No. 14-1008

IN THE

Supreme Court of the United States

JEFFREY HARDIN,

Petitioner,

v.

OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF THE INNOCENCE NETWORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Innocence Network is an affiliation of organizations dedicated to providing pro bono legal and investigative services to prisoners for whom evidence discovered after conviction can provide conclusive proof of innocence. The 70 current member organizations of the Innocence Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as internationally.[2]

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1. Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* states that no party or counsel for any party authored any part of this brief, and no person other than *Amicus Curiae* or its counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), letters of consent from all parties to the filing of this brief are on file or have been submitted to the Clerk of the Court.

2. The member organizations include the Alaska Innocence Project, Arizona Justice Project, Arizona Innocence Project, Midwest Innocence Project, California Innocence Project, Loyola Law School Project for the Innocent, Northern California Innocence Project, Connecticut Innocence Project, New England Innocence Project, Office of the Public Defender, State of Delaware, Mid-Atlantic Innocence Project, Innocence Project of Florida, University of Miami Law Innocence Clinic, Georgia Innocence Project, Hawai'i Innocence Project, Idaho Innocence Project, Life After Innocence, Center on Wrongful Convictions, Illinois Innocence Project, Wrongful Conviction Clinic, Innocence Project of Iowa, Kentucky Innocence Project, Innocence Project New Orleans, Resurrection After Exoneration, University of Baltimore Innocence Project Clinic, Committee for Public Counsel Services Innocence Program, Thomas M. Cooley Law School Innocence Project, Michigan Innocence Clinic, Michigan State Appellate Defender Office – Wrongful Conviction Units, Innocence Project of Minnesota, Mississippi Innocence Project, Montana Innocence

The Innocence Network has helped to exonerate hundreds of individuals over the past two decades. Through these experiences, it has become clear that problems involving the forensic sciences and their application are pervasive. The interests of justice are undermined by forensic error and false information. Indeed, examination of post-conviction DNA-based exonerations demonstrates that flawed or inaccurate forensic science testimony has contributed to approximately fifty percent of those wrongful convictions.[3] The Innocence Network advocates

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Project, Nebraska Innocence Project, Rocky Mountain Innocence Center, Innocence and Justice Project at the University of New Mexico School of Law, The Exoneration Initiative, Innocence Project, New York Law School Post-Conviction Innocence Clinic, Reinvestigation Project, The Duke Center for Criminal Justice and Professional Responsibility, North Carolina Center on Actual Innocence, Wake Forest University Law School Innocence and Justice Clinic, Ohio Innocence Project, Office of the Ohio Public Defender, Wrongful Conviction Project, Oklahoma Innocence Project, Pennsylvania Innocence Project, Witness to Innocence, Justicada Reinvindicada – Puerto Rico Innocence Project, Innocence Project of Texas, Texas Center for Actual Innocence, Thurgood Marshall School of Law Innocence Project, Innocence Project at UVA School of Law, Innocence Project Northwest Clinic, West Virginia Innocence Project, Wisconsin Innocence Project, Innocence Project Argentina, Griffith University Innocence Project, Sellenger Centre Criminal Justice Review Project, Association in Defense of the Wrongly Convicted, University of British Columbia Law Innocence Project, Osgoode Hall Innocence Project, Innocence Project of France, Irish Innocence Project at Griffith College, Israel Public Defender, Italy Innocence Project, Knoops' Innocence Project, Innocence Project New Zealand, Innocence Project South Africa, and Taiwan Association for Innocence.

3. *See Unreliable or Improper Forensic Science*, INNOCENCE PROJECT, *available at* http://www.innocenceproject.org/understand/Unreliable-Limited-Science.php.

for reforms to prevent wrongful convictions and has a strong interest in ensuring that criminal convictions are premised on valid and reliable scientific evidence—an interest directly implicated by Petitioner Jeffrey Hardin's case.

SUMMARY OF THE ARGUMENT

Authors of autopsy reports should be subject to the constitutionally prescribed method of testing validity: confrontation. Those drafting autopsy reports are particularly susceptible to cognitive bias and suggestion by law enforcement officers. Further, forensic pathology is subject to human error, incompetence, and even fraud. Surrogate testimony hides these issues at trial and frustrates the justice system's truth-seeking function.

The defendant's constitutional right to confront the author of an autopsy report is especially important in cases, like Petitioner's, that involve controversial medical diagnoses such as Shaken Baby Syndrome ("SBS") and in which the central issue is whether a homicide occurred. SBS diagnoses have caused numerous wrongful convictions, and many medical and legal experts—including the very pediatric neurosurgeon who pioneered the hypothesis—have questioned its validity.

Confrontation of an autopsy report's author is also critical in cases involving child autopsies, another subset of cases in which it is often unclear whether a homicide occurred. These autopsies are especially error-prone because examiners often lack the specialized training needed to assess child deaths.

