combination of Nikki's undiagnosed pneumonia, medications prescribed to her, and an accidental fall entirely explain Nikki's condition. Yet Texas courts disregarded all of Petitioner's new evidence and denied him a new trial, leaving him on death row without any obvious recourse beyond this Court's intervention.

OPINIONS BELOW

The CCA's unpublished opinion, *Ex parte Roberson*, No. WR-63,081-03, 2023 WL 151908 (Tex. Crim. App. Jan. 11, 2023) (per curiam), is in Appendix A (App001-004). The habeas court's unpublished findings of fact and conclusions of law (FFCL), recommending that habeas relief be denied, is in Appendix B (App005-017). The CCA's unpublished remand order, *Ex parte Roberson*, No. WR-63,081-03, 2016 WL

3543332 (Tex. Crim. App. June 16, 2016) (per curiam), is in Appendix C (App018-021).

STATEMENT OF JURISDICTION

The CCA entered its judgment on January 11, 2023. On April 3, 2023, Justice Alito granted an extension of time to file this petition up to and including May 11, 2023. No. 22A856. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. art. XIV, § 1.

STATEMENT OF THE CASE

I. Factual Background

A. Origins of the SBS Hypothesis

The idea that "shaking" might explain the mystifying deaths of some infants was first proposed in the 1970s in anecdotal articles by Dr. John Caffey, a radiologist, and Dr. Norman Guthkelch, a neurosurgeon. These physicians hypothesized that shaking might have caused "subdural hematoma," *i.e.*, bleeding under the dura membrane covering the brain, and, in turn, the deaths of infants absent any obvious explanation for the internal bleeding (such as a high-speed car accident or fall from a great height). APPX20; APPX21; 3EHRR45; 4EHRR12, 17-18. This hypothesis, first called "Shaken Baby Syndrome," became associated with a triad of internal symptoms: bleeding under the dura, brain swelling, and retinal hemorrhages. Yet no

evidence or testing supported that hypothesis.[2] 3EHRR93; 8EHRR17-18.

Gradually, the SBS hypothesis was applied to older and older children, although their brains and neck muscles are quite different from infants'. 3EHRR46-47; 4EHRR18. By 2001, the American Academy of Pediatrics (AAP), the leading organization of pediatricians, published a position paper stating that violent shaking was not only a form of child abuse but could be "diagnosed" when the SBS triad was observed. 4EHRR20; APPX22.[3] The 2001 AAP paper was not a scientific study, but a document used to educate the organization's members regarding then-current medical understanding. 4EHRR20.

In 2002-2003, after Robert Roberson's daughter Nikki inexplicably collapsed, the State relied on the SBS hypothesis to charge, try, and convict him. At that point, the prevailing view in the medical community was that, whenever a child presented with the triad (1) the child must have been the victim of either violent shaking alone or shaking with blunt impact; and (2) whoever had been caring for the child when the symptoms manifested must have been the culprit—absent some verified major trauma such as a car wreck or fall from a multistory building. That is, by the time of Nikki's death, SBS had become a "medical diagnosis of murder,"[4] and reports of

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[2] Dr. Guthkelch later retreated from his unverified hypothesis, acknowledging that subdural and retinal bleeding, with or without brain swelling, have been observed in accidentally and naturally occurring circumstances. 10EHRR130. Dr. Guthkelch also recognized that forces generated by humans and laboratory machines shaking a dummy had proven "insufficient to cause disruption of human tissue" or any aspect of the SBS triad. 10EHRR131; 4EHRR64; APPX34F.

[3] Over time, "SBS" was rebranded as "Shaken Impact Syndrome" and then "Abusive Head Trauma;" despite the name changes, no evidence-based science has yet been adduced to support the hypothesis. *See generally* David Moran, et al. *Shaken Baby Syndrome, Abusive Head Trauma, and Actual Innocence: Getting it Right*, HOUS. J. HEALTH L. & POL'Y 12, NO. 2 at 209-312 (2012).

[4] Deborah Turkheimer, *Science-Dependent Prosecution and the Problem of Epistemic Contingency: A Study of Shaken Baby Syndrome*, 62 ALA. L. REV. 513, 516 (2011).

recent illnesses or short-distance falls were considered false explanations intended to conceal abuse.

B. Nikki's Illness and Her Father's Arrest

Nikki was born to a drug-addicted, homeless woman supporting herself through prostitution; in the hospital, she was denied custody and Nikki was given to her maternal grandparents, Verna and Larry Bowman. Soon before Nikki's second birthday, Robert volunteered to take a paternity test and the Bowmans, eventually, agreed to relinquish custody of Nikki to him. 6EHRR162.

Unbeknownst to her father, Nikki had had chronic health issues during her short life. Her first reported infection occurred a few days after her birth; thereafter, she had many unresolved infections that proved resistant to multiple antibiotics, including chronic ear infections that persisted even after she had had tubes surgically implanted. Nikki also suffered unexplained "breathing apnea," which caused her to suddenly cease breathing, collapse, and turn blue. APPX9; APPX10; APPX14.

On January 28, 2002, soon after Robert obtained custody, he and his mother took Nikki, who had been vomiting, coughing, and having diarrhea for five days, to the local emergency room in Palestine, Texas. The attending ER doctor prescribed potent drugs, including Phenergan, which now has an FDA black-box warning against prescribing it to children Nikki's age and in her condition. APPX122.

Later that night, Nikki's temperature shot up to 103.1 degrees. Therefore, Robert took Nikki to her pediatrician the next morning (January 29th), where Nikki's temperature was measured at 104.5 degrees. But the pediatrician sent Nikki home,

issuing a second prescription for Phenergan, this time in cough syrup along with codeine—an opioid that the FDA now restricts for children under 18 due to the risks of inducing breathing difficulties or death. APPX9; 4EHRR182; 5EHRR237.

The Bowmans took Nikki that day, having agreed to keep her for two nights while Robert's live-in girlfriend was in the hospital recovering from surgery. 43RR152. But the next night (January 30th), the Bowmans called Robert, insisting that he pick up Nikki out in the country. Although Nikki was sick, although the Bowmans had been involved in a bitter custody fight with Robert's family for most of Nikki's life, and although it was after 9:30 PM, the Bowmans demanded that Robert pick up Nikki and take her back to his house in town.[5] 6EHRR165-66, 176, 178.

When they got to his house, Robert put Nikki into bed, which was a mattress and box springs recently propped up on layers of cinderblocks. Robert awoke in the early morning when he heard a strange cry and found Nikki on the floor. He saw a small speck of blood on her mouth and wiped it off with a washcloth. They both eventually fell back asleep. But, later that morning, January 31st, Robert woke up to find Nikki unconscious and saw that her lips were blue. He grabbed Nikki's face, shook her to try to revive her, then brought her to the local ER. APPX7.

At the ER, staff commenced performing CPR; they intubated Nikki and restarted her heart. She then experienced "tachycardia," a rapid heartbeat caused by inadequate circulation of oxygenated blood. 41RR112; 6EHRR96-97. About an hour

[5] Evidence adduced in this proceeding showed that, although the Bowmans had voluntarily relinquished custody of Nikki to Robert in the fall of 2001, up through the month of her death in early 2002, they were looking for "evidence" to use against him to try to regain custody. 6EHRR205.

later, a CT scan revealed that the breathing tube had not been inserted properly; it had to be removed and reinserted. 6EHRR97-98; 42RR87. But well before triage had even begun, Nikki had likely succumbed to brain death (which occurs after 10-12 minutes without oxygen); medical staff had noted that Nikki's eyes were already "fixed and dilated" upon admission to the hospital. 2EHRR79; 8EHRR62.

