Serial: **249068**

IN THE SUPREME COURT OF MISSISSIPPI

No. 2015-M-01145

TASHA MERCEDEZ SHELBY	**FILED**	***Petitioner***
v.	OCT 16 2023	
STATE OF MISSISSIPPI	OFFICE OF THE CLERK SUPREME COURT COURT OF APPEALS	***Respondent***

ORDER

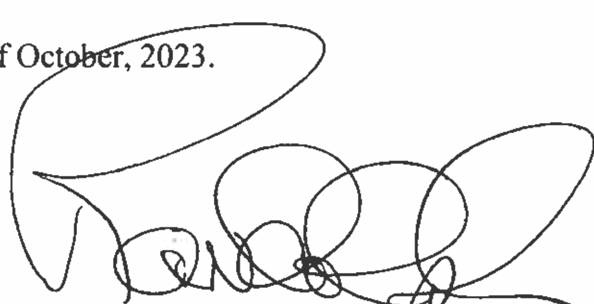
This matter is before the panel of Randolph, C.J., Ishee and Griffis, JJ., on the Motion for Leave to File Petition for Post-Conviction Relief in the Trial Court filed by counsel for Tasha Mercedez Shelby. Also before the panel is the Motion of the George C. Cochran Innocence Project for Leave to File a Brief as Amicus Curiae. The panel finds that the amicus brief should be accepted for filing.

After due consideration, the panel finds that Shelby's previous petitions for post-conviction relief have ultimately been denied and that the present filing is successive. Miss. Code Ann. § 99-39-27 (Rev. 2020). The panel further finds that the petition is untimely. Miss. Code Ann. § 99-39-21 (Rev. 2020). Notwithstanding the bars, we find that Shelby has presented no arguable basis for her claims and that the petition should be denied. *See **Means v. State***, 43 So. 3d 438, 442 (Miss. 2010).

IT IS THEREFORE ORDERED that the Motion of the George C. Cochran Innocence Project for Leave to File a Brief as Amicus Curiae is granted.

IT IS FURTHER ORDERED that the Motion for Leave to File Petition for Post-Conviction Relief in the Trial Court filed by Tasha Mercedez Shelby is denied.

SO ORDERED, this the 12 day of October, 2023.



MICHAEL K. RANDOLPH, CHIEF JUSTICE

Serial: 249235

IN THE SUPREME COURT OF MISSISSIPPI

No. 2015-M-01145

TASHA MERCEDEZ SHELBY ***Petitioner***

v.

STATE OF MISSISSIPPI ***Respondent***

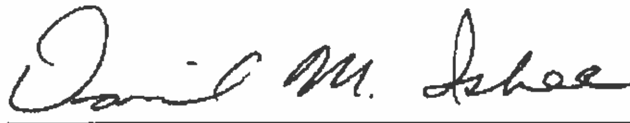
ORDER

This matter is before the undersigned Justice on the Motion for Reconsideration and Clarification of Order filed by counsel for Tasha Mercedez Shelby. Shelby seeks reconsideration of the denial of her most-recent petition for post-conviction relief. Reconsideration is not permitted by M.R.A.P. 27(h). The undersigned Justice further finds that clarification of the prior order is not necessary.

IT IS THEREFORE ORDERED that the Motion for Reconsideration and Clarification of Order filed by counsel for Tasha Mercedez Shelby is denied.

SO ORDERED.

DIGITAL SIGNATURE
Order#: 249235
Sig Serial: 100007802
Org: SC
Date: 11/01/2023



David M. Ishee, Justice

ALABAMA
DEPARTMENT OF FORENSIC SCIENCES

P.O. BOX 7925
MOBILE, ALABAMA 36670
(334) 471-7026

2451 FILLINGIM ST.
MOBILE, ALABAMA 36617
FACSIMILE (334) 470-5816

REPORT OF AUTOPSY

CASE NO.: 01(A)-97MB-84637 **DATE/TIME**: June 1, 1997 at 1030 hours

COUNTY: Mobile

DECEDENT: Bryan Thompson, IV

AGE: 2 **SEX**: Male **LENGTH**: 36 inches **WEIGHT**: 27 pounds

FINAL ANATOMIC DIAGNOSES

I. Multiple blunt force injuries.
   A. Head.
      1. Multiple contusions to the scalp.
   B. Subdural hematoma.
   C. Massive cerebral edema.
II. Status post harvesting of organs for transplantation.
   A. Heart, liver, spleen, kidneys and adrenals.

CAUSE OF DEATH: Blunt force injuries to the head

MANNER OF DEATH: Homicide

AUTHORIZATION: Act 87-525

IDENTIFICATION:

PERSONS PRESENT: Ms. Poellnitz, Ms. Littles

EVIDENCE: See DFS 1 Form.

CLOTHING: None.

PERSONAL EFFECTS: None.

EVIDENCE OF TREATMENT AND HARVESTING OF ORGANS: An orotracheal tube is present in the left side of the mouth and a nasogastric tube in the left nares. Vascular lines are present in the region of the right radial artery, the right femoral region and on both ankles. A Foley catheter is in place. Anteriorly, a 12 inch long recently sutured surgical incision extends from the sternal notch inferiorly.

DISTINGUISHING FEATURE AND SCARS: An 8 inch long semi-circular hypopigmented scars measuring up to 2 inches in width begins at the gluteal fold on the right buttock and extends laterally and then inferiorly. A skip region is present and then a 3 inch zone of similar scar is present over the posterior lateral portion of the right thigh. Another skip zone and a 2 inch zone are present on the right calf and a 3 inch zone over the lateral portion of the right foot. A small 1 inch scar is present on the anterior surface of the right knee.

EXTERNAL EVIDENCE OF TRAUMA: A 1/4 inch blue contusion is present on the mid portion of the left forehead. A 1 1/4 inch irregular oval blue-green contusion extends from the nasolabial fold over the right cheek. Lateral to this at the outer portion of the right orbit is a 3/4 inch blue-purple contusion and then another small 1/8 blue-purple contusion on the outer portion of the right eyebrow. Posteriorly in the left scapula region is a ½ inch pale blue contusion and in the mid-line over the lumbar region a ½ inch in greatest dimension contusion. Recent blood is present beneath these latter two.

1K

Over the buttocks and left thigh are zones where the skin is bluish, an incision is made but no hemorrhage is present beneath these. A one inch in greatest dimension green contusion is present on the lateral surface of the left thigh. Hemorrhage is present beneath this. A small 1/4 inch blue-purple contusion is present on the medial surface of the left knee. A hyperpigmented region is present on the posterior surface of the right shoulder but no hemorrhage is present beneath this.

EXTERNAL EXAMINATION

The body is that of a normally developed, unembalmed, Caucasian male appearing the reported age of 2 years.

The following measurements are made: Head circumference - 52 ½ cm, chest circumference - 44.5 cm and abdomen - 36.5 cm.

HEAD AND FACES: The scalp is covered with 4 inch long brown hair. The injuries have been noted.

EYES: The cornea has been removed and the vitreous humor is pouring out of the eyes. The irides are brown; the pupil diameter is impossible to tell.

NOSE: The nares are patent. No injury.

EARS: Normally set. No injuries.

ORAL CAVITY: Natural deciduous teeth are present. No injuries are present.

NECK: Symmetrical, no injuries.

CHEST: The chest is slightly asymmetrical due to the surgical incision.

ABDOMEN: The abdomen is scaphoid and has a surgical incision as noted.

EXTERNAL GENITALIA: These are of a male child. Both testes are in the scrotal sac.

LOWER EXTREMITIES: Injuries and treatment as noted. All digits are present.

UPPER EXTREMITIES: Injuries and treatment as noted.

BACK: The symmetrical back has the injuries as noted.

INTERNAL DESCRIPTION

SCALP, SKULL, AND CENTRAL NERVOUS SYSTEM: Over the occipital region of the scalp in a zone 4 ½ inches in the transverse dimension by up to 3 inches in the vertical dimension is a large, dark red-brown hemorrhage which is partially subgaleal. In the left frontal region corresponding to the small contusion noted, externally is a 3 ½ inch zone of dark red-blue to brown contusion. Another small 1/4 inch contusion is present in the right frontal region of the scalp. The bones of the skull are intact. An estimated 30 mg of dark purple congealed subdural hematoma covers the lateral convexity of the right cerebral hemisphere and also a thin subdural is present beneath the right temporal lobe. The dura mater is stained red to red-purple but has no organization. The 1,410 gram brain is massively edematous with swelling of the gyri, compression of the sulci, herniation of the uncinate process of both temporal lobes and frank necrosis of the cerebellar tonsils. The brain is fixed and an addendum will follow.

ORGANS OF THE NECK: The skin is intact. The strap muscles have no injury. The hyoid bone, the cartilages of the larynx, and the cervical vertebral column are intact. The airway contains an endotracheal tube. The neck is incised posteriorly and the posterior elements of the spinal removed. Subdural hemorrhage is present along the cervical cord but no contusions are present per se'.

SUBCUTANEOUS TISSUES AND BODY CAVITIES: An incision is made from the occipital prominence inferiorly to the sacrum posteriorly. Hemorrhage is present around the contusion over the left scapula and also in the mid-line over the lower thoracic upper lumbar region. No other zones of contusion are present. Anteriorly, the skin is reflected and there are no contusions present. The sternum has been split and the abdomen open for harvesting organs. The only organs remaining within the body are the gastrointestinal tract including esophagus, stomach, duodenum, small and large intestines, both lungs, the bladder and genitalia. A small segment of thoracic aorta is also present.
RESPIRATORY SYSTEM: The 69.3 gram right and 60.9 gram left lungs are atelectatic. The pleural surfaces are a variegated very pale pink to darker lavender in the more dependent zone. On the posterior surface of the upper lobe of the right lung are two small 4 to 5 mm zones of dark purple hemorrhage. The pulmonary arterial tree is free of lesion. The bronchial tree contains thick mucous. On section the parenchyma is collapses a variegated pale gray-pink to dark lavender.

The segment of aorta is unremarkable. As noted above, the heart, liver, spleen, both kidneys and adrenal glands are surgically absent.

1K

MACROPHAGE LYMPHOCYTIC SYSTEM: Two small 1 cm in diameter accessory spleens are identified. These have no gross lesions.

GASTROINTESTINAL TRACT: The esophagus has no lesions. The stomach contains a few milliliters of bile stained fluid. The mucosa is edematous but has no other lesion. The duodenum contains bile stained fluid. The remaining portion of the gastrointestinal tract is edematous but has no other gross lesions.

The vermiform appendix is identified.

UROGENITAL SYSTEM: The bladder has no lesions. The prostate gland is that of a male child.

EYES: The orbital plates are removed. Hemorrhage is present along the nerve sheaths of both optic nerves and then small hemorrhages are present in the surrounding tissue. The globes are collapsed from removing the cornea. The upper lid of the left eye is inadvertently incised. This is sutured.

LeRoy Riddick, M.D.
State Medical Examiner

LRR/dw

THE FRONT OF THIS DOCUMENT IS PINK - THE BACK OF THIS DOCUMENT IS BLUE AND HAS AN ARTIFICIAL WATERMARK - HOLD AT AN ANGLE TO VIEW

Attachment Page

ALABAMA
Center for Health Statistics

Amendment No. **052342**

ALABAMA
Supplemental Medical Certification

This Supplemental Medical Certification replaces any Medical Certification shown on previous pages for the record identified below.