Recent exonerations and scandals illustrate how death investigation errors lead to the conviction of innocent people. This is unsurprising, given that autopsies often play a central role in homicide trials. Nevertheless, as in Petitioner's case, some state courts admit autopsy reports into evidence without allowing the defendant to cross-examine their author—such that this critical piece of prosecution evidence is untested.

Now is the time for this Court to clarify this important area of law, which has deeply divided state courts of last resort. Recognizing that criminal defendants have a constitutional right to confront the authors of autopsy reports will minimize wrongful convictions and strengthen the justice system's integrity.

I. Autopsy Reports Created in Homicide Investigations That Assert the Cause of Death Is Homicide Are Inherently Testimonial.

Autopsy reports created in homicide investigations should trigger the defendant's Sixth Amendment confrontation right because their primary purpose is to prove events relevant to criminal prosecution. *See Melendez-Diaz v. Mass.*, 557 U.S. 305, 311 (2009); *Bullcoming v. N.M.*, 131 S. Ct. 2705, 2714 n.6 (2011).

Autopsies are typically performed when a person dies under suspicious circumstances, and time, manner, and cause of death are often the ultimate questions to be resolved in homicide trials. As a result, medical examiners know that their autopsy reports will be key evidence at trial. Because this evidence is central, testing its accuracy through cross-examination is crucial.

II. The Current System's Deficiencies Illustrate that Confrontation Is Essential To Ensure that Autopsy-Related Evidence Is Accurate.

The current death investigation system is fraught with systemic problems that undermine autopsy reports' accuracy. Further, death investigators are highly susceptible to cognitive bias and law enforcement influence. These issues illustrate that confrontation of the authors of autopsy reports is necessary to ensure the integrity of autopsy-related evidence.

A. Systemic Problems in the Death Investigation System Undermine the Veracity of Autopsy Reports.

Systemic flaws pervade the death investigation system, increasing the likelihood that autopsy reports will contain inaccurate judgments.

The qualification requirements and training programs for death examiners are woefully inadequate. Presently, 82 percent of supervising coroners are popularly elected,[4] and in some states, medical or scientific training is unnecessary.[5] Typical qualifications include being a

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4. *See Strengthening Forensic Science in the United States: A Path Forward*, Nat'l Research Council, Comm. on Identifying the Needs of the Forensic Scis. Cmty. at 247 (2009) (hereafter, "NAS Report").

5. *Id.*; *see also* Leah Bartos, *No Forensic Background? No Problem*, ProPublica and PBS Frontline (Apr. 17, 2012), *available at* http://www.propublica.org/article/no-forensic-background-no-problem ("Bartos").

registered voter, attaining a minimum age (usually between 18 and 25), being free of felony convictions, and completing a training program. Recently, a 17-year-old student passed Indiana's coroner's examination and was appointed a deputy coroner.[6]

Further, all coroner and medical examiner systems nationwide are plagued by serious deficiencies, as the National Academy of Sciences ("NAS") has recognized. Some of these deficiencies include:

- inadequate expertise to investigate and medically assess decedents;
- inadequate training of personnel in the forensic science disciplines;
- lack of best practices and information standards; and
- lack of quality measures and controls.[7]

These systemic problems foster an environment that can tolerate gross incompetence and even fraud, two primary causes of wrongful convictions. Recognizing that a defendant has a Sixth Amendment right to confront an autopsy report's author would increase the likelihood that the defendant could expose these deficiencies.

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6. NAS Report, *supra* n.4, at 247.

7. *Id.* at 250.

B. Forensic Science Is Particularly Susceptible to Cognitive Bias and Suggestion by Law Enforcement.

As this Court has recognized, forensic pathology is particularly susceptible to cognitive bias and law enforcement suggestion. *See Melendez-Diaz*, 557 U.S. at 318 ("A forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution"). Exacerbating the problem, *elected* coroners perform death investigations in 14 states;[8] because elected officials must be responsive to public opinion, it can be difficult for them to make unpopular cause or manner of death determinations.[9]

A robust body of scientific research demonstrates that bias and human error can affect the findings of forensic examiners.[10] Research demonstrates that experts can be biased in favor of the side that retains them,[11] or by

8. *Id*. at 245.

9. *Id*. at 247.

10. *See, e.g.*, Saul M. Kassin et al., *The Forensic Confirmation Bias: Problems, Perspectives, and Proposed Solutions*, 2 J. OF APPLIED RES. IN MEMORY & COGNITION 42, 42-52 (2013); M.J. Saks et al., *Context Effects in Forensic Science: A Review and Application of the Science of Science to Crime Laboratory Practice in the United States*, 43 SCI. & JUST. 77, 77-90 (2003).

11. *See, e.g.*, Daniel C. Murrie et al., *Are Forensic Experts Biased by the Side That Retained Them?*, PSYCHOL. SCI., 1889, 1889-97 (2013) (simulated experiment revealed that forensic psychologists and psychiatrists assigned higher risk scores to offenders when assigned to the prosecution and lower risk scores when assigned to the defense).

"domain irrelevant" information that points to a particular conclusion.

