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IN THE
3RD DISTRICT COURT, ANDERSON COUNTY, TEXAS

EX PARTE ROBERT LESLIE ROBERSON III, APPLICANT	))))))	Trial Cause No. 26,162-C Writ Cause No. WR-63,081-05

APPLICANT'S BRIEF ON THE MATERIAL FACTUAL SIMILARITIES BETWEEN THE CASES AND ARTICLE 11.073 CLAIMS OF ANDREW ROARK AND ROBERT ROBERSON

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CITATION KEY

Citation	Source	Bates Range
RR*	Reporter's Record of Robert Roberson's 2003 trial (Volumes 50-52 include the State's (SX) and the Defense's (DX) trial exhibits	Cause No. 26,162, Ex parte Robert Roberson 00001-5364
RRR*	Reporter's Record of Andrew Roark's 2000 trial	N/A (previously produced to the court)
EHRR*	Evidentiary Hearing Reporter's Record for -03 habeas proceeding	Cause No. 26,162, Ex parte Robert Roberson 05475-9587
SX** (color)	State trial exhibits	Cause No. 26,162, Ex parte Robert Roberson 05365-5378, 05381-5474
DX** (color)	Defense trial exhibits	Cause No. 26,162, Ex parte Robert Roberson 05379-5380
APPX	Applicant's exhibits in -03 evidentiary hearing (in 11EHRR)	Cause No. 26,162, Ex parte Robert Roberson 07332-09587
2016EX	Exhibits to -03 habeas application	Cause No. 26,162, Ex parte Robert Roberson 09588-9832
2024EX	Exhibits to -04 habeas application	Cause No. 26,162, Ex parte Robert Roberson 09833-11244
2026EX	Exhibits to Motion to Admit Additional Exhibits	Cause No. 26,162, Ex parte Robert Roberson 11245-11268
CR	Clerk's Record	

*The number preceding these symbols refers to the volume number and the number following refers to the page number or page range.

**These ranges include available color duplicates of trial exhibits. A complete set of color copies of original trial exhibits needs to be obtained.

Overview

On October 9, 2025, the Court of Criminal Appeals ("CCA") reconsidered Robert Roberson's -05 habeas application and remanded the claim therein for this Court to assess, in the first instance, whether *Ex parte Roark* "Establishes that [Applicant] Is Entitled to Relief under Article 11.073." As outlined in this briefing, the facts underlying Robert Roberson's case are substantially similar to those underlying Andrew Roark's case, as reported in *Ex parte Roark*, 707 S.W.3d 157 (Tex. Crim. App. 2024). Both cases involve an alleged crime that no one witnessed, and the sole "evidence" that a crime had purportedly even occurred was medical opinion testimony. These medical opinions reflected what was then known as "Shaken Baby" and "Shaken Impact" Syndrome ("SBS"). As the CCA recently recognized in *Ex parte Roark*, "science has [now] evolved to a degree that has removed 'Shaken' from 'Shaken Baby Syndrome.' This is evident from the need to vague the terms to 'Impact Syndrome' and then to 'Abusive Head Trauma.'" *Id.* at 185 (noting that "[r]esearch ranging from mechanical dolls to animal abuse has yet to bridge the gap between theory and reproduceable results which the scientific method demands.").

The SBS hypothesis was based on the belief that, whenever a certain set of intracranial symptoms was observed in an infant or young child, those symptoms should be interpreted as proof that the child had been subjected to some combination

of violent shaking and blunt impact—and thus "non-accidental trauma." And SBS permitted the presumption that whichever adult was with the child when she became symptomatic must have caused the condition because the change in the child's condition would have been immediate. Upon recognizing that the scientific understanding of the SBS hypothesis had evolved such that Andrew Roark's conviction was unreliable, the CCA granted him relief in the form of a new trial. The same relief is fully warranted here where Robert's trial featured nearly 200 references to "shaking" and SBS terminology. *See* 2024EX36.

I. **The Facts and the State's Trial Theories in These Two Case Are Markedly Similar.**

On July 16, 1997, Andrew Roark was caring for BD, the daughter of his fiancé Bridgitte. Upon checking on BD after a nap, Andrew found BD on the floor, having apparently fallen out of bed. She was "unconscious, barely breathing, and near death." *Ex parte Roark*, 707 S.W.3d at 159. She had a little blood in her mouth. *Id.* Roark tried to revive BD, called Bridgitte in a panic, and called 911. BD had recently had a few short falls with head impact against a table and, earlier that afternoon, in the bathtub; she had had a high fever the night before; and she had recent diarrhea and diaper rash. *Id.* at 170–171. A few weeks before, she had had tubes surgically implanted in her ears. *Id.* at 170. This history was dismissed as irrelevant to explaining the child's significant intracranial condition, which included multiple

subdural hematomas (bleeding outside the brain under the dura membrane), brain swelling and herniation (shift), and retinal hemorrhages (bleeding into the eyes).

Early in the morning on January 31, 2002, Robert Roberson heard a strange cry and woke up to find his 27-month-old daughter Nikki on the floor after she had apparently fallen out of bed. APPX7 (01.31.2002 statement of R. Roberson to police). He comforted her, saw nothing wrong except a small bit of blood on her mouth, and they eventually fell back asleep. A few hours later, Robert woke up to find Nikki unconscious and not breathing, with blue lips. Robert tried to revive Nikki, during which time his girlfriend called from the hospital where she was recovering from surgery; he then rushed Nikki to that same hospital. Nikki had been seriously ill for over a week—coughing, vomiting, suffering from diarrhea, with a high fever (up to 104.5 degrees)—and was diagnosed with a respiratory infection. But she had been prescribed two different respiratory-suppressing medications: Phenergan/promethazine and Codeine. She was prescribed Phenergan on back-to-back days by different doctors, with the second prescription including the narcotic Codeine. Nikki had a history of chronic, antibiotic-resistant infections and unexplained breathing apnea that would cause her to inexplicably collapse, cease breathing, and turn blue. But all of her previous apneic episodes happened when Nikki was in the custody of her maternal grandparents, before Robert, her biological father, obtained custody. *See* APPX9 (Nikki's pediatric records); APPX14 (Nikki's

Palestine Regional Medical Center records). Nikki's ear infections persisted even after she had had tubes surgically implanted in both ears. APPX9. But during Robert's trial, Nikki's medical history, to the extent it was mentioned at all, was dismissed as irrelevant to explaining her significant intracranial condition, which included subdural bleeding, brain swelling and herniation, and retinal hemorrhages.

In its Opening Statement in Andrew Roark's trial, the State asserted that it would "prove[] this baby was ***violently shaken, violently struck*** … while she was in the sole custody of the Defendant, Andrew Roark." 4RRR26.[1]

In its Opening Statement in Robert Roberson's trial, the State invited the jury to imagine violent shaking and promised that medical experts would testify "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.

Both children were referred to as "babies" throughout the trials. But "BD," the child whose near-death was the focal point of Andrew Roark's trial, was a 13-month-old toddler, and Robert Roberson's daughter Nikki was a 27-month-old toddler. Toddlers' necks are anatomically different from infants', one of many facts never accounted for by proponents of the SBS hypothesis, even as doctors started to apply the hypothesis to older and older children. 3EHRR46–47.

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[1]Unless indicated otherwise, where quoted text is emphasized, that emphasis has been added.

In both cases, medical personnel focused on the child's severe internal head condition, as revealed by CAT scans: subdural bleeding, brain swelling pushing the brain against one side of the skull, and retinal hemorrhages. And because the male caregiver offered no history that seemed to explain the severity of the child's intracranial condition, the report of a short fall was treated as a reason to conclude the male caregiver was lying and the child's condition had been "inflicted."

In both cases, law enforcement was called in immediately based on the presumption that child abuse had occurred; and law enforcement thereafter deferred entirely to the medical providers' opinions to allege that a crime had been committed.

In both cases, the girls were transferred from a small, local hospital (insufficiently equipped to handle the child's serious medical condition); in both cases, they were transferred to Children's Medical Center of Dallas ("CMCD"). (BD only had to travel across the DFW metroplex and surgery commenced right away, which succeeded in reversing the life-threatening condition and enabling her rehabilitation; Nikki was transferred by ground approximately 120 miles from Palestine, Texas to CMCD; by the time she arrived, there was no way to reverse her condition.)

In both cases, CPS was alerted before the transfer to CMCD; then, at CMCD, the matter was referred to CMCD's internal child abuse team: REACH.

In both cases, the REACH team included pediatrician Dr. Janet Squires, who, in both cases, made an SBS diagnosis and later testified at length about her SBS diagnosis for the State in both trials.

In both cases, the men were hastily arrested using a warrant supported by an affidavit from Dr. Squires noting her SBS diagnosis. *See* 5RRR103-04; APPX103 (01.31.2002 REACH affidavit of Janet Squires MD).[2]

In both cases, CAT scans of the child's head were used to make the SBS diagnosis and, in both cases, the scans showed only minor external evidence of impact in the form of swollen tissue.[3] But in Robert's case, the jury never saw these scans, the most objective and reliable evidence of Nikki's condition upon arrival in ER.

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[2] A police officer arrested Andrew the day BD was transferred to CMCD. 4RRR76–77. With Robert, CMCD staff conveyed to him that he was "not allowed" to visit his daughter there, although he was the sole person with legal authority to make major medical decisions affecting her. He was arrested the next night at home—after Nikki had been removed from life support without his knowledge or consent and before an autopsy was even performed. APPX103; APPX12.

[3] "CAT," also abbreviated as "CT," scans are medical imaging that uses x-ray technology to create detailed images of bones and soft tissues to aid in medical diagnoses. The role of the head CAT scans in Andrew's case are discussed at length in *Ex parte Roark*. *See* 707 S.W.3d at 160–66. The CAT scans taken of Robert's daughter Nikki are not even mentioned in the previous habeas court's Findings entered in the -03 proceeding initiated in 2016. *See* Section II.C, below.

In both cases, the State relied on bruises observed on the child's body to support the abuse allegations, and the juries heard extensive testimony, especially in Andrew Roark's trial, about those bruises.[4]

In both cases, baseless, highly prejudicial sexual assault allegations were leveled (but, as explained below, these allegations were handled in notably different ways by the two different DAs' offices before they were dropped).

The State's Closing Arguments in both cases emphasized that it was a Shaken Baby case. In Andrew's case, the State argued that he had delayed calling 911 and "confessed" to shaking BD (to try to revive her), characterized Roark and his loved ones as liars, and relied heavily on Dr. Squires' testimony. 11RRR28–41. In Robert's case, the State capitalized on the fact that Robert's appointed lawyer had, contrary to Robert's assertion of innocence, conceded that "this is a shaken baby case"; the State argued that Nikki's death was "not accidental" and that "[t]he story given by Mr. Roberson in his confession was not truthful." 46RR15. The State then painted a lurid picture of an imagined, violent assault on Nikki involving shaking that

[4] The bruises observed on Nikki were minimal, as demonstrated by the State's own photographic evidence and as acknowledged by multiple doctors and even the Anderson County DA during trial. The extent of Nikki's external injuries have been repeatedly misrepresented in the State's post-conviction briefing and divorced from the actual trial record. *See* Sections I.C and III.A, below.

"scrambles the brain,"[5] invoking the testimony of Dr. Squires and the "science" that purportedly supported the State's theory of guilt. 46RR26, 63, 66.

Beyond the facts ascertainable from *Ex parte Roark*, a comparison of the trial transcripts shows that the two cases are remarkably similar, even at a granular level—as if the State utilized the same prosecutorial playbook to obtain both convictions. These similarities overwhelmingly support finding that Robert Roberson, like Andrew Roark, should be granted relief under Article 11.073.

II. <u>The Same Science Used to Convict Both Men Has Changed.</u>

Andrew Roark and Robert Roberson were both accused and tried when SBS was considered generally accepted diagnosis within the medical community despite the absence of scientific validation. In *Ex parte Roark,* the CCA recognized that the scientific understanding of SBS has changed, and that, if tried today presenting contemporary scientific evidence, Andrew Roark would likely be aquitted. The same scientific change has rendered Robert Roberson's conviction completely untenable.

Soon after Andrew's 2000 trial—and before Robert's 2003 trial—the American Academy of Pediatrics ("AAP") published a position paper unequivocally instructing that "the constellation" of intracranial symptoms—subdural bleeding,

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[5] This kind of irresponsible, exaggerated rhetoric pervaded Robert's trial. There was/is no evidence that Nikki's brain was "scrambled" or even bruised. Multiple doctors looked for evidence of contusions and found none. *See* Section II.H, below.

brain swelling, and retinal hemorrhages—"***does not*** occur with short falls, seizures, or as a consequence of vaccination." APPX23 (AAP 2001 Position Paper).[6] The AAP's 2001 paper further declared, "Although physical abuse ***in the past has been a diagnosis of exclusion***, data regarding the nature and frequency of head trauma consistently support the need for a ***presumption of child abuse*** when a child younger than 1 year has suffered an intracranial injury." *Id.* As many SBS exonerations show, in practice, the presumption of abuse was routinely applied to children older than 1 year (as it was with BD and Nikki).[7]

In short, the 2001 AAP paper expressly directed medical personnel to presume child abuse in the form of violent shaking whenever the triad of intracranial symptoms was observed. The 2001 AAP paper also expressly rejected the concept that a short-distance fall with head impact could cause these kind of intracranial symptoms and implicitly ***rejected*** the concept that naturally occurring phenomenon could cause them—even though the possibility of other causes had, by then, been recognized by research in other medical fields. In other words, within the pediatric

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[6] American Academy of Pediatrics, Committee on Child Abuse & Neglect, *Shaken Baby Syndrome: Rotational Cranial Injuries—Technical Report*, 108 PEDIATRICS 206 (2001).

[7] *See also, e.g.*, *State of Ohio v. Butts*, 2023 WL 4883377, at *14–16, *20–21 (Ohio Ct. App. Aug. 1, 2023) (vacating SBS conviction involving two-year-old where post-conviction investigation revealed a missed pneumonia); *see also* Nat'l Registry of Exonerations, (last visited June 8, 2026) (discussing Butts' 2024 exoneration).

community, certainty about SBS became ***more*** dogmatic after Dr. Squires testified in Andrew's 2000 trial and before she testified in Robert's 2003 trial.[8]

The 2001 AAP position paper has since been entirely superseded. The presumption of abuse based on the constellation of intracranial symptoms has been rejected. This significant change has yet to be acknowledged in this case, although it was acknowledged in *Ex parte Roark*. *See, e.g.*, 707 S.W.3d at 182–83 (discussing, *inter alia*, a 2010 AAP position paper acknowledging that retinal hemorrhages are "non-specific" and cannot be viewed as markers of shaking or other forms of abuse).[9]

More recent pronouncements from the AAP, which remains the most ardent proponent of the current version of the SBS hypothesis, acknowledge that scientific study has established (1) that accidental short-distance falls with head impact have caused the triad of intracranial conditions observed in BD and Nikki, and such

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[8] The possibility that the constellation of intracranial symptoms could be caused by other phenomena was noted by some witnesses in Andrew's case but not in Robert's. *See* Section II.A.

[9] A 2009 AAP position paper was the APP's first recognition that the triad of symptoms long associated with SBS (subdural hematoma, brain swelling, retinal hemorrhages) could actually be caused by other natural and accidental phenomena. APPX118. Moreover, there has yet to be any scientific study to support the hypothesis that shaking can cause ***any*** aspect of the triad; yet SBS proponents, through the AAP, continue to endorse it as a viable (although unvalidated) hypothesis. But at the time of Robert's 2003 trial, SBS proponents viewed the triad alone as proof-positive of either shaking or shaking + inflicted impact and told doctors that they need not even consider any other cause upon observing the triad. APPX23.

accidents have even caused fatalities; and (2) that many naturally occurring phenomena—including pneumonia, infection, sepsis, genetic disorders, seizures, etc.—can cause the same triad of symptoms without any trauma at all. In begrudging recognition of these advances in scientific understanding, the AAP now directs its members to again treat SBS, since renamed Abusive Head Trauma ("AHT"), as a diagnosis of exclusion, to be made only after a thorough, multi-disciplined, differential diagnosis has excluded all non-abuse possibilities. *See* APPX119, Arabinda Kumar Choudhary et al., *Consensus Statement on Abusive Head Trauma in Infants and Young Children*, 48 PEDIATRIC RADIOLOGY 1048 (May 23, 2018) (2018 AAP).[10]

There was no differential diagnosis undertaken in the cases of BD or Nikki; abuse was the only explanation ever posited by the treating doctors.

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[10] Despite its title, the 2018 AAP position paper does not reflect a "consensus" within the broader medical community and was drafted by the most vocal defenders of the SBS/AHT hypothesis, who have long testified for the prosecution in SBS/AHT cases. But even a narrow focus on AAP guidance shows that the change in scientific understanding since Robert's 2003 trial has been monumental. *See also* Keith A. Findley et al., ed., SHAKEN BABY SYNDROME: INVESTIGATING THE ABUSIVE HEAD TRAUMA CONTROVERSY at 35 (Cambridge Univ. Press 2023) (hereafter, "2023 TREATISE") (identifying some of the non-traumatic, naturally occurring phenomena now known to cause the triad as "coagulation disorders, meningitis, sinus or cortical vein thrombosis, vascular malformations, tumors, and metabolic diseases," as well as hypoxia and accidental short-distance falls with head impact); *see also* APPX141, Norrell Atkinson et al., *Childhood Falls with Occipital Injuries*, 34 PEDIATRIC EMERGENCY CARE 837–41 (2018) (describing eight cases of witnessed accidental short falls with impact at back of child's head, all of which produced subdural and retinal hemorrhages).

In 2024, Andrew Roark was granted habeas relief and subsequently exonerated in recognition of the sea change in scientific understanding of SBS/AHT since his trial. A core part of the new understanding is that SBS, as a hypothesis, is primarily a matter of biomechanics; all efforts by biomechanical engineers to validate the SBS hypothesis have failed.[11]

Meanwhile, Robert Roberson remains on death row. A careful comparison of the two cases establishes that Robert must be afforded a new trial if Article 11.073 is to be applied consistently. Indeed, if the totality of the relevant trial and post-conviction evidence is assessed fairly and accurately, the few material differences between the two cases further militate in favor of relief for Robert. He has amassed considerable medical evidence of alternative causes of Nikki's condition that were missed or not viewed as relevant at the time—but which contemporary science requires considering before abuse can even be posited. Given this change in the underlying science that purportedly supports Robert's conviction, which was recognized in *Ex parte Roark*, and the striking similarities between Robert's and

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[11] Biomechanics is "the study of forces acting on and generated within the human body[.]" *People v. Lemons*, 22 N.W.3d 42, 59 (Mich. 2024) (explaining that SBS is, in essence, a biomechanical hypothesis and holding that, "just as a biomechanical engineer may not testify about medical causation outside of their expertise, the medical community is not the judge of the validity of biomechanical research, nor is it the sole relevant expert community with respect to SBS.").

Andrew's cases, Robert is entitled to the same relief from the CCA: the grant of a new trial.

ARGUMENT & AUTHORITIES

I. Material Similarities Between the Facts Developed in Both Trials Mandate Similar Relief.

A. In both cases, the male caregiver's explanation of events, which included short-distance falls with head impact, was treated as inadequate and thus a reason to suspect child abuse.

The doctors who testified for the State in Andrew Roark's and Robert Roberson's cases perceived that a child had suddenly "gone from a normal child to a child with major neurological dysfunction" and that the person caring for her at the time provided no acceptable explanation as to how that change had occurred. 5RRR70. And because Andrew, who had a high school education, and Robert, who had a ninth grade Special Ed education, could not explain the child's complex medical condition to the satisfaction of the medical professionals, it was presumed that they had inflicted the child's condition through acts of violence. The name then given to this presumption was Shaken Baby Syndrome. SBS was the only example of a medical diagnosis that presupposes a crime. *See* Deborah Tuerkheimer, FLAWED CONVICTIONS: "SHAKEN BABY SYNDROME" AND THE INERTIA OF INJUSTICE (Oxford Univ. Press 2014) (former prosecutor's exploration of how the SBS triad came to be perceived as a I that a crime had occurred).

1. Andrew Roark was deemed guilty because he could not explain BD's serious medical condition.

The State's Opening Statement emphasized that Andrew's "story" about what had happened should be rejected—although Andrew, like Robert, never claimed to understand how BD's condition came about:

- "You will hear testimony this did not happen from a fall from her bed, a bed measured at 17 inches off the ground."
- "You'll hear testimony that when the Defendant was told that these injuries could not have told [sic] from her falling off the bed, the issue was brought up that maybe it was from when she fell in the bathtub, when she was taking a bath that day and fell backwards from a seating position and hit her head on the bathtub."
- "And you'll hear testimony from all of these doctors that that injury could not have occurred from a fall in the bathtub. Her brain, swollen to the point of pushing through her skull. Blood so heavily pooled in her brain that they had to insert a shunt in her forehead to drain the blood from her brain."

4RRR25–26.

Andrew reported that BD seemed fine when he initially woke her up early on the day of her medical crisis. He described taking BD along when he drove her mother Bridgette (Andrew's fiancé) to work. He described returning home with BD and how they both went briefly back to sleep. He attested that Bridgette called to let him know that she had made an appointment for BD with her pediatrician because she had had a high fever the night before and was due for some vaccinations. 8RRR104–05, 163.

Andrew reported that, later that day, after the doctor's appointment, BD slipped in the tub while he was giving her a bath and hit the back of her head. 8RRR110, 114. Andrew felt for a bump but did not find one. 8RRRR112. He then put BD down for a nap. When he checked on her later, he found her on the floor, apparently having sustained an unwitnessed fall out of bed: "I found her on the other side of the bed" "laying down" on the floor. 8RRR118. Andrew reported that he called BD's name, but she did not respond. He described her "making a gurgling noise," said she was "limp like a rag doll," and "very pale." 8RRR120. He called 911 and BD's mother. *Id.*

Later, at CMCD, both Andrew and his mother told doctors that, about two weeks before BD's medical crisis, her had slipped and hit her head on a coffee table. 8RRR34, 59, 169. Mrs. Roark (a veteran RN) described how BD cried for a "few seconds" then "went back to playing," but it left a mark on her forehead. 8RR34–35. Andrew's mother informed medical personnel that this other fall happened about a week after BD had had tubes surgically implanted in her ears to address infections. 8RRR35–37.

But State's counsel and their witnesses expressed complete skepticism. *See, e.g.*, 4RRR54 (paramedic testifying that a fall out of bed was the only explanation provided); 4RRR66 (officer skeptically explaining that he "measured the bed to see how high it was off the floor and the top of the mattress, it's almost 17 inches to the

ground”); 4RRR166–67 (ICU doctor dismissing reports that BD “fell in the bathtub from a sitting position and hit the back of her head” and that she “fell from the bed that was one to two feet off the ground or she was awakened from the bed”).

Medical doctors told Andrew’s jury that they did not believe the “history” he provided because BD’s internal head condition was consistent with the kind of injury seen in a “high speed car accident” or fall from a “second story.” 4RRR167–68; 4RRR179.

ICU doctor, Kathleen Murphy, employed SBS terminology, claiming the “type of forces” needed to cause this “kind of trauma” was “an acceleration/deceleration injury, so that the person is moving at a rapid speed then is stopped abruptly, either by impact with something or just stopped abruptly.” 4RRR164. Dr. Murphy opined that “a rotation force” “can cause the tearing of the veins” inside the head and the brain to “bounce[] against the side of the cranial vault” and then “swelling” that “squish[es] the other side of the brain or whatever.” 4RRR164–65. In her opinion, only “a force” could cause brain swelling, not any medical disorder. 4RRR180. Therefore, the doctor diagnosed “non-accidental trauma closed head injury.” 4RRR182.

Similarly, Dr. Squires told Andrew’s jury that BD’s condition had to be “non-accidental” because neither the head injuries nor the “vaginal bruises” observed on her were something the thirteen-month-old could have “inflicted on herself.”

5RRR110. Dr. Squires specifically dismissed the notion that BD's falls could be relevant—except as a sign that Andrew was concealing abuse:

> I see injuries all the time where children fall off things. We see that all the time. This was extensive bruising in the diapered area on both sides into the groin. There's nothing this child could have fallen, …. If this child – if I had been told this child had fallen out of a window and landed, you know – You can think of scenarios from the bruising besides absolute abuse. It's the lack of history. That's what child abuse is. It's the fact that the history that people tell you doesn't explain the injuries seen.

5RRR110; *see also* 5RRR155–56.

Dr. Squires was adamant that there was no non-abuse explanation she would have considered credible except, perhaps, if they had been told "the child had been in a burning building and to save their life you had to fling them…. It's almost hard to think of a history that would explain it. And the lack of history is again[] the hallmark of child physical abuse." 5RRR111. She justified her conclusion that "a life threatening injury to the brain" was inflicted because "there's no documentation of a significant trauma event [such as a car accident] which would explain these findings. So, my diagnosis says without a history of significant trauma given at the time of presentation the findings indicate physical child abuse." 5RRR58–59.

Likewise, a neuroradiologist, Dr. Nancy Rollins, testified that BD had experienced "non-accidental trauma, child abuse." 5RRR202. She too believed that only "trauma" could cause these intracranial conditions. 5RR203–04. Her "training" was that "this is child abuse. Unless there is a witnessed accident that is pretty

severe…. That's the accepted medical standard." 5RR205. An example of the only kind of "history" that would have suggested something to her other than abuse was "[m]ajor car accident, child falling from a two story building." 5RR205. For Dr. Rollins, "rapid acceleration and then deceleration" forces must have been brought to bear on BD that caused "the little fibers in the brain [to] just kind of get ripped apart. It's a shearing injury of all the little fibers that compose the brain." 5RR206.

In other words, the State's medical experts opined that the combination of (1) "radiologic findings" of intracranial injury with (2) "the lack of history of accidental trauma that would account for those findings" could only mean child abuse. 5RR207. The reports of short falls were dismissed as lies.

2. Robert Roberson was deemed guilty because he could not explain Nikki's serious medical condition.

The State's Opening Statement emphasized that Robert's "story" about what had happened should be rejected—although Robert never claimed to understand how Nikki's condition came about:

> You'll hear evidence that the hospital staff were the ones that initially called the police because they had talked to him. You'll hear evidence of those nurses. They went to talk to Mr. Roberson to find out and find out what the story was to try and assist in helping Nikki, find out what the injuries were. So they talked to Mr. Roberson and they see that his stories aren't consistent…. They don't make sense.

41RR50. The State emphasized that it was "unbelievable" that a fall from 22-inch-high bed onto the wooden floor could explain Nikki's condition. 41RR51–52.

In retrospect, it is facially unreasonable that medical professionals would expect a man with a ninth-grade Special Ed education with cognitive and developmental disabilities to have more insight into a phenomenon that it took the medical community decades to better understand. But for decades, innocent parents and caregivers, like Robert, have been charged and imprisoned based on a medical hypothesis that was never validated and the belief that the caregiver's failure to provide a "history" to explain the intracranial symptoms proves that child abuse occurred.[12]

It is uncontested that, three days before Nikki's medical crisis, on January 28, 2002, Robert took his daughter to the Palestine Regional ER with a one-week history of diarrhea, vomiting, and breathing issues. 43RR150–51; APPX14. She was diagnosed with a viral infection and prescribed promethazine (brand name "Phenergan") in suppository form and Loperamide (for diarrhea). Robert was instructed to follow up with her pediatrician in two days or return to the ER if problems persisted. *Id.* Medical records show that Nikki had been repeatedly prescribed Phenergan, well before she was two years old. *Id.*; APPX9. Phenergan

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[12] *See, e.g.*, Pamela Coloff, *He Frantically Called 911 to Revive His Infant Son. Now He Could Face 12 Years in Prison*, PRO PUBLICA & THE NEW YORK TIMES MAGAZINE (Dec. 29, 2024) (documenting how caregivers are continuing to be charged with Abusive Head Trauma, the newer name for Shaken Baby Syndrome, even as exonerations and new science raise more concerns about the diagnosis).

now has an FDA Black Box warning against prescribing it to children Nikki's age and in her condition. APPX122.

The next morning, January 29, 2002, Nikki had a temperature of 103.1°F. Therefore, she was taken to her pediatrician's office, where her temperature was measured as **104.5°**F. APPX9. She was assessed with "fever, possible viral etiology or unresolved upper respiratory tract infection" and again sent home with prescriptions—this time for Omnicef (an antibiotic) and Phenergan cough syrup with Codeine, 3-4 teaspoons every 4-6 hours. *Id.* While Robert went to fill the prescriptions, Nikki went home with her maternal grandparents, the Bowmans, who had agreed to keep her for the next few days because Robert's girlfriend was recovering from a hysterectomy, and he was staying with her at the hospital.[13] 43RR152.

The next night, however, the Bowmans contacted Robert and told him to come get Nikki and take her back to his house. He drove from the hospital out to their house in the country and arrived sometime after 10:00 PM. 43RR154. Larry Bowman carried the sick child to Robert's car, and Robert drove her home, gave her some food, and they fell asleep watching a movie. 43RR155; APPX7.

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[13] Robert's solution for his girlfriend post-surgery was to prop up their bed (which was merely a box springs and mattress) on two layers of cinder blocks to make it easier for her to get in and out of bed. That had the inadvertent consequence of making it unfamiliar to Nikki when Robert brought her home late at night on January 30, 2002, at the Bowmans' request.

Robert later reported that, around 5:00 AM on January 31, 2002, he heard a strange cry and woke up to find Nikki on the floor at the foot of the bed, seemingly having fallen. APPX7. He saw small specks of blood on her mouth, but no other injury. He wiped her mouth with a washcloth, kept her up for a while to ensure she was okay, then they both fell back asleep. *Id.* When his alarm went off a few hours later at 9:00 AM, Robert found Nikki unresponsive with blue lips. He tried to wake her and clutched her face. *Id.* Then, in a state of shock, he took her back to the Palestine Regional ER. APPX14.

Upon arrival at the ER, a nurse noted that Nikki "was like a rag doll," her "lips were blue" from lack of oxygen. 41RR66–67. She was not breathing, and her pupils were fixed and dilated. 41RR120.

Nikki was intubated, and resuscitation was initiated. APPX5 (01.31.2002 Palestine Regional treatment records). Her revived heart experienced tachycardia. A CAT scan later revealed that the breathing tube had been placed too deep, ventilating only the right lung. 42RR87–88. Therefore, it was pulled out and reinserted so both lungs could be aerated. *Id.*

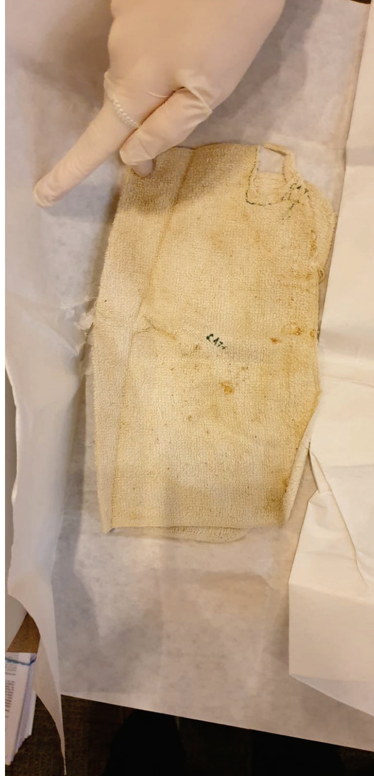
CAT scans of Nikki's head revealed a small subdural bleed near a "goose egg" (swollen tissue) on the back of her head in the occipital region. APPX109 (X-ray Film/CAT scans & digitized copy). The images also showed that her brain had

swollen and shifted to one side. *Id.* But there were no skull fractures, neck injuries, or broken bones. *Id.*

Id.; *see also* APPX93 (2021 Report of pediatric radiologist Julie Mack, MD, marking scalp soft-tissue swelling with blue arrow); 2024EX6 (2024 Aff. Julie Mack, MD).

A nurse alerted the police almost immediately. Various members of the hospital staff and lead detective Brian Wharton then pressed Robert to explain Nikki's condition. Robert tried to explain Nikki's collapse, reporting that she had been sick and describing her strange cry and apparent fall out of bed, which he had not witnessed. APPX7.

While at the house, Roberson gave the police the washcloth he had used to clean specks of blood off Nikki's mouth and they took it with them for testing:



41RR187. Detective Wharton later testified that if Robert had not pointed out the washcloth and pillowcase with small specks of blood on them, the detectives would not have noticed them. 2024EX1 (2022 Decl. of Brian Wharton). There were no pools of blood anywhere and no signs of violence. 7EHRR23–24; 7EHRR26; 41RR187. There was also nothing suggesting that the place had been scrubbed clean. 7EHRR26. The detectives expressly looked for evidence that Nikki had been thrown into a wall or something of that nature; they found nothing. 7EHRR26–27.

The ER doctor, Dr. Thomas Konjoyan, discounted Nikki's recent illness and insisted that her condition—subdural hematoma and brain swelling—"did not result from a fall out of bed[,]" "[t]hat would basically be impossible[,]" "extremely

implausible," "very implausible," "very unlikely." 42RR80–87. Dr. Konjoyan was adamant that Nikki's condition "did not match the history." 42RR84.

Similarly, Nurse Kelly Gurganus testified that she found Robert's "story" about falling off a bed "implausible." 41RR69. Gurganus claimed she spoke to Robert for "two or three minutes," "asked him 'Tell me exactly what happened,'" and reported that he said "'Ma'am, if I'd known, if I'd known she'd fallen off the bed this far', and I just remember that, 'that she'd fallen off the bed this far I would never have let her sleep with me.' That's when something hit me that something's not right."[14] 41RR69.

Ironically, Nurse Odem, who also spoke to Robert in the Palestine ER, expressed exasperation about Robert's attempt to explain Nikki's illness that week:

> When I asked what happened he began to tell me about how Nikki had been sick on Monday and I think this was like Thursday, maybe. She had been sick in the earlier part of the week and he had taken her to the pediatrician's office and a long story about how she had had fever and then I said, 'No.' I said, 'Why did you bring her here today?' And he started to tell me that when he woke to come, he was coming to get his fiancé who was in the hospital, she was a patient there at the time. And he woke her up, was getting her dressed, and she just was not responding and he felt like he needed to bring her in.

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[14] No one at the time asked, but the Bowmans had instructed Robert to have Nikki sleep in the same bed with him because, according to Larry Bowman, Nikki "always" slept in the bed with him and his wife; and the reason he gave for calling Robert to come get Nikki the night of January 30, 2002, was because his wife Verna was sick too and Nikki had a habit of moving around "like a little brush hog or something just going around and around", thus keeping Mrs. Bowman from sleeping. 6EHRR172.

41RR85. When asked whether Robert indicated what he had done after Nikki fell off the bed, Odem testified Robert "said he went around – He went in to check on her is what he said. 'I heard something. I heard her cry out. I went in to check her.' And he mentioned she had blood on her mouth and he cleaned it up." 41RR87.

The severity of Nikki's internal head condition and Robert's inability to explain how it had happened were perceived as proof that child abuse had occurred. After Nikki's transfer to CMCD, Dr. Squires concluded that: "The only reasonable explanation" for Nikki's condition "is trauma." 42RR104. She further explained that "the medical findings," including "very obvious" retinal hemorrhages, "fit a picture of shaken impact syndrome." 42RR105. Dr. Squires surmised there was "some flinging or shaking component which resulted in subdural hemorrhaging and diffuse brain injury." *Id.* At trial, Dr. Squires emphasized that "without a history to explain it," she was of the opinion that Nikki's condition was "non-accidental inflicted trauma, abusive trauma." 42RR113. Robert's information about the short fall out of bed and his effort to explain how Nikki had been sick that week were dismissed as lies.

B. In both cases, Dr. Squires diagnosed SBS soon after the child was transferred to CMCD, which was the core basis for believing a crime had occurred.

The State's principal causation expert in both Andrew Roark's and Robert Roberson's trials was also a fact witness: Dr. Squires. When BD and Nikki were transferred to CMCD from smaller hospitals, Dr. Squires was employed in CMCD's child abuse unit, known as "REACH." In both cases, the suspicion of abuse led to a referral to REACH at the outset of the hospitalizations. In both cases, because the CAT scans had revealed intracranial bleeding and brain swelling with herniation, and an eye examination had revealed retinal hemorrhages, Dr. Squires diagnosed SBS. In both trials, Dr. Squires described the child's internal head condition in near-identical terms:

- Dr. Squires in Andrew's case: "[T]he most dangerous thing that can happen is if this swollen brain pushes the brain down through the opening, and that term is called herniation, and that's what will kill somebody. That's the most common thing that kills a child right then and there is the whole brain swells up and that will cut off the breathing centers." 5RRR82.

- Dr. Squires in Robert's case: "The most significant thing was that the brain had shifted. Your skull is closed, the bones are closed and so if the brain swells sometimes the brain starts shifting. And it had shifted across the midline and at the base of the brain it looked like what we call herniation. The brain was so swollen that the brain was starting to push through the bottom of the skull and that will kill you because your brain stem no longer can function." 42RR102–03.

The similarities in her testimony regarding what had reputedly caused this severe internal head condition was nearly identical too.

1. Dr. Squires and others testified that SBS was the only way to explain BD's condition and described tenets of the SBS hypothesis that evidence-based science has since rejected.

In Andrew's trial, Dr. Squires testified at length about her SBS diagnosis of BD based on the hypothesis that her internal condition had been caused by "shearing" parts of the brain as the head "flops back and forth" during a violent shaking episode that in turn reputedly caused bleeding and brain swelling. *See, e.g.*:

> My diagnosis was ***Shaken Baby Syndrome*** which is a form of child physical abuse…. And what you see-- the main injury is to the brain itself, where the brain tissue itself has ***shearing*** injuries….
>
> The baby's head -- Our head is about a seventh of our weight, but a baby is a quarter of their weight and they have very weak neck muscles. And, so, ***when baby is shaken their head flops back and forth*** like this (indicating), and the ***rotational forces*** through the brain literally sort of ***shear*** the tissues of the brain. And then there is some -- sometimes there is hemorrhaging, sometimes it swells and blood can't get through, so the damage is really the brain damage.
>
> Overlying that is often some blood, and the blood results from the tearing of the bridging veins that go between the brain and the membranes, the dura and the bony parts. So, ***when you shake a baby these blood vessels get broken and then there's blood over the top of the brain***. And both of them can cause damage, but by far the most part of the damage is the brain itself.

5RRR68–69.

Dr. Squires emphasized the importance of retinal hemorrhages to her diagnosis, which she saw as "obvious" in BD and defined as "classically" associated with SBS:

> The retina is the membrane at the back of the eye, and there's a big disc where these blood vessels come out. And when you look back there – hemorrhages mean little broken blood vessels, there's little blood blobs that are coming around there. And usually they're hard to see with just an ophthalmoscope. Usually we have to get the ophthalmologist to come, who uses a special instrument and dilates the eyes.
>
> In this case, you could see these big blobs of blood. And the significance are that they are broken blood vessels and there's several things that can cause them, but it is very -- and particularly the kind that we saw are associated with major trauma. They are actually ***very, very classically seen in the Shaken Baby Syndrome***.