INFORMATION FROM ORIGINAL RECORD:

Certificate No. **1997-20205**

Name **Bryan E. THOMPSON IV**

Date of Death **June 1, 1997**

County of Death **Mobile**

File Date **June 25, 1997**

MEDICAL CERTIFICATION

PART I. CAUSE OF DEATH Enter the chain of events--diseases, injuries, or complications--that directly caused the death. DO NOT enter terminal events such as cardiac arrest, respiratory arrest, or ventricular fibrillation without showing the etiology. Enter only one cause on a line.

Approximate interval Onset to death

IMMEDIATE CAUSE (Final disease or condition resulting in death) a. Cerebral Edema with Herniation

Due to (or as a consequence of)

Sequentially list conditions, if any, leading to the cause listed on line a. Enter the UNDERLYING CAUSE (disease or injury that initiated the events resulting in death) LAST

b. Hypoxic Encephalopaty

Due to (or as a consequence of)

c. Seizure Disorder

Due to (or as a consequence of)

d.

PART II. Enter other significant conditions contributing to death but not resulting in the underlying cause given in PART I.

Asthma and Blunt Trauma of the Head

MANNER OF DEATH ☐ Natural ☐ Homicide ☑ Accident ☐ Pending Investigation ☐ Suicide ☐ Undetermined

DID TOBACCO USE CONTRIBUTE TO DEATH? ☐ Yes ☐ Probably ☑ No ☐ Unknown

IF FEMALE: ☐ Not pregnant within past year ☐ Pregnant at time of death ☐ Not pregnant, but pregnant within 42 days of death ☐ Not pregnant, but pregnant 43 days to 1 year before death ☐ Unknown if pregnant within the past year

DATE OF INJURY (Month, Day, Year): May 30, 1997

TIME OF INJURY: 3:30 a.m

PLACE OF INJURY (e.g. Decedent's home; construction site; restaurant; wooded area): Residence

INJURY AT WORK? ☐ Yes ☑ No

LOCATION OF INJURY (Street or R.F.D. No., City or Town, County, State): 1891 Popps Ferry Rd, #34, Biloxi, MS.

IF TRANSPORTATION INJURY, SPECIFY ☐ Driver/Operator ☐ Passenger ☐ Pedestrian ☐ Other (Specify)

DESCRIBE HOW INJURY OCCURRED: Fall

AUTOPSY/TOXICOLOGY PERFORMED? Autopsy ☑ Yes ☐ No ☐ Unknown; Toxicology ☑ Yes ☐ No ☐ Unknown

WERE FINDINGS CONSIDERED? Autopsy ☑ Yes ☐ No; Toxicology ☑ Yes ☐ No

LeRoy Riddick, M.D

SIGNATURE OF CERTIFIER

6/18/2018

DATE SIGNED

The above Medical Certification as provided by the certifier is hereby made a part of the record concerned. Done this **20th** day of **June, 2018**

By Shayla Santiago

Recording Clerk

ADPH-HS-91/Rev. 3-03

This is an official certified copy of the original record filed in the Center of Health Statistics, Alabama Department of Public Health, Montgomery, Alabama. 2018-305-584-1

June 20, 2018

Nicole H. Rushing

IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT

No. 2015-M-01145; No. 2000-KA-01763-COA; Cause No. B2402-98-041

TASHA MERCEDEZ SHELBY, Petitioner

v.

STATE OF MISSISSIPPI, Respondent

AMENDED PETITION FOR POST-CONVICTION RELIEF

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A. The 2018 amended death certificate saying Bryan IV's death was accidental, caused by a seizure, and not the direct result of blunt-force trauma to the head, is admissible, newly discovered evidence that would likely produce a result different from the first prosecution of Ms. Shelby. 22

1. The 2018 amended death certificate is necessarily newly discovered within the meaning of Miss. Code Ann. § 99-39-5. 22

2. Under well-established precedent of this Court, the 2018 amended death certificate is automatically admissible as a vital statistic under Mississippi Rule of Evidence 803(9). 23

3. Under well-established precedent of this Court, the 2018 amended death certificate is substantive evidence that Bryan IV's death was accidental, caused by a seizure, and not the direct result of blunt-force trauma to the head; a capital murder prosecution or conviction would not stand based on this newly discovered evidence. 24

4. Ms. Shelby's claim based on the 2018 amended death certificate is not barred by res judicata. 25

5. Ms. Shelby's life sentence without the possibility of parole is based on inaccurate information;that sentence almost certainly would have been different—at the very least, it

certainly might have been different—had Ms. Shelby's jury known of the 2018 amended death certificate; her sentence therefore violates the Due Process Clause of the Fourteenth Amendment. 26

6. Two of the jurors who voted to sentence Ms. Shelby to death would have acquitted her, had they known about the amended death certificate. 27

B. Ms. Shelby is entitled to a new trial because of newly discovered, contradictory testimony by the state's expert, Dr. Scott Benton, when comparing his testimony at Shelby's hearing and his testimony as a defense expert, which demonstrates that Petitioner's due process and equal protection rights were violated. 29

1. Dr. Benton was the only state witness to testify at the Post-Conviction Relief Hearing in support of the state's theory that Tasha Shelby killed Bryan by shaking him to death; his unreliable testimony violated Petitioner's due process rights. 29

2. An in-depth Mississippi Today Investigative Report questions Dr. Benton on "how his decisions can tear families apart," with his false accusations of abuse. 31

3. Testimony Benton gave as a defense expert on behalf of defendant Mixon would have supported relief for Tasha Shelby at her Post-Conviction Relief hearing. 32

4. Dr. Benton gave contradictory testimony about seizures in Mixon's case as an expert witness – testimony that would have supported a finding Bryan IV suffered from seizures. 33

5. Dr. Benton gave contradictory testimony about subdural hemorrhages (brain bleed) in Mixon's case as an expert witness, conflicting with his testimony in Shelby's case. 34

6. The Harrison County Circuit Court denied relief to Ms. Shelby based largely on Dr. Benton's testimony at the Post-Conviction Relief hearing. 35

C. Ms. Shelby is entitled to a new trial because a juror withheld crucial information that he was the great-uncle of the deceased child and new about the child's death, denying Tasha Shelby a fair trial. 36

D. Ms. Shelby's petition is not time-barred and meets the statute of limitations to file for post-conviction relief. 40

1. Newly discovered evidence of the amended death certificate for Bryan Thompson IV is properly filed within the statute of limitations. 41

2. Newly discovered evidence about Dr. Scott Benton's testimony is properly filed within the statute of limitations. 41

3. Newly discovered evidence about Juror Mullen is properly filed within the statute of limitations. 42

F. Ms. Shelby is factually innocent, and no procedural bar should stand in the way of any of her claims for relief. 43

CONCLUSION 47

PETITION FOR POST-CONVICTION RELIEF

COMES NOW, TASHA MERCEDEZ SHELBY ("Ms. Shelby" or "Petitioner"), through undersigned counsel, pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act, Mississippi Code Annotated § 99-39-1, *et seq*., and asks this Court to vacate her conviction.

INTRODUCTION

In 1997, Bryan IV, the two-and-a-half-year-old stepson of Petitioner Tasha Mercedez Shelby ("Ms. Shelby") fell from his bed. Ms. Shelby found Bryan convulsing on the floor and took him to the emergency room at Biloxi General Hospital – a hospital she knew well, because she had given birth via c-section and had tubal ligation surgery there two weeks earlier. Bryan IV tragically died a day later.

For months, prosecutors waited for the medical examiner, Dr. LeRoy Riddick, to finish his autopsy report and complete the death certificate: the manner of death, Dr, Riddick then said, was homicide. Abuse was the only possible cause of death. (TT 346; 32; 375.) Prosecutors then charged Ms. Shelby with capital murder based on child abuse.

At trial in 2000, both the state and defense experts agreed and testified that the child died from abuse, specifically Shaken Baby Syndrome/Shaken Impact Syndrome ("SBS" or "SIS") (shaking and impact). Both the state and defense experts agreed that the child died as a result of a "violent act" and not a short fall. (TT 523.) Based on this evidence, a jury found Ms. Shelby guilty. The judge gave the jury only two sentencing options: death or life without parole. The jury sentenced her to life without parole.

Ten years earlier, in 1990, a jury convicted and sentenced Sabrina Butler to death in Columbus, Mississippi for allegedly killing her baby boy through shaking and impact. *Butler v. State*, 608 So. 2d 314 (Miss. 1992). Ms. Butler's conviction was reversed and, at her second trial in 1995, the baby's injuries were readily explained as resulting from CPR, and the baby's death was due to a rare genetic kidney condition. Ms. Butler was acquitted. In 2021, **the Hinds County Chancery Court finally amended her baby's death certificate to no longer read "homicide" as the manner of death**.

On June 18, 2018, Dr. Leroy Riddick filed an amended official death certificate for Bryan E. Thompson IV with the Alabama Center for Health Statistics, at the Alabama Department of Public Health. (Ex. A, Amended Death Certificate for Bryan Thompson IV.) This death certificate crucially changed the manner of death from "homicide" to "accident." It also recognized the cascade of events that led to Bryan's death: cerebral edema with herniation, hypoxic encephalopathy, and seizure disorder. The death certificate describes how the injury occurred: a fall. This directly contradicted Dr. Riddick's expert testimony that the jury heard at trial. (TT 423-424.) Falsely changing a death certificate is a felony offense, and Dr. Riddick would also have lost his medical license.

Yet unlike Sabrina Butler, Ms. Shelby remains incarcerated 25 years after the tragic accidental death of her stepson, because the trial court dismissed the expert's new opinion as a recantation and "harmless error" that was not newly discovered evidence. (Ex. S, Trial Order Den. Tasha Shelby's Mot. for PCR 2018.) **The trial court did not, and could not legally consider, the amended death certificate, which was filed after the post-conviction hearing, in June 2018.** The amended death certificate was not part of the petition that the trial court had permission from the Mississippi Supreme Court to review.

Instead, the trial court relied on the state's only witness and expert at the post-conviction hearing: child abuse pediatrician Dr. Scott Benton. *Shelby v. State, Order,* No. 24C12:16-cv-0114 (Cir. Ct. Harrison Cnty, Dec. 7, 2018) ("Dr. Benton, after reviewing the entire case, opined that there is no new evidence that would change his opinion as to the cause of death and that current science supports the original conclusions from Dr. Riddick at trial."). Dr. Benton has now provided diametrically opposed testimony as a defense expert in another Shaken Baby Syndrome case, culminating in that defendant's acquittal. *State of Alabama v. Michael Wayne Mixon*, CC 2019-2834 (Thirteenth Judicial Cir. Ct. Mobile Cnty, Alabama, Apr. 28, 2022). Had he presented this same testimony at Ms. Shelby's hearing, he would have demonstrated her innocence. A recent in-depth investigative reporting series by Mississippi Today documents Dr. Benton's problematic testimony in Ms. Shelby's case and his harmful testimony as a child abuse pediatrician across the South. *Mississippi Today investigation examines dangers of one doctor's reign over child abuse cases,* MISSISSIPPI TODAY (Feb. 27, 2023), https://mississippitoday.org/shaky-science-fractured-families/.

