No. 10-1115

IN THE SUPREME COURT OF THE UNITED STATES

JAVIER CAVAZOS, Acting Warden, *Petitioner*

v.

SHIRLEY REE SMITH, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL J. BRENNAN, ESQ.
729 Marine Avenue
Manhattan Beach, California 90266
Telephone: (213) 740-2527

Attorney for Respondent
SHIRLEY REE SMITH

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QUESTION PRESENTED

When prosecution experts, coroners employed by the Los Angeles County Coroners Office, who opined that the cause of the infant's death in this case was the result of violent shaking which tore or sheared the brain and/or the brainstem, admitted at trial that they could not identify any medical evidence of tearing and/or shearing of the brain or brainstem during their autopsy of the infant, does such lack of observable medical findings meet the sufficiency of evidence standard set forth by this Court in *Jackson v. Virginia*, 443 U.S. 309 (1979).

STATEMENT OF THE CASE

Respondent adopts the recitals contained in the decisions of the Ninth Circuit Court of Appeals, which opinions are reported at 437 F.3d 884 (9th Cir. 2006), 508 F.3d 1256 (9th Cir. 2007), and 624 F.3d 1235 (9th Cir. 2010).

Rule 15.2 of the Rules of the Supreme Court of the United States states, in part:

> ...in addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the court if certiorari were granted.

Petitioner's Statement of the Case, which appears at pages 3 - 14 of his Petition for Writ of Certiorari, contains material misstatements of fact and material omissions of fact, which are relevant to the question Petitioner attempts to raise before this court.

Respondent addresses these misstatements and omissions as follows, including citations to the trial record.

1. Petitioner's factual statement in his statement of the case, (hereinafter "Petitioner's Statement"), Petition, pg. 3-4:

> Respondent [Smith] explained to the social worker that, at that point, she gave Etzel "a little shake, a jostle" to awaken him. Respondent demonstrated the shaking as a smooth rather than jerking motion. But, Respondent said, Etzel still failed to respond. When the social worker asked what happened next, Respondent said, "Oh, my god. Did I do it? Did I do it? Oh, my god." At that, Respondent's daughter [Tomeka Smith] turned to her and said, "If it wasn't for you, this wouldn't have happened. Respondent did not reply.

The statements attributed to Respondent and her daughter are contradicted

by the record. Tomeka Smith testified at the trial that she was present when this conversation took place between the social worker and Respondent. Ms. Smith denied that Respondent made a statement to the effect of "Did I do it?" and denied that she, Tomeka Smith, made any statement accusing her mother, Respondent Smith, of any culpability. RT 388-391.

2. Petitioner Statement:

> [The prosecution experts] found physical evidence of recent trauma to the brain, including bleeding at the top of the brain caused by tearing of blood vessels in that area. Petition, pg. 4.

Response:

This statement is incorrect.

First, both Drs. Carpenter and Erlich agreed that when the infant's skull was opened, a small amount of blood was observed on the brain itself, approximately 1 - 2 tablespoons. RT 538, 557, 675, 758. Both doctors described the observed blood as being "small" in quantity and not the cause of the infant's death. RT 758, 676. When Erlich first observed this small amount of blood on the brain, she did not see "any physical organic injury to the brain," nor did she see any blood on the brainstem. RT 759.

3. Petitioner's Statement:

Dr. Erlich found several independent signs of recent trauma during the autopsy on Etzel's body: fresh blood, measuring one or two tablespoons, on the top of the brain; a fresh blood clot between the hemispheres of the brain; recent hemorrhaging around the optic nerves; a small quantity of fresh subarachnoid blood; and a small bruise and recent abrasion at the lower-back part of the infant's head. These indicators, together with the absence of evidence of hemorrhaging or swelling and the absence of evidence of any external injury that might have caused death, supported Dr. Erlich's conclusion that the infant was violently shaken in a way that resulted in a very rapid death. Petition, pg. 5 - 6.

Response:

This statement is both a misstatement of fact and an omission of fact.

Both Carpenter and Erlich observed a small abrasion on the back of the infant's head, which they also agreed was not the cause of death. RT 576, 711-13. This abrasion, which measured 1/16 of an inch by 3/16 of an inch, was described by Dr. Erlich by being the size of a "match head." RT 1287.

Both doctors testified that they saw small subdural hemorrhages in the outer membrane surrounding the brain, which were located in the back and bottom part

of the skull. Some of this subdural hemorrhaging was bleeding which had occurred at least two weeks prior to the infant's death. RT 570-73, 710, 718-22, 770-71.

Carpenter and Erlich also observed subarachnoid hemorrhages, hemorrhages of the middle membrane surrounding the brain. RT 570-73, 717-22. Erlich said these hemorrhages as "very, very small areas and very patchy." RT 719. She said these hemorrhages as being "about a quarter of an inch in size. . ." RT 675.