During multiple hospital and police interviews, Robert tried to explain Nikki's collapse, reporting that she had been sick and describing her strange cry and apparent fall out of bed during the night, which he had not witnessed. APPX7. Hospital staff did not know that Robert had autism and were suspicious of his flat affect; they judged his response to his daughter's grave condition as reflecting a lack of emotion. 41RR50-160.[6]

The same ER doctor who had treated Nikki on January 28th—when Robert brought her in due to "flu, diarrhea, vomiting"—also treated her on January 31st. 42RR80-81. The doctor observed "some bruising around the left side of her jaw," which he did not attribute to abuse. 42RR83, 87. But based on the CT scan of Nikki's head, showing bleeding under the dura and brain swelling, he discounted her recent illness and concluded that Nikki's condition "did not result from a fall out of bed[,]" "[t]hat would basically be impossible[,]" "extremely implausible," "very implausible," "very unlikely." 42RR80-87.

The "abuse" accusation was stoked by a local nurse, who held herself out as a "Sexual Assault Nurse Examiner" (SANE), although she was not actually SANE

[6] Evidence of Robert's autism spectrum disorder and how it affects the "normal" display of emotion was developed for the first time in this habeas proceeding. *See* 7EHRR64-138.

certified. 41RR141. She summoned the police to Nikki's hospital room and then took it upon herself to perform a sexual assault exam on the comatose child. 6EHRR105-06. This nurse told colleagues and investigators that she had seen "anal tears" that she perceived as a sign of "sexual abuse." The nurse's leap from purported "anal tears" to "sexual abuse" was never substantiated by any evidence. APPX62; APPX6. Nor was the nurse's dubious accusation ever reconciled with the fact that Nikki had had diarrhea for over a week before her collapse. Instead, at trial, the nurse doubled-down on her false accusation by incorrectly insisting that diarrhea would not cause a child's anal region to crack or "tear." 41RR127-28.

Meanwhile, the Bowmans told law enforcement and medical personnel that Nikki had been "totally well" when Robert had picked her up from their house the night before. That demonstrably false report buttressed the assumption that Nikki's condition could and should be blamed on Robert. APPX103.

Because the local hospital in rural Palestine, Texas did not have the means to treat Nikki, she was transported, while on life support, to Dallas Children's Hospital. In Dallas, in a futile effort to save Nikki's life, doctors gave her high doses of multiple medications to increase blood circulation. And a pressure monitor was surgically screwed into her skull to try to reduce internal pressure. While the medications increased the flow of blood to Nikki's brain, the blood could not reach her brain because Nikki's brain was already dead. APPX11. The Dallas hospital records indicate that Nikki also had a clotting disorder of unclear origin, which made her susceptible to bruising and likely increased the bleeding inside her skull.

In Dallas, Nikki's case was referred to a child abuse pediatrician, Dr. Janet Squires. She examined Nikki and found no evidence of sexual abuse. She observed that CT scans of Nikki's head showed a single, minor impact site on the back right side. But, consistent with the prevailing SBS consensus, she did not believe that this minor impact site or Robert's report about a fall explained Nikki's condition. Instead, she attributed the triad of "injuries" observed in Nikki as "proof" that she had been violently shaken, despite the absence of neck injuries. Dr. Squires gave local law enforcement an affidavit describing her SBS diagnosis, which police used to arrest Robert even before an autopsy was performed. APPX103.

A medical examiner, Dr. Jill Urban, performed the autopsy on February 2, 2002, and concluded that same day that Nikki's death was a homicide. APPX12; APPX101. Dr. Urban did not investigate Nikki's medical history. Nor did she consider the head CT scans showing a single, minor impact site on the back of Nikki's head, a phenomenon consistent with Robert's report of a short fall. Nor did she wait for the results of a toxicology report she had ordered, which showed lethal levels of respiratory-suppressing prescription drugs in Nikki's system 5EHRR201-09.

The autopsy did not reveal any skull fractures or neck injuries. The autopsy report did contain an unexplained note about "macrophages" in the lung tissue. APPX12. Macrophages are a sign of virus, and a pediatrician's record, made 2 days before Nikki's collapse, documented that her temperature was 104.5 degrees and that her "[f]ever, may be viral etiology or may be unresolved upper respiratory infection." APPX9. But those facts were not explored. Dr. Urban saw a large volume of blood

under the dura and, consistent with the SBS hypothesis, assumed the blood was caused by "blunt force injuries," which she later attributed to an unknown combination of "shaking" and "impact."

II. Trial

The State indicted Robert on two counts of capital murder: alleging that (1) he had "intentionally or knowingly" caused the death of "a person under the age of six" and (2) he had killed his child "in the course of committing or attempting to commit the offense of aggravated sexual assault." 1CR2-4.

Throughout jury selection, the State specifically invoked SBS 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. *See, e.g.*, 7RR25-27, 67, 75, 127; 8RR10; 19RR22, 57.

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, counsel ***agreed*** with the prosecution that this was a "shaken baby" case and did not challenge the State's theory regarding cause of death during any phase of trial, instead arguing only that 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, emphasizing how Robert had not

displayed appropriate emotion and that a short fall and Nikki's recent illness could not have caused her condition. 41RR-42RR. The State elicited the most extensive testimony from the SANE nurse who claimed she had seen anal tears, graphically described "anal penetration," and offered her view of the proclivities of "pedophiles." 41RR127-42. But the State's causation and mens rea theory hinged on the testimony of two experts relying on the tenets of SBS as generally accepted in 2003. These subsequently discredited tenets were presented as scientific fact.

- **The jury heard unchallenged, but subsequently discredited, "scientific" testimony that, where the triad is present, shaking can be presumed as the mechanism of injury.**

Dr. Squires told Robert's jury that Nikki's condition was caused by SBS, not by disease or an accidental fall. Dr. Squires testified that the "medical findings" were "a picture of shaken impact syndrome," which she defined as synonymous with what the "public" knew as "shaken baby syndrome." 42RR106. Next, Dr. Squires explained the then-prevailing view of the only real controversy with respect to SBS:

> some people think that with shaken baby that the most part of the damage is that they're often shaken and then thrown against something …. There are some experts that think that you cannot kill a child by just shaking alone, but you have to—And they call it shaken impact. So the term is about the same. I will say that most ... experts do think that shaking alone, if done vigorously, will kill a child, but most children are shaken and then thrown against something.

42RR106-07.

The prosecution highlighted the triad observed in Nikki: "the items we talked about, the subdural hemorrhages, the retinal hemorrhages, and the brain swelling; what are they indicative of?" 42RR107. Dr. Squires responded, "Well, it is my opinion

... that there was some component of shaking that happened to explain all the deep brain injury ... There had to have been something more than just impact." 42RR107-08. She further opined that the "subdural blood" combined with the "retinal hemorrhages" "really lets you know that those eyes were being shaken." 42RR108. On redirect, Dr. Squires emphasized: "You really have to shake them really hard back and forth and then you typically slam them against something." 42RR126.

Dr. Squires invoked the AAP's position on SBS, a reference to its 2001 position paper. 42RR116-17. In that paper, pediatricians were taught that they did not have to consider other possible diagnoses if they found: bleeding under the dura, brain swelling, and retinal hemorrhages; they could assume that a child's condition had been caused by abusive shaking. APPX23.

Dr. Urban also relied on the SBS hypothesis. She told the jury that Nikki's "[s]ubdural hemorrhage is something that we see in injuries that are caused in children this age by blunt force and also by shaking or blunt impact injuries." 43RR75-76. Dr. Urban explained that the bleeding occurred "when that brain moves back and forth in the front of the skull" and that the bleeding caused "the swelling or edema." 43RR76, 81. She then highlighted Nikki's retinal hemorrhages as "something that is typically seen in a blunt force or shaking type of injury." 43RR76.