5RRR61. Dr. Squires admitted in passing that "there's a lot of things that cause retinal hemorrhages" but then immediately asserted: "when you see these retinal hemorrhages it is ***very classic*** and it is literally thought now that the eyes themselves, ***in this rotational motion***, that the retina is actually -- they separate sometimes a little bit and you tear blood vessels." 5RRR101.

Dr. Squires claimed the mantle of science and explained that "most experts" believed that shaking alone could cause these kind of severe intracranial injuries, but there was generally violent impact too:

> Some experts believe that most of the time children when ***they're shaken*** like this that at some point ***they're slammed against something***, and that often maybe a lot of the damage is done when this ***head is moving back and forth*** and then suddenly slams into something, which

> can be ***something soft like a mattress where you might not see any fractures or anything***. ***And some experts would call this shaken impact***.
>
> In my education and attending meetings, to me it seems that at the current time ***most experts don't think you have to have an impact, although that probably happens most of the time***.

5RRR70–71. She then explained that evidence of impact was not necessary to conclude that there had been impact:

> Q. Are there things that she could have impacted with that wouldn't leave a mark?
>
> A. Yes.
>
> Q. What types of things?
>
> A. Particularly soft surfaces where it gives on impact. So, particularly cushions, beds, mattresses, possibly floors, although that is a firmer -- it depends on how much it gives and of which force there was impact.

5RRR113.

The purportedly scientific concept that Dr. Squires sponsored was that an extreme "force" had to have been applied to the child that was well beyond what anyone would think was "normal": "Nothing in the course of the normal interactions between a child[care] giver and a baby should result in these massive life-threatening brain injuries…. I think no reasonable person -- no person would see this interaction and think that this could be a normal caregiver child action." 5RRR73–74.

Dr. Squires also asserted that this unreasonable, violent shaking would result in an immediate change in consciousness, which is how the person who was with the child when she collapsed could be deemed guilty of having caused the collapse:

> After this injury this child would not have been neurologically normal. ***Very quick***. It would be hard to date this, to say four hours, or six hours, or twelve hours with great certainty, but after this injury she wouldn't have been normal…. When you sustain this amount of injury, you don't walk and talk and do normal things. And ***any person seeing a child after this would have known she was abnormal***…. But after this injury no child would be perceived to be neurologically normal.

5RRR108, 109.

Dr. Squires was not the only medical professional to opine during Andrew's trial about SBS and violent shaking as the likely cause of BD's condition.

Dr. Murphy, the pediatric ICU treating doctor, was asked about SBS and claimed to be "very familiar" with it and the associated triad of intracranial symptoms. 4RRR126. Dr. Murphy made a diagnosis of "severe traumatic brain injury" but deferred to REACH—*i.e.*, Dr. Squires—as "the experts in discerning mechanisms of injury and really the specifics of the type of trauma." 4RRR176. Dr. Murphy acknowledged that she "suspected" "non-accidental trauma with closed head injury," which "means that I suspected impact and an acceleration/deceleration." 4RRR149–50.

Dr. Murphy, like Dr. Squires, associated "retinal hemorrhages," which are "bleeding of the blood vessels that are along the backside of the eye," with SBS.

4RRR168. Dr. Murphy was shown a demonstrative, called “Subdural Hematoma in Shaken-Impact Syndrome,” 13RRR249, and agreed that this demonstrative “showed” “the mechanism of injury … the ***shearing forces*** and where the blood is pooled and collected in a head injury” like BD had. 4RRR170.

Additionally, Dr. Nancy Rollins, a pediatric neuroradiologist, opined that BD’s condition was consistent with SBS, which Dr. Rollins defined as follows:

> The Shaken Baby Syndrome is the abused baby, and the mechanism is physical taking of the child and ***shaking back and forth***, often by the neck, and that causes-- the baby’s head is big, relative to the size of the neck, the baby doesn’t have good strength in the neck muscles, and it causes kind of a whiplash injury to the baby’s brain.

5RRR208. Dr. Rollins believed that BD’s condition was “absolutely” consistent with SBS. *Id.*

The doctors used different terms to describe BD’s condition, treating them as synonyms, such as “closed head injury with a subdural hemorrhage,” and “blunt head trauma.” 4RRR109–110. But the “mechanism” of injury was perceived to be abuse. As Dr. Murphy acknowledged, she had not used the words “shaken baby” during BD’s hospitalization but was clear that “[c]losed head injury is a general term that encompasses—Shaken baby refers to the mechanism [of injury], so closed head injury would be a manifestation of—Like I said, it could be a manifestation of shaken babies or motor vehicle accidents or other.” 4RRR148.

2. Dr. Squires and others testified that SBS was the only way to explain Nikki's condition and described tenets of the SBS hypothesis that evidence-based science has since rejected.

During Robert's trial, the State's counsel expressly noted that Dr. Squires had diagnosed Nikki with SBS and asked Dr. Squires to explain it:

> Q. …your diagnosis was massive brain injury and your only explanation was trauma. And medical findings is ***a picture of shaken impact syndrome***. All right. It's a pretty significant diagnosis, doctor. Can you explain to us then what shaken impact syndrome is?
>
> A. There's a very well known, well described entity in children and it goes by several terms. ***Most of the lay public knows [the] term shaken baby syndrome***. And what, and if I may just for a minute, explain shaken baby. When one human being is much smaller than-- Let me say it this way. Children are uniquely at risk that if you take a child and you shake them, their ***head will go back and forth*** very forcefully and you know that you can cause major brain injury doing that.

42RR105.

Dr. Squires utilized the same graphic imagery she used in Andrew's trial, of violent shaking causing a baby's head to flop back and forth resulting in the brain being damaged through "shearing" forces and emphasized that in cases like Nikki's "you might not be able to see anything on the outside":

> [O]ne of the features is that ***you might not be able to see anything on the outside and have all these significant brain injury***. And the reason babies are so prone to that, there's lots of reasons, but mainly it's because they're so small compared to how big whoever it is shaking them. In addition, their heads are big compared to their bodies, their neck muscles are weak, and they don't—They're not conscious enough

> to protect their neck. In addition their brains have higher water content. So for all those reasons, ***shaken baby has been a well described entity***.

42RR106–07.

Dr. Squires' testimony did not play a de minimis role in Robert's trial. She opined at great length, consistent with her testimony in Andrew's case, that the only kind of falls that could result in this kind of internal head injury were "falling out of windows," which is why, with the absence of any significant external injuries, violent shaking was the explanation:

> We see children fall out of windows and all sorts of things and we know what an impact injury looks like and when you see this much damage deep to the brain,[15] then you see subdural blood. The reason subdural blood is so important is there are little blood vessels that go between the bone and the dura. And ***when you shake a baby those blood vessels break and you get blood over the top of the brain***. So whenever we see ***lots of subdural blood***, I don't mean localized right under a fracture, but all over, usually ***that's indicative of this shaking***.

42RR107–08. Dr. Squires was clear that she saw Nikki's condition as "classically consistent with injuries from rotational force." 42RR120.

Dr. Squires also told Robert's jury that retinal hemorrhages, which were observed in Nikki, were a marker of shaking, just as she had attested in Andrew's trial:

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[15] In the -03 proceeding, neuropathologist Dr. Roland Auer and medical examiner Dr. Urban agreed that, contrary to Dr. Squires' and Dr. Urban's trial testimony, Nikki's brain had no injuries, only swelling.

> This child had ***very obvious retinal hemorrhages***. When you look in the back of the eyes with the opthaloscope [sic] there's all these little blood vessels. And in multiple places her blood vessels had broken and you'd just see little blood—blobs of blood there. And sometimes we doctors can't see it. The specialists [sic] has to come with a special scope. These were very obvious. Everybody could see them, so it's on every note that she had retinal hemorrhages. And I remember looking at them. I remember showing someone else what ***retinal hemmorrhages*** [sic] looked like, ***so it was very obvious***.

42RR104. For Dr. Squires, Nikki's intracranial condition was "indicative of this shaking," but Dr. Squires put a special emphasis on retinal hemorrhages: "[T]he retinal hemorrhages are just further-- It's one more thing that really lets you know that those eyes were being shaken and that the blood vessels broke." 42RR108.

Dr. Squires also told Robert's jury, just as she had told Andrew's jury, that "some people think" the injury comes from shaking plus impact; but she opined that most experts, like her, believed shaking was the "force" that "sheared" and otherwise damaged the brain:

> Now, some people think that with shaken baby that the most part of the damage is that they're ***often shaken and then thrown against something***. And at the time when the ***head is moving back and forth*** very, very vigorously and then all of a sudden it stops against something; that at that moment is probably when a lot of the damage is being done because these ***shearing forces actually go through the brain*** itself. There are some experts that think that you cannot kill a child by just shaking alone, but you have to-- And they call it shaken impact. So the term is about the same. I will say that most, when I would consider ***most of the experts do think that shaking alone, if done vigorously, will kill a child, but most children are shaken and then thrown against something***. And it's in the whole context of the head

> being ***vigorously shaken back and forth*** and then slammed against-- It can be a mattress ….

42RR106–07. Dr. Squires' explanation of SBS was that it is often diagnosed where "there's no signs of trauma at all and yet as that head is moving and then suddenly stops, those ***shear forces*** go through it and cause tremendous damage to the brain, deep in the brain." 42RR107.[16]

As she did in Andrew's trial, Dr. Squires told Robert's jury that the level of violent force needed to cause this kind of intracranial condition was extreme, something no one would think was "normal" parenting: "It's a very violent forceful act. It is not something that ever happens accidentally. It is not something that you see in normal children who are cared for by reasonable adults. It's a very violent act." 42RR114.

Just as in Andrew's case, Dr. Squires told Robert's jury that the result of the envisioned violent shaking would be an immediate change in consciousness, which is how the person who was with the child when she collapsed could be deemed guilty of having caused the collapse:

> It is my assessment in this child that ***after the event that caused all this deep brain injury she would not have been normal***. And any

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[16] In 2021, neither neuropathologist Dr. Auer nor medical examiner Dr. Urban found damage to the brain itself beyond the swelling. But Dr. Squires' and Dr. Urban's 2003 trial testimony about "shearing" to the brain was consistent with the SBS hypothesis of that era, which viewed the intracranial bleeding as proof of tiny, ruptured veins. No brain specialist, like Dr. Auer, was consulted at the time of trial.

> reasonable person would know that she wasn't normal. However, she could live for several hours and might not totally stop breathing long enough-- She certainly could live for hours after the event, but she would never have talked, walked, and been thought to be normal by anybody.

42RR108–09.

Dr. Squires repeatedly emphasized that no lucid interval was possible and that the neurological change Nikki had experienced would be apparent immediately. *See, e.g.*:

- "[T]his child would not talk, would not walk. Usually they're very-- Usually they're very hard. They're not normally neurological. Often times they're having trouble breathing." 42RR110.

- "She would not have talked normally. I don't know how you want to define nonresponsive. She might not have been totally comatose. She could have been-- She could have been seizing. She could have been gurgling. But she would not have done normal things." 42RR124–125.

Dr. Squires was not the only medical professional to opine during Robert's trial about SBS and violent shaking as the likely cause of Nikki's condition. One other doctor offered an opinion about the mechanism that reputedly caused Nikki's intracranial condition: the medical examiner, Dr. Jill Urban.[17] The significant issues with Dr. Urban's trial opinions are addressed in Section II.H, below. But, critically,

[17] The other doctors who testified—the ER doctor and the pediatrician who had treated Nikki in the days before her final medical crisis—did not offer an opinion about causation except to insist that Nikki's condition could not have been caused by accident or illness and thus had to have been inflicted.

Dr. Urban's opinions were not contrary to Dr. Squires'. They were consistent with them—except that Dr. Urban, who never even looked at Nikki's CAT scans, made highly misleading statements about the intracranial blood itself being a sign of shaking and "multiple impacts."

Dr. Urban relied on the SBS hypothesis, testifying 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 believed 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. She testified that, "[w]hen 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. Dr. Urban was also repeatedly asked by the prosecutor to describe to the jury the mechanism of injury she believed had occurred in Nikki's case, and she repeatedly used SBS terminology, suggesting for instance, that nerve cells in the brain had been "sheared" and the brain had moved "back and forth" during a shaking episode. 43RR57–98.

Dr. Urban, like Dr. Squires, testified that Nikki had anatomical features, such as a "weak neck," that made her more vulnerable to shaking. 4EHRR76–78.[18] Dr. Urban, like Dr. Squires, opined, "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.

Dr. Urban, like Dr. Squires, testified at trial that, after being shaken, Nikki would have immediately experienced "a change in the level of consciousness." 43RR81. 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. Neither Dr. Urban nor Dr. Squires discussed Nikki's medical history, recent illness, or the medications she had been prescribed in the days right before her final medical crisis.

3. The State sponsored shaking "demonstrations" to underscore to the jury that shaking had been a mechanism of injury and that SBS was generally accepted as science.

In both cases, the prosecution invited witnesses to provide shaking demonstrations—to support the opinion of just how violent and out of control the shaking must have been to produce the child's internal head condition.

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[18] Yet Nikki was not an infant with weak neck muscles; she was a two-and-a-half-year-old.

In Andrew's trial, the State played a videotape of a doctor acting out a shaking episode using a non-anthropomorphic doll. The video was titled "The Mechanism of Injury in Shaken Baby Syndrome" by Dr. Don Davis. When the State announced its intent to play this video, Andrew's attorney objected vociferously. But outside the jury's presence, Dr. Squires explained that she saw this video at "a conference on child abuse," copies were available for sale, and she bought one to use as a "teaching" tool. 5RRR14–15. She also claimed that the video would assist in explaining her SBS diagnosis of BD to the jury. 5RRR18. She further insisted that, having studied SBS for ten years at that point, she believed the video was a way for the "truth" to get out about the kind of force involved, just how "vigorously" a baby had to be shaken to cause the internal injuries. 5RRR24–25.

Dr. Squires opined at length that the video showed the "mechanisms" involved and just how unreasonable the action was, and that it was "not normal acceptable behavior between a caregiver and a child." 5RRR26–27.

Dr. Squires was given leave to introduce the video to the jury, explaining that it had been made by a pathologist in Minnesota in 1997 and that she had bought a copy at a national child abuse conference to teach doctors and nurses at CMCD about SBS. 5RRR75–76. During and after the playing of the video to the jury, Dr. Squires provided commentary: "Basically, we're seeing a doll representation…." Her

testimony about the shaking demonstration went on for pages of transcript and included her view that the video supports the "science" of SBS. 5RRR78–84.

In Robert's trial, instead of a video, the State asked multiple witnesses to use a teddy bear to demonstrate how Robert had supposedly shaken Nikki.[19] It is unclear from the record how many times these doll demonstrations occurred. *See, e.g.*, 41RR52; 43RR3. But Robert's appointed defense counsel did not object to the patent impropriety. Today's scientific consensus recognizes that a stuffed animal, weighing less than a pound, has no anatomical similarity to a nearly 30-pound toddler like Nikki. *See* 5HREE90–96 (explaining the anatomical differences and demonstrating the significant amount of force required to lift and then move back and forth a 30-pound weight as compared to a 1-pound stuffed bear).

After Andrew's trial, but before Robert's, at least one appellate court reversed an SBS conviction upon holding that a shaking demonstration using a doll like this lacked a proper foundation to establish that the in-court demonstration was substantially similar to the events that had allegedly caused the infant's death. *See Andrews v. State*, 811 A.2d 282 (Md. 2002). But Robert's appointed trial lawyer made no objection to the misleading shaking demonstrations and, thereafter, when appointed to continue representing Robert in his direct appeal, raised no related

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[19] On information and belief, the State had obtained the same or similar video but did not ultimately ask to play it during Robert's trial.

issues because, unlike Andrew's retained counsel, Robert's appointed lawyer improperly overrode his not-guilty plea and conceded that the SBS hypothesis explained Nikki's condition. *See* Section II.A, below.

4. In both cases, the juries were told that SBS was a generally accepted medical belief, yet there was no evidence-based science supporting it.

Neither Andrew Roark's nor Robert Roberson's juries heard anything about the origin of SBS. The idea that shaking might explain the mystifying deaths of some infants was first proposed in the 1970s in anecdotal articles by Dr. Norman Guthkelch, a neurosurgeon, and then Dr. John Caffey, a radiologist. Dr. Guthkelch published a paper titled *Infantile Subdural Hematoma and its Relationship to Whiplash Injuries*, in which he speculated that shaking an infant might be what had caused subdural bleeding or "hematomas" where an infant's head showed no external signs of head trauma. APPX20; 4EHRR17–18. Importantly, Dr. Guthkelch expressly stated that his shaking explanation was a "hypothesis." 2023 TREATISE at 12. Caffey not only embraced Guthkelch's hypothesis; Caffey argued, absent any scientific testing, that, if an infant has subdural bleeding, retinal hemorrhages. and perhaps brain injury and/or rib fractures, then the infant was likely shaken and thus abuse could be "diagnosed." *Id.* Dr. Guthkelch later retreated entirely 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. He also recognized that forces generated by humans and laboratory machines shaking anatomically accurate dummies had failed to cause disruption of human tissue or to create any component of the SBS triad. *See* APPX34F.[20]

The origins of SBS, the history of the shift to the vague term AHT while still relying on the core SBS premises, and a comprehensive explanation of current scientific understanding have recently been captured in the first multidisciplinary treatise published in late 2023: Keith A. Findley et al., eds., SHAKEN BABY SYNDROME: INVESTIGATING THE ABUSIVE HEAD TRAUMA CONTROVERSY (Cambridge Univ. Press 2023). But none of this history was presented to Andrew's or Robert's juries, primarily because evidence-based testing of the hypothesis had not yet occurred.

Nor did the medical professionals who testified that the only explanation for BD's and Nikki's conditions was some unknown combination of "shaking" and "impact" reference any peer-reviewed studies or provide any data to establish the basis for the medical community's acceptance of SBS. Primarily, they did not do so because there was no evidence-based data supporting the hypothesis. Even so, their beliefs were conveyed as generally accepted within the medical community.

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[20] A.N. Guthkelch, *Problems of Infant Retino-Dural Hemorrhage with Minimal External Injury*, 12 HOUS. J. HEALTH L. & POL'Y (2012).

Dr. Squires, for instance, told Andrew's jury that "people" believed that a baby's "weak neck muscles" was key to understanding SBS:

> ***for a long time people thought*** maybe the baby brain was different, that it has more water, et cetera. ***These days people do believe*** it can occur in an adult…. But we think it's unique to young children because it takes some other force or person, big and strong enough to do it. And then as I described before, the big head, ***the weak neck muscles, make the baby uniquely at risk for this***. Really it's the fact, we think, there's someone big and strong enough to do this to the young child.

5RRR72. She then suggested that "a lot of [unidentified] studies" had shown "it's a very violent, vigorous force that it takes" to shake a baby with the head "really flopping back and forth very hard." 5RRR73.

The prosecution asked Dr. Squires to explain how "the medical field knows" about SBS. She responded: "Since the ['60s] it's been well described, although many people had a hard time believing it for a long time." 5RRR74. She claimed, "It is now a well-recognized acceptable pediatric diagnosis in every major textbook, well accepted, and there are lots of research going on, although it's fairly hard to do, to try and figure that out." *Id.*

Dr. Squires repeatedly emphasized that SBS is "accepted" and made assertions about what the symptoms are, which did not include neck injury despite a "weak neck." However, she offered no cogent basis for the belief that these symptoms allowed doctors to presume that violent shaking, with or without impact, had occurred and thus supported the conclusion that the injuries had been "inflicted."

This “circular reasoning” problem is at the heart of the contemporary critique of the unvalidated SBS hypothesis. *See Ex parte Roark*, 707 S.W.3d at 179 (describing research exposing the SBS hypothesis as follows: “[I]t is only with great speculation devoid of adequate scientific basis that shaken baby can be diagnosed, that the timeline for the injuries can be inferred, and that ultimately a perpetrator of the abuse, if it occurred, can be identified.”).

During Andrew’s trial, Dr. Squires expressed views that have come to be seen as basic logic problems with the SBS hypothesis, but she did so uncritically:

- “[M]ore often than not there are ***not neck injuries***.” 5RRR96. When asked to explain why not, she said “It is ***just because presumably they’re limber***.” *Id.*

- When asked whether she would expect to see bruises “where the child was held while they were shaken,” Dr. Squires answered: “I look for them but don’t necessarily expect to see them. Because ***many times we don’t see bruises in that area***. ***More often than not we don’t.***” 5RRR105.

Quite simply, there was no widely accepted, evidence-based critique of SBS when Andrew and Robert were tried. *See* APPX23; APPX3 (2016 Dec. of Dr. John Plunkett).

An email chain from January 2003 to the Anderson County DA at that time, Doug Lowe, discusses SBS and a forensic pathologist, Dr. John Plunkett, who was then one of the lone voices in the medical community questioning the premises underlying the SBS hypothesis. 2026EX4. The email chain is further evidence that the State considered the case against Robert to be an SBS case and was seeking

advice from a prosecutor in another jurisdiction (Robert Parrish) who was teaching prosecutors how to obtain SBS convictions. The email chain contains disparaging comments about Dr. Plunkett, who later provided testimony in the habeas proceedings for both Andrew and Robert.

As the CCA has now recognized, several doctors testified for the State during Andrew's 2000 trial consistent with Dr. Squires' opinions, creating the impression of consensus. For instance, the jury was told that, without history of "high speed impacts, like in a motor vehicle accidents, falls from usually a second story window" a brain injury of the magnitude was not possible. *Ex parte Roark*, 707 S.W.3d at 161. Multiple doctors testified that BD's condition was consistent with "having been shaken or struck against something." *Id.*

Even more of a monolith was presented to Robert's jury because, unlike Andrew's counsel, there was no attempt to muster any defense. *See* Section II.A, below. Dr. Squires told Robert's jury that the "medical findings" were "a picture of shaken impact syndrome," which she defined as synonymous with what the "public" knows as "shaken baby syndrome." 42RR106. When asked about the medical significance of Nikki's three intracranial symptoms, Dr. Squires testified that they indicated Nikki must have been violently shaken, stating that "all" with whom she had consulted agreed:

> Q. All right. And the items we talked about, the subdural hemorrhages, the retinal hemorrhages, and the brain swelling; what are they indicative of?
>
> A. Well, it is my opinion, my estimation ***after a consultation with all*** that there was some component of shaking that happened to explain all the deep brain injury out of proportion, I would say, to the injury to the skull and the back of the head. There had to have been something more than just impact.

42RR107.

During Robert's trial, the prosecutor also asked Dr. Squires about the AAP's position on SBS, suggesting that her opinions were endorsed by a professional organization:

> Q. All right. Has the American Academy of Pediatrics taken a position on shaken impact syndrome?
>
> A. Yes.
>
> Q. All right. You consider the American Academy of Pediatrics to be an authoritative body?
>
> A. Yes.
>
> Q. I'm assume you're a member of that?
>
> A. Yes, I am. It represents 59,000 pediatricians which is about 92 percent of all pediatricians.

42RR116–117. At that time, the AAP's 2001 position paper (since superseded) told its thousands of pediatrician-members that they did not have to consider anything other than abuse upon seeing the triad. APPX23; *see also* APPX2 (2016 Aff. Janice J .Ophoven, MD); APPX3.

With Nikki, Dr. Squires was aware that the only evidence of an impact was a "goose egg" (swollen soft tissue) on the back of Nikki's head in the occipital region and that the scans established that she had no skull fractures. APPX93. The minor nature of the external impact injury is precisely why Dr. Squires voiced the opinion that there had to have been shaking, "something more than just impact." 42RR107.

With BD, Dr. Squires said she found no evidence of impact to BD's head because she believed a sufficient impact to cause the intracranial condition would have caused a skull fracture. 5RRR73. Yet, per Dr. Murphy, BD's scans actually ***did*** show "soft tissue swelling" (just as Nikki had) and thus some evidence of an impact.

But in both cases, whatever impact there had been, it was insufficient to cause any skull fracture—which was a primary reason Dr. Squires concluded that the triad of intracranial symptoms had been caused by inflicted trauma in the form of ***shaking***. Questions that went unaddressed, because of the SBS assumptions of that era, include:

- Did the child have any medical conditions now known to cause the same cascade of subdural bleeding, brain swelling, and retinal hemorrhages?
- What else was going on—genetically or in terms of natural disease progression—that may have caused breathing challenges—since it is now known that hypoxia causes subdural bleeding, brain swelling, and retinal hemorrhages, which can be brought on by infection, seizures, etc.?
- What circumstances might have made the child especially vulnerable to an accidental fall with head impact?

There is no science that permits looking at a bump on a child's head and determining whether it was caused by an accidental fall or an inflicted injury. And it is now established by biomechanical science that, even a short-distance fall with certain kinds of head impact can cause the intracranial symptoms previously seen as "diagnostic" of shaking. Also, there are now a multitude of other phenomena known to cause the triad previously believed to be conclusive evidence of the SBS hypothesis. *See, e.g.*, APPX30, Patrick D. Barnes, MD, *Imaging of Nonaccidental Injury and the Mimics: Issues and Controversies in the Era of Evidence-Based Medicine*, 49 RADIOL. CLIN. N. AM. 205–229 (2011).[21]

In short, the opinions presented in both trials about what had caused the child's intracranial condition was conveyed as entirely consistent with consensus beliefs within the medical community (but without recourse to any of the factors we now associate with expert opinions capable of withstanding a *Daubert* challenge).[22]

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[21] Dr. Barnes, formerly chair of the Department of Radiology, Lucile Packard Children's Hospital, Stanford University Medical Center, is a noteworthy contributor to the evolution of scientific understanding. He testified for the prosecution in one of the first "shaken baby" trials, known as "the British nanny case" (Louise Woodward). But after testifying consistent with SBS beliefs at the time, he then engaged in evidence-based research that convinced him that the SBS hypothesis that was used to "diagnose" abusive shaking was wrong. *See* Patrick D. Barnes, MD, Law Needs to Keep Up With Science in Shaken Baby Syndrome Cases, Bloomberg L.: US L. Week (Sept. 23, 2023, 3:00 AM), https://news.bloomberglaw.com/us-law-week/law-needs-to-keep-up-with-science-in-shaken-baby-syndrome-cases.

[22] *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592–93 (1993) (requiring trial courts to serve as gatekeepers in assessing the reliability of

C. In both cases, the State relied on evidence of bruises to bolster its abuse theory.

1. Andrew Roark's trial featured extensive testimony about bruises observed on BD.

The State's theory of Andrew's guilt was never that it was a "shaking only" case. The indictment presented to the jury alleged that Roark caused "serious bodily harm to child" "by shaking" and "striking … with or against an object." 4RRR23.

In a final pretrial hearing, the prosecution made clear it intended to rely on evidence of "bruising," particularly in BD's vaginal area and was authorized to go into: "bruising from one thigh through the vaginal area down the other thigh …. present at the same time that they found the other head injury." 4RRR6. The prosecution also emphasized "the bruising and the head" were all discovered within the "48-hour window" when BD was brought to the hospital. 4RRR7.

The State argued repeatedly that the condition of BD's whole body was "certainly relevant, including the vaginal bruising, bruising on her face, the head injury." 4RRR9–10.

In its Opening Statement, the State promised to call "several" treating doctors to attest the "baby had a brain injury consistent with being violently shaken,

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purported expert testimony, particular about hard and soft sciences); *see also Kelly v. State*, 824 S.W.2d 568, 572–73 (Tex. Crim. App. 1992) (same).

consistent with being struck against something." 4RRR25. The State further emphasized: "There were other bruises that were not there … when she saw the pediatrician [earlier that morning] bruises in her genital area that's covered by the diaper extending from one thigh across the genitals to the other thigh." 4RRR26.

A paramedic, who was the first person to treat BD, described pulling down her diaper and seeing "bruising around the vaginal area" which he believed were "new" because there was no yellow color, which led him to presume "possible abuse, unusual bruising" that they would have to report. 4RRR48.

The first police officer on the scene testified that he got called to the hospital because they noticed "several other bruises on [BD] that I saw. There was bruising on her jaw, her cheek, on her forehead. So she had several bruises all over her body." 4RRR72.

The ER doctor who first treated BD testified that they "noted extensive bruising on [BD's] vulva and perirectal area in the genitalia, which would be unusual." 4RRR107.

The pediatric ICU doctor similarly emphasized bruising observed on BD: "She had bruising of her left jaw, mandible, and left ear. She had bruising by report on the left side of her head …. She had bruising of her perineal region, which is the region around the genital area and the opening around the vaginal orifice, and the inner thighs." 4RRR160–61. The ICU doctor told jurors that she believed some of

BD's bruises were "fresh," such as those in the vaginal area, and some may have been older. *Id.* And these bruises are what prompted Dr. Murphy to refer the case to REACH; she testified that she "suspect[ed] child abuse" based on the "location of the bruising," emphasizing bruising in the vagina area. 4RRR152–53.

Dr. Murphy also offered the opinion that BD's "closed head injuries" were "consistent" with a child who has been "shaken ***or*** struck" and did not, in her belief, "go along" with the history Roark had given. 4RRR173. She found every aspect of BD's condition consistent with "shaking ***or*** being struck with an object." 4RRR180–81. Her role was to be a treating physician, but she shared her strong opinion that child abuse had occurred—because they had "a child who presents with a neurologic injury that's thirteen months old and a history that does not go along with that injury, a CAT scan that shows bleeding of two different ages, and bruising that was at least of two distinct ages in a distribution that was not normal for a toddler to be bruised and normal blood clotting exam." 4RRR178.

Dr. Murphy repeatedly returned to the bruises, emphasizing them as evidence relevant to her abuse assumption:

> [BD] had diffuse, red and purple eccymotic areas, which is kind of bruising and bleeding under the skin, which are the outer folds of the genital area, extending to the perirectal area and inside of the thighs on both sides.
>
> The introitus, which is the opening to the vaginal area, appears bruised as well with purple discoloration and a small tear at 3:00 o'clock of the labia minora, which are inside folds that cover the vaginal orifice.

4RRR199. For her, this extensive bruising was "not normal, even for a toddler." 4RRR200.

Dr. Squires also emphasized the bruises she observed on BD:

> On her body she had some bruising…. She had one small bruise under her left chin that was about a little more than quarter size, and it was greenish in that area. She had very significant, unusual bruising in the diaper area, in the genital area. It was bluish/red bruising on both sides, sort of in the middle and both sides, and then extended down onto one leg or into the groin of the other side more than the other.

5RRR53; *see also* 5RRR56 (discussing "bruising on both sides of what's called the labia area"). The prosecution employed photos (SX3–SX6) to enable Dr. Squires to point out all the bruising she observed on BD. 5RRR54–57. She was certain "***the bruising was physical abuse*** because there was no" history of a trauma sufficient to explain it. 5RRR110–11.

In its rebuttal case, the State recalled Dr. Squires to the stand to emphasize her position that BD's condition "***could be caused either by the shaking or the striking or both***." 9RRR136. The State argued that "the jury will not have to decide whether it was unanimous shaking or unanimous striking." 9RRR137–38. What mattered, per the State's witnesses, was the lack of "history," along with BD's intracranial condition, which they believed supported the "assumption" that "the baby was battered." 9RRR185.

Finally, State's counsel aggressively cross-examined BD's mother Bridgette regarding bruises on BD's thighs that were not present when Bridgette left for work in the morning but emerged only after "the only person that was taking care of [BD] was the Defendant[.]" 9RRR92.

In short, no fair reading of Andrew Roark's trial record supports the conclusion that Andrew was convicted using a "shaking only" theory or without evidence of what was ***presumed*** to be external signs of inflicted trauma.

2. Robert Roberson's trial featured testimony about bruises observed on Nikki, although there was only evidence of minimal bruises.

While there is a notable difference between the bruises found on BD (extensive) and those found on Nikki (minimal), the State in Robert's case aggressively argued that Nikki likely sustained abuse beyond the imagined shaking. This argument was not tethered to any objective medical evidence.

The ER doctor who treated Nikki, Dr. Konjoyan, never suggested he saw any external sign that Nikki had been battered. In fact, his initial reaction was an expression of fear that he may have "missed something," because he recognized that Nikki had been in the ER just two days before. 41RR67–68 (nurse quoting Dr. Konjoyan as saying "'This is a little girl that's been here, was here two days ago'" and describing his concern "that he might have missed something."); 41RR77 (nurse explaining "When he told me, Dr. Konjoyan, I was standing beside him, he said, 'Oh,

my God.' I mean that was his words to me, 'I just saw this child two days ago. Would you go see what it was,' He couldn't really remember, but by the look of her face he remembered her.").

Dr. Squires, who assessed Nikki after she was transferred to CMCD, described looking for bruises and scars and finding nothing significant: "I looked for scars and bruises and I really did not see very much …. I saw a ***just minimal little bruising on the forehead*** which I thought was insignificant. I had read the records. I was aware of the fact that people had said that there was ***a little chin abrasion***, but she was taped up so I just wasn't able to see that. ***The rest of her body, there were no scars, no unusual bruising or anything***." 42RR96.

Nevertheless, the State elicited as much as it could about bruises from two Palestine nurses (Kelly Gurganus and Andrea Sims).[23] The State also showed the jury two sets of photographs: (1) Polaroids taken by law enforcement in the Palestine ER and (2) Dr. Urban's autopsy photos, taken after two days of extensive medical treatment had altered Nikki's condition—especially the volume of intracranial blood.

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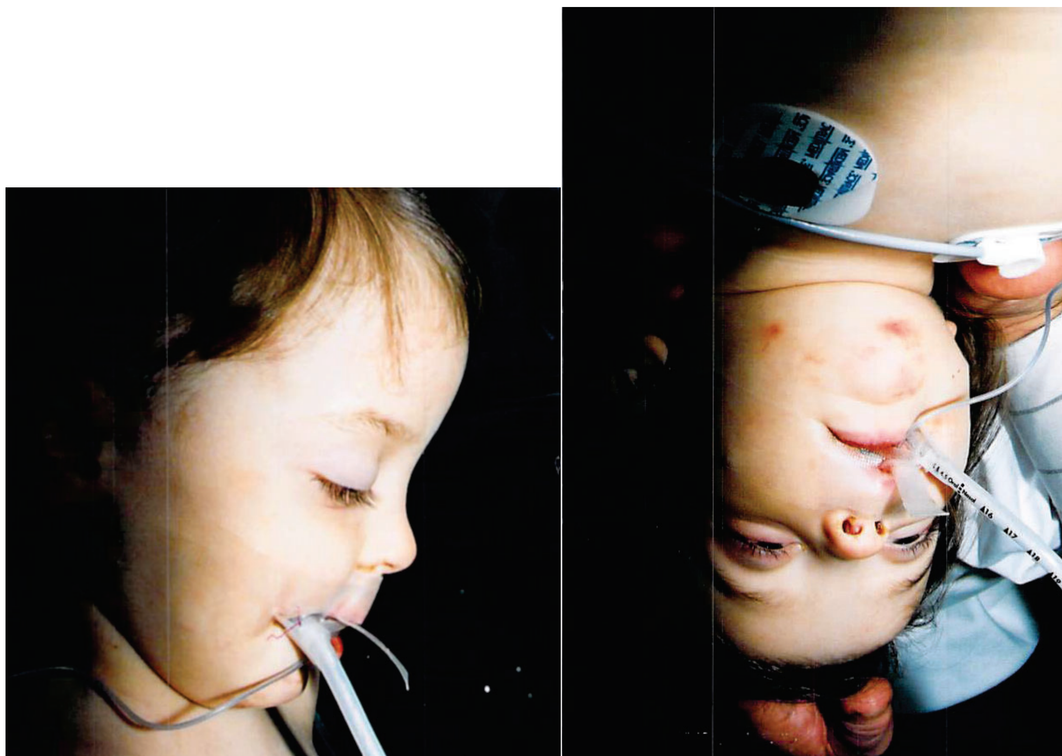
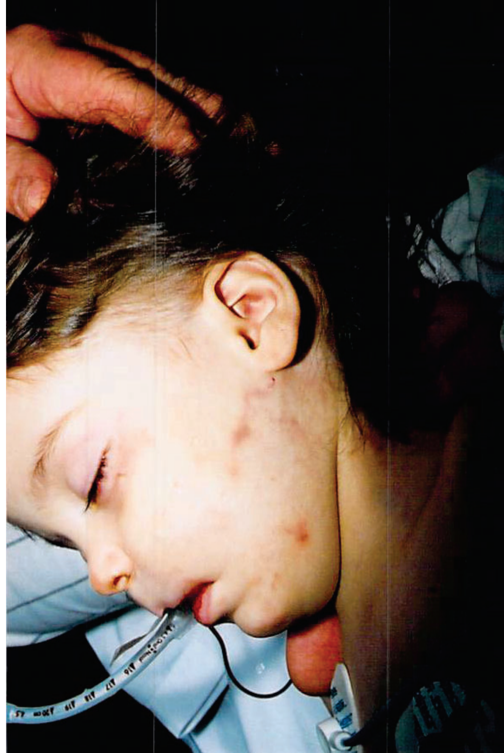
[23] Nurse Odem, who acknowledged that she never saw Nikki, testified that Robert had told her that Nikki "had a bruise on her cheek and under her chin," seemingly, after the fall out of bed. But the timing of his observation was never clarified. 41RR87.

The first person to see Nikki, Nurse Gurganus, testified that she "witnessed bruising" but only after "they started doing CPR[.]" 41RR67. Gurganus described "what appeared to be a bruise like right across here and down here on her medially" —gesturing without clearly identifying what she was talking about. *Id.* Gurganus explained: "As the time went on more bruises were apparent." 41RR68. She then suggested that she "didn't automatically go to somebody done something to this little girl until we saw the bruising." 41RR68.

The State's own photographic evidence—non-medical-grade Polaroids—are upsetting because they depict a comatose, intubated child; but they do not show a "battered" child or any significant external trauma on Nikki's body; they capture only a few small touch-bruises on her face.

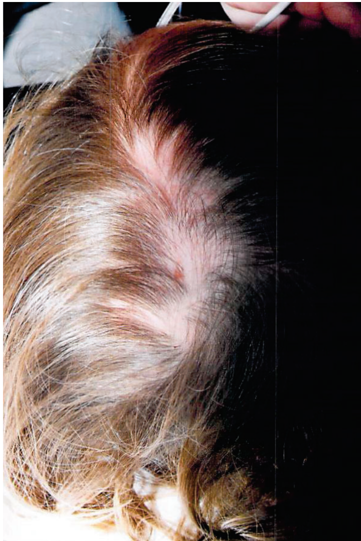


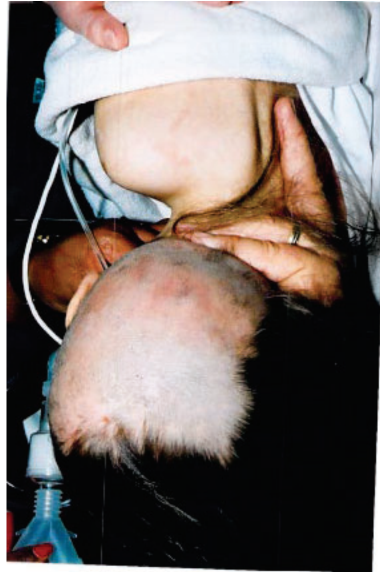


See, e.g. SX4, SX6, SX11.