Finally, the doctors observed both old and new bleeding around the optic nerves. RT 570, 714. Erlich testified that both subdural hemorrhages and subarachnoid hemorrhages are **not** exclusively limited to cases involving Shaken Infant Syndrome, but are manifested in other forms of trauma in infants. RT 1279. Again, both doctors agreed that the subdural and subarachnoid hemorrhages and the bleeding around the optic nerves, either individually or in combination, was **not** the cause of death.

4. Petitioner's statement:

> Dr. Carpenter opined that Etzel's death had been caused by the third process [violent shaking], and he also identified the observable physical evidence supporting his opinion. He found that the bleeding

autopsy findings?

A: *One cannot know specifically*. It would be the areas that were destroyed during the shaking upon which the body - - depends for its survival such as the area in the medulla of the brainstem that controls the heart and the area in the medulla of the brainstem that controls respiration.

Q: Doctor, is it not true that the brainstem plays a critical role in the breathing of an infant?

A: Yes.

Q: And, doctor, is it not true that the reports show clearly that the brainstem was normal and intact.

A: It shows there are *no findings that could be detected.* It does not mean that it is normal and intact. It means that there *is no evidence* and *there is no evidence expected to be found* in a shaken infant that dies quickly because the body does not have time to react to the injury.

RT 694-96. (emphasis added.)

5. Petitioner's Statement:

[Dr. Carpenter] added that the bruise and abrasion at the back of Etzel's head had "very probably" occurred during the shaking, indicating that the head collided with a hard, rough surface. Petition,

pg. 7.

Response:

While both Drs. Erlich and Carpenter observed a small abrasion on the back of the infant's head, they also agreed it was not the cause of death. RT 576, 711-13. This abrasion, measured 1/16 of an inch by 3/16 of an inch, and was described by Dr. Erlich as being the size of a "match head." RT 1287.

6. Petitioner's statement:

In Dr. Erlich's opinion, Etzel's death was caused by the third process: he was shaken so violently that the vital centers of his brain were **directly damaged**, causing his heart and breathing to shut down. Petition, pg. 5. (emphasis added).

Response:

When asked to describe the cause of death of the infant, Erlich testified as follows:

Q: And they could die immediately without the swelling of the brain?

A: Yes, because that's not the mechanism. The mechanism is the *damage* to the brainstem from the shaking. It is not the swelling and it is not the amount of blood.

Q: Okay. So, doctor, you are saying that it is either the swelling of the brain

or a herniation of the brainstem? The *damage* to the brainstem?

A: It could be *damage* to the brainstem which causes *damage* to the areas that control respiration and heartbeat. And if that's the case, the death is fast.

Q: Well, so doctor - -

A: And since I don't have the blood to go on, and I don't have the swelling, the most *likely* mechanism is that it was fast and it was *direct damage* too (sp) the brainstem.

Q: But, doctor, that opinion that you have expressed now is not reflected by the findings because the brainstem is intact. There is no herniation; is that correct.

A: Yes. . . . Grossly, the brainstem is intact. But the areas - - there *may be damage* microscopically that we won't see because it all happened so fast. It is a difficult *concept* to absorb.

Q: I acknowledge that. So, doctor, it was your testimony prior and your - - I believe you stated it now that you could not microscopically tell the mechanism of death in this case, correct?

A: *We did not even section the brainstem.* There is no need because it happened so fast that ***we wouldn't even see*** *anything.*

RT 1298-99. (Emphasis added).

Throughout Petitioner's Statement of the Case related to the state court trial, he appears to rely upon the trial transcript by including quoted passages, but since he omits any citation to the trial record it is difficult to respond to some of these quoted passages.

7. Petitioner's statement regarding the direct review of Respondent's state court conviction. With respect to Respondent's insufficiency claim on direct appeal, Petitioner states "the state court presented a lengthy and meticulously detailed summary of the trial evidence, with special emphasis on the testimony of the expert witnesses for both sides." Petition, pg. 9.

Response:

The opinion of the California Court of Appeal in this matter is significant for what it failed to include in its opinion.

In reporting these findings, the court **failed** to disclose that the blood on the infant's brain was insignificant in quantity, approximately 1 - 2 tablespoons, and was not the cause of the infant's death. With respect to the abrasion on the back of the infant's head, the court **failed** to describe this abrasion as being 1/16 by 3/16 of an inch in size. With respect to the subdural and subarachnoid hemorrhages the court failed to describe that these hemorrhages were approximately 1/4 of an inch

in size, which Carpenter said were "small, mild areas" of hemorrhage.

The court recounted Dr. Carpenter's testimony that in his opinion the infant died as "a result of direct trauma to the vital areas of the brain before there was enough accumulation of blood to cause death from pressure on the brain." Petitioner's App. K, pg. 82.

