No. 23-

In The

SUPREME COURT OF THE UNITED STATES

TASHA MERCEDEZ SHELBY,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

On Petition for a Writ of Certiorari

to the

Supreme Court of Mississippi

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QUESTION PRESENTED

May a State, consistent with the Due Process Clause of the Fourteenth Amendment, refuse to resentence petitioner, who was sentenced to life in prison for a murder based on the Shaken Baby Syndrome theory, when the official medical examiner, who signed the death certificate that was the principal evidence supporting her conviction, has signed a new certificate stating that the cause of death was an accident, not homicide?

PARTIES TO THE PROCEEDING BELOW

Tasha Mercedez Shelby, the defendant in this criminal case, is the petitioner.

The State of Mississippi, which brought this criminal case, is the respondent.

There are no other parties to these proceedings.

RELATED PROCEEDINGS

Shelby v. State, 812 So.2d 1144 (Miss Ct. App. 2002)

Shelby v. State, No. 2005-M-00615; No. 2000-KA-01763-COA; Case No. B2402-98-041 (Miss. 2005)

Shelby v. State, Order, No. 24C12:16-cv-0114 (Cir. Ct. Harrison Cnty. 2018)

Shelby v. State, 311 So.3d 613 (Miss Ct. App. 2020)

Shelby v. State, 310 So.3d 830 (Miss. 2021)

Shelby v. Cain, 2023 WL 2563229 (S.D. Miss. 2023)

Shelby v. Cain, Docket No. 23-60178 (5th Cir. 2023)

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On October 16, 2023, the Mississippi Supreme Court issued an order denying petitioner's Motion for Leave to File Petition for Post-Conviction Relief in the Trial Court. That order is not officially reported. It is reproduced at Pet. App. 1a–2a. On November 1, 2023, the Mississippi Supreme Court denied petitioner's motion for reconsideration of the prior order, in an unreported order that is reproduced at Pet. App. 3a.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the order of the Mississippi Supreme Court of October 16, 2023, and its order denying reconsideration entered on November 1, 2023. On January 22, 2024, Justice Samuel Alito extended the time to file a petition for a writ of certiorari to March 29, 2024.

RELEVANT CONSTITUTIONAL PROVISIONS

The Due Process Clause of the Fourteenth Amendment provides:

"Nor shall any state deprive any person of life, liberty or property without due process of law."

STATEMENT OF THE CASE

Every year, in countless criminal cases, a person who has been convicted of charges returns to court and alleges that a key witness has recanted and that a new trial is warranted. In some cases, the witness was a co-defendant who now admits to

a greater role than the defendant. *See Herrera v. Collins*, 506 U.S. 390, 423 (1993) (O'Connor, J., concurring) (detailing the limited value of admissions like those). In others, an eye witness now claims, with certainty, to have been mistaken, *see Souter v. Jones*, 395 F. 3d 577, 592 (6th Cir. 2005), or that a newly discovered videotape shows that the defendant could not have committed the crime, *see Schlup v. Delo*, 513 U.S. 298 (1995). In still others, a third party admitted that he, not the defendant, committed the crime. The courts in those cases must evaluate the evidence, often in the face of procedural barriers such as those in the Anti-Terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254, which requires defendants seeking review in federal court to have exhausted remedies in state court and to present clear and convincing new evidence to support their claim.

This case is different in two major respects: First, this is not a habeas case coming from the federal courts, with all the limitations on review in this Court that Congress has imposed. This case comes directly from the Mississippi Supreme Court, which refused to order even a hearing on petitioner's motion for a new trial. Second, the new evidence in this case is an official state death certificate that changed the cause of death from homicide to accidental. The original death certificate was not simply corroborative of other direct evidence, but, as explained below, it was the key evidence in the case, without which there would have been *no* probative evidence against petitioner.

There is one other significant fact about this case. Petitioner has been confined for over 25 years, and there is no way that she can recover that time. But her request

also asked that she be resentenced from her original term of life without the possibility of parole. Petitioner recognizes the importance of finality in the criminal justice system, but when there is the kind of injustice found here, where the state now concludes that a death was accidental, not murder, resentencing can provide some measure of justice, consistent with the principal of finality, even if her conviction is not overturned.

Facts Relating to the Death of Bryan Thompson IV

These facts are entirely based on the evidence that petitioner gave to everyone from the first moment when she found Bryan in distress. Her statements never varied. She is also the only person with direct knowledge of what happened to Bryan, and other than the ultimate medical conclusion that Bryan was murdered, there was no evidence presented to the jury that contradicted her statements.