Gurganus was asked about the photos "taken during the examination of this child in the ER" and "whether those photos would show the extent of the bruising injuries you're talking about?" 41RR75. Nurse Gurganus agreed that they would. She was then asked about injuries to "the lips" that she had observed; and Gurganus clarified "***that was just from not breathing***"—that the child's lips were a "blue" color when she first saw her. 41RR75. No one in the hospital reported finding any injuries to Nikki's mouth or bleeding anywhere on her body. Additionally, during cross-examination, Nurse Gurganus acknowledged that she saw no "black eyes, broken nose" and no bruise "like somebody had put their hand on the face, not impacted like with a fist[.]" 41RR76.

Gurganus also described her memory that, later, "once the police got there they shaved the back of [Nikki's] head" at the request of Nurse Sims because she had felt a "mushy" spot on the back of Nikki's head. 41RR72. Gurganus did not "recall it being bruised, but it was red and it was just mushy, like a soft spot." *Id.*

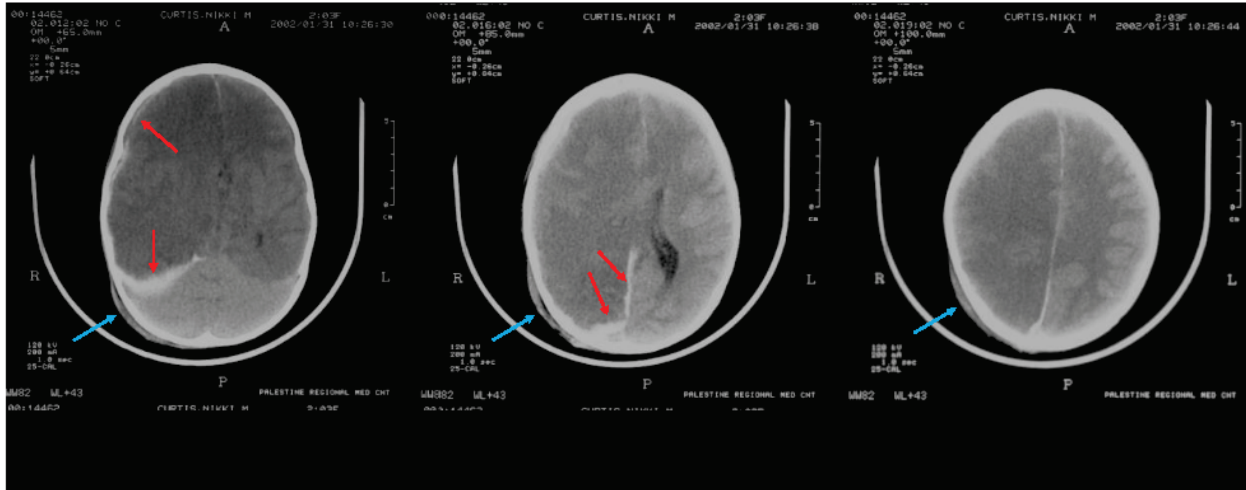




SX8, SX13 (showing no blood but only nicks made while shaving Nikki's hair off and revealing a single bump of swollen tissue at the back of the head).

None of the nurses testified about the CAT scans. But as a pediatric radiologist has since explained, those scans plainly show the intracranial abnormalities (small areas of subdural bleeding with asymmetrical brain swelling and shift), with the only external injury being swollen tissue at the back of the head with no skull fractures:

Non-sequential images showing dural based bleeding (red arrows), asymmetric edema, and shift of the brain to the left. Scalp soft tissue swelling is marked with a blue arrow

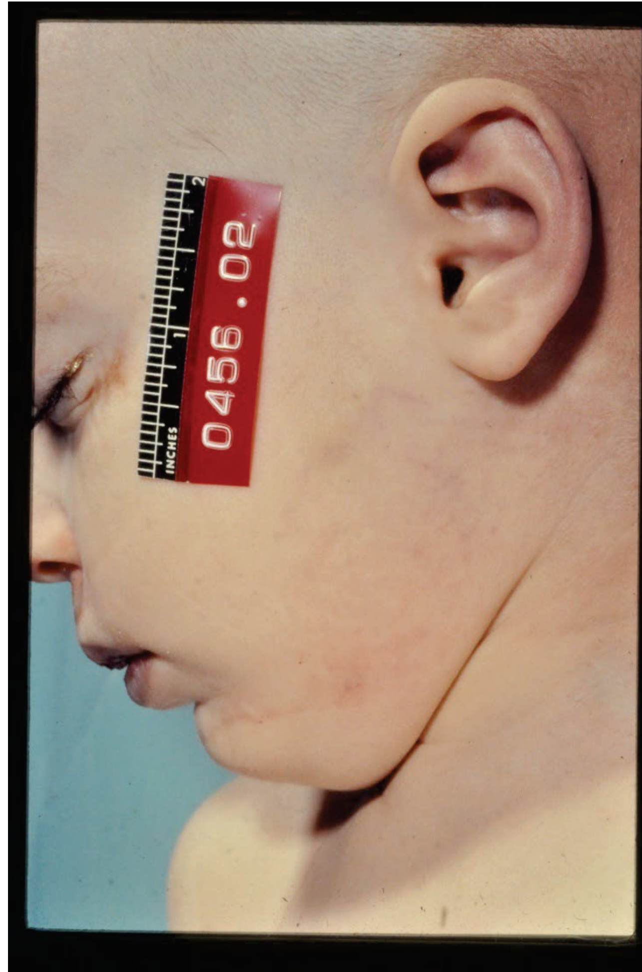


APPX93.

No one in the Palestine hospital considered Nikki's medical history. Nor did they look for any evidence of a blood clotting disorder that might explain both the intracranial bleeding and the touch bruises that appeared on her face during treatment.[24]

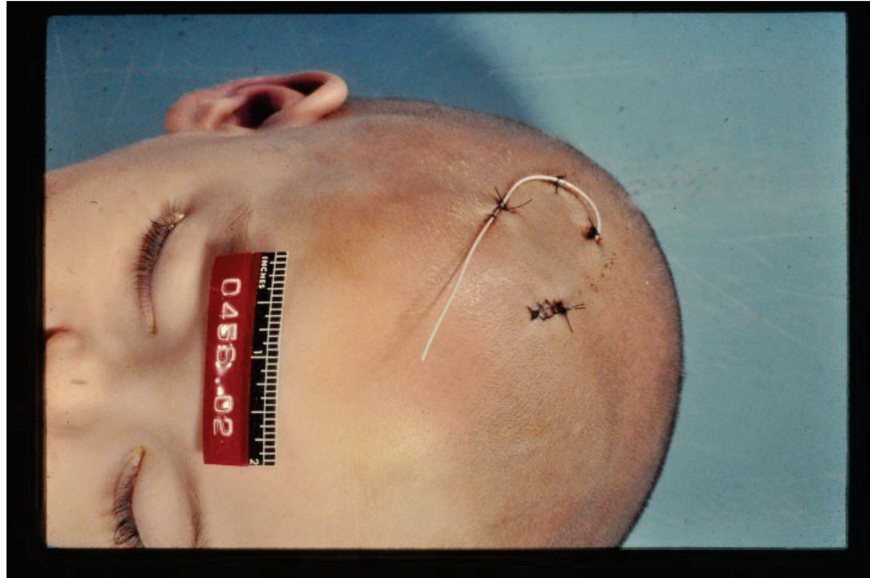
The State asked the medical examiner about the bruises she had listed in her autopsy report based on her assessment of Nikki's body two days later, after Nikki had been put through extensive triage. Even then, Dr. Urban's photographs show minimal bruises. *See, e.g.*:

[24] Objective evidence of Nikki's significant blood clotting disorder is in the CMCD records, but no one mentioned it during Robert's trial. APPX11. *See* Section II.D, below.



But Dr. Urban misleadingly told the jury that she saw evidence of “multiple impacts,” one of which she suggested was on the top of Nikki’s head. But that is where a pressure monitor had been surgically affixed to the top of Nikki’s head while she was hospitalized at CMCD. Years later, Dr. Urban admitted that one of her photographs depicted a medical pin inserted in Nikki’s head where the pressure monitor had been removed before Nikki was transferred from the hospital for the

autopsy.[25] But this crucial context was not shared with Robert's jury. 9EHRR181. *See* original autopsy photo 2592, clearly showing the surgical pin where the pressure monitor had been removed and related bruising, which Dr. Urban, deceptively, told the jury was an "impact site":



Additionally, Dr. Urban did not account for how the high intracranial pressure and the surgical insertion of the pressure monitor itself would have altered the exterior and interior of Nikki's head before the autopsy. Dr. Urban, who never looked at the CAT scans, also failed to appreciate that the volume of blood she observed during the autopsy was not present when Nikki arrived in the hospital; therefore, she did not account for that development either.

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[25] The autopsy was performed at Southwestern Institute of Forensic Sciences (SWIFS), which houses the Dallas County medical examiner's office.

But even with Dr. Urban's failure to account for how intervening events changed Nikki's appearance over the course of two days, Nikki's exterior did not suggest a battery; there was a notable discrepancy between her external appearance and the intracranial condition, which even the lead prosecutor noted during his direct examination of Dr. Urban during the 2003 trial:

> There really is a ***large discrepancy***, at least in my mind, between ***what you see on the outside and what you see on the inside***. You described a lot of different impact sites, multiple blows to Nikki's head. And ***you really don't see that when you look at the pictures of her face***. Can you explain to us why that is?

43RR89.

Dr. Urban's perplexing, unscientific explanation was that children somehow don't bruise as easily as adults because they have "a lot of fat":

> Well, again, I think that's because just of the way children are built. You know, like I said, they've got a lot [of] fat. There's a lot of fat between, say, the skin and actual bones of the skull and that can absorb a lot of energy that's inflicted on the skin…. you can actually get a great deal of injury to the head and not see anything on the outside because all that force is transmitted inwards without actually disrupting the skin.

Id. Her testimony, suggesting that you can beat a child in the head and not "disrupt the skin," because a child has more "fat" is contrary to the laws of physics and common sense, as children are not immune to bruising. *Id.* Her generalization about "fat" as applied to Nikki is also perplexing as Nikki was under-weight, per her

pediatric records. APPX9. But Dr. Urban's testimony went largely unchallenged during Robert's trial because it was consistent with the SBS beliefs of that era.

In sum, during both Andrew's and Robert's trials, witnesses presumed that the significant bruising observed on BD and the minimal bruising observed on Nikki was further evidence of abuse.[26]

D. In both cases, witnesses gave testimony to support the false narrative that the child had been "totally well"—absent any meaningful investigation of the child's medical history.

For Dr. Squires and other medical professionals who testified in these trials, the opinion that the child had been "totally well" one moment and then suddenly unconscious was seen as another basis for presuming that abuse had occurred. But even the scant evidence adduced at trial shows that neither BD nor Nikki was "totally well" at the time of their medical crises. There was no meaningful investigation of their medical histories, particularly in Nikki's case. Even the medical records adduced by the State show that Nikki had been struggling with serious, unresolved

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[26] In fact, bruises can be caused by many kinds of medical conditions, not to mention accidental falls. *See, e.g.*, M. Razmi, et al., *Spontaneous upper eyelid ecchymosis: A cutaneous clue to increased intracranial pressure*, J. AM. ACAD. DERMATOL 2017;77:e65-6 (2016); Shih AF and Sharaf M., *Pressure Urticaria in an Infant Appearing Similar to Physical Abuse*, PEDIATRICS 2020;146(4):e20193644. *See also* Section II.D, below discussing Nikki's bleeding disorder that was not disclosed or discussed at trial by any witness.

medical issues most of her life; but the State went out of its way to minimize that evidence, treating it as irrelevant.

1. Signs that BD had *not* been "totally well" were dismissed without investigation.

The night before BD's medical crisis, she had a "high fever," "diaper rash," and "diarrhea." 8RRR137. BD was given two shots, one in each thigh, during the visit to her pediatrician's office several hours before her medical crisis. 8RRR108. That history may have explained the bruises later observed on BD's legs and pelvic region that law enforcement and medical personnel interpreted as signs of abuse. But no one considered the possibility.

Andrew described observing "a little blood in BD's mouth" when he found BD unconscious and tried to perform CPR. 8RRR95, 129. This blood in her mouth may have been evidence that she had sustained a seizure, as a neurologist, who did not testify, later told BD's mother Bridgette. 9RRR123–25. Dr. Squires was brought back to rebut that suggestion, opining that she did not believe that BD's condition was caused by "some sort of seizure or seizure disorder." 9RRR152. No medical care provider investigated whether BD had inherited any predisposition to seizures even though her mother Bridgitte had been diagnosed with a seizure disorder as a child. 9RRR101–02, 123–25.

The first treating doctor to see BD in the ER of the small, regional hospital (4RRR97) testified that her job was to try to stabilize BD who was "minimally

responsive and having quite a bit of difficulty breathing" and, once stabilized, get BD transferred to CMCD. 4RRR99–102. Dr. Nance admitted that she did minimal investigation of BD's history. The entirety of her understanding of BD was that she had been to the pediatrician that morning for a wellness check-up and no issues had been noted. 4RRR102. Dr. Nance diagnosed "blunt head trauma" and made notes to check other possible causes, such as accidental drug intoxication, electrolyte imbalance, and "[i]nfections like meningitis." 4RRR109–10. But there is no evidence that any of these alternatives were ever considered.

Dr. Padma Bala, BD's pediatrician, testified about the wellness checkup the morning before BD's collapse. 5RRR117–19. Dr. Bala claimed she noted no concerns that day and gave BD two vaccinations, one in each thigh. 5RRR120–21. At that time, she did not notice any bruising in the diaper area. 5RRR122. Defense counsel noted that, although the pediatrician found nothing wrong, the fact that BD's CAT scans later revealed both "old" and "new" subdural blood indicated that BD had already had some kind of subdural bleeding episode before her appointment that day, yet nothing had been detected during the visit. 5RRR126.

The State elicited from BD's step-grandmother, who aligned herself against Andrew, that BD had no known health issues other than "ear infections." 6RRR40. But these ear infections had been significant enough to warrant surgery about two weeks before BD's medical crisis. 8RRR107.

Also, Mrs. Roark, a licensed RN, reported that, when BD emerged from the ear surgery, Mrs. Roark had observed unusual bruises on BD's face that "looked like from a handprint." 8RRR170. Mrs. Roark, a nurse for over two decades, told the jury that she had never seen anything like the "thumbprints" on BD's face and tried to call it to the attention of medical staff at the time. 8RRR39–40. Additionally, when BD was hospitalized following her collapse, Mrs. Roark asked the ICU doctor if she was going to consult with a hematology specialist about the possibility of a bleeding disorder and, over the State's objection, provided some specific examples based on her own experience treating patients as to why this kind of consultation seemed warranted. 8RRR40–43.

No hematologist was ever consulted. When Mrs. Roark encountered Dr. Squires at the hospital and asked if she was going to consult with a hematologist or otherwise consider anything other than abuse, Dr. Squires said, "absolutely not, she was finished." 8RRR44–45. When Mrs. Roark brought up the need to look at clotting factors and the fall with head impact against a coffee table two weeks previously, Dr. Squires was clear that she was unwilling to consider any possibility other than abuse. 8RRR46–47.

Dr. Squires implicitly admitted that she did no investigation. Her notes about the "history" she gathered related to BD are minimal and outright inaccurate: "found unresponsive by dad in bed." 5RRR53. She claimed that she "talked to everyone

[she] could" but at trial could not identify anyone she spoke to. 4RRR213–37; 5RRR59. Her summary of the hearsay she received was only this:

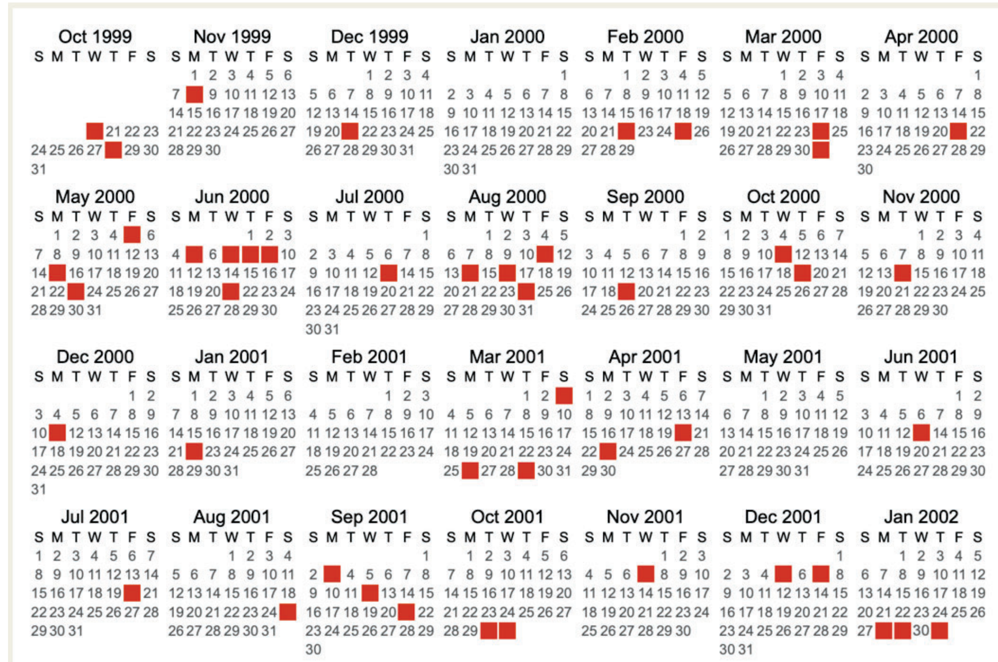
> I had been told that this child was ***totally normal*** the day before at noon time. She was active and alert. By 4:30 in the afternoon or 4:45 …. she had gone from a normal child to a child with a major neurological dysfunction and then x-ray findings of brain injury.

5RRR59. The totality of information Dr. Squires relied on was (1) her own examination of BD when the child was unconscious and intubated; (2) BD's CAT scans; and (3) her opinion that Andrew's explanation did not explain BD's condition. 5RRR52–59.

2. Significant evidence that Nikki had *not* been "totally well" was minimized or ignored.

The affidavit that Dr. Squires provided, which was used to arrest Robert, states that she conferred only with Nikki's maternal grandparents, who had, by then, aligned themselves against Robert. The Bowmans told Dr. Squires that Nikki was "totally well" when they last saw her around "10:00 PM" the night before her collapse. APPX103. But Nikki's medical records, had Dr. Squires reviewed them, would have shown this description was false. APPX9; APPX14. Nikki was far from "well." Her fever had been measured at 104.5 degrees in her doctor's office the day before and she was prescribed potent medications, which the grandparents were ostensibly giving her. Moreover, Nikki's maternal step-grandmother (Verna Bowman) was aware of Nikki's numerous interactions (47) with doctors over the

course of Nikki's short 27-month life because Mrs. Bowman had been the person primarily responsible for taking her to doctors:



Each red box indicates a day when Nikki visited a doctor or hospital; it does not capture all days when, according to her various caregivers, she was sick. *See, e.g.*, APPX9; APPX14; APPX76 (Mrs. Bowman's journal).

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 intracranial condition "is trauma." 42RR104. Dr. Squires further declared that "the medical findings," including "very obvious" retinal hemorrhages, "fit a picture of shaken impact syndrome." 42RR105.

In truth, Nikki was plagued by infections since the first few days of life. APPX9; APPX110 (2021 Report of Roland Auer, MD, Ph.D); 2024EX5 (2024 Aff.

Francis Green, MD). To address the chronic ear infections, she had surgery to have tubes surgically implanted in both ears. APPX9. But she continued to have ear infections that left her ear drums fiery red, including at the time of her final hospitalization. 42RR18.

Nikki also had a history of alarming breathing apnea episodes when she would collapse, cease breathing, turn blue, and have to be revived. *See, e.g.*:

8/14/00
Curtis, Nikki

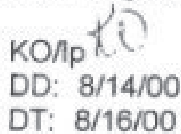
CHIEF COMPLAINT: FOLLOW-UP EMERGENCY ROOM

SUBJECTIVE: This is a 9-month-old female who has a history on Friday of sitting on the floor playing while the custody Grandmother was hemming some pants. She made a funny cry and Grandmother turned around and she was lying face down on the floor. Grandmother turned her over and she was kind of blue and didn't appear to be breathing. Grandmother gave her 1 rescue breath and kind of gave her a shake. She gave her a 2nd breath and she started breathing again and pinked up. She took her to the emergency room and they did a chest x-ray, Pulse-Ox and some other things, but they couldn't find anything. They sent her home. Grandmother said it happened again on Saturday. She was playing and they heard a kind of funny cry and turned around and she was lying on her back on the floor again. She appeared to be kind of blue. There was no rhythmic jerking noticed at that point. They gave her 1 rescue breath and she did fine at that point. They called the Office and were told to just keep a real close eye on her.

PHYSICAL EXAMINATION: Temperature – 99.4°; Weight – 18 pounds, 9 ounces. The head is normal. The anterior fontanelle is soft and flat. The neck is supple. The nose is clear. Oropharynx is clear. Left and right TMs are clear. Chest is clear to auscultation. CV is regular rate and rhythm without murmur. Abdomen is soft, nontender and non-distended with normal active bowel sounds. Extremities have no cyanosis, clubbing or edema. There is full range of motion. The skin is clear with no rashes. GU examination is normal female. Neurological exam appears intact for a 9-month-old.

ASSESSMENT: THIS IS A 9-MONTH-OLD WHO HAS PREVIOUSLY HAD SOME MINOR EAR INFECTIONS AND ILLNESSES, BUT MAINLY BEEN HEALTHY WHO NOW HAS 2 EPISODES IN 24 HOURS OF APNEA WITH SOME REPORTED CYANOSIS. I THINK THAT THIS MAY BE SEIZURE ACTIVITY EVEN THOUGH THE SEIZURES ARE NOT WITNESSED. SHE HAS A FUNNY CRY THAT NOTIFIES THAT SOMETHING IS HAPPENING AND THEN THEY FIND HER ON THE FLOOR. BECAUSE SHE IS IN DIAPERS, IT IS NOT KNOWN IF THERE IS ANY URINARY INCONTINENCE AT THE TIME THEY HAPPEN.

PLAN: I am going to go ahead and schedule her for an EEG and CT Scan to verify any kind of tumors or other reasons that might be causing her to quit breathing, as well as place her on an apnea monitor until we get some of the other results back.


KO/lp
DD: 8/14/00
DT: 8/16/00

APPX9.

At least "2 episodes in 24 hours of apnea with some reported cyanosis," after 9-month-old Nikki emitted a "funny cry" and collapsed, prompted Nikki's pediatrician to suspect "seizure activity." *Id.* Therefore, a neurological work-up was

ordered, but the neurologist was not told that Nikki had maternal half-brothers with a seizure disorder and Fetal Alcohol Spectrum Disorder. The cursory work-up concluded without any cogent explanation for the apneic episodes. APPX15. *See also* this letter from Nikki's pediatrician, Dr. Ostrom:

Pediatric Associates of Palestine

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

August 24, 2000

To Whom It May Concern:

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

Sincerely,

Dr. Karen Ostrom
Pediatric Associates

KO/lp

APPX90. Dr. Ostrom's letter shows that Nikki had serious, unexplained health issues that affected her ability to breathe long before her final illness in late January 2002. As the letter attests, Nikki's unexplained "apneic episodes" were sufficiently serious that her doctor did not believe Nikki should be "shifted between different caretakers[.]" *Id.* But the jury did not see this letter, which was not produced to the defense before trial.

Whether Nikki's breathing apnea episodes indicated a seizure disorder remains unknown. Nikki's post-mortem toxicology report indicates that she had a massive amount of anti-seizure medication (phenytoin) in her system, which is unexplained by her medical records. 2024EX7 (2024 Affidavit of Keenan Bora, MD). She may have had a seizure while in transit to CMCD, but records related to her treatment while in transit have never been produced; and the issue was not investigated or discussed during Robert's trial. *Id.*

The week before Nikki's final medical crisis, she had high fever, diarrhea, vomiting, and respiratory issues, and she was taken to the ER. APPX14. The next day, she was taken to her pediatrician where her temperature was recorded as 104.5º; but she was sent home. APPX9. Along with other medications, Nikki was prescribed Phenergan on two consecutive days by two different doctors, to address complaints of week-long diarrhea, vomiting, fever, and respiratory issues. APPX9; APPX14. But Phenergan ***suppresses*** the nervous system, thus making it harder to breathe. 2024EX7. The first Phenergan prescription was in suppository form; the second was in cough syrup with Codeine, a narcotic. *Id.* The effects of these medications on a two-year-old with a respiratory virus (undiagnosed pneumonia) was not investigated or discussed during Robert's trial. *See, by contrast*, 2024EX5 (2024 Affidavit of Francis Green, MD); 2024EX7.

During Nikki's final hospitalization, Robert reported that he had found a "little blood" on Nikki's mouth after he found her on the floor; he wiped the specks of blood off with a washcloth that he later gave to law enforcement. 2024EX1. This blood may have suggested a seizure or a symptom of the undiagnosed pneumonia that was causing parts of Nikki's lung tissue to "necrotize" and slough off. 2024EX5. None of this was investigated.

Likewise, the clear evidence that Nikki had developed a serious clotting disorder, Disseminated Intravascular Coagulation ("DIC"), at the time of her medical crisis was entirely ignored. *See* Section II.D, below.

During Robert's trial, the first treating doctor to see Nikki in the Palestine hospital after her medical crisis, Dr. Konjoyan, instantly recognized her as a patient who had been in the ER just two days before. His first reaction was to wonder if he had "missed something." 41RR67–68. And indeed, he had missed something—an advanced pneumonia that, by the time of Nikki's crisis, had progressed to the point of sepsis. 2024EX5; 2024EX7. Dr. Konjoyan and Dr. Ross, the pediatrician who saw Nikki the day after her ER visit, both gave her contra-indicated medications that are no longer given to children Nikki's age—especially when they already have respiratory issues because these drugs are associated with respiratory failure and death, per the FDA Black Box Warning that now accompanies Phenergan:

- "Phenergan tablets and suppositories may lead to ***potentially fatal respiratory depression***."

- "Use of Phenergan tablets and suppositories in ***patients with compromised respiratory function*** (i.e. -- e.g., COPD and ***sleep apnea***) ***should be avoided***."

- "***Caution*** should be exercised when administering Phenergan tablets and suppositories to ***pediatric patients 2 years of age and older because of the potential for fatal respiratory depression***."

- "Excessively large doses of antihistamines, including Phenergan tablets and suppositories, in pediatric patients ***may cause sudden death***."

10EHRR203–206; APPX122; 2024EX7. The potential effect of this medication, in the quantity prescribed to a child with a respiratory infection (undiagnosed pneumonia), was not investigated or discussed at trial.

The only witnesses who testified during Robert's trial about Nikki's medical history were pediatrician Jonathan Ross and Verna Bowman. Both notably downplayed Nikki's chronic health issues, evident since birth.[27] Dr. Ross did admit at trial that the notes he had made the day of Nikki's final hospitalization in Palestine contained several errors; for instance, he had written that Nikki was "'free of illness'" at the time of her admission, but acknowledged that he "should have [stated] 'viral illness.'" 42RR13. But he rejected the notion that Nikki's illness at the time of her collapse and her recent 104.5-temperature were relevant. Similarly, Mrs. Bowman described one of Nikki's breathing apnea episodes that had occurred before

[27] Dr. Ross had only seen Nikki on a few occasions. He testified about Nikki's medical history because her primary physician, Dr. Ross's partner, had been in a serious car accident and was unavailable. 42RR4.

Robert gained custody of her, suggesting that that was not a particularly concerning thing to have to "breathe[] for" Nikki:

> my granddaughter, said, 'Granny, there's something wrong Nikki.' And I said, 'What happened?' She said, 'I don't know. She just made a little noise and I turned around to see what was wrong and she was just laying there.' And, you know, she had picked her up and brought her to me and Nikki was limp in my granddaughter's arms and so I took her and ***I shook her, you know, trying to get her to catch her breath because she turned blue and purple*** and I kind of-- Like you would if you walked up to someone lying there on the floor, 'Are you okay?' You know? ***That's the way I did Nikki***…. ***I'd breathed for her***.

43RR127. After Mrs. Bowman explained how she had shaken Nikki upon finding her turning blue and not breathing, the prosecutor engaged Mrs. Bowman in the following exchange, seemingly, to try to distinguish her reaction to Nikki's apnea from Robert's:

> Q. You didn't pick her up by the shoulders and shake her?
>
> A. No, sir, I did not.

43RR127–128. Mrs. Bowman was encouraged to minimize Nikki's alarming history of breathing arrest. Indeed, repeatedly, Robert's jury was told that all of his daughter's health issues were simply irrelevant to the condition observed during her final medical crisis.

E. In both cases, the State elicited spurious testimony about the male caregiver's "demeanor" and "changing stories" to insinuate guilt.

Both Andrew and Robert were male caregivers with limited experience caring for a toddler, who were alone with the child when she experienced a major medical crisis that overwhelmed them. They had little capacity to comprehend, let alone explain, what had happened.

At the time of BD's medical crisis, Andrew was unemployed after working as a cashier, but he was living with his parents who provided financial and caregiving support for Andrew, his fiancé Bridgette, and the child they planned to raise together. 8RRRR99, 101–02.

At the time of Nikki's medical crisis, Robert was endeavoring to support himself, his new girlfriend, her daughter, and Nikki, delivering newspapers after he had recently been awarded full custody of Nikki. 2024EX37 (2024 Decl. Robert Roberson); 43RR15–16.

These facts were treated as additional reasons to suspect these men, neither of whom had any documented history of violence toward any child. In both cases, the State recruited witnesses to testify disparagingly about them based on specious observations about their "demeanor" and their reputedly "changing stories" during multiple interrogations about their child's medical crisis.

1. Witnesses were urged to describe Andrew Roark as unfeeling and vacillating.

In Andrew's trial, the State stretched to adduce reasons to view him in a bad light, repeatedly employing what seemed like a script. The State elicited testimony from a paramedic about arriving in response to Andrew's 911 call and finding him "just standing there" not "crying or screaming or excited." 4RRR43. The State then asked another witness, a police officer, leading questions to emphasize that Andrew did not seem upset—was "not shaking, upset, or crying" or "upset in anyway," was "showing no emotion," and "didn't really say much at all." 4RRR60–63.

Another police officer, Sergeant Smith, testified about interactions with Andrew, describing his explanation to imply callousness: "she fell a lot and might have fallen while she was playing." 5RRR217. Smith described Andrew as "extremely nervous," just "worry[ing] about what was going to occur," no crying, no "expression of concern" about BD. 5RRR218.

The State also called BD's maternal step-grandmother as a witness, who was asked about Andrew's demeanor at the hospital, and she stated: "He wasn't upset…. He had no reaction." 6RRR47–48. She then emphasized that he, unlike her, was not crying; he was "just real quiet." 6RRR50. She claimed that Andrew's demeanor never changed while at the hospital before his arrest. 6RRR51.

Andrew testified that he did not "remember a whole lot" because he was "in shock," which State's counsel mocked. 8RRR139. State's counsel also implied that

Andrew ceased attempting CPR because he was indifferent to BD's condition. 8RRR143. State's counsel then scorned Andrew's claim that BD seemed "fine" when she went down for a nap and then "got a severe head trauma" soon thereafter. 8RRR148. Additionally, the State urged disbelieving Andrew because he may have called BD's mother Bridgette before calling 911 and accused both Andrew and Bridgett of lying about which call occurred first. 9RRR95, 98; 10RRR28–31.

The State also crafted a narrative to suggest that Andrew was somehow "changing" his story about what happened. One officer-witness testified that Andrew initially did not tell law enforcement anything "other than the fall off the bed" but claimed that officers went back and took pictures of a bathtub because Andrew later "changed" his story. 4RRR63, 69. While questioning the ER doctor, State's counsel implied that Andrew shifted his story because he told that doctor about a fall two weeks prior and a nurse about a fall out of bed that day: "there's conflicting histories [from Andrew] just in your medical records, aren't there?" 4RRR104–05.

Sergeant Smith, who interviewed Andrew at the first hospital, testified at length about what Andrew reputedly told him, suggesting that his story was continuously changing:

> Originally I was informed that he – that the child just rolled off the bed and he found her in that condition and she was having a hard time breathing…. He said that he didn't know of anything that – at that time that could have caused that. He just found her that way…. Knowing that there was some pretty severe trauma to the child, I asked him was there anything that he could think of that could have caused that to

> happen. And he said that he had given the child a bath that day and she had slipped and fallen backwards and struck her head against the tub, and so, that was pretty much the explanation for the head injury, but he didn't have – he didn't know of any reason for the trauma to the child's [genital area].

5RRR216. Sergeant Smith then suggested Andrew asked whether "a fall have caused those type of injuries" and when Smith suggested skepticism, Smith claimed "[t]hat's when [Andrew] told me about giving her a bath and she fell backwards." 5RRR217. Also, according to Smith, when Andrew was asked about the bruises in BD's vaginal area, he initially said "he had seen them the night before but … he didn't offer an explanation for them" and when asked why he had not given certain information to doctors earlier, Smith claimed Andrew reported "he was afraid." 5RR220–21. Another officer claimed that, while Andrew was being driven to jail, he changed his story "three times." 6RRR7.

Similarly, BD's maternal step-grandmother claimed that Andrew initially told her that he went to BD's room and found her on the floor unconscious, but she later overheard him say something about giving her a bath and her slipping and hitting the back of her head, but he "forgot" to mention that before. 6RRR46, 50. The State also sponsored testimony from the maternal step-grandmother to impugn Andrew's character. She claimed that "at first everything seemed fine" when he began his relationship with Bridgette and BD, 6RRR24, but testified that things later "changed," and that the child "would cry when he would try to hold her, but she

didn't cry with anybody else trying to hold her." 6RRR30, 58. The grandmother claimed that was "[w]henever he would try to have any contact with her." 6RRR31.

The step-grandmother also planned to testify that she had previously observed "a black eye" on BD, a "broken leg," and "bruises on her neck" at various unspecific dates. 6RRR36–43. But Andrew's retained counsel objected to putting this extraneous evidence before the jury. Unlike in Robert's case, the trial court sustained the defense's objections, finding this testimony more unfairly prejudicial than probative. *Compare* 6RRR41–44 *with* 42RR43. After being denied the opportunity to put on improper extraneous evidence of undocumented bad acts, State's counsel focused on berating Andrew himself for failing to initially tell EMTs that BD had fallen in the bathtub and hit her head. 8RRR146.

2. Witnesses were urged to describe Robert Roberson as unfeeling, vacillating, and incoherent.

In Robert's trial, the State stretched to adduce reasons to view him in a bad light, repeatedly employing what could be deemed "the Roark script." The State spent a significant portion of Robert's trial emphasizing his flat demeanor at the hospital and him supposedly "changing" his story while being interrogated by different people. In retrospect, this testimony is especially misleading because no one at the time knew that Robert is a person with pronounced Autism, a symptom of which is non-neurotypical displays of emotion, especially during times of high stress, like waking up to find a beloved child unconscious and not breathing and

being interrogated by multiple health professionals and police officers. *See* Section II.F, below.

The State sounded the theme that Robert was suspiciously unemotional starting in its Opening Statement, characterizing him as not "excited" but "matter of fact," "nonchalantly" driving into the parking lot and just "sort of hang[ing] his head and shak[ing] it from side to side." 41RR48–49. The prosecutor insisted he "wasn't concerned. He wasn't excited. He wasn't scared for his children." 41RR50. The prosecution further insisted that "he never once asked the condition of his 2-year-old daughter in the emergency room in that hour or so they spent in the hospital. He wasn't emotional, he wasn't pacing. He was sitting there in the lobby." 41RR50–51.

From Nurse Gurganus, the State elicited testimony that she felt Robert appeared "[n]ervous and anxious." 41RR69, 70. In response to State's counsel's leading questions, Gurganus agreed that she never heard Robert inquire about "how his little girl was doing" and she never saw him crying. 41RR71.

Nurse Odem testified that Robert's "emotions" seemed "somewhat more calm than I would be." 41RR86, 92. She agreed with the prosecutor that she did not see him "crying" or "pacing." *Id.* And she did not remember him asking how Nikki was doing. 41RR87. She judged Robert's statements based on what she herself would have done: "I guess if my child fell off the bed, which they have many times, I just don't feel like that if they fell off the bed and got hurt that I was going to say, 'If

something happened to them I'll never forgive myself.'" 41RR98. That made her feel it seemed "less of an accident." *Id.*

Nurse Sims described Robert as failing to act like "other parents": "He didn't appear as upset as other parents that I've seen with injured children." 41RR121. According to Sims, "other parents" act "extremely upset. If they're not in the room they're standing right outside the room and, you now, they need to be comforted, you know, by each person that leaves the room even if it's just a pat, you know, saying we're doing everything we can." *Id.* By contrast, she said Robert "was sitting in a chair" and only started "crying after the police arrived." 41RR122.

When asked to describe Robert's demeanor, lead detective Wharton said that Robert "was kind of unemotional and detached." 41RR156. "He wasn't jumping up and down, screaming and yelling. He was just there. If questioned by anyone about circumstances he would answer the questions kind of matter of factly with a little bit of consideration before his answers[.]" *Id.* Wharton also described how, after Robert led the officers to his house to show them the bed where Nikki fell, Robert "stayed in the kitchen and he was eating [.]" 41RR160.

The only exception to the parade of witnesses who negatively assessed Robert's non-neurotypical demeanor was Nikki's pediatrician, Dr. Ross. He, who had at least interacted with Robert a few times previously when Robert had brought Nikki to appointments, said, "Mr. Roberson, it was obvious, he was, in addition, he

was distraught, too, which was understandable." 42RR15. But Dr. Ross found it "difficult to get a history as to really what was going on and it was hard to kind of pin down the illness." *Id.* Again, no one knew that Robert is a person on the Autism Spectrum with life-long speech impairments; they treated the symptoms of his disability as another reason to suspect him.

Most offensive was the testimony the State obtained from Robert's very impaired girlfriend of a few months, Teddie Cox, after state actors placed tremendous pressure on her to "cooperate." Through a series of patently leading questions, the prosecution pulled from her a portrait of Robert as someone who was utterly unfeeling, who "didn't seem upset" or "in a hurry" and who "seemed strange" with the way he did not discuss Nikki when they talked on the phone (while he was in jail after her death). 42RR183–90. Teddie agreed with the prosecutor's leading questions that he never seemed emotionally distraught or upset about Nikki's death. 42RR190. But viewed in the totality, Teddie was a thoroughly unbelievable witness, whose own sister attested to Teddie's difficulties with telling the truth. 42RR129–91; 43RR36–50.

Additionally, starting in its Opening Statement, the State urged viewing Robert as guilty because "his stories aren't consistent." 41RR50. The prosecutor argued, "Roberson's story varies depending on who he told it to. But he told numerous stories to the Palestine Police Department detectives. He told different

stories to the hospital staff. He told different stories to Teddie, his girlfriend." 41RR51.