Consistent with the SBS hypothesis, Dr. Urban opined that "blunt force" meant "being struck with something or being struck against something. Shaking also falls into this definition of blunt force ... When a child is say, shaken hard enough, the brain is actually moving back and forth within, again, within the skull, impacting the

skull itself and that motion is enough to actually damage the brain." 43RR79; *see also* 43RR80 ("What actually happens is when the brain is shook or struck hard enough in cases such as you might find here."). She was unable to say "this much of [Nikki's] death was caused by the shaking and this much of her death was caused by the battering," but told the jury that they "together killed Nikki." 43RR85-86.

- **The jury heard unchallenged, but subsequently discredited, "scientific" testimony that shaking can cause internal head injuries without injuring the neck.**

Nikki had no neck or spinal injuries of any kind and few bruises. To explain the absence of external injuries on Nikki, Dr. Squires relied on a central tenet of SBS at that time, suggesting "there's no signs of trauma at all and yet as that head is moving and then suddenly stops, these shear forces go through it and cause tremendous damage to the brain, deep in the brain." 42RR107. She also opined that "babies are … so small compared to how big whoever it is shaking them…. [T]heir heads are big compared to their bodies, their neck muscles are weak." 42RR106.

Likewise, Dr. Urban testified that Nikki, a two-year-old child, had anatomical features, such as a "weak neck," that made her more vulnerable to shaking. 4EHRR76-78.[7] Dr. Urban suggested that, "if the child is shaken, it's this very large object sitting on a fairly weak neck. And, you know, the weakness in the neck protects the neck from getting hurt, but it really just doesn't protect the head[.]" 43RR82.

- **The jury heard unchallenged, but subsequently discredited, "scientific" testimony that shaking induces immediate brain damage with no lucid interval possible before the onset of symptoms.**

[7] Yet Nikki was not an infant with weak neck muscles but a 28-pound toddler.

In accord with another SBS tenet, Dr. Squires opined that the imagined shaking would have produced an obvious, instant change in Nikki's level of consciousness, thus allowing an inference that Robert had been the one to cause Nikki's condition by shaking her:

> after the event that caused all this deep brain injury she would not have been normal. And any reasonable person would know that she wasn't normal.… [S]he would never have talked, walked, and been thought to be normal by anybody.

42RR108-09. Similarly, Dr. Urban testified at trial that, after being shaken, Nikki's injuries would have been immediately apparent—reflected in "a change in the level of consciousness." 43RR81.

- **The jury heard unchallenged, but subsequently discredited "scientific" testimony that a short fall could not have explained any aspect of Nikki's condition**.

All of the local medical personnel and law enforcement witnesses who testified at trial rejected the idea that a short fall could have explained Nikki's condition—yet another core tenet of SBS. *See, e.g.*, 41RR66, 69, 89, 99, 123-25; 42RR17-18, 83-85, 108; 43RR156. Dr. Urban also rejected the concept that a short fall could have played any role in causing Nikki's condition; thus, she did not seek any information about the reported fall or otherwise investigate the circumstances preceding Nikki's collapse. 5EHRR215.

* * *

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 assault based solely on the testimony of the

SANE who was not actually SANE-certified. 46RR58-60. The jury convicted Robert of capital murder on the lone count before it. 47RR-49RR. The punishment-phase began the next day; and, soon thereafter, Robert was sentenced to death. 49RR.

III. Post-Conviction Proceedings

A. Initial Appeals

The same defense lawyer who had conceded that this was a "shaken baby" case represented Robert on direct appeal. The CCA affirmed Robert's conviction and death sentence in an opinion that described at length the SBS causation trial testimony. Another lawyer, recommended by trial counsel, pursued an initial state habeas application, which did not include any claims challenging the State's cause-of-death theory. The habeas court recommended denying habeas relief without holding an evidentiary hearing, and the CCA later denied all relief requested in the initial habeas application and dismissed a 2005 *pro se* filing as an unauthorized successive application. *Ex parte Roberson*, Nos. WR-63,081-01, WR-63,081-02, 2009 WL 2959738 (Tex. Crim. App. Sept. 16, 2009) (per curiam) (not designated for publication). State habeas counsel continued to represent Robert in an unsuccessful federal habeas proceeding, in which the State's SBS causation theory was never challenged.

B. Current State Habeas Proceeding

In 2016, an execution date was set; Robert obtained new counsel, who initiated the current proceeding. The new habeas claims focused on intervening changes in the scientific understanding of SBS, which had, in the interim, been renamed as a more amorphous umbrella term "Abusive Head Trauma" (AHT). 4EHRR124. The habeas

application relied 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. Four claims were raised: (1) that new scientific evidence established by a preponderance of the evidence that Robert would not have been convicted; (2) that the State's reliance on false, misleading, and scientifically invalid testimony had deprived Robert of the right to due process under state law; (3) that Robert was entitled to habeas relief because he is actually innocent; and (4) that Robert was entitled to habeas relief because his federal right to due process and a fair trial were violated by the State's introduction of forensic science testimony that current science has exposed as false. The application, supported by several volumes of evidentiary proffers, was submitted to the CCA, along with a motion seeking to stay Robert's then-pending execution.

On June 16, 2016, mere days before Robert's scheduled execution date, the CCA granted the motion to stay the execution and entered an order remanding all claims "to the trial court for resolution." AppC.

After the remand order, the State filed an Answer, attaching 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. APPX12; APPX19. 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." APPX100; *but see* 43RR75-86 (extensive discussion of "shaking" in Dr. Urban's trial testimony).

1. New Evidence Material to the Conviction

During the evidentiary hearing, new evidence was adduced about scientific advancements that debunked the State's SBS trial causation theory and the opinion that a homicide had occurred. Experts also testified about Nikki's undiagnosed interstitial viral pneumonia and the toxic level of respiratory-suppressing medications in her system at the time of her death, circumstances that likely explain why she ceased breathing at some point after the short fall from bed her father had reported, which CT scans taken of Nikki in the ER actually verified.

- **The habeas court heard new, unrebutted scientific evidence that many phenomena can cause the triad, and thus a differential diagnosis is essential.**

Experts explained the change in scientific understanding since 2003 when virtually all physicians and pathologists believed that, absent evidence of a high-speed car crash or similar event, seeing the triad was sufficient to assume that a child had been shaken and thus had sustained an intentionally inflicted head injury. 4EHRR23; 8EHRR129. It is now recognized that the triad is not specific to trauma, let alone inflicted trauma. 3EHRR49; APPX35C; APPX1; APPX2. Many naturally occurring conditions can cause the triad, 3EHRR48-49; APPX34B; APPX1, and studies have demonstrated each component of the triad is associated with hypoxia (oxygen deprivation). APPXC; 8EHRR16. Evidence was adduced that, by 2009, the AAP had acknowledged that doctors must perform a "differential diagnosis" to rule out other medical conditions, by then associated with the same triad.

Because the triad cannot legitimately be seen as a res ipsa loquitur of abuse,

forensic ethics now demands a "differential diagnosis," whereby all relevant circumstances and conditions are identified and all other potential causes ruled out before inflicted injury is posited. 4EHRR72-73.