The court then addressed the testimony of Dr. Erlich, who corroborated Dr. Carpenter's testimony about the autopsy findings of the infant. The court also included Dr. Erlich's testimony concerning the neuropathological examination which she conducted on the infant's brain, along with Dr. Hidelo Itabashi, and Dr. Erlich's testimony concerning the presence of subarachnoid and subdural hemorrhages. The court reported Dr. Erlich's testimony that in her opinion the cause of death was trauma to the brain. Petitioner's App. K, pg. 84.

The significance of the court's opinion concerning the testimony of the prosecution's medical experts was not that which was included in the opinion, but rather the more significant testimony from Carpenter and Erlich which was **not** mentioned in the opinion at all. The court **failed** to mention that Carpenter and Erlich agreed that two of the recognized causes of death in Shaken Infant Syndrome cases are massive swelling of the brain or massive bleeding within the infant's skull, which both cause the brain to be pushed downward within the skull

REASONS FOR DENYING THE WRIT

I. This Court Should Deny Respondent's Petition for Writ of Certiorari Because His Assertions for Granting the Writ Are Neither Factually Nor Legally Accurate.

For the third time in the past five years, Respondent (actually the State of California) seeks to reincarcerate an elderly, African-American grandmother, who has already served some ten years in custody as a result of a state court conviction which is not supported by sufficient evidence.

For the third time, Petitioner mischaracterizes this case as one in which the Ninth Circuit Court of Appeals re-weighed conflicting expert testimony concerning the cause of the infant's death and substituted its view that the defense experts were more persuasive than the prosecution's experts. *See* Petition, pg. 21 - 23. Petitioner's mischaracterization of the Ninth Circuit's decision is an obvious attempt to garner this Court's attention to the case. The Ninth Circuit did not choose the defense experts' testimony over that of the prosecution, but rather found that the scientific evidence agreed upon by all five medical experts in the case did not support the prosecution experts' opinion that the infant died as a result of Shaken Baby Syndrome. The Ninth Circuit relied upon the admissions of the prosecution's experts that they were unable to identify through the gross autopsy, the neuropathological examination and/or the eye pathology **any** medical

evidence to support their hypothesis concerning the cause of death. The court found that the absence of any medical evidence of the supposed tearing or shearing of the brain and/or the brainstem, constituted an **absence** of evidence which was insufficient to constitute proof of guilt beyond a reasonable doubt in this case. This conclusion by the court was not its choice of the testimony of one set of experts over the other, but rather its finding that there was **no** medical or circumstantial evidence to support the hypothesis offered by the prosecution's experts.

A federal court's collateral review of a state court conviction does not involve a determination of whether the evidence established guilt beyond a reasonable doubt. *Payne v. Borg*, 982 F.2d 335, 338 (9th Cir. 1992), cert. denied, 510 U.S. 843, 114 S.Ct. 131 (1993). Instead, the federal court determines only whether, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* If no rational trier of fact could have found proof beyond a reasonable doubt, then the writ is granted. *Jackson*, 443 U.S. at 324; *Wright v. West,* 505 U.S. 277, 318-319 (1995).

The very existence of the reasonable doubt test set forth in *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781 (1979), presupposes that juries, accurately

charged on the elements of a crime and on the strict burden of persuasion to which they must hold the prosecution, nevertheless "may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt. [The test] was adopted to provide an additional safeguard against that possibility, and was to give added assurance that guilt should never be found except on a rationally supportable state of near certitude." *West v. Wright*, 931 F.2d 262, 268 (4th Cir. 1991), rev'd on other grounds, 505 U.S. 277, 112 S.Ct. 2482 (1992)(quoting *Jackson v. Virginia*, 443 U.S. at 315, 99 S.Ct. at 2786).

The Ninth Circuit was faced with uncontroverted evidence in many areas, including Smith's personal history, the circumstances surrounding the death of the infant and the medical findings of the gross autopsy, the neuropathological exam and the eye pathology.

First, Smith had no history of violence, no history of any social problems, no history of child abuse upon her children or her grandchildren, no history of infliction of corporal punishment upon her children and/or her grandchildren and no evidence of any predisposition to commit the violent act attributed to her.

In addition, the infant, Etzel Smith, had no history of any abuse and presented at the hospital with no observable signs of any physical abuse inflicted upon him. The infant had acted normally the evening he died, going to sleep on

his stomach in the living room area of the apartment, with his mother asleep a few feet away in an adjoining bedroom. Smith found the infant to be unresponsive and limp at approximately 3:20 a.m. on November 30, 1997. Emergency personnel were summoned, but the infant could not be revived. The diagnosis by the emergency room doctor was that the infant died as a result of Sudden Infant Death Syndrome.

