

October 24, 2024

**Via E-Filing**

Mr. Blake Hawthorne, Clerk  
Supreme Court of Texas

Re: No. 24-0884, *In re Texas House of Representatives*

Dear Mr. Hawthorne:

Representative Cody Harris and Cecil Bell, Jr., Greg Bonnen, Briscoe Cain, Mark Dorazio, Cole Hefner, Tom Oliverson, M.D., and Tony Tinderholt, other Members of the Texas House of Representatives respectfully submit this letter brief as amici curiae in support of the Texas Department of Criminal Justice.<sup>1</sup>

In last week’s frantic run-up to the lawful execution of a convicted baby-killer called Robert Roberson, the House Committee on Criminal Jurisprudence attempted to use its subpoena-and-hearing authority to usurp the Governor’s clemency power. *Contra* TEX. CONST. art. IV, § 11(b) (“*The Governor shall have the power to grant one reprieve in any capital case for a period not to exceed thirty (30) days . . .*” (emphasis added)). The House Committee has continued to use its hearing authority in the days since, attempting to wield the judiciary’s power to re-determine facts and evidence about a capital murder—despite decades of state- and federal-court judges having rejected Roberson’s claims. And now, in this unprecedented case, a single Committee purports to litigate on behalf of the “Texas House of Representatives.” At practically every turn, a single committee of a single chamber of a single branch of government has encroached not only on the prerogatives of two other branches, but also on those of their *colleagues in the same branch*.

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<sup>1</sup> No fee was paid or will be paid for preparing this brief. See TEX. R. APP. P. 11(c).

And the results have been messy. This past week, the House Committee held a one-sided re-trial of Roberson’s criminal case, twenty-one years after he was convicted by an Anderson County jury.<sup>2</sup> As can happen in a legislative committee hearing, as opposed to an actual court of law, witnesses and committee members alike presented only one side of the story. Indeed, the substantial evidence of Robertson’s guilt was not even presented.

The House Committee’s hearings lacked “the adversarial process on which our legal system depends.” *In re Abbott*, 628 S.W.3d 288, 298 (Tex. 2021). Had the House Committee followed the adversarial process that is intrinsic to our judicial system, it would have revealed to Members—and to the People of Texas—these deeply troubling facts:

- Roberson, the only adult known to be with Nikki in the hours before she took a brutal beating that proved fatal, brought his two-year-old daughter to the hospital with multiple “external” bruises;
- Roberson was not some “sweet, impaired man,” but a bully with a long history of violence that included punching his pregnant ex-wife for walking too slowly, beating an unborn child still in that woman’s womb, and molesting a nine-year-old girl;
- the prosecution’s theory at trial was not that Roberson shook Nikki, but that he “beat” her to death; and
- though he now claims that Nikki succumbed to pneumonia, Roberson has offered at least five theories of how she died that are mutually inconsistent.

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<sup>2</sup> See House Committee on Criminal Jurisprudence, Hearing Testimony, 88th Leg. (Oct. 21, 2024), <https://house.texas.gov/videos/20863> [October 21 Hearing Testimony]; see also House Committee on Criminal Jurisprudence, Hearing Testimony, 88th Leg. (Oct. 16, 2024), <https://house.texas.gov/videos/20862> [October 16 Hearing Testimony].

Over the past two decades, Roberson has given various audiences at least five different *whodunnit* narratives:

- (1) Roberson told hospital staff and investigators that Nikki was just a clumsy kid who fell out of bed and plummeted to her death—from a height of just 22 inches.
- (2) Roberson told his girlfriend that he might have “snapped” and killed Nikki, but he just can’t remember.
- (3) While awaiting trial, Roberson told a cellmate that he’d “put[] his dick in the baby’s mouth” before hitting her on the skull, dropping the child on her head, and leaving her on the floor.
- (4) In a 2008 letter from death row, Roberson agreed that Nikki *was* beaten to death—but pointed the finger at Heather Berryhill, a woman with whom he was smoking crack and having sex.
- (5) Now, Roberson says Nikki died because she was a sickly child with a bad case of pneumonia.

The only consistency here is Roberson’s mendacity. Given the one-sided nature of the hearing, it is not surprising the House Committee chose to believe only Robertson’s latest theory—no questions asked. Some Members even claim Roberson was “framed.”<sup>3</sup> By the floor? By Heather? By pneumonia?