Courts have acknowledged that forensic pathologists' subjective findings are vulnerable to the influence of biasing contextual information. *See, e.g.*, *United States v. Ignasiak*, 667 F.3d 1217, 1233-34 (11th Cir. 2012) ("[T]he ultimate conclusions and supporting findings reflected in the autopsy reports are the product of the examiner's skill and judgment, not an infallible machine that requires no human intervention."); *People v. Freycinet*, 11 N.Y.3d 38, 42 (N.Y. 2008) ("[A] report of a doctor's findings at an autopsy may reflect more exercise of judgment than the report of a DNA technician[.]")

Forensic pathologists are uniquely susceptible to the problem of improper external influence because, unlike other forensic assays such as toxicology, forensic pathology *requires* contextual information to opine on the potential circumstances of death.[12]

In a death investigation, the police usually provide the "circumstances surrounding death" to the medical examiner.[13] Indeed, Ohio (like many other states) *requires* law enforcement to share its preliminary findings with coroners preparing autopsy reports, on request.[14]

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12. *Cf. Resolution*, Nat'l Assoc. of Med. Exam'rs, Exec. Comm., (July 2, 2009), *available at* https://netforum.avectra.com/temp/ClientImages/NAME/b21b1126-3124-42f1-b73f-0a689113084f.pdf (urging caution in the area of contextual information and forensic pathology).

13. NAS Report, *supra* n.4, at 247.

14. *See* Ohio Rev. Code Ann. § 313.12(A).

In short, autopsies are inherently subjective, and medical examiners are exposed to many potential sources of biasing information, making their cross-examination essential. *See Bullcoming*, 131 S. Ct. at 2715 ("[S]urrogate testimony . . . . could not convey what [the forensic examiner] knew or observed about the events his certification contained . . . . Nor could such surrogate testimony expose any lapses or lies on [the examiner's] part.").

C. Confrontation of the Authors of Autopsy Reports Serves the Interests of Justice.

Cross-examination of the medical examiner who conducted the autopsy is essential to a proper defense. *See Davis v. Alaska*, 415 U.S. 308, 316 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.").

A surrogate's insulated testimony creates an unacceptable risk that inaccurate forensic science will be concealed. When a surrogate testifies, a defendant cannot probe whether the examining investigator's training or resources may have undermined the autopsy report's accuracy. Likewise, surrogate testimony will not reveal the role cognitive bias may have played in an investigator's conclusions, nor will it expose the pressure she experienced from a detective in the autopsy room to corroborate a law enforcement theory.[15]

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15. Rachel E. Barkow, *Prosecutorial Administration: Prosecution Bias and the Department of Justice*, 99 Va. L. Rev. 271, 296-99, 307 (2013) (reflecting upon the "notable tension

The implications of precluding such surrogate testimony are brought sharply into focus by *Melendez-Diaz*. Before this Court's decision reversing the Massachusetts Supreme Court in that case, Massachusetts permitted prosecutors to introduce toxicology reports without requiring testimony from the report's author. As a result, a long-running fraud by a lab analyst, Annie Dookhan, went undetected for years, affecting tens of thousands of Massachusetts criminal cases.[16] After *Melendez-Diaz*, the defense need not accept at face value a lab analyst's purportedly objective findings concerning controlled substances.

III. Errors in Shaken Baby Syndrome Prosecutions Illustrate the Importance of the Confrontation Clause Right.

Shaken baby syndrome ("SBS") (also known as abusive head trauma) refers to the two-part medicolegal hypothesis that, absent a confirmed alternative explanation, (1) "one can reliably diagnose shaking or abuse from three internal findings—subdural hemorrhage, retinal hemorrhage, and encephalopathy (brain abnormalities and/or neurological symptoms)" (collectively, the "Triad"); and (2) one can identify the perpetrator based on the onset of symptoms.[17]

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between forensic science and prosecution interests, with forensic labs tailoring results for law enforcement interests").

16. Sally Jacobs, *Annie Dookhan Pursued Renown Along a Path of Lies*, Boston Globe (Feb. 3, 2013), *available at* http://www.bostonglobe.com/metro/2013/02/03/chasing-renown-path-paved-with-lies/Axw3AxwmD33lRwXatSvMCL/story.html.

17. Keith A. Findley et al., *Shaken Baby Syndrome, Abusive Head Trauma, and Actual Innocence: Getting It Right*, 12 Hous. J. Health L. & Pol'y 209, 212 (2012) ("Findley").

Approximately 200 American defendants are convicted annually in deaths attributed to SBS.[18] In 50-75 percent of those cases, no medical evidence beyond the Triad supports the conviction.[19] As described in Section III.A, *infra*, the medical community increasingly agrees that the Triad alone cannot support an SBS conviction.[20] When a medical examiner attributes a child's death to SBS, she opines on the central issue in the case: whether a homicide has occurred. Defendants facing homicide charges based substantially on an examiner's belief that a homicide occurred must be allowed to confront the examiner.

A. As the Criminal Justice System Increasingly Recognizes, Scientific Research Undermines the Validity of Many SBS Diagnoses.

