

Cause No. 26162-A

EX PARTE

§ IN THE 3<sup>RD</sup> DISTRICT COURT

§ OF

ROBERT ROBERSON, III,  
Applicant

§ ANDERSON COUNTY, TEXAS

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**RESPONDENT'S ORIGINAL ANSWER**

RESPONDENT, the State of Texas, by and through its Assistant District Attorney for Anderson County, files this, its original answer, in the above-captioned cause, having been served with the applicant's subsequent application for writ of habeas corpus, pursuant to the requirements of Tex. Code Crim. Proc. art. 11.073 and 11.071, and would show the following:

**I.**

The applicant is confined pursuant to the judgment and sentence of the 3rd District Court of Anderson County, Texas, in cause number 26162 (hereinafter "the primary case"), wherein a jury convicted the applicant of the felony offense of capital murder. On February 14, 2003, after the jury affirmatively answered the first special issue and second special issue, the trial court assessed punishment at death by lethal injection. (RR48:44-46).

On June 20, 2007, the Court of Criminal Appeals affirmed the applicant's conviction in an unpublished opinion. *Robert Leslie Roberson, III v. The State of Texas*, No. AP-74,74671, (Tex. Crim. App. 2007)(not designated for publication).

On September 16, 2009, the Court of Criminal Appeals denied the applicants first and subsequent post-conviction writs of habeas corpus. *Ex Parte Robert Leslie Roberson*, WR-63081-01 & WR-63081-02, (Tex.Crim.App. 2009)(not designated for publication).

## II.

Respondent denies the factual allegations made in the instant application, except those supported by official court records, and offers the following additional reply:

The State presented eleven witnesses to prove the offense and the facts surrounding the offense. Applicant did not testify; the defense presented one witness at the guilt phase. Briefly, the evidence showed that on January 30, 2002, applicant caused the death of his daughter, Nikki Curtis, a child under six years of age.

The State's first witness was Kelly Gurganus, a nurse in the Palestine Regional Medical Center ER. She was working on January 31, 2002, when

applicant and Teddie Cox appeared in the ER with Nikki, who was blue and flaccid. As soon as Gurganus laid the child on a bed, she noticed Nikki was bruised around her head. As others worked on the child, Gurganus stepped out to ask applicant what had happened. Applicant said, "If I'd known that she'd fallen off the bed this far I would have never let her sleep with me." (RR41: 63-69). His story seemed immediately implausible, because it did not match her injuries, and Gurganus immediately arranged for police to be called. She asked applicant again what happened, and he told her Nikki had fallen off the bed at 5:30 in the morning and that he tried to wake her every hour after that. Applicant never asked how Nikki was doing, he did not cry, but he seemed nervous and anxious. (RR41: 69-71).

When the maternal grandparents, the Bowmans, arrived, Gurganus tried to take them to another room to talk, but applicant ran and interfered and prevented her from talking to them alone. When the SANE nurse arrived, they noted that the back of Nikki's head was mushy, and after they shaved the head to get a better look, they could not see bruising but saw that the back of the head was red and mushy. Applicant's only other remark to Gurganus came when he approached her at her computer and said, "I love my little girl. I would never mean to hurt her." (RR41: 71-73).

Robbin Odem, Ms. Gurganus' supervisor at the ER, was present that morning and responded to the "code blue" on the public address system. She saw Nikki in the ER, and Gurganus told her "I think we have a problem here." Odem went to talk with applicant and his fiancée, Teddie. Applicant told her that when he woke to come to the hospital to pick up Teddie, he woke Nikki, and as he was dressing her she did not respond, so he felt he needed to bring her in. He later told Odem Nikki fell off the bed, that he went to check her, found blood on her mouth, and cleaned it up. When Odem asked about the blood, he told her Nikki must have hit the table when she fell from the bed. Applicant seemed calm as they spoke; Teddie was tearful and upset. (RR41: 82-89).

Applicant told Odem that Nikki had been crying the night before, and that he let her sleep with him so that she would quit crying. He said she was calling for her mommy, her sissy, and Court-Court. He also told Odem that he would wake Nikki every couple of hours to check on her, which made Odem think something was wrong because "that's what you do to people who have head injuries." She asked applicant about waking the child and whether something had happened, and he then told her that Nikki fell off the bed. (RR41: 92-95).

Applicant first told Odem that Nikki fell "last night," and he then changed his story and said she fell about five o'clock in the morning. He eventually told Odem that he kept Nikki up from five until seven a.m.; applicant told her that Nikki just mainly laid there. He set his alarm to pick up Teddie and awoke at 10 a.m. (RR41: 95-97). It seemed odd to Odem that applicant said, "If anything happens to Nikki, I'll never forgive myself." Odem denied that applicant seemed confused that morning, saying that he was oriented as to person, place, time, and thing. (RR41: 98-100).

Andrea Sims, an emergency room staff nurse and sexual assault nurse examiner (SANE nurse) with 24 years of nursing experience, described her training as a SANE nurse and ER nurse, and she testified that she reviewed her records of her examination of Nikki, as well as Nikki's medical records and the autopsy report, before her testimony. Nikki's medical records were admitted as State's exhibit 2, and the SANE records were admitted as State's exhibit 3. (RR41: 101-08). State's exhibits 4, 6 through 14, and 16 through 23, photos of Nikki taken in the ER, were admitted. (RR41: 108-10). When Nikki was brought in, she was "lifeless," with some bruising to her chin. She was cyanotic, not breathing, and Dr. Konjoyan intubated her. CPR was performed. Sims testified that the ET tube generally does not damage the throat or face when inserted except for an occasional minor laceration of the

upper lip. Nikki was taken for a CT scan with hospital personnel bagging her to maintain air flow. Sims agreed with the consensus to call police, because Nikki looked like she had been injured intentionally. She had bruising across her chin and the back of her skull was mushy from swelling and blood pooling under the skin. (RR41: 111-16). There was bruising across Nikki's face like the mark of a hand, and bruising - ecchymosis - inside the outer ear on each side. She had bruising around her eyes consistent with a head injury. The handprint-shaped bruise showed an intentional injury. State's exhibit 7 showed the boggy area on the back of her head, with a mark like a fingernail mark, and she also had discoloration on her shoulder. State's exhibits 9 and 11 showed the bruising on her face. State's exhibit 19 showed the bruising in her ear. (RR41: 117-20).