More importantly, all five medical experts who testified in this case agreed upon the medical findings of the gross autopsy, the neuropathological examination of the brain and the pathological examination of the infant's eyes. Upon gross autopsy, a small amount of fresh blood, approximately 1 - 2 tablespoons, was found on top of the infant's brain. A small abrasion, approximately 1/16 of an inch by 3/16 of an inch, was located on the back lower part of the infant's head. There were findings of recent subdural and subarachnoid hemorrhages, as well as evidence of old subdural bleeding, and both old and new bleeding around the optic nerves. The experts agreed that the old bleeding observed within the infant's skull had occurred at least days, if not weeks, prior to his death.

Except for the minor bleeding, there were no other findings indicating any trauma to the infant, either internally or externally. There were no fractures of any of the infant's bones, there was no bruising observed on the infant's body, there

were no sprains or dislocations of any of the infant's joints, there was no swelling of the infant's brain and no significant bleeding within the infant's skull.

All of the medical experts agreed that the two medically recognized causes of death in Shaken Baby Syndrome cases are massive bleeding and massive swelling within the skull, both causing downward pressure of the brain into the spinal column which crushes the brainstem. All medical experts in this case agreed that there was no swelling of the infant's brain which was the cause of death and that the bleeding which was observed inside the infant's skull was insignificant and did not cause the infant's death. The experts all agreed that the small abrasion on the back of the infant's head was not the cause of the infant's death.

The experts all agreed that in at least 80 - 85 percent of cases involving Shaken Baby Syndrome, there is observable retinal hemorrhaging. There was no retinal hemorrhaging in this case.

Most importantly, all of the medical experts agreed that the gross autopsy and subsequent neuropathological examination of the brain did not reveal any **observable** damage to the brain or the brainstem. Both the brain and the brainstem were normal and intact.

Despite the agreement by all five medical experts about the medical findings

detailed above, the prosecution's experts offered their hypothesis that Smith's assumed shaking of the infant had torn or sheared the brain and/or brainstem of the infant causing his nearly instantaneous death. The prosecution experts, both coroners working for the Los Angeles County Coroner's Office, admitted that this shearing or tearing of the brain and/or brainstem **could not** be detected upon their physical examination of the infant. They agreed that there was **no observable evidence** in the brain and/or the brainstem confirming their supposition as to the cause of death.

Moreover, the prosecution experts did not they testify that they were offering their medical opinions based upon "a reasonable degree of medical certainty" that the child was a victim of Shaken Baby Syndrome. *See People v. Ewing,* 72 Cal. App. 3d, 714, 140 Cal.Rptr. 299 (1977). In addition, neither coroner testified that they had previously performed an autopsy upon an infant in which they reached a similar hypothesis, that being an infant who died instantly with no observable brain injury. Neither coroner testified that their hypothesis of instantaneous death, without any observable damage to the brain or brain stem, was supported by any recognized medical literature.

This case has nothing to do with the Ninth Circuit choosing one set of experts over the other set of experts, but rather the court's correct conclusion that

the hypothesis offered by the prosecution experts had no evidentiary support from the agreed upon medical findings of the gross autopsy, the neuropathological examination of the brain and the eye pathology of the infant's eyes. The Ninth Circuit was correct in concluding that a defendant cannot be found guilty beyond a reasonable doubt and sentenced to life in prison based upon an **absence of evidence** to support the hypothesis of the state's experts.

II. The Ninth Circuit Correctly Analyzed this Court's Decision in *McDaniel v. Brown*, 558 U.S. _____, 130 S.Ct. 665 (2010), as it Applied to this Case.

On or about Jan 19, 2010, the United States Supreme Court vacated this court's prior judgment in this matter and remanded the case for further consideration in light of *McDaniel v. Brown, 558* U.S. _____ , 130 S.Ct. 665 (2010).

A. <u>This Court's Decision in *McDaniel v. Brown*</u>.

In a *per curiam* decision, the Supreme Court held, in *McDaniel v. Brown,* that the Ninth Circuit erred when it granted habeas corpus relief to a state prisoner by misapplying *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A Nevada jury convicted Brown of sexual assault, relying primarily upon DNA evidence recovered from the victim's underwear which matched Brown's

DNA profile.

Brown sought state post-conviction relief, claiming that his trial counsel was constitutionally ineffective for failing to object to the admission of the DNA evidence and this failure caused valid issues for appeal not to be preserved. The state post-conviction relief was denied by the Nevada appellate courts and the Nevada Supreme Court.

