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

PETITIONER'S REPLY MEMORANDUM

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy State Solicitor General
LAWRENCE M. DANIELS
Supervising Deputy Attorney General
Counsel of Record
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2288
Fax: (213) 897-6496
E-mail: Larry.Daniels@doj.ca.gov
Counsel for Petitioner

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PETITIONER'S REPLY MEMORANDUM

The Question Presented is whether the Ninth Circuit on remand from this Court for reconsideration in light of *McDaniel* v. *Brown*, 130 S. Ct. 665 (2010), failed for the third time to apply the deferential standard for habeas corpus review under 28 U.S.C. § 2254(d) when it granted relief on an insufficient-evidence claim regarding cause of death by accepting the expert testimony of defense experts over the contrary opinions of prosecution experts believed by the jury and found sufficient by the state appellate court. Constitutional sufficiency review is conducted under the deferential "any rational factfinder" standard defined in *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). State adjudications of sufficiency claims are also insulated by the additional layer of protection afforded by AEDPA, which precludes federal habeas relief unless the state judgment was an objectively unreasonable application of clearly established Supreme Court law. *Brown*, 130 S. Ct. at 674.

In the first decision in this case, the Ninth Circuit panel lost sight of both layers of deference. The state appellate court, after a careful review of the record, had rejected the claim of insufficient evidence of cause of death based on its conclusion that this was a case involving a conflict of expert opinion evidence that was for the jury to resolve. The Ninth Circuit reweighed the evidence and chose to credit the defense experts who were disbelieved by the jury, thus disregarding the deference demanded by *Jackson*. The Ninth Circuit then exacerbated its error by concluding that the state appellate court's finding of substantial evidence to support the jury's verdict was an objectively unreasonable application of *Jackson* because this was a case of *no* evidence of cause of death rather than a case of conflict of the

evidence. This conclusion was possible only by misapprehending the record and ignoring the additional layer of protection for state judgments mandated by AEDPA. When this Court granted the Warden's first petition for certiorari and remanded the case, it offered the Ninth Circuit an opportunity to reevaluate its decision in light of *Carey* v. *Musladin*, 127 S. Ct. 649, 654 (2006). In response, the Ninth Circuit simply held that *Musladin* had nothing to do with this case, and reinstated its first opinion unchanged.

The latest decision in this case comes after this Court granted the Warden's second petition for certiorari, and vacated and remanded under an intervening decision, *McDaniel* v. *Brown*, 130 S. Ct. 665, where this Court held that a federal court on habeas may not overturn a state conviction for insufficient evidence by discounting prosecution expert testimony in favor of defense expert testimony. Despite *Brown*'s logical application to this case, the Ninth Circuit has again found the authority that this Court remanded under to be irrelevant, and has again reinstated its original opinion unchanged. Consequently, as in *Brown*, the Ninth Circuit has again "made an egregious error" by finding, even with the additional deference afforded by 28 U.S.C. § 2254(d), that the evidence was constitutionally insufficient to support the conviction on the ground that the defense expert testimony trumped the prosecution expert testimony. *Id.* at 673-74.

I. THE NINTH CIRCUIT IMPROPERLY SUBSTITUTED ITS OWN JUDGMENT IN PLACE OF THE JURY'S JUDGMENT IN REJECTING EXPERT OPINION REASONABLY SUPPORTED BY SUBSTANTIAL EVIDENCE AT TRIAL

1. In her brief in opposition to the third petition for certiorari, Smith repeats her argument that this is not a case involving a conflict of expert opinion at all, and that the Ninth Circuit did not simply substitute its preference for the defense expert opinion on cause of death for the jury's decision crediting the prosecution experts. Smith contends that this is a case in which there was *no* evidence to support the opinion of the three prosecution experts that the cause of death was violent shaking. More specifically, Smith asserts that the prosecution experts were unable to identify "*any* medical evidence to support their hypothesis concerning the cause of death," and even contends, incorrectly, that the prosecution experts *agreed* that there was no physical evidence to support their opinions. Opp. 13-14, 18. Most importantly, Smith argues that the three prosecution experts agreed with the two defense experts that there are only two "medically recognized causes of death in Shaken Baby Syndrome cases," namely "massive bleeding and massive swelling within the skull, both causing downward pressure of the brain into the spinal column which crushes the brainstem." Opp. 17. All of these assertions by Smith are completely belied by the record in this case.