At the time of Bryan's death, petitioner was living with Bryan's father, Bryan Thompson III, in Biloxi Mississippi. Bryan IV, who was not her biological son, was two and a half years old, was 36 inches tall, and weighed about 33 pounds. Petitioner, who was 22 years old, has a condition known as dwarfism, and is four feet ten inches tall. In addition, two weeks before the incident in question, petitioner gave birth via caesarian section to a baby girl and had tubal ligation surgery. She remained in the hospital for three days and returned a week later to have her stitches removed and was still on doctor-ordered bedrest.

On May 30, 1997, Bryan III was at work, and petitioner was taking care of her infant and Bryan IV. Petitioner's older child, age 3, lived with them, but was at a relative's home that evening. About 3:30 am, petitioner was awakened by what she described as a loud thud. She immediately went to Bryan's room and found that he had fallen out of his bed and was on the floor in obvious distress. She immediately called his father who returned home, and she also called the local hospital where she had just given birth. Although neither of them had CPR training, they both sought to administer it while they rushed Bryan to the hospital. A police officer trained as a medic stopped their car and took over CPR on the drive to the Biloxi Medical Center. The hospital staff realized that the child's condition was beyond its capabilities, and so Bryan was evacuated by ambulance to a larger, nearby hospital, the University of South Alabama Medical Center, across the state line in Mobile Alabama. When Bryan arrived at the Alabama hospital, he was alive but unconscious. He was officially pronounced dead the next day.

The investigation into Bryan's death continued for two months, during which time, petitioner and Bryan's father married. Also, on the date Bryan was pronounced dead, the State removed all the children from the home pending the outcome of the investigation. The holdup was due to the fact that LeRoy Riddick, the Alabama doctor who was the official medical examiner on the case, had not issued a death certificate with the cause of death. His Report of Autopsy, *see* Pet. App. 4a-8a, which was finally issued on July 29, 1997, stated that he examined Bryan on June 1, 1997. Because Dr. Riddick did not see Bryan when he was alive, he had no knowledge of the cause of

death except what he found in his examination and what he had been told by others. His report included in the section on "Anatomic Diagnoses" his conclusion that Bryan had sustained "Multiple blunt force injuries," with subsidiary findings of "Multiple contusions of the scalp" as well as "Subdural hematoma" and "Massive cerebral edema." For Cause of Death, Dr. Riddick's conclusion was "Blunt force injuries to the head," and he stated that the Manner of Death was "Homicide." *Id.* at 4a.

A copy of the report was sent to the Biloxi Police Department on July 29th, and the District Attorney of Harrison County promptly obtained an arrest warrant for petitioner on a homicide charge. She was arrested on August 13, 1997, and because she was charged with a capital offense, and even though she was the mother of an infant and an older toddler, she was confined immediately and has been incarcerated every day since then.

The Trial

At the trial, which was not held until June 2000, Dr. Riddick testified about his report and concluded that Bryan had died by what is known as Shaken Baby Syndrome (SBS). Under that theory, an adult, presumably angered, for example because an infant will not stop crying, violently shakes the baby and causes internal damages to the brain, which produces death. Without questioning the physical ability of this petitioner to inflict a deadly injury on Bryan, the medical examiner testified that the official cause of death was homicide and that it could only have been caused by the violent shaking of Bryan.

Even in 2000 when petitioner was tried, Shaken Baby Syndrome had already been questioned as lacking in a scientific foundation: "By the end of 1998, it had become apparent that 'there was inadequate scientific evidence to come to a firm conclusion on most aspects of causation, diagnosis, treatment, or any other matters pertaining to SBS,' and that 'the commonly held opinion that the finding of subdural hemorrhage and retinal hemorrhage in an infant was strong evidence of SBS was unsustainable.'" *Cavazos v. Smith*, 565 U.S. 1, 13 (2011) (Ginsburg, J., dissenting) (quoting Mark Donohoe, *Evidence–Based Medicine and Shaken Baby Syndrome, Part I: Literature Review, 1966–1998*, 24 AM. J. FORENSIC MED. & PATHOLOGY 239, 241 (2003)). Nonetheless, petitioner's counsel failed to argue that Bryan's death was caused by anything other than his being literally shaken to death. The only evidence to support that conclusion, beyond the fact that petitioner was home when Bryan was found on the floor, was the after-the-fact official medical examiner's report. Although a dark spot on Bryan's leg was originally suspected of being a bruise, it was later determined by Dr. Riddick to be a birth mark. Moreover, there was no evidence of a motive to support the charge, and petitioner had no arrest record or a history of child abuse. Petitioner's defense counsel never challenged the cause of death, but instead argued that Bryan's father, who was at work that night, must have done the shaking earlier in the day, with the effects of his shaking his son delayed for several hours.