Sims performed the sexual assault exam on Nikki at 10:40 a.m. She had seen applicant in the waiting room, and she testified that he was quiet, not upset as a normal parent would be. He started crying when police arrived. Before doing the sexual assault exam, she had no indication that Nikki had been sexually assaulted, but she did the exam because the police asked her to in light of the intentional injuries. Sims testified that head injuries as massive as Nikki's are usually the result of a car wreck or other massive impact. In her experience, children who fall from a bunk bed or

something similar have a bruise or small laceration, not a massive head injury. (RR41: 120-23).

Sims took a brief history from applicant, who stated that Nikki fell off the bed at 5 a.m., that he washed her off and kept her awake for two hours to make sure she was okay, and that when he awoke later she would not wake up. Sims performed the physical exam on Nikki and found that she had three fresh tears to the anal area, all in one quadrant, caused by over-stretching. Sims explained that although Nikki had been sick with diarrhea, it would not cause tearing in a particular area like this. She testified that localized tearing of the anus is indicative of sexual assault. She also noted redness in the vaginal area, but she explained that that appeared to be from a hygiene problem rather than sexual assault. (RR41: 124-28).

Sims explained that the frenulums are tissue in the mouth holding the upper and lower lips to the mouth and holding the tongue to the base of the mouth. When a frenulum is torn, in Sims' experience it is a sign that something was forced into the mouth and it is a sign of sexual assault. Nikki was transferred to Texas Children's Hospital for treatment because Palestine did not have the proper resources to treat such a head injury. (RR41: 135-38).

Brian Wharton, Palestine Police chief of detectives, responded to the hospital that morning, called out other detectives to assist, and went to the Roberson house with applicant and Detective Munoz. Wharton described applicant as unemotional and detached at the hospital. They followed applicant to the house, entered with his consent, and he showed them around. Wharton took photos of the house, State's exhibits 24 through 35. Applicant showed them the bedroom where he said he stayed the night before with Nikki, then he went to the kitchen with Detective Munoz to make himself a sandwich, leaving Wharton in the bedroom. Applicant had shown them a separate bedroom where Nikki's bed and Teddie's daughter's beds were located, but he said Nikki slept in his bed that night. While Wharton took photos of the house, applicant stayed in the kitchen and ate. (RR41: 152-60).

Wharton identified State's exhibits 24 and 35 as photos of applicant's bedroom. Wharton did not see any sign of where Nikki might have fallen. Applicant told them at the house that she had fallen, but he did not say she struck anything when she fell. The top of the mattress was 22 inches from the floor, and Wharton did not see any blood on the floor near the bed. Wharton did find a wash rag that applicant claimed he used to wipe Nikki's



mouth, and a pillow had blood on it. The house was pier and beam construction, with a carpet in the bedroom. (RR41: 160-63).

After viewing the house, they asked applicant to follow them to the police station to give a statement. State's exhibits 36, 37, 38, and 39 were admitted. In applicant's first statement, State's exhibit 37, he claimed that Nikki had been sick that Monday with vomiting and diarrhea, that "her little butt was red and hurting," and that they took her to the doctor.

The next day she had a high fever and the Bowmans took her back to the doctor. He did not see her again until Wednesday night when he took her from the Bowman's because Mrs. Bowman was sick. He claimed that they watched a movie together until after 11 p.m., that Nikki "came up on the bed with me and went to sleep. She was sleeping in my arms." At five a.m., he awoke and heard her cry. He found her at the end of the bed with blood around her lips and a bruise on her chin. He cleaned her mouth with a wet rag, then they "sat up about two hours and she was talking about the kids and family." She seemed fine, so they went back to sleep, but she would not wake up when the alarm went off. (RR4 1: 164-70). Applicant further explained that Nikki had wanted to sleep in her own bed that night, but he told her to come sleep with him. When she would not wake up, applicant explained that he "crawled up on the bed and grabbed her face and shook it

to wake her up. Then when she wouldn't wake up I slapped her face a couple of times." He said, "When I shook her head I shook it side to side. I don't know what caused the head injury. She is a clumsy child. She stumbles and falls sometimes." (RR.41: 170).

In the supplement, State's exhibit 38, applicant said that after Nikki would not wake up, he called Teddie at the hospital, and she told him to bring Nikki to the hospital. He took Nikki in his car, and he could not say why he didn't call an ambulance. (RR.41: 171). Sergeant Wharton saw Nikki's injuries at the hospital, and they were not consistent with the story applicant gave of her falling from bed. (RR.41: 175-76).

The State's next witness was Dr. John Ross, a Palestine pediatrician, the partner of Nikki's prior pediatrician Dr. Olstrom. Nikki's records reflected that she was a normal infant with a history of some ear infections, which is common in children. Nikki had several episodes in her first year when she would become upset, hold her breath, and past out briefly. She was seen for neurological testing and no serious problems were found. Dr. Ross saw Nikki on Tuesday, January 29, 2002 for a viral illness. She had been to the ER the day before with vomiting and diarrhea, developed fever overnight, and Mrs. Bowman and applicant came back in with her. Dr. Ross treated her with antibiotics and a cough syrup. He next saw Nikki when she

was brought to the ER on the morning of January 31, and he was called to the hospital. Dr. Ross testified that he was trying to sort out what happened, that he talked to applicant, who was somewhat distraught, and that applicant said something like, "I hope she didn't hurt her head." (RR42: 3-15). Applicant also told Dr. Ross that Nikki fell off the bed during the night, that he got her up after he heard a noise, that she was talking to him afterward, and that she was unresponsive when the alarm went off about 10a.m. Dr. Ross testified that Nikki's head injury was not consistent with a fall from a bed. Her CT exam showed a large subdural hematoma, a lot of edema in the brain tissue, and an uncal shift of the brain from right to left. The shift of her brain from midline to left indicated a lot of pressure in the brain. After checking with police, Dr. Ross gathered the family together and told them that Nikki had a head injury, that her distress was not part of any illness. He told the family he did not know whether she would survive. (RR42: 16-20). Based upon what he saw that day, Dr. Ross believed that Nikki's injuries were intentionally inflicted, not accidental. (RR42: 21).