- **The habeas court heard new, unrebutted scientific evidence that shaking would cause neck injuries not subdural bleeding.**

Dr. Ken Monson, a biomechanical engineering professor at the University of Utah who studies head injuries and directs the "Head Injury and Vessel Biomechanics Laboratory," described studies in his field on the injury-potential of shaking. 5EHRR83-89. He attested that it is "literally impossible" to cause subdural bleeding through shaking and no study has demonstrated that shaking can produce any internal head injuries. 5EHRR98-131. He and other experts explained that there is no scientific basis to support the hypothesis that violent shaking can "shear" an infant's brain cells or cause the triad. 3EHRR45-46; 4EHRR37, 142, 146. When asked about Dr. Urban's trial testimony stating that Nikki's neck was not injured because it was "protected," Dr. Monson testified "It just doesn't make sense." 5EHRR101. As he explained, any head acceleration generated by shaking would be generated by force ***in the neck*** specifically; thus, the neck is ***not*** protected during shaking. 5EHRR102. He found it significant that Nikki had no neck injuries of any kind. 5EHRR101. Dr. Monson concluded that it was "very unlikely" that shaking caused any aspect of Nikki's condition. 5EHRR99.

- **The habeas court heard new, unrebutted scientific evidence that children can experience a lucid interval of hours or even days before subdural bleeding causes a collapse.**

New evidence was adduced that hypoxia, which can be brought on by many means, can trigger a cascade of events that eventually—after a lucid period of hours or even days—produces the triad. 3EHRR32-33, 49; 8EHRR82. Dr. Monson discussed a video, played during his testimony, showing a little girl, precisely Nikki's age, accidentally fall from a small playscape onto concrete covered by carpet while a relative happened to be filming. The child remained lucid but ended up dying a day later; an autopsy revealed the triad. 5EHRR28-32. Dr. Monson's unrebutted testimony established that testimony at Robert's trial denying any possibility of a "lucid interval" was false, thus further undercutting the corresponding assumption that Robert must have caused Nikki's condition because he was with her when she collapsed.

- **The habeas court heard new, unrebutted scientific evidence that short falls can produce serious, even fatal injuries.**

Multiple experts testified that, in 2003, only a few outliers in the medical community were considering whether a short fall with a head impact could seriously injure a child. A forensic pathologist, Dr. John Plunkett, had published a paper, *Fatal Pediatric Head Injuries Caused by Short-Distance Falls*, challenging this key component of SBS cases; the paper identified 18 cases of child fatalities in the Consumer Product Safety Commission's database that had been classified as short-fall accidents and thus verified that short falls can, under some circumstances, be fatal. 4EHRR25-26; APPX24. But Dr. Plunkett and his research were summarily dismissed by the larger medical community for years. APPX3; 5EHRR29-30.

Dr. Monson's unrebutted testimony described the biomechanical research that ultimately validated Dr. Plunkett's intuitions. APPX3; 5EHRR27-105. Evidence was adduced of contemporary scientific studies, including a 2018 study, demonstrating that short falls can cause the exact kind of impact and internal bleeding observed in Nikki when she first arrived at the hospital (as seen in the CT scans taken of her head). 5EHRR215-16, 140-43 (discussing Atkinson 2018, *Childhood Falls with Occipital Impacts in Pediatric Emergency Care*); APPX141. Dr. Monson observed that the trial testimony stating that a short fall could not have caused Nikki's condition was incorrect. 5EHRR27-28, 104-05.

- **The habeas court heard new, unrebutted scientific evidence that no sound science supports the SBS hypothesis used to convict Robert.**

Expert testimony, based on substantial new science, debunked all core tenets of the SBS/AHT theory. Experts explained the significance of the first "meta-study" of SBS studies, published by an agency of the Swedish government in 2016.[8] 4EHRR51-52; 8EHRR35-38. The meta-study identified significant defects in the literature endorsing SBS/AHT as a causation theory. APPX34D.[9] It found no high-quality articles or scientific studies supporting the SBS/AHT hypothesis or any meeting the criteria for sound science. 4EHRR52-53. An appendix to the study highlighted the absence of any uniform diagnostic criteria for SBS/AHT, unlike other

[8] A "meta-study" is a statistical analysis that combines the results of multiple scientific studies addressing the same question. While each individual study may report measurements that have some degree of error, meta-analytic results are considered to be the most trustworthy source of evidence by the evidence-based medical literature. Oxford Centre for Evidence-Based Medicine*, Levels of Evidence*, March 2009.

[9] A reviewing court in a different jurisdiction recently recognized this same study as compelling "new evidence" relevant to an actual innocence claim warranting habeas relief from an SBS-based conviction. *See Jones v. State*, No. 0087, 2021 WL 346552, n.26 (Md. Ct. Spec. App. Feb. 2, 2021).

medical conditions. 4EHRR53-54. The meta-study also noted the "circular" reasoning at the heart of the SBS/AHT phenomenon—which assumes that the presence of subdural bleeding, brain swelling, and retinal hemorrhages proves that violent shaking and thus abuse occurred, so whenever these conditions are observed, abuse can be assumed. 4EHRR54-55; 8EHRR35.

The Swedish meta-study is but one example of the new evidence adduced to show the lack of evidence-based support for the hypothesis that shaking a baby or toddler can cause the triad. App084-099.

- **The habeas court heard new evidence from multiple experts that Nikki's death was not a homicide.**

A radiologist, Dr. Julie Mack, interpreted long-lost CT scans of Nikki's head and issued a report.[10] APPX93. Drs. Auer, Ophoven, Wigren, and Monson all relied on that report from the only radiologist to provide evidence in this proceeding. These experts concluded that the radiological evidence showed that Nikki had sustained a single impact to the back of her head where a "goose egg" had formed and a small subdural bleed had commenced. They opined that the single impact was consistent with Robert's report that Nikki had fallen out of bed and inconsistent with Dr. Urban's testimony regarding multiple impact sites.

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

[10] During the first day of the evidentiary hearing, it was put on the record that the new District Clerk had found case-related materials in a locked closet in the courthouse basement; these materials included Nikki's CT scans that had been missing from her hospital records for years. 2EHRR85-87.

- **Dr. Janice Ophoven**, a licensed M.D. since 1971, board certified in forensic pathology and anatomic pathology with special training and experience in pediatrics and pediatric pathology, concluded that Nikki's death should not have been designated a homicide, in part because there is no scientific basis for looking at an impact site and concluding whether it was intentionally inflicted or the result of an accidental fall. Dr. Ophoven opined that Nikki's internal condition simply meant that she had suffered irreversible damage from oxygen deprivation. Dr. Ophoven explained that anyone who stops breathing and has their heart stop is at risk for the same constellation of internal head conditions. If the brain is deprived of oxygen, brain swelling occurs. Then, as pressure against the brain increases, bleeding into the eyes, which are connected to the brain, can occur. Dr. Ophoven was confident that the precipitating event was not "shaking" or "multiple impacts" to the head. She further explained that Dr. Urban's autopsy pictures, to which the jury had been subjected, were misleading because they did not reflect Nikki's condition when she was brought to the ER but were taken after multiple intervening events had affected Nikki's internal and external condition. 3EHRR13-81; APPX2.

- **Dr. Ken Monson** explained the relevant scientific literature and studies showing that the SBS/AHT assumptions about how shaking would cause internal head injuries but no neck injuries have been falsified. He also explained how the laws of physics and modeling are utilized to study the injury-impact of falls with head impacts. Dr. Monson explained how a teddy bear, such as that used as a demonstrative during Robert's trial, weighing less than a pound, is not a comparable model in any relevant respect to a 28-pound toddler like Nikki and thus misled the jury. 5EHRR22-108.