Although many SBS convictions are based primarily or exclusively on an examiner's finding that the Triad is present, the medical community increasingly accepts that the Triad alone is insufficient to establish homicide.

The history of SBS itself renders questionable the hypothesis that abuse can be reliably diagnosed based on

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18. Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 Wash. U. L. Rev. 1, 9-10 (2009).

19. *See* Emily Bazelon, *Shaken-Baby Syndrome Faces New Questions in Court*, N.Y. Times Mag. (Feb. 2, 2011) ("Bazelon"), *available at* http://www.nytimes.com/2011/02/06/magazine/06baby-t.html.

20. *See, e.g.*, Deborah Tuerkheimer, *Flawed Convictions: "Shaken Baby Syndrome" and the Inertia of Justice* 19-20 (2014).

the Triad's presence. In the 1960s, American neurosurgeon Ayub Ommaya experimented on monkeys to determine the acceleration level needed to cause head injury; his study did not address shaking or babies.[21] In 1972, British neurosurgeon A. Norman Guthkelch hypothesized—based on Ommaya's study and several individuals' confessions that they shook children violently—that severely shaken children could sustain subdural hemorrhages without direct evidence of violence.[22] And in 1974, American pediatric radiologist John Caffey hypothesized that the Triad could support a diagnosis of abusive shaking.[23]

Caffey's and Guthkelch's hypotheses crystallized into the medicolegal hypothesis of SBS, which initially went without serious challenge in the medical community.[24] More recently, however, Guthkelch has repudiated the use of his hypothesis to secure criminal convictions, and other former proponents of the SBS hypothesis have done

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21. Ayub K. Ommaya et al., *Whiplash Injury and Brain Damage: An Experimental Study*, 204 JAMA 285, 286 (1968).

22. A.N. Guthkelch, *Infantile Subdural Haematoma and Its Relationship to Whiplash Injuries*, 2 Brit. Med. J. 430, 430 (1971); *see also* Debbie Cenziper et al., *Doctors Who Diagnosed Shaken Baby Syndrome Now Defend the Accused*, Washington Post (Mar. 20, 2015) ("Cenziper"), *available at* http://www.washingtonpost.com/graphics/investigations/shaken-baby-syndrome/.

23. John Caffey, *The Whiplash Shaken Infant Syndrome: Manual Shaking by the Extremities with Whiplash-Induced Intracranial and Intraocular Bleedings, Linked with Residual Permanent Brain Damage and Mental Retardation*, 54 Pediatrics 396, 396 (1974).

24. Findley, *supra* n. 17, at 223-24.

the same.[25] Four key scientific findings have undercut the SBS hypothesis.

First, biomechanical research consistently shows that humans cannot shake an infant hard enough to produce the Triad of symptoms absent an accompanying blow to the head.[26] But more than half of SBS prosecutions do not involve external injuries.[27]

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25. A.N. Guthkelch, *Problems of Infant Retino-Dural Hemorrhage with Minimal External Injury*, 12 Hous. J. Health L. & Pol'y 201, 207 (2012) ("SBS and AHT are hypotheses that have been advanced to explain findings that are not yet fully understood . . . . [i]t *is* wrong . . . to fail to advise parents and courts when these are simply hypotheses, not proven medical or scientific facts[.]"); Findley, *supra* n.17, at 243 (Guthkelch states of SBS, "[T]here was not a vestige of proof when the name was suggested that shaking, and nothing else, caused the triad."); Cenziper, *supra* n.22 (Guthkelch explains, "I am doing what I can . . . . to correct a grossly unjust situation," and several other doctors, including former supporters of the SBS hypothesis, explain why they now believe it is unsound).

26. *See, e.g.*, Ann-Christine Duhaime et al., *The Shaken Baby Syndrome: A Clinical, Pathological, and Biomechanical Study*, 66 J. Neurosurg. 409, 409, 414-15 (1987) ("[S]evere head injuries commonly diagnosed as shaking injuries require impact to occur and that shaking alone in an otherwise normal baby is unlikely to cause the shaken baby syndrome."); Jan E. Leestma, *Case Analysis of Brain-Injured Admittedly Shaken Infants, 54 Cases, 1969–2001*, 26 Am. J. Forensic Med. & Pathology 199, 211 (2005) ("[M]ost of the pathologies in allegedly shaken babies are due to impact injuries to the head and body . . . ."); *see also* Debbie Cenziper, *Prosecutors Build Murder Cases on Disputed Shaken Baby Syndrome Diagnosis*, Washington Post (Mar. 20, 2015) ("Cenziper II"), *available at* http://www.washingtonpost.com/graphics/investigations/shaken-baby-syndrome/.

27. *See* Bazelon, *supra* n.19.