Because relators’ pleadings attempt this approach on behalf of the entire “House of Representatives,” it is imperative for other Members—in whose name this suit is nominally brought—to tell the story the House Committee failed to tell.

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In 2002, Roberson sauntered into the hospital with his two-year-old daughter, who was blue and unresponsive.<sup>4</sup> Upon arrival, the little girl

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<sup>3</sup> *October 21 Hearing Testimony* at 8:26:54–8:27:03.

<sup>4</sup> 42 RR 183:12–186:15.

had extensive bruising to her chin, face, ears, eyes, shoulder, and mouth, and the back of her skull was “mushy.”<sup>5</sup> Roberson was the only adult with Nikki in the hours beforehand. The State indicted him for capital murder.

Initially, after bringing his bruised, bloody, and unconscious child to the hospital, Roberson claimed she simply died from a 22-inch fall out of bed because she was “a clumsy child.”<sup>6</sup> But an autopsy concluded Nikki died from “blunt force head injuries”—not from mere shaking.<sup>7</sup> The jury agreed. On February 11, 2003, after being instructed on the prosecution’s theory that Roberson killed Nikki “by causing blunt force head injuries,” the jury unanimously found him “‘Guilty’ of the offense of capital murder.”<sup>8</sup> It rejected Roberson’s theory, crediting instead the evidence that pointed to external blows—not shaking or a short fall.<sup>9</sup>

Almost immediately, Roberson’s story changed. While in pre-trial custody, for example, Roberson confided to his live-in girlfriend, Teddie Cox, that he may have “snapped” and killed the girl. Cox relayed a conversation in which she asked Roberson point-blank: “Did you kill Nikki?” He told her that “if he did do it, he don’t remember, that he snapped, and he don’t remember doing it.”<sup>10</sup> That was not the only evidence of Roberson’s violence. The jury heard testimony from Roberson’s ex-wife, Della, that he choked her with “a coat hanger,”

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<sup>5</sup> 41 RR 115:21–23, 116:1–4, 117:5–18 (Sims); 42 RR 82:20–83:13 (Konjoyan); *Ex parte Roberson*, Nos. WR-63,081-03 & -04, at 2–3 (Tex. Crim. App. Oct. 10, 2024) (Yeary, J., concurring); 2022 Findings of Fact ¶¶ 21, 24, 26, 33, 35, 36, 37, 40, 41; 5 CR 660. *Contra October 21 Hearing Testimony* at 8:20:35–8:20:43 (Roberson’s lawyer claiming “there is no mushy skull”); *October 16 Hearing Testimony* at 4:11:37–4:11:43 (Dr. Auer saying the child was “entitled to have a goose egg”).

<sup>6</sup> 41 RR 170:21 (Wharton); 41 RR 66:19–67:24, 69:13–23, 70:18–21 (Gurganus); 41 RR 86:22–23, 95:21–25 (Odem); 42 RR 82:7 (Konjoyan); 50 RR, State’s Exh. 37 (Roberson’s signed statement to police); 5 CR 669 (Wharton’s police report).

<sup>7</sup> 51 RR, State’s Exh. 48.

<sup>8</sup> 5 CR 613–625.

<sup>9</sup> 41 RR 69:22–23 (Gurganus); 41 RR 89:19–21 (Odem); 41 RR 123:18–20 (Sims); 41 RR 176:10–14, 177:6 (Wharton); 42 RR 85:14–15 (Konjoyan).

<sup>10</sup> 42 RR 190:11–25; *see also* 41 RR 55:7–10; 46 RR 25:8–11; 5 CR 670.

forcing her to “fight for her life”;<sup>11</sup> punched her while she was pregnant because she “wasn’t walking fast enough for him”;<sup>12</sup> and hit both her and her unborn baby, Victoria.<sup>13</sup> This is the “sweet, impaired man” who, according to his lawyer’s legislative testimony, has “no history of violent assaults” and poses “zero” security risks?<sup>14</sup>

While in pre-trial custody, Roberson painted an even more damning picture of Nikki’s vicious death. In 2002, the Anderson County District Attorney’s Office received a letter saying that Roberson confided to his cellmate that he had sexually assaulted and beat Nikki to death. First, Roberson “put[] his dick in the baby’s mouth and rub[bed] his penis against her vagina.”<sup>15</sup> Then he “hit[] Nikki on the back of her head with his hand” and “dropp[ed] her on her head,” “leaving her on the floor.”<sup>16</sup> The evidence indicates that sexually abusing children was hardly unusual for Roberson. On another occasion, one month before he killed Nikki, Roberson climbed into bed with his girlfriend’s nine-year-old daughter, “slipped his hand down to her panties,” and “touched her breast and vagina[].”<sup>17</sup> While the testimony before the House Committee would have us believe “there’s not a record of violence, child abuse, any of that” for Roberson, such a conclusion simply ignores a panoply of facts and evidence.<sup>18</sup>