2. All three prosecution expert witnesses testified that Etzel Glass's death was caused by violent shaking. Both Dr. Ehrlich, who conducted the autopsy, and Dr. Carpenter, the autopsy supervisor, testified that death from violent shaking can occur in *three* different ways, not two, as Smith asserts. First,

the shaking can cause a massive subdural hemorrhage so that the bleeding will eventually build up enough pressure to damage the brain stem. Second, the shaking can cause massive swelling of the brain, which can result in compression of the brain stem. And, third, the shaking can be violent enough to cause direct trauma to the vital centers of the brain which control the functioning of the heart and breathing, leading to a very rapid death. The prosecution experts all found that the infant died as a result of the third process. RT 692-96, 801, 1273-98, 1476-80.

Two defense experts disagreed with the prosecution expert opinions on the ground that the autopsy did not find the massive swelling or bleeding in the brain characteristic of the first two processes, and offered the opinion that the Shaken Baby Syndrome diagnosis was ruled out by the absence of observable brain stem shearing.

Dr. Carpenter and Dr. Erlich, in turn, disputed the defense theory and testified that the presence of visible brain stem damage was *not essential* to the diagnosis of death by violent shaking. Even more importantly, however, all of the prosecution experts explained *why* the swelling and bleeding and visible brain stem shearing did not develop in this case: the shaking was so violent that it caused virtually instantaneous death, thus cutting off the infant's circulation. RT 552-53, 576-77, 730-31, 1296-98, 1324. Judge Bea accurately pointed out that the conflict between the experts centered on the dispute over the question of whether "to be valid, does a doctor's opinion that a baby died from violent shaking require evidence, visible on autopsy, of brain stem shearing?" *Smith* v. *Mitchell*, 453 F.3d 1203, 1206 (9th Cir. 2006) (Bea, J., dissenting). The prosecution experts said no. The defense experts

said yes. This is a conflict of evidence requiring resolution by a trier of fact. It is not an absence of evidence.

The prosecution experts did not merely present a "hypothesis" concerning the cause of death, however. They pointed to substantial physical evidence supporting their opinion that the death was caused by violent shaking. During the autopsy, Dr. Erlich noted one or two tablespoons of fresh blood on the top of the infant's brain, a fresh blood clot between the hemispheres of his brain, recent hemorrhaging around his optic nerves, a small quantity of fresh subarachnoid blood, and a small bruise and recent abrasion at the lower back part of his head. In combination with the absence of any evidence of hemorrhaging or swelling and the absence of any external injury that might have caused death, these indicators supported Dr. Erlich's conclusion that Etzell Glass was shaken so violently that he died very quickly. RT 538-42, 710-729.

Dr. Carpenter also found that the evidence of recent injury to the brain substantiated his opinion that violent shaking was the cause of death. He found that the bleeding at the top of the brain was caused by tearing of the blood vessels in that area. RT 604. He also noted that there was no evidence of any external trauma that could alone have caused this tearing. In the absence of such evidence, and in conjunction with the other evidence of internal injury to the brain, Dr. Carpenter found that the bleeding on top of the infant's brain was caused by violent shaking, resembling "a whiplash action of the head on top of the body with the back of the head slamming into the back and the front of the chin slamming into the chest repeatedly so that the vessels on top of the brain tore." RT 540.

In addition, Dr. Carpenter explained that the subdural blood, the subarachnoid blood, and the blood around the optic nerves together showed "violent trauma to the head sufficient to cause the death of the infant." He 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. Based on these observable findings, Dr. Carpenter testified that shaking caused Etzel's death and that the shaking was "so violent that it destroy[ed] the vital centers in the brain" and led to "a quick death." RT 604-12.