The prosecution's theme of a shifting and thus suspicious "story" was emphasized by leading multiple witnesses through the "Roark script." Nurse Gurganus was the first hospital employee to speak to Robert in the ER soon after Nikki was brought in. She testified that, after the police were called, she asked Robert again to explain what happened: "he told me that she had fallen off the bed approximately, I think he told me, 5:30 in the morning. And so he tried to wake her up every hour and that's another thing that triggered me[.]" 41RR70. She also reported him later walking up to her when she was at the computer and saying "'you know, I love my little girl. I would never mean to hurt her,'" which she said made her feel "like basically spitting in his face because it bothered me a lot." 41RR73.

The State, endeavoring to show a "changing" story, asked Nurse Odem whether Robert ever mentioned Nikki hitting a table; Odem responded, "Yes. When I said, 'She had blood in her mouth? And he said, 'Yes.' And he said, 'She must have hit the table when she fell off the bed.'" 41RR87. Odem also implied that he was inconsistent because he referred to Nikki falling out of bed "last night" then said "something about five o'clock in the morning," although he had a perfectly reasonable explanation for this "change":

> He said last night when she fell off the bed that he cleaned her up. He went to check on her and he cleaned her up. But then later he made a

> reference to something about five o'clock in the morning because that's when I said, 'But I thought this happened last night.' And he said, 'Well, it was kind of like last night because it was still dark outside.'

41RR96. Odem summarily dismissed him as "just inconsistent." 41RR100.

But if one looks objectively at what Robert told multiple people, he was ***notably consistent***. He reported that Nikki had fallen off the bed while he was sleeping; that he had heard a cry, found her on the floor, found some blood on her mouth and wiped it off; that he did not see anything wrong and they eventually fell back asleep; and that he later woke up when his alarm went off to find Nikki unconscious with blue lips and could not wake her up. *See*, *e.g.,* 41RR93–98; 41RR160–65. *See also*:

- Detective Wharton's testimony that he overheard Robert "[b]asically giving the same version to the hospital staff" that Robert then gave to Wharton. 41RR161–62.
- Teddie Cox's testimony that: "He said they had fallen asleep watching a movie that night and that he heard her crying and he woke up and Nikki was at the foot, close to the foot of the bed, but she was on the floor. He woke up and made sure that she was okay and then he put her in the bed with him and they went back to sleep." 42RR187.
- Nurse Sims' testimony that Robert reported a fall "out of the bed at approximately 5:00 AM." 41RR124.
- Dr. Ross's testimony that Robert told him that Nikki fell off the bed but she had been talking to him, before he set the alarm clock and woke up the next morning and found her unresponsive. 42RR17.
- Dr. Konjoyan's testimony that "the father, I think, stated that he hadn't been able to wake her up and that she might have fallen out of the bed." 42RR82.

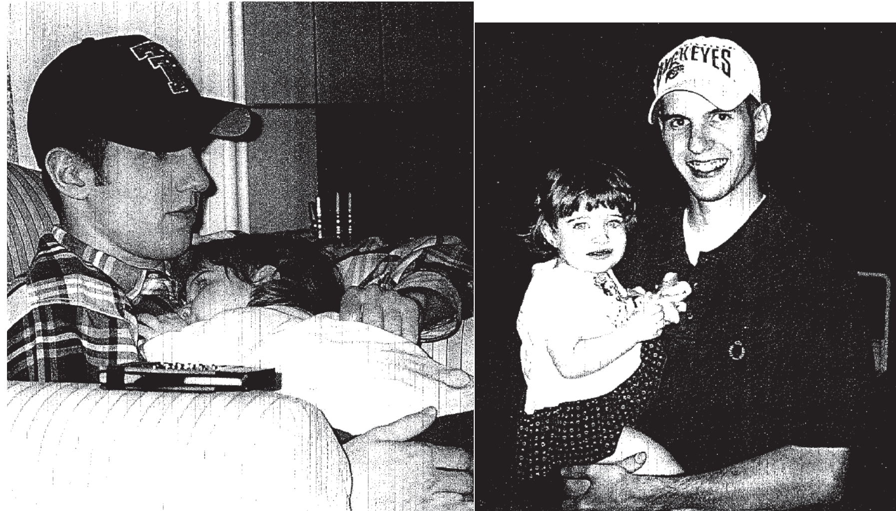
- Nikki's step-grandmother Verna Bowman's testimony that Robert "said 'Nikki fell off the bed and hit her head on the table or something.'" 43RR155.

In short, the issue was not one of inconsistency, but that no one believed that a fall out of bed could explain Nikki's condition and otherwise dismissed Robert as "not normal." As Mrs. Bowman put it, his explanation did not strike her well "because, you know, just falling off of a bed is not going [to] do that, give a baby that type of injury." 43RR156.

To create an ***appearance*** of "changing stories," the State relied primarily on Teddie Cox. Teddie was asked whether Robert ever gave her a different version of how he found Nikki. Without saying when, Teddie testified that Robert told her "she'd fell off and hit her head on the brick." 42RR188. But Robert never claimed to have seen the fall and the reference to possibly hitting a "brick" was referring to one of the cinder block bricks propping up their bed, as documented by Detective Wharton:

SX35.

In terms of adverse character evidence, the State relied on the same kind of unsubstantiated "evidence" of bad acts that was properly ***kept out*** of Andrew's trial, along with the nearly identical and equally baseless assertion made against Andrew that the child he was taking care of would "cry" whenever he tried to hold her. These absurd claims were rebutted, in both cases, by photographic evidence. Here are photos of Andrew holding BD that was introduced into evidence during Andrew's trial:



Roark DX8, DX10

Here are photos of Robert holding Nikki that were introduced into evidence during Robert's trial:

DX11, DX8

Notably, Nikki's maternal grandparents, the Bowmans, had seen Robert as sufficiently trustworthy that they had voluntarily relinquished custody of Nikki to him. Moreover, they urged him to pick Nikki up, while she was sick, late the night

before her medical crisis. 6EHRR146, 162. That conduct is inconsistent with any suggestion that they (or anyone else) believed he was mistreating Nikki.

The State, in this proceeding, continues to peddle the false "changing stories" narrative although Robert (like Andrew) never purported to understand how a child could sustain a short fall and later become unconscious and apneic.[28] Also, the State's spurious position that Robert subsequently "confessed" to shaking Nikki was so thoroughly debunked in the -03 proceeding that it was not even included in the State-drafted Findings of Fact and Conclusions of Law (Findings) that the previous habeas judged largely adopted wholesale. *See, e.g.*, 7EHRR130–137.

If the State were to again endeavor to revive that false "confession" narrative, the Court should be guided by the wisdom of Judge Posner in *Aleman v. Village of Hanover Park*, 662 F.3d 897, 907 (7th Cir. 2011) (finding confession obtained from a caregiver in an SBS case under intensive questioning about whether the child may have been shaken to death was "worthless as evidence, and [as] a premise for arrest"), cited in *Ex parte Roberson*, 726 S.W.3d 290, 310–31 (Tex. Crim. App.

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[28] The most unprincipled example is an unauthenticated hearsay document the State attributes to Robert, which was sent to the CCA in 2007 by some unidentified person purporting to "help" Robert, who never owned a typewriter, did not type the document in question, and has no idea how or when it was sent to the CCA. That document, which contains a wild story about Teddie's sister shaking Nikki in the middle of a crack-fueled binge, was ***never*** treated as "evidence" by any court and, on its face, is completely lacking in credibility and should have zero bearing on how this Court assesses the purportedly scientific evidence used to obtain Robert's 2003 conviction and the evidence-based science that debunks it.

2025) (Finley, J., concurring); *see also* Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW, Vol. 37, Issue 3 (Sept. 2009) (explaining that coerced confessions "are consistently one of the leading, yet most misunderstood, causes of error in the American legal system and thus remain one of the most prejudicial sources of false evidence that lead to wrongful convictions" and analyzing the empirical research on the causes of false confessions).

F. In both cases, baseless sexual assault allegations undeniably tainted the fairness of the proceeding.

The State had no credible evidence to explain why either Andrew or Robert, with no documented history of violence, would suddenly engage in an act of homicidal violence against a beloved child.[29] Yet, in both cases, medical professionals insisted that non-accidental trauma was the only way to explain the child's condition. Perhaps this circumstance explains, but does not justify, why state actors chose to inject highly prejudicial, baseless sexual assault allegations into the proceedings.

[29] No one saw Robert with Nikki during the last few hours of her life after her maternal grandparents urged him to pick up his sick child around 10:00 PM and take her to his house. Before Nikki's death, which was immediately blamed on him, no one had ever reported him harming Nikki—or any other child. Indeed, his extensive school, military, child custody, and TDCJ records do not include any evidence of him committing aggressive or violent acts. *See* 7EHRR128–129.

Andrew was arrested based on a sexual assault allegation, but no charge was ultimately pursued. The warrant relied on medical personnel's observations of extensive bruising in BD's "vaginal area." 4RRR88–91. Before trial, the State dropped the sexual assault allegation because testing of a sexual assault did not produce any evidence to support the allegation. 44RRR8–9; 5RRR175–73. But the State repeatedly elicited testimony from witnesses about the vaginal bruising, and witnesses cited those bruises as further corroboration of their belief that physical abuse, including sexual abuse, had occurred. For instance, an officer testified that, while EMS was working on BD, he observed "several bruises around her vaginal area," which led to a suspicion of "sexual abuse." 4RRR70–71.

One officer, during cross-examination, refused to admit that a sexual assault had ***not*** happened and would only agree that someone in the DA's Office had decided there was not enough evidence to go to a jury with the charge. 4RRR90. Prosecutors mocked the notion that BD's diaper rash or anything else could explain the bruises in her pelvic region. 8RRR29–30, 62–65.

Robert too was accused of sexual assault—absent ***any*** credible evidence. Yet a charge was pursued—up until the jury began deliberating. By then, the trial had been irredeemably contaminated. This exceptionally egregious trial misconduct is discussed in Section II.B, below.

II. The Material Differences Between the Cases Further Supports Relief for Robert Roberson.

There are differences between the two cases. But all material differences weigh heavily in favor of relief for Robert. As noted above, the guidance provided by the AAP changed soon after Andrew's trial and before Robert's trial. The net result was that, for years, any effort to challenge the SBS hypothesis became even more difficult. As of 2001, the AAP was instructing its members to treat SBS as a default diagnosis, not as a diagnosis of "exclusion," as had previously been the case. *See* APPX23. By the time of Robert's trial, abuse was to be presumed whenever the triad of intracranial symptoms (observed in BD and in Nikki) was found. *Id.*

Additional differences that weigh entirely in favor of relief for Robert are outlined below.

A. Andrew Roark had counsel who defended him, Robert Roberson did not.

1. Andrew Roark's retained counsel mounted a defense.

Andrew Roark, from a middle-class family, had resources that permitted him to retain counsel of his own choosing, who mounted a robust defense. Andrew's attorney challenged the relevance of evidence regarding external bruises pre-trial (although his objections were overruled). 4RRR5–20. In his Opening Statement, Andrew's attorney pointed out that a person who has just committed violence against a child does not seek medical care for them. Outside the jury's presence, Andrew's attorney challenged Dr. Squires' reliance on other doctors whom she could not name

and tried to prevent her from opining beyond the scope of her expertise. *See, e.g.*, 4RRR229–31; 5RRR12–40. Then Andrew's attorney vigorously cross-examined Dr. Squires.

Andrew's retained attorney also put on an affirmative case through medical experts voicing opinions contrary to the State's medical witnesses, thereby challenging various aspects of the State's "abuse" causation theory, such as:

- Dr. Marengo-Rowe, a specialist in hematology and pathology at Baylor Hospital who offered, *inter alia*, these opinions:
    - Brain swelling can be caused by subdural bleeding alone. 7RRR58.
    - A subdural hematoma is created when blood comes out of blood vessels "for whatever reason – It doesn't necessarily have to be an injury," providing a congenital condition, like an aneurysm, as an example. And once blood is in a space where it is not supposed to be, that can cause the brain to swell. 7RRR62.
    - Clots are the body's attempt to stop the bleeding. 7RRR63. But once a clot is formed, it can rupture and cause a "rebleed," even from a minor event like hitting the head on a coffee table or even just "spontaneously." 7RRR64–65.
    - It is possible to sustain a head injury and be fine for hours or even days before experiencing symptoms. 7RRR74–75.
    - Retinal hemorrhages can be caused by birth, coughing, a difficult bowel movement, intracranial pressure, breathing apnea—in other words, many phenomena other than inflicted trauma. 7RRR86, 101.
    - BD could have had a clotting disorder that was not picked up by the limited testing that was done. 7RRR91–92.

- Dr. Robert Bux, chief deputy medical examiner for Bexar County with special expertise in anatomical, clinical, and forensic pathology, who offered, *inter alia*, these opinions:

  - BD had subdural bleeding that led to brain swelling and caused a stroke on the left side of her brain where the brain herniated and some of the cells were deprived of blood and died (in the left parietal occipital region). 7RRR139.

  - BD's recovery was possible because the pressure was released; and the part of the brain that had become ischemic from the pressure was damaged, but the rest of the brain was fine. 7RRR140–41.

  - A "[s]eemingly insignificant minor trauma" such as falling in a bathtub or out of bed could have caused the subdural bleeding—or it could have even happened "spontaneously." 7RRR158. And whatever the trigger was—or even if the rebleeding started spontaneously—it could have started up to a couple of days before the child became symptomatic because "brain swelling takes time to manifest itself." 7RRR162–63.

  - Retinal hemorrhages can be caused by CPR, breathing apnea, and increased intracranial pressure that can be caused by numerous things that are not abuse. 7RRR194.

  - Shaking does not seem to generate forces, biomechanically speaking, that could cause brain injuries: "So biomechanically, it doesn't make any sense. Based on what was done in the laboratories, to think that simple shaking can cause that kind of injury to the brain." 7RRR155.

Andrew's retained attorney also called lay witnesses: his mother Mickie, Andrew himself, and Andrew's fiancé/BD's mother Bridgitte. Mickie was a nurse who testified that she had endeavored to share some of BD's recent medical history with Dr. Squires, that she had suggested that Dr. Squires get a hematology consult, and that she had asked Dr. Squires if she planned to investigate anything beyond

SBS; Mickie reported Dr. Squires as saying "absolutely not, she was finished." *Ex parte Roark*, 707 S.W.3d at 170.

2. Robert Roberson's appointed counsel ignored his client's innocence plea and improperly conceded his guilt.

Unlike Andrew Roark, Robert Roberson was an indigent, disabled individual forced to rely on a court-appointed lawyer. Robert's lawyer was appointed by the same judge who stripped him of custody of his daughter—without notice or an opportunity to be heard—several days after she had been removed from life support without his knowledge or consent. 42RR128.[30] Robert's appointed lawyer, local Palestine attorney Steve Evans, barely communicated with Robert and disregarded his insistence that he had done nothing to hurt Nikki, as demonstrated by contemporaneous notes Robert made that were improperly seized from his jail cell by the DA's office pre-trial. 2024EX37; 40RR (hearing on defense motion to quash privileged materials the State's agent had seized). In handwritten notes, Robert expressed alarmed that his appointed lawyers were not trying to defend him:

- "My attorneys are not representing me professional!"
- "Lawyers [are] misrepresenting me."

[30] *See also In the Interest of Nikki Michelle Curtis/Bowman Roberson a Child*, No. 38338 (3rd Dist. Ct., Anderson County, Texas). The appointment order was signed the very same day that Robert was stripped of his parental rights, without a hearing, although the judge who entered the appointment order did not preside over the criminal case and should have recused himself. *See* CR.

- "[They are] Falsely accusing me of things that I haven't done. So what's the deal anyway? You both need to get off your butts and represent me fairly. I thought that you both suppose to be working for me? So what's the problem anyways? I think I'm getting railroaded by you all getting me to say that I done something when I haven't done a damn a thing. Plus Kelly Goodness was supposed to help me, or let me say she is supposed to help represent me. But it looks like she is representing the state"

- "Are you all going to be able to help me or not?"

2024EX37 at Exhibit 1.[31]

While Andrew's attorney investigated and found a qualified pathologist who testified that he did not think BD's condition was caused by SBS, Robert's appointed defense lawyer put on no causation experts and explicitly conceded that it was a Shaken Baby case.[32] Throughout jury selection, Robert's appointed lawyer agreed with the prosecution that it was a "Shaken Baby" case, even though his client had refused multiple plea offers and maintained his innocence throughout. In the defense opening, Robert's appointed lawyer again agreed with the prosecution that this was a "Shaken Baby" case and did not challenge the State's cause-of-death theory during

[31] The confiscated notes were not produced until 2018 when Anderson County's new District Clerk found them in a locked closet in the courthouse basement along with the long-lost CAT scans.

[32] During a recent interview with Lester Holt, trial counsel Steve Evans adamantly denied that he had ever conceded that Nikki's death was a "Shaken Baby" case. But when confronted with transcripts from the trial, he saw that he had in fact done just that; he then admitted that such a concession was contrary to his client's interest (and had possibly guaranteed his client's conviction). *See The Last Appeal*, Episode 2, *available at* https://www.nbcnews.com/thelastappeal.

any phase of trial, instead arguing only that, because of Robert's cognitive impairments, he lacked any intent to kill. *See, e.g.*, 41RR57–61.

Quite unlike Andrew's retained counsel, Robert's appointed lawyer did not cross-examine Dr. Squires but instead lobbed softball questions, such as this:

> Q [by defense counsel]. In many respects what you saw with this child are classically consistent with injuries from rotational force; is that correct?
>
> A. Yes.

42RR120.

Because of the complete absence of a defense, Robert's jury heard unchallenged, but subsequently discredited, "scientific" testimony that:

- where the triad of subdural bleeding, brain swelling, and especially retinal hemorrhages is present, shaking can be presumed as the mechanism of injury;
- shaking can cause internal head injuries without injuring the neck;
- shaking induces immediate brain damage with no lucid interval possible before the onset of symptoms thus permitting the assumption that the adult with the child when she becomes symptomatic must have caused the child's condition; and
- a short fall could not explain any aspect of Nikki's condition.

No evidence of a non-criminal, non-abuse possibility for Nikki's condition—or of the concept that the triggering event could have happened at a time other than that posited by Dr. Squires and Dr. Urban—was put before Robert's jury at all. Yet,

vast evidence now undeniably supports such alternative explanations both in the scientific literature and in Nikki's medical records (which were largely ignored).

Robert's appointed lawyer cannot, of course, be blamed for not predicting how dramatically the scientific understanding of SBS would change after 2003. But he can be faulted for failing to provide a meaningful defense to some of the State's more outrageous slanders. Even though Robert faced the prospect of a death sentence, his appointed lawyer did next to nothing to counter the State's stunningly false portrait of Robert as someone indifferent to his daughter.[33]

The State pushed this slander through Teddie Cox, who had lied to the Grand Jury about having arranged to be in the hospital for her hysterectomy only after learning Nikki would be at the Bowmans at the time, suggesting fear of "the kids to be alone with him." 43RR18–19. But, as Mrs. Bowman herself testified, Mrs. Bowman had volunteered to babysit Nikki after learning ***from Robert*** that Teddie was going to be in the hospital. Teddie played no role in arranging for Nikki's whereabouts or scheduling surgery around the Bowmans' availability. As Mrs.

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[33] Nikki was born to Michelle Bowman on October 20, 1999. CPS immediately took custody of the child from her. No father was identified at the time. After learning of Nikki's existence, and before even knowing for sure that he was Nikki's biological father, Robert made clear to CPS that he wanted to get his life together and be a father to Nikki. 2024EX50. Thereafter, he joined his mother in suing for visitation rights and volunteered to take a paternity test. This history is documented in court records that were accessible to his appointed defense team before trial.

Bowman explained:

> Well, [Robert] told me that weekend that Teddie was going to have surgery on Monday and I said, "Well, if you want me to, I will baby-sit while you're at the hospital with Teddie.' And he said, okay, he'd think it over. And so he did and he called me and asked me if I still wanted to baby-sit and I said, 'Sure.' And so he brought Nikki over for me to baby-sit.

43RR150.

Robert's appointed lawyer met one outrageous low-blow after another with minimal resistance. He called only one guilt-phase witness: Patricia Conklin, Teddie Cox's sister. Teddie's sister Patricia had known Robert longer than Teddie had. Patricia described Robert as loving and caring with Nikki, attesting that she had never seen Robert be unkind to Nikki, and acknowledging her sister Teddie's pronounced problems with truthfulness and that Teddie's daughter Rachel had been the only person she had ever seen hit Nikki. 44RR10–22. But Patricia had a great deal more information that could and should have been shared with the jury to impeach the false portrait that the State created using Patricia's exceptionally vulnerable sister Teddie.

Patricia, who has "known Robert Roberson since he was a teenager," has recently attested:

- "Robert does not have a mean bone in his body. He is a little slow. But I never saw him be mean to anyone, verbally or physically, during all the years I knew him."

- "I saw Robert with Nikki many times. What I saw was a loving father. He was attentive, encouraged Nikki to play, and was never dismissive or short with her. I never saw him do anything hurtful. I have a strong memory of him holding her on his hip with Nikki resting her head on Robert's shoulder. I never even saw him spank her."

- "Teddie gave birth to Rachel when Teddie was 17 years old. [Rachel's] father was Edward Cox. Rachel has gone through some terrible things [with Cox] and sometimes has trouble controlling her anger."

- "Robert is night and day from Ed Cox. When [Robert] learned what had happened to Rachel, he offered to help Teddie and Rachel move back to Palestine. By then, Robert had gotten a job delivering newspapers for the Palestine Herald. My daughters enjoyed going along with him during the evening routes and would argue over who would get to sit with him in the front seat. He also occasionally took Nikki and my nieces Rachel and Courtney along with him. I had no fear at all about my daughters spending time with Robert."

- Not long after Teddie and Robert got into a relationship, "Teddie found out that she was going to need a hysterectomy. She was only 27 years old. She was very upset about this because, of course, this would mean she would not be able to have any more children. Robert was very patient with her and was going to be taking care of her when she got out of the hospital."

- Right after Nikki's final medical crisis, "case workers with CPS came to me [Patricia] wanting me to report that I had seen Robert mistreating Nikki. Teddie and I talked about this. We were both threatened with having our kids taken away from us if we did not get on board with accusing Robert. I am a stronger person than my sister and had a better understanding of my rights.

This pressure did not work on me. But Teddie is different. She has never been a strong person."[34]

- Teddie "had a lot of issues. She did not finish high school. She was diagnosed with schizophrenia and would not always take her prescription medication. She had some struggles with the Fen/Phen diet medication. Back in 2002 when Nikki died, this was literally right after her hysterectomy. Her hormones were all over the place. And she was very, very upset about Nikki's death. She did not have a job. Robert was the one who had been supporting her and Rachel with his paper routes. She was not able to take care of Rachel, then ten years old, so our mother took Rachel in. I'm aware that Teddie kept writing to Robert at the jail and sounded like she was still planning to get back together with him."

- "Teddie was very confused and did not know what to believe. We were all being told by law enforcement and CPS that Robert had caused Nikki's death. She did not understand her own rights and was scared and drinking a lot. Then our father died."

- "During that horrible time, she tried to kill herself with pills and was hospitalized. Meanwhile, she was called before the Grand Jury to testify against Robert. At the same time, her husband, Ed Cox, was in jail in Nacogdoches County about to go to trial for sexually assaulting Rachel."

- "I understand that Cox's first trial ended with a mistrial. Before the second trial, Teddie, Rachel, Courtney, and I were all called to testify in Robert's trial. I stand by my own testimony to this day. I never saw Robert hurt Nikki and do not believe he is capable of shaking or beating her or any child. He was and is a gentle man. I also stand by my testimony that my sister has a problem with honesty. Teddie is a troubled person, and when she is scared,

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[34] For verification of CPS's role, *see* Appendix 2 to the 2016 (-03) habeas application at Cause No. 26,162, *Ex parte Robert Roberson*, 09761–9805.

she tends to tell people what she thinks they want to hear. Then she has trouble telling the difference between reality and the stories she has told."

- "The same year that Robert was convicted, Cox's trial was held. I understand that Cox was convicted in September 2003 for multiple charges of sexual assaulting Rachel. He remains in prison to this day."

- "I understand that Teddie claimed at trial that Nikki was so scared of Robert that she cried whenever he came anywhere near her. That is not true. Although Nikki only lived with them for a couple of months, even before that, I saw Robert with Nikki many times. If Nikki was somehow totally different with him when I was not around, Teddie never reported anything like that to me or anyone else in the family. What I saw was Robert being loving and caring with Nikki and with my own children. My experience watching him interact with people goes back for years before Nikki was even born."

- "After Robert was convicted, Teddie continued to struggle with mental problems and has never really been stable."

2026EX2 (2025 Decl. of Patricia Conklin).

Robert's appointed lawyer did not elicit any of this material information. Then, in the defense Closing Argument, he conceded, as he had done from the outset, that this was a Shaken Baby case, arguing anemically only that the case should not be considered capital murder:

> Shaken baby syndrome has become an unfortunate issue in our society. The foundation says over 10,000 cases occur a year. As I said also earlier in this trial, this is not the type of tool to deal with this situation.

49RR34.

Robert spent years thereafter asking for his appointed lawyers to pursue his

innocence, only to be ignored. *See, e.g.*, 2004EX37–2024EX43. The same appointed defense lawyer, who had ignored Robert's insistence that he did nothing to harm Nikki and who conceded at trial that this was a "classic shaken baby case," was appointed to represent Robert in his direct appeal, over Robert's objection. Thereafter, 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 same appointed lawyer who handled the trial and direct appeal (Evans) recommended that his friend (Wes Volberding) be appointed to pursue an initial state habeas application. 49RR50. The resulting application did not include any claims challenging the State's cause-of-death theory. *See Ex parte Roberson*, Nos. WR-63,081-01, WR-63,081–02, 2009 WL 2959738 (Tex. Crim. App. Sept. 16, 2009) (unpub.). Right after relief was denied, Robert wrote a letter to the federal district court again requesting new counsel. 2024EX39. But the court granted the state habeas lawyer's request to stay on as federal counsel, despite the patent conflict of interest. 2024EX40. Robert wrote additional letters begging for new appointed counsel willing to pursue his innocence, to which his lawyer responded defending himself and denigrating his client's wish to prove his innocence. *See, e.g.*,

2024EX41.[35]

A federal habeas petition was filed, but the lawyer raised no claims challenging the Shaken Baby cause-of-death hypothesis that was, by then, being widely challenged.[36] *See Roberson v. Thaler*, Civil Action No. 2:09-cv-00327. Meanwhile, Robert continued to send urgent requests asking for a lawyer willing to investigate his innocence. *See, e.g.*, 2024EX42; 2024EX43.[37]

B. Both men were baselessly accused of sexual assault, but the baseless allegation against Robert Roberson was pushed through trial.

As noted above, Andrew Roark was arrested the night of BD's hospitalization based solely on the presence of extensive bruising in her pelvic area that was used to obtain a probable cause warrant. But after a sexual assault kit failed to yield any

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[35] *See also* Appendix 3 to the 2016 (-03) habeas application at Cause No. 26,162, *Ex parte Robert Roberson*, 09806–9829.

[36] *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).

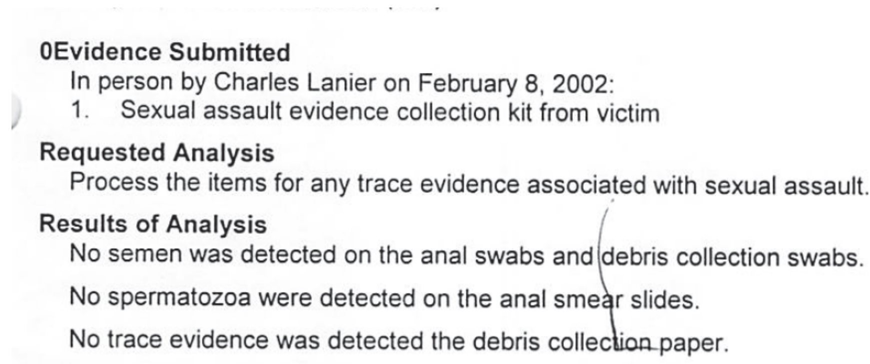
[37] The courts continued to deny Robert's request for substitute counsel until 2016. His desperate efforts to obtain conflict-free counsel, in the shadow of an execution date, was so shocking that it became the subject of a New Yorker story. *See* The Death Penalty in Texas and a Conflict of Interest | The New Yorker.

evidence of a sexual assault, the Dallas County DA's office declined to pursue a charge that BD had been sexually assaulted.

In Robert's case, although there was no evidence to even suggest that a sexual assault had occurred, evidence was gathered for a sexual assault kit—which was submitted to DPS for testing; and it was returned with absolutely no evidence to suggest that a sexual assault had occurred. SX77. Nevertheless, the State pursued a capital murder charge alleging that Nikki had been killed "in the course of committing or attempting to commit the offense of aggravated sexual assault." 1CR2–4. Despite—or because of—the exculpatory DPS results, the State relied entirely on a local nurse, who falsely claimed to be a certified "Sexual Assault Nurse Examiner" or "SANE." This ER nurse (Andrea Sims) was allowed to testify at great length about her unsubstantiated views that Nikki had been sexually assaulted. 41RR101–151.

Sims was working in the ER when Robert brought his comatose daughter to the Palestine Regional hospital. Sims took it upon herself to conduct a SANE exam although she was not SANE-certified and had not been asked to conduct such an exam. 41RR141. She also summoned the police to the hospital and told colleagues and investigators that she saw signs of "anal tears," an observation not corroborated by any other treating physician or the medical examiner. Nor was Sims' leap from purported "anal tears" to "sexual abuse" ever substantiated by any evidence.

APPX62; APPX6. In fact, well before trial, the allegation had been refuted by the results of the DPS testing, just as in Andrew's case:



0Evidence Submitted
In person by Charles Lanier on February 8, 2002:
1. Sexual assault evidence collection kit from victim

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

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

SX77.

Throughout jury selection, the State specifically invoked SBS 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 its theory that Nikki had been killed after a sexual assault—although there was ***no evidence*** to support these inflammatory allegations. *See, e.g.*, 7RR25–27, 67, 75, 127; 8RR10; 19RR22, 57; SX77.

Nikki's medical records show that she had had diarrhea for over a week and been prescribed suppositories, which fully explained the condition of Nikki's anal region. But at trial, Sims was invited to double-down on her false accusation by testifying, incorrectly, that diarrhea would not cause the tender skin in a child's anal region to crack or "tear." 41RR127–28. Her graphic testimony about an invented

"anal penetration" and her view of the proclivities of "pedophiles" was totally untethered to reality—and self-evidently prejudicial. 41RR129–130.

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 Sims, the self-appointed SANE who was not actually SANE-certified. 46RR58–60. The jury was not told about the exculpatory results from the DPS sexual assault kit testing. *See* SX77; SX78.

Post-conviction, lead detective Brian Wharton expressed shock that Sims had been allowed to testify in this way because there was "nothing supporting her opinion." 2024EX1. He knew that, after Sims first made her allegations, based on something he could not see, he personally arranged for the collection of evidence for a sexual assault kit, but nothing came back from the DPS testing to support Sims' speculation. SX76, SX77; *see also* APPX61 (Sexual Assault Data Sheet from DPS Crime Lab); APPX62 (DPS results from the sexual assault evidence collection kit). Wharton, quite sensibly, noted that "if Nurse Sims was allowed to tell jurors that she had seen 'anal tears,' that would be very prejudicial." *Id.*

In addition to Detective Wharton's recent disavowal, expert testimony, obtained in 2021 from a certified SANE shows that Sims' testimony was not only inconsistent with SANE training, it was a violation of basic nursing ethics. Kim

Basinger is a registered nurse who specializes in trauma and is a very experienced and certified SANE authorized to perform sexual assault exams on adults, adolescents, and children. 6EHRR60. She was among the first five nurses to receive SANE certification in 1998 through the Attorney General's Office of Texas. She has been a SANE trainer for the Attorney General's Office since 2002, when she also became certified by the International Association of Forensic Nursing. 6EHRR61–62. She has performed over a thousand SANE exams on adults and children. 6EHRR63. She attends many trainings and conferences and is often a presenter. Courts have accepted her as an expert on SANE exams many times; and she has testified at the request of both the prosecution and the defense. 6EHRR66–67. *See also* APPX111 (Basinger CV).

Nurse Basinger reviewed Sims' paperwork related to her SANE exam of Nikki, the rest of the ER records for that day, Sims' trial testimony, and the photographs introduced into evidence during Sims' trial testimony. 6EHRR65. Nurse Basinger explained the basic standards that govern SANEs and SANE exams. Under Texas law, a SANE exam must be requested by law enforcement before it is undertaken. Contrary to the standard of care, Sims took it upon herself to initiate a SANE exam. 6EHRR69–70.

Nurse Basinger explained that a SANE exam generally starts with taking a history from the patient, regardless of age. And if the patient is unable to talk, then

a history is obtained from any available collateral sources, including EMS, other nurses, and lay witnesses. 6EHRR80–90. That did not occur in this case. *See* APPX6. Further, as Nurse Basinger instructed, the ethics that are supposed to inform SANE exams, as with all nursing, start with the principle to do "no harm." 6EHRR80. The trial record established that Sims was on duty in the ER and on the team doing triage on Nikki when she did her SANE exam. Nurse Basinger noted that this was "not best practice" because Sims was supposed to be providing emergency care. 6EHRR95.

Per hospital records, Nikki was intubated by 9:50 AM, then CPR was performed to get her heart restarted, then the heartbeat was described as "tachycardia," which meant that the heart was beating too fast to counter the inadequate circulation of oxygenated blood. 41RR112. At 10:10 AM, Nikki was taken to get a CAT scan of her chest to ensure that the breathing tube had been properly inserted; ultimately, the x-ray revealed that the tube had not been properly inserted and had to be pulled out and reinserted. 6EHRR97–98. At some point thereafter, before Nikki was transported to Dallas for further treatment, Sims did her exam although Nikki had not been stabilized. 6EHRR99. According to Nurse Basinger, a SANE is supposed to prioritize patient care; undertaking a SANE exam under these circumstances indicates that Sims acted more as an adjunct of law enforcement than as a nurse.

Additionally, Nurse Basinger noted that Sims' SANE exam paperwork (APPX6) was replete with errors. 6EHRR126–130 (noting that Sims recorded Nikki's temperature as "9," described her cardiovascular system as "normal" although Nikki had stopped breathing and her resuscitated heart experienced tachycardia, described her neurological system as "normal" when she was brain dead and unresponsive). Sims also included in the paperwork a drawing that was an "overexaggeration" of the skin tears that she claimed to have seen but which no one else, including Drs. Squires and Urban, saw as significant. *Id.* As Dr. Squires put it: "What I saw was a tiny little laceration and I bet every mother knows what I'm talking about . . . . ***very tiny and superficial*** and probably not considered to be significant." 42RR100.

According to Nurse Basinger, there is an additional obligation to "base all of our opinions on the science in the field, and keep our personal opinions out of anything, to be honest and truthful in court regardless of who's asking the questions, and just do our job as a nurse in taking care of the health of the patient." 6EHRR84. The principal way that SANEs can keep up with the science relevant to their field is to become certified as a SANE. 6EHRR89–90. Sims, however, was never certified. 41RR104 Yet she falsely testified ***under oath*** that she had been certified as a SANE for "four years." 41RR144. She only admitted during cross examination that she had never actually been certified. Nurse Basinger explained that it is misleading to sign

one's name and then "SANE" on the same line if one is not in fact certified. Yet that is what Sims did. APPX6; 6EHRR73–74.

Nurse Basinger was clear that it is not the role of a SANE to decide if a sexual assault occurred. 6EHRR81. Instead, the primary concern is "to take care of the health and welfare of the patient" and document whatever is observed. 6EHRR83. Moreover, a SANE has an obligation to be an objective fact-finder, not to inject "personal opinions" into the process, as Sims did. 6EHRR84.

Nurse Basinger explained that, for a nurse employed in a rural community like Palestine, doing a SANE exam on a two-year-old child would be a "rare thing." 6EHRR64. It is unclear if Sims had ever done a SANE exam on a child Nikki's age before because she was not asked about that experience at trial, her CV was not offered or admitted into evidence, and she did not ever obtain SANE certification, which would have involved keeping a record of her experience. *Id.*

Nurse Basinger noted that Sims had not been a registered nurse for very long before January 2002 when she performed the SANE exam on Nikki. 6EHRR85. Sims had been an "LVN" or licensed vocational nurse, which involves a one-year training program and only permits the individual to perform simple tasks, like taking blood pressure, that do not require critical thinking. *Id.*

According to Nurse Basinger's investigation, Sims took a SANE training right after she became an RN, yet the rules at the time in Texas and for the International

Association of Forensic Nursing required that a nurse have been an RN for at least two years before they could take the SANE training. 6EHRR86. Therefore, Sims either took a training before she was authorized to do so or she testified incorrectly about when she had first taken a SANE training. *Id.* Moreover, she initially told the jury that she was a "certified" SANE, which, again, was not true. 41RR104; 41RR144.

At trial, Sims claimed that she had done approximately 200 SANE exams "in the course of [her] career as a SANE nurse." 41RR104. According to Nurse Basinger, who is an actual SANE with extensive expertise, she did not get to a volume like that in four years and did "more like 12" exams a year initially. 6EHRR91–92. It is unclear whether Sims exaggerated her experience while testifying or she unethically initiated a strikingly high number of SANE exams during the few years she had been a licensed RN. Either way, Nurse Basinger's expert testimony shows that the sheer number of SANE exams that the uncertified Sims claims to have performed raises serious concerns about her credibility as well as her judgment. 6EHRR91–92.

Sims told the jury that she decided that Nikki had been "sexually assaulted" after she did the SANE exam. 41RR122. Yet, according to Nurse Basinger, that is a legal conclusion that SANE nurses are expressly trained ***not*** to offer. 6EHRR100–101.

As for Sims' testimony suggesting that she saw a bruise on Nikki's face that looked like a handprint, Nurse Basinger opined that the photographs taken in the hospital after Nikki was intubated show only light bruising on her face and nothing in the shape of a hand. 6EHRR103–104. More troubling, the pictures that were seemingly taken during the SANE exam show hands pulling on Nikki's buttocks, creating traction contrary to the way SANE nurses are trained because doing so affects dilation, which Basinger explained, would already be expected in a comatose patient. 6EHRR105; 6EHRR107.

Sims' photographic "evidence" raises more concerns about her conduct than supports her baseless allegations. *See, e.g.*, SX23 (showing nothing more than chafed skin as would be expected in a toddler, still in diapers, who had had diarrhea for over a week). Nurse Basinger pointed out that these photos also show at least three different sets of hands pulling on Nikki, none wearing gloves, contrary to basic practice among health-care providers. 6EHRR105–106; *see also* SX22. At trial, Sims speculated wildly about supposed support for her opinion that Nikki had been anally penetrated, none of which Nurse Basinger found to be remotely sound. 6EHRR108–122. *See also* APPX (2016 Decl. Harry J Bonnell, MD).