Second, causes such as infection, bleeding disorders, Sudden Infant Death Syndrome (SIDS), and accidental fall—which are not linked to criminal behavior—may produce Triad symptoms.[28]

Third, many autopsies that diagnosed SBS were inadequate because they did not examine the spine. Yet, spinal trauma may be clearer evidence of an SBS death than the Triad symptoms.[29]

Fourth, it is now medically established that children may remain conscious after a traumatic brain injury.[30] This undermines earlier thinking that traumatic brain injuries must be sustained immediately before death, which was sometimes used to convict adults who were with a child immediately before the child's death.[31]

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28. *See, e.g.*, Findley, *supra* n.17, at 214-15, 251-54 (listing numerous other causes of Triad symptoms); Mark Donohoe, *Evidence-Based Medicine and Shaken Baby Syndrome, Part I: Literature Review, 1966–1998*, 24 Am. J. Forensic Med. & Pathology 239, 241 (2003) ("[C]ommonly held opinion that the finding of [subdural hemorrhage] and [retinal hemorrhage] in an infant was strong evidence of SBS was unsustainable."); *see also* Cenziper II, *supra* n.26.

29. *See* Arabinda Kumar Choudhary et al., *Spinal Subdural Hemorrhage in Abusive Head Trauma: A Retrospective Study*, 262 Radiology 216, 216-17 (Jan. 2012).

30. *See, e.g.*, Scott Denton & Darinka Mileusnic, *Delayed Sudden Death in an Infant Following An Accidental Fall: A Case Report with Review of the Literature*, 24 Am. J. Forensic Med. & Pathology 371, 371-76 (2003); Findley, *supra* n.17, at 249-51.

31. Waney Squier, *Shaken Baby Syndrome: The Quest for Evidence*, 50 Developmental Med. & Child Neurology 10, 10-

The justice system increasingly recognizes that SBS diagnoses can be unreliable. Justices of this Court have acknowledged the increasing medical doubts "whether infants can be fatally injured through shaking alone." *Cavazos v. Smith*, 132 S. Ct. 2, 10 (2011) (Ginsburg, J., dissenting) (internal quotations omitted). Similarly, a federal district court granted habeas relief based on new medical evidence on SBS, explaining that SBS "is more an article of faith than a proposition of science." *Prete v. Thompson*, 10 F. Supp. 3d 907, 958 n.10 (N.D. Ill. 2014); *see also Edmunds*, 308 Wis. 2d at 385-86 (granting new trial in homicide case based on a "significant and legitimate debate in the medical community" as to SBS); *Ex parte Henderson*, 384 S.W.3d 833, 833-34 (Tex. Crim. App. 2012) (affirming grant of new trial because it was impossible to determine with reasonable medical certainty whether the victim's injuries resulted from abuse or an accident).

Foreign jurisdictions also recognize that SBS diagnoses have supported false convictions. In 2014, the Swedish Supreme Court reversed a conviction because "the scientific evidence for the diagnosis of violent shaking has turned out to be uncertain." The court noted that the Swedish Council on Health Technology Assessment is investigating the validity of the SBS hypothesis, and that the prosecution's medical expert at the defendant's initial trial now opined that "it is not possible to say today that the occurrence of the triad means that violent shaking has

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14 (2008); *State v. Edmunds*, 2008 WI App. 33, ¶ 15, 308 Wis. 2d 374, 386-89, 746 N.W.2d 590, 596 (Wis. Ct. App. 2008) (granting defendant new trial where, *inter alia*, there was a reasonable probability of a different result given new medical evidence that a child victim of head trauma could appear normal and lucid for a period before death).

been proved." *See* Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2014-10-16 pp. 7, 10 B3438-12.

From 2005 to 2007, the Ontario Attorney General systematically reviewed pediatric forensic pathology, focusing on Dr. Charles Smith, a leading pathologist whose diagnostic conclusions were widely questioned.[32] The Attorney General reviewed 142 cases, leading to at least four exonerations.[33] The United Kingdom conducted a similar review of 88 SBS cases, identifying three convictions with such serious concerns about their integrity that the Attorney General recommended appeal to the defense.[34]

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32. *See* Stephen T. Goudge, *Inquiry into Pediatric Forensic Pathology in Ontario, Volume 1: Executive Summary (2008)*, *available at* http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/report.

33. *See, e.g.*, Kirk Makin, *Mother Wrongly Convicted in Infant's Death Acquitted*, Globe & Mail (Dec. 7, 2009), http://www.theglobeandmail.com/news/national/mother-wrongly-convicted-in-infants-death-acquitted/article4294856/; Tracey Tyler, *A Father's 20-year Battle for Exoneration*, Toronto Star (Jan. 20, 2011), *available at* http:// www.thestar.com/news/gta/2011/01/20/a_fathers_20year_battle_for_ exoneration.html; Mike Crawley, *Ont. Mother's Murder Conviction Quashed*, CBC News Toronto (Feb. 10, 2011), http://www.cbc.ca/news/canada/toronto/ont-mother-s-murder-conviction-quashed-1.1024570; *Pathologist Played Key Role in Several Cases*, Hamilton Spectator (Nov. 12, 2007), *available at* http://www.thespec.com/news-story/2133878-pathologist-played-key-role-in-several-cases/.