Ms. Shelby presents this newly discovered evidence of the changed death certificate as proof that she is innocent, and that her due process rights were violated by her being convicted *and sentenced* based on faulty evidence. She further presents the newly discovered evidence of Dr. Benton's changed testimony as a further violation of her due process rights, and that the trial court was misguided in its reliance on Dr. Benton's testimony as the sole evidence to uphold Tasha Shelby's conviction.

Ms. Shelby has additional newly discovered evidence of her innocence and her wrongful conviction at trial. A juror on Ms. Shelby's capital trial, Daniel Mullen, was the great-uncle by marriage of Bryan IV. The juror was related to the child and knew about the child's death and its circumstances before the trial began. During the trial and during jury deliberations, he knew that the deceased was his great-nephew. (Ex. U, Aff. Juror Daniel Mullen 2022.) These factors violate Ms. Shelby's constitutional right to due process and to a fair trial.

Ms. Shelby seeks relief from her unlawful confinement and requests that this Court vacate Ms. Shelby's wrongful conviction. No one ever observed Ms. Shelby harming or mistreating Bryan IV. Ms. Shelby has never made any statements suggesting she harmed Bryan. She has always given a consistent account about what happened the night Bryan collapsed: she heard a loud thump in the room where Bryan was sleeping, ran into the room to find him on the floor gasping for air, and immediately called her fiancé, Bryan's father. Together, they both performed CPR and rushed Bryan IV to the hospital, where medics likewise tried to revive the child. Bryan died a few days later.

This Petition asks this Court to vacate Ms. Shelby's wrongful conviction and is divided into six sections. The first three sections lay out the procedural history, the preservation of issues, and this Court's jurisdiction. The fourth section explains that this motion deals with newly discovered evidence, specifically: (1) a death certificate finding the manner of death was accidental and the cause of death was a seizure; (2) new evidence undermining the credibility of the state's sole witness against Ms. Shelby at her post-conviction hearing in 2018; and (3) and a juror who was related to the victim, knew about the victim's death before trial began, and had already, before the trial heard about the cause of Bryan IV's death. The fifth section explains the facts relevant to this case. The sixth section explains why this Court should hold a hearing or vacate Ms. Shelby's conviction.

I. PROCEDURAL HISTORY

A. Trial and Appeal

Tasha Shelby was charged in an indictment returned January 29, 1998, by the grand jury of Harrison County, Second Judicial District, with one count of capital murder under the Felony Child Abuse Act, Miss. Code Ann. § 97-5-39(2), and in violation of Miss. Code Ann. § 97-3-19(2)(f). The charge stemmed from the May 31, 1997, death of Bryan, the son of Ms. Shelby's fiancé, Bryan Thompson III, from a previous relationship.

The basis of the State's case was Shaken Baby Syndrome coupled with a diagnosis of blunt force trauma from which the prosecution inferred "shaken impact." Dr. Riddick, the state's medical expert, testified that Bryan died from blunt force injuries to the head, and explained that shaking a baby really hard can cause this kind of trauma.[1] (TT 420, 422–23.) Ms. Shelby entered a plea of not guilty. For the past twenty-five years, she has steadfastly maintained her innocence.

The Circuit Court of Harrison County appointed attorneys Michael E. Cox and Donald A. Smith to defend Petitioner against the charge. A jury trial before the Honorable Robert H. Walker began in Harrison County Circuit Court on June 12, 2000. On June 15, the jury returned a verdict of guilty. The following day, Petitioner was sentenced to life imprisonment without parole.

Ms. Shelby, through counsel,[2] appealed her conviction to the Mississippi Supreme Court, raising the following grounds:

1. Trial court incorrectly denied motions for directed verdict and new trial.
2. Evidence presented at trial was insufficient to support a verdict of guilty.
3. Trial court erred when it addressed the jury outside the presence of counsel.
4. Trial court erred when it replaced a juror with an alternate.

On March 26, 2002, the Mississippi Court of Appeals affirmed Ms. Shelby's conviction. *Shelby v. State*, 812 So. 2d 1144 (Miss. Ct. App. 2002). There was no oral argument and no rehearing was requested.

---

[1] As explained more fully below, the expert, Dr. LeRoy Riddick, incorrectly inferred SBS from flawed science that prevailed at the time of Bryan's death and Ms. Shelby's conviction.

[2] Petitioner was represented on appeal by Donald A. Smith, one of her trial attorneys. Mr. Smith passed away in Ocean Springs in February 2008.

On March 25, 2005, Petitioner, through Attorney Judson M. Lee, filed in the Mississippi Supreme Court an Application for Leave to File a Petition for Post-Conviction Relief. (Cause No. 2005-M-00615). The grounds raised were:

1. Ms. Shelby's court-appointed counsel rendered ineffective assistance such that she was denied her right to a fair and impartial trial:
    a. Trial counsel was ineffective in failing to investigate the case against Ms. Shelby and present an adequate defense;
    b. Counsel failed to object to the admission of prejudicial and irrelevant photograph of the victim;
    c. Trial counsel was ineffective by failing to ensure that the jury who tried Ms. Shelby was impartial; and
    d. Trial counsel was ineffective by failing to object to the prosecutor's improper comments in closing argument.

Notably, the petition included an affidavit from a medical expert addressing a large alleged bruise spanning the lower back and buttocks of the child. The prosecution characterized this discoloration as a bruise at trial. (TT 420; Ex. L, Dr. Leroy Riddick Autopsy Report; *see also* Ex. U, Aff. Juror Daniel Mullen 2022 ("At trial, pictures were shown of Bryan's bruises on his body. I remember being told these bruises were due to Tasha shaking and hurting the child.").) Yet the mark is identifiable as a "Mongolian spot"—similar to a birthmark. *See, e.g.*, *Dermal melanocytosis*, NAT'L LIBR. OF MED., https://medlineplus.gov/ency/article/001472.htm (last visited Mar. 21, 2023). The Mississippi Supreme Court denied Petitioner's Application for Leave to File a Petition for Post-Conviction Relief on April 28, 2005.

B. Ms. Shelby's 2015 Post-Conviction Petition

On July 30, 2015, Petitioner Tasha Shelby filed a Motion for Leave to File a Post-Conviction Relief Petition with the Mississippi Supreme Court. The motion was supplemented on January 12, 2016, with a one-page affidavit from Dr. Riddick. The motion was granted on August 8, 2016. Ms. Shelby filed the Petition for Post-Conviction Relief in the Harrison County Circuit Court, and the Circuit Court held an evidentiary hearing on April 24–26, 2018. Ms. Shelby presented as witnesses: forensic pathologist Dr. Janice Ophoven, bio-mechanic Dr. Kenneth Monson, neurologist Dr. Julie Mack, and forensic pathologist and original medical examiner in

the case, Dr. LeRoy Riddick. Dr. Riddick testified extensively at the hearing. The State presented one witness, pediatrician Dr. Scott Benton.

On December 10, 2018, the Harrison County Circuit Court denied Ms. Shelby's Petition for Post-Conviction Relief. Ms. Shelby appealed; the Mississippi Court of Appeals heard oral argument in the case on February 5, 2020. Amicus briefs were filed on her behalf by the Mississippi Association for Justice, the Innocence Network, and the Center for Integrity in Forensic Sciences. In a 5-3 split decision, the Mississippi Court of Appeals upheld the denial of Ms. Shelby's petition on August 4, 2020. Ms. Shelby filed a Petition for Writ of Certiorari to the Mississippi Supreme Court, which the court denied on February 10, 2021. **C. Ms. Shelby's Current Post-Conviction Petition**

In June 2018, Dr. Riddick amended Bryan Thompson IV's death certificate, changing the manner of death from homicide to accident. He likewise changed the cause of death to "seizure disorder." The courts did not have leave to previously consider this newly discovered evidence which, in any event, did not exist until after the Post-Conviction Relief Hearing in Spring 2018. (Ex. A, Amended Death Certificate of Bryan Thompson IV). Petitioner is raising this newly discovered evidence now that the previous state post-conviction litigation has concluded.

In July 2022, two volunteer law students from Great Britain met with the jurors who originally convicted Ms. Shelby. They learned that one of these jurors, Daniel Mullen, was related to the child Bryan. They also learned that Mr. Mullen knew of the child's death before the trial began. This information was likewise discovered by investigative reporter and Peabody Award-winning journalist Andy Pierrotti, of Gray Television. Andy Pierrotti, *Woman Convicted on Controversial Medical Diagnosis Staying in Prison,* ATLANTA NEWS FIRST (Feb. 9, 2023), https://www.atlantanewsfirst.com/2023/02/09/woman-convicted-controversial-medical-diagnosis-stay-prison/. Pierotti reported Mullen as saying about what he knew *before* the trial: "And I remember that her nephew baby had died from shaking syndrome." *Id.*

In February 2023, an investigative journalism report by Mississippi Today exposed that the state's expert at the post-conviction hearing, Dr. Scott Benton, had provided conflicting testimony across cases. Isabelle Taft, *This Doctor's Testimony has Helped Put People in Prison. Some Say He Doesn't Always Get it Right,* MISSISSIPPI TODAY (Feb. 28, 2023), https://mississippitoday.org/2023/02/28/part-two-shaky-science-fractured-families/.

Ms. Shelby is now presenting this newly discovered evidence in her request for her wrongful conviction to be reversed.

II. PRESERVATION OF ISSUES

The Mississippi Uniform Post-Conviction Collateral Relief Act (UPCCRA) requires a post-conviction petitioner "to allege in his motion such facts as are necessary to demonstrate that his claims are not procedurally barred under this section." Miss. Code Ann. § 99-39-21(6). Additionally, "[p]ost-conviction proceedings are for the purpose of bringing to the trial court's attention facts not known at the time of judgment." *Williams v. State*, 669 So. 2d 44, 52 (Miss. 1996) (cleaned up); *see also* Miss. Code Ann. § 99-39-5. Under the UPCCRA, post-conviction review "provide[s] prisoners with a procedure, limited in nature, to review those objections, defenses, claims, questions, issues or errors which in practical reality could not be or should not have been raised at trial or on direct appeal." Miss. Code Ann. § 99-39-3.

III. JURISDICTION

This Court reviews petitions for post-conviction relief pursuant to Miss. Code Ann. §§ 99-39-1 *et seq*. It has the authority to hold an evidentiary hearing under Miss. Code Ann. § 99-39-23 and to vacate the conviction under Miss. Code Ann. § 99-32-5.

IV. NEWLY DISCOVERED EVIDENCE

Ms. Shelby should have her conviction vacated or be granted a hearing. A petitioner is entitled to relief when she can demonstrate: (1) that the new evidence was discovered since trial; (2) that due diligence could not have discovered the new evidence prior to trial; (3) that the evidence is material to this issue and not merely cumulative or impeaching; and (4) that the evidence will probably produce a different result or verdict in a new trial. *See Ormond v. State*, 599 So. 2d 951, 962 (Miss. 1992) ("Newly discovered evidence warrants a new trial if the evidence will probably produce a different result or verdict; further, the proponent must show that the evidence has been discovered since the trial, that it could not have been discovered before the trial by the exercise of due diligence, that it is material to the issue, and that it is not merely cumulative, or impeaching") (cleaned up); *accord Hunt v. State*, 877 So. 2d 503, 510 (Miss. Ct. App. 2004).