Courtney Berryhill, who was eleven years old and the niece of Teddie Cox, testified that she sometimes spent the night with Teddie, applicant, Nikki, and Teddie's daughter Rachel. Courtney sometimes saw Nikki around applicant; she would cry sometimes when he was around. Sometimes Nikki

let applicant hold her. Once in Rachel's room, Courtney saw applicant shake Nikki. He picked her up by her shoulders, held her by the arms, and shook her to make her stop crying, but she did not stop. He shook her hard, so that her head swung back and forth. Courtney demonstrated for the jury with a teddy bear. While he shook her he said "please be quiet." After that incident Courtney didn't spend the night there anymore, because she didn't want to see applicant do that to Nikki again. (RR42: 44-52). Courtney told applicant not to do that and that her daddy, when he got out (of prison), would hurt him if he did it again. (RR42: 53).

Rachel Cox, Teddie Cox's 10 year old daughter, testified that she lived with applicant, Teddie, and Nikki at one time. She did not like applicant, "for all sorts of reasons." Once he spanked her with a belt; he had a bad temper. Applicant would get mad when Nikki would not go to him. When Nikki would cry, applicant would get angry and shake and spank her. Rachel saw him shake her ten times or so. She used the teddy bear to demonstrate to the jury how he would grab Nikki by the arms and shoulders and shake her, and her head would bounce back and forth. She would not stop crying, and he would then "whup" her. He would bend her over on the bed and hit her with his hand. He sometimes got mad enough that he would threaten to spank her or threaten to kill her. Nikki wouldn't let applicant hold her; she

would cry when he held her. She followed Rachel and Teddie around, but she didn't follow applicant much. When Nikki cried about applicant holding her, it would make him mad. (RR42: 64-72).

Dr. Thomas Konjoyan, an emergency room physician, saw Nikki at the Palestine ER on January 28, 2002, and again on January 31 when she was brought in in a coma. Nikki's father said he hadn't been able to wake her and that she might have fallen out of bed. Her deterioration over three days was surprising. He noted bruising on the left side of the jaw. He requested a CAT scan, which showed a very extensive head injury. The CAT showed that there was uncal herniation, meaning that there was irreversible swelling in the brain which would lead to brain death. This injury did not match the history given that she had fallen from a bed; it would be "basically impossible" to sustain such an extensive injury from a fall from a bed, and he felt the explanation given by applicant was "very implausible." (RR42: 80-85).

Dr. Janet Squires, a pediatrician at Children's Medical Center in Dallas, testified that she saw Nikki on February 1, 2002, at Children's when Nikki was on full life support and probably already brain dead. Prior to this she had reviewed Nikki's medical records. Dr. Squires could not move Nikki's head because of drainage equipment in place, and she could not

check the chin for injury because it was taped up, but she did check Nikki's anus because of concerns from medical personnel in Palestine. Dr. Squires found a tiny laceration on the anus, which she felt was non-specific, but she made no findings based upon her exam. She viewed the Palestine photos of Nikki's facial bruising during her testimony, and she pronounced them "pretty impressive." She testified that bruises around the chin and neck are less likely to be accidental than those on the forehead or shins. (RR42: 91-98).

Dr. Squires did not attempt to check the muscle tone of Nikki's anus, because in children who are brain dead or comatose the muscle can be lax. Absence of medical evidence on her exam did not mean that Nikki was not abused; Dr. Squires frequently has seen children who have been abused but where the medical examination does not produce findings of abuse. Dr. Squires reviewed Nikki's CT scan with the neurosurgery specialist, which showed that she had subscalpular hemorrhage, indicating an impact on the right side, lots of subdural hemorrhage, edema of the brain itself, and uncal herniation, meaning that the swelling was causing the brain to shift and push through the bottom of the skull, preventing the brain stem from functioning. Upon eye exam, along with an ophthalmologist consult, Nikki had obvious retinal hemorrhaging, and she had no evidence of skeletal fractures. (RR42:

99-105). Dr. Squires explained the process of shaken baby syndrome as well as shaken impact syndrome, where a child is shaken and then thrown or slammed against an object. She explained that Nikki's injuries were unlikely to have been caused by an impact alone, but that shaking with a subsequent impact on a surface such as a mattress would explain the massive degree of brain injury along with the impact injury. (RR42: 106-08).

Dr. Squires testified that in light of Nikki's injuries, she was rendered not normal immediately after the event that caused her head injury, and any reasonable person with her would have known she was not normal although she might have lived for several hours. She explained that in order for a CT scan at 10:40 a.m. to look that bad, the injury would have to have occurred several hours earlier. She would have had obvious symptoms such as lack of speech, neurological impairment, and difficulty breathing, as though she were gurgling, in the interim. Dr. Squires explained that in a child this age, a torn frenulum generally is the result of someone forcing something into the child's mouth. (RR42: 108-11).

Dr. Squires testified that this child's head injury alone, with no history that would adequately explain it, was sufficient to diagnose non-accidental child abuse. She testified that in her diagnoses she does not use the term "intentional," but instead refers to the injury as "non-accidental," "inflicted,"

or "abusive" trauma. (RR42: 112-13). She testified that the force necessary for this injury would have to be "a very violent forceful act," not something that ever happens accidentally," and "excessive, violent force." Dr. Squires testified that in her experience, delay in seeking treatment for this type injury is a strong indicator of child abuse. She testified that the injury in this case was likely caused by a combination of rotational injury from shaking coupled with impact injury. She testified that the injury here had to have occurred more than six hours before the 10:40 a.m. CT exam. (RR42: 115-22).

Dr. Squires explained that in order to do this damage, "you don't just take a kid and sling them once or twice. You really have to shake them really hard back and forth and **then you typically slam them against something.**" (RR42: 126 emphasis added). She testified that in these cases, about two thirds of the time there is no evidence of previous injury, and yet it's often been a pattern of abuse. (RR42: 127-28).