Sims also testified about Nikki having a torn frenulum, which Sims described as another sign of sexual assault—although neither she nor anyone else in the ER had observed a torn frenulum or any mouth injury when Nikki was admitted. Nurse

Basinger explained that a frenulum is a small piece of skin, with one example being found where the upper lip connects to the gumline. 6EHRR123. Because Sims did not see a torn frenulum, she did not mention one in her SANE report. APPX6. Sims only learned later that a torn frenulum was observed several days later during the autopsy. 41RR136–137. But Sims told the jury that intubation would not tear a frenulum, implying, absent evidence, that the frenulum had been torn earlier. *Id*. Yet, as Nurse Basinger explained, when intubated, the tube is held tightly against the patient's lip and, when rocked back and forth, can tear a frenulum. 6EHRR123. Nurse Basinger opined that she has seen torn frenulums in intubation attempts, either from the tube or from the instrument that is used to be able to see the vocal cords, which is a metal blade attached to a flashlight-like handle. That metal blade goes in the mouth, over the tongue, and then is lifted up during the intubation process. *Id.* Nurse Basinger's opinion rebuts Sims' opinion and is consistent with that provided by other medical experts. *See, e.g.,* 8EHRR113; *see also* APPX115 (*Diagnosing Abuse: A Systematic Review of Torn Frenulum and Other Intraoral Injuries*, a medical article emphasizing that one of the things that can tear a frenulum is intubation and cautioning against rushing to conclusions regarding abuse); APPX1.

For all of these reasons, Nurse Basinger concluded that the opinions that the jury heard from Sims regarding a potential sexual assault were unreliable, prejudicial, and in fact false. 6EHRR123. Yet the obvious has yet to be recognized:

any trial involving the death of a child, in which the defendant is falsely accused of sexually assaulting that child by a nurse treated as an "expert" by the State, cannot be deemed a fair trial. *Cf. Ex parte Mayhugh*, 512 S.W.3d 285 (Tex. Crim. App. 2016) (finding that women who had been falsely accused of child sexual abuse were entitled to relief under Article 11.073 and were actually innocent). Considering her dishonest role in one of the most egregious aspects of Robert's trial, ***none*** of Sims' testimony should be deemed credible.

C. While doctors, in both cases, relied on CAT scans to detect the child's intracranial injuries, those scans were not introduced into evidence or shared with Robert Roberson's jury, and would have provided important evidence of Nikki's actual condition.

Dr. Squires, based on her review of the head CAT scans, described BD's and Nikki's conditions in very similar terms:

- In **Andrew's case**: "The brain itself was very abnormal, full of brain swelling. There was shift across the midline showing that there were big pressure changes inside the head." 5RRR66. "[T]he x-rays are absolutely classic for shaken baby, and then there were retinal hemorrhages, which go along with it. And putting it all together it is a very classic case of Shaken Baby Syndrome." 5RRR70.

- In **Robert's case**: "The brain was so swollen that the brain was starting to push through the bottom of the skull and that will kill you because your brain stem no longer can function. So that's called uncal herniation and it was very obvious on this CAT scan." 42RR102–03. The scans revealed "no fractures of her skull," a medical finding important to the diagnosis of "shaken baby syndrome." 42RR105–106.

Although doctors in both cases relied on CAT scans of the child's head to detect the intracranial anomalies, the degree to which these scans were considered in the two cases is strikingly different.

1. Andrew Roark's jury saw the CAT scans of BD's head and heard a great deal about them.

In Andrew Roark's trial, there was extensive testimony about reliance on the CAT scans, and they were admitted into evidence with detailed explications from Dr. Squires. She told the jury that the primary piece of evidence relevant to her SBS diagnosis was the head CAT scans. 5RRR167.

Although Dr. Squires was not a radiologist, she testified that she relied on a radiologist to "read" and go over the scans with her. 5RRR11, 31.[38] In the CAT scans, Dr. Squires and the radiologist saw intracranial blood and retinal hemorrhage. 5RRR134–35. Because of the centrality of the head scans, Dr. Squires brought to trial some scans taken of what she described as "a normal eleven month old" to compare to BD's. 5RRR86–92. The eleven month old had, supposedly, fallen off a couch but suffered no injury. This led Dr. Squires to categorically reject the notion

[38] Andrew's attorney objected to Dr. Squires opining about the contents of CAT scans because she is not a radiologist or neuroradiologist; but the objection was overruled. 5RRR33–34. The State, however, also called the pediatric neuroradiologist who had initially interpreted BD's head CT scans to testify. 5RR199.

that "a fall off a couch" would "create an injury" like the kind BD had, an absolutist position now recognized as unsound in *Ex parte Roark*. 5RRR92.

Additionally, ICU doctor, Kathleen Murphy, attested that she had reviewed BD's CAT scans, which she explained are "a fancy x-ray" that allowed "looking at the inside" of the child's head, "so you can tell the difference in bony structures or soft tissue structures, you can tell bleeding, if there's bleeding."[39] 4RRR161. Dr. Murphy described her reliance on the scans: "based on [BD's] CAT scan … she had a subdural hemorrhage"—a "couple of those" "both old and new," also "cerebral edema," which is "swelling of the brain," "shifting of the brain from one side to the other." 4RRR128–129. Dr. Murphy also reported seeing "some bruising" but "no skull fractures" per the CAT scan. "But there were some soft tissue injuries which were outside the skull." 4RRR128.

Dr. Murphy's diagnosis, based on what she saw in BD's head scans, was "closed head injury" "meaning that [the child] had an injury inside her cranial vault without a skull fracture, that was made up of a [subdural] hemorrhage, which is

[39] Dr. Murphy, like Dr. Squires, made a point to say she "always" reads CAT scans "with a radiologist." 4RRR188; 5RRR134–135. That basic professional norm was ignored by the State's all-purpose "expert" in the -03 evidentiary hearing, Dr. Downs, a forensic pathologist with the Shaken Baby Alliance. Downs admitted that he never talked to a radiologist about Nikki's CAT scans but instead took reproductions of the scans, blew them up, and cut and pasted different pieces together, while claiming to see things in them that no one else had seen. 9EHRR51–53, 110.

bleeding around the brain in the space between the brain and the bone, the cranium." 4RRR161–164.

Once BD was stabilized, surgery was performed to drain the large volume of intracranial blood, relying on her CAT scans and using a shunt. 4RRR183. That process saved BD's life.

2. Robert Roberson's jury did not see the CAT scans of Nikki's head and heard next to nothing about them.

The failure to properly consider Nikki's CAT scans raises serious concerns for multiple reasons and warrants scrutiny for multiple reasons. First and foremost, the CAT scans of Nikki's head, taken soon after she was admitted to the Palestine Regional ER, show only a small amount of subdural blood as opposed to what Dr. Urban observed two days later after Nikki's body had been subjected to extensive medical intervention. APPX109; APPX93. But Dr. Urban never looked at the scans and thus did not account for the material differences. 9EHRR109.

Second, the CAT scans—in a case alleging inflicted head trauma—were kept from Robert's jury. The only person who discussed them was Dr. Squires. *See* 42RR101–102 (describing the CAT scans that she reviewed as "a copy of the one that was done here in Palestine" that she took to a "neuroradiologist and [she] also went over it with the neurosurgeon" although "one part of it was missing at the time [she] saw it" but what she "saw was clearly an abnormal CT"). Dr. Squires recognized that the CAT scans showed only a single impact site on the head—with

no corresponding fracture: "she had a little soft tissue swelling, so we could tell there was an impact," but "[t]here were no fractures, so the bone looked intact," but "[i]nside" "was a very abnormal CT." 42RR101.

Dr. Squires even posited that the bump of soft tissue on the back of Nikki's head "happened at a different time" from the shaking she envisioned because "the actual brain injury, we do not feel is explained by a simple impact." 42RR107.

Third, after trial, the CAT scans were unavailable to Robert for over ***15 years,*** until they were rediscovered by the District Clerk in the courthouse basement in 2018. 2EHRR85–87. Eventually, both parties had access to digitized copies of the images and the opportunity to consult with a radiologist. APPX109. The only radiologist to thereafter interpret these images (the most objective evidence of the condition of Nikki's head upon admission to the hospital) is pediatric radiologist Dr. Julie Mack, board certified by the American Board of Radiology. APPX93.

Dr. Mack graduated from Harvard Medical School and is currently licensed to practice medicine in Pennsylvania. *Id.* At Penn State Hershey Medical Center, she interprets medical imaging studies. She publishes in the field of pediatric radiology, presents at conferences concerning pathology and radiology, and researches and writes about SBS/AHT as it relates to radiology. 2024EX6 at Exhibit B.

Dr. Mack confirmed that Nikki's CAT scans show that she had only a single impact site on her head. APPX93; 2024EX6. Thus, these scans are consistent with

Robert's 2002 report that Nikki fell out of bed in the night and possibly hit her head, but the impact did not result in a significant external injury, only swollen tissue. *Id.* Yet Dr. Urban, ***who never looked at the CAT scans***, testified in 2003 that Nikki sustained multiple impacts to her head, which, along with "shaking," was the "blunt force trauma" that she concluded killed Nikki. 43RR75–76. It has now been demonstrated, using the incontrovertible radiological evidence, that Dr. Urban was wrong and Dr. Squires was right about the single "simple" impact site. APPX93; APPX109; 2024EX6.

State's counsel, during the 2003 trial, did not ask Dr. Urban about the highly relevant CAT scans, likely so that the jury would not notice the conflict between Squires' and Urban's opinions about a critical fact. Instead, during trial, State's counsel embraced Dr. Urban's misleading rhetoric about "multiple impacts" and "blows," which was unsupported by the medical evidence. *See* 46RR25 (prosecutor in Closing Argument: "You heard from Dr. Urban, the Medical Examiner. Not just shaken, but blunt force injuries to Nikki, received multiple blows to the head. Multiple blows to the head."). Similarly, in Dr. Urban's autopsy report and in her 2016 affidavit, Dr. Urban referenced a "contusion and an abrasion on the face" as an example of an impact site. APPX12; APPX100. Yet what is apparent in her own autopsy photographs are marks likely caused by medical personnel masking, intubating, and moving Nikki when she was in the hospital, especially since this

child had a documented bleeding disorder (which Dr. Urban also failed to note). *See* Section II.D, below.

As Dr. Mack explained, the short fall with a minor head impact might not have been fatal if experienced by a healthy child; but Nikki was profoundly ill. 2024EX6. Dr. Mack reviewed a series of chest x-rays of Nikki, including ones only produced to Robert's counsel in 2024. *Id.* Dr. Mack concluded that these chest x-rays corroborate the conclusion of lung pathologist, Francis Green, that Nikki had a fatal lung infection (pneumonia). *Id.*; 2024EX5.

Regrettably, just as the critical CAT scans were kept from Robert's jury and then hidden in the courthouse basement for years, there is no mention of the CAT scans or Dr. Mack's findings in the State-drafted proposed Findings that were adopted, almost verbatim, by the previous habeas judge. *See* -03 Findings entered on Feb. 14, 2022. This omission is one of many glaring problems with the Findings conveyed to the CCA, which the CCA subsequently relied on. *See Ex parte Roberson*, WR-63, 081–03, 2023 WL151908 (Tex. Crim. App. Jan. 11, 2023) (unpub).

D. While CMCD, in both cases, did testing to check for bleeding disorders, Nikki's test results were not shared with Robert Roberson's jury even though they revealed a significant bleeding disorder.

During Andrew Roark's trial, the issue of whether BD had a bleeding disorder that could explain her intracranial bleeding or bruises came up repeatedly. That same highly relevant issue did ***not*** come up at all in Robert Roberson's trial. Yet significant evidence that Nikki had a serious bleeding disorder was hiding in plain view in her CMCD records.

1. In Andrew Roark's case, the importance of ruling out a bleeding disorder was discussed.

In Andrew Roark's case, a pediatric ICU doctor explained to the jury that they tested to determine if BD's blood was clotting normally and opined that the tests showed "her clotting studies were normal." 4RRR174. Then Dr. Murphy testified that, because BD's clotting was normal, that "leads us to believe that she would require a significant force to sustain these injuries, ***whereas if she had a clotting disorder a small trauma would—could account for***" the intracranial bleeding. *Id.*

Likewise, Dr. Squires, in Andrew's trial, claimed that it was important to test for clotting disorders and described the testing that had been done on BD:

> we always wonder about kids who have a problem with bleeding disorders, probably ***since [BD] had all this bruising***. And so we do certain studies, a platelet count which are the things that help your blood clot. They were normal at five hundred and seven thousand. We do

> something called a ProTime and a PTT. That's from the lab. You see how long it takes blood to clot.

Dr. Squires, like Dr. Murphy, reported that the results for BD "were both normal." 5RRR106. And for that reason, Dr. Squires claimed that the tests "ruled out that [BD] had a bleeding problem[.]" *Id.*

2. In Robert Roberson's case, the clear evidence Nikki had a bleeding disorder was entirely ignored.

The Palestine Regional medical records do not show any request to measure Nikki's clotting functioning. APPX14. However, after Nikki was transferred to CMCD, doctors ordered four separate blood panels to measure Nikki's clotting functioning. APPX11 (Nikki's CMCD records). Two of these tests were the ***same ones*** that CMCD did for BD: the "Prothrombin Time" test (PT) and the "Partial Thromboplastin Time" test (PTT). *Id.* But as opposed to BD's results, all four of Nikki's tests produced results showing a blood clotting dysfunction (difficulty clotting) and conclusively demonstrate she had Disseminated Intravascular Coagulation (DIC), a serious bleeding disorder, which can consume clotting factors, block small blood vessels, and lead to internal bleeding. 8EHRR68–69, 125; *see also* APPX110.

Multiple post-conviction experts recognized that these objective test results indicate that, when Nikki was hospitalized on January 31, 2002, she suffered from DIC and that her bleeding disorder must be, but was not, taken into account when

subsequently assessing the blood observed inside Nikki's head. Moreover, it is not just post-conviction experts that recognized Nikki's DIC, treating physicians at CMCD plainly identified her blood-clotting disorder because they treated Nikki with medications whose purpose is to try to counter coagulopathy, but which also cause bleeding. *See, e.g.*, 4EHRR131–132 (Dr. Janice Ophoven explaining that it was not just her "opinion," but CMCD plainly believed Nikki had a clotting disorder, which was why they were treating her with Heparin, which also causes bleeding).[40]

As Dr. Ophoven explained: "most importantly in this case, Nikki had developed ***an inability to clot her blood*** as part of the chaos -- the physiologic chaos that she had. ***She couldn't clot her blood***, and it's well-reported that ***if you can't clot your blood, then bleeding in the eyes is a frequent complication***." 3EHRR55.

Nikki's condition over the course of her hospitalization was dynamic, affected by both what was happening in the hospital and efforts to deal with her bleeding disorder. As Dr. Ophoven noted: "Over time, the tissues in the scalp and below the

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[40] Dr. Ophoven provided her expertise years ago in the post-conviction case of Cathy Henderson, another child death case. Henderson was a babysitter who was convicted of capital murder; a subsequent habeas application was filed on her behalf based on recent scientific research regarding the injury-potential of short-distance falls with head trauma. The CCA expressly relied on the testimony of Dr. Ophoven and two of Robert's other experts (Drs. Monson and Plunkett) in staying Henderson's execution and remanding for further factual development. *Ex parte Henderson*, 384 S.W.3d 833 (Tex. Crim. App. 2012). *Ex parte Henderson* is a precedent upon which the CCA built and which is cited repeatedly in *Ex parte Roark*.

scalp will fill with blood, both by ongoing bleeding as well as gravity as well as inability to clot the blood." 3EHRR55.

By studying the CMCD records that revealed the bleeding disorder, Dr. Ophoven recognized what is visible in the autopsy photos under Nikki's scalp and above her skull. She then explained the causal connection between Nikki's DIC and the subdural and subgaleal blood:

> The tissue that shows this blood is what we call the subgaleal space, and this is an area that sits below the actual tissues of the scalp and above the skull. This is a very loosely adherent area. And when blood accumulates under pressure, it flows freely in this area after any kind of an insult that causes bleeding literally anywhere.
>
> So patients with a brain surgery and so forth, when the scalp is cut into or the bone is cut into [as it was with Nikki], bleeding occurs into this space and it flows basically all over the scalp. ***So you can't conclude that where the blood is indicates where impact or trauma is***. ***So it's very important to correlate where you see blood in these kinds of photographs with what you see on the outside of the scalp or anything that indicates that there is evidence of a separate impact or the like***.
>
> So this is ***consistent with, A, what you would see with someone who's had an impact and; B, with someone who has a clotting problem, which she had severe; C, who's received anticoagulants in her blood stream, Heparin***[.]

3EHRR67–68. Dr. Urban did not account for any of this since she did not review the medical records and thus did not notice the evidence of DIC or mention it to the jury.

Dr. Ophoven further explained that CMCD's records show that "they gave [Nikki] Heparin [an anticoagulant] ***to try and control this DIC*** that she had as a

complication of her arrest and breathing and all of the other issues. And so when you have someone who's on anticoagulants who's bleeding terribly as a complication of their condition and they've had a traumatic injury, then the presence of blood all over like this is not surprising." 3EHRR68.

Dr. Auer explained at length that the medical examiner did not consider any possible cause for the intracranial hemorrhages other than trauma and missed multiple other causes for which there was objective medical evidence, number one being "Disseminated intravascular coagulation (DIC)." APPX110.

As Dr. Auer's report explains:

> When the heart stops, the stagnation can give rise to consumption of clotting factors called disseminated intravascular coagulation, or DIC. Because this consumes the clotting factors, bleeding can result. In fact, bleeding and clotting simultaneously are the hallmark of DIC. We see that in the present case. The oozing hemorrhage we see throughout the autopsy, together, argue that cardiac arrest DIC occurred. DIC following cardiac arrest is known from the literature, including its occurrence in very young children such as Nikki Curtis. The blood drawn January 31, 2002 showed elevated D-dimer 16.8 (normal 0-3), establishing that Nikki Curtis in fact had disseminated intravascular coagulation.

Id. (footnotes omitted). Like Dr. Ophoven, Dr. Auer identified the anticoagulant Heparin as something CMCD employed to treated Nikki's DIC but which would have actually contributed to her bleeding:

> Heparin is a powerful anticoagulant and can cause so much bleeding it has been used as a murder weapon by making the victim bleed. It is used here to keep perfusion going. But as an anticoagulant, it acts together with the above cause #1 of the bleeding, disseminated

> intravascular coagulation. Together, heparin and DIC are synergistic in causing bleeding. This powerful anticoagulant profile that existed in Nikki acted on the imposed detour of blood flow around non-perfused brain, giving rise to massive bleeding around the non-perfused brain. We recall that 60% of the blood flow coming out of the heart normally goes to brain, but has to go around it if there is non-perfused brain as in Nikki Curtis. Fueled by epinephrine, vasopressin and dopamine, the high flow naturally bleeds due to heparin and DIC.

Id. at 42 (footnotes omitted).

Dr. Auer further attested:

> When [Nikki] was brain dead, she was resuscitated with epinephrine and she also developed disseminated intravascular coagulation, or DIC, and the recirculation detours the hemorrhage around the nonperfused brain, and this was misinterpreted as a fatal, major head trauma when she had only a minor goose egg.

8EHRR46.

Expert testimony also established that DIC in infants and children is generally caused by infection, which Dr. Auer found ample evidence of in Nikki's medical records and in her lung tissue. APPX110 at 46. Subsequently, Dr. Green, a specialist in lung disease, noted the objective evidence of Nikki's DIC and further explained the relationship between Nikki's infected lungs and her DIC, none of which was taken into account when the autopsy was performed:

- "Nikki had a very high neutrophil white cell count on admission to hospital, and blood chemistry consistent with Disseminated Intravascular Coagulation (DIC), both good indicators of infection, on her final admission to hospital. However, nothing in the medical records indicates that her lungs were inspected during her final hospitalization for viral or bacterial infection."

- "Nikki's death was caused by a severe, undiagnosed pneumonia, the onset of which must have occurred days to months before her collapse. The pneumonia had features of a chronic viral infection complicated by a secondary necrotizing bronchopneumonia at time of death. As a result of the infection, she also developed Disseminated Intravascular Coagulation (DIC), which contributed to her bleeding."

- "The condition of Nikki's lung tissue cannot be reconciled with the conclusion that her death was caused by blunt force head injuries, inflicted or otherwise. The subdural blood observed during the autopsy is explained by the oxygen deprivation that she experienced because of her pneumonia. Oxygen deprivation can cause vessels in the dura membrane to leak. If the oxygen deprivation persists, the subdural blood can accumulate and cause encephalopathy or brain swelling. This condition is not specific to trauma. In light of the severe pneumonia, and DIC there is no basis for suggesting that the subdural bleeding and brain swelling was caused by trauma."

2024EX5.

DIC patients can spontaneously bleed and bruise easily with normal handling.[41] During the kind of emergency resuscitation that Nikki experienced, Nurse Gurganus acknowledged that bruises started to appear ***after*** "they started doing CPR." 41RR67. But neither Nurse Gurganus nor any other medical witness who testified in Robert's 2003 trial seemed to have any conception of Nikki's DIC and how it might have affected her condition and appearance.

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[41] *See, e.g.*, explanation by National Heart, Lung, and Blood Institute, *available at* https://www.nhlbi.nih.gov/health/disseminated-intravascular-coagulation.

Failing to take the DIC into account in assessing both Nikki's intracranial bleeding and minimal bruises, both of which increased by the time of the autopsy, renders the cause-of-death opinions of Drs. Squires and Urban wholly unreliable.[42]

Nikki had a serious, persistent infection during her last week of life. And over the course of her two years—starting at eight days old—she was plagued by numerous infections and treated repeatedly with at least five different types of antibiotics.[43] Her pediatric records show that these multiple strains of antibiotics failed to resolve her chronic infections. And it is now widely recognized that the repeated recourse to antibiotics can reduce platelet function.[44]

Thus, in the medical records that were ignored, there is also an explanation as to why Nikki developed DIC, which made her vulnerable to bleeding anywhere inside the body: a respiratory infection that was resisting antibiotics and affecting multiple systems. APPX9; APPX14; *see also* 2024EX5. That risk was elevated in the wake of even minor trauma (like a fall out of bed). 2024EX6. And the risk was even greater because her infection was worsening and devastating her respiratory

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[42] In 2021, Dr. Urban admitted that the testing shows that Nikki had DIC, which causes "increased susceptibility to bleeding," yet she did not include this information in the autopsy report put before the jury or factor it into her assessment of Nikki's condition. 9EHRR186.

[43] The antibiotics prescribed to her per her medical records are: Amoxicillin, Cefzil, Rocephin, Bactrim, and Omnicef.

[44] *See, e.g.*, Rudiger Eberhard Scharf, *Drugs that Affect Platelet Function*, Seminars in Thrombosis & Hemostasis 38(8):p 865–83, November 2012.

system and yet she was treated with contra-indicted, respiratory-suppressing drugs, which could only have made her worse. 2024EX5; 2024EX7.

While no one mentioned the objective evidence showing that Nikki had a serious bleeding disorder, Dr. Squires, at least in 2000 when she testified in Andrew Roark's trial, knew that such testing is relevant to assessing the cause of both bruises and intracranial bleeding. But she did not testify about Nikki's CMCD blood test results during Robert's 2003 trial, and State's counsel did not ask about them. *See* 42RR90–128.

As neuropathologist Dr. Auer noted in 2021, the only marks on Nikki's face were the kind that "must occur when a child with DIC is held either for surgery as when the intracranial pressure monitor was placed [into her skull] or for intubation or for any procedure or just being moved in bed. [Nikki] was brain dead, so had to be handled and moved. So the face and the extremities have to show some markings." 8EHRR125. In short, considering Nikki's DIC, there is no sound basis for treating the minor bruises and marks observed on Nikki's exterior when she arrived at the hospital or thereafter as the result of inflicted trauma or abuse.

Even the AAP has, since Robert's trial, specifically cautioned against overlooking the effects of DIC when considering an SBS/AHT diagnosis:

> ***because DIC can cause any type of bruising/bleeding, including ICH [intracranial hemorrhage], the finding of DIC in the context of suspected child abuse could significantly change the clinical approach to a patient***. In children with DIC and bleeding symptoms as

> the only finding concerning for abuse, consideration must be given to the multitude of primary causes of DIC, including trauma, sepsis, and primary bleeding disorders, among many others.

Anderst et al., *Evaluation for Bleeding Disorders in Suspected Child Abuse*, 131 PEDIATRICS e1314 at e1319, April 2013.[45]

This exculpatory evidence was not even noted in Robert's trial. The fact that Nikki had DIC was raised in the -03 proceeding but, like the exculpatory CAT scans, was not mentioned in the State-drafted proposed Findings that were adopted, almost verbatim, by the previous habeas judge. This is yet another glaring problem with the Findings conveyed to the CCA, which that court subsequently relied on.

E. While both BD and Nikki had notable breathing problems when they experienced a medical emergency, evidence of Nikki's chronically and acutely infected lungs was not shared with Robert's jury.

When Andrew Roark discovered BD's medical crisis and EMTs were called in, they recognized she was having a "hard time breathing" with periods of "apnea" 4RRR44. But the ICU doctor later explained to the jury that BD "did not have a lung problem"; instead, "something in her brain was causing her not to breathe on her own." 4RRR198.

Nikki, by contrast, definitely had "a lung problem," although the severity of her illness was not recognized when she exhibited breathing problems earlier that

[45] *Available at* Evaluation for Bleeding Disorders in Suspected Child Abuse | Pediatrics | American Academy of Pediatrics.

week. 2024EX5. Nor were her infected lungs investigated during the autopsy. APPX12. The illness that preceded Nikki's breathing arrest was dismissed at trial as irrelevant. *See* 42RR13 (pediatrician testifying that the "viral" respiratory illness he had diagnosed on January 29, 2002, was irrelevant to understanding her condition on January 31, 2002).

In addition to the diagnosis of a "respiratory illness" "likely viral" during a doctor visit two days before her death, there are hints in the autopsy report that Nikki had infected lungs. APPX12. The report includes the notation that Nikki's lungs have "Interbronchial aggregates of neutrophils and macrophages." *Id.* Macrophages are a sign of virus. 8EHRR84. This information was not presented to the jury. In fact, Dr. Urban made no mention of the condition of Nikki's lungs during her testimony. 43RR57–98.

During the -03 proceeding, Dr. Auer studied the original autopsy slides made of Nikki's lung tissue under a microscope and observed interstitial cellular thickening, which he analogized to placing Saran Wrap over the breathing membrane. 8EHRR60–61. Dr. Auer observed considerable interstitial thickening and "macrophages"—a sign that the infection in Nikki's lungs pre-dated her hospitalization and thus was not ventilator pneumonia.[46] In the lung tissue itself, Dr.

[46] Dr. Auer explained that ventilator pneumonia, caused by bacteria, is easy to identify and looks entirely different from interstitial viral pneumonia, which requires special expertise to identify. 8EHRR86. As lung pathologist Dr. Green further

Auer also observed "smudge cells,"[47] lung cells with a nucleus that has been rendered dark, a marker of "viral cytopathic effect." 8EHRR85. The presence of smudge cells is another indication that Nikki's lungs were infected. 8EHRR84-86.

Dr. Auer attested that pneumonia is the most common cause of death worldwide in children, and yet "pneumonia is being missed" in autopsies of children dying at a young age. 8EHRR90.[48] Dr. Auer explained that unless one is trained to look for it, many pathologists will miss interstitial pneumonia because it replicates ***in*** the lung tissue but leaves air spaces within the lungs open. 8EHRR173.

Dr. Auer observed that Dr. Urban had a note about seeing "macrophages" in the lungs, but she did not "connect the dots"—likely because she was not trained in 2002 to look for interstitial pneumonia.[49] Interstitial pneumonia does not fill the

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explained, Nikki's lung infection "was not caused by being on a ventilator for two days. Ventilator injuries are usually related to physical injury due to high pressures and high oxygen tensions for too long. Signs of ventilator injury were not present in Nikki's lungs at autopsy," as he studied the autopsy slides under a microscope. 2024EX5

[47] The State's retained expert Dr. Downs testified that he had "never heard anybody else use" the term "smudge cell" to apply to anything but "blood smears." 9EHRR75. Yet forensic pathologist Dr. Wigren also attested to seeing "viral smudge cells" in Nikki's lung tissue. 6EHRR20. Additionally, this Court should take judicial notice of the fact that "smudge cells" are referenced in scientific publications available on the Internet. *See e.g.*, [What Are Smudge Cells and What Do They Indicate? - ScienceInsights]

[48] *See also, e.g.*, SBS exonerations involving a missed pneumonia, including: *State v. Alan Butts*, 2023 WL 4883377 (Ohio Ct. App. Aug. 1, 2023); *People v. Miller*, 2021 WL 1326733 (Mich. Ct. App. Apr. 8, 2021).

[49] Interstitial viral pneumonia was seen in many people infected with the COVID-19 virus. Therefore, during the recent pandemic, doctors became more

airways with pus. 8EHRR84–85. "[B]ecause of the open air spaces, it's often easily missed unless you're looking at it knowing what you're looking for." 8EHRR84; *see also* 9EHRR141 (Dr. Urban admitting that she went back and looked only for evidence of "intrabronchial inflammation ***in her airways***" as opposed to examining the lung tissue itself).

The previous habeas judge ignored evidence that Nikki had undiagnosed pneumonia when she ceased breathing on January 31, 2002. Since then, Dr. Green, an expert in lung pathology with over 46 years of experience, reviewed Nikki's medical history and examined her lung tissue under a microscope. 2024EX5. His detailed report explains how two different types of pneumonia—a viral and a bacterial infection—were ravaging Nikki's lungs. *Id.* Dr. Green is the only forensic lung specialist to ever examine Nikki's lungs. His examination and photographs of precisely what he observed under a microscope show the specific bases for his findings that interstitial viral pneumonia substantially thickened the cell walls of the tiny air sacs in Nikki's lungs, where oxygen is absorbed into the bloodstream. *Id.* As those interstitial cell walls thickened, Nikki's ability to breathe was greatly inhibited and, eventually, her brain and other organs were starved of oxygen. *Id.*

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familiar with interstitial viral pneumonia and the way it can cause a sudden collapse due to gradual thickening of lung tissue at the cellular level. 8EHRR89; 8EHRR100.

Dr. Green's detailed analysis shows that Nikki's pneumonia had to have started many days, if not weeks, before her final hospitalization and cannot be explained by Nikki being on a ventilator after her collapse. *Id.* This evidence from a highly qualified specialist rebuts the opinions of the State's post-conviction experts (Urban and Downs), neither of whom have any special expertise in lung pathology. 9EHRR104 (Dr. Urban speculating that Nikki's lung condition was caused by time spent on a ventilator); 10EHRR243 (Dr. Downs claiming he saw only a "little touch of pneumonia from the ventilator.").[50]

This exculpatory evidence has yet to be considered by any court. The evidence that Nikki had a missed pneumonia was dismissed by the previous habeas judge with this sentence in the Findings: "The court finds this pneumonia was known at the time of Applicant's trial." Yet there is absolutely no mention of "pneumonia" anywhere in the trial record, the autopsy report, or the medical records. Nor was there any understanding in 2002 or 2003 as to how a viral pneumonia might affect brain swelling and blood flow to the brain after a child developed DIC, ceased breathing, and had to be resuscitated. *See* 2024EX5; APPX110. This is yet another way that the

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[50] Dr. Downs has no credibility when it comes to assessing pneumonia. He was confronted with an appellate court decision granting habeas relief in a different child death case in which he had claimed cause of death was "child battery", but multiple experts subsequently found that Dr. Downs had missed the child's pneumonia. *See Ward v. State*, CR-18-0316, 2020 Ala. Crim. App LEXIS 62 (Ala. Crim. App. Aug. 14, 2020); *see also* APPX160.

Findings conveyed to the CCA, which that court subsequently relied on, were entirely misleading.

F. Differences in social status and mental capacity adversely affected Robert Roberson.

A palpable difference in social status gave Andrew more of a fighting chance than Robert Roberson ever had. Even so, it took 27 years after Andrew was accused for him to be vindicated through an Article 11.073 changed-science claim.

Aside from being able to afford a lawyer, Andrew was a high school graduate and "regular guy" who was able to testify in his own defense. *See* 8RRR93, 167. He did so capably, even though the jury was swayed by the State's SBS cause-of-injury theory. *See* 8RRR90–92 (explaining he did not shake or strike BD); 8RRR122 (describing being "in shock" throughout the whole crisis).

By contrast, Robert was a "special needs" student before dropping out after ninth grade. 2024EX37. He had documented cognitive impairments and an undiagnosed developmental disability. 7EHRR67–68. He did not know what to do when he woke up to find his daughter was not breathing with blue lips. 2024EX37.

This indigent, disabled father went to the local hospital seeking help—and was immediately judged based on his "odd" demeanor in the midst of this crisis. *See* Section I.E, above. Yet 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. 7EHRR76–105.

Robert's disability directly contributed to his wrongful conviction because investigators assumed his flat demeanor, at a moment of high stress, was a sign of culpability. 7EHRR105, 148. Instead, it was a manifestation of his Autism. *Id.*

Robert had notable speech delays as a child. 7EHRR89 He was given some speech therapy and other services available to poor folks in rural East Texas. *Id.* But he was never properly assessed, and his Autism was not diagnosed in childhood. After falling through the cracks at school, Robert got married at age 19. 2024EX37. He and his young wife, both then struggling with addiction, had two special needs children whom Robert's mother agreed to raise when they soon decided to divorce. *Id.*; 2024EX49 (Agreement regarding Custody Feb. 29, 1990); 43RR22. Robert, with little education and an undiagnosed disability, spent several years thereafter floundering, while maintaining close ties to his disabled children. 2024EX37.

In early 1999, Robert had a brief relationship with Michelle Bowman, a young woman from his hometown, Palestine. *Id.* After he suggested marriage, she quickly moved on to a new boyfriend. *Id.* 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. *Id.*; 2024EX50 (Nov. 25, 1999 Ltr. from R. Roberson regarding seeking custody of Nikki). He got a job delivering newspapers for the *Palestine Herald* and, with the help of friends, acquired a small rental house. 2024EX37; 2026EX2. His new girlfriend, Teddie Cox, and her child Rachel, moved in after recently leaving

her husband then in jail for sexually abusing Rachel. *Id.* Part of building a new family involved welcoming Nikki over for visits. Robert was awarded full custody, as sole managing conservator, with the Bowmans' agreement, on November 16, 2001.[51]

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, which he had not witnessed. APPX7. 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. *See* Section I.E, above. Those hasty judgments were profoundly wrong. Robert loved his little girl and was thrown into a state of shock when he woke up to find her unconscious. 2024EX37.

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. 7EHRR15, 25, 67. These are the very terms trial witnesses used to describe Robert's response to Nikki's medical crisis. *See id*. Tragically, the jury was unaware of Robert's Autism and did not hear from any qualified expert who could explain that his outward lack of emotional response masked intense distress.

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[51] *See* docket and related hearing transcript in *n the Interest of Nikki Michelle Curtis/Bowman Roberson a Child*, No. 38338 (3rd Dist. Ct., Anderson County, Texas).

Only in 2018 did a qualified neuropsychologist conduct a comprehensive evaluation and diagnose Robert with Autism Spectrum Disorder, a developmental disability that explains his non-neurotypical response to Nikki's crisis. 7EHRR59, 145.[52]

Dr. Diane Mosnik conducted a diagnostic interview, administered a battery of tests, and conducted interviews with collateral witnesses who knew Robert during the developmental period.[53] Additionally, Dr. Mosnik reviewed extensive social history records and materials related to the trial. 7EHRR93–109. She noted that Robert's medical history included an "abundance" of documentation indicating that he had sustained brain damage and had brain dysfunction. 7EHRR68. After undertaking her independent assessment, Dr. Mosnik conclusively diagnosed Robert with Autism Spectrum Disorder. 024EX13 (summary of neuropsychological test results); 7EHRR93.

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[52] Notably, one of the few changes the previous habeas judge made to the State-drafted Findings was to add this sentence: "The Court finds Dr. Diane Mosnik testified in the evidentiary hearing that she diagnosed Applicant with Autism Spectrum Disorder." Otherwise, there was no mention of the Autism-related evidence or testimony or why it is relevant to a contemporary assessment of the 2003 trial.

[53] Dr. Mosnik's 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 explained that autistic people have significant deficits in the areas of social and emotional processing, social perception, and understanding social relationships. 7EHRR99–123. There is often a significant "disconnect between what they are feeling and expression of feelings." 7EHRR98–99. They also can exhibit repetitive movements, interests, and speech, and tend to have a strong preference for routine and structured, simplistic environments. *Id.* She found ample evidence of these symptoms in Robert.

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. 7EHRR104–109. Dr. Mosnik's testing revealed that Robert has the social problem-solving skills equivalent to those of an 11-year-old child. 7EHRR105.

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. 7EHRR95–100. Additionally, testing revealed that Robert's speech patterns are very stilted and child-like, and his writing is characterized by very simplistic grammar and syntax. 7EHRR107–08, 152. Casey Brownlow, a witness who had known Robert when they were teenagers and began writing to him after his 2016 execution

was stayed, testified that Robert's letters looked like what Brownlow "would get from [his] sons from summer camp" with "[s]miley faces at the end of sentences. Sad faces at the end. Very childlike" and all "very similar." 7EHRR56–57.

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.[54] *See, e.g.*, 7EHRR15 (Detective Wharton testifying that "Everybody on his team" felt Robert's "demeanor" was "odd"). 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. 2024EX13.

Dr. Mosnik found no evidence in Robert's voluminous records that he had any history of aggressive or violent acts. 7EHRR128 (describing the absence of any incidents of aggression in extensive records and reports of collateral witnesses but instead "[e]ven in the face of when he was bullied and shoved and pushed to the ground, he would simply stand up, brush himself off. He didn't fight back.") 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

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[54] *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).

trial, there are no records corroborating any of her claims; instead, there was evidence that she had forfeited custody of their special needs children and never visited them again.[55] 47RR26, 29; *see also* 2024EX49.

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 medical

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[55] Ms. Gray was a punishment-phase witness and as such, none of her testimony is relevant to Robert's Article 11.073 claim. But because the State continues to reference it, devoid of context, it must be noted that her credibility is, if anything, even more facially suspect than Teddie Cox's. The prosecution, through leading questions, suggested that there had been a "nasty" custody battle that resulted in her losing her kids. 47RR13. There was indeed a protracted divorce proceeding—during which Ms. Gray would have been highly motivated to point out any and all of Robert's past failings. Yet, during the 1990 divorce proceeding, she did not mention any of the abuse Robert had supposedly, per her 2003 trial testimony, perpetrated during their brief marriage. *See* 47RR7–32. And notwithstanding any evidence Ms. Gray may have offered during the divorce proceeding through her board-certified family law attorney, an Anderson County judge was convinced that she should ***not*** be awarded custody of their children. 47RR27. Ms. Gray also had to admit that her 2003 allegations about what had supposedly transpired back in the 1980s were not supported by any report to CPS, any medical record, or any court's findings. 47RR26, 31. Additionally, Ms. Gray was forced to admit on cross-examination that she had been a drug user; that she had a drinking problem during the marriage; that, during the years since the divorce, she had never filed any motion to try to regain custody of her children; that she had never sought any visitation; that she had provided absolutely no support for her children, even knowing that they had special needs and required ongoing counseling; and that she had not seen Robert or her children since the divorce but only came back to Texas in 2003 to make him "pay" by testifying for the State. 47RR28–32. Moreover, the State adduced no reports to police or to CPS or to any other witnesses to substantiate any of Ms. Gray's outrageous testimony—because none exists. Any further reference to misleading summarizes of the testimony of this wholly unreliable lay witness should be beneath the dignity of any principled advocate.

crisis is not only unfairly prejudicial but false.[56] The lead detective and one of 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. *See* 2024EX1–2024EX3.