Ms. Shelby's new evidence satisfies all four factors. First, Ms. Shelby discovered the new evidence since trial—most of it in the past year. Second, due diligence could not have discovered the new evidence prior to trial because this evidence either did not exist at the time of her trial (the 2018 amended death certificate and Dr. Benton's conflicting testimony) or was not available

because the juror did not disclose this information. Third, the new evidence is material to the claims raised with respect to Ms. Shelby's conviction and sentence. It is also not merely cumulative or impeaching, because now-discredited evidence was the only evidence against Ms. Shelby. Fourth, the new evidence will probably produce a different result in a new trial because the only evidence against Ms. Shelby —the medical evidence that purported to prove every element of the crime— has been thoroughly undermined by an amended death certificate and the changed testimony of the State's sole remaining expert, Dr. Benton. The newly discovered evidence set forth in this Petition requires the reversal of Ms. Shelby's conviction and sentence.

V. STATEMENT OF FACTS

A. Background

In May of 1997, Tasha Mercedez Shelby and her three-year-old son Dakota shared a home in Biloxi with Ms. Shelby's then-fiancé, Bryan Thompson III (who she later married), and his son from a previous relationship, Bryan Thompson IV. (TT 313–14.)

Bryan was, at the time of his collapse and subsequent death, two and a half years old. He was three feet tall and weighed approximately thirty-three pounds. (TT 420; Ex. C, Bryan Thompson IV Medical Records.) Ms. Shelby is under five feet tall with an unusually short adult height legally referred to as dwarfism.

In May of 1997, Ms. Shelby and Bryan III were expecting a child together. On May 14, Ms. Shelby went into labor and was admitted to the hospital. (Ex. D, Tasha Shelby Hospital Discharge Summ.) Later that day, she gave birth to a baby girl, Devin, via an emergency cesarean section surgery. Doctors also performed a bilateral salpingectomy (removal of the fallopian tubes) while she was in the hospital. *Id.*

Due to these multiple surgeries, Ms. Shelby remained in the hospital for several days after the birth of her daughter. On May 17, 1997, she was discharged with written instructions to refrain from "straining down" and "heavy lifting," and a prescription for pain relievers. Ex. D, Tasha Shelby Hospital Discharge Summ. She was given instructions to return to the hospital on May 21 to have her stitches removed. *Id.*

Prior to the events that gave rise to her conviction, Ms. Shelby had no criminal record, and had never been charged with anything or even arrested. (TT 639.) There was no evidence presented

at trial to suggest that she ever engaged in acts of abuse, neglect, or violence toward Bryan or anyone else.

B. May 29, 1997 and May 30, 1997

At around 8:00 p.m. on May 29, 1997, Ouida "Honey" Schalk, Ms. Shelby's grandmother, arrived with her husband "Poppa" at the Shelby-Thompson home. (TT 354.) Honey and Poppa would often have great-grandson Dakota, and sometimes Bryan, spend the weekend at their house. (TT 352.)

After visiting with Ms. Shelby and the children for about an hour, Honey and Poppa left with Dakota. (TT 353-54.) Bryan was given a snack of popcorn and lemonade and went to bed not long after Honey and Poppa left. Ms. Shelby went to sleep at around midnight. (TT 372.)

During the early morning hours of May 30, 1997—a time she estimated to be between 3:45 and 4:00 a.m.— Ms. Shelby was awakened by the sound of a "thump" from Bryan's room. (TT 316; 320; 372.) Startled, she rushed into the room to find the child on the floor, convulsing and gasping for air; he appeared to be having some kind of seizure. (TT 372.) Bryan was, in fact, prone to such seizures. (Ex. E, Letter from Att'y John McDonnell about Thompson Family Seizures.)

Ms. Shelby immediately called her fiancé at the distribution plant where he was working an overnight shift and asked him to come home and help her with Bryan. (TT 316.) Next, she phoned the nearby hospital where she had just given birth and was advised to bring Bryan in. (TT 372.) While waiting for her husband to arrive, she performed CPR.

As soon as Bryan III arrived at home, he grabbed his son and also attempted CPR, which he was not trained to perform. (TT 319.) Unable to revive the child, Bryan III and Ms. Shelby put him and the baby in the van to go to Biloxi Regional Medical Center, which was only minutes from their house. (TT 319-20.) In his rush to get his son into their van, Bryan III bumped Bryan's head on the car door. (TT 477; 481.)

Shortly after Bryan III began driving to the hospital, his van was pulled over by Deputy Patrolman Teddy Rose of the Harrison County Sheriff's Department. (TT 251-52.) Upon being pulled over, Bryan III told Deputy Rose that he was speeding in order to get his son, who had stopped breathing, to the hospital. *Id.* Deputy Rose's partner, Deputy Sheriff Bobby War, jumped into the back of the van and also began to perform CPR on the child. Deputy Rose followed in his car as the van continued on to the hospital. *Id.*

Deputy Rose testified at trial about his conversation with Ms. Shelby in the ER. Ms. Shelby told Deputy Rose exactly what she had related to her fiancé when she called him at work: that she heard a "thump" and rushed into Bryan's room where she found the child on the floor, struggling to breathe. (TT 253.) Ms. Shelby later provided a written narrative of the events of that evening to Biloxi Police Officer Rick Dawson. In that written statement, she again described the events she had witnessed that evening—hearing a thump sound, and finding Bryan on the floor gasping for air. (TT 259; Ex. F, Statement Tasha Shelby Biloxi Police Department.)

After "aggressive airway management" and the administration of drugs, emergency room personnel were able to establish a pulse and stabilize Bryan. The child, however, was brain dead. (TT 270.) He was transferred to the University of South Alabama Medical Center in Mobile where he was pronounced dead at 2:28 p.m. on May 31, 1997. (Ex. G, USA Diagnosis and Progress Notes.)

C. The Medical history of Bryan Thompson IV

Bryan Thompson IV was born on November 21, 1994, to Angela Reynolds and her then-partner Bryan Thompson III. (TT 313.) Bryan IV had a well-documented history of medical problems including a family history of, among other things, seizures, asthma, and allergies. (Ex. H, Bryan Thompson IV Medical History; Bryan Thompson IV Pediatric Admission Assessment Record.)

Bryan experienced episodes of apparent neurological dysfunction and/or seizures; there were times when the child's eyes would seem to roll backwards in his head, and he would become nonresponsive. Several family members observed these seizures, including Honey Schalk, who told Investigator Newman that she thought she witnessed the child having a seizure on one occasion, and Bryan III, who testified that he had seen his son's eyes roll back in his head and seem to "almost close" on several occasions. (TT 396; 344.)

Neurological disorders ran in the Thompson family. Bryan Thompson III's mother, Cynthia Ferrill, suffered from a seizure disorder, specifically, Atypical Absence Seizures. (TT 469; Ex. E, Letter from Att'y John McDonnell about Thompson Family Seizures.) His uncle, Robert Thompson, suffered from Primary Seizure Disorder. *Id.*

In addition to seizures, a letter from Bryan's pediatrician notes his "history of recurrent wheezing consistent with asthma since 8–9 months of age," which he managed with a home nebulizer (Ex. I, Letter Don H. LaGrone; Ex. K, USA Death Discharge Form.) In his two and a

half years, he was treated multiple times for respiratory problems and was, on several occasions, hospitalized.

In the weeks before Bryan's death, family members noticed that something else seemed wrong with the child's eyes. Bryan III testified about a time, several weeks prior to the child's collapse, when "red dots" in Bryan's eyes led Ms. Shelby and Bryan III to schedule an appointment with a neurologist:

> ATTORNEY SMITH: For some several weeks prior to May the 30th of 1997, in retrospect, you realize that you had seen [Bryan IV] with bloodshot eyes, did you not?
>
> BRYAN THOMPSON: Yes.
>
> SMITH: And this had gone on for, I believe you told Mr. Cox and I, three or four weeks?
>
> THOMPSON: Yes.
>
> SMITH: And had you sought medical attention for that for your son?
>
> THOMPSON: Yes.
>
> SMITH: And with whom?
>
> THOMPSON: Dr. Siddiqui.
>
> SMITH: Has he been to see Dr. Siddiqui for that?
>
> THOMPSON: We scheduled him to see him for that. I think he might have been there for something else, and we asked him about it. We came back again for that, but he recommended a neurologist.
>
> SMITH: Okay. Had he been to see a neurologist before that?
>
> THOMPSON: No. He had an appointment the week after. We would have made it to the appointment seven days – he would have died seven days prior to the appointment we were supposed to have.

(TT 336-37.)

Additionally, Honey Schalk testified she observed redness in the child's eyes about a week before his death. She noticed how, when Bryan would look up, the bottoms of his eyes would be red. (TT 364). Honey described this to the police as "little dots of blood pooled up in his eyes." (TT 367).

Lastly, Bryan Thompson IV was born with Mongolian Spots. These are essentially birthmarks: flat, irregularly shaped spots that present on the back of the spine, buttocks, and back of children. (Ex. J, Photo Mongolian Spots.) While not health problems themselves, these spots, which range in color form blue-gray to dark brown, can often be confused with bruises. During Ms. Shelby's trial, the State's medical expert, Dr. LeRoy Riddick, testified that Bryan "had a [bruise] in the midline on his lumbar region, and he had another bruise on the outer portion of his left thigh." (TT 420; Ex. L, Dr. Leroy Riddick Autopsy Report.) A number of photographs taken of Bryan make clear that these apparent bruises were, in fact, nothing more than birthmarks. (Ex. J, Photo Mongolian Spots.) This is further supported by Dr. Riddick's testimony that these "bruises" did not have any hemorrhaging beneath. (TT 420.)

D. The diagnosis of Shaken Baby Syndrome is both flawed generally, and inapplicable to the current case – yet was accepted at the time of trial.

There are serious questions as to whether Shaken Baby Syndrome is a valid theory generally of causation. *See Jones v. State*, 2021 WL 346552 (Md. Ct. Spec. App. Feb. 2, 2021) (extensively reviewing the recent scientific evidence, and granting writ of actual innocence); *see generally* DEBORAH TUERKHEIMER, FLAWED CONVICTIONS: "SHAKEN BABY SYNDROME" AND THE INERTIA OF INJUSTICE (2015). Even more alarming, there are similar doubts about specific causation – whether the evidence in a particular case is sufficient to make the necessary connection between an assumed shaking of an infant and his death.

As reported in *Commonwealth v. Millien*, the American Academy of Pediatrics 2009 policy statement included the following: "Few pediatric diagnoses engender as much debate as [abusive head trauma] . . . Controversy is fueled because the mechanisms and resultant injuries of accidental and abusive head injury overlap, the abuse is rarely witnessed, an accurate history of trauma is rarely offered by the perpetrator, there is no single or simple test to determine the accuracy of the diagnosis, and the legal consequences of the diagnosis can be so significant." 474 Mass. 417, 440 (2016) (alteration in court opinion).