After a jury convicted him of killing his daughter via blunt force head injuries, Roberson tried shifting the blame to his girlfriend’s sister, Heather Berryhill, claiming *she* threw Nikki on the ground after the two had smoked crack and had sex in front of the child. In 2008, Roberson wrote to a prison website seeking a fellow death-row pen-pal. In the

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<sup>11</sup> 47 RR 15:11–24.

<sup>12</sup> 47 RR 16:2–12.

<sup>13</sup> 47 RR 18:13–25; *see also* 42 RR 171:3–172:11.

<sup>14</sup> *October 16 Testimony* at 6:57:23–6:57:26; *October 21 Hearing Testimony* at 7:55:55–7:56:10, 8:46:13–8:46:26.

<sup>15</sup> 5 CR 687 (Lodygowski).

<sup>16</sup> *Id.*

<sup>17</sup> 5 CR 677 (T. Cox), 679 (R. Cox).

<sup>18</sup> *October 21 Hearing Testimony* at 8:08:56–8:09:10 (Roberson’s lawyer).

letter, he admitted that he “lied to the[] nurses and doctors” about the alleged 22-inch fall out of bed.<sup>19</sup> And he described January 30, 2002, as a crack-fueled night in which he awoke to see “Heather shaking Nikki back and forth, from front to back.”<sup>20</sup> Heather—not Roberson, of course, but his crack-smoking paramour—then threw the girl so forcefully that “Nikki bounced off the floor, hitting the floor hard.”<sup>21</sup> Roberson, on his own telling, never even checked on her. Later that night, Heather *again* picked Nikki up and “started shaking her some more.”<sup>22</sup> Roberson still could not be bothered to check on the girl. Instead, he “laid down and dozed off” and then (for some reason) covered up for Heather.<sup>23</sup>

In 2016, on the eve of his scheduled execution, Roberson sought and obtained a stay of execution to review his conviction and sentence under Texas’s newly amended junk-science law, codified at Article 11.073 of the Texas Code of Criminal Procedure. This time, he claimed Nikki had suffered from an extreme case of pneumonia that somehow caused her brain to shift inside her skull and compress her spinal cord.<sup>24</sup> The Texas Court of Criminal Appeals (CCA) remanded Roberson’s habeas petition to the Anderson County District Court,<sup>25</sup> giving him the opportunity to develop evidence in support of this new theory that pneumonia was the *real* killer.

In 2021, shortly before his evidentiary hearing began on remand, Roberson’s 2008 story of a crack-and-sex-filled night was conspicuously removed from Lamp of Hope’s website. During a seven-day evidentiary hearing, the District Court carefully considered Roberson’s arguments,

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<sup>19</sup> Robert Roberson, PenPal Request, Lamp of Hope (July 24, 2008), <https://web.archive.org/web/20080724175922fw/http://www.lampofhope.org/wp999442.html>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> 42 RR 102:20–23 (Squires); 43 RR 83–84 (Urban).

<sup>25</sup> *Ex parte Roberson*, No. WR-63,081-03 (Tex. Crim. App. June 16, 2016) (per curiam).

rejected all of them, and reaffirmed that he beat his daughter to death. Among other detailed findings,<sup>26</sup> the District Court found that:

- “[N]o one testified in the original trial that Nikki was killed by shaking alone.”<sup>27</sup>
- Because there was impact, the “question of SBS (shaken baby syndrome) is kind of moot.”<sup>28</sup>
- Abusive head trauma, as distinguished from mere shaking, is still a recognized medical diagnosis.<sup>29</sup>
- And Roberson’s pneumonia theory, even after a full and fair exploration, did nothing to change the evidence that Nikki had been brutally beaten.<sup>30</sup>

In January 2023—a full 22 months before the House Committee’s hearing—the CCA reviewed the record. It agreed that the record supports the District Court’s findings of fact and adopted them in full. Based on those findings and its own independent review, the CCA denied habeas relief on Roberson’s claims.<sup>31</sup>

In short, Roberson has peddled no fewer than *five* different theories of what happened to Nikki. Courts and a Texas jury have rightly rejected all of them. Now, some have claimed in legislative testimony that Roberson’s conviction rests solely on “shaken baby syndrome.” That argument is not new. And it is not right.