Brian Wharton was Chief of Detectives in Palestine, Texas in January 2002 when Robert brought Nikki to the hospital, and Wharton took charge of the investigation. 41RR152–154. He has acknowledged that he has "long been troubled by this case" and does "not believe that justice was served." 2024EX1. 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." *Id.* But he had not been trained in mental health or developmental issues. *Id.* 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. *Id*.

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 investigators did not believe Robert or think his statement

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

about Nikki being "sick recently" was relevant. *Id.* Once Dr. Squires told them that Nikki's condition was the result of her being "violently shaken," they did not investigate further and looked at Robert through the lens of someone who had abused his daughter. *Id.*

During the year Robert spent awaiting trial, only one "incident" report was made about him, which was based solely on his lack of emotional display the night of his arrest. A jail officer reported "he just sat in a chair and didn't acknowledge that they were even talking to him"; he "made no expression when talking, he talked in one tone the whole time." APPX66. Jailers, like the State's trial witness, were wholly unaware of Robert's Autism. Thus, his jury did not hear about it.

Studies have since confirmed what should be intuitive: if jurors are unaware of a defendant's Autism, there is a higher chance that judgmental demeanor evidence is held against him—even subconsciously.[57] Unfair assumptions are made about a perceived "lack of remorse or empathy" that "can be particularly harmful[.]"[58] In

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

[58] *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,

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." *See* Section I.E, above. 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.

G. Andrew Roark's fiancé, unlike Robert Roberson's uniquely vulnerable girlfriend, did not succumb to tremendous pressure to endorse the State's abuse theory.

Both Andrew Roark and Robert Roberson had recently begun living with a girlfriend with whom they planned to co-parent the child who thereafter experienced a significant medical crisis while alone with them. Almost immediately after the child was hospitalized, both of these women were subjected to CPS investigations. The CPS investigators coordinated with Dr. Squires and the REACH program at CMCD to insist on cooperation or risk losing custody of their children. 9RRR43–44.[59] That is where the similarities end.

Brief Report: Judicial Attitudes Regarding the Sentencing of Offenders with High Functioning Autism 48 J. AUTISM AND DEVELOPMENTAL DISORDERS 2770 (2016).

[59] *See also* CPS record in Appendix 2 to the 2016 (-03) habeas application at Cause No. 26,162, *Ex parte Robert Roberson* 09761–9805.

1. **Andrew Roark's partner did not succumb to government pressure to blame him.**

Bridgette, BD's mother and Andrew Roark's fiancé, had been a high school honors student. At the time of BD's medical crisis, Bridgette was employed full-time. She withstood pressure from CPS and rejected its insistence that Andrew must have abused BD. 8RRR155–57. Bridgette testified on Andrew's behalf during his trial, subjecting herself to a hostile cross-examination by State's counsel. The prosecutor accused Bridgette of creating a "false impression" that she "is a very concerned parent, loving parent," citing Bridgitte's resistance to CPS's narrative and her refusal to reject Andrew as justifications for attacking her on the stand. 9RRR39, 42, 63–65.

The State ridiculed Bridgette for disregarding the bruises on BD's thighs after Bridgette had described the child's severe diaper rash. 9RRR91. Similarly, the State disparaged her for not agreeing that Andrew called her before 911, yet she was clear: "I wasn't there. I don't know if he called 911 first." 9RRR98. Similarly, the State railed against Bridgette's suggestion that BD had had a stroke following a seizure. 10RRR7. Yet Bridgette stood firm, explaining that she herself had been diagnosed with a seizure disorder at CMCD when she was a child and that the chief of pediatric neurology had suggested that BD's condition might have been caused by an inherited genetic predisposition to seizures. 9RRR101–02, 123–25.

Bridgette clearly and firmly rejected the suggestion that BD cried whenever Andrew tried to interact with her, as Bridgette's step-mother had falsely claimed. 8RRR161. *See also* Roark DX8 & DX10. Bridgette also corroborated Andrew's testimony that BD had had a high fever the night before BD's medical crisis, which was what had prompted Bridgette to schedule an appointment for BD with her pediatrician the next day. 8RRR163.

Bridgette's refusal to cooperate with CPS because she did not believe that Andrew had harmed BD led to proceedings that deprived her of custody of her child. State's counsel violated a motion in limine and injected the custody litigation into Andrew's trial, which led to a motion for mistrial. 9RRR39. But the motion was denied. *Id.* Considering Andrew's ultimate exoneration, Bridgette's and BD's loss of a mother-child relationship due to her refusal to get on board with a (false) abuse narrative represents yet another kind of tragedy that arises from scientifically unsound SBS/AHT allegations.

2. Robert Roberson's girlfriend succumbed to government pressure to blame him and testified in a manner that strained all credulity.

The State leaned heavily on Robert's ex-girlfriend, Teddie, an intellectually impaired, unstable woman who had failed her ninth grade Special Ed classes, was unemployed, on disability, and recovering from a hysterectomy at only 27 years old at the time of Nikki's death. 43RR40–43. The very day of Nikki's collapse, before

Teddie had been discharged from the hospital, a CPS investigation was opened naming her as a person of interest, although she had no personal knowledge of how the last week of Nikki's life had unfolded. 43RR18, 43.

Teddie had only become romantically involved with Robert a few months before Nikki's death. 2024EX37; 2026EX2. Robert, Teddie, and her daughter Rachel had gotten a rental house with help from Teddie's mother, who had known Robert for years. 43RR14; 2024EX37; 2026EX2. Soon after leaving her husband, Edward Cox, Teddie moved in with Robert, who then supported her and her child with his paper routes. 43RR44. But he was then (falsely) accused of murdering his daughter Nikki by violently shaking her to death. 43RR38. Thereafter, Teddie became transient, moving from house to house and in and out of another relationship. 43RR11–15. She was still not working at the time of trial and was unable to care for her daughter Rachel, whom Teddie left with her mother. 43RR14–15.

Although Teddie had never suggested to anyone that Robert ever hurt Nikki or anyone else, after a CPS case was opened naming her as a target, she fluctuated between agreeing to help the State convict Robert and writing him love letters while he sat in jail. 2026EX2; 43RR9.[60] Soon before Robert's trial, she overdosed on drugs, attempted suicide, and was confined to a psychiatric hospital. 43RR3–5, 8. At

[60] *See also* Appendix 2 to the 2016 (-03) habeas application at Cause No. 26,162, *Ex parte Robert Roberson* 09761–9805.

trial, she alluded to "lots of trauma" in her life at that time, which was one of the few truthful aspects of her testimony. 43RR4. She was still on serious psychotropic medications at the time she testified. 43RR3–6

Meanwhile, Teddie, Rachel, and Courtney were all subpoenaed to testify against Edward Cox in a trial, which ended with a mistrial.[61] 43RR4–5. This highly stressful experience was hanging over them when they were then called upon by the State to testify against Robert in a capital murder trial.[62]

Teddie was also induced to falsely claim that she had pressured Robert to get custody of Nikki, when that process had begun soon after Nikki's birth, nearly two years before Teddie began a relationship with Robert. 2024EX50. In fact, it was Teddie who had spent very little time with Nikki during the few months that Teddie knew her, as Nikki had split her time between three households. 43RR21.

Teddie's testimony was consistent on only one point: she maintained that Robert had never hurt her in any way. 42RR169. However, she was repeatedly asked

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[61] *See State v. Cox*, F098942002 (145th Dist. Ct., Nacogdoches County) (showing that they were required to testify in a second trial in which Edward Cox was found guilty on Sept. 8, 2003, a few months after Robert's trial).

[62] While under oath in Robert's trial, Courtney denied that she had previously testified in any trial, which led to a hearing outside the jury's presence. It was uncontested that she was not telling the truth, but defense counsel was not permitted to go into it although he argued that "the credibility of both [Courtney] and Rachel is rather suspect[.]" 42RR55–56. Public records, as well as Teddie Cox's testimony, verify that Courtney, Rachel, and Teddie all testified in both of Edward Cox's trials. 43RR4–5.

leading questions, urging her to describe how Robert did not care about Nikki and had previously shaken her. 42RR167–177, 185–186, 190–191.

Teddie ultimately admitted on the stand that she would change her story about Robert depending on how she "feels" at the moment or "as best as [she] could remember." *See, e.g.*, 43RR11, 19, 36. *See also*:

> Q (by defense). Okay. Now, when you testified before the grand jury you were mad at Robert?
>
> A (Teddie). Yes, sir.
>
> Q. When you came to our office on your own, we weren't threatening you, you already said that; right? We weren't doing anything bad to you at all?
>
> A. Yes, sir.
>
> Q. You weren't mad at Robert?
>
> A. Not at the time.
>
> Q. And now you are?
>
> A. Yes, sir.
>
> Q. And your stories have changed with each, being mad and not being mad?
>
> A. Yes, sir.

43RR48.[63]

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[63] Before trial, the State had in its possession a journal that Mrs. Bowman had kept related to Nikki's visitations with the Robersons. This very important impeachment document was not produced to the defense before trial. Mrs.

Just like BD's step-grandmother, Teddie absurdly claimed that Nikki would cry every time Robert came near Nikki. 42RR131, 158–59, 165–67; 43RR40–41. Teddie's remarkably unreliable testimony was rebutted by her own sister, Patricia, who testified that Teddie had pronounced problems with truthfulness. 44RR10–22. Patricia, who had known Robert far longer than her sister Teddie had, attested that she had only observed Robert being loving and caring with Nikki and had never seen him be unkind to her. *Id. See also* 2026EX2.

The far-fetched efforts at trial to paint Robert as a monster capable of violence (that had not occurred) were unprincipled. In reality, Robert has no history of violence and a virtually pristine disciplinary record during his decades in prison. 7EHRR128. Because of his record of peacefulness, he was selected to be in the very first faith-based program on death row. 2024EX37. He not only graduated but, thereafter, he was only 1 of 13 men selected to participate in an experimental "group rec" program that allows him to move freely on the pod in community with others on death row whom the State of Texas has identified as no threat to anyone.[64]

Bowman's final entry in the journal provides yet more evidence of Teddie's instability, as she seemingly contacted the Bowmans mere days after Nikki's death with conspiratorial observations about "spying" for the Bowmans against the Robersons. APPX76.

[64] *See, e.g.*: https://www.houstonchronicle.com/news/investigations/article/texas-death-row-solitary-group-recreation-20398075.php (describing the pilot program and identifying Robert Roberson as a participant).

Yet the State has repeatedly invoked Teddie Cox's facially unbelievable trial testimony and that of two girls in her care who barely knew Robert: Teddie's daughter Rachel Cox (age 10) and Teddie's niece Courtney Berryhill (age 11). They each claimed, in response to leading questions from the prosecutors, that, at some unidentified time in the past, they had seen Robert "shake" and otherwise mistreat Nikki. 42RR41–70. The only other evidence the State was able to adduce to suggest that Robert had ever hurt anyone was punishment-phase evidence from his estranged ex-wife Della Lucretia Gray. 47RR27–32.

The testimony of these witnesses is unsupported by any contemporaneous evidence, reflects pronounced bias, and suffers from severe credibility problems. For instance, none of the allegations they made at trial had ever been previously reported to anyone; these allegations came into existence only after Robert's arrest following Nikki's death—and only under pressure from state actors who told these witnesses that Robert had killed Nikki by violently shaking her—because that was what the prosecutors then believed based on Dr. Squires' SBS diagnosis. These witnesses' stories reflected inconsistencies and notable exaggerations—as is evident if one reads the full trial record.

For instance, the stories told at trial by Teddie Cox and the brief testimony of Rachel Cox and Courtney Berryhill contradicted themselves and each other about when and how Robert had supposedly "shaken" Nikki in the past. When being

interrogated by CPS, police, and prosecutors, it is understandable that these vulnerable individuals, devastated by Nikki's inexplicable death, would be scared by the authorities' insistence that Robert must have caused Nikki's death and then strained to find something to please these adults with power over their lives.

As for the minors related to Teddie, she herself described her troubled daughter Rachel as someone she "could not trust." 43RR19. And Rachel's Aunt Patricia testified that Rachel was the only person she had ever seen hit Nikki, not Robert. 44RR10–22. Certainly, Rachel was then a highly vulnerable girl.[65]

As for Courtney, in her trial testimony she claimed that she once saw Robert be mean to Nikki when he "picked her up" and "like shook her to make her stop crying." 41RR51. The prosecutor made her demonstrate the shaking using a teddy bear that Rachel had also been asked to use (which had no anatomical similarity to Nikki, a 28-pound two-year-old). 41RR52. The prosecutor then suggested that maybe Courtney had once seen Robert "pop" Nikki "on her butt" the same time Courtney allegedly saw him shake Nikki. 41RR60–2. On cross-examination, Courtney admitted that she had enjoyed going along with Robert on his paper routes,

[65] In 2018, Rachel claimed to have no memory of ever testifying in Robert's trial. Similarly, her cousin Courtney, when finally located, claimed to have no memory of that time. *See* 2024EX44. (2024 Aff. G. Sween, describing attempts by undersigned counsel to engage Teddie, Rachel, and Courtney).

that she had never been afraid to do so, and that he had never done anything to hurt her. 41RR59–60.

That the State was able to strongarm these exceedingly vulnerable witnesses to manufacture something to corroborate the notion that Robert was capable of violently shaking his beloved daughter to death is another tragedy. Certainly, the fact that Andrew was fortunate enough to have a supportive, educated partner capable of withstanding tremendous pressures—from CPS, the State, and within her own family—and at great personal cost to herself is not a basis for distinguishing Robert's case on the merits.

H. A happenstance of timing made saving BD's life possible, whereas Nikki's condition was irreversible and an autopsy, fraught with bias, errors, and omissions, followed.

The most consequential difference in the facts of Andrew Roark's and Robert Roberson's cases is that BD, fortunately, recovered because of surgery undertaken at CMCD, draining a large volume of the intracranial blood that had caused her brain swelling. 8RRR179–81. Thereafter, the brain swelling was reversed and BD was sent to a rehabilitation facility for several weeks and fully recovered. 8RRR179–181.

The fact that BD's struggle to breathe was caught in time was a matter of happenstance. Andrew happened to check on BD while she was napping in the afternoon; he discovered her on the floor struggling to breathe. 8RRR117–120. He

was able to take action before her breathing was arrested. *Id.* Then EMTs got her "bagged" to provide oxygen and, in transit to the nearest hospital, she "pinked up" after several minutes. 4RRR5–46.

Robert, however, did not discover Nikki's condition until some point after she had ceased breathing because he was asleep. When his alarm went off, he woke up and found Nikki unconscious with blue lips, he tried desperately to rouse her and then realized he could barely detect a heartbeat. APPX7. He got her to the ER seeking help. *Id.* Medical personnel recognized that Nikki's blue lips were a sign of serious oxygen-deprivation, a condition which Nikki's medical records show she had experienced multiple times before the day of her final apneic episode, all while in the Bowmans' care. 41RR66–67; APPX9; APPX14.

The tragic happenstance that Nikki had her last breathing apnea crisis while her caregiver was asleep means that it is unclear how long she was deprived of sufficient oxygen before she was discovered. We only know, now, that there are multiple reasons why she would have struggled to breathe, including an undiagnosed viral and broncho-pneumonia and toxic levels of contra-indicated prescription medications that would have further suppressed her breathing. 2024EX5; 2024EX7.

After just 10-12 minutes without oxygen, the brain will shut down, irrevocably. 2EHRR79. Providers in the ER testified that Nikki's eyes were already "fixed and dilated" when they resuscitated her heart, indicating that her brain was

no longer functioning. 2EHRR82. Hospital records also show that Nikki was not initially intubated correctly, and the tube had to be pulled out and reinserted. 42RR87–88. Thus, she was likely without oxygen for well more than 10-12 minutes.

In short, ***when*** the child's arrested breathing was detected is a material difference in these two cases. For Nikki, the intubation came too late and she was not, thereafter, capable of breathing on her own.

The next morning, Dr. Squires made her SBS diagnosis and sought permission from the Bowmans to remove Nikki from life support. APPX11. Several hours later, she was pronounced dead. *Id.*; 42RR95. Her father was arrested that same night before an autopsy was even performed. APPX60. Nikki was transferred the next morning to Southwestern Institute of Forensic Sciences ("SWIFS") in Dallas. Dr. Urban, a relatively inexperienced medical examiner, performed the autopsy. APPX12.

Another unfortunate happenstance is that Nikki's hasty autopsy was performed by a medical examiner who, unlike a respected medical examiner discussed in *Ex parte Roark*, has been unwilling to admit that her errors and omissions, not to mention the evolution of scientific understanding, warrant a reconsideration of opinions she reached on February 2, 2002. *See* 707 S.W.3d at 176–77 (quoting at length from 2007 affidavit of former medical examiner Dr. Bayardo, recanting part of his testimony in the death-penalty case of Cathy

Henderson, changing his opinion about the manner of a child's death from "homicide" to "undetermined"). *See also Ex parte Robbins*, 478 S.W.3d 678 (Tex. Crim. App. 2014) ("*Robbins II*") (finding male caretaker convicted of capital murder of a child was entitled to habeas relief based on medical examiner's admission that she had learned in the interim more about the injury-potential of short falls with head impact and thus changed her opinion about the manner of a child's death from "homicide" to "undetermined").[66]

Habeas relief under Article 11.073 does not require proof that a particular medical examiner has been willing to admit to having learned something in intervening years. But it is yet another tragedy that Dr. Urban, despite making numerous, material admissions reflecting the unreliability of her 2002 conclusions, has refused to reconsider those conclusions.

1. Dr. Urban's 2002 autopsy report reflects bias, haste, and inexperience.

Records made at the time of the autopsy show that Dr. Urban was informed in advance that Dr. Squires at CMCD had already made an abuse diagnosis and was told by a Palestine detective that Nikki "may have been sexually assaulted," which was untrue, and was told that Robert had already been arrested for "capital murder."

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[66] The Texas Legislature was motivated to enact Article 11.073 in part to address concerns about the scientific integrity of criminal convictions raised in cases like *Ex parte Robbins*, 478 S.W.3d 678, 695–696 (Tex. Crim. App. 2014). *See Ex parte Robbins*, 560 S.W.3d 130 (Tex. Crim. App. 2016) ("*Robbins III*").

9EHRR156–157. That same detective then sat in on the autopsy. APPX99 (2018 SWIFS production of autopsy file). These are circumstances now known to create pronounced bias.[67]

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.[68] But Nikki's 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 medical crisis 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 medical crisis;

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[67] *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).

[68] 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.

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

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

- The scene where Nikki fell out of bed, 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;

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

- Any information regarding "promethazine" (brand name "Phenergan"), 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 affixed to her skull.

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

Because Dr. Urban did not review Nikki's medical records, she also failed to account for Nikki's DIC that made her distinctly susceptible to bruising and internal bleeding. *See* Section II.D, above.

Dr. Urban saw intracranial 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." APPX12. During trial, Dr. Urban repeatedly told the jury that the "blunt force head injuries" had been inflicted by some unknown combination of "shaking" and "blows." 43RR64–97.

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. APPX101.

The toxicology report in the SWIFS file was not disclosed before trial, nor were any of the results therein discussed during trial. APPX99. At some point, a short list of drug results was added to the autopsy report:

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Blood:  Alcohols and Acetone - negative.
        Cannabinoid Screen - negative.
        Drug Screen - 0.05 mg/L lidocaine.
                      0.40 mg/L promethazine.
                      9.2  mg/L phenytoin.
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APPX12. When interviewed a few months before trial, Dr. Urban made clear that she was unfamiliar with the results:

> Q [defense 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.

APPX105 at 17 (Aug. 23, 2002 transcript of defense conference w Dr. Urban). 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 insisted should have been taken into account in assessing the cause of Nikki's death.[69]

2. Dr. Urban's conclusions are inconsistent with contemporary scientific understanding.

For many years, pursuant to the SBS hypothesis, medical doctors were taught to assume abuse when a child died and there was evidence of any intracranial

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[69] 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.

bleeding absent some "clear-cut traffic accident" or similar event. 3EHRR41-42. Thus, bias was explicit—fueled by the honorable, but overzealous, quest to identify child abusers. Current teaching is that abuse must be a last, not first supposition, because of both the change in scientific understanding and the recognition that many parents and caregivers have been wrongly accused. *See, e.g.*, Aniello Maiese et al., *Pediatric Abusive Head Trauma: A Systemic Review*, 11 Diagnostics 734 (2021).[70] *See also* 2024EX19 (partial list of SBS/AHT convictions reversed or vacated).

Dr. Urban's trial testimony, and the significant medical evidence that she did not consider, suggest that she was already laboring under a presumption that child abuse had occurred when she performed the autopsy and, years later, strained to justify that presumption.

3. Dr. Urban's trial testimony was materially misleading.

In advance of testifying before the jury, objections were raised to some of Dr. Urban's very gruesome, very bloody photographs taken of the area underneath Nikki's scalp that Dr. Urban had cut into and peeled back from Nikki's skull: SX60-SX68. Notably, the jury in Andrew Roark's case was not subjected to such

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[70] *Available at* Pediatric Abusive Head Trauma: A Systematic Review - PMC. *See also* Am. Acad. of Pediatrics, *Abusive Head Trauma in Infants and Children: Technical Report,* 155 PEDIATRICS e2024070457, 37 (2025) (admitting that none of the SBS triad "is specific to inflicted trauma"); A. Lynøe et al., *Systematic Review of Abusive Head Trauma*, 106 ACTA PAEDIATRICA 1021–1027 (2017)—quoted in *Ex parte Roark*, 707 S.W.3d at 179.

traumatizing images because BD survived—although the State used drawings showing "the skull removed and . . . the dura, which is the thick lignin that's sort of peeled back" to expose "the bridging veins that go through the subdural space" and where "the blood would pool[.]" 4RRR171–72. Certainly, it was a uniquely horrifying experience for all involved in Robert's trial to have to view autopsy photos of a child with her scalp cut open and pulled over the back of her skull, revealing the intracranial bleeding. *See, e.g.*, 2024EX4 (2022 Decl. Terre Compton, juror).

Dr. Urban insisted that all of the photographs were necessary to show "a number of different blows that were inflicted on Nikki's head" and "to show the different points of impact, the different place where trauma was inflicted and the way [Nikki] was hurt." 43RR57–58. Those photos have since been described by Dr. Ophoven, a specialist in pediatric forensic pathology, as "highly misleading" because they did not represent Nikki's condition when she arrived at the hospital. APPX2 at 16. Nikki's initial condition was captured in the long-lost CAT scans of Nikki's head—which Dr. Urban never saw and thus did not consider.

In the days between Nikki's admission to the hospital and the autopsy, she was put through a great deal of triage: she was repeatedly intubated and had her heart restarted after her brain was already dead/nonperfused; a pressure monitor was screwed into her skull; she was pumped full of medications to try to counter her

bleeding disorder, making her even more prone to internal bleeding; and she was in a comatose state for over two days on life support—all before Dr. Urban saw Nikki. APPX5; APPX11; APPX110.

Moreover, because Dr. Urban did not consider any of this information, she did not appreciate that the CAT scans taken of Nikki's head soon after her father brought her to the hospital on the morning of January 31, 2002, show only a small volume of subdural blood. APPX109. But after Nikki had been subjected to two days of extensive medical treatment to try to reverse her condition, Dr. Urban saw a larger volume of subdural and subgaleal blood and hastily deemed the blood itself proof of "multiple impacts." But most of that blood was not present when Nikki arrived in the hospital. *Id.*; APPX93; 2024EX6.

As multiple experts have since explained, the appearance and distribution of the intracranial blood and retinal hemorrhages observed during Nikki's autopsy would have been affected by the increased intracranial pressure and coagulation abnormalities reflected in Nikki's medical records, by the chest compressions she had received, and by the hypoxia that had resulted in her appearing "blue" to hospital staff when she was first brought in on January 31. *Id.*; *see also* APPX1; APPX2; APPX95; APPX110; 3EHRR; 4EHRR; 5EHRR; 6EHRR; 8EHRR; 2024EX5. Multiple experienced pathologists (Drs. Bonnell, Ophoven, Wigren, Auer, Green) who looked at the autopsy photographs and the autopsy microscopic slides found no

support for the opinion that the subdural blood observed during the autopsy could be interpreted as a sign of "multiple impacts." APPX1; APPX2; APPX95A (2021 chart, Carl Wigren, MD); 3EHRR12–4EHRR82; 5EHRR152–251; 8EHRR5–140; 2024EX5.

At trial, Dr. Urban admitted that Nikki had no skull fractures or other broken bones. 43RR79–80. To support her view that Nikki's internal head condition had been inflicted, Dr. Urban testified repeatedly that shaking was a likely explanation because it was then believed that shaking would leave no external evidence of trauma. *See, e.g.*, 43RR75–80, 86. She also referred to possible "blows" and "impacts" that did not leave external marks based on the concept that children have "lots of fat" and thus do not bruise easily. 43RR89. In a nutshell, that is the SBS hypothesis plus an invented children-don't-bruise concept, contrary to evidence-based science.

Again, it was the ***absence*** of evidence of external or radiological evidence of multiple impact sites or fractures that had led Dr. Squires to diagnose SBS. No objective medical evidence supports Dr. Urban's claim that the intracranial blood reflects "multiple impact sites" (that did not cause any external marks). In 2021, the State retained Dr. Downs, of the Shaken Baby Alliance, to bolster Dr. Urban's

"multiple impacts" opinions. But the credibility problems with this highly biased and ill-informed witness are legion.[71]

4. Dr. Urban's trial testimony is inconsistent with contemporary biomechanical and medical understanding.

Dr. Urban claimed at trial that the reason Nikki's neck was not injured by the purported shaking and blunt impacts was because the neck was "flexible" and "weak":

> the neck is actually fairly flexible and that's one of the reasons that blows to the head or shaking is so dangerous because the neck is not actually strong enough to support the head. And, you know, if you ever looked at a small child, their head is very large in proportion to the rest of their body. And so when the head is struck or, again, 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 from getting hurt.

43RR82. Dr. Urban's 2002 belief that "the weakness in the neck protects the neck" but not the inside of "the head" is contrary to the biomechanical principles explained

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[71] Dr. Downs' credibility problems are too extensive to outline here. As was previously detailed in Applicant's proposed Findings of Fact and Conclusions, Dr. Downs has a history of missing a pneumonia during the autopsy of a deceased child, which he failed to disclose; he ventured far beyond his field of expertise and even purported to have expertise in fields known to be "junk science" in Texas (bite-mark comparisons); his approach to this case demonstrated a cavalier attitude about the relevant, underlying facts and unethical treatment of core evidence (CAT scans and autopsy photos); he exhibited bias against Mr. Roberson, whom he obviously never met, instead of objectively considering the relevant facts and science; and his conclusions regarding causation were internally inconsistent and inconsistent with contemporary scientific understanding.

at length in *Ex parte Roark*. *See* 707 S.W.3d at 174 (citing, with approval, the biomechanical research that led the CCA to conclude "People cannot shake an infant hard enough to generate the force necessary to cause the injury seen in this case, and even if it could, the shaking would break the infant's neck.").

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 reported in the -03 proceeding how, well after the SBS hypothesis had already become entrenched in the medical community, biomechanical studies were conducted to test the hypothesis that the rotational acceleration and deceleration associated with abusive shaking would cause the triad of intracranial conditions associated with SBS; and that hypothesis has now been proven false. 5EHRR98; 5EHRR122; 5EHRR131. While SBS/AHT is still endorsed by child abuse pediatricians,[72] there is no scientific support for the hypothesis that violent shaking can scramble or "sheer" an infant's brain cells or cause subdural hematoma, brain swelling, and retinal hemorrhage. 3EHRR45–46; 4EHRR37; 4EHRR142; 4EHRR146. More specifically, there are no biomechanical studies that

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[72] Importantly, no one in the medical community has ever argued that violent shaking is advisable. If a baby is shaken with sufficient force, the baby's neck can be injured or the spinal cord severed. 5EHRR100.

support the assertion that a child of Nikki's weight and height could be shaken so as to cause any internal head injuries—as opposed to the potential of neck and spinal cord injuries. 3EHRR46–47. But all doctors, including Urban, agree that Nikki had neck or spinal injuries.

Newborns have weak necks, which is why their necks need to be protected; but a two-year-old's neck is anatomically quite different. 3EHRR91. As Dr. Ophoven explained, "[b]y the time a child gets to two and a half years old, their brains are three times bigger and their skulls are thicker and their necks are stronger" than those of newborns. 3EHRR90. Dr. Urban's suggestion that Nikki's neck would have been protected while being shaken and battered because the neck muscles were "weak" and her head big compared to her body was, and is, inaccurate and misleading. 3EHRR91.

Dr. Urban also claimed at trial that she saw evidence of a torn frenulum inside Nikki's mouth and described it as "consistent with" a blow to the mouth. 43RR71. Yet, in 2021, Dr. Urban admitted that it is possible to injure a frenulum when medics "manipulate the mouth" during intubation. 9EHRR65. Dr. Urban claimed that she "personally" has not seen a frenulum torn from intubation, but she, a doctor who has only performed autopsies, has never treated living patients; therefore, she does not observe or perform intubations as a part of her practice. *Id.* Critically, Dr. Urban's admission, even if begrudging, indicates that she cannot say with any reasonable

degree of medical certainty that the frenulum was torn from a "blow" to the mouth, as she testified in 2003.

While State's counsel has represented that Nikki arrived at the hospital with a "mouth injury," there is no record or testimony to support that claim; the only information regarding Nikki's mouth was obtained from Robert, who described wiping a small amount of blood off of her mouth with a washcloth after he found her on the floor having apparently fallen out of bed. That information was confirmed by the washcloth itself, which contained small specks of blood. There was no evidence adduced that the blood was the result of a torn frenulum or that her mouth was injured in any other way. She could have spit up the small amount of blood due to her ongoing respiratory infection and cough, conditions that were documented in her medical records but not considered. APPX14; APPX9.

Dr. Auer and other experts attested that a torn frenulum is common when a child is intubated. 8EHRR113; 6EHRR123–125. During the violent process associated with a Code Blue situation, which was initiated when Nikki arrived at Palestine Regional, there would have been individuals responsible for putting the endotracheal tube in by adjusting Nikki's head and mouth, pulling her jaw up and away from the mouth, lifting her tongue with a blade, and pushing a tube down through the vocal cords into the trachea. 4EHRR184. Moreover, this process had to

been done twice in the Palestine hospital because an x-ray revealed that the breathing tube was initially placed incorrectly. 42RR87–88.

The staining technique used on that wound during the autopsy showed that it was "very recent," "not a few days old"—therefore, it had to have occurred during the hospitalization soon before the autopsy. 8EHRR114. Moreover, a torn frenulum would not be evidence of fatal head trauma. Dr. Auer noted that Dr. Urban's explanation of why the torn frenulum was relevant "doesn't make sense" as there was "ample other cause for" the minor injury to the inside of Nikki's lip. 8EHRR123; 8EHRR125.

Dr. Urban did not review any records reflecting Nikki's medical treatment before the autopsy or view the Polaroids taken in the Palestine hospital—both of which show the absence of any injury to Nikki's mouth when she was admitted. Dr. Urban irresponsibly presumed that Nikki's torn frenulum was evidence of a "blow"—which the State seized upon to falsely malign Robert. *See* 46RR25 (prosecutor in Closing: "You heard from Dr. Urban, the Medical Examiner. Not just shaken, but blunt force injuries to Nikki, received multiple blows to the head. Multiple blows to the head. Not just, 'I lost it,' you know, 'Please be quiet.' Sits her gently on the bed. But we're talking shaking and beating is what Nikki sustained."). But even Dr. Urban's own staining process showed that the torn frenulum could not have happened when Nikki was with her father.

The other "impact site" Dr. Urban identified was the top of Nikki's head where there had been no bruises or bleeding until ***after*** the hospital surgically affixed a pressure monitor there, which Dr. Urban failed to disclose.

Further muddying the water, Dr. Urban listed "retinal hemorrhage" as a "blunt force injury" in her autopsy report. APPX12. But as Dr. Auer explained, bleeding in the eyes and optic nerve is caused by intracranial pressure, which Nikki undoubtedly experienced, not blunt force. 8EHRR116. Also, as Dr. Auer instructed, "there's no way of getting a blunt force to the optic nerve. It's packed in fat and bone. It's in a bony canal, and the back of the eye is unreachable for trauma as well." 8EHRR121. These hemorrhages were related to blood flow and intracranial pressure, not the result of an external "blunt force." *Id.* But Dr. Urban used the term "blunt force" and "blunt impact" to encompass "shaking," just as did doctors in Andrew Roark's trial. *Compare* 43RR75–76 *with* 4RRR109–110. And as the CCA has recognized, there is no science supporting the notion that retinal hemorrhage is a marker of shaking, as Dr. Urban, consistent with the SBS hypothesis, had posited. *See Ex parte Roark*, 707 S.W.3d at 186 (finding that "retinal hemorrhaging, applied through today's scientific method, to be non-specific and of no value in assigning causation for its existence.").

Dr. Urban did not investigate Nikki's medical history—which shows a serious illness (a missed fatal pneumonia) and inappropriate and excessive medications prescribed by the very doctors whom the State continues to hold up as authorities

(treating ER Dr. Konjoyan and pediatrician Dr. Ross, who prescribed Phenergan on back-to-back days along with Codeine, a narcotic). 5EHRR176–177; 8EHRR107–108.

The jury did not hear from a medical toxicologist or see the toxicology report that was part of the autopsy file, which was not disclosed until well after the -03 application was filed. APPX99. During the -03 evidentiary hearing, forensic pathologist Dr. Carl Wigren was the first to raise concerns suggested by the belatedly produced toxicology report. He looked up the drugs listed in the toxicology report and saw that there seemed to be dangerously high level of promethazine in Nikki's system at the time of autopsy. He also saw that Nikki's medical records showed that, in the days right before her medical crisis, she had been given two different prescriptions for Phenergan, which is promethazine, including one mixed with Codeine, which metabolizes into morphine, an opiate. APPX95A; 5EHRR225–238; 6EHRR25.

Dr. Wigren, a forensic pathologist like Dr. Urban, did not have special training in medical toxicology. But he consulted a treatise while preparing to testify and highlighted during his testimony that the promethazine levels appeared to him to be significantly elevated and the drugs' properties dangerous. He recommended further

investigation, as did Dr. Auer. 5EHRR201–209, 227–228, 239; 6EHRR29.[73] Dr. Urban, in contrast, never investigated the toxicology results from testing she herself had requested.

Dr. Urban's conclusions are inconsistent with the contemporary mandate to rule out all potential non-abuse factors before presuming that inflicted trauma caused the intracranial symptoms long associated with SBS.[74]

III. Both Material Similarities and Differences Between Andrew Roark's and Robert Roberson's Post-Conviction Proceedings Mandate Relief for Robert Roberson.

A. State's counsel in Andrew's post-conviction proceeding engaged with the new evidence, whereas State's counsel in Robert Roberson's post-conviction proceedings avoided and misrepresented the truth.

Counsel for the State comported themselves in these two materially similar Article 11.073 proceedings in a manner that could not have been more different.

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[73] The previous habeas judge did not include any discussion of these respiratory-suppressing medications or the expert testimony regarding their significance in the State-drafted Findings. The only reference in the Findings is this brief comment purporting to summarize Dr. Wigren's two days of testimony: "Nikki was impaired due to opiate and promethazine." Findings at 5. Because this material evidence was disregarded, further investigated was undertaken by consulting a specialist in medical toxicology who demonstrated that Dr. Wigren's concerns were well-founded and that this medication regime alone could have caused Nikki's death. *See* 2024EX7.

[74] *See, e.g.*, Aniello Maiese et al., *Pediatric Abusive Head Trauma: A Systemic Review*, 11 Diagnostics 734 (2021); 2023 TREATISE.

In Andrew Roark's case, the Dallas County DA's Office engaged its Conviction Integrity Unit (CIU) to work cooperatively with the defense to understand the science that was being challenged and to try to communicate with Dr. Squires to determine whether her opinions had changed. *See* 2026EX1 (Affidavit of Andrew Roark's attorney explaining what was required to engage Dr. Squires as "laborious," "taking many years," and how she was "totally uncooperative" until the Dallas County DA's Office intervened). Eventually, after the CIU's intervention, Dr. Squires reluctantly agreed to recant a small portion of her testimony (regarding the possibility of rebleeds). *See id.*

At the end of the proceeding, the *Roark* habeas court adopted agreed Findings because the State conceded that the scientific understanding of SBS had changed, that Andrew had carried his burden under Article 11.073, and that he should be awarded a new trial. *See Ex parte Roark*, 707 S.W.3d at 174. Thereafter, the CCA awarded a new trial. *Id.* at 185–186 (describing aspects of Dr. Squires' trial testimony that are inconsistent with contemporary scientific understanding). In *Ex parte Roark*, the CCA explicitly recognized that the "new science" "supports the proposition" that BD's condition could have been caused "by a short-distance fall, or occurred spontaneously, due to the acute-on-chronic subdural hematoma." *Id.* at 186. The CCA further found that "retinal hemorrhaging, applied through today's scientific

method, to be non-specific and of no value in assigning causation for its existence." *Id.*

By contrast, Robert still faces execution because the prosecuting attorneys and habeas court in Anderson County have denied that the "science" used to convict him has changed and instead have propagated an exceptionally misleading representation of the contents of both the trial and habeas records. The State has repeatedly sought to downplay the central role that Dr. Squires played in diagnosing Nikki with SBS in 2002 and then testifying as an expert about that diagnosis and about SBS principles during the 2003 trial.

In 2022, during Closing Arguments in the evidentiary hearing in the -03 habeas proceeding, Robert's counsel asked rhetorically "where is Dr. Squires?" to emphasize the State's efforts to reinvent this case as something other than an SBS case and the State's efforts to minimize the degree to which it had relied on Dr. Squires and her SBS-related testimony in obtaining Robert's conviction. It certainly seems reasonable to assume that, if Dr. Squires believed that her trial testimony was defensible, she would have been asked to testify in the -03 proceeding. But that would also have created a problem for the State as it sought to rewrite history about the role the outdated SBS hypothesis had played in establishing that a crime had been committed. *See, e.g.*, APPX60 (Feb. 1, 1998 arrest warrant relying on Dr.

Squires' SBS diagnosis); 2026EX4 (DA's pretrial emails obtaining advice about prosecuting an SBS case).

In response to the argument about Dr. Squires' palpable absence, State's counsel claimed that they had been unable to locate Dr. Squires:

> And I want to actually address something that was brought up that made it seem like someone was playing hide the ball with this Court in the fact that Dr. Squires is not here. We actually told this when we were asked; ***we could not locate Dr. Squires***. She had retired and moved to Pennsylvania. We put two investigators on it and could not locate her.