Indeed, a meta-study, conducted under the auspices of the Swedish Government, concluded that brain swelling and bleeding around the brain and bleeding around the eye, *do not*, as the state's forensic pathologist Dr. Riddick claimed at Ms. Shelby's trial, reliably indicate that a child has been shaken. *See also* Keith A. Findley et al., *Feigned Consensus: Usurping the Law in Shaken Baby Syndrome/Abusive Head Trauma Prosecutions,* 2019 WIS. L. REV. 1211 (2019) (agreeing

with the study, which reviewed more than 1000 papers, and its conclusion that the papers supporting SBS were of "very low quality."). In Supreme Court Justice Ginsburg's 2011 dissent in *Cavazos v. Smith*, addressing a conviction based on Shaken Baby Syndrome, Justice Ginsburg wrote, "What is now known about shaken baby syndrome (SBS) casts grave doubt on the charge leveled against Smith . . . . In 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. 1, 14 (2011) (Ginsburg, J., dissenting) (emphasis added). Cavazos' trial was the same year as Ms. Shelby's arrest. The majority did not disagree with Justice Ginsburg's point, but reversed the lower court decision on different grounds.

At the time of Ms. Shelby's trial, both the prosecution expert and the defense expert agreed that the child, Bryan, died from Shaken Baby Syndrome – shaking and impact. But since then, the science has changed.

In 2000, the first sentence of the Government's opening statement was this: "On May 30th, 1997, Tasha Shelby shook a two-and-a-half-year-old child, Bryan Thompson, the Third, - - the Fourth so violently that the child died the next day from those injuries." (TT 243.) The Government repeated this sentiment multiple times throughout trial,[3] and in its closing argument told the jury, "Bryan Thompson, the Fourth, was violently shaken to death. That is undisputed. Even their [defense expert] testified to that. He was violently shaken to death." (TT 583.)

The SBS theory held that when an infant—usually a baby less than six months old—presented with three specific symptoms (retinal hemorrhage, subdural hemorrhage, and cerebral edema), and there was no other explanatory cause, then the child *must* have been shaken to death.

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[3] Other noted examples in the trial transcript are as follows: "[Dr. Riddick] will tell you that in no way, shape or form is this an accident. He will tell you that this is not from falling off a sixteen-inch bed or a sixty-inch bed. He will tell you these injuries are comparable to a car wreck traveling at 35, 30 miles an hour coming to a dead stop. He will tell you that this is no accident. It is a violent, violent shaking." (TT 248: 11-17.) "Dr. Reddick [sic] testified that the child would immediately, and that's critical, immediately become nonresponsive. So if this mystery person would have shaken this baby so violently to tear its brain from outside of its skull, that would have had to have happened, the child would have been nonresponsive immediately." (TT 585: 17-23.) "Number one, that child died from being violently shaken, an intentional violent act." (TT 586: 1-2.) "Bryan Thompson, the Fourth, could not defend himself. That is why this is termed a capital murder case. When a baby is shaken to death, they can't defend themselves, and therefore the defendant is guilty of capital murder." (TT 587: 5-9.)

The history of the diagnosis is explained, in brief, below. Notably, Bryan IV did *not* have retinal hemorrhage. Indeed, the doctors allowed his eyes to be "harvested." Also, he had only a small subdural hemorrhage, misrepresented at trial as much larger. Thus, the only symptom of Shaken Baby Syndrome Bryan IV had was cerebral edema, commonly caused by a lack of oxygen.

1. Historical origins of the Shaken Baby Syndrome diagnosis

From 1970 until 2001, medical doctors routinely determined that injuries similar to those of Bryan were uniquely and exclusively attributed to shaking or Shaken Baby Syndrome. SBS began as a hypothesis in the 1970s in an attempt to explain certain deaths of babies where the cause of death could not be determined. This hypothesis was first posited by British pediatric neurosurgeon Norman Guthkelch in a 1971 two-page journal article where he posited that vigorous shaking of babies could cause whiplash-like injuries, including subdural hematoma. A.N. Guthkelch, *Infantile Subdural Haematoma and its Relationship to Whiplash Injuries*, 2 BRIT. MED. J. 430 (1971). Dr. Guthkelch's hypothesis was premised on a 1968 study of car-accident-like whiplash on adult rhesus monkeys. *See* Ayub K. Ommaya, *Whiplash Injury and Brain Damage: An Experimental Study*, 204 J. AM. MED. ASS'N 285, 286–89 (1968). Dr. Guthkelch compared the rhesus monkey study with two of his own patients' case histories where the babies had subdural hematoma with no signs of head trauma and the caregiver for each admitted to shaking the patient. He concluded shaking had caused the brain injuries.

This hypothesis that shaking could cause brain injury to young children expanded and gained traction following the publication of two articles by pediatric radiologist John Caffey in 1972 and 1974, respectively. The first involved his review of patient case histories, mostly based on patients discussed in a Newsweek article where a nurse confessed to abusing babies in her care. *See* John Caffey, *On the Theory and Practice of Shaking Infants: Its Potential Residual Effects of Permanent Brain Damage and Mental Retardation*, 124 AM. J. DISEASES CHILD. 161 (1972). The second involved comparing Dr. Caffey's own data to that of the findings in the Ommaya rhesus monkey study that Dr. Guthkelch relied on to support the hypothesis that subdural hemorrhages in babies, without apparent external trauma, is caused by violent shaking. John Caffey, *The Whiplash Shaken Infant Syndrome: Manual Shaking by the Extremities With Whiplash-Induced Intracranial and Intraocular Bleedings, Linked With Permanent Brain Damage and Mental Retardation*, 54 PEDIATRICS 396, 400 (1974). Dr. Caffey concluded, "[M]anual whiplash shaking of infants is a common primary type of trauma in the so-called battered infant syndrome. It appears to be the

major cause in these infants who suffer from subdural hematomas." While Dr. Caffey noted that his conclusions were based on evidence that was "manifestly incomplete and largely circumstantial," he nonetheless called for an educational campaign against shaking babies.

Following these articles, advocacy groups like The National Center on Shaken Baby Syndrome carried out Dr. Caffey's suggestion to raise awareness about the supposed dangers of shaking babies. This helped SBS to rapidly gain acceptance as the prevailing diagnosis when certain symptoms were presented. *See* Edward J. Imwinkelried, *Shaken Baby Syndrome: A Genuine Battle of the Scientific (and Non-Scientific) Experts*, 46 CRIM. L. BULL. 156 (2010) ("In a relatively short time after Caffey's enunciation of the theory, the theory became widely accepted in both medical and legal circles."); Ronald H. Uscinski, *Shaken Baby Syndrome: An Odyssey*, 46 NEUROL. MED. CHIR. 57 (2006) ("This widely proclaimed yet still hypothetical supposition has become a virtually unquestioned assumption nowadays as a modality for causing inflicted intracranial injury in infants."). Physicians were then trained to diagnose SBS as the likely cause of injuries whenever they observed what became known as the "triad of symptoms," which are: edema (brain swelling); subdural hematoma (bleeding in the brain); and retinal hemorrhaging (bleeding in the eyes).

By the time of Bryan's death in 1997 and Ms. Shelby's trial in 2000, SBS was entrenched in the medical and legal communities. The American Academy of Pediatrics endorsed it and suggested that whenever a child younger than one year had intracranial injury and retinal hemorrhages, child abuse should be presumed. *See* Am. Acad. of Pediatrics Comm. on Child Abuse and Neglect, *Shaken Baby Syndrome: Rotational Cranial Injuries—Technical Report*, 108 PEDIATRICS 206, 206–10 (2001). The National Association of Medical Examiners (NAME) also endorsed SBS as a reliable diagnosis. *See* Mary E. Case et al., *Position Paper on Fatal Abusive Head Injuries in Infants and Young Children*, 22 AM. J. FORENSIC MED. & PATHOLOGY 112, 112 (2001). Almost no medical professionals were questioning the SBS diagnosis at the time of Bryan's death and Ms. Shelby's trial.

Ms. Shelby's counsel, Mr. Cox, told the court at the Post-Conviction Hearing, "If there were witnesses available and medical experts that were going to give us valid opinions based on science that it was able to be caused consistent with what Tasha's testimony was, we certainly would have availed ourselves of that." (HT 32–33.) Mr. Cox said, "Tasha's statement was that she heard the thud, though, you know, it sounded like Bryan fell out of the bed, went in there, and I

believe saw him gasping or his eyes rolled back and he appeared to be having seizures. That was what her testimony was . . . her statement to the police. And that's what – and that's what she told us as well." (HT 29.) Yet he couldn't find an expert who could scientifically support Ms. Shelby's statement, which has been consistent for over 25 years. (HT 32-33.)

2. Serious questioning of SBS begins after Ms. Shelby's trial in 2000.

After Ms. Shelby's trial, the medical community began to question whether SBS could truly be diagnosed as easily as they had been led to believe. Dr. Jennian Geddes, a British neuropathologist, published two papers questioning SBS. J.F. Geddes, *et al.*, *Neuropathology of Inflicted Head Injury in Children I*, 124 BRAIN 1290 (2001); Manoj V. Parulekar & John S. Elston, *Neuropathology of Inflicted Head Injury in Children II*, 124 BRAIN 1299 (2001). Dr. Geddes reviewed the findings of brain and eye damage in infants who were allegedly victims of nonaccidental head injury, including shaking, and compared them to subdural hemorrhage and brain findings in infants that died of natural causes. Dr. Geddes observed that the brain findings and subdural hemorrhages were virtually identical. Based on her research, Dr. Geddes's opinion was that concluding shaking had occurred based on the presence of subdural hemorrhaging and other symptoms to the exclusion of other causes "require[s] fresh examination."

As time went on, other doctors in the field similarly questioned whether subdural hemorrhaging, retinal hemorrhaging, and edema had other explanations. In 2001, John Plunkett, a forensic pathologist, analyzed case data collected from the Consumer Product Safety Commission. Dr. Plunkett observed that some or all of the triad injuries—which had historically been thought to only occur with car accidents and Shaken Baby Syndrome—were also present in many documented short-fall incidents. Plunkett's research included one videotaped fatal fall of a twenty-three-month-old toddler from a plastic gym that was twenty-eight inches high onto a carpeted garage floor and resulted in retinal hemorrhages and subdural hematoma. John Plunkett, *Fatal Pediatric Head Injuries Caused by Short-Distance Falls*. 22 AM. J. FORENSIC MED. PATHOLOGY 1 (2001). Dr. Plunkett's findings, like those of Geddes', were initially met with skepticism, but that changed over time. One forensic pathologist, Dr. George Nichols of Louisville, initially thought Dr. Plunkett was a "first-class nut." But after "reviewing the literature cited by Plunkett," Dr. Nichols "changed his mind" and "went to the other side." *See* Dee J. Hall, *Shaken Baby Case Back After 10 Years*, WISC. STATE J. (Jan. 26, 2007), http://host.madison.com/news/local/shaken-baby-

case-back-after-years-witnesses-say-symptoms-in/article_2a02bc07-8c39-59a2-abee-11d2e111cd67.html.