Teddie Cox testified that she had just been treated for severe depression, that she felt she was responsible for Nikki's death because she was in the hospital when Nikki was beaten to death. She did not trust applicant to care for Nikki. (RR42: 129-34). She made sure before she went in the hospital that the Bowmans were keeping Nikki, because she did not



want applicant alone with her. Applicant had never been in charge of his older children either. Teddie testified that she had earlier given inconsistent stories to defense counsel and their investigator because she was afraid of applicant's family. (RR42: 148-55).

Teddie testified that she and applicant first lived together in 1998, after which she went back to her husband, then re-united with applicant in 2001. In fall of 2001, they lived with her sister and Teddie's daughter Rachel, and Nikki did not live with them at that time. They moved to the house on Perry Street, and after a custody fight with the Bowmans, Nikki came to live with applicant, Teddie, and Rachel in the two bedroom house. Rachel slept in her room, Teddie and applicant slept in their room, and Nikki mostly slept in the room with them. Teddie testified that applicant did not want custody of Nikki but that she did, and she and Carolyn Roberson pushed him to get custody. Nikki moved in around mid-November 2001, and Teddie loved her like her own daughter. Nikki loved Rachel and Courtney and thought of them as sisters. Nikki and applicant did not love each other. Applicant did not care about Nikki, and she did not like being around him and cried when she was around him or when he would try to pick her up or play with her. When applicant would pick her up, Nikki would cry for Teddie or Rachel until they took her. (RR42: 160-66).

Nikki was not reluctant to be held by anyone but applicant. She went to other adults readily. Nikki did not like applicant because he yelled at her and was mean to her. The night she was fatally injured was the only time applicant ever took care of Nikki alone. Teddie did not leave her alone with applicant, because she was afraid he would "whip her or get onto her." Applicant was never violent with Teddie, even when they argued, but he was abusive to Nikki, including yelling and whipping her. Applicant would whip Nikki for crying, and the more she cried the more he would whip her. She would stop if Teddie picked her up. He would threaten Nikki, and when he would spank her he usually used his hand but once used a board, which left bruises on her bottom. The Bowman's saw the bruising, and applicant told them Rachel did it. (RR42: 167-72).

Nikki often slept on the floor on Teddie's side of the bed. Applicant was angry about it and wanted to put her in Rachel's room. Once he got mad and said that if Nikki was sleeping in their room she was sleeping on his side of the bed. He picked her up off the pallet and took her around to his side of the bed, and he put her under the blanket, head and all. Nikki cried, and he told her to shut up and go to sleep or he would whip her. Once when Nikki made applicant angry, Teddie saw him pick Nikki up by the shoulders and shake her, then throw her down on the bed. He shook her violently, and her

head shook back and forth. Teddie told him to stop. She got so angry she took Rachel and left, but came back because applicant followed them in the car with Nikki, and Nikki was crying for her to come back. (RR42: 172-78).

When Mrs. Bowman called Teddie at the hospital on January 30 and told her applicant needed to get Nikki because she was sick and couldn't watch her, applicant was angry. He waited quite a while and then left angry. On January 31 Teddie tried to call applicant to come get her from the hospital; the phone was busy, and applicant eventually called her. Applicant asked when Teddie was going to be ready to go home. She told him she was ready, and he then told her he needed to come up there anyway because Nikki wasn't breathing. She told him to hurry and bring her, and he said "okay" and hung up. (RR42: 180- 83). Teddie waited about five minutes and called back; applicant answered and said he had to get Nikki dressed, and she told him just to hurry. (RR42: 184).

Teddie went outside the hospital in a wheelchair and waited for applicant. When he arrived, he didn't seem to be in any hurry. He got Nikki out of the car and handed her to Teddie; Nikki was limp and turning blue, and she had bruising on her face. Later, she asked applicant what happened. He told her that they fell asleep watching a movie, and when he woke up he heard Nikki crying and found her on the floor close to the foot of the bed. He

picked her up, made sure she was okay, put her back on the bed, and they went back to sleep. (RR42: 185-87). Teddie didn't believe his story, because if he had Nikki on the bed, she would have been crying for Teddie. Applicant told her different stories; he told her at one point that Nikki was crying for her, and he told her that Nikki fell from the bed and hit her head on "the brick." (RR42: 188).

Teddie went to stay with her cousin Mary for several weeks after this happened because she was afraid of applicant. She talked to him on the phone some, and he never wanted to talk about Nikki and never seemed distraught over her death. She asked him on a jail visit if he had killed her, and he said if he did do it, he didn't remember, that he snapped." (RR42: 188-90).

Dr. Jill Urban, a forensic pathologist for the Dallas County Medical Examiner, testified that she performed the autopsy in this case. Dr. Urban showed the jury photographic exhibits showing the bruise to the back of Nicki's shoulder, a scrape on her elbow, and her various head injuries. She described a bruise over the right brow, bruises on the chin, a bruise on the left cheek, and an abrasion by the left eye. There was an abrasion on top of the head, and a group of bruises on the back of the head. Dr. Urban showed where the upper frenulum was torn above the front teeth, which she testified

would result from a blow to the mouth. She also found bruising in the inner surface of the lower lip. (RR43: 64M72).

She showed photos of the skull with the scalp pulled back, showing subscalpular and subgaleal hemorrhage between the skin and skull, consistent only with impacts to the head. She showed photos of the right side of the head showing subscalpular hemorrhage corresponding to the bruising seen on the back of the head. Based upon the appearance of the subscalpular hemorrhage, Dr. Urban concluded that there were multiple impacts or blows over the entirety of the head. She showed photos of the head with the top of the skull removed, showing subdural hemorrhage, seen in injuries caused by blunt force as well as in shaking injuries. She showed a photo of the brain with subarachnoid hemorrhage over the surface of the brain, also from blunt force and shaking injuries. (RR43: 73-76).