SuppEHRR85. This representation by Anderson County's deputy DA was later contradicted by Anderson County's DA during testimony before the Texas House Committee on Criminal Jurisprudence on October 16, 2024. When a member of the committee asked DA Mitchell if she had "spoken to Dr. Squires" as the doctor who had made "the original diagnosis" and testified about SBS, the following exchange ensued:

> Ms. Mitchell: I've not spoken directly with her, but ***someone in my office has***.
>
> Representative Harrison: Do you know if that person has spoken with her now and as to whether she believes that … the implications of the shaken baby … syndrome hypothesis have evolved in the … two decades since this was at trial?
>
> Ms. Mitchell: ***In initial conversations with her in preparation for the Article 11 [sic] hearing, she stood by her original diagnosis***, um, that Nikki was shaken, but also I believe, and I'd have to double-check, that she, in fact, also recognized the blunt force injuries that Dr. Urban had found.

Hearing Transcript at 114 (emphasis added).

DA Mitchell's testimony contradicted the previous representation made by her deputy during the -03 Closing Arguments that the DA's Office had been unable to locate Dr. Squires. DA Mitchell's testimony regarding the relationship between Dr. Squires' and Dr. Urban's trial testimony also contradicted the trial record. The trial record shows that it was Dr. Urban who agreed with Dr. Squires that Nikki's condition was explained by SBS beliefs. Although it was not noted at the time, their testimony differed only with respect to Dr. Urban's (incorrect) view that there was evidence of multiple blunt impacts on Nikki's head. Dr. Squires was the only person to testify at trial about the CAT scans of Nikki's head, because, as Dr. Urban admitted years later, she never looked at that critical medical evidence.

Because Dr. Squires consulted with a radiologist, she acknowledged at trial that the CAT scans showed only a single blunt impact site on the head—with no corresponding fracture. Dr. Squires even posited that the bump on the head "happened at a different time" from the shaking she envisioned as the primary cause of Nikki's condition because "the actual brain injury, we do not feel is explained by a simple impact." 42RR107. For Dr. Squires, the subdural blood, brain swelling, and retinal hemorrhages—the SBS triad—was proof of shaking in part because the CAT scans showed only one minor blunt impact site on the head, which had not even

caused a hairline fracture (and the then-entrenched, since-debunked belief that a short-distance fall with head impact could not cause a serious injury like the triad).

An affidavit obtained from Andrew's habeas counsel shows that Dr. Squires could indeed be located—but was exceedingly reluctant to talk. 2026EX1. She only signed an affidavit recanting part of her Roark SBS testimony after years of efforts and under threat of subpoena. Dr. Squires similarly has refused to talk to Robert's counsel. *See* 2024EX5. But it is not credible that, when these two cases were in habeas proceedings at the same time (in Dallas County and Anderson County, respectively) that the Anderson County DA's Office could not have contacted their counterparts in the Dallas County DA's Office or used other means, such as basic Google searches, to learn Dr. Squires' whereabouts. *See id.* Therefore, Anderson County's deputy DA seems to have intentionally misled the habeas court in 2022, as revealed by DA Mitchell's testimony before a legislative committee in 2024.

In any event, State's counsel plainly avoided Dr. Squires. Instead, for the -03 evidentiary hearing, the State retained, Dr. James Downs, who demonstrated a lack of familiarity with the trial record he was asked to defend. He did not seem to know that Dr. Squires had been an expert for the State until asked about some of Dr. Squires' testimony during cross-examination. After stating repeatedly that he agreed with Dr. Urban that this was not a "shaking case," during cross-examination, Dr. Downs switched gears and opined that he believed Nikki's injuries were caused by

shaking after all: "I think a shaking-type motion did occur here because I have multiple impacts, and that argues a back-and-forth motion in order to get repeated impacts." 10EHRR148. Once shown Dr. Squires' trial testimony stating that the presence of subdural blood "all over" is "indicative of shaking," he conceded entirely. Dr. Downs attested that Dr. Squires "sees more of these cases or saw more of these cases than I do." 10EHRR153–154. In other words, Dr. Downs ultimately deferred to what he viewed as Dr. Squires' superior expertise.

Similarly, the State exploited and possibly encouraged Dr. Urban's refusal to revisit her 2002 opinions even allowing her to proffer an affidavit in which she, erroneously, denied that she had ever testified about "shaking" as a mechanism of injury. Additionally, Dr. Urban repeatedly refused offers to meet with Robert's counsel and experts to discuss the new evidence in a non-adversarial setting.[75]

Dr. Urban was and continues to be employed by SWIFS, a public entity that performs autopsies for Dallas and other neighboring counties. State's counsel has repeatedly implied, absent any evidence, that Dr. Urban's autopsy report was vetted because of the presence of other undated signatures affixed to her report. 9EHRR114–116. No evidence was adduced as to anything these former SWIFS employees did, if anything, to verify or double-check Dr. Urban's work.

[75] Likewise, counsel with the OAG has so far refused all offers to meet with Robert's counsel to discuss the new medical and scientific evidence.

9EHRR164–165. Dr. Urban herself acknowledged that she was the only one who did the autopsy—and then signed her report and the death certificate the same day. *Id.*

When Dr. Urban performed the autopsy on Nikki, SWIFS' lab was not yet accredited and thus not governed by recognized quality-control standards that would preclude having people "sign off" on an autopsy they did not conduct. 9EHRR158.[76] Yet the State has repeatedly pushed the fallacious argument that undated signatures, circa February 2002, on Dr. Urban's autopsy report somehow indicates that its conclusions are reliable.

Somewhat similarly, in Andrew's trial, State's counsel argued that "some 70 doctors in the field of pediatrics" had signed onto an unidentified article, which expressed disbelief in the possibility of subdural rebleeds. 7RRR176–178. But as *Ex parte Roark* itself establishes, just because a number of people affix their names to something, that does not render it reliable. *See* 707 S.W.3d at 174 (recognizing that there was new science establishing that "rebleeds" of subdural hematoma are not in

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[76] The Texas Forensic Science Commission's website includes a list of Forensic Lab Accreditation Status in this state. The information about SWIFS, where Dr. Urban performed the autopsy on February 2, 2002, shows that SWIFS was not accredited with respect to any recognized standards in ***any*** area until 2003. Moreover, that accreditation was withdrawn by the accrediting body in 2008 and only reinstated several years later. Public reports are available at https://www.txcourts.gov/media/1452463/texas.pdf.

fact rare contrary to what numerous doctors, including Dr. Squires, had previously believed).

Most concerning has been State's counsel's choice to inject new, misleading "evidence" into the post-conviction record to manufacture support for recharacterizing this as a battery case. Although Dr. Urban's autopsy photographs were already in the record because they were admitted during her 2003 trial testimony, much of Dr. Urban's direct examination in the 2021 evidentiary hearing was devoted to "proving-up" reproductions of those photos that State's counsel had blown up, cropped, and distorted with shadows. *See*, e.g., 9EHRR24–33; 9EHRR42–48; 9EHRR68–72; 9EHRR76–88; 9EHRR94–96; 9EHRR156–157. Dr. Urban had been expressly asked, through Applicant's subpoena duces tecum, to bring her entire file to court when she testified, but she did not do so. *See* Supp CR. Instead, she participated, via Zoom, in perpetrating what amounts to a fraud on the court.[77] Even with the role Dr. Urban played in injecting misleading reproductions

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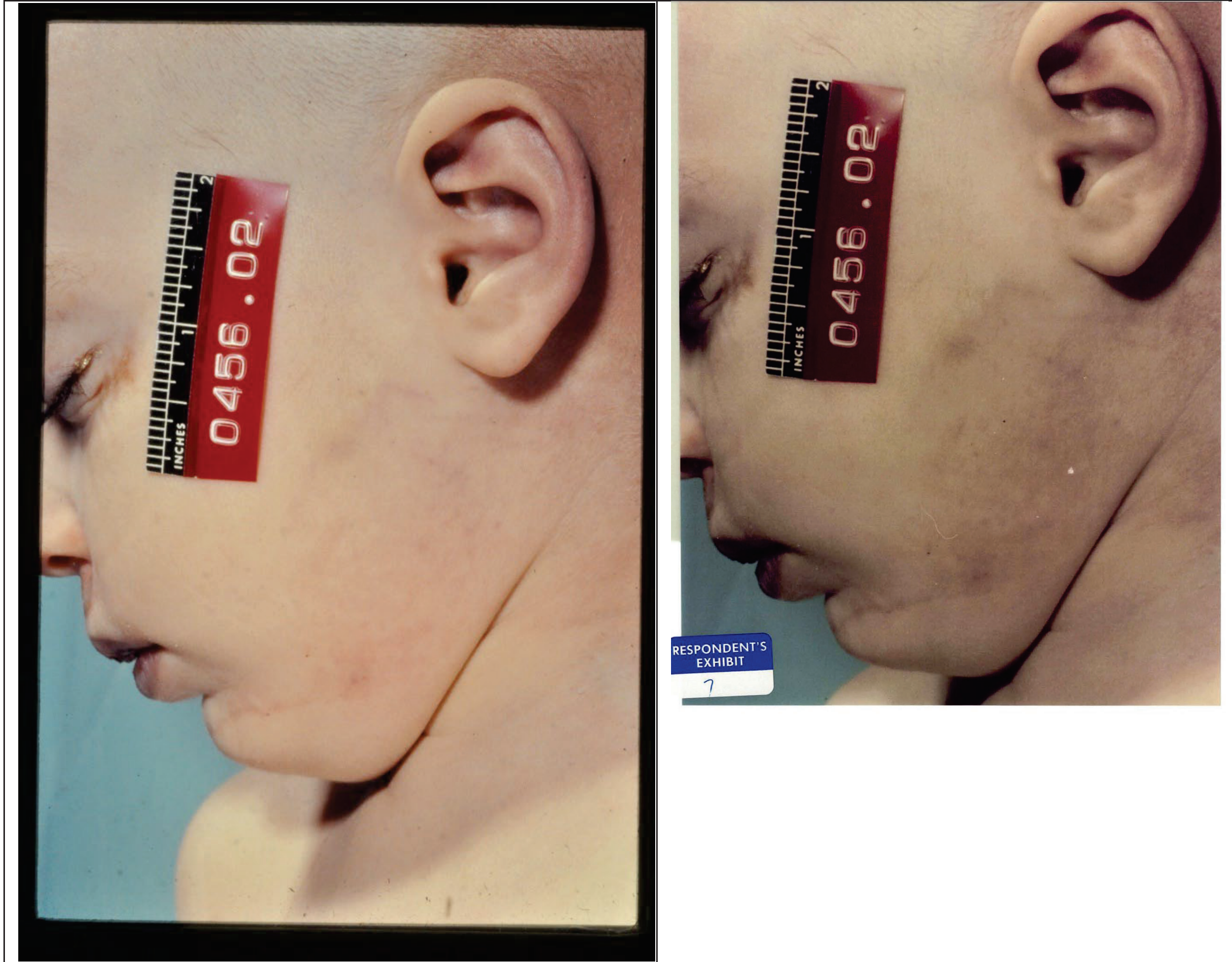
[77] It does not appear that the State's current counsel has ever reviewed the original electronic photos in the SWIFS case file or in the trial record in Anderson County. This is one of many reasons why an in-person hearing is needed in the wake of this briefing: to set the record straight as to what the State's photographic evidence of Nikki's condition was, to verify the extent of her external injuries upon arrival in the hospital, and to note how Nikki's condition compared to that of BD's. The Court also needs to assess Dr. Urban's original autopsy photos and the degree to which they misled the jury in light of the Polaroids and CAT scans taken at Palestine Regional reflecting Nikki's condition upon arrival at the hospital and the evidence of how the medical treatment and Nikki's DIC affected her body over the intervening days before the autopsy.

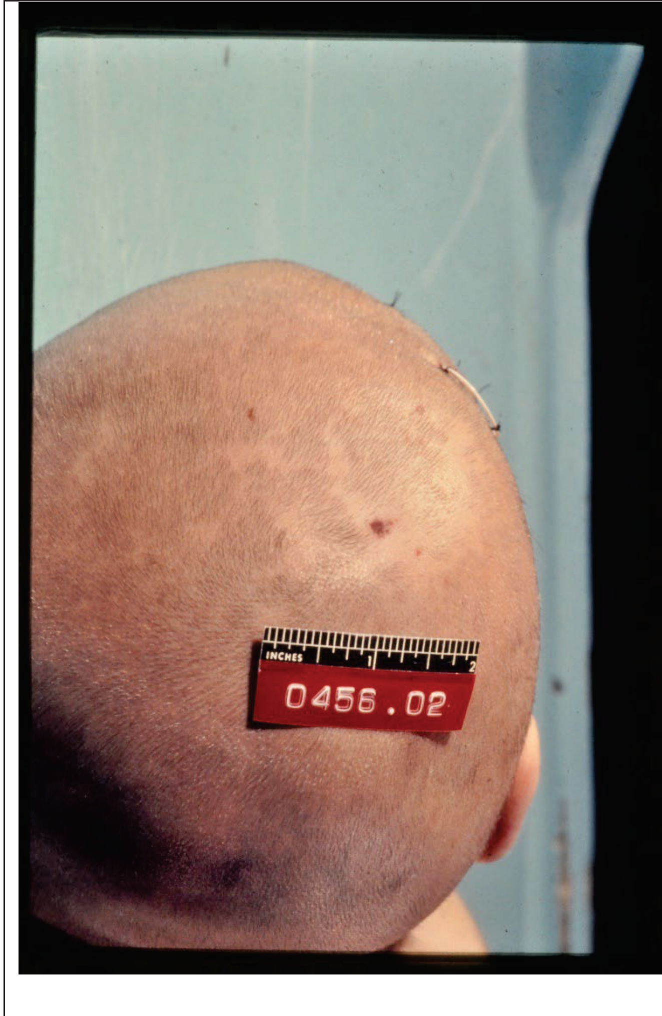
of her autopsy photos, Dr. Urban had to admit that there were no bruises on Nikki's brain itself, "minimal bruising" on Nikki's face and head, and no skull fractures of any kind—all of which is inconsistent with a "battery" theory. 9EHRR129; 9EHRR181; 9EHRR187.

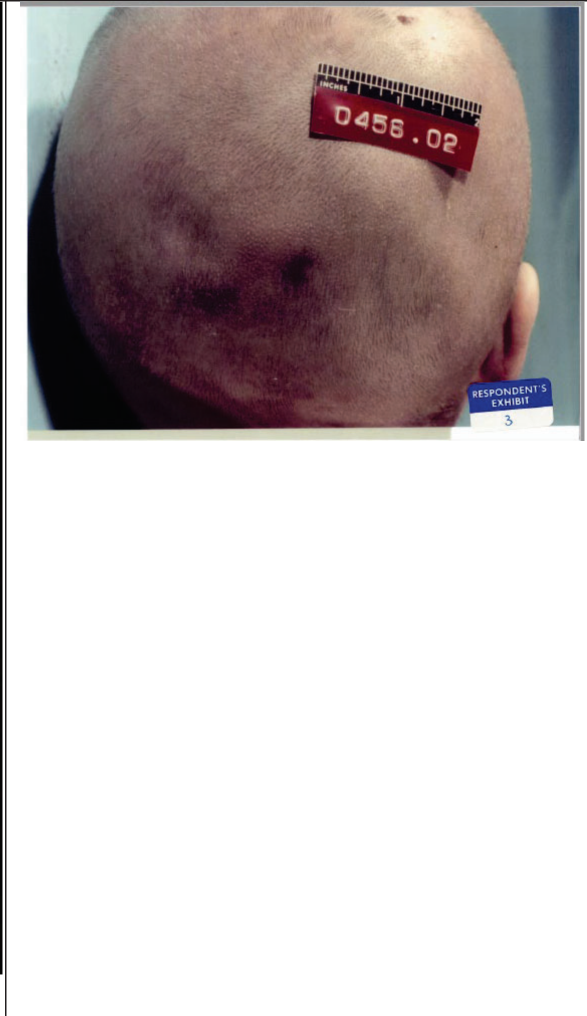
As explained above, several of the original autopsy photographs were misleading in that they were presented to the jury as if they reflected Nikki's condition when she arrived in the hospital—instead of after Nikki's body had been put through multiple intrusive measures as doctors attempted to reverse her comatose condition. But the State's misleading reproductions of the original autopsy photographs, introduced into evidence during the 2021 evidentiary hearing, were both completely unnecessary and ***fraudulent***. The reproductions palpably distort what was captured in Dr. Urban's original photos. The reproductions that State's counsel created in 2021 are also "blow-ups" much larger than the originals seemingly made on a photocopy machine. For example, see the following comparisons, which do not capture the full scope of the distortions:



Original 2002 Autopsy Photograph State's 2021 "Reproduction" (RX7)

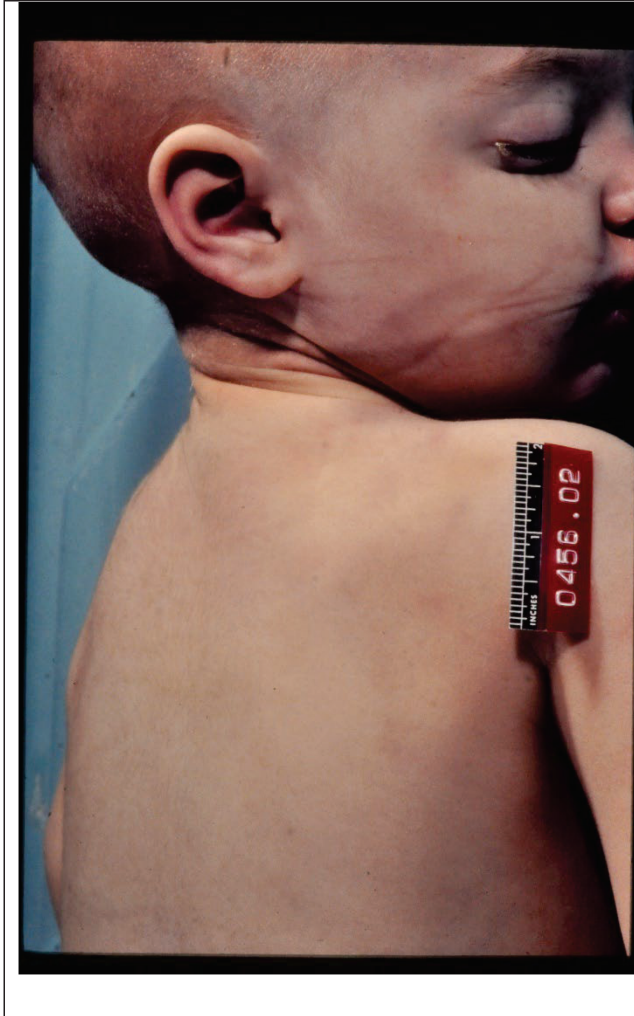
Note that RX7, on the right, is considerably darker, dramatically exaggerating the light bruises on the face captured in the original and creating the appearance of bruises that did not exist.



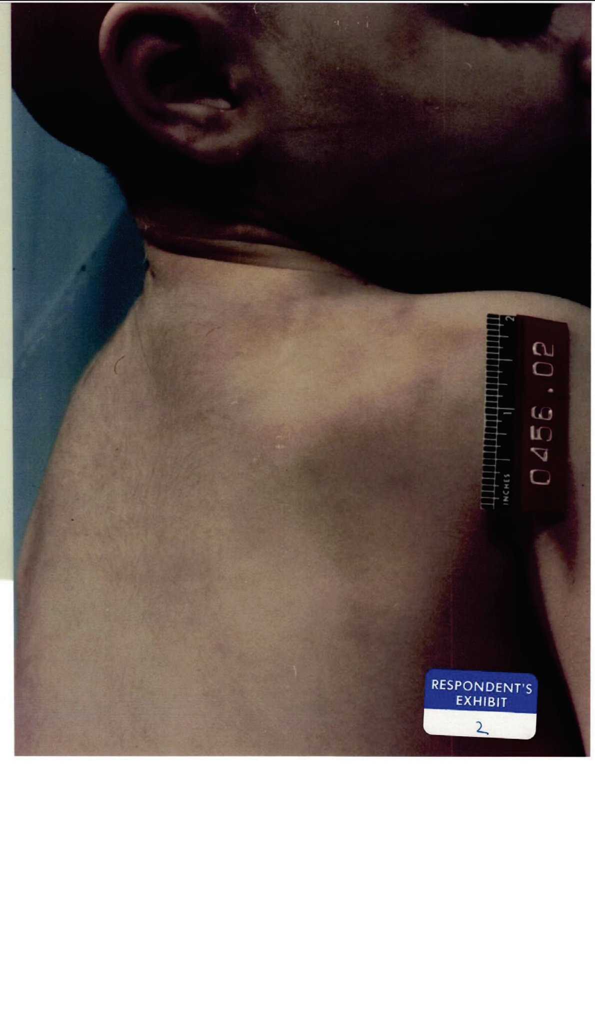


Original 2002 Autopsy Photograph State's 2021 "Reproduction" (RX3)

Note that RX3, on the right, was cropped to conceal the surgical pin visible on the right side of the top of Nikki's head where the pressure monitor had been removed, and the reproduction was darkened, exaggerating bruising associated with the single impact site on the back of Nikki's head captured in the original.



Original 2002 Autopsy Photograph



State's 2021 "Reproduction" (RX2)

Note that RX2 was cropped and considerably darkened, exaggerating the light bruise on Nikki's shoulder, captured in the original, and obscuring in shadow what are plainly sheet marks on Nikki's face to create the false appearance of bruises that did not exist.

These grossly misleading reproductions should not have been admitted into evidence in 2021 because they were not the "best evidence"—the originals, already in the record, were. Nor were these deceptive images fair or accurate reproductions

of what was observed during the autopsy. That the DA engaged in this misconduct, that a medical examiner went along with it, and that the habeas judge overruled objections to this grossly misleading "evidence" is repugnant to the interests of justice. Nothing like this distortion of the truth occurred in Andrew Roark's 11.073 proceeding.

Throughout the -03 habeas proceeding, State's counsel refused to engage with the evidence of the changed science and instead adopted an incoherent position: (1) Shaken Baby Syndrome has not really changed, it just got a new name: "Abusive Head Trauma"; and (2) this was not really a Shaken Baby case but a case of "battery." But the record completely belies that argument. From beginning to end, the case was tried as a Shaken Baby case, as the trial transcripts show. It was "classic" in the worst sense: a circumstantial case presuming that an unwitnessed crime had occurred based on a now-defunct SBS hypothesis that was conveyed to the jury as grounded in science. *Ex parte Roark* thereafter recognized there is no underlying science to support much of the testimony that the jury heard in both Andrew Roark's and Robert Roberson's trial.

Ignoring all of the evidence adduced during a 10-day evidentiary hearing, the -03 habeas court adopted the State's patently misleading Findings, which failed to even mention, let alone substantively address: the change in scientific understanding,

the significant errors and omissions in the autopsy and the surrounding investigation, and the alternative causes of Nikki's condition.

B. Guided by cogent and accurate Findings, the CCA in Andrew Roark's case made specific determinations as to why SBS is not a valid scientific theory based on current scientific knowledge.

Andrew's 11.073 proceeding, unlike Robert's previous 11.073 proceeding, involved a cooperative process in which the quest for the truth was privileged over adversarial gamesmanship. At the end of Andrew's habeas proceeding, the presiding judge was able to rely on observed testimony, documentary evidence, and agreed proposed Findings to outline the basis for his new trial recommendation. In turn, those Findings guided the CCA, instead of seeking to deceive it. *See Ex parte Roark*, 707 S.W.3d at 174–84 (describing at length the relevant Findings made by the habeas judge).

First, in 2014, the *Roark* habeas judge "found that SBS, upon which the prosecution based the theory of the crime, is not a valid scientific theory based on current scientific knowledge." *Id.* at 174. The *Roark* habeas judge also made five specific findings supported by the new scientific evidence that was contrary to the testimony put before the jury:

- Short-distance falls can cause the injuries BD suffered;
- People cannot shake an infant hard enough to generate the force necessary to cause the injury seen in BD, and even if it could, the shaking would break the infant's neck;

- Children can experience lucid intervals of up to several days after sustaining a head injury before they display symptoms, thus dismantling the presumption that whatever adult was with the child when she collapsed must have caused the condition;

- Retinal hemorrhages are caused by a host of phenomena, not just inflicted head trauma; and

- Dr. Squires' testimony that rebleeds of a prior head injury rarely occur is inaccurate.

Id. at 174–75.

In 2019, the *Roark* habeas court made additional Findings based on the recantation of Dr. Squires regarding subdural "rebleeds." *Id.* at 175.

In 2023, the *Roark* habeas court made yet more Findings (1) that Dr. Squires had engaged in "fudging" with respect to her affidavit; (2) that relief under Article 11.073 should be granted; and (3) reemphasizing its five key findings articulated in 2014. *Id.* at 175. Guided by those Findings, the CCA was able to describe the evidence that had been adduced to support each of five findings regarding the flawed premises underlying the SBS hypothesis, four of which are directly relevant to Robert's changed-science claim.

1. In *Ex parte Roark*, the CCA held that the SBS assumption that "short-distance falls cannot harm" has been debunked.

With respect to short falls, the CCA in *Ex parte Roark* noted that, in *Ex parte Henderson*, 384 S.W.3d 833, 834 (Tex. Crim. App. 2012), it had already recognized

"advancements in relevant scientific knowledge" that had "called into question the belief that short-distance falls could not cause severe head injuries in children." *Ex parte Roark*, 707 S.W.3d at 176.[78] The CCA also noted that in *Ex parte Henderson*, medical examiner Dr. Bayardo had submitted an affidavit acknowledging that he would have given a different opinion regarding manner of death in a child-death case had he known about the biomechanical principles that explain how pediatric head trauma could be quite serious, even in a fall from a short distance.[79] *Id.*

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[78] Three of the experts (Drs. Plunkett, Ophoven, and Monson) whose affidavits the CCA relied on in 2007 in remanding claims in *Ex parte Henderson* also provided evidence in Robert's -03 proceeding. But that evidence of changed science, reflecting further advances since 2007, was disregarded by the previous habeas judge.

[79] In the -03 evidentiary hearing, undersigned counsel endeavored to ask Dr. Urban about Dr. Bayardo's affidavit in *Ex parte Henderson*, but State's counsel objected. Later, the following passage was included in the proposed Findings submitted on Robert's behalf:

> Before this proceeding began, many courts, including the Texas Court of Criminal Appeals, had already recognized that scientific studies have now established that a child may sustain serious internal head injuries and even death from a relatively short fall, even from a height of one to ten inches, far less than the height of the bed at issue in this case. *See also Ex parte Henderson*, 384 S.W.3d 833, 837–51 (Tex. Crim. App. 2012) (detailing significant scientific changes in the field of biomechanics on whether "short falls" can cause fatal injuries to infants); *Ex parte Robbins*, 478 S.W.3d 678 (Tex. Crim. App. 2014) ("*Robbins II*") (finding male caretaker convicted of capital murder of a child was entitled to habeas relief based on new science related to short falls). *See also*, *e.g.*, *In re Fero*, 367 P.3d 588 (Wash. Ct. App. 2016); *Commonwealth v. Epps*, 53 N.W.2d 1247, 1264–65 (Mass. 2016); *People v. Bailey*, 999 N.Y.S.2d 713, 725 (N.Y. 2014); *Del Prete v.*

2. **In *Ex parte Roark*, the CCA held that the SBS assumption that "shaking" can cause the kind of injuries attested to in SBS cases has been debunked.**

Andrew Roark's new evidence exposed the discredited beliefs, espoused during his trial, that shaking alone could cause the kind of intracranial conditions observed in BD. The CCA cited the testimony of biomechanical engineering expert, Dr. Chris Van Ee, *e.g.*: "Based on a review of the current scientific data, the hypothesis that shaking is likely to result in injurious angular acceleration/deceleration resulting in direct damage to bridging veins and diffuse axonal injury cannot be scientifically supported." *Ex parte Roark,* 707 S.W.3d at 178. The opinion quotes at length a summary of the current perspective of the biomechanical engineering field, supported by the only systematic meta-study of SBS to date.[80] This meta-study was commissioned by the Swedish government in response to the controversy surrounding SBS/AHT, *e.g.*:

Thompson, 10 F. Supp. 3d 907 (N.D. Ill. 2014); *Edmonds v. Wisconsin*, 746 N.W.2d 590 (Ct. App. Wisc. 2008).

Several of these same cases are cited favorably in *Ex parte Roark*. None of them were cited in the previous habeas judge's Findings. Nor did the Findings mention any of the evidence Robert adduced of the kind of biomechanical research first acknowledged in *Ex parte Henderson*. *See* APPX3; APPX3; 5EHRR12–149.

[80] 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.

> … it is only with great speculation devoid of adequate scientific basis that shaken baby can be diagnosed, that the timeline for the injuries can be inferred, and that ultimately a perpetrator of the abuse, if it occurred, can be identified. This position is supported by a recent study performed by an independent group of scientists from Sweden charged by the government to assess health technology and social services. After performing an extensive review of the scientific basis of the 'shaken baby syndrome' (Lynøe et al. 2017) these authors concluded:
>
>> *The systematic review indicate[s] that there is insufficient scientific evidence on which to assess the diagnostic accuracy of the triad in identifying traumatic shaking (very low quality evidence). It was also demonstrated that there is limited scientific evidence that the triad and therefore its components can be associated with traumatic shaking (low quality evidence).*

Id. at 179 (quoting the first "meta-study" of SBS research, commissioned by the Swedish government and published in 2017).[81]

3. In *Ex parte Roark*, the CCA held that the SBS assumption that "lucid intervals are not possible" has been debunked.

To debunk the notion that shaking would cause an immediate change in consciousness and that no lucid interval is possible, Andrew Roark relied, for instance, on testimony from Dr. John Plunkett discussing research showing that subdural hematomas can exist for some time before a child becomes symptomatic.

[81] Robert too adduced testimony related to the same Swedish study and offered both the study and its appendix as documentary evidence. *See* APPX33; APPX33A. But the previous habeas judge sustained the State's objections to admitting these materials into evidence and then failed to mention any of the extensive testimony regarding the study from Robert's experts.

Moreover, with chronic subdural bleeding, symptoms may never become apparent. Thus, "it is axiomatic to accept lucid intervals[.]" *Id.* at 179.[82]

4. In *Ex parte Roark*, the CCA held that the SBS assumption that "rebleeding of a subdural hematoma does not occur—or if it does, it proves prior shaking" has been debunked.

The CCA recognized that new scientific knowledge, buttressed by Dr. Squires' "sparse" recantation admitting that what she had said about rebleeds was not accurate. *See, e.g.*, *id.* at 182 (describing Dr. Plunkett's testimony "that there is new scientific evidence since the time of [Andrew Roark's] 2000 trial showing that Dr. Squires was wrong when she said that rebleeds were controversial, rare, and limited to children with abnormal spaces above their brains.").[83]

5. In *Ex parte Roark*, the CCA held that the SBS assumption that "retinal hemorrhages are a marker of shaking" has been debunked.

Andrew Roark's habeas proceeding also involved testimony about retinal hemorrhages, countering the opinions, offered by multiple State's experts during Andrew's trial, stating that retinal hemorrhages are a "classic" marker of SBS, citing studies published since the time of trial. *See, e.g.*, *id.* at 182–183, citing publications

[82] As explained below, Robert also adduced evidence from Dr. Plunkett on, *inter alia*, evidence of lucid intervals. APPX3. But the previous habeas judge did not mention any of that evidence in the Findings submitted to the CCA.

[83] Robert's case did not involve the issue of "rebleeds", thus Dr. Squires' "sparse" recantation is not relevant except as further evidence that her opinions circa 2000-2003 are inconsistent with contemporary scientific understanding.

by Dr. Patrick Lantz supporting "this evolution" and post-conviction testimony "that the science has evolved since Applicant's trial which refute the testimony of the State's witnesses."[84] The current medical understanding is that intracranial pressure from a subdural hematoma causes retinal hemorrhaging" "non-specific in nature" and thus cannot be interpreted as a marker of abuse.

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Based on the totality of these factors, the habeas court found that Andrew Roark was entitled to relief and, thereafter, the CCA agreed:

> We find that scientific knowledge has evolved regarding SBS and its application in Applicant's case. Additionally, we find that given further study, the experts would have given a different opinion on several issues at a trial today—some already have. The admissible scientific testimony at trial today would likely yield an acquittal.

Id. at 185. Moreover, the CCA acknowledged:

> Research ranging from mechanical dolls to animal abuse has yet to bridge the gap between theory and reproduceable results which the scientific method demands. Essentially, science has evolved to a degree that has removed "Shaken" from "Shaken Baby Syndrome." This is evident from the need to vague the terms to "Impact Syndrome" and then to "Abusive Head Trauma."

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[84] Robert also relied on the research of Patrick Lantz. *See, e.g.,* APPX34C, Patrick Lantz, M.D., et al., *Extensive Hemorrhagic Retinopathy, Perimacular Retinal Fold, Retinoschisis, and Retinal Hemorrhage Progression Associated with a Fatal Spontaneous, Non-Traumatic, Intracranial Hemorrhage in an Infant*. This 2013 study identified approximately 30 ***non-traumatic*** conditions that can cause retinal hemorrhage. Retinal hemorrhage had previously been used as a primary indicator that child abuse had been perpetrated in the form of violent shaking. 4EHRR60–61. But this relevant research was not mentioned in the previous habeas court's Findings.

Id.

C. Robert Roberson adduced evidence markedly similar to the evidence relied upon to grant Andrew Roark habeas relief.

Except for the issue of rebleeds, which was not raised by Nikki's case, Robert adduced vast post-conviction evidence relevant to the other four SBS assumptions that the CCA, in *Ex parte Roark*, recognized have been debunked by the evolution of scientific knowledge. Indeed, the habeas application filed in 2016 was supported by Dr. Plunkett's sworn declaration, later introduced into evidence (APPX3), providing a detailed discussion of "twelve distinct areas" in which the medical profession's "understanding of pediatric head injury" and thus of SBS/AHT had changed since Robert's 2003 trial up to 2016. Dr. Plunkett's declaration identified the changed understanding of the following as all relevant to Robert's changed-science claim:

- The potential lethality of short-distance falls;
- The potential for a "lucid interval" prior to collapse or the onset of signs/symptoms;
- The lack of specificity of retinal hemorrhage (RH) for inflicted injury or a specific injury mechanism;
- The lack of specificity of subdural hemorrhage (SDH) in an interhemispheric intracranial distribution for inflicted trauma;
- The role of traumatic axonal injury (TAI), often referred to as diffuse axonal injury (DAI) in pediatric brain damage;

- The application of the principles of biomechanics to infant injury evaluation;
- The natural disease "mimics" for inflicted trauma, and the concept of a "differential diagnosis";
- The improbability of "shaking" as a mechanism for brain injury;
- The misconception that "confessions" support a medical diagnosis of shaking;
- The misinterpretation of injuries due to resuscitation or medical intervention as being due to inflicted trauma;
- The application of principles of evidence-based medicine to evaluate the scientific literature regarding pediatric head injuries; and
- The role that a child-abuse bias can play in distorting the medical inquiry at various stages from presentation of injury through autopsy.

APPX3.

Robert continued to amass evidence, through an evidentiary hearing, to support his 2016 habeas application until that proceeding was closed in 2021. But none of his new evidence about the evolution of scientific understanding was even mentioned in the previous habeas judge's subsequent Findings, upon which the CCA then relied.

Likewise, the previous habeas judge's Findings did not mention the extensive evidence, since fully corroborated by multiple specialists, of how Nikki's lungs were profoundly diseased with undiagnosed pneumonia, how she had a significant bleeding disorder, DIC, and how she had a toxic level of respiratory-suppressing prescription drugs in her system at the time of her death. These circumstances fully

explain why Nikki ceased breathing at some point after the short fall from bed when she may have sustained the single impact on the back of her head and then developed a subdural hematoma and cerebral edema, as her brain strained for oxygen, as verified by the long-lost CAT scans. Those critical, exculpatory scans were also not mentioned in the previous habeas judge's Findings.

Likewise, none of the voluminous studies and scholarly articles adduced to demonstrate how science has evolved and to debunk the State's SBS trial causation theory and the opinion that a homicide had occurred were mentioned in the previous habeas judge's Findings. Moreover, the State's baseless "hearsay" objections to admitting most of this material scholarship were sustained.[85] But some of this same

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[85] *See* 11EHRR at APPX20 (1971 A. Norman Guthkelch, *Infantile Subdural Haematoma and Its Relationship to Whiplash Injuries*); APPX21 (1972 John Caffey, *On the Theory and Practice of Shaking Infants*); APPX22 (2001, National Association of Medical Examiners *Fatal Abusive Head Injuries in Infants and Young Children*); APPX23 (2001 American Academy of Pediatrics position paper/technical report, *Shaken Baby Syndrome Rotational Cranial Injuries*), APPX24 (2001 John Plunkett, *Fatal Pediatric Head Injuries Caused by Short-Distance Falls*, AMERICAN JOURNAL OF FORENSIC MEDICINE AND PATHOLOGY); APPX25 (2003, Michael Prange, Duhaime, et al., *Anthropomorphic simulations of falls, shakes, and inflicted impacts in infants*, JOURNAL OF NEUROSURGERY); APPX26 (2008 Executive Summary of the Goudge Inquiry); APPX27 (2007, Ken Monson, et al, *Head Exposure Levels in Pediatric Falls*, JOURNAL OF NEUROTRAUMA); APPX28 (2009, Chris Van Ee, John Plunkett, et al: *Child ATD reconstruction of a fatal pediatric fall*); APPX29 (2009, *Statement from the American Academy of Pediatrics on Abusive Head Trauma*); APPX30 (2011, Patrick D Barnes, I*maging of Nonaccidental Injury and the Mimics: Issues and Controversies in the Era of*

scholarship, reflecting significant changes in scientific understanding that the previous habeas judge disregarded, has now been acknowledged in *Ex parte Roark*.[86]

Evidence-Based Medicine, RADIOLOGIC CLINICS, Vol. 49, Issue 1, 205–229); APPX32 (2014, Dr. Jan Leetsma, FORENSIC NEUROPATHOLOGY 3 ed.); APPX33 (2016, Swedish Agency for Health Technology Assessment and Assessment of Social Services, *Traumatic shaking: The role of the triad in medical investigations of suspected traumatic shaking, A systematic review*"); APPX33A (2016, Appendix to the Swedish study identifying studies with "high risk of bias"); APPX34A 2012, (Nicole G. Ibrahim, et al *Influence of age and fall type on head injuries in infants and toddlers*, INT. J. DEVL. NEUROSCIENCE); APPX34B (2013, Scheimberg et al., *Nontraumatic in intradural and subdural hemorrhage*); APPX34C (2013, Patrick Lantz, *Extensive hemorrhagic retinopathy*); APPX34D (2017, Niels Lynøe, MD, PhD, et al., *Insufficient Evidence for Shaken Baby Syndrome, Stockholm Centre for Healthcare Ethics*); APPX34E (2019 Lynow & Eriksson, *Hidden Clinical Values and Overestimation of Shaken Baby Cases*, CLINICAL ETHICS); APPX34F (2012, A.N. Guthkelch, *Problems of Infant Retino-Dural Hemorrhage with Minimal External Injury*, 12 HOUS. J. HEALTH L. & POLICY); APPX129 (NG Ibrahim, Abstracts of scientific articles, including *The Response of Toddler and Infant Heads During Vigorous Shaking*); APPX131 (Prange et al., Mechanical Properties and Anthropometry […]',); APPX132 (Lloyd, Dissertation, S*tudies of the Human Head*); APPX133 (2009, CRABI-6 Anthropomorphic Test Device).