Faced with that limited choice, the jury found petitioner guilty of homicide. The jury was instructed that they could impose the death penalty or life without possibility of parole, and they chose the latter.

Subsequent Proceedings

Pursuant to a recently enacted Mississippi law, petitioner filed a motion with the State Supreme Court in 2016, seeking to reopen her case based on newly discovered evidence. That motion was granted, and a hearing held in the spring of 2018. In the intervening 18 years, there had been many questions raised about Shaken Baby Syndrome. As Justice Ginsburg urged in her dissent in *Cavazos*, "[i]n light of current information, it is unlikely that the prosecution's experts would today testify as adamantly as they did in 1997." 565 U.S. at 11 (Ginsburg, J., dissenting). Because of changes in the medical support for Shaken Baby Syndrome theory, Dr. Riddick, who had originally concluded that Bryan's death was a homicide, was no longer sure of the cause of death, and he so testified at the hearing. The State then countered with an expert, who was new to the case and who took the opposite position, *i.e.,* that the evidence still supported a verdict of homicide. On December 7, 2018, the judge who heard the evidence declined to reopen the case, the Mississippi Court of Appeals, by a divided vote, affirmed on August 4, 2020, and the Mississippi Supreme Court declined to review those decisions on February 9, 2021.

Meanwhile, Doctor Riddick's uncertainty ripened into certainty. On June 18, 2018, Doctor Riddick took the next step and submitted a one page "Supplemental Medical Certification," in which he effectively amended Bryan's official death certificate by changing the cause of death from "Homicide" to "Accident." Pet. App. 9a. Under "Cause of Death," the "Supplement" listed "Cerebral Edema with Herniation" as well as "Hypoxic Encephalopathy" and "Seizure Disorder." It also

included under other significant contributing factors "Asthma and Blunt Trauma of the Head." Neither hypoxic encephalopathy, nor seizure disorder, nor asthma appeared in the 1997 autopsy, nor did the Supplement explain the reasons behind the radical changes in Dr. Riddick's conclusions. And in the section which asked Dr. Riddick to "Describe How Injury Occurred," his answer was "Fall."

RULE 14(1)(g)(i) STATEMENT

The question presented by this petition is whether the Due Process Clause of the Fourteenth Amendment was violated by a State's refusal to grant a new trial and/or to resentence petitioner when the State itself has withdrawn the key evidence against her—the death certificate that found she had committed a homicide—and replaced it with a new certificate that determined that the death of Bryan Thompson was an accident. Petitioner was still litigating her earlier claims for a new trial on other grounds when the new certificate was issued on June 18, 2018, which was the first time that she had a viable Due Process claim.

Because the new death certificate was created after the record closed in the prior post-conviction proceeding, it could only be brought to the attention of the Mississippi Supreme Court by filing a second petition to reopen based on newly discovered evidence, the amended official death certificate. Petitioner did that on April 4, 2023. In her Amended Petition for Post-Conviction Relief of April 28, 2023, petitioner argued on pages 22, 24, & 26–27 that the Due Process Clause forbade the State from refusing to overturn her conviction and refusing to resentence her, thereby satisfying Rule 14(1)(g)(i) of this Court. *See* Pet. App. 31–36. In its brief order

denying the motion to reopen, the Mississippi Supreme Court made no mention of the Due Process Clause. *See* Pet. App. 1a–2a. Rather, it concluded that the change did not amount to newly discovered evidence, even though the Supplemental Medical Certification did not exist at the time of the hearing on the prior motion to reopen, let alone at the time of petitioner's trial in 2000.

REASONS FOR GRANTING THE WRIT

This Court has never decided whether the Constitution would be violated if a defendant conclusively established that she was actually innocent, such as where uncontroverted DNA evidence proved that the crime was committed by another individual, and the state nevertheless refused to overturn her conviction. In such a case, the defendant's claim would be that the courts have a Due Process obligation to do justice, even though the State was not responsible for the wrongful conviction.