Dr. Urban showed the jury the brain sitting in the skull as well as the bottom of the skull with the dura intact, showing dense subdural hemorrhage in that area. She showed the jury photos of the eyes, which revealed the retinal hemorrhage and hemorrhage surrounding the optic nerve. (RR43: 76-78). Dr. Urban explained that in a small child, shaking can actually be forceful enough to cause blunt force injury over the surface of the brain by causing the brain to impact the inside of the skull. She explained that it is

not unusual for a child of this age not to suffer a skull fracture from this type of injury because the skull in a young child is still malleable. She explained that Nikki would actually have died from the injuries to her brain on a cellular level, which caused the brain to stop functioning and to swell, and that the subdural and subarachnoid hemorrhage were markers of this injury. She testified that after this level of injury, Nikki would have been immediately altered, unable to talk or walk, and either unconscious or moaning, perhaps gasping for air. It could have taken several hours for her to actually stop breathing. (RR43: 79-82). She explained the microscopic level autopsy of the brain tissues, and how slides showed the damage to the nerve cells of the brain from the shearing injury caused by shaking her. She explained that the autopsy also revealed minor hemorrhage in the muscles of the back. Dr. Urban testified that her conclusion from the autopsy was that Nikki died from blunt force head injuries, although it was not possible to say what percentage of the injury was caused by shaking and how much was caused by battering her head with or against another object. (RR43: 83-86).

Dr. Urban explained that the makeup of small children and their higher percentage of baby fat masks some of the damage they sustain, so that bruising that looks minor on the outside may in fact be more severe on internal examination. (RR43: 88-89).

Verna May Bowman, Nikki's maternal step-grandmother, testified about Nikki's infancy and early life. She testified regarding Nikki's normal childhood medical problems, and about the custody dispute with Carolyn Roberson. Ms. Bowman testified that after Carolyn and applicant started getting visitation with Nikki in Carolyn's home, Nikki began to have nightmares and night terrors where she would wake up screaming and saying "no, no, no." Nikki would push her away until she woke enough to see it was Ms. Bowman. Around that time, when Carolyn and applicant would come over to pick Nikki up three times a month, Nikki would cry very hard and hang onto Ms. Bowman. Nikki did not want to go with them, and she would scream and cling to Ms. Bowman. (RR43:99-132).

In punishment, the defense called Dr. Kelly Goodness, a clinical psychologist, testified that most of her practice involves forensic psychology consultations and that she had previously testified in two capital murder trials. She was previously employed at Vernon State Hospital in the behavior management treatment unit working with felony inmate psychiatric patients. She has not ever evaluated inmates for TDCJ, but only in individual cases. (RR48: 10-14). Dr. Goodness explained that she evaluated applicant by reviewing the documents she requested, listed in Defense exhibit 18, interviewing applicant twice and then administering a battery of test

instruments, and talking with collateral witnesses, including family members. She did not administer the Hare checklist, because she doubts its validity in predicting institutional violence in light of debate within her field. She explained that a psychopath is a person who doesn't have a conscience, behaves in antisocial ways and has little remorse. (RR48: 20-23).

Dr. Goodness explained that when she interviewed applicant, he initially told her he did not remember the offense, then told her he just lost it and shook the victim. She testified that she believes applicant was abused by his own father even though applicant and others deny it. She related that applicant was married at 19, had the first two children, and that either he or his first wife abused them. Applicant has been institutionalized most of his adult life. She diagnosed him as suffering from chronic depression, a cognitive disorder, substance abuse, and anti-social personality disorder (ASPD). She noted that during his years of incarceration he was generally a model prisoner, with a few exceptions. (RR48: 24-34).

Dr. Goodness explained that applicant is prone to impulsive behavior, in part because of his brain deficiencies and in part because of his personality, his "polysubstance abuse," his ASPD, and paranoia. She described several factors leading to the commission of this offense. First, she contended that applicant has an executive cognitive functioning deficit,



which causes him to have a higher likelihood than normal of acting impulsively. She also contended that applicant's mother, Carolyn, forced him to obtain custody of Nikki when he had no desire for custody. She blamed his lack of parenting skills, the fact that he and Nikki never "bonded" as father and daughter, the fact that applicant had a "rage reaction" triggered in part by Nikki being irritable from an ear infection, and she blamed applicant's own free will. She was not surprised to hear that he had a history of spousal abuse with his ex-wife. (RR48: 36-45).

Finally, Dr. Jill Urban reviewed her testimony, the autopsy, and preserved slides from that autopsy. (Exhibit A: 1) She ruled in her autopsy that Nikki Curtis died due to blunt force trauma. She never testified that she died due to a shaking mechanism, though she could not rule out that a possible component to Nikki's death. (Exhibit A: 2) She found several discreet areas of blunt force trauma to several separate areas of the victim's body. She further found that these injuries are inconsistent with a single fall as that would have a single impact site as opposed to the several sites found upon Nikki. (Exhibit A: 2) Further, in her review of the autopsy, there was no evidence of meningitis, or of sagittal sinus or central vein thrombosis as suggested by applicant's experts. (Exhibit A: 1-2)

### REPLY TO APPLICANT'S FIRST, THIRD, AND FOURTH GROUND FOR RELIEF

The applicant contends that the medical/scientific evidence used to convict him has been proven to be invalid “junk” science, that new science not available at the time would have exonerated him, and that no rational juror could have convicted him, particularly focusing on CCP 11.073 that shows by a preponderance of evidence that he would not have been convicted had this evidence been provided to the jury. Further, he relies on *Ex Parte Henderson*, 384 S.W.3d 833 (Tex.Crim.App. 2012) and *Herrera v. Collins*, 506 U.S. 390 (1993) arguing that he is actually innocent of the charge and his due process rights were violated by the introduction of this “junk science.” This is a complete and total fabrication upon the part of applicant. Current scientific standards and case law do not support applicants claims.

Applicant presents four expert witnesses who claim that the “paradigm” has shifted and that the science of what is known as “shaken baby syndrome” (SBS) or, as it is called more often today, “abusive head trauma” (AHT) is invalid. Applicant and his experts go so far as to point out a policy that was issued by the American Academy of Pediatrics from 2009 decrying that the triad of factors looked for when diagnosing AHT/SBS were

invalid. This is not the case at all, other than his experts claiming this massive paradigm change, there is no evidence of this from the medical community. In point of fact, as recently as 2015 the American Academy of Pediatrics stated that:

Arguments against the validity of AHT/SBS have recently focused on the specificity of a “triad” of subdural hematoma, retinal hemorrhage, and encephalopathy that is claimed to be diagnostic of AHT. This controversy regarding a triad is a “straw man” created for legal arguments against the diagnosis of AHT/SBS. The diagnosis of AHT is made following detailed medical examinations and testing and is not made automatically on the basis of the presence of these 3 findings, nor can it be excluded if 1 or more of these elements is missing.<sup>1</sup>

AHT/SBS is recognized by multiple scientific organizations, the American Academy of Family Physicians<sup>2</sup>, the American Academy of Ophthalmology,<sup>3</sup> the American Association for Pediatric Ophthalmology and Strabismus,<sup>4</sup> the American Association of Neurologic Surgeons,<sup>5</sup> the

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<sup>1</sup> “Understanding Abusive Head Trauma,” American Academy of Pediatrics, June 1, 2015.