In 2002, Dr. Ayub Ommaya, one of the authors of the 1968 rhesus monkey whiplash article that served as the basis for the original SBS triad-of-symptoms hypothesis, published an article, now with biomechanical expert coauthors, pointing out that Ommaya's study involved rhesus monkeys, not human infants, and that the monkeys were not shaken, but strapped into carts that were impacted at various speeds to simulate car accidents. Ayub K. Ommaya, *Biomechanics and Neuropathology of Adult and Pediatric Head Injury*, 16 BRIT. J. NEUROSURGERY 220 (2002). The authors argued that Ommaya's original work provided no basis for the development of a hypothesis that became Shaken Baby Syndrome. The authors additionally posited that in order for physical shaking to be sufficient to cause subdural and retinal hemorrhage, the shaking would have to cause soft tissue injury to the neck and also cause spinal injuries. Additional evidence has continued to undermine the previously unquestionable hypothesis that the traumatic brain injuries in babies could only be attributable to car crashing and Shaken Baby Syndrome. These new studies show that an adult cannot physically generate enough force by vigorously shaking a child to cause was known as SBS. *See, for example,* Nicole G. Ibrahim, Brittany Coats & Susan S. Margulies, *The Response of Toddler and Infant Heads During Vigorous Shaking*, 22 J. NEUROTRAUMA 1207 (2005).

In 2003, Dr. Mark Donohoe evaluated the literature on Shaken Baby Syndrome and Shaken Impact Syndrome from 1966 through 1998. Mark Donohoe, *Evidence Based Medicine and Shaken Baby Syndrome Part I: Literature Review, 1966–1998*, 24 AM. J. FORENSIC MED. PATHOLOGY 239, 241 (2003). After reviewing and categorizing 55 articles on Shaken Baby Syndrome, Dr. Donohoe concluded that, based on these articles, "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."

Even Dr. Guthkelch, the original Shaken Baby Syndrome hypothesis proponent, has voiced serious doubt about Shaken Baby Syndrome diagnoses. "If shaking is responsible for significant damage to the central nervous system and its coverings, one must ask why the forces generated by humans or laboratory machines shaking a dummy have so often proved insufficient to cause the disruption of these tissues." A. Norman Guthkelch, *Problems of Infant Retino-Dural Hemorrhage with Minimal External Injury*, 12 HOUS. J. HEALTH L. & POL'Y (2012). In a variety of forums, Dr.

Guthkelch expressed his dismay at the way in which his original hypothesis led to the prosecution of so many caregivers. "Every single case that I have been asked to review in the last few years has had some sort of unrelated (unrelated to shaking that is) illness, congenital anomalies, seizures since birth, recurrent otitis media [middle ear infection], *etc.* . . . What is being regarded as 'plainly' SBS...is a rag-bag of pathologies in which trauma is not (in my experience) prominent." Tuerkheimer, FLAWED CONVICTIONS, at 133.[4]

SBS advocates have said that shaking causes a baby's brain to slide back and forth, which in turn causes bridging veins around the brain to tear or rupture and, then, hemorrhage into the subdural area overlying the brain. New knowledge about anatomy suggests this is unlikely. *See* Waney Squier & Julie Mack, *The Neuropathology of Infant Subdural Hemorrhage*, 187 FORENSIC SCI. INT'L 6, 12 (2009).

Similarly, shaking was believed to cause retinal blood vessels to strain and then burst, causing microscopic retinal hemorrhages. And the real harm—the brain damage and swelling—was believed to be caused by direct shearing of nerve fibers in the brain during shaking. This claim, too, is outdated and incorrect; even vocal supporters of the SBS hypothesis now acknowledge that the damage is more likely due to a lack of oxygen. *See* Mark S. Dias, *The Case for Shaking*, 2011 CHILD ABUSE AND NEGLECT, 364, 368 (2010).

At trial, the State made three essential contentions, all of which were supported by medical expert testimony presented at trial: (1) Bryan's injuries must have been caused by shaking and some sort of intentional impact (TT 423: 5–17); (2) the shaking – or shaking and impact – must have been inflicted with tremendous force, equivalent to that of a violent car accident, indicating a deliberate design to kill (TT 423: 5–17); and (3) after the alleged abusive episode, Bryan became immediately comatose, so the harm must have occurred while the child was in Ms. Shelby's exclusive care. (TT 275–76: 28–29, 1–2; TT 585: 17–23.)

Each of these contentions has been undermined in Bryan's death by the change in science and literature, which now indicates: (1) shaking is not as forceful as a fall and cannot cause the rupture of bridging veins; (2) a brain bleed can occur days before a child's collapse; and (3) the

[4] As a result of this change in medical science, courts throughout the country have determined that the change in science regarding SBS qualifies as newly discovered evidence and ordered new trials of prior SBS convictions based on outdated medical science. *See, e.g.*, *Hill v. Mitchell*, Case No. 19-cv-452, 2019 WL 1785485, at *4 (S.D. Ohio April 24, 2019); *State v. Louis*, 332 Wis. 2d 803 (Wis. Ct. App. 2011).

constellation of events and characteristics of Bryan's health resulted in an accidental and tragic, but not murderous, death.

VI. ARGUMENT

A. The 2018 amended death certificate saying Bryan IV's death was accidental, caused by a seizure, and not the direct result of blunt-force trauma to the head, is admissible, newly discovered evidence that would likely produce a result different from the first prosecution of Ms. Shelby.

Newly discovered evidence of the changed death certificate for Bryan Thompson IV demonstrates that Shelby's due process rights were violated because the original trial testimony against Shelby was premised on "unreliable science and was therefore itself unreliable." *See Han Tak Lee v. Glunt*, 667 F.3d 397, 407 (3d Cir. 2012); *Han Tak Lee v. Tennis*, No. 4:08-CV-1972, 2014 WL 3894306, at *19 (M.D. Pa. Jun. 13, 2014) ("as our understanding of scientific truth grows and changes, the law must follow the truth in order to secure justice."). *See also McLean v. Davis, et. al,* 3:22-cv-00033-DPJ-FKB (N.D. Miss. 2022) (if medical examiner fabricated facts for an autopsy report to support a criminal charge, that could violate petitioner's due process rights). In light of the amended death certificate, Shelby's conviction shocks the conscience and violates substantive due process.

In June 2018, medical examiner Dr. Leroy Riddick amended Bryan Thompson IV's death certificate, changing both the manner and cause of death. The amended death certificate documents the manner of death as "accident," rather than "homicide." (Ex. A, Amended Death Certificate of Bryan Thompson IV). It also recognized the cascade of events that led to Bryan's death: cerebral edema with herniation, hypoxic encephalopathy, and seizure disorder.

Notably, the State waited *months* after Bryan IV's death, until it had received Dr. Riddick's findings, conclusions, and the death certificate, to arrest Tasha Shelby. (TT 587-88). The death certificate was fundamental to the State's case. (TT 375) ("The State didn't bring charges against Tasha at all until they got the death certificate from Dr. Riddick").

1. The 2018 amended death certificate is necessarily newly discovered within the meaning of Miss. Code Ann. § 99-39-5.

The Mississippi Uniform Post-Conviction Collateral Relief Act defines "newly discovered evidence" as "evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused

a different result in the conviction or sentence." Miss. Code Ann. § 99-39-5(a). The 2018 amended death certificate, had *it* been produced at Ms. Shelby's trial, would have caused a different result in both Ms. Shelby's the conviction or sentence because the original death certificate was foundational to the prosecution's case. Indeed, foundational to the prosecution even bringing charges against Ms. Shelby.

No reported capital murder case exists in Mississippi where the death certificate identified the death as "accidental." Nor would a capital conviction stand in Mississippi where the State has to prove the defendant *caused* the physical harm to the decedent, but the death certificate shows an accidental manner of death and lists natural and accidental causes of death. Bryan IV's death was *not* the "direct result" of "blunt force trauma," says the amended death certificate. And it was "blunt force trauma" upon which the State relied to prove both cause and intent. Furthermore, we know that two jurors would have changed their verdict had they known about the changed death certificate. (Ex. U, Aff. Juror Daniel Mullen 2022; Ex. V, Aff. Juror Timothy Cipolla 2022).

A conviction cannot be based on purely circumstantial evidence. *Steele v. State*, 544 So. 2d 802 (Miss. 1989). In *Steele*, where a much younger and smaller child fell from a bed, the Mississippi Supreme Court ruled that a motion for judgment notwithstanding the verdict should have been granted, *because there was no direct evidence of murder presented by the State*:

> We hasten to add that, in this opinion, we do not answer the question of whether medical probabilities can ever support a conviction based on circumstantial evidence of criminal agency. We simply hold that, on the facts of this case, the state's proof of criminal agency was so deficient that no reasonable hypothetical juror could have found, beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence, that Steele killed Christina Sinclair.

Id. at 809. In light of the amended death certificate saying Bryan IV died accidentally as the result of a seizure, the result of any retrial of Ms. Shelby could be no different.

2. *Under well-established precedent of this Court, the 2018 amended death certificate is automatically admissible as a vital statistic under Mississippi Rule of Evidence 803(9).*

A death certificate is a vital statistic, presumptively reliable, and self-authenticating. *Birkhead v. State,* 57 So.3d 1223, 1231–32 (Miss. 2011) ("no debate exists that a death certificate is a vital statistic."). Death certificates thus fall within the hearsay exception for vital statistics in Miss. R. Evid. 803(9). *See Shell v. State*, 554 So. 2d 887, 898 (Miss. 1989) ("[a] death certificate clearly falls under the language of" Rule 803(9)), *overruled on other grounds by Shell v.*

Mississippi, 498 U.S. 1 (1990). The Mississippi Rules of Evidence provide no exclusions to this hearsay exception. *Birkhead v. State*, 57 So. 3d 1223, 1231–32 (Miss. 2011) ("Unlike Rule 803(8) regarding public records and reports, Rule 803(9) provides no exclusions to its hearsay exception").

> 3. *Under well-established precedent of this Court, the 2018 amended death certificate is substantive evidence that Bryan IV's death was accidental, caused by a seizure, and not the direct result of blunt-force trauma to the head; a capital murder prosecution or conviction would not stand based on this newly discovered evidence.*

The amended death certificate by Dr. Riddick is substantive evidence that Brian IV's death was accidental. In light of that, no re-prosecution of Ms. Shelby for capital murder could even proceed, much less result in a conviction and life sentence. When, in different case, Dr. Riddick determined the manner of death of a child was not homicide, but natural causes, the State *nolle prossed* the existing murder charge based on Dr. Riddick's findings. *Miss. Crime Lab. v. Douglas*, 70 So. 3d 196, 199–200 (Miss. 2011). In *Douglas,* a lab test led prosecutors to arrest and charge Ms. Douglas with the murder of her son. Dr. Riddick, however, ultimately determined the cause of the child's death was interstitial pneumonia and myocarditis. "After she had been incarcerated for more than a year and a half, the murder charge against Douglas was *nolle prossed*... Douglas was then cleared of all wrongdoing in the death of her son." *Id.* The result should be no different in Ms. Shelby's case.

The very same thing happened in a similar recent case. As recited in *Mclean v. Davis, et. al,* 3:22-cv-00033-DPJ-FKB (N.D. Miss. 2022), Ms. Jocelyn McLean gave birth prematurely to her daughter Emberly, who tragically died at Tallahatchie General Hospital a short time later. Despite clear evidence to the contrary, the Deputy Chief Medical Examiner claimed in his autopsy report that "Emberly's injuries were the result of blunt force trauma featuring strangulation and that the cause of death was homicide." *Id.* at 2. Ms. Mclean was indicted for capital murder of her daughter and held in the county jail pending her trial. Eleven months later, the medical examiner "informed the District Attorney that the cause and manner of death was not blunt force injuries with features of strangulation and that the injuries he previously observed were consistent with lifesaving efforts." *Id.* In response, Ms. Mclean was released from jail, and the District Attorney dismissed the capital murder charges against her with prejudice.