Brown thereafter filed a federal habeas petition claiming there was insufficient evidence to convict him of the assault charges and that the Nevada Supreme Court's rejection of his claim was both contrary to, and an unreasonable application of *Jackson*. This claim was not a typical sufficiency claim under *Jackson*, but rather an argument that the DNA evidence admitted against him should have been excluded from the *Jackson* analysis on the grounds that it was inaccurate and unreliable. In support of his claim, Brown submitted a report prepared by Dr. Lawrence Mueller (the Mueller Report), which had been prepared some 11 years after the trial. The district court supplemented the appellate record with the Mueller report even though it had not been presented to the state court jury. Relying upon the Mueller Report, the district court set aside the "unreliable DNA testimony" and held that, without the DNA evidence, a reasonable doubt would exist in the mind of any rational trier of fact concerning the prisoner's guilt.

The court granted habeas release on the *Jackson* claim.

The Ninth Circuit, in *Brown v. Farwell*, 525 F.3d 787 (9th Cir. 2008), affirmed the district court decision, holding that "the admission of [the state's DNA expert's] unreliable and misleading testimony violated Troy's due process rights . . . *Id.* at 797. The court then reviewed the sufficiency of the remaining evidence, including the district court's "catalog [of] the numerous inconsistencies that would raise a reasonable doubt as to [the prisoner's] guilt in the mind of any rational juror." *Ibid.* In light of the "stark" conflicts in the evidence and the state's concession that there was insufficient evidence absent the DNA evidence, the court held that it was objectively unreasonable for the Nevada Supreme Court to reject Brown's sufficiency of the evidence claim. *Id.* at 798.

This court granted certiorari to consider the proper standard of review for a *Jackson* claim on federal habeas and whether such a claim may rely upon evidence outside the record that goes to the reliability of the trial evidence.

In briefing before this court, both parties agreed that the resolution of the *Jackson* claim by the Ninth Circuit was in error. The court found, however, that the *Jackson* issue was not moot since the parties continued to seek different relief from the court. Brown conceded that it was improper for the district court to admit the Mueller report for the purpose of evaluating his *Jackson* claim and

conceded the "purpose of the *Jackson* analysis is to determine whether the jury acted in an irrational manner in returning a guilty verdict based upon the evidence before it, not whether improper evidence violated due process . . ." Brief for Respondent 35, at 2. Finding that there had been no suggestion that the evidence adduced at trial was insufficient to convict unless some of the DNA evidence was excluded, this court found that Brown's concession disposed of his *Jackson* claim.

Having disposed of the sufficiency claim related to the DNA evidence, the court went on to find that the holding of the Ninth Circuit related to the non-DNA evidence departed from the differential standard of review required by *Jackson* and 28 U.S.C. §2254 (d)(1).

In its decision affirming the decision by the district court to grant habeas relief, the Ninth Circuit reviewed "numerous inconsistencies that would raise a reasonable doubt as to [Brown's] guilt in the mind of any rational juror." 525 F.3d at 797. These inconsistencies included the following: (1) three witnesses disagreed about the time when Brown left the bar to return home the night of the assault, with one witness placing him at the bar after the assault had occurred, (2) the victim identified Brown as her attacker, but had twice identified Brown's brother, Trent, as her assailant, (3) there was considerable conflict between the victim's description of her attacker and Brown's clothing and appearance the night

of the assault, (4) the defense offered testimony by Brown's brother and his roommate that they did not see blood on Brown's boots or notice anything unusual when he arrived home at approximately 1:30 a.m., the night of the assault, (5) an investigating officer failed to find any marks on Brown's hands or blood on his clothing, which would have been consistent with Brown being the assailant, (6) there was inconsistency in testimony about Brown's reason for washing his clothes when he arrived home the night of the assault, (7) there were questions about the manner in which the forensic evidence at the scene was collected and examined by investigating officers, (8) the fact that Brown's fingerprints did not match the fingerprint on the night stand in the victim's room, which the victim testified her attacker had turned off before waking her, (9) the fact that the victim's bedding and pubic hairs discovered in the victim's bedroom were not tested for DNA samples, and (10) the fact that Brown voluntarily contacted the police to determine whether he was wanted for arrest and the fact that he voluntarily submitted to a full-body examination. *Id.* at 797.

The Ninth Circuit concluded this exhaustive examination of the differences between the prosecution evidence and the defense evidence by stating:

> The conflicts in the evidence are simply too stark for any rational trier of fact to believe that [Brown] was the

> assailant beyond a reasonable doubt, an essential element of any sexual assault charge. This conclusion is confirmed by respondent's own concessions. Therefore the Nevada Supreme Court's decision was "an unreasonable application of" *Jackson*. *Id.*

The U.S. Supreme Court, in *McDaniel*, concluded its *Jackson* analysis by stating:

> In sum, the Court of Appeals analysis failed to preserve "the fact finder's role as weigher of the evidence" by reviewing "all the evidence . . . in the light most favorable to the prosecution," (internal cite omitted) and it further erred in finding that Nevada Supreme Court's resolution of the *Jackson* claim was objectionally unreasonable.