34. The Rt. Hon. The Lord Goldsmith QC, *Review of Infant Death Cases Addendum to Report: Shaken Baby Syndrome* (2006), *available at* http://www.childrenscourt.justice.

Given the scientific uncertainties concerning SBS, the examples below illustrate that convictions are particularly unreliable if the SBS diagnosis is not tested through confrontation of the examiner.

B. Innocent Defendants Have Been Convicted in SBS Cases Because They Could Not Effectively Confront the Authors of Autopsy Reports.

Several innocent people have been wrongly convicted of causing SBS deaths, based on erroneous autopsy reports whose authors were not subject to effective confrontation at trial. The exemplar cases of Brandy Briggs, Sean Ralston, and Teresa Engberg-Lehmer and Joel Lehmer demonstrate the pervasive cognitive bias and error in the death investigation system, and how persuasive autopsy findings can be—both to juries and to defendants who plead guilty because they lack the resources to challenge autopsy findings effectively via confrontation of the examiner and competing expert evidence.

1 *Brandy Briggs*

Brandy Briggs' son, Daniel Lemons, was very sick from birth. Doctors were not able to diagnose the cause of his ailments. He died in 1999 at the age of two months, several days after being admitted to the hospital with a diagnosis of hypoxia, which was aggravated by emergency room personnel who mistakenly inserted an endotracheal (oxygen) tube into his stomach instead of his lungs.

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nsw.gov.au/agdbasev7wr/_assets/childrenscourt/m41005111/reviewofinfantdeathcasespaper.doc.

Harris County forensic pathologist Dr. Patricia Moore conducted Daniel's autopsy and concluded that his death was an SBS homicide. Based largely on the autopsy report, Briggs was charged in Daniel's death. Briggs pled guilty at her counsel's urging, because she could not afford his fees or experts' fees at trial. She was sentenced to 17 years in prison. Her guilty plea meant she never confronted Dr. Moore.

Years later, Briggs was able to hire habeas counsel. Habeas counsel retained forensic experts, who determined no evidence supported the conclusion that Daniel died from child abuse or SBS. Rather, he died from complications of an undiagnosed birth defect, made worse by the faulty intubation that led to brain death. While Briggs' habeas proceeding was pending, Dr. Moore became discredited: Harris County's chief medical examiner, Joye Carter, criticized Dr. Moore's "defective and improper work" and her pro-prosecution bias in infant death cases, and Harris County officials reclassified several child autopsies that she had labeled homicides.[35]

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35. *See* Brandy Briggs, Univ. of Mich. Law Sch., *available at* http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3812; Cenziper II, *supra* n.26. Moore's flawed child autopsies have been successfully challenged in at least three other cases. *See, e.g.*, *Ex Parte Robbins*, No. WR-73, 484-02 (Tex. Crim. App. Nov. 26, 2014); Yamil Berard, *Questions Raised About the 'Science' of Autopsies*, Fort Worth Star-Telegram, § B1 (Oct. 1, 2009); Lise Olsen, *Harris Co. Autopsy Changes Spurs Plea for Freedom*, Hous. Chronicle, § A1 (Sept. 14, 2009), *available at* http://www.chron.com/news/houston-texas/article/Harris-Co-autopsy-changes-spur-plea-for-freedom-1732345.php; Craig Kapitan, *Pathologist on Hot Seat in Trial*, Eagle (Nov. 9, 2007).

Briggs received habeas relief in 2005, because her trial counsel provided her prejudicially ineffective assistance in failing to discover and present the compelling evidence that Daniel died of natural causes rather than SBS. *Ex parte Briggs*, 187 S.W.3d 458, 469-70 (Tex. Crim. App. 2005).

2 *Sean Ralston*

In 1984, Sean Ralston and his wife took their three month old son, Bryan, to the hospital because he was not breathing. Bryan died before they arrived. The emergency room physician, Dr. Gary Cohen, told the couple that the baby had died of SIDS. Police questioned Dr. Cohen about a dark mark on Bryan's back and froth in his throat, but Dr. Cohen explained that the dark mark was due to post-mortem blood pooling and the frothy material was epinephrine that he had administered. In contrast, pathologist Dr. Edward Sussman, who conducted the autopsy, concluded that Bryan died from SBS. Ralston was charged with manslaughter.

Dr. Sussman testified at Ralston's trial, but defense counsel inadequately rebutted his testimony, according to the trial judge's later finding that counsel's work was disorganized and ineffective. Ralston's confrontation right was thus inadequately vindicated. He was convicted of involuntary manslaughter in 1989 and sentenced to 10-15 years in prison.

Ralston retained new counsel, who reinvestigated the case. Counsel submitted multiple expert affidavits concluding that Dr. Sussman incorrectly determined that Bryan died from SBS rather than SIDS. In late 1991, a judge set aside Ralston's conviction, holding that his trial

counsel had been prejudicially ineffective and that Dr. Sussman had used improper autopsy techniques. In June 1992, the prosecution dismissed the charges.[36]

3 *Teresa Engberg-Lehmer* and *Joel Lehmer*

In 1997, Teresa Engberg-Lehmer found her three-month-old son, Jonathan, cold and unresponsive. Iowa State Medical Examiner Dr. Thomas Bennett performed Jonathan's autopsy and declared his death an SBS homicide based on the presence of less than one-fifth of a teaspoon of blood within the child's skull, which he characterized as a subdural hemorrhage.