- **Dr. Carl Wigren**, a forensic pathologist who has performed over 2,000 autopsies and is a member of the American Academy of Forensic Sciences, concluded that Nikki's death was not a homicide based on: (1) the report of a fall off of a bed; (2) the evidence (CT scans and autopsy photographs) showing only a single impact site to the back of Nikki's head that was consistent with the report that she had sustained a short fall; (3) evidence in the toxicology report of potentially toxic quantities of Phenergan/promethazine, now known to suppress the nervous system, in Nikki's bloodstream at the time of autopsy; (4) evidence that, shortly before her collapse, she had been prescribed Phenergan in two forms and cough syrup with codeine, a narcotic that metabolizes into morphine and further suppresses the nervous system; (5) evidence that the fall occurred while she was in an unsafe and unfamiliar sleep environment, a bed that consisted of a mattress and box springs recently propped up on layers of cinder blocks, some of which were sticking out from under the box springs; and (6) evidence that Nikki had undiagnosed pneumonia. Dr. Wigren concluded that these factors had come together to

cause an "unfortunate accident," "absolutely not" a homicide, and opined that SBS/AHT played no role in causing Nikki's death. 5EHRR157-244; 6EHRR25; APPX92; APPX95.

- **Dr. Roland Auer**, a neuropathologist board certified in the United States and Canada, who is both a medical doctor and a Ph.D. scientist, the author of a leading neuropathology treatise and over 130 scientific articles in peer-reviewed journals, and a researcher with extensive experience with head trauma, hypoxia, hypoxic ischemia, and pediatric pneumonia, independently identified factors relevant to assessing the cause of Nikki's death. He concluded that her death could not reasonably be deemed a homicide. As a specialist in brain pathology, Dr. Auer clarified that trauma sufficient to cause internal brain damage would leave external markers on the skin in the form of corresponding bruises/contusions and likely corresponding skull fractures. He found no evidence suggesting significant trauma to Nikki's head, only one minor impact, "no support for multiple impact sites neither on the brain nor in the skull nor in the scalp," and "no evidence for multiple impact sites whatsoever" but instead found evidence in Nikki's lung tissue of ***advanced interstitial viral pneumonia***. He explained that interstitial viral pneumonia causes hypoxia by disrupting the lung tissue and, if untreated, a cascade of symptoms will result in brain death: oxygen-deprived blood vessels leak into the dura; the blood accumulating outside of the brain causes swelling and increased intracranial pressure; the pressure inside the skull in turn causes retinal hemorrhages. He also noted that the drugs Nikki had been prescribed before her collapse—Phenergan, which depresses respiration, and codeine, an opiate—would have done nothing to address her undiagnosed pneumonia but would have further hindered her ability to breath. 8EHRR55-56. 8EHRR8-144; APPX124; APPX110.

By contrast, the State relied on just two witnesses. The first was Dr. Urban who admitted that she had never considered Nikki's medical history. She also acknowledged that a lot of her cases "run together" (suggesting she had not carefully reviewed her previous testimony in Robert's case), and could not identify anything she had learned in the intervening years that would make her doubt her 2002 findings. 9EHRR121, 127. The second was Dr. James Downs, a member of the "Shaken Baby Alliance," an SBS/AHT advocacy group that teaches prosecutors how

to obtain convictions based on the SBS/AHT hypothesis.[11] 10EHRR112-15. In an attempt to rebut Dr. Auer's comprehensive findings, including his conclusion that Nikki's death was caused by her undiagnosed viral pneumonia, Dr. Downs repeatedly claimed that Nikki's lungs were "normal little kid lungs" and he saw "no pneumonia." 10EHRR74, 76, 212, 220, 242. Dr. Downs also (falsely) asserted that he did not believe he had "ever missed" pneumonia in an autopsy,[12] "since they're pretty much readily apparent grossly," 10EHRR221. Yet, as Dr. Auer testified, interstitial viral pneumonia is ***not*** readily apparent grossly and its effect on lung tissue has only become widely understood in the wake of the COVID-19 pandemic. 8EHRR89, 100.

2. The State Habeas Courts' Actions

After the hearing record was prepared, the habeas court directed the parties to submit proposed Findings of Fact and Conclusions of Law (FFCL). The habeas applicant's proposed FFCL summarizing the key evidence in the new 11-volume record was 302-pages long. AppD. The State's proposal was 17-pages long. AppE. The State's proposed FFCL did not discuss the new evidence amassed during the 9-day court proceeding showing how the core tenets of SBS/AHT had changed and supported the conclusion that Nikki had died of accidental and natural causes. The

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

[12] During cross examination, Dr. Downs was confronted with a court opinion granting habeas relief to an inmate sentenced to death for intentionally causing the death of his infant son. Based in part on new evidence that the child had pneumonia at the time of his death, the court found that Dr. Downs, who had performed the child's autopsy, had missed the pneumonia, which was not mentioned in his autopsy report or trial testimony. *See Ward v. State*, No. CR-18-0316, 2020 WL 4726486, at *4 (Ala. Crim. App. Aug. 14, 2020) (to be reported in So. 3d).

State's proposed FFCL relied primarily on the 2003 trial 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. At the same time, the State insisted that the scientific view of SBS/AHT has not changed since 2003 because SBS/AHT "is still a recognized diagnosis in the medical field." App330.[13]

Soon thereafter, the habeas court followed suit, finding that SBS is "still an accepted mechanic [sic] of death" and, on that basis, recommended that habeas relief be denied. App008. The habeas court's FFCL largely tracked the State's proposal, including its typographical and grammatical errors. *Compare* AppB *with* AppE. A motion was filed urging the CCA to deny deference to the lower court, documenting the extraordinary inconsistencies and omissions in the FCCL, which ignored entire categories of new evidence, including the evidence of actual innocence. But on January 11, 2023, the CCA issued an unsigned opinion (AppA), summarily stating:

> We have reviewed the habeas record and conclude that it supports the habeas court's findings of fact and conclusions of law. We agree with the habeas court's recommendation and adopt the court's findings of fact and conclusions of law. Based on those findings and conclusions and our own independent review of the record, we deny habeas relief on all of Applicant's claims.

[13] To support this assertion, the State cited testimony of Drs. Ophoven and Monson that does not support the State's position. The citation to Dr. Ophoven's testimony shows she acknowledged that SBS/AHT is still a diagnosis in the context of explaining that "child abuse experts," who have long championed the diagnosis's legitimacy, have resisted evidence-based science and attacked as "child-abuse deniers" "a significantly greater cohort of mainly forensic pathologists" who have grave concerns about the SBS presumptions. 4EHRR67. Likewise, the citation to Dr. Monson's testimony shows that, when asked on cross to admit that SBS/AHT is still "an accepted mechanic [sic] of death," he replied: "It is, but it's still never been shown to be an actual phenomenon." 5EHRR122.

REASONS TO GRANT THE PETITION

Robert is near the end of his options for challenging his wrongful conviction. Any further habeas applications in federal or state court would need to meet the dauntingly high successor petition standards. 28 U.S.C. § 2244(b)(2); TEX. CODE CRIM. PROC. art. 11.071 § 5(a). This Court's intervention now is essential to prevent executing an innocent man whose conviction hinges entirely on discredited science and false testimony.

In his initial habeas proceedings, his attorneys did not investigate Nikki's complex medical history or the flawed "science" underpinning the conviction. In 2016, with a looming execution date, Robert was only able to challenge the basis of his conviction because he obtained new counsel who utilized a unique new procedural vehicle created by the Texas legislature that allows individuals who had already pursued and lost habeas claims to get back into state court to challenge convictions based on discredited or incorrect science. *See* TEX. CODE CRIM. PROC. art. 11.073 (the "junk-science writ"). The instant habeas proceeding is the only time Robert was afforded the resources to retain essential experts and make a record exposing his wrongful conviction.