Just empirically, then, in light of *Steele* and *McLean*, it is a practical certainty that, had Dr. Riddick amended Bryan IV's death certificate at any time in the three years prior to Ms. Shelby's trial, the capital charge against her would have been dismissed. The result should be no different just because he amended the death certificate in 2018. Furthermore, if there were a new trial – at which the State would be unable to exclude the 2018 amended death certificate as evidence – it is a practical certainty that Ms. Shelby would not be convicted and sentenced for capital murder. As noted above, there is no reported case in which someone was convicted and sentenced for capital murder where the death certificate said the manner of death was accidental and listed accidental and natural causes of death. Therefore Ms. Shelby's conviction and sentence violate due process.

4. *Ms. Shelby's claim based on the 2018 amended death certificate is not barred by* res judicata.

Ms. Shelby's claim based on the 2018 amended death certificate is not barred by *res judicata*, and the State should be judicially estopped from arguing that it is. The amended death certificate was not part of the original Post-Conviction Relief petition, which the Mississippi Supreme Court granted permission for the Harrison County Circuit Court to review in 2016. Thus, the Harrison County Circuit Court appropriately never addressed the amended death certificate; nor did the majority opinion of the Mississippi Court of Appeals affirming the denial of post-conviction relief. *See Shelby*, 311 So. 3d at 625 (¶¶ 49–50). This newly discovered evidence could not have been presented as the basis for a claim to *any* court earlier because of the ongoing litigation for the prior petition.

Shelby's single claim in her petition approved by the Mississippi Supreme Court in 2016 was that "new scientific and medical advances undermining the medical evidence against her did not exist until after her trial." That was supplemented with a one-page affidavit from Dr. Riddick about his own changed opinion due to the changed science. It was on this basis, the changed science and medical advances, that the case was litigated in the post-conviction trial court and then in the Mississippi Court of Appeals. The trial court denied relief without mention or review of the amended death certificate. The Mississippi Court of Appeals affirmed the denial of post-conviction relief in a split decision without reference to the 2018 amended death certificate. Instead, the Court of Appeals referenced Dr. Riddick's new testimony and other experts:

> The trial court considered Dr. Riddick's **new testimony** but found that the reasons for his change of mind were not supported by the evidence. The trial court also considered the

> testimony of Shelby's other experts, but the court found that Dr. Benton persuasively addressed their contentions and that **their testimony** as a whole did not undermine the evidence that supported the conviction.
>
> . . . .
>
> Here, the trial court did not commit any clear error in finding that Shelby's new evidence would not probably produce a different result in a new trial.

Shelby, 311 So. 3d at 625 (¶¶ 49–50) (emphases added).

Furthermore, the State's defense in the prior litigation had nothing to do with the 2018 amended death certificate. The State's defense was entirely that neither Dr. Riddick's changed opinion nor the changes in science were newly discovered. *See State's Corrected Brief, Shelby v. State,* 311 So. 3d 613 (Miss. Ct. App. 2020) ("Statement of the Issues: The trial court properly held that Shelby failed to establish that the expert testimony she presented during her post-conviction proceedings constituted newly discovered evidence…"). The State's Summary of the Argument was that "[t]he trial court properly held that Shelby failed [sic] establish that the expert testimony she presented during her post-conviction proceedings constituted newly discovered evidence. Dr. Riddick's changed opinion [sic] the cause and manner of Bryan's death is not newly discovered. Nor does the cumulative testimony of Drs. Monson, Riddick, Mack, and Ophoven constitute newly discovered evidence." *See State's Corrected Brief, Shelby v. State,* 311 So. 3d 613 (Miss. Ct. App. 2020). Thus, the State should be judicially estopped *now* from arguing that the 2018 amended death certificate is barred by *res judicata* in the current petition.

5. *Ms. Shelby's life sentence without the possibility of parole is based on inaccurate information; that sentence almost certainly <u>would</u> have been different—at the very least, it <u>certainly</u> <u>might</u> have been different—had Ms. Shelby's jury known of the 2018 amended death certificate; her sentence therefore violates the Due Process Clause of the Fourteenth Amendment.*

Because Ms. Shelby was sentenced based on inaccurate information, her sentence to life in prison without parole violates due process. *United States v. Tucker*, 404 U.S. 443 (1972); *Townsend v. Burke*, 334 U.S. 736 (1948); *Beamon v. State*, 9 So. 3d 376, 379 (Miss. 2009). In *Townsend* and *Tucker,* the Supreme Court established a due process right to be sentenced based on accurate information. The *Townsend* Court held that sentencing someone "on the basis of assumptions concerning his criminal record which were materially untrue. . . . whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand." 334 U.S. at 741. Then, in *Tucker*, the Supreme Court reaffirmed its holding in *Townsend*, applying

Townsend to a mistake discovered decades later and to which the sentencing judge gave "specific consideration." *Tucker*, 404 U.S. at 444–45, 447. The Supreme Court held that **if the sentence *might* have been different** had the sentencing judge known about the evidence, then the petitioner's due process rights were violated. *Id.* at 447–48 (emphasis added). As the Mississippi Supreme Court has held, "the reliance upon materially false assumptions in sentencing violates due process." *Beamon v. State*, 9 So. 3d 376, 379 (Miss. 2009). *See also Halphen v. Butler*, U.S. Dist. Lexis 6656, at *3 (E.D. La. July 16, 1987) ("When a state petitioner contends that the court impermissibly relied on certain information in determining and imposing punishment, **courts will grant habeas relief where the petitioner shows that the court considered erroneous information**, invalid convictions **or facts that are materially untrue.**" (Emphases added) (citing *Bourgeois v. Whitley*, 784 F.2d 718 (5th Cir. 1986)). Had Ms. Shelby's jury known about the 2018 amended death certificate, Ms. Shelby's sentence *at least* "*might* have been different," per the standard established by the Supreme Court in *Tucker*.

The issue of Ms. Shelby's sentence being based on inaccurate information is of particular importance because the trial court failed to instruct the jury on the three possible sentences for Ms. Shelby: death, life without parole, and life with parole. (TT 674-675; Hearing on Motion for JNOV (Harrison County Cir. Ct., Oct. 16, 2000)). Defense counsel raised this issue in its motion for Judgment Notwithstanding the Verdict, after Ms. Shelby was sentenced to life in prison without parole. At the time, the statute permitted all three sentencing options, yet the jury was only instructed to choose either life without parole or death. The Motion for Judgement Notwithstanding the Verdict was denied. (TT 677). Had the trial judge known about the amended death certificate, the sentencing instructions might have been different and the sentence, therefore, at the very least *might* have been different. *Tucker*, 404 U.S. at 447–48. The refusal to instruct the jury on the possibility of life with parole was a further violation of Ms. Shelby's due process rights.

6. Two of the jurors who voted to sentence Ms. Shelby to death would have acquitted her, had they known about the amended death certificate.

Two jurors who voted to convict Ms. Shelby, both of whom voted she be punished by death, have sworn affidavits that they would not convict her today based on the amended death certificate and the change in science. Juror Daniel Mullen stated, "The evidence that was presented to us at the time, it showed that she was guilty. But if this evidence would have been presented to the jury or to the court, I don't think any of the jurors would have found her guilty. I know I would

not have." (Ex. W, Unofficial Tr. Interview Juror Daniel Mullen 2022). In his affidavit, Mr. Mullen also said:

> If there would have been more emphasis and discussion about Brian's seizures, this information would have been enough for me to vote not guilty. The information about the seizures, Dr. Riddick changing the death certificate to accident, and all of the other information that I recently learned that was either withheld from the jury at the time of trial or was learned after the trial, would have changed the verdict and there would have been **absolutely no way Tasha Shelby would have been found guilty**. I initially was one of two jurors that voted for the death penalty but **I now believe Tasha Shelby is innocent**.

(Ex. U, Aff. Juror Daniel Mullen 2022.)

Juror Timothy Cipolla, who also voted for the death penalty for Ms. Shelby, likewise attested: "If given the new information, and if I was in the original trial, I would have come to a different conclusion." (Ex. V, Aff. Juror Timothy Cipolla 2022.) As for the whole jury, Mr. Cipolla said, "If the jury had known that Tasha's original legal representation was ineffective, that Bryan had a seizure disorder and the new evidence disputing Shaken Baby Syndrome, I believe the jury may not have convicted Tasha Shelby of capital murder." *Id.*[5]

Ms. Shelby has demonstrated, in line with the UPCCRA, that the newly discovered evidence of the death certificate is "of such a nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence." Miss. Code Ann. § 99-39-5(2)(a). We now know that at least two of the jurors, based on this exact evidence, would not have voted to convict. No reasonable factfinder would have convicted Ms. Shelby if evidence of the amended death certificate had been introduced at trial.

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[5] As noted in Tasha Shelby's Post-Conviction Petition in 2005, juror Valerie Strickland-Britt also had a conflict. She had been fired from her job by Ms. Shelby's character witness, Diane Bennett, who is a nurse on the coast. Ms. Bennett had been working as a Quality Assurance Manager for Humana Military Healthcare Services in Biloxi, and Ms. Strickland-Britt was working on contract for Humana as a temp-staff employee. Ms. Bennett fired Ms. Strickland-Britt, which led to a contentious departure. Juror Strickland-Britt did not disclose this relationship in voir dire, despite Ms. Bennett's name being shared as one of Ms. Shelby's witnesses and Ms. Bennett being present in the courtroom. (TT 118-19). This alone should have been and could be now sufficient reason for a new trial. *Myers v. State*, 565 So. 2d 554 (Miss. 1990).

B. Ms. Shelby is entitled to a new trial because of newly discovered, contradictory testimony by the state's expert, Dr. Scott Benton, when comparing his testimony at Shelby's hearing and his testimony as a defense expert, which demonstrates that Petitioner's due process and equal protection rights were violated.

Dr. Scott Benton was the state's only witness and only expert at Ms. Shelby's Post-Conviction Relief Hearing in April 2018. On April 29, 2022, Dr. Benton provided testimony in the case of *Alabama v. Mixon,* which was contradictory to his testimony in Ms. Shelby's hearing. This section documents those contradictions, and that Ms. Shelby should be granted post-conviction relief. *State of Alabama v. Michael Wayne Mixon*, CC 2019-2834 (Thirteenth Judicial Circuit Court, Mobile County, Alabama, Apr. 28, 2022); *see also* Isabelle Taft, *This Doctor's Testimony has Helped Put People in Prison. Some Say He Doesn't Always Get it Right,* MISSISSIPPI TODAY (Feb. 28, 2023), https://mississippitoday.org/2023/02/28/part-two-shaky-science-fractured-families/. State courts have recognized that significant questions, if not fundamental flaws, arise from relying on an SBS expert opinion to establish guilt beyond a reasonable doubt. *See State v. Edmunds*, 308 Wis. 2d 374 (2008); *Ex Parte Henderson*, 384 S.W.3d 833, 847 (Tex. Crim. App. 2012); *People v. Bailey*, 999 N.Y.S.2d 713 (Cnty. Ct. 2014), *aff'd*, 41 N.Y.S.3d 625 (App. Div. 4th Dept. 2016), *People v. Miller*, 2021 WL 1326733 (Mich. Ct. App. 2021). In an exhaustive opinion, a federal district judge opined that an SBS diagnosis is "more an article of faith than a proposition of science." *Prete v. Thompson*, 10 F. Supp. 3d 907, n. 10 (N.D. Ill. 2014). Here, the opinion relied upon by the Harrison County Circuit Court to deny Ms. Shelby's petition for post-conviction relief, has now been contradicted, albeit in another case, by the very person who made the opinion, Dr. Benton.