The prosecution experts also explained that this rapid death resulted in trauma to the brain stem that *could not* be seen because the child's circulation had been shut down. All three prosecution experts testified that some of the effects of the trauma often seen in cases of Shaken Baby Syndrome simply did not have time to develop in this case. In Judge Bea's succinct summary, "the prosecution's experts based their opinions on the evidence of recent trauma to Etzel's brain, and explained how a rapid death would result in brain-stem tearing that could not be seen. When the defense's experts disputed the validity of this hypothesis, it was for the jury to resolve the conflicting opinions." *Smith*, 453 F.3d at 1208.

In short, the state appellate court correctly concluded that this was a case involving a straightforward conflict of expert opinion testimony. There is simply no basis for the view that there was *no* evidence of trauma to support the testimony of the prosecution witnesses. The prosecution experts "reached their conclusion [on cause of death] despite the lack of visible shearing, not because of it, and explained why." *Smith*, 453 F.3d at 1206.

Smith's argument that this was not a case of conflicting expert opinion as to the cause of death, but rather a case in which the prosecution experts offered *no* objective physical evidence to support their opinion that the cause of death was Shaken Baby Syndrome, thus finds no support in the record. And Smith's assertion that the prosecution experts agreed with the defense experts that death from violent shaking can only occur in two ways, not three, is simply wrong. When the jury chose to believe the prosecution experts, it acted on the basis of substantial evidence.

In addition to the expert testimony, moreover, the prosecution relied on other significant inculpatory evidence. As the magistrate judge correctly noted, Smith made several statements that reasonably could be taken as admissions of guilt. Smith was alone with Etzel at the time of his death. She admitted that when she picked him up, his head "flopped back." She also admitted that she shook or "jostled" or "twisted" him when he appeared to be unconscious. In response to questions from a social worker, Smith said, "Oh, my God. Did I do it? Did I do it? Oh, my God." When Smith's daughter told her, "If it wasn't for you, this wouldn't have happened," Smith did not reply. This too was evidence of guilt supporting the verdict.

3. The California appellate court properly rejected Smith's claim of constitutionally insufficient cause-of-death evidence, finding that the jury resolved the conflict between the experts on the basis of substantial evidence from the prosecution experts, as well as the additional inculpatory circumstantial evidence of respondent Smith's guilt. When the Ninth Circuit disagreed and granted habeas relief, finding the defense theory more plausible because the death did not occur in the "usual manner" of

Shaken Baby Syndrome deaths, the panel "stepped over the line dividing the province of the jury from that of the court," as Judge Bea aptly put it. *Smith*, 453 F.3d at 1206. In this manner, the Ninth Circuit panel failed to apply the deferential *Jackson* rule for reviewing the claim of insufficiency of evidence.

II. THE NINTH CIRCUIT FAILED TO HONOR—AND THE OPPOSITION BRIEF WHOLLY FAILS TO DISCUSS—THE DEFERENTIAL-REVIEW RESTRICTIONS IMPOSED ON THE FEDERAL COURTS BY AEDPA

1. In addition to its misapplication of the *Jackson* standard, the Ninth Circuit failed to review the state court denial of the claim of insufficient evidence of cause of death with the deference required by AEDPA. Under AEDPA, a federal habeas court may grant relief under 28 U.S.C. § 2254(d)(1) only if the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The Ninth Circuit failed to respect this additional layer of protection for the state court adjudication, even after this Court remanded the case for further reconsideration under *Brown*. Smith's opposing brief does not explain how the Ninth Circuit's analysis defers to the state court judgment in any way at all.

Brown specifically held that the Ninth Circuit failed to properly apply AEDPA by granting relief on a sufficiency claim based on its resolution of conflicting expert testimony. That is exactly what happened here, and still the Ninth Circuit declined to change its analysis and result in light of *Brown*.

2. Smith claims that unlike the Ninth Circuit had done in *Brown*, the Ninth Circuit in this case did not conduct a "comparative analysis of the evidence," but

simply found that the prosecution experts' opinions as to the cause of death were unsupported. Opp. 27. But, in fact, the Ninth Circuit did compare the prosecution experts' opinions to the defense experts' opinions in reaching its decision, and ultimately found the defense view should prevail. *Smith* v. *Mitchell*, 437 F.3d 884, 887-88, 890 (9th Cir. 2006).