[https://www2.aap.org/sections/childabuseneglect/PDFs/Understanding\\_AHT\\_Infants\\_and\\_Children.pdf](https://www2.aap.org/sections/childabuseneglect/PDFs/Understanding_AHT_Infants_and_Children.pdf)

<sup>2</sup> Liz Horsley, *AAP Guidelines on Evaluating Suspected Child Physical Abuse*, 77 AM. FAM. PHYSICIANS 1461, 1461-4 (2009)

<sup>3</sup> Alex V. Levin et al., *Information Statement: Abusive Head Trauma/Shaken Baby Syndrome*, AM. ACAD. OF OPHTHAMOLOGY (June 2010).

<sup>4</sup> *Info for Patients: Shaken Baby Syndrome*, AM. ASS’N FOR PEDIATRIC OPHTHAMOLOGY & STRABISMUS, <https://aapos.org/terms/conditions/97> (last visited Dec. 12, 2016)

American College of Radiology,<sup>6</sup> the American College of Surgeons,<sup>7</sup> the Canadian Paediatric Society,<sup>8</sup> the Centers for Disease Control and Prevention,<sup>9</sup> the Royal College of Ophthalmologists,<sup>10</sup> the Royal College of Paediatrics and Child Health,<sup>11</sup> the Royal College of Radiologists,<sup>12</sup> and the World Health Organization,<sup>13</sup> to name a few. There has been no radical change in paradigm nor has AHT/SBS been found to be either “junk science” or an “invalid finding” by any of these organizations of experts. The remaining three issues become,

- was there enough evidence to support the experts’ findings in this case,
- explain why any new evidence to the contrary is not relevant to applicant’s defense, and

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<sup>5</sup> *Patient Information: Shaken Baby Syndrome*, AM. ASS’N OF NEUROLOGICAL SURGEONS (Nov. 2005) <http://www.aans.org/en/Patient%20Information/Conditions%20and%20Treatments/Shaken%20Baby%20Syndrome.aspx>

<sup>6</sup> James S. Meyer, et al, *ACR Appropriateness Criteria: Suspected Physical Abuse – Child*, AM. COLL. RADIOLOGY, <https://acsearch.acr.org/docs/69443/Narrative/> (last reviewed 2012)

<sup>7</sup> *Recognition of Physical Child Abuse*, AM. COLL. OF SURGEONS, <https://www.facs.org/~media/files/quality%20programs/trauma/publications/childabuse.ashx> (last visited Dec. 12, 2016)

<sup>8</sup> See *Joint Statement on Shaken Baby Syndrome*, CANADIAN PAEDIATRIC SOC’Y, <http://www.cps.ca/documents/position/shaken-baby-syndrome> (last visited Dec. 12, 2016)

<sup>9</sup> See *Preventing Abusive Head Trauma in Children*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/violenceprevention/childmaltreatment/abusive-head-trauma.html> (Last reviewed March 28, 2016).

<sup>10</sup> See G. Adams et al., *Update from the Ophthalmology Child Abuse Working Party: Royal College Ophthalmologists*, 18 EYE 795, 795-96 (2004)

<sup>11</sup> THE ROYAL COLL. OF PAEDIATRICS & CHILD HEALTH & ROYAL COLL. OF RADIOLOGISTS, *Standards for Radiological Investigations of Suspected Non-Accidental Injury* (March 2008) [https://www.rcr.ac.uk/system/files/publication/field\\_publication\\_files/RCPCH\\_RCR\\_final\\_0.pdf](https://www.rcr.ac.uk/system/files/publication/field_publication_files/RCPCH_RCR_final_0.pdf)

<sup>12</sup> See *id.*

<sup>13</sup> See Jonathan Dart & Sarah Cumberland, *Fragile Brain, Handle with Care*, 87 BULL. WORLD HEALTH ORG. 331, 331-32 (2009)

- despite what applicant's experts have raised, he still would have been convicted of this crime by a rational jury.

The pathologist who testified in the case, Dr. Jill Urban, testified that Nikki Curtis died due to blunt force trauma, not SBS as has been raised by applicant. (RR43: 85; Exhibit A) In her autopsy and testimony, Dr. Urban testified that Nikki Curtis died as the result of blunt force trauma after finding facial contusions and multiple, discrete foci of subscalpular/subgaleal hematomas which are consistent with impact sites. (RR43: 85; State's Exhibit 48) This finding was concurred upon by no less than SIX other pathologists, including the chief of pathology, of the Southwestern Institute of Forensic Sciences at Dallas. (RR43: 67; State's Exhibit 48: page 6) Dr. Urban did, during questioning, explain the theoretic mechanism of shaking causing injuries, (RR43: 78-79) but she clearly defined multiple impact sites to the head (RR43: 74) and ruled the death was due to blunt force injuries. (RR43: 85) In her affidavit prepared for this court, she answers one of applicant's experts on the possibility that the autopsy findings were caused by meningitis and/or a central vein or sagittal sinus thrombosis. She re-examined slides from the autopsy and, after examination, there was no sagittal sinus or central vein thrombosis found nor was there any evidence of meningitis. (Exhibit A) This concurs with the

testimony of Dr. John Ross who testified that Nikki's injuries were not the result of illness. (RR42: 16-20)

Dr. Urban goes on to answer two other experts' opinion on Nikki's death being caused by a short fall. In her analysis, she states that whether or not short falls can cause death is a matter of controversy in the forensic community, a short fall should result in a single impact, rather than the multiple discreet impact sites seen as seen in Nikki's case. Her death was clearly not caused by a short fall of 22 inches. (Exhibit A) (RR41: 160-63 (testimony of Brian Wharton for height of bed))