558 U.S. at _____.

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B. The Distinction Between *McDaniel v. Brown* and The Ninth Circuit's Decision in *Smith v. Mitchell*.[1]

The Ninth Circuit's decision in *Smith v. Mitchell* stands in stark contrast to the Supreme Court decision in *McDaniel v. Brown*. In *Smith*, the Ninth Circuit, as is required by *Jackson*, set forth a summary of the evidence submitted to the jury at trial. 437 F.3d at 885-888. Having summarized the trial evidence, the Ninth Circuit then proceeded to its sufficiency analysis. Ninth Circuit correctly observed that while the prosecution experts testified that shaking had caused the victim's death, the experts conceded the absence of the usual indicators of violent shaking, such as bruises on the body, fractured arms or ribs, or retinal bleeding. *Id.* at 890. The Ninth Circuit also observed that while there was bleeding on the brain, both old and new, the prosecution experts agreed that the bleeding did not cause death. *Id.* at 890. The Ninth Circuit further observed that while the prosecution experts opined that violent shaking had torn or sheared the brainstem, they admitted the supposed trauma was undetectable. *Id.* at 890. The prosecution experts agreed that the brain of the victim did not exhibit the usual manner of death in Shaken

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[1] The original opinion of the Ninth Circuit reversing the judgment of the district court and remanding with instructions to grant respondent's petition for writ of habeas corpus is reported at 437 F.3d 884 (9th Cir. 2006), and the order denying the warden's petition for rehearing and suggestion for rehearing en banc is reported at 453 F.3d 1203 (9th Cir. 2006).

Baby Syndrome cases, that being excessive bleeding or swelling that crushes the brainstem. *Id.* at 890. The Ninth Circuit then stated that "Instead, their testimony was that death was caused by shearing or tearing of the brainstem and they reached this conclusion because *there was no evidence in the brain itself of the cause of death.*" *Id.* at 890. (emphasis added).

The Ninth Circuit went on to state:

> The prosecution's expert testimony, absolutely crucial to its case, concluded that the cause of death was tearing or shearing of the brainstem when there was no physical evidence of tearing or shearing, and no other evidence supporting death by violent shaking. *Absence of evidence cannot constitute proof beyond reasonable doubt.* (emphasis added).

Id. at 890.

In deciding *Smith*, the Ninth Circuit did not, as Respondent continues to argue, substitute the opinion of defense experts concerning the cause of death of the victim for the testimony of the prosecution experts. The Ninth Circuit simply pointed to the fact that the prosecution experts, whose testimony was the sole basis of the jury's guilty verdict, did not offer identifiable evidence that the victim's brain had suffered any trauma whatsoever. The prosecution's experts simply

opined that the victim's brain must have suffered trauma which caused death, all the while agreeing that there was no physical evidence of such trauma.

In contrast, in *McDaniel v. Brown*, this court pointed to numerous instances in which the Ninth Circuit compared and contrasted prosecution evidence with defense evidence. The Ninth Circuit had referred to no fewer than ten instances of contradictory evidence between the prosecution case and the defense case in reaching its decision.

The Ninth Circuit did not engage in such a comparative analysis of the evidence in *Smith*, but rather correctly pointed out that the prosecution case against Smith was not simply insufficient, but nonexistent. The prosecution experts' opinions were not supported by any observable physical evidence of trauma to the victim. The Ninth Circuit did not compare and contrast the prosecution experts with the defense experts. Rather, the Court ruled that there was a failure by prosecution experts to identify and present verifiable physical evidence to support their opinions concerning the case of the victim's death. This failure of evidence compelled the Ninth Circuit's decision.

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III. This Court Should Deny the State's Petition for Writ of Certiorari Because this Court Is Not the Appropriate Forum for Resolving Factual Disputes.

By its own decree, this Court is not the appropriate forum for addressing a claim of erroneous factual findings by a lower court: "[W]e do not grant a certiorari to review evidence and discuss specific facts." *U.S. v. Johnson,* 268 U.S. 220, 227 (1925); *see NLRB v. Henricks County Rural Elec. Memership Corp.,* 454 U.S. 170, 176 n.8 (1981) (improvident grant of cross-petition; petition presented primarily a question of fact, "which does not merit Court review"); *Rudolph v. United States,* 370 U.S. 269 (1962) (per curaim)*; Southern Power Co. V. North Carolina Pub. Serv. Co.,* 263 U.S. 508 (1924)*; Houston Oil Co. V. Goodrich,* 245 U.S. 440 (1918); Sup. Ct. R. 10 (Petition for Writ of Certiorari "is rarely granted when the arrested error consists of erroneous factual findings").