Whatever the result in that case, this one is different, and offers a more compelling basis for this Court to intervene. Here, the very state official whose conclusion as to the cause of Bryan's death resulted in petitioner's conviction has now done a one hundred eighty-degree reversal. That same official has issued a new death certificate in which he concluded that the death was an accident, not a homicide. A death certificate is a vital statistic, presumptively reliable, and self-authenticating. *See Birkhead v. State,* 57 So.3d 1223, 1231–32 (Miss. 2011) ("no debate exists that a death certificate is a vital statistic"). To petitioner's knowledge, no reported capital murder case exists in Mississippi where the death certificate identified the death as "accidental." In these circumstances, the responsibility of the State for petitioner's

wrongful conviction and continued wrongful incarceration are clear, and this Court should grant review and hold that the Due Process Clause does not allow petitioner's conviction and sentence to life in prison without parole to stand.

In most of this Court's cases involving claims of actual innocence, the claim is in habeas corpus coming from the federal courts, with all the barriers that AEDPA places on the federal courts before they can reach the merits. This case is different because the case comes directly from the Supreme Court of Mississippi, which rejected petitioner's Due Process argument with no discussion or analysis. Without the habeas restrictions, this Court should be much more willing to apply the Due Process Clause to claims of actual innocence to overturn petitioner's conviction or at least require that the State re-sentence her.

In *Herrera v. Collins*, this Court refused to set aside the conviction but also observed:

> This is not to say that our habeas jurisprudence casts a blind eye toward innocence. In a series of cases culminating with *Sawyer v. Whitley,* 505 U.S. 333 (1992), decided last Term, we have held that a petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence.

506 U.S. 390, 404 (1993). Two years later in another habeas case, *Schlup v. Delo*, 513 U.S. 298 (1995), the defendant's actual innocence enabled the Court to direct the lower court to consider his ineffective assistance of counsel claim. In its ruling, the majority observed that:

> Claims of actual innocence pose less of a threat to scarce judicial resources and to principles of finality and comity than do claims that focus solely on the

> erroneous imposition of the death penalty [or other error of constitutional dimension].
>
> Of greater importance, the individual interest in avoiding injustice is most compelling in the context of actual innocence.

Id. at 324. This Court continued in the same vein in *Bousley v. United States*, stating that "actual innocence means factual innocence, not mere legal insufficiency." 523 U.S. 614, 623 (1998). As the Court further explained,

> To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup,* 513 U.S. at 324. The Court counseled however, that the actual innocence exception should "remain rare" and "only be applied in the 'extraordinary case.'"

Id. at 321.

Of particular interest are a series of cases from the Texas Court of Criminal Appeals in which it found actual innocence in circumstances that were no more, and arguably less, compelling than here, and in which it ordered retrials or resentencing. In *Ex Parte Henderson,* 246 S.W.3d 690 (Tex. Crim. App. 2007), a babysitter was charged in the death of an infant in her care. The doctor who had testified that an accidental fall could not have caused the infant's death submitted an affidavit saying that if "this new scientific information had been available to me [twelve years before], I would have taken it into account before attempting to formulate an opinion about the circumstances leading to the injury." *Id.* at 692. That limited recantation—far less impactful than the change in the official cause of death shown here—was enough for the court to approve an order for a hearing based on this new evidence. A new hearing on punishment was also ordered in *Ex Parte Tiede,* 448 S.W.3d 456 (Tex.

Crim. App. 2014), where the state conceded that its expert witness was factually mistaken when he described the defendant "as having an unremarkable mental-health history." *Id.* at 457.

In another case similar to this one, *Ex Parte Robbins,* 478 S.W.3d 678 (Tex. Crim. App. 2014), there were two subsequent reviewers who reached a different conclusion as to the cause of death from that of the original testifying doctor. The testifying doctor then reconsidered her prior opinion and stated that she believed that there are unanswered questions about the cause of death and that after reviewing the case file "and having had more experience in the field of forensic pathology, I now feel that an opinion for a cause and manner of death of undetermined, undetermined is best for this case." *Id.* at 685. She further explained that:

> [S]he has reviewed additional information that suggested that the bruises could have resulted from aggressive CPR and other efforts to assist the child. She emphasized that it was significant that aggressive adult-type CPR by untrained persons was performed on Tristen, a 17–month–old child.

Id. (footnote omitted). In support of its decision to re-open the case, the court concluded by observing, in a statement that describes this case perfectly, that the doctor's "original trial testimony was the only evidence presented claiming conclusively that Tristen died as the result of a homicide." *Id.* at 692.