3. Smith also argues that this Court should deny certiorari because this case simply involves a factual dispute. Opp. 28-29. This petition is not, however, merely aimed at vindicating a particular jury's verdict, or a particular state court's decision, or even a particular infant's killing. Nor is it just about correcting "egregious error" in a published Ninth Circuit habeas opinion, or about stemming the threat it poses to the prosecution of child abuse crimes. At this juncture, the central concern of the petition is the Ninth Circuit's repeated failure to follow this Court's directives in this case to correctly apply the law. When the Ninth Circuit again reissued its original opinion, refusing to acknowledge the manifest similarity between this case and *Brown*, the case took on institutional significance.

4. Smith cites *Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 2527 (2009) for the proposition that scientific testing is not necessarily neutral or reliable. Opp. 30-31. But there has never been any challenge in this case to the validity of any of the scientific evidence. Rather, the core dispute at trial was about the interpretation of the scientific evidence, and the state appellate court reasonably resolved this dispute in the prosecution's favor on sufficiency review.

5. Smith lastly presents a recent study questioning the reliability of forensic evidence and an article specifically on Shaken Baby Syndrome purportedly casting doubt on the validity of such convictions

generally. While acknowledging that these materials "are not part of the record before the court with regard to the sufficiency issue in this case," Smith argues that this Court should take them into account. Pet. 32-36. But in making this argument, Smith brings this case even closer to *Brown*, where this Court held in the alternative that the new scientific evidence (the *Mueller* report) must not be considered in a sufficiency inquiry because it was not presented at trial. *Brown*, 130 S. Ct. at 672. Like the *Mueller* report, the evidence Smith now raises was not presented at trial and thus should not be considered in a sufficiency inquiry.

Moreover, the law review article on Shaken Baby Syndrome that Smith discusses "'systematically distorts the scientific consensus . . . [and] relies exclusively on the opinions and work of "experts" who derive substantial income from lucrative court testimony on behalf of the accused perpetrators of child abuse,'" according to one child abuse specialist, Dr. Daniel Lindberg. CommonHealth, "The Real Consensus on Shaken Baby Syndrome?" located at http://commonhealth.wbur.org/2010/09/shaken-baby; see Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome in the Criminal Courts*, 87 Wash. U.L. Rev. 1 (2009). Smith's sweeping claim that recent research has been "undermining the foundations of thousands of SBS convictions" (Opp. 33) should not be credited in any event. To the contrary, the scientific underpinnings of Shaken Baby Syndrome continue to be generally accepted within the medical community. See, e.g., Robert M. Reece, *Highlighting Violent and Repetitive Shaking*, 126 Pediatrics 572 (2010); Mattiew Vinchon & Marie Desurmont, *Confessed Abuse Versus Witnessed Accidents in Infants: Comparison of Clinical, Radiological, and Ophthalmological Data in*

Corroborated Cases, 26 Child's Nervous System 637 (2009); see also Letter to the Editor from 106 doctors, *The Evidence Base for Shaken Baby Syndrome*, 328 BMJ 1316 (2004).

6. At bottom, the opposition brief simply defends the decision of the Ninth Circuit as a proper *de novo* consideration of the sufficiency claim. Although that is, in fact, the way the panel approached the issue, *de novo* review is forbidden by AEDPA. Both the Ninth Circuit and the opposition brief simply disregard AEDPA's stringent limits on the power of federal courts to overturn state judgments. And both the Ninth Circuit and the opposition brief fail to come to grips with the implications of the *Brown* analysis, as required by this Court's remand order. Thus, as in *Knowles* v. *Mirzayance*, 129 S. Ct. 1411 (2009), and *Wright* v. *Van Patten*, 128 S. Ct. 743 (2008), this Court's intercession is required.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: April 20, 2011

Respectfully submitted

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy State Solicitor General

LAWRENCE M. DANIELS
Supervising Deputy Attorney General
Counsel of Record
Counsel for Petitioner

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