Indeed, this Court is understandably loathe to review issues of fact. Instead, a Petition for Rehearing and Suggestion for Rehearing en Banc following an adverse decision from the court of appeals is the appropriate vehicle for considering facts "overlooked or misapprehended . . ." Fed. R. App. P. 40(a)(2). The State filed such a pleading in this case, and failed to receive a single vote from any of the judges of the lower court. This Court need not become a third court of involvement. *Graver Tank & Mfg. Co v. Linde Air Products*, 336 U.S. 271, 275

(1949).

As Petitioner has pointed out above, the State, for the third time, argues that the Ninth Circuit adopted the expert opinions of defense witnesses over the expert opinions advanced by prosecution witnesses. The Ninth Circuit has explained, in three separate opinions, that this is not and has not been the case. However, even if this case involved a claim of erroneous factual findings by a lower court, this Court is not the appropriate forum for resolving such factual disputes.

IV. The Myth of Infallible Forensic Evidence.

Over the past three decades, a belief has taken hold in the criminal justice system that critical elements of many cases can be conclusively and irrefutably resolved through the use of forensic evidence. This belief stems from the assumption that state forensic examiners are highly-trained scientists, who conduct widely-recognized tests and can then provide an objective and impeachable report about their results for use in criminal trials. In reality, state forensic examiners do exercise substantial discretion and judgment, regardless of the nature of the technique, and these examiners often interpret the results of unverified techniques for which there often exists no recognized or objective standard at all.

Undoubtedly, there are many cases in which qualified forensic examiners

are careful and conservative in their work, exercise appropriate professional discretion and judgment, and thus provide sound and helpful scientific opinions. Unfortunately, however, there are also hundreds of documented cases in which state forensic examiners have relied upon unscientific methods and procedures, have made mistakes in recording or reporting results, have evinced bias in favor of the prosecution by overstating the probative value of test results, and have even fabricated test results entirely. In short, there are simply no basis for the idea that, as a result of the "scientific" label placed upon the opinion of a state examiner, forensic testimony is somehow "neutral" or ministerial and therefore unimpeachable.

While this court is obviously concerned about the involvement of the federal appellate courts in sufficiency of evidence reviews of state court convictions, the court did recently address the issue of testimony related to "neutral scientific testing." In *Melendez-Diaz v. Massachusett*, 129 S.Ct. 2527, 174 L.Ed.2d 1314 (2009), a state appellate court ruled that the trial court had comported with the Sixth Amendment when it admitted certificates of analysis sworn by a state crime lab analyst without requiring in-court testimony by the analyst. The court, finding that the admission of the certificates violated petitioner's Sixth Amendment right to confront witnesses, addressed the issue of

whether "neutral, scientific testing" should have to withstand confrontation by coss-examination.

The court stated:

> Nor is it evident that what respondent called "neutral scientific testing" is as neutral or as reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation. According to a recent study conducted under the auspicies of the National Academy of Sciences, "the majority of [laboratories producing forensic evidence] are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency, (internal cite omitted) and because forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency." (internal cite omitted).

129 S.Ct. at 2536.

In a recent study, which examined the cases of 232 defendants who had been exonerated by post-conviction DNA testing, 156 exonerees were identified as having had forensic testimony at their trial. The study examined trial transcripts in 137 of the 156 cases. The study found invalid forensic science testimony had been admitted in 82 cases - - sixty percent of the 137 cases in the study set. *See, Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Virginia Law Review 1, March 2009, at pg. 5.

This invalid forensic testimony involved serological analysis (100 cases), microscopic hair comparison (65), fingerprint comparison (13), DNA analysis (11), forensic geology (soil comparison)(6), forensic odontology (bite mark comparison)(6), shoe print comparison (4), fiber comparison (2), voice comparison (1), and fingernail comparison (1). *Id* at pg. 5. Most of the invalid forensic testimony involved evidence which was presented as inculpatory. In just two of the 82 cases with invalid forensic testimony, the analyst testified that all of the forensic evidence was non-probative or inconclusive. *Id* at pg. 6.[2]

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[2] *See also, Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1 (March 2009), *Why a Conviction Should Not Be Based on a Single Piece of Evidence: A Proposal for Reform,* 48 Jurimetrics J. 43 (Fall 2007), *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. Crim. L. and Criminology 761 (Spring 2007), Symposium: *Wrongful Convictions: Causes and Cures, ABA Policies Concerning Wrongful Convictions*, 37 Sw. L. Rev. 832 (2008), *Post-*

Criminal cases involving alleged fatalities as a result of Shaken Baby Syndrome are particularly dependant upon forensic evidence. In a prosecution paradigm without precedent, expert medical testimony is used to establish that a crime occurred, that the defendant caused the infant's death by shaking, and that the shaking was sufficiently forceful to constitute depraved indifference to human life. Shaken Baby Syndrome (SBS) is, in essence, a medical diagnosis of murder, one usually based solely on the presence of a diagnostic triad: retinal bleeding, bleeding in the protective layer of the brain, and brain swelling. However, new scientific research has cast doubt on the forensic significance of this triad, thereby undermining the foundations of thousands of SBS convictions. *See*, *The Next Innocence Project: Shaken Baby Syndrome in the Criminal Courts,* 87 Wash. U.L. Rev.1 (2009).[3]

Professor Deborah Tuerkheimer, the author of "*The Next Innocence Project: Shaken Baby Syndrome in the Criminal Courts,*" stated:

> The application of the evidence-based framework to the SBS literature resulted in a remarkable determination: the

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Conviction Claims of Innocence, 24 Fall Crim. Just. 14 (Fall 2009).