[86] Moreover, since Robert's 2021 evidentiary hearing, scholarship has continued to reflect the evolution in scientific understanding. Some additional scholarship to which Robert has previously directed the courts includes:; 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 (2012); 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 (2013); Göran Elinder et al., *Traumatic Shaking: The Role of the Triad in Medical Investigations of Suspected Traumatic Shaking*, Report No. 255E (Oct. 2016), available in English translation in 2018; J. Mack, et al., *Anatomy and Development for the meninges: Implications for Subdural Collections and CSF Circulation*, 39 PEDIATRIC RADIOLOGY (2019); S.M. Zahl, et

1. **Robert Roberson adduced evidence showing that the SBS assumption that "short-distance falls cannot harm" has been debunked.**

Robert, like Andrew, adduced new, unrebutted scientific evidence that short falls can produce serious, even fatal injuries, including a lengthy declaration from

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al., *Examining Perinatal Subdural Haematoma as an Aetiology of Extra-Axial Hygroma and Chronic Subdural Haematoma*, ACTA PAEDIATRICA (2019); 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 (2020); I. Thiblin et al., *Medical Findings and Symptoms in Infants Exposed to Witnessed or Admitted Abusive Shaking: A Nationwide Registry Study*, 15 PLOS ONE (2020); 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 (2021); I. Thiblin, et al., *Retinal Hemorrhage in Infants Investigated for Suspected Maltreatment is Strongly Correlated with Intracranial Pathology*, 111 ACTA PAEDIATRICA (2022); K Wester, et al., *Re-evaluation of Medical Findings in Alleged Shaken Baby Syndrome and Abusive Head Trauma in Norwegian Courts Fails to Support Abuse Diagnoses*, 111 ACTA PAEDIATRICA (2022); W. Squier, *Infant Retinal Haemorrhages Correlate with Chronic Subdural Haemorrhage, not Shaking*, 111 ACTA PAEDIATRICA (2022); D. Vaslow, *Chronic Subdural Hemorrhage Predisposes to Development of Cerebral Venous Thrombosis and Associated Retinal Hemorrhages and Subdural Bleeds in Infants*, 35 NEURORADIOLOGY JOURNAL (2022); C. Brook, *Evidence for significant misdiagnosis of abusive head trauma in pediBIRN data*, FOR. SCI. INT'L: SYNERGY (2023); J. Tibballs and N. Bhatia, *Medical and Legal Uncertainties and Controversies in "Shaken Baby Syndrome" or Infant "Abusive Head Trauma,"* J. LAW & MED. (May 2024); C. Brook, *Retino-dural hemorrhages in infants are markers of degree of intracranial pathology, not of violent shaking*, ANN. CHILD NEUR. SOC. 00(00)(2024); C. Brook, *Retino-dural hemorrhages in infants are markers of degree of intracranial pathology, not of violent shaking*, ANN. CHILD NEUR. SOC. 00(00)(2024); 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). *See* 2024EX20–2024EX351.

Dr. John Plunkett, who testified in Andrew Roark's case but had passed away before Robert Roberson's evidentiary hearing began. APPX3.

Dr. Plunkett's testimony and contributions to the evolution in scientific understanding of the SBS hypothesis is described favorably and at length in *Ex parte Roark*, 707 S.W.3d 157 (Tex. Crim. App. 2024). *See, e.g.*:

- *Id.* at 176: noting Dr. Plunkett's role in the Roark habeas proceeding and in that of Cathy Henderson as an expert who explained "an acceptance of the scientific community's current view that short-distance falls can cause serious injury or death."

- *Id.*: describing and quoting Dr. Plunkett's 2014 testimony in Roark's case in which he "was explicit that what the medical community [now] thought" that a short-distance fall could cause the kind of injury seen in the child Roark had been accused of harming and thus there is now "no question that what Mr. Roark said happened could have occurred."

- *Id.*: observing that, in the Roark habeas proceeding, "[t]he trial court made findings of fact regarding short-distance falls in conformity with Dr. Plunkett's testimony."

- *Id.*: recognizing the role Dr. Plunkett's research played in a recantation by medical examiner Dr. Bayardo of Bexar County in another child-death case, which then led to a grant of habeas relief in the death-penalty case of Cathy Henderson.

- *Id.* at 177–78: quoting extensively from Dr. Plunkett's testimony in *Ex parte Henderson*.

- *Id.* at 179: finding that the Roark habeas court, relying extensively on Dr. Plunkett's testimony about "the advancement, knowledge, and acceptance of lucid intervals in patients with subdural hematomas," had found that "new scientific evidence has developed since Applicant's trial that refuted trial testimony" that the infant in Roark "would not have appeared neurologically

normal from the onset of injury" and there could have been no "lucid interval" (as State's witnesses Dr. Squires and Dr. Urban testified in Robert's trial).

- *Id.* at 186: finding the testimony of Dr. Plunkett (and others) "to be credible in demonstrating the change in medical science."

Multiple experts testified in Robert's -03 habeas proceeding 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. The principal outlier was forensic pathologist, John Plunkett, whose published paper, *Fatal Pediatric Head Injuries Caused by Short-Distance Falls*, had been the first to challenge this key component of SBS cases; his 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.

Biomechanical engineer Dr. Monson described the biomechanical research that ultimately validated Dr. Plunkett's intuitions. APPX3; 5EHRR27–105, 104–105. Robert adduced contemporary scientific studies, including a 2018 study, demonstrating that short falls can cause the exact kind of internal bleeding observed in Nikki when she first arrived at the hospital (as seen in the CAT scans taken of her head). 5EHRR215–16, 140–143 (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 scientifically incorrect. 5EHRR27–28, 104–05.

2. Robert Roberson adduced evidence showing that the SBS assumption that "shaking" can cause the kind of injuries attested to has been debunked.

Robert, like Andrew, adduced extensive testimony from the field of biomechanical engineering regarding the lack of proof that shaking can produce any aspect of the triad. For instance, Dr. Monson 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. *See also Ex parte Roark*, 707 S.W.3d at 178–79 (quoting a paper by a leading proponent of SBS admitting "Unfortunately, nobody has yet marshaled a coherent and comprehensive argument in support of shaking as a causal mechanism for abusive head injury."); *see also* 2023 TREATISE at 232 ("there are no definitive experimental studies of the proposed mechanism of SBS that demonstrate that shaking, in any form, can produce the intracranial findings associated with the triad[.] Further, shaking should cause precursor trauma to the torso and cervical spine that is typically not observed in cases of alleged SBS/AHT.").

When asked about Dr. Urban's trial testimony stating that Nikki's neck was not injured because it was "weak" and yet "protected," Dr. Monson testified bluntly: "It just doesn't make sense." 5EHRR101. As he explained, any head acceleration generated by shaking would generate force experienced 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 testimony Robert adduced from Dr. Monson is analogous to the testimony of biomechanical engineering expert Dr. Chris Van Ee, whom the CCA quotes favorably in *Ex parte Roark*. *See* 707 S.W.3d at 178.

3. Robert Roberson adduced evidence showing that the SBS assumption that "lucid intervals are not possible" has been debunked.

Robert, like Andrew, adduced new, unrebutted scientific evidence that children can experience a lucid interval of many hours or even days before subdural bleeding causes a collapse. For instance, material new evidence was adduced that hypoxia, which can be caused by many things—including lung disease like pneumonia—can trigger a cascade of events that eventually, after a lucid period of many hours, days, or even weeks, produces the triad, only detected after the child collapses. 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. 5EHRR28–32. The child remained lucid but ended up dying a day later; an autopsy revealed that she had the triad. *Id.* Dr. Monson's unrebutted testimony established that trial testimony denying any possibility of a "lucid interval" was false. 5EHRR32. This evolution in scientific understanding entirely undercuts the corresponding assumption that Robert must have caused Nikki's condition because he was with her when she experienced her medical crisis, just as the same science undercuts the assumption that Andrew had caused BD's condition because he was with her when she experienced her medical crisis. *See* 42RR108–109 (Dr. Squires testifying in Robert's trial about assumption of immediate change in consciousness); 43RR81 (Dr. Urban same).

4. Robert Roberson adduced evidence showing that the SBS assumption that "retinal hemorrhages are a marker of shaking" has been debunked.

Robert, like Andrew, adduced new, unrebutted scientific evidence that retinal hemorrhages are ***not*** "proof" that shaking had occurred. Robert showed that, at the time of his trial, the medical community believed that the presence of retinal hemorrhage alone confirmed that shaking had taken place—which is how Dr. Squires testified. 3EHRR56. For many years, doctors were taught that bleeding in the eyes was proof of child abuse in the form of shaking. 3EHRR56; 3EHRR89.

Now it is recognized, and studies have demonstrated, that many phenomena can cause retinal hemorrhage that have nothing to do with trauma, let alone inflicted trauma. APPX34C; 8EHRR16 (explaining that retinal hemorrhaging is caused by hypoxia, which can even be caused by activities like climbing in high altitudes).

5. **Robert Roberson adduced evidence showing that the SBS assumption that "the triad proves inflicted trauma" has been debunked.**

Robert, like Andrew, adduced new, unrebutted scientific evidence that no sound science supports the SBS hypothesis used to convict him. Expert testimony, based on substantial new science, was adduced debunking all core tenets of the SBS theory of that time. Experts explained the significance of the first "meta-study" of SBS studies, published by an agency of the Swedish government in 2016. 4EHRR51–52; 8EHRR35–38. This same study is quoted in *Ex parte Roark*, 707 S.W.3d at 179.

The meta-study identifies significant defects in the literature endorsing SBS/AHT as a causation theory. APPX34D. Researchers found no high-quality articles or scientific studies supporting the SBS/AHT hypothesis or meeting the criteria for sound science. 4EHRR52–53. Moreover, the Swedish meta-study identifies specific methodological problems with each individual study. An appendix to the study highlights the absence of any uniform diagnostic criteria for SBS/AHT, unlike other medical conditions. 4EHRR53–54. The meta-study also notes 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 an SBS/AHT diagnosis "proves" there was shaking. 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. But it is of paramount importance as the first (and only) meta-study to date. It was undertaken by an agency of the Swedish government in response to widespread concern about the lack of scientific support for the core SBS/AHT assumptions that (1) shaking can cause certain intracranial conditions (the triad) and (2) if these conditions are found, they are proof of shaking. This first and only comprehensive, systematic, peer review of articles claiming support for the SBS/AHT hypothesis was only available after the -03 application was filed, as it was first released in late 2016 and translated into English in 2017. 8EHRR34–36.

Courts in other jurisdictions reviewing SBS/AHT cases have recognized the Swedish meta-study as compelling "new evidence" relevant to actual innocence claims warranting habeas relief. *See, e.g.*, *Jones v. State*, No. 0087, 2021 WL 346552, n.26 (Md. Ct. Sp. App., Feb. 2, 2021). Most notably, relying in part on the Swedish meta-study, the New Jersey Supreme Court recently concluded that opinion

testimony about SBS/AHT is not sufficiently reliable to be admissible in most instances because it is not generally accepted by the relevant scientific community of biomechanics. *See State v. Nieves*, 345 A.3d 1127 (N.J. 2025) (affirming exclusion of SBS expert opinion under *Frye* because there is no support for the proposition that shaking alone can cause the SBS triad symptoms).[87]

Ex parte Roark and *Nieves* recognize (1) that the medical and biomechanical bases for diagnosing SBS/AHT have changed materially since people like Robert and Andrew were convicted; (2) that experts' opinions offered in these older trials are not defensible in light of intervening evolution in scientific understanding; and (3) that convictions dependent on seriously undermined forensic theories raise due

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[87] This significant decision was previously filed in this Court and the CCA. Important, the "shaking alone" problem addressed in *Nieves* is not somehow circumvented by positing, as Dr. Urban did, that there were "multiple impacts" without external evidence of such impacts. With the phrase "shaking alone," the biomechanics research distinguishes between shaking produced by a human alone as opposed to whiplash generated mechanically resulting in an impact equivalent to a car going at least 30 MPH and slamming on its brakes—forces that no human has ever been able to generate. *See, e.g., People of Illinois v. Cameron Valdez*, 18-CF-370 (5th Judicial Circuit Ill. Aug. 26, 2025) (*Valdez*), describing some of the same biomechanical research discussed in *Ex parte Roark* and barring testimony from SBS/AHT proponent Dr. Sandeep Narang about his specific SBS/AHT causation theory because: "The diagnosis of SBS/AHT is not solely a medical opinion or diagnosis and is not generally accepted by all relevant scientific fields involved in the 'diagnosis'" and holding "There is simply ***no science that supports Dr. Narang's speculative opinion*** that [the child] more probably than not suffered from intentional or abusive head trauma." *Id.* In *Valdez*, the State had accused a father of causing his daughter's intracranial condition through SBS and "blunt force trauma" defined by the State's experts at trial as an unknown combination of shaking and blunt impact, just as Dr. Urban did in this case

process concerns. The CCA and New Jersey's highest court are not, however, alone in finding that new science has undermined the validity of SBS convictions. Since Robert's 2003 trial, and with growing frequency, courts have been recognizing the same developments in the scientific understanding of the SBS hypothesis and granting relief.[88] Recently, on June 8, 2026, the 252nd District Court in Jefferson County, Texas, resolved a remand from the CCA involving virtually the same question currently before this Court. *See Ex parte Garner*, F03-89302-B (252nd Dist. Ct., Jefferson County, Texas).[89] Specifically, the Applicant, Luther Kenneth Garner II, had challenged his SBS conviction under Article 11.073, arguing that new medical and scientific evidence relating to SBS that was unavailable during his 2004 trial, contradicts the State's experts' trial testimony, and that this unavailable evidence, had it been presented, by a preponderance of the evidence Applicant would not have been convicted; and the trial court was asked to assess that claim in light of

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[88] *See, e.g., People v. Baumer*, 2007 WL 1095236 (Mich. Ct. App. Apr. 12, 2007); *Wisconsin v. Edmunds*, 746 N.W.2d 590 (Wis. Ct. App. 2008); *New York v. Bailey*, 999 N.Y.S.2d 713 (N.Y. County Court 2014), *affirmed* 41 N.Y.S.3d 625 (N.Y. Supreme Court, Appellate Division 2016); *People v. Del Prete*, 92 N.E.3d 435 (Ill. App. Ct. 2017); *Hanson v. Baker*, 2018 WL 10400454 (D. Nevada 2018) (unpub.); *Debelbot v. State*, 839 S.E.2d 513 (Ga. 2020); *Jones v. Maryland*, 2021 WL 346552 (Court of Special Appeals - Maryland 2021) (unpub.); *People v. Miller*, 2021 WL 1326733 (Mich. Ct. App. Apr. 8, 2021) (unpub.); *Ohio v. Butts*, 2023 WL 4883377 (Ohio Ct. App. 2023) (unpub.); *People v. Lemons*, 22 N.W.3d 42 (MI. 2024); *State v. Kitto*, 274 N.E.3d 864 (Ohio Ct. App. 2025); *Bennett v. Cain*, 3:24-cv-00613-KHJ, Doc. 36 (S.D. Miss. Apr. 1, 2026).

[89] A copy of these recent, highly relevant Findings will be filed separately for the Court's convenience.

Ex parte Roark. *Id.* at *3. Following a two-day live evidentiary hearing and the post-hearing submission of proposed findings of fact and conclusions of law, the court entered its Findings of Fact and Conclusions of Law, concluding that "there is a reasonable likelihood that the false testimony [relating to the SBS triad] affected the jury's judgment . . . thus, this Court believes the issue is cognizable and merits relief." *Id.* at *50.

The integrity of *Ex parte Roark* as a landmark decision depends on its fair and accurate application in Robert's markedly similar case where it is equally true that "doctors and literature brought forth under this writ application make it clear the State's medical witnesses were not malicious in any way because their testimonies were considered mainstream science at the time of trial," but there has since been "a marked shift" in the testimony they could provide today "concerning the effect of a short-distance fall to a child, the effect of shaking a child, … lucid intervals, retinal hemorrhaging, and SBS in general as applied" to Nikki's condition. *Ex parte Roark*, 707 S.W.3d at 185.

IV. **Robert Roberson's New Evidence Proving Nikki's Cause of Death Must Be Considered Because of the New Scientific Consensus Recognized in *Ex parte Roark*.**

In this brief, we do not attempt to marshal all the new evidence material to causation that has been amassed over the past ten years since Robert's conviction was first challenged utilizing Article 11.073. That laborious process unfolded as

intermittent disclosures of material information were made, often against great resistance; as resources became available to seek essential guidance from an array of experts; and as the relevant scientific fields continued to evolve. A comprehensive summary of the relevant evidence will wait for the proposed Findings of Fact and Conclusions of Law. That evidence shows not only that the science underlying the SBS diagnosis made in 2002, based on the scientific consensus of that era, has changed; the correlated opinions of multiple experts from a range of scientific and medical disciplines shows that ***there was no crime at all.***

But the Court will note that the CCA, in *Ex parte Robbins*, made clear that an Article 11.073 claim is less onerous than an Actual Innocence claim where the focus is on the "relevant scientific evidence that contradicts scientific evidence relied on by the state at trial." 478 S.W.3d at 690. And of course, the most specific guidance as to how to assess the specific Article 11.073 claim at issue here is found in *Ex parte Roark*, as it involves the exact same "changed science." Robert's habeas record overwhelmingly establishes that the same result obtained in *Ex parte Roark* is warranted here: a finding that ***"scientific knowledge has evolved regarding SBS and its application in Applicant's case"*** and a finding that ***"[t]he admissible scientific testimony at trial today would likely yield an acquittal."*** *Ex parte Roark*, 707 S.W.3d at 185.

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 (intracranial bleeding, brain swelling, and retinal hemorrhages)—because those ***same*** conditions are associated with a host of naturally occurring illnesses, including pneumonia, as well as accidental short falls with head impact.[90]

A. Causation evidence adduced in the -03 proceeding that must be considered in assessing the Article 11.073 claim

Robert adduced significant new evidence from multiple experts that there is no evidence of multiple impacts and that Nikki's death was not a homicide. A radiologist, Dr. Julie Mack, interpreted long-lost CAT scans of Nikki's head and issued a report—not mentioned in the previous habeas judge's Findings. APPX93. Drs. Auer, Ophoven, Wigren, and Monson all relied on that report from the only radiologist to provide evidence in the -03 proceeding. 3EHRR85; 4EHRR100; 5EHRR25, 170: 8EHRR14. These experts concluded that the radiological evidence shows that Nikki sustained a single impact to the right back of her head where a "goose egg" formed and a small subdural bleed commenced. 8EHRR78. They opined that the single impact was consistent with Robert's report that Nikki had

[90] *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).

fallen out of bed and inconsistent with Dr. Urban's testimony regarding multiple impact sites. APPX93 ("The imaging findings show definitive evidence of ***an*** impact-related insult to the right side of the head."). As Dr. Auer opined:

> there has been an impact to the skull on the right side posteriorly where the blue arrow has been inserted by Dr. Mack presumably; and there is some soft tissue swelling, which would be called in English a goose egg or a boo-boo if a child hit themselves; and this is the site of a single impact. It is not sufficient to fracture the skull, and we will see that the skull is actually very thin [at that point], only about an eighth of an inch.

8EHRR19-20; *see also* APPX110A. The critical questions are: what likely made Nikki vulnerable to an unbraced fall with head impact and, thereafter, to hypoxia, additional intracranial bleeding and brain swelling, and breathing arrest?

In light of current scientific understanding and material new information about Nikki's condition at the time of her collapse, highly qualified experts concluded that there was no evidence that Nikki's death was caused by abuse but was instead the result of natural and accidental causes. For instance:

- **Dr. Janice Ophoven**, a licensed M.D. since 1971, board certified in forensic pathology and anatomic pathology with special training and experience in pediatrics and pediatric pathology, concluded that Nikki's death should not have been designated a homicide, in part because there is no scientific basis for looking at an impact site and concluding whether it was intentionally inflicted or the result of an accidental fall. Dr. Ophoven opined that Nikki's internal condition simply meant that she had suffered irreversible damage from oxygen deprivation. Dr. Ophoven explained that anyone who stops breathing and has their heart stop is at risk for the same constellation of internal head conditions. If the brain is deprived of oxygen, brain swelling occurs. Then, as pressure against the brain increases, bleeding into the eyes, which are connected to the brain, can occur. Dr. Ophoven was confident that

the precipitating event was not "shaking" or "multiple impacts" to the head. Moreover, she explained that Dr. Urban's autopsy pictures, to which the jury had been subjected, were misleading because they did not reflect Nikki's condition when she was brought to the ER, were taken during the autopsy, performed after multiple intervening events had affected Nikki's internal and external condition, and her testimony about the photos did not account for or even acknowledge Nikki's DIC. 3EHRR13–81; APPX2.

- **Dr. Ken Monson** explained the relevant scientific literature and studies showing that the SBS 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 (CAT scans and autopsy photographs) showing only a single impact site to the back of Nikki's head that was consistent with the report that she had sustained a short fall; (3) evidence in the toxicology report of 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 medical crisis, 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 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 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 blood work and medical treatment of DIC and evidence in Nikki's lung tissue of advanced interstitial viral pneumonia. He explained that DIC would have affected internal blood flow and her vulnerability to bruising. 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 medical crisis—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.

In the -03 proceeding, Robert also adduced 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 most 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 struck against a blunt surface 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 (body depleted of oxygen). APPXC; 8EHRR16. Evidence was adduced that, by 2009, the AAP had acknowledged that doctors must perform a "differential diagnosis" to rule out the ever-growing number of medical conditions by then associated with the same triad. APPX118.

Because the triad cannot legitimately be seen as a *res ipsa loquitur* of abuse, forensic ethics too now demand 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.

B. Causation evidence proffered since the -03 proceeding that must be considered in assessing the Article 11.073 claim

Building on the evidence developed in the -03 habeas proceeding, additional medical and scientific evidence was amassed—including detailed reports from specialists with unassailable credentials. These new expert reports show that Nikki died of severe viral and bacterial pneumonia that progressed to sepsis and then septic shock and likely caused her DIC, a bleeding disorder, none of which was taken into account when SBS was diagnosed or when the autopsy was performed.

Nikki's pneumonia was first identified by forensic pathologist Dr. Carl Wigren in 2018 upon studying the autopsy slides, which included some lung tissue.

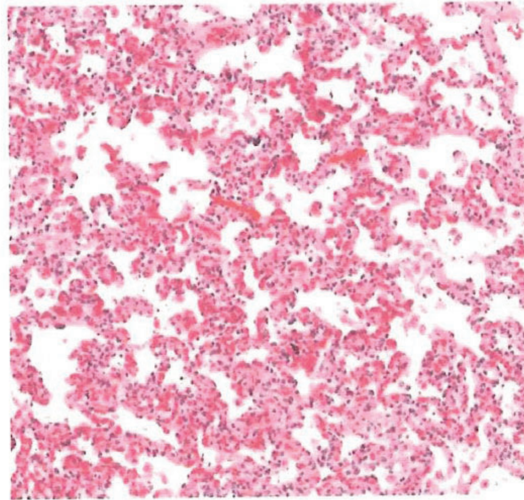
5EHRR180 (explaining the process of "looking at the slides" and noticing "that the lungs of Nikki looked like they were involved with a pneumonia and not just a hospital-acquired pneumonia but a more chronic type of pneumonia. And through my understanding of the medical records, in the week prior to death, Nikki had been quite ill with temperatures reaching 104.5," supporting his concern that "there was indeed just another process going on here that was maybe a pneumonia").

Thereafter, Dr. Wigren's findings were verified by neuropathologist Dr. Roland Auer who had been working with a lung pathologist and attested to his own findings in 2021. *See, e.g.*, APPX110.

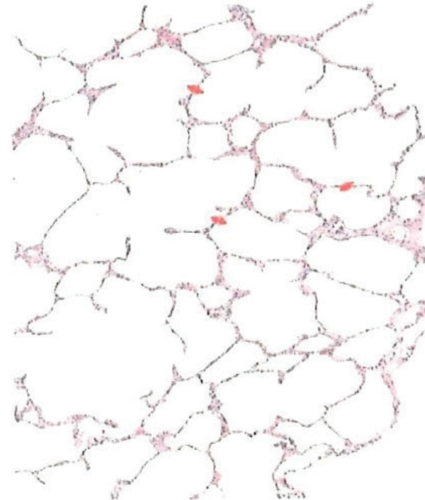
Then, the pneumonia finding was uncontrovertibly confirmed and expounded upon by Dr. Franics Green, an expert in lung pathology with over 46 years of experience. Dr. Green's detailed report includes photographs taken of Nikki's lung tissue under a microscope. These are not artistic renderings but photographs, including the following images comparing Nikki's lung tissue to that of normal lung interstitium, demonstrating how the virus was colonizing her lungs at the cellular level:

3. Chronic Interstitial Pneumonia

Nikki Curtis Interstitial Pneumonia



Normal Interstitium



2024EX5.

Dr. Green's report also includes photographic evidence documenting and describing multiple pathological features observed in Nikki's respiratory system that show how her infected lungs had likely commenced weeks before she ceased breathing. For example:

Figure 1

Viral Tracheitis. Low power scan of section of Nikki Curtis's trachea at the level of the thyroid gland. The cartilaginous plates (blue) are intact, and the airway is open. A collection of enlarged mucus glands is seen (arrow). A finding indicative of a response to chronic (weeks to months) infection.

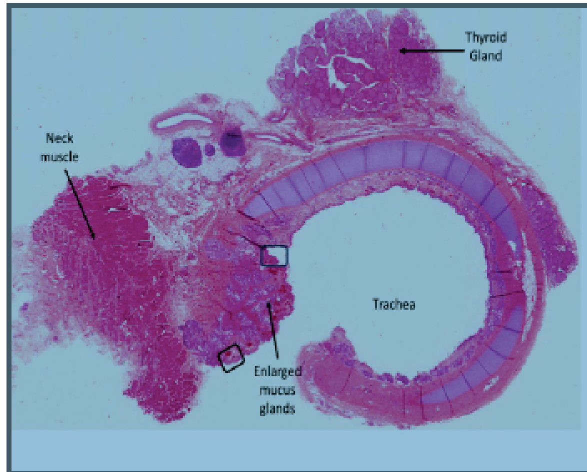
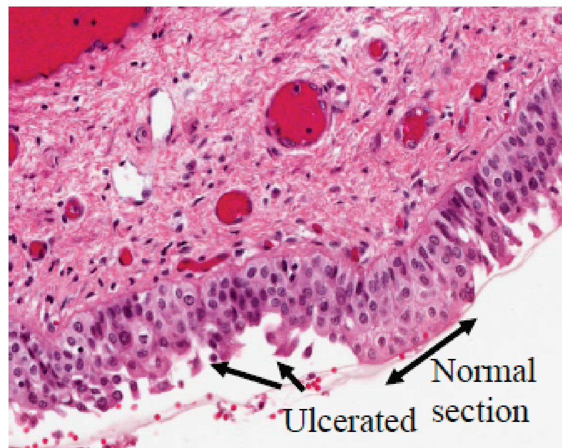


Figure 2

Viral tracheitis. Higher magnification of the tracheal mucosa shown in figure 1 (lower box). Note the small normal section with adjacent acute ulceration. 90% or more of Nikki's airway was not normal. Examples of the abnormalities are shown in figures 3 and 4.



Id.

Dr. Green opined that Nikki's fatal lung disease was likely hastened by the contra-indicated medications, prescribed to her by doctors who had failed to appreciate the severity of her respiratory infection. 2024EX5. That opinion was confirmed and expounded upon by Dr. Keenan Bora, an expert in medical toxicology. 2024EX7. Dr. Green also explained that Nikki's advanced lung infection caused a bleeding disorder (DIC) as evidenced by CDCM's blood test results

(APPX11) that were long overlooked. 2024EX5. Nikki's DIC entirely explains the minor external bruises and intracranial bleeding, along with the hypoxia caused by her undiagnosed pneumonia. *Id.*; *see also* APPX110.

There was no homicide. The correlated opinions of yet more experts, from a range of medical specialties, explain exactly how Nikki died, corroborating and elaborating upon the opinions previously offered by forensic pathologist Dr. Bonnell, pediatric forensic pathologist Dr. Ophoven, forensic pathologist Dr. Wigren, and neuropathologist Dr. Auer:

- **Dr. Francis Green**, an **expert in lung pathology** concluded 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. 2024EX5.

- **Dr. Julie Mack**, an **expert in pediatric radiology**, concluded that the initial CAT scans of Nikki's head show only a single 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). 2024EX6.

- **Dr. Keenan Bora**, an **expert in medical toxicology and emergency room medicine**, 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 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. 2024EX7.

The current medical consensus, reflected in these experts' reports, is that a multi-disciplinary approach to assessing causation is ***required*** precisely because it is now known that a host of non-abuse phenomena can cause intracranial bleeding, brain swelling, and retinal hemorrhages. Thus, the triad of intracranial symptoms cannot be deemed proof of inflicted head trauma, as Drs. Squires and Urban opined in Robert's 2003 trial. 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—as well as DIC.[91]

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[91] *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

The new expert opinions, reflecting different medical specialties, can now explain precisely how Nikki died. These correlated opinions were only possible because of new evidence that emerged over the course of the previous -03 habeas proceeding. This new evidence was thus not available when Robert's -03 application was filed in 2016. *See, e.g., People v. Miller*, 2021 WL 1326733 (Mich. Ct. Appeals. 2021) (granting relief from SBS conviction where new evidence included pneumonia as an alternative cause of the child's death). In *Miller*, the Michigan court recognized that pneumonia, as a disease, was plainly known at the time of trial, but "the new interpretation" of that diagnosis was not known to defense counsel at the time and "not potentially available given the state of medical knowledge at the time." *Id.* at *3. The court recognized that the "scientific methodology underlying both the

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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).

conclusiveness of the triad and the absence of another cause of death" had "changed dramatically since Miller's trial." *Id.*

When Robert was tried, no medical expert had diagnosed Nikki's pneumonia or considered the combination of her illness, dangerous medications, and a short fall with head impact in the occipital region as explaining Nikki's condition and subsequent death. Because of the mistaken, outdated SBS medical consensus associated with the triad, the State's trial experts presumed inflicted trauma. The new evidence proves that Nikki's condition, including intracranial bleeding and light bruises, resulted from a severe lung infection and a bleeding disorder (DIC) triggered by that infection, which led to a systemic failure known as sepsis.

Nikki's medical condition was complicated, as evidenced by her doctors' struggle to understand her history of breathing apnea, her many unresolved infections, and, ultimately, her fatal pneumonia. Dr. Squires and Dr. Urban missed Nikki's DIC diagnosis or ignored its now-obvious significance. Dr. Urban compounded the problem by never looking at the head CAT scans or any other medical records. It is now widely recognized that a complete medical understanding requires a comprehensive, multidisciplinary inquiry. Meanwhile, science has continued to evolve—dramatically since the 2002 SBS diagnosis was made.[92]

[92] *See* 2023 Treatise at 35 (inventorying some of the many non-traumatic, naturally occurring causes of the triad that have gradually prompted the medical

Numerous scientific studies, unavailable in 2016 or even during the -03 evidentiary hearing, show that SBS/AHT has never been validated by evidence-based medicine and new, statistical analyses show that SBS/AHT has been significantly over-diagnosed.[93] Yet pediatric and child abuse professionals, led by Sandeep Narang, continue to defend it.[94] The current version of SBS/AHT as a diagnosis of last resort

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profession, including the AAP, to recognize that a differential diagnosis is essential before abuse can be posited).

[93] *See, e.g.*, C. Brook, *Retino-dural hemorrhages in infants are markers of degree of intracranial pathology, not of violent shaking*, Ann. Child Neur. Soc. 00(00): 1–7 (2024); J. Tibballs and N. Bhatia, *Medical and Legal Uncertainties and Controversies in "Shaken Baby Syndrome" or Infant "Abusive Head Trauma,"* J. LAW & MED. 151–184 (May 2024) (analysis critiquing use of the triad to diagnose "severe deliberate shaking with or without head trauma," despite the exceptionally poor quality of the reputed scientific studies supporting the hypothesis, and recommending "abandonment of the inherently inculpatory diagnostic terms 'shaken baby syndrome' and 'abusive head trauma'").

[94] The State has repeatedly invoked Dr. Narang as an authority, although he has never reviewed the evidence amassed in this case or been retained by either party. Dr. Narang has, however, been a leader in fighting ***against*** the scientific criticism of SBS/AHT for decades. He is not a scientist. He is a lawyer and a "child abuse pediatrician" who has frequently testified for the prosecution in countless SBS/AHT case—including ones that have resulted in reversals or exonerations. *See, e.g.*, *People v. Bailey*, 999 N.Y.S.2d 713, 725 (N.Y. 2014)—one of the cases cited in *Ex parte Roark*. But even recent publications by Dr. Narang, cited by Judge Yeary in his dissent to the remand, acknowledge that a differential diagnosis is now required. *See also* Am. Acad. of Pediatrics, *Abusive Head Trauma in Infants and Children: Technical Report,* 155 PEDIATRICS e2024070457, 37 (2025). The AAP Technical Report collects and endorses literature that it claims supports the current, revised version of SBS/AHT; an analysis of the references, however, has demonstrated that correct diagnostic features remain highly vulnerable to incorporation bias and circular reasoning. *See* Chris Brook et al., *A critical review of the American Academy of Pediatrics technical report on abusive head trauma*, FORENSIC SCIENCE INTERNATIONAL: SYNERGY, Vol.11 (2025).

bears no resemblance to the version endorsed when Robert was accused and tried based on Dr. Squires' SBS diagnosis.

As *Ex parte Roark* shows, the law needs to catch up with the science—not be derailed by advocacy groups and individual doctors who have staked their careers on SBS/AHT being a legitimate diagnostic approach when no science has validated those intensely held beliefs. It is time for irrationality to cease and for science and justice to prevail. As the CCA held in *Ex parte Roark*, the contemporary biomedical and biomechanical research has "evolved" and the admissible scientific testimony like that which Robert has adduced "would likely yield an acquittal." 707 S.W.3d at 185.

CONCLUSION

Nikki's death was a tragedy, not a crime. Nikki's infected lungs were straining for oxygen—for days or likely weeks. Unaware of her pneumonia, doctors prescribed medications that further suppressed her ability to take in life-sustaining oxygen. In the hours before she became unresponsive, she fell out of bed, which is how she may have sustained the minor "goose egg" on the back of her head, the only evidence of any blunt impact or notable external injury of any kind when her father brought her to the ER on January 31, 2002. Her condition was intracranial—not reflecting any injury to the brain itself, which had no bruises or other injuries; rather, the small vessels in the dura membrane that encases the brain had begun to strain

and then leak blood (subdural hematoma), reflecting a bleeding disorder arising from the undiagnosed pneumonia that was causing systemic failure.

Robert woke up to a nightmare, finding his beloved daughter Nikki comatose with blue lips. He tried to revive her, but he, an autistic father with a ninth-grade Special Ed education, had no medical training of any kind. In a state of shock, he rushed her to the ER where medical personnel revived her heart, but she was already brain dead. Her brain had become non-perfused/dead because her undiagnosed pneumonia, made worse by respiratory-suppressing medications, had deprived her of sufficient oxygen. The brain becomes irreversibly non-perfused in just 10-12 minutes. After Nikki's brain had already shut down, blood being pumped from her resuscitated heart could no longer enter her brain. That blood then pooled outside of her oxygen-deprived, swollen brain, furthering compounding her intracranial symptoms. Because the medical consensus at the time (SBS) permitted presuming abuse upon observing these kinds of intracranial symptoms, no one considered Nikki's medical history, much less did the painstaking examination of her lung tissue conducted two decades later by Dr. Green, an expert with nearly 50-years experience studying lung disease. The tragic internal consequences of the progression of Nikki's undiagnosed pneumonia to a bleeding disorder (DIC), sepsis, then breathing and cardiac arrest were viewed as signs of head trauma—presumed to have been "inflicted" despite any outward signs of battery.

Current science entirely disproves the SBS presumption of abuse and exposes the multiple factors that Dr. Squires and Dr. Urban should have, but did not, consider. The robust scientific and medical evidence Robert has amassed post conviction shows that he has easily carried the burden imposed by Article 11.073.[95]

On October 9, 2025, the CCA reconsidered Robert's -05 habeas application and remanded his SBS changed-science claim that "*Ex parte Roark* [] Establishes that [Applicant] Is Entitled to Relief under Article 11.073." This Court is now charged with applying to Robert's case the CCA's decision in Andrew Roark's markedly similar SBS case, in which the CCA recognized how the SBS hypothesis has changed considerably since these men were tried.

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[95] Under Article 11.073 of the Texas Code of Criminal Procedure, an applicant is entitled to relief in the form of a new trial upon showing that:

> (1) relevant scientific evidence is currently available and, at the time of the applicant's conviction, the scientific evidence was not available or otherwise ascertainable through the exercise of reasonable diligence, or that the new scientific evidence contradicts scientific evidence relied on by the state at trial;
>
> (2) the newly available scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the application; and
>
> (3) had the scientific evidence been presented at trial, on the preponderance of the evidence, the applicant would not have been convicted.

TEX. CODE CRIM. PROC. art. 11.073.

Applying *Ex parte Roark* to this case will require making extensive findings of fact, identifying the material similarities and differences between the two cases in terms of (1) the cause-of-injury evidence adduced by the State to obtain the convictions and (2) the evidence amassed post-conviction that contradicts and undermines that trial evidence. That is, per Article 11.073 caselaw, this Court's focus must be on the "relevant scientific evidence that contradicts scientific evidence relied on by the state at trial." *Robbins II*, 478 S.W.3d at 690.

Ex parte Roark specifically holds that (1) contemporary scientific studies demonstrate that short-distance falls with head impact can cause subdural hematomas; (2) lucid intervals are possible before intracranial conditions progress to a point such that a child becomes symptomatic; (3) peer-reviewed studies have failed to establish that shaking can ever produce forces sufficient to cause the classic SBS "triad" but would instead first injure the neck; and (4) any experts who endeavored to testify as Dr. Squires, Dr. Urban, and other medical personnel did during Robert's trial would be confronted today with "twenty years of reputable scientific evidence that contradicts their trial testimony." *Id.* at 187. Upon applying these determinations to the relevant evidence used to obtained Robert's conviction and to the evidence he has adduced in this habeas proceeding, the Court should strongly recommend vacatur of Robert's conviction and the grant of a new trial.

Respectfully submitted,

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June 12, 2026

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Lee Kovarsky		l.kovarsky@phillipsblack.org	6/12/2026 2:31:42 PM	SENT