Further evidence at trial came from Dr. Janet Squires of the REACH clinic at Dallas Children's Hospital. She reviewed Nikki's medical records, (RR42: 95) examined her CT with a neurosurgeon, (RR42: 101-102) examined her eyes with ophthalmologist consult, (RR42: 104) examined a skeletal survey of Nikki, (RR42: 105) consulted with Nikki's grandparents, the Bowmans, for background, (RR42: 95), and conducted her own examination of Nikki. (RR42: 95-103) She did not just find the "triad" of subdural hematoma, retinal hemorrhage, and encephalopathy and say it was SBS. Upon completion of all these forensic measures, Dr. Squires found that Nikki died as a combination of both shaking and blunt force injuries such as slamming her into a blunt object. (RR42: 119-120)

The medical evidence was not heard in a complete vacuum as has been described by applicant. He had history of having violent episodes with Nikki prior to her death. In particular, Teddie Cox, applicant's then paramour, testified against him. She testified that she had seen applicant get angry with Nikki on many occasions where he spanked her violently, including with a board. (RR42: 169-171) Most tellingly, she remembered an occasion where Nikki was sleeping on the floor in their room and crying. Applicant got angry with her, threatened to spank her, and when she did not quiet down he picked Nikki up by the shoulders shook her, and then threw her down on the bed. Cox testified that Applicant shook Nikki violently, and her head shook back and forth. (RR42:175-177)

This same incident was witnessed by Courtney Berryhill, an eleven year old niece of Teddie Cox. She saw the same violent shaking episode by the Applicant directed toward Nikki. She recalled him telling Nikki to "please be quiet." Berryhill further demonstrated Applicant's actions with a teddy bear in court. (RR42: 44-52) Rachel Cox, Teddie Cox's ten year old daughter, also testified to seeing Applicant shake Nikki in the past when he got angry and wanted to discipline her. (RR42: 64-72)

These observations are completely consistent with the findings made by both Dr. Urban and Dr. Squires. Dr. Squires stated the injuries came from

a violent shaking motion coupled with an impact. (RR43: 120) She even described how even a soft surface such as a mattress could still cause these traumatic injuries and not cause fractures, just as witnessed in a previous incident by Teddie Cox. (RR43: 107)

Finally, these claims could not have been ethically brought forth by applicant's trial counsel. An attorney may not suborn perjury or offer testimony that they know is false. TRPC 3.03(a)(5) To put forward these alternative theories would have necessitated applicant's trial counsel to ignore what applicant had revealed to his own punishment witness, Dr. Kelly Goodness. In her testimony during the punishment phase of the trial, she revealed that applicant told her "that he had lost it, that Nikki was crying and that he had shook her." (RR48: 24) She also testified that his manner of killing Nikki was "a rage reaction." (RR48: 43) In fact, in Defense exhibit 16, Dr. Goodness goes further to describe the incident, "[Applicant] 'lost it' when he could not stop Nikki from crying. He stated that he recalled shaking her, but does not know how long he shook her." (Defense exhibit 16 page 5) Further we find out that Nikki had "hit him in the mouth making his lip swell the night before she was critically injured." (Defense 16 page 17) (RR48: 81) For Applicant's attorneys to put forth these "new" theories, they would have to share Applicant's final admissions of guilt to their own expert



and that he actually committed the crime of which he was accused. That would negate Applicant's use of "new" scientific theories as to the manner of death of Nikki Curtis.

In the end, there is no new scientific evidence that would have exonerated Applicant and, even if Applicant's evidence had been presented at trial, there is no evidence that any rational jury would have exonerated him for "intentionally or knowingly causing the death of an individual, namely Nikki Curtis, a person under the age of six years, by causing blunt force head injuries, in a manner and means unknown by the grand jury" as presented in the charge of the court. (CR 623-644) Applicant's claims under CCP 11.073, *Herrera*, or due process complaints should be dismissed and the judgement of the jury should stand.

#### **REPLY TO APPLICANT'S SECOND GROUND FOR RELIEF**

Applicant claims he is entitled to a new trial under *Ex parte Chabot*, 300 S.W.3d 768, 770-71 (Tex. Crim. App. 2009) and *Ex parte Chavez*, 371 S.W.3d 200, 207-08 (Tex. Crim. App. 2012). Applicant accuses the State of violating Applicant's rights to a fair trial, to due process, and to avoid cruel and unusual punishment by using false scientific evidence to secure his conviction and death sentence. *Id.* To be entitled to habeas relief on the

basis of false evidence, Applicant must show that (1) false evidence was presented at trial; and (2) the false evidence was material to the jury's verdict. *Ex parte Weinstein*, 421 S.W.3d 656, 665 (Tex. Crim. App. 2014).

Applicant fails to support these claims in that **no** false evidence was presented at trial. AHT/SBS is still a valid diagnosis and all the evidence at trial, along with Applicant's admissions to his own expert supported that finding by the jury.

The only testimony that could be considered "false" is that testimony of Nurse Andrea Sims' findings of possible sexual assault of Nikki and the State does not, and has not, conceded it is false. In fact, in Applicant's first writ, this court found, "there is no evidence by the court that the prosecutor in this case abandoned the sexual assault paragraph because he believed he had no evidence to support the claim. (States Proposed Findings of Fact #22) Whether Sims' testimony was false scientific evidence or not is a moot point as there is no way it could have been material to the jury's verdict. The sexual assault allegations were abandoned by the State and not submitted to the fact finder. (RR44: 3-5; RR46: 4-15; CR 623-644) There is no evidence that any testimony proffered by Nurse Sims affected the verdict in any way. This is a red herring and should be denied.

**III.**

The Applicant raises questions of law which can be resolved by the Court of Criminal Appeals upon review of official court records and without need for an evidentiary hearing.

**IV.**

Service has been accomplished by sending a copy of this instrument to counsel for the applicant on this the 13<sup>TH</sup> day of December, 2016.