[3] *See also*, *Criminal Justice at a Crossroad: Science-Dependant Prosecution and the Problem of Epistemic Contigency*, 62 Alabama L. Rev. _____ (forthcoming 2010) (draft, March 2010).

medical literature published prior to 1998 contained "inadequate scientific evidence to come to a firm conclusion on most aspects of causation, diagnosis, treatment, or any other matter pertaining to SBS." (internal cite omitted). More specifically, "serious data gaps, flaws of logic, and inconsistency of case definition" meant that "the commonly held opinion that the finding of [subdural hematoma] and [retinal hemorrhage] in an infant was strong evidence that SBS was unsustainable." (internal cite omitted) *Id.* at 12.

Professor Tuerkheimer further stated:

> New debate has emerged regarding whether shaking can generate the force levels sufficient to cause the injuries associated with SBS. Those who believe it point to a number of biomechanical studies, as well as research using animal and computer models. (internal cite omitted) Many of these scientists assume arguendo that rotational acceleration-deceleration forces can, in theory case retinal hemorrhage and subdural hematoma, but

> contend that shaking an infant with sufficient force to do so would necessarily damage the neck and cervical spinal cord or column. Since most infants diagnosed with SBS do not present this type of injury, (citing Kimberley Molina, *Neck Injuries in Shaken Baby Syndrome*, 30 AM. J. Forensic Med. & Pathology 89 (2009)), they could not have been simply shaken. (citing Faris A. Bandak, *Shaken Baby Syndrome: A Biomechanics Analysis of Injury Mechanisms*, 151 Forensic Sci. Int'l. 71 (2005).) *Id.* at 20-21.

The Tuerkheimer article, *The Next Innocence Project*, focuses on scientific developments which have cast doubt upon the guilt of defendants who have been convicted based upon triad-only SBS diagnosis, the triad consisting of retinal bleeding, bleeding in the protective layer of the brain and brain swelling.

While substantial scientific questions have been raised concerning these triad-only SBS cases, it is important to recall that the Ninth Circuit specifically noted the absence of all three triad symptoms in the victim in the *Smith* case. The prosecution experts in *Smith* admitted there was no retinal bleeding, no substantial bleeding and no substantial swelling, those most commonly recognized and now

challenged symptoms of SBS. In this case, jurors were faced with the only evidence which implicated Smith, the opinions of the coroners employed by the state. These opinions were unsupported by any scientific testing results and unsupported by any recognized medical findings at autopsy.

While these studies, calling into question the criminal justice system's dependence upon questionable scientific forensic evidence in some cases, are not part of the record before the court with regard to the sufficiency issue in this case, the information contained in these numerous studies should cause anyone to pause before affirming a life sentence based soley upon a coroner's opinion, which opinion was unsupported by any physical forensic findings concerning the cause of the victim's death.

CONCLUSION

The death of an infant, such as Etzel Smith, is an unnatural tragedy and, in the face of such a tragedy, there is a societal need to assign blame, to hold someone responsible. However, much as the death of an infant child demands an explanation, society must also be concerned about due process and the constitutional mandate that all persons be presumed innocent until proven guilty. The Ninth Circuit Court of Appeals was correct when it found that the hypothesis advanced by Los Angeles County Coroners Erlich and Carpenter, that the baby

died as a result of violent shaking which tore or sheared the brain and/or the brainstem, failed to meet the mandate of proof beyond a reasonable doubt since the same experts admitted that there was no medical evidence of any tearing or shearing of the brain or the brainstem in this case. The coroners' hypothesis of "instant death/no observable brain injury" was constitutionally insufficient to support the jury's finding of guilt. The petition must be denied.

Dated: 4/7/2011

Michael J. Brennan, Attorney for
Shirley Ree Smith, Respondent

STATEMENT OF BRIEF FORMAT

Pursuant to Ninth Circuit Rule 32(e)(3), Counsel certifies that the opening brief is proportionally spaced, has a typeface equivalent to 14 points or more (Times New Roman)(Corel WordPerfect 12 for Windows 14 point) and contains fewer than 7,520 words.

Dated: April 7, 2011

Michael J. Brennan