Based on Dr. Bennett's conclusions, both Engberg-Lehmer and her husband, Joel Lehmer, were charged with first-degree murder, although both steadfastly maintained their innocence. They entered *Alford* pleas to involuntary manslaughter and were sentenced to 15 years in prison, because they feared still-longer sentences if convicted of murder based on Dr. Bennett's findings.

After sentencing, the couple retained new counsel. Post-conviction counsel consulted with an expert pathologist who found no evidence of SBS and believed the child had died of SIDS. Thereafter, the prosecution consulted a forensic pathologist, who concurred that there was no evidence of SBS. The couple's convictions

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36. *See* Sean Ralston, Univ. of Mich. Law Sch., *available at* http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4531; Ian Donnis, *Former Soldier Vies for New Trial: Attorney Says Manslaughter Charge Should Be Dropped, Discrepancies Cited*, Telegram & Gazette (June 13, 1992); *Father Wins New Trial in Death of Infant Son*, Telegram & Gazette (Dec. 19, 1991).

were vacated. Shortly thereafter, Dr. Bennett resigned as the state Medical Examiner. At least two of his other SBS diagnoses were discredited and the defendants exonerated.[37]

The Briggs, Ralston, and Engberg-Lehmer/Lehmer cases illustrate the devastating effect that erroneous autopsy evidence not subject to confrontation can have on innocent defendants.

IV. Errors in Cases Involving a Child's Death Illustrate the Importance of the Confrontation Clause Right.

Although the death investigation system is rife with systemic flaws, the problems described above are especially acute in the investigation of the deaths of children, as sudden child deaths are often assumed to be murder, and many death investigators lack specialized expertise in the forensic pathology of children.

Members of the medical community have long recognized that "[a]utopsies of young children require a specialized understanding of pediatrics, pathology, child abuse, and forensic investigation," the lack of which often results in misclassification and mismanagement of the

37. *See* Barry Siegel, *Judging Parents as Murderers on 4 Specks of Blood*, L.A. Times (July 11, 1999), *available at* http://articles.latimes.com/1999/jul/11/news/mn-54984; Teresa Engberg-Lehmer, Univ. of Mich. Law Sch., *available at* http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3952; Joel Lehmer, Univ. of Mich. Law Sch., *available at* http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3953.

child's death.[38] This is because children succumb to unique and sometimes subtle injuries and maladies that may be easily missed by an examiner trained to ascertain causes of adult death.[39,40] Unfortunately, the vast majority of medical examiners and forensic pathologists lack specific training in identifying the cause of a child fatality, and only a handful of medical examiners nationwide specialize in child autopsies.[41]

To make matters worse, the forensic evidence often plays a primary role in police investigation and prosecution in child death cases. According to Canadian Justice Stephen Goudge, who conducted an extensive inquiry into Ontario's forensic pathology system, in the death investigation of a child "[o]ften there are only two pieces of evidence . . . . who had care of the infant in the hours leading up to the death . . . . [and] the forensic pathology, which attempts to give an opinion on what the cause of death was." Thus, if the autopsy findings are flawed, "the risk of a miscarriage of justice is high."[42]

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38. Michael J. Durfee et al., *Origins and Clinical Relevance of Child Death Review Teams*, 276 JAMA 3172, 3173 (June 17, 1992).

39. U.S. Dep't of Health & Human Services, *A Nation's Shame: Fatal Child Abuse and Neglect in the United States* 51-52 (1995), *available at* http://ican4kids.org/documents/Nation%27s_Shame.pdf ("HHS Report").

40. A.C. Thompson, Chisun Lee & Joe Shapiro, *The Hardest Cases: When Children Die, Justice Can Be Elusive*, ProPublica, PBS Frontline & NPR ("Thompson"), *available at* http://www.pbs.org/wgbh/pages/frontline/the-child-cases/the-hardest-cases/.

41. HHS Report, *supra* n.39, at 51.

42. Thompson, *supra* n.40 (internal quotations and citation omitted).

These factors have culminated in a disturbing trend in which unsound prosecutorial forensic evidence has contributed to wrongful convictions.[43] The examples discussed below illustrate that the confrontation right can be invaluable in exposing inadequate qualifications of death investigators, and other forms of misconduct in death investigations of children.

1. *Paul Shrode*

Rigorous cross-examination was instrumental in the dismissal of El Paso County medical examiner Paul Shrode. Concerns regarding Mr. Shrode's credentials were initially raised by his admissions during cross-examination in 2007, while testifying in a child protection case in which he had offered medical testimony.[44] During these proceedings, Mr. Shrode conceded that he had no law degree or diploma, despite having claimed to hold

43. A recent investigation by ProPublica identified nearly two dozen cases in the United States and Canada in which individuals were falsely accused of killing children based on flawed or biased forensic pathology work, and later cleared. Chisun Lee et al., *The Child Cases*, ProPublica, PBS Frontline & NPR (June 27, 2011) ("Lee"), *available at* http://www.propublica.org/special/the-child-cases.