Given that Robert has now been flagrantly denied due process in his one opportunity to prove his innocence at last, this Court should exercise the jurisdiction conferred by Congress over the CCA's judgment. *See Wearry v. Cain*, 577 U.S. 385, 395–96 (2016) (explaining "[t]his Court, of course, has jurisdiction over the final judgments of state postconviction courts, and exercises that jurisdiction in appropriate circumstances" (citing 28 U.S.C. § 1257(a)) (collecting cases)).

I. A Conviction And Death Sentence Based On Discredited "Science" Violates The Right To Basic Due Process.

New evidence established that Nikki's condition is explained by her undiagnosed pneumonia, the respiratory-suppressing medications she had been prescribed, and an accidental fall. But Robert's jury heard that the only explanation for Nikki's death was violent shaking and other inflicted trauma.

SBS/AHT was the crux of the prosecution's case, used to prove both cause of death and mens rea. Without any adversarial challenge, the following discredited premises were put before the jury as scientific fact: (1) where the triad is present, shaking can be presumed as the mechanism of injury, absent a high-speed accident or fall from a great height; (2) shaking does not injure the neck but only the brain; (3) shaking induces immediate brain damage with no lucid interval possible before the onset of symptoms; and (4) Nikki's medical history, recent illness, and fall from a bed were all irrelevant. All of these premises have since been falsified by actual science.

During Robert's trial, the State's experts testified to the then-prevailing belief that a short fall, like the fall Robert had reported, could not produce a serious injury. 3EHRR44. The AAP's 2001 position paper, upon which Dr. Squires expressly relied, stated that "the constellation" of injuries, *i.e.*, the triad, "does not occur in short distance falls." APPX23. Consistent with this hypothesis (which has since been falsified), the State's trial experts stated that Nikki's condition was the kind "usually" seen with "a massive car wreck …. something that you have a massive impact." 41RR123-24.

This testimony was similar to statements made in SBS/AHT cases around the country that are now recognized as devoid of scientific basis. *See, e.g.*, Edward Imwinkelried, *Shaken Baby Syndrome: A Genuine Battle of the Scientific (and Non-Scientific) Experts*, UC Davis Legal Studies Research Paper (Oct. 26, 2009) (noting "prosecution experts frequently give analogies" to "the amount [of force] generated by high speed automobile accidents and a fall from a several-story building" but those analogies are "fallacious"); *see also* Randy Papetti, et al., *Outside the Echo Chamber: A Response to The Consensus Statement on Abusive Head Trauma in Infants and Young Children*, 59 SANTA CLARA L. REV. 299, 314 (2019) (concluding "[t]he motor vehicle and multi-story analogies, which filled the child abuse literature and courtrooms for decades ... were without basis.").

For many years, doctors were taught that retinal hemorrhages alone proved that abusive shaking had occurred—as Dr. Squires testified during Robert's trial. 42RR108 (describing retinal hemorrhages as "one more thing that really lets you know that those eyes were being shaken and that the blood vessels broke."). But in fact, many phenomena can cause retinal hemorrhages that have nothing to do with trauma, let alone inflicted trauma—including ***pneumonia***. 4EHRR46; APPX30. The contemporary scientific understanding is that, a variety of illnesses, sometimes in combination with a short fall, can cause hypoxia. When a child, for whatever reason, is deprived of oxygen, the resulting hypoxia can then set off a cascade of events, starting with tiny blood vessels in the dura membrane leaking, which can eventually

produce the fatal triad of subdural blood, brain swelling, and retinal hemorrhages. 3EHRR32-33, 49; 8EHRR82; APPX1; APPX2.

Because the triad was seen as "diagnostic" of abuse at the time of Robert's trial, doctors did not believe they needed to conduct a differential diagnosis. That now-discredited notion explains why Dr. Squires and Dr. Urban did not even investigate Nikki's medical history—including the evidence that she had a viral illness, affecting her respiration, that caused a fever measured up to 104.5 degrees less than 2 days before her collapse. Indeed, neither Dr. Urban's autopsy report nor her trial testimony discussed ***any*** of the following, as she admitted during this habeas proceeding, 8EHRR107-08:

- Nikki's medical history, including her recent illness and her history of breathing apnea;
- The medications Nikki was prescribed during her last doctors' visits right before her collapse, which included Phenergan/promethazine in two forms and cough syrup with the narcotic codeine;
- The toxic level of Phenergan/promethazine still in Nikki's system at the time of the autopsy, as reflected in a toxicology report (issued after Dr. Urban had already declared Nikki's death a homicide caused by inflicted trauma);
- The possibility that Nikki's accidental fall off the bed may have contributed to Nikki's death, as suggested by the head CT scans taken in the ER the day of her collapse, showing a single, minor impact site and only a small volume of subdural blood; or
- ER doctors' extensive efforts to save Nikki's life, such as administering drugs to address a clotting disorder and surgically inserting a pressure monitor into the top of her skull, which greatly increased the volume of subdural blood later found at autopsy and affected her external appearance.

This Court has previously recognized that introducing faulty evidence is unconstitutional when "its admission violates 'fundamental conceptions of justice.'"

Dowling v. United States, 493 U.S. 342, 352 (1990) (quoting *United States v. Lovasco*, 431 U.S. 783, 790 (1977)). *See also Estelle v. McGuire*, 502 U.S. 62, 70 (1991) (considering whether admission of battered child syndrome evidence against defendant was a due process violation). Junk-science claims are, in essence, a species of false-testimony claims.

Both the Ninth Circuit and the Third Circuit have recognized that "the introduction of material, flawed expert scientific evidence violates a petitioner's due process right to a fundamentally fair trial." *Gimenez v. Ochoa*, 821 F.3d 1136, 1143 (9th Cir. 2016) (citing *Estelle*, 502 U.S. at 68-70); *see also Kealohapauole v. Shimoda*, 800 F.2d 1463, 1465-66 (9th Cir. 1986); *McKinney v. Rees*, 993 F.2d 1378, 1385 (9th Cir. 1993); *Han Tak Lee v. Glunt*, 667 F.3d 397, 407 (3d Cir. 2012); *Han Tak Lee v. Houtzdale SCI*, 798 F.3d 159, 162 (3d Cir. 2015). Courts have found that a habeas applicant can establish a Fourteenth Amendment Due Process violation by alleging a conviction based on junk science generally, and a triad-based SBS hypothesis specifically. *See Gimenez*, 821 F.3d at 1144 (recognizing that a due process claim based on faulty evidence "is essential in an age where forensics that were once considered unassailable are subject to serious doubt").

This Court needs to clarify that a conviction based on discredited science violates the right to due process if the scientific testimony contributed to the conviction, as it plainly did here. Indeed, courts in other jurisdictions, considering virtually identical fact-patterns, have understood what due process requires and granted habeas relief. *See, e.g.*, *State v. Edmunds*, 746 N.W.2d 590, 595, 598-99 (Wis.