Similarly, the factual issue in *Souter v. Jones,* 395 F.3d 577 (6th Cir. 2005), was whether a particular bottle could have been used to cause the victim's death. One of the three expert pathologists who testified for the State subsequently changed his opinion on whether the bottle was the cause of death. The court concluded that

this new opinion was "even more reliable than an eyewitness account, however, because it is not merely based on a renewed look at the bottle, but rather it is a result of his increased education, training, and experience, as well as examination of autopsy slides which he had not seen before." *Id.* at 593. Accordingly, the court allowed "an otherwise time-barred habeas petitioner . . . to pass through the gateway and argue the merits of his underlying constitutional claims." *Id.*

Two circuits have recognized, even in a federal habeas context, the right to a hearing when defendants have raised a credible Due Process claim that seriously flawed scientific evidence was a significant basis for their convictions. *See Gimenez v. Ochoa*, 821 F.3d 1136, 1144 (9th Cir. 2016); *Han Tak Lee v. Glunt,* 667 F.3d 397, 403 (3rd Cir. 2012). The facts of this case, where the State's official medical expert has reversed his position as to the cause of death from homicide to accidental, are an even stronger case for finding a Due Process violation than the cases discussed above.

Petitioner's claim based on the June 2018 Supplemental Medical Certification presents a compelling factual and legal basis to re-open her conviction and life sentence. Doctor Riddick's conclusion in his autopsy and his testimony at the trial in 2000 that Bryan's death was a homicide, was the only significant evidence that contradicted petitioner's insistence that she did nothing to harm Bryan. Dr. Riddick has now reversed his conclusion in an official document of the State of Alabama, changing his finding that Bryan's death was a homicide and instead determining that it was an accident. In addition, almost none of his prior subsidiary findings were

carried forward and three new health factors—asthma, encephalopathy, and seizure disorder—were added.

This change alone should have sufficed to re-open the case, but there were several additional reasons why petitioner's motion should have been granted. Not only was there no corroborating evidence against petitioner (other than the fact that she was in the same home as Bryan when he was found on the floor), there was considerable evidence pointing to her innocence. Two weeks before Bryan's death, petitioner had surgery to deliver her daughter, her stitches had recently been removed, and her doctor had ordered bedrest for her. Furthermore, petitioner is less than five feet tall, whereas Bryon weighed 33 pounds, and his height was 36 inches – over half petitioner's height. Even if petitioner had been physically capable of lifting Bryan from his bed and shaking him with sufficient force to cause his death (a highly dubious proposition), no one suggested that petitioner possessed any motive for that conduct or that petitioner had a history of child abuse or any criminal record.

Finally, the radical change in the death certificate from homicide to accident was done by Dr. Riddick on behalf of the State of Alabama, with the homicide version offered by the State of Mississippi as the official cause of death. Unlike many cases where an independent expert is offered by the state as a trial witness, Dr. Riddick functioned here as a state official when he issued his original homicide autopsy in 1997 and again in 2018 when he concluded that Bryan's death was an accident. This "fundamental miscarriage of justice," *Schlup*, 513 U.S. at 315, is a violation of the

Due Process Clause of the Fourteenth Amendment for which the State of Mississippi is responsible.

Petitioner has served more than 25 years in prison for what the State's official medical examiner now concludes was an accidental death. For that reason, her conviction should be overturned. Of course, petitioner cannot recover the lost years she has been incarcerated, not to mention the State having taken away her daughter who was less than a month old at the time. But even if her conviction were to stand, the very least that Mississippi must do is to resentence her in light of the fact that the State's official position is that Bryan's death was an accident and that no crime occurred, let alone that petitioner committed one.

Precedent for this partial relief is supported by this Court's decision in *United States v. Tucker,* 404 U.S. 443 (1972), in which the appeals court ordered a resentencing where the defendant had received a 25-year maximum based on the sentencing judge's express reliance on the fact that he had three prior felonies. It subsequently turned out that the defendant was not provided counsel for two of the prior felonies, as the Constitution requires, and thus those felony convictions were invalid. In ordering resentencing, the majority observed:

> Instead of confronting a defendant who had been legally convicted of three previous felonies, the judge would then have been dealing with a man who beginning at age 17, had been unconstitutionally imprisoned for more than ten years, including five and one-half years on a chain gang.

Id. at 448.

As recently affirmed by the Mississippi Supreme Court, that court "has the inherent power to correct its judgments." *Powers v. State*, 371 So.3d 629, 647 (Miss. 2023). Continuing in that vein, the Court stated that "[a]ll courts have the inherent power to correct and make their judgments speak the truth" and that the "power to correct an error in the record of a judgment rendered by it at a former term . . . is inherent in the court system." *Id.* (citations omitted).

Twenty-five years in prison for what the State of Mississippi has now officially determined was an accident is an intolerable injustice that Due Process does not permit. At the very least, petitioner is entitled to immediate release from prison so that she can start her life again.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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