44. Diana Washington Valdez & Ramon Bracamontes, *Update: County Commissioners Fire El Paso Medical Examiner Paul Shrode*, El Paso Times (May 24, 2010) ("Valdez"), *available at* http://www.elpasotimes.com/news/ci_15148023?source=pkg; *see generally* Trial Transcript from *In the Interest of A.R.D. et al.* (Aug. 13, 2007), *available at* http://extras.mnginteractive.com/live/media/site525/2010/0110/20100110_053811_Shrodercase.pdf ("Shrode Testimony").

a law degree on his resume.[45] Subsequent investigation revealed that Mr. Shrode also never received certification in anatomic and forensic pathology and was not eligible for board certification.[46]

Mr. Shrode was dismissed from his position in 2010, and his work has since been discredited in numerous cases.[47] For example, in 2008, Mr. Shrode incorrectly ruled that the death of two-year-old Jayceon Tyson was a homicide caused by blunt force trauma, and his autopsy report served as the basis for a capital proceeding against the child's mother, Monea Tyson. Although Mr. Shrode had by then been fired, Ms. Tyson's attorney challenged his credentials based on the investigation prompted by his 2007 testimony, and engaged an independent medical examiner who testified that the child died of sepsis.[48] Ms. Tyson was subsequently acquitted.

2. *Thomas Gill*

Dr. Thomas Gill has conducted thousands of autopsies in multiple states for over 30 years. After Dr. Gill was terminated for inaccurate findings and alcohol abuse

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45. Shrode Testimony, *supra* n. 44, at 216-20.

46. Valdez, *supra* n.44; Marty Schladen, *County Fires Chief Medical Examiner Paul Shrode: Ohio Parole Board's Ruling Spurs Decision*, El Paso Times (May 25, 2010), *available at* http://www.elpasotimes.com/ci_15155274?source=pkg.

47. *Id.*

48. *Former Texas Soldier Acquitted in Toddler's Death*, KWTX.Com (Nov. 19, 2010), *available at* http://www.kwtx.com/home/headlines/109191644.html; Lee, *supra* n.43.

while working as a coroner in Indianapolis, he was hired to perform death investigations for over a dozen cities in Northern California, where he was ultimately barred from conducting autopsies because of his incompetence.[49]

Dr. Gill's shoddy work was eventually exposed by rigorous confrontation. Dr. Louis Pelfini was charged with the murder of his wife based largely on Dr. Gill's determination that the victim's death was due to murder by asphyxiation. Pelfini's counsel highlighted deficiencies in Dr. Gill's death investigation and employment history, and hired a competing medical expert to challenge his conclusions.[50] The district attorney's office eventually dismissed all charges against Pelfini, and the California State Bar initiated an investigation of the prosecuting attorney.[51] It concluded that "Dr. Gill was not a competent pathologist and committed several serious errors," including "creat[ing] new drawings of his autopsy a year after his [original] autopsy to correct errors in his autopsy report."[52]

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49. Ryan Gabrielson, *Second Chances Underscore Flaws in Death Investigations,* ProPublica (Jan. 31, 2011) ("Gabrielson"), *available at* http://www.pbs.org/wgbh/pages/frontline/post-mortem/second-chances/.

50. *Pelfini Charges Dropped-Stunning Video of Pathologist Fabrications*, Chris Reynolds Investigations, *available at* http://cdrpi.com/pelfini-charges-dropped-stunning-video-of-pathologist-fabrications/; *see also* Gabrielson, *supra* n.49.

51. *In the Matter of Brooke P. Halsey, Jr.*, State Bar of Cal. Hearing Dept. (Aug. 1, 2006), *available at* http://www.documentcloud.org/documents/31419-02-o-10195.html.

52. *Id.*

Many of Dr. Gill's autopsy findings of children have been discredited; for example, he ruled that a 17-month-old child died from an infection when, in fact, the child was killed trying to free himself from a dilapidated crib.[53] He also incorrectly ruled another child's death a homicide by shaking, a finding that was later overruled by his supervisor.[54]

These examples illustrate that if autopsy findings are flawed, "the risk of miscarriage is high." It is essential that the examiner who conducted the autopsy is subject to cross-examination.

53. *Id.*

54. Gabrielson, *supra* n. 49.

V. Conclusion

For these reasons, *Amicus Curiae* urges this Court to grant the petition and hold that autopsy reports—especially those finding that the victim died due to homicide—are testimonial, requiring confrontation of their authors. This is necessary to expose fraud, cognitive bias, shoddy techniques, and suggestion by law enforcement officers that may have affected the autopsy report's conclusions, and to ensure that erroneous autopsy reports do not continue to generate wrongful convictions.

Respectfully submitted,

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