Ct. App. 2008) (finding new evidence related to SBS/AHT controversy "[was] entirely different in character from the evidence offered" at trial as it showed "a shift in mainstream medical opinion" and granting new trial); *Commonwealth v. Epps*, 53 N.E.3d 1247, 1268 (Mass. 2016) (finding "substantial risk of a miscarriage of justice where the jury heard no scientific or medical expert challenging the majority views on [SBS/AHT] and short falls, and where new research has emerged since the time of trial that would lend credibility to the opinion of such an expert" and granting new trial); *People v. Bailey*, 41 N.Y.S.3d 625, 627 (App. Div. 2016) (holding that "advancements in science and/or medicine may constitute newly discovered evidence" and "defendant established . . . that 'a significant and legitimate debate in the medical community has developed in the past ten years over whether infants [and toddlers] can be fatally injured through shaking alone'" and affirming lower court ruling vacating SBS/AHT conviction) (alteration in original, citation omitted); *Jones v. State*, No. 0087, 2021 WL 346552, *11-20 (Md. Ct. Spec. App. Feb. 2, 2021) (surveying changes in SBS/AHT's original tenets in light of scientific developments and finding that petition for writ of actual innocence should be granted); *see also Del Prete v. Thompson*, 10 F. Supp. 3d 907, 951 (N.D. Ill. 2014) (finding petitioner convicted for 2002 death of child in SBS case had satisfied *Schlup v. Delo*, 513 U.S. 298 (1995) gateway materiality standard for constitutional claims).[14] In each of these SBS/AHT cases, courts have used different procedural vehicles to vacate convictions for the very

[14] Inexplicably, the CCA itself recognized over ten years ago that the scientific understanding of the injury-potential of short falls has changed. *See Ex parte Henderson*, 384 S.W.3d 833 (Tex. Crim. App. 2012) (granting habeas relief in infant-death case based on developments in biomechanics that led medical examiner to reconsider initial homicide finding).

reason that Texas enacted its junk-science writ: to unwind fundamental miscarriages of justice arising from an unreliable SBS/AHT cause-of-death hypothesis.

The outdated SBS/AHT hypothesis and the numerous errors related to Nikki's autopsy were decidedly material to Robert's conviction. Scientific and medical developments in the years since Robert's trial render the State's cause-of-death theory not just flawed and unreliable but patently false. These flaws could not have been exposed to the jury through vigorous cross-examination, as the SBS/AHT hypothesis was considered so unassailable when Robert was tried that his own lawyer conceded that Nikki's death was a "shaken baby" case. 41RR57-61. Nor could defense counsel have analyzed Nikki's lung tissue exposing her ***undiagnosed interstitial viral pneumonia***; the expertise needed to identify this type of pneumonia did not emerge until years after Robert's trial. 8EHRR170.

Both the quality and quantity of faulty evidence used to obtain Robert's 2003 conviction undermined his constitutional right to a fundamentally fair trial, denying him the due process the U.S. Constitution guarantees. Without the SBS/AHT testimony and the baseless slander of sexual abuse, the jury would not have convicted him. Now Texas is poised to execute someone described as "like Forrest Gump." 7EHRR51. He stands condemned because he was unable to explain the cause of his daughter's tragic death—which was so mystifying that it took numerous specialists and a significant advancement in science to illuminate. Allowing the conviction to stand risks a grave moral wrong—executing an innocent; but it also threatens fundamental conceptions of justice upon which we all depend.

II. Petitioner Was Deprived Of Basic Due Process In This Habeas Proceeding Expressly Authorized To Reexamine The Discredited "Science" Used To Convict Him.

At the very least, this Court should grant the petition and summarily reverse because of the patent deprivation of due process in a proceeding expressly authorized to develop the evidentiary record that was subsequently and inexplicably ignored. Here, the procedural right the Texas legislature created via the junk-science writ is meaningless when the evidence adduced thereafter to establish a wrongful conviction and actual innocence is ignored. *Compare* AppA *with* AppD. "Due process" must require more than a mere show of process. *Cf. Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (holding due process means "the decision maker should state the reasons for his determination and indicate the evidence he relied on").

Under long-standing federal constitutional law, Robert was entitled to due process in this Article 11.073 proceeding. *See, e.g.*, *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (finding "an arbitrary disregard" of right created by state law amounted to denial of due process); *Evitts v. Lucey*, 469 U.S. 387, 401 (1985) ("[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause."); *Medina v. California*, 505 U.S. 437, 454 (1992) (O'Connor, J., concurring) (identifying examples "in which we have required States to institute procedures that were neither required at common law nor explicitly commanded by the text of the Constitution" under Due Process Clause).

The CCA expressly ordered the state habeas proceeding below so that a record

could be developed to support Robert's claims that his conviction was based on discredited "science" and that he is actually innocent. AppC. The CCA's authorization meant that the CCA had determined, back in 2016, that his "current claims and issues have not been and could not have been presented previously in a timely initial application . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." TEX. CODE CRIM. PROC. art. 11.071 § 5(a)(1). In other words, to obtain the remand that led to the development of volumes of new evidence, Robert had already proven that the relevant scientific understanding of SBS/AHT had changed and that the change was not something he could have demonstrated when his previous state habeas applications were filed.

But then, during the evidentiary hearing expressly authorized to develop evidence of the changes in scientific understanding, the State endeavored to keep out the scientific articles illustrating the change in scientific understanding. *See, e.g.*, 4EHRR12-66. Even more shocking, the State took the position that it had not relied on SBS/AHT to obtained Robert's conviction, a position utterly at odds with the trial record. The State also argued, in the alternative, that a new trial was not warranted because SBS/AHT "is still a recognized diagnosis in the medical field." App330. Next, instead of fairly portraying the record, the State's skeletal proposed FFCL misrepresented the few components of the trial and habeas records to which it referred and ignored the vast new evidence that had been adduced. *See* AppE.

Thereafter, the habeas court rubberstamped the State's mischaracterization of the record and recommended that relief be denied. The habeas court's copy-and-paste

approach suggests a lack of independence and care, particularly alarming in a matter where the life of a man asserting his actual innocence is involved. For example, the habeas court's FFCL suggested it was dispositive that some members of the medical community still believe in the legitimacy of the SBS/AHT hypothesis. At best, that fact is irrelevant, because Robert's conviction was based on a set of premises that ***no*** expert currently endorses. It is now recognized that no actual science supports the hypothesis that violent shaking can "shear" a child's brain cells or cause subdural bleeding, brain swelling, or retinal hemorrhage but no neck injuries. 3EHRR45-46; 4EHRR37.

The habeas court's FFCL repeatedly and inexplicably insisted that Robert had introduced "no new evidence;" yet the habeas record reflects considerable new, material evidence demonstrating: (i) how SBS/AHT became accepted as medical orthodoxy absent a scientific basis; (ii) the specific tenets of SBS/AHT relied on at trial that have now been discredited by evidence-based science; (iii) significant material omissions and errors in the autopsy; (iv) the false sexual abuse allegations used to poison the jury against the accused; and most critically (v) the new medical and scientific evidence demonstrating that Nikki's tragic death was due to illness, inappropriate medications, and an accidental fall, ***not a homicide***. *See* App084-162.

The suggestion in the FFCL that Nikki's pneumonia is "nothing new" is particularly misleading as there was no mention of pneumonia in the autopsy report or at trial. Moreover, the type of pneumonia that Dr. Auer identified is not something pathologists are even trained to recognize. Interstitial viral pneumonia has only

become widely understood in the wake of the COVID-19 pandemic. 8EHRR89, 100. Dr. Urban did not recognize Nikki's pneumonia during the autopsy and, in the current proceeding, confused it with "ventilator pneumonia," an entirely different phenomenon that does not affect the lung cells themselves. 8EHRR173.

Further, the habeas court's FFCL primarily invoked the very trial testimony that was challenged in the habeas proceeding as incompatible with current scientific understanding. *See, e.g.*, AppB ¶¶19, 21-37, 40-41, 64-67, 77-88 (relying on trial testimony of State's causation experts and local Palestine, Texas doctors and nurses). The existence of scientifically unsound trial testimony does not rebut the new evidence that the scientific understanding has changed. Rather, the contrast demonstrates that the scientific understanding ***has*** changed. *See* AppD.

The CCA, the lone reviewing court for all Texas death-penalty cases, uncritically adopted the habeas court's facially unreliable FFCL without any substantive discussion at all. There is no mention of the 11 volumes of unchallenged, material, new evidence in the CCA's terse opinion. AppA.