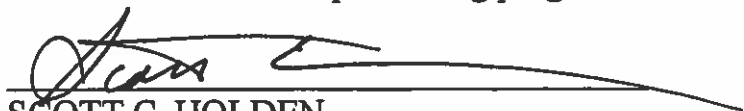
Respectfully submitted by,



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Palestine, Texas 75801  
Texas Bar No. #24036795  
(903)723-7400

**CERTIFICATE OF SERVICE AND WORD COUNT**

I hereby certify that a true copy of the foregoing Writ Response for the State has been delivered to: Benjamin B. Wolf and Gretchen S. Sween, on this the 13th day of December, 2016 in accordance with the provisions of the Texas Rules of Criminal and Appellate Procedure. I also certify that this response is 8051 words per the word count feature of this word processing program.



SCOTT C. HOLDEN,  
1<sup>st</sup> ASSISTANT CRIMINAL  
DISTRICT ATTORNEY

**EXHIBIT A**  
**AFFIDAVIT OF DR. JILL URBAN**



Dallas County  
SOUTHWESTERN  
INSTITUTE OF FORENSIC SCIENCES  
at Dallas

Office of the Medical Examiner  
2355 N Stemmons Freeway  
Dallas TX 75207

RESPONSE OF JILL URBAN, M.D.

Nikki Curtis was admitted to the hospital on January 31, 2002 with a diagnosis of severe closed head injury including subdural hematoma. She progressed to brain death and life support was discontinued. She was pronounced dead at 7:04 pm on February 1, 2002. The autopsy was performed the following morning at 7:30 am.

Autopsy findings were significant for contusions and an abrasion on the face. The upper frenulum was lacerated. There were numerous, discreet foci of subscalpular and subgaleal hemorrhage in the vertex of the scalp, occipital region and left temporal region, removed from the portion of scalp through which a therapeutic intracranial pressure monitor passed. There were no skull fractures. 25 mL of subdural hematoma were observed overlying the right side of the brain, and a thin film of left parietal subdural blood was also identified. Patchy fresh subarachnoid hemorrhage was seen. There was generalized cerebral edema, with associated bilateral infarcts of the border zone and posterior cerebral artery territories, as well as the basal ganglia and orbital frontal regions. Both eyes showed perioptic nerve hemorrhage and small foci of retinal hemorrhage. Otherwise, autopsy examination was significant for contusions of the posterior right upper shoulder and abrasions of the left arm and left foot. Hemorrhage into the proximal thoracic and distal cervical erector spinae muscles on the right side was also seen. The anogenital region was unremarkable. No organ injuries within the trunk were identified, and the bones of the trunk and extremities were free of fracture.

The brain, dura and spinal cord were retained in formalin and examined in neuropathology conference on February 2, 2002 by the Department of Neuropathology at the University of Texas Southwestern Medical Center. Sections of the left border zone, body of the corpus colosum, splenium, right hippocampus, internal capsule, right insula, midbrain, pons, cervical spinal cord, thoracic spinal cord, lumbar spinal cord, cerebellum and dura were examined using hematoxylin and eosin stains. These stains showed patchy acute neuronal necrosis of the neocortex, deep grey matter and brainstem. Amyloid precursor protein axonal staining was also performed on sections from the border zone, corpus colosum, internal capsule/thalamus, hippocampus, midbrain, pons, medulla, spinal cord and cerebellum and showed multi-focal axonal injury.

These autopsy findings are all consistent with blunt impact. The facial contusions are evidence of blunt impact. The multiple, discreet foci of subscalpular/subgaleal hematomas are consistent with impact sites.

The motion for the stay of execution as well as the defense expert opinions offer several alternative explanations for the autopsy findings of Nikki Curtis. In the Declaration of Harry J. Bonnell, M.D., he raises the possibility that the autopsy findings were the result of meningitis and a central vein or sagittal sinus thrombosis. The dura was examined in

neuropathology conference by a board certified neuropathologist and neuropathology fellow in the presence of other medical examiners, and no sagittal sinus or central vein thrombus was identified. Multiple sections of brain were reviewed, again by a neuropathologist, a neuropathology fellow and myself, and there is no evidence of meningitis. These slides are available for review by retained experts should they so desire.

The Declaration of Kenneth L. Monson, Ph.D. states that "The medical examiner, Janet (sic) Urban, concluded that the cause of death was "blunt force" defined as the result of impact and violent shaking. She stated it was 'not unusual' that this kind of serious injury was not accompanied by any fractures to the skull, because it is the shaking that causes the injuries that ultimately killed the child." That it is an incorrect characterization of my testimony. While I did explain the theoretical mechanism of shaking causing injuries, in this case I quite clearly defined multiple impact sites to the head and ruled that the death was due to blunt force injuries. I also provided a list of possible reasons a lethal head impact would not also result in a skull fracture. At no point did I indicate that the decedent had a "triad of symptoms-retinal hemorrhages, subdural hematoma and cerebral edema-that indicate shaken baby syndrome" or that the lack of skull fractures was indicative of shaken baby syndrome.

Several experts consulted in this case (Declarations of John Plunkett, M.D. and Dr. Monson) offered an explanation of a short fall as causing the death. While this view is controversial in the forensic community, a short fall should result in a single impact, rather than the multiple discreet impact sites seen upon reflection of the scalp in this case.

The declarations provided dispute the diagnosis of "shaken baby" in this case. However, it was my testimony that multiple impact sites were identified at the time of autopsy, and that this child died as a result of blunt force head injuries. While I was asked on the witness stand to describe the mechanism of shaking, my testimony was that I could definitively identify impact sites at autopsy. While I could not rule out a shaking component, I ruled in my autopsy that the death was a result of blunt force head injuries, and emphasized head impacts in my testimony.

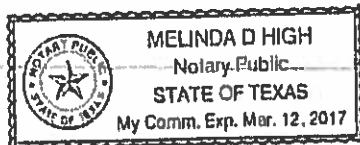
  
Jill Urban M.D.  
Medical Examiner


Before me, the undersigned authority, personally appeared Jill Urban, M.D. who, being by me duly sworn, deposed as follows:

My name is Jill Urban, M.D. I am of sound mind, capable of making this response, and personally acquainted with the facts herein stated.

STATE OF TEXAS  
COUNTY OF DALLAS

SWORN TO AND SUBSCRIBED before me on the 18th day of November, 2016.



  
NOTARY PUBLIC, STATE OF TEXAS

MELINDA D. HIGH  
Printed Name of Notary

COMMISSION EXPIRES: 03-12-2017