The prosecutor’s closing argument expressly reiterated to the jury that its theory was not that Nikki was shaken, “but was *beaten* about the head.”<sup>32</sup> In his closing to the jury, the prosecutor addressed this very

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<sup>26</sup> See, e.g., *Ex parte Roberson*, No. 26162-A, Findings of Fact at ¶¶ 21, 24, 26, 33, 35, 36, 37, 40, 41 (3rd Judicial Dist. Ct. Feb. 14, 2022).

<sup>27</sup> *Id.* at ¶ 11; see also *id.* at ¶¶ 20, 28, 58.

<sup>28</sup> *Id.* at ¶ 16.

<sup>29</sup> *Id.* at ¶ 45; see also *id.* at ¶¶ 9, 14, 15.

<sup>30</sup> *Id.* at ¶¶ 40, 50, 51, 107.

<sup>31</sup> *Ex parte Roberson*, No. WR-63,081-03 (Tex. Crim. App. Jan. 11, 2023) (per curiam).

<sup>32</sup> 46 RR 25:13–23 (emphasis added).

argument,<sup>33</sup> twenty-one years before Roberson sold it to the House Committee:

4 bit earlier. But are we talking about an either or? Are we  
5 talking about he just shook her? You know, an out of control  
6 parent is frustrated because their child is sick and they pick  
7 them up and they shake them, shake them. Is that an out of  
8 control parent? No. He did this and then he starts punching  
9 them he slams her down and he throws her on the ground. And  
10 that's not intentionally or knowingly? Talked about her  
11 battered face. Did he just shake her? No. Frenulum is busted,  
12 ripped, torn, blood coming out. Multiple impacts to the head.  
13 You saw bruising to the shoulder. Take a look at her face on  
14 the photographs. This not just, 'I shook her and then I  
15 realized, well, maybe I shouldn't be doing that because they may  
16 file some sort of criminally negligent homicide, so I stopped.

Consistent with these arguments in closing, the evidence at trial repeatedly described “external” injuries caused by “impact” from being “struck” with objects or forcible “blows.”<sup>34</sup>

During its second legislative hearing, some House Committee Members and witnesses repeatedly suggested that anyone who says Roberson’s case was not a shaken-baby case “ha[s] not read any of the record” or is “intentionally deceiving.”<sup>35</sup> Have those proponents of this

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<sup>33</sup> 46 RR 61:4–16.

<sup>34</sup> See, e.g., 41 RR 117:16–21, 123:15–25 (Sims); 42 RR 103:10–19 (Squires); 43 RR 54–55 (Urban). *Contra October 21 Hearing Testimony* at 1:58:43–1:59:31 (Dr. Phil claiming “a careful analysis of the trial record” suggests there was no evidence of “battery” or that the child had been “beaten”); *id.* at 2:41:50–2:42:14 (juror claiming they “heard nothing about Nikki being beaten”); *id.* at 7:57:20–7:57:36 (Roberson’s lawyer claiming there were no “exterior signs of abuse” and “everything is internal”).

<sup>35</sup> *October 21 Hearing Testimony* at 7:56:15–7:56:45 (Roberson’s lawyer).



theory read the same record? Equally concerning is the House Committee's motive for a last-minute attempt to unwind our State's constitutional order. More than 100 votes of state- and federal-court judges have reaffirmed Roberson's conviction and sentence at every turn.

This case may be captioned *In re Texas House of Representatives*. But those waging this campaign on a child-murderer's behalf do not speak for the full Texas House of Representatives. And certainly not for the *amici* Members listed below.

CODY HARRIS  
*House District 8*

CECIL BELL, JR.  
*House District 3*

GREG BONNEN  
*House District 24*

BRISCOE CAIN  
*House District 128*

MARK DORAZIO  
*House District 122*

COLE HEFNER  
*House District 5*

TOM OLIVERSON, M.D.  
*House District 130*

TONY TINDERHOLT  
*House District 94*

Respectfully submitted.

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## CERTIFICATE OF COMPLIANCE

Microsoft Word reports that this document contains 2373 words, excluding the exempted portions of the document.

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## CERTIFICATE OF SERVICE

On October 24, 2024, this document was served electronically on all counsel of record as follows:

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