That is not due process. *See, e.g.*, *Riggins v. Nevada*, 504 U.S. 127, 131 (1992) (finding defendant's right to due process was violated when his motion was decided "with a one-page order that gave no indication of the court's rationale"); *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006) ("[B]y evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of

contrary evidence[.]").[15]

By contrast, the same scientific and medical evidence has prompted reviewing courts in, for instance, Maryland, Massachusetts, New York, and Wisconsin to grant post-conviction relief in SBS/AHT cases. *See* pp. 29-30, above. Even trial courts in other jurisdictions have recognized the importance of considering the post-conviction record of substantial changes in the scientific understanding of SBS/AHT. *See, e.g.,* AppF (recognizing considerable changes in SBS/AHT hypothesis since 2003 trial and granting out-of-time motion for new trial based on new evidence, including toddler's overlooked pneumonia).[16] "New evidence," "science," "due process of law" should not mean different things in different parts of the country in the same kinds of cases.[17]

In a series of recent cases, this Court has implicitly recognized a systemic

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[15] Under Texas law, fact-finding in a habeas proceeding is supposed to be adequate for reaching "reasonably correct results." *Ex parte Davila*, 530 S.W.2d 543, 545 (Tex. Crim. App. 1975) (citing *Townsend v. Sain*, 372 U.S. 293, 316 (1963)). In deciding whether to defer to a habeas court's fact-finding, the CCA is supposed to investigate whether the fact-finding is actually supported by the habeas record. *Ex parte Adams*, 768 S.W.2d 281, 288 (Tex. Crim. App. 1989). That could not have occurred below.

[16] The courts below were apprised of this markedly similar case and of a recent New Jersey case in which the trial court granted a pre-trial *Daubert* motion precluding any testimony about SBS/AHT, finding it "inappropriate because [SBS/AHT] is an inaccurate and misleading diagnosis" that "lacks scientific grounding." *State of New Jersey v. Darryl Nieves*, Indictment No. 17-06-00785 (Superior Court of NJ, Middlesex County Jan. 7, 2022). After surveying the evidence, the *Nieves* court found "[t]here is no 'quality assurance' component to this diagnosis" and recognized that "[t]he accuracy of scientific evidence must be established and not left premised upon probabilities based upon extrapolation of data but, instead, certainties borne from testing and examination." *Id.*

[17] Over a decade ago, this Court summarily reversed in an SBS/AHT case where the Ninth Circuit had undertaken a sufficiency-of-evidence review in a federal habeas proceeding, not the posture here. *See Cavazos v. Smith*, 565 U.S. 1 (2011). Despite the summary reversal, the majority was so troubled by the case that it took the unusual step of suggesting that perhaps clemency should be sought. *Id*. at 8. Cavazos was subsequently granted clemency. Deborah Tuerkheimer, FLAWED CONVICTIONS: "SHAKEN BABY SYNDROME" AND THE INERTIA OF INJUSTICE, n.33, chapter 9 (Oxford UP 2015). But rare grants of executive clemency are no substitute for due process; nor does the existence of a clemency mechanism guarantee that the innocent will not be executed. *See, e.g.*, James Liebman, et al., THE WRONG CARLOS: ANATOMY OF A WRONGFUL CONVICTION (Columbia UP 2014) (amassing evidence that Texas executed a poor, impaired, Hispanic man who was innocent).

problem with fair review in Texas death-penalty habeas proceedings. *See, e.g., Moore v. Texas*, 139 S. Ct. 666, 667 (2019) (per curiam) (summarily reversing after having previously reversed the CCA in the same death-penalty case because the CCA "reconsidered the matter but reached the same [incorrect] conclusion"); *Andrus v. Texas*, 140 S. Ct. 1875, 1878 (2020) (per curiam) (summarily vacating CCA's decision to deny habeas relief because the CCA had failed to properly apply the legal standard for ineffective assistance of counsel in death-penalty case); *cf. Andrus v. Texas*, 142 S. Ct. 1866, 1869, 1879 (2022) (Sotomayor, Breyer & Kagan, JJ., dissenting from denial of certiorari because the CCA had "violated vertical stare decisis and the law-of-the-case doctrine by rejecting or ignoring the conclusions of this Court[,]" the CCA's "opinion on remand cannot be reconciled with this Court's prior opinion, let alone with the habeas record[,]" and the CCA "repeatedly indicated its disdain for this Court's conclusions").

Mere days before the CCA's unsubstantiated opinion issued in this case, this Court summarily reversed the CCA's denial of habeas relief in another Texas death-penalty case in which grave doubts about the unreliable science used to secure the conviction had been developed in another Article 11.073 proceeding—and then disregarded. *See Escobar v. Texas*, 143 S. Ct. 557 (2023) (mem.). Escobar went to the CCA for final fact-finding utilizing the same junk-science writ; and after he was denied, he came to this Court in the same procedural posture as this case. In *Escobar* and here, forensic science was presented to the jury as reflecting apodictic certainty, but in truth, the "science" was thereafter exposed as utterly unreliable through

development of a post-conviction evidentiary record. In both cases, the CCA denied the habeas applicant due process.

The due process violation at issue here is arguably even more egregious. DNA evidence, unlike the SBS/AHT hypothesis, is grounded in validated science. In *Escobar,* the issue was one of methodology; and the CCA at least discussed the challenged DNA evidence, which that habeas court's FFCL had fairly and comprehensively described; and the CCA endeavored to explain why it found the false DNA testimony immaterial (despite the State's concession that it was material). Here, the CCA did not explain its decision to adopt the habeas court's facially unreliable FFCL *in toto* except for the conclusory assertion that "the habeas record" "supports the habeas court's findings of fact and conclusions of law." App003. No independent review of the habeas record could have prompted a reviewing court to adopt the FFCL below because almost nothing in them can withstand scrutiny if compared to the evidentiary record. *Compare* AppB *with* AppD.

At the very least, this Court should grant the petition and summarily reverse because, if a state affords a potentially innocent habeas applicant the opportunity to return to the convicting court to create an evidentiary record, then due process requires considering that record.

"[S]ummary disposition is appropriate to correct clearly erroneous decisions of lower courts," especially "error[s] of great magnitude." *See* Stephen M. Shapiro, et al., SUPREME COURT PRACTICE 5-44–5-45 (11th ed. 2019); *see also Wearry*, 577 U.S. at 395-96 (reversing state habeas court in death-penalty case upon finding false inculpatory

evidence material); *Smith v. Cain*, 565 U.S. 73, 75-76 (2012) (same).

The habeas record established that Robert's jury had been told a slew of falsehoods incompatible with contemporary scientific understanding, warranting a new trial. The falsehoods shared with the jury included the monstrous lie that he had perpetrated sexual abuse on his vulnerable two-year-old daughter absent any credible evidence of such conduct. The jury was subjected to gruesome autopsy photos with Nikki's scalp pulled back revealing subdural blood and then told, falsely, that this blood had been caused by "shaking" and "blows." The jury was falsely informed that Nikki had no neck injuries because a "weak neck" is somehow "protected" during shaking. The jury was told that evidence of "impact sites" included the top of her head when in fact that is where the hospital had screwed a pressure monitor into her skull—information not shared with the jury. All of this false testimony, conveyed as scientifically valid, was used to convict an impaired, autistic man working newspaper routes to earn a living. *See* 7EHRR64-129.

Refusing a new trial, when no legitimate basis exists for the causation theory the State relied on to convict, contravenes the basic truth-seeking function that is supposed to animate criminal justice. The CCA's abdication warrants summary reversal.

CONCLUSION

Petitioner respectfully asks that this Court grant the petition and conduct plenary review or, alternatively, summarily reverse.

Respectfully submitted,

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