1. Dr. Benton was the only state witness to testify at the Post-Conviction Relief Hearing in support of the state's theory that Tasha Shelby killed Bryan by shaking him to death; his unreliable testimony violated Petitioner's due process rights.

Dr. Scott Benton is a child abuse pediatrician; in his work his "objective [is] to try and find some type of child abuse." (HT 521: 1-3.) Dr. Benton is a pediatrician, and not a forensic pathologist, engineer, or biomechanics expert. Ms. Shelby's conviction was focused on Shaken Baby Syndrome[6] as it related to cause and manner of Bryan IV's death. Dr. Benton, who is not a

[6] The prosecution emphasized that, at the time of trial, there was no dispute that Bryan died from violent shaking. It said in its closing: "Bryan Thompson, the Fourth, was violently shaken to death. That is

forensic pathologist and lacks experience and training in determining both cause and manner of death (a determination made by forensic pathologists), was not qualified to render opinions in this context.

Dr. Benton also lacks qualifications in the area of biomechanics—the study of mechanical and physical laws relating to the movement or structure of living organisms. Biomechanics are important because biomechanical studies have demonstrated that the injuries attributed to Shaken Baby Syndrome can occur with far lower levels of force than in violent car accidents or falls from multiple story buildings, as SBS theorists once proposed:. These studies show instead that short falls can generate the necessary amount of force, that shaking can rarely produce these levels of force, and that to produce these injuries through shaking one would also likely create particular neck injuries. *See, for example,* Norrell Atkinson et al., *Childhood Falls With Occipital Impacts*, 34 PEDIATRIC EMERGENCY CARE 837 (2017); Mark A. Davidson et al., *A Biomechanical Assessment of Shaken Baby Syndrome: What About the Spine?*, 163 WORLD NEUROSURGERY 223 (2022). While Dr. Benton would qualify as an expert witness in areas of pediatrics or clinical treatment of children, he was in no way qualified to render expert opinions under Rule 702 on biomechanics.

In a similar case concerning a wrongful death of an unborn child, the Mississippi courts refused to admit the testimony of an obstetrician-gynecologist as to the cause of death of the unborn child because it would be "outside *his discipline* or the *particular topic* in which he possessed scientific, technical, or specialized knowledge," which is that of a forensic pathologist. *Worthy v. McNair,* 37 So.3d 609, 616 (Miss. 2010) (emphasis in original). Mississippi Rule of Evidence 702 and *Daubert* require judges to make scientific determinations, and the Due Process clause requires the state to produce reliable scientific evidence, and for trial judges to explain their reasoning when admitting expert testimony. This gate-keeping and accuracy is crucial to ensure defendants like Ms. Shelby not be wrongly convicted without due process.

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undisputed." (TT 583–84.) The prosecution repeated multiple times in closing that Bryan had to have been fatally shaken to death, pointing out that the prosecution and defense were in agreement that Bryan had been shaken to death. (TT 583; 584; 585; 586; 587.) The defense expert in this case, Dr. Anthony Ioppolo, agreed that Bryan had likely been shaken. (TT 493; 498; 507; 523.) The prosecution also emphasized that Bryan must have been injured shortly before arriving at the hospital, meaning that only Ms. Shelby could have injured him. (TT 425.)

Dr. Benton however did testify, and his report proffered opinions on the cause and manner of death and about biomechanics, notwithstanding his lack of experience or training in forensic pathology or biomechanics. In addition, Dr. Benton's report filed with the Petitioner and the Court was incomplete, specifically with regards to citation of studies that purported to support his positions. (HT 592: 3.) Dr. Benton blamed the software he used, his administrative assistant who prepared the report, and the short turnaround time that the State gave him to complete the report. (HT 59: 16–25; HT 592: 8–14; HT 602: 8–13.) The report failed to appropriately identify several of the research papers upon which Dr. Benton based his opinion. Dr. Benton said that there was no difference in the body of the report between the incomplete version filed with the Court and the complete version that was not—the only difference was apparently citations to support. (HT 602: 8.) (HT 602: 8-13) ("So I was under a lot of pressure by you to get this in, so the body is the same, but when the program was run, the – it clipped for whatever – I don't understand those things. My assistant caught it and our encryption thing should have sent a second one.") Petitioner never received an update version of the report prior to the hearing.

Dr. Benton was given the available medical records for his report in December 2017; he prepared a report for the State in January 2018. He testified to feeling under "a lot of pressure" from the State to complete the report. (HT 602: 8–12.) When asked individually about the research papers upon which he based his opinion, Dr. Benton was unable to identify with certainty both the papers he relied upon, as well as the findings of those papers. (HT 598: 4–8; 601: 6–22.)

Dr. Benton's scattered testimony and lack of in-depth review of medical literature in Ms. Shelby's case is sadly not alone, this behavior is now documented in other cases in Mississippi.

2. *An in-depth Mississippi Today Investigative Report questions Dr. Benton on "how his decisions can tear families apart," with his false accusations of abuse.*

An investigative series by Mississippi Today, "Shaky Science, Fractured Families," published in February 2023, investigated Dr. Benton's outsized role as the state's only child abuse pediatrician, "with limited oversight or consequences for making accusations that are unsubstantiated." Isabelle Taft, *Mississippi's Child Abuse Pediatrician Works Between Medicine and The Justice System. Can He Be Objective?*, MISSISSIPPI TODAY (Feb. 28, 2023), https://mississippitoday.org/2023/02/28/part-one-shaky-science-fractured-families/.

Mississippi Today uncovered three examples in recent years where parents allege that Dr. Benton made the wrong diagnosis of child abuse, where there were medical conditions or other

explanations for the injuries the children exhibited. Kate Royals & Will Stribling, *How Dr. Scott Benton's Decisions Tore These Families Apart,* MISSISSIPPI TODAY (Feb. 27, 2023), https://mississippitoday.org/2023/02/27/part-three-shaky-science-fractured-families/. Mississippi Today also discovered that, as a prosecution expert in a Louisiana murder trial, Dr. Benton "incorrectly characterized the possible consequences of a rare genetic disorder, claiming it had never been linked to the brain bleeding and swelling that preceded a child's death when, it fact, it had been so linked in multiple peer-reviewed journal articles." Taft, *This doctor's testimony has helped put people in prison.* Mississippi Today documented five cases of people convicted and denied post-conviction relief based in part on Dr. Benton's testimony, in spite of medical evidence of their innocence. *See id.* One of those cases was Ms. Shelby's.

Dr. Benton has also notably been excluded from testifying where his opinion was found by a chancellor to be "unsupported speculation." *Darnell v. Darnell*, 167 So. 3d 195 (Miss. 2014). (HT 585: 1–6, 15–22.) What is particularly important now is that Dr. Benton has provided contradictory testimony in another case – testimony that would have supported the claim asserted in Ms. Shelby's prior post-conviction petition and, indeed, Ms. Shelby's factual innocence.

3. Testimony Benton gave as a defense expert on behalf of defendant Mixon would have supported relief for Tasha Shelby at her Post-Conviction Relief hearing.

Dr. Benton was not involved in Ms. Shelby's trial, and he was accepted at the PCR hearing as an "expert in the field of child abuse pediatrics and pediatric forensic medicine." (HT 676.) Dr. Benton testified that "there has to be an element of acceleration/deceleration"—*i.e.*, shaking—involved in Bryan's death. Dr. Benton testified Bryan was shaken because he had diffuse subarachnoid hemorrhage and that impact on one side of the head would not explain the diffuse hemorrhage. (HT 552: 13–19; *but see* HT 212: 4-8.) Diffuse subarachnoid hemorrhage was found in the autopsy, **however at the time of Bryan IV's hospital admission, the radiology images showed the hemorrhage was trace in size and only on one side of the brain, consistent with an impact on one side.** (HT 192: 15-22.) Dr. Benton did not correlate, then, the pathology results with the radiology results in order to show the progression of Bryan's brain injuries while he was in the hospital. (HT 541: 17-19; *but see* HT 192: 15-22.)

Notably, Dr. Benton testified that bridging veins were the cause of bleeding in the brain in exclusion of other possibilities, and thus that shaking was the only cause of bleeding in the brain. (HT 552–53: 20–25, 1–2.)

Dr. Benton has now provided testimony directly contradicting his findings against Ms. Shelby. In *State of Alabama v. Michael Wayne Mixon*, CC 2019-2834 (Thirteenth Judicial Circuit Court, Mobile County, Alabama, Apr. 28, 2022), the state charged Mr. Mixon with felony aggravated child abuse. Two-month-old Kian Mixon was brought to the emergency room with a brain bleed, intra-retinal hemorrhages in both eyes, and bruising on the head. Dr. Benton's testimony as a defense expert in *State v. Mixon* differed from his testimony in Ms. Shelby's case on two distinct points: brain bleeds and seizures. **He notably gave a list of alternative causes of subdural hemorrhages, far beyond only bridging veins** ("There's a long list of things that can cause subdural [hemorrhages]...") (*Mixon* Transcript, 36-37). Mr. Mixon was found not guilty; Mixon's legal team directly attributed the not guilty verdict to Dr. Benton's testimony. Taft, *This Doctor's Testimony has Helped Put People in Prison.*

Speaking more broadly, since Ms. Shelby's trial, radiology research, which includes the study of blood vessels and bleeding, has determined that small vessels, or non-traumatic or minimally traumatic bleeding in the dura, can cause subdural hemorrhages. (HT 186: 14–23.) Dr. Julie Mack, an expert in diagnostic radiology, testified to the change in scientific understanding about the relationship between large "bridging veins," dural bleeding, and much smaller blood vessels. **Dr. Mack testified that the belief that shaking caused bridging vein ruptures was widely held at the time of Ms. Shelby's trial, but that this belief is no longer widely held.** (HT 186: 11–23; Ex. T, Dr. Julie A. Mack's Report). She explained that because bridging veins are very large blood vessels, a tear in one would result in a very large amount of bleeding in the space between the brain and the dura (HT 184: 10–19); Bryan's radiology images show only a small amount of blood in that area. (HT 185: 9–20; Ex. M, Dr. Julie A Mack's Slides for Tasha Shelby's PCR Hearing). *See also* Waney Squier & Julie Mack, *The Neuropathology of Infant Subdural Hemorrhage*, FORENSIC SCI. INT. (2009). This evidence is directly at odds with the testimony of Dr. Benton at the Post-Conviction Relief Hearing in 2018; more importantly, it is completely consistent with Dr. Benton's testimony in *Mixon*.

4. Dr. Benton gave contradictory testimony about seizures in Mixon's case as an expert witness – testimony that would have supported a finding Bryan IV suffered from seizures.

In *Shelby*, Benton officially found and testified that Bryan did not experience seizures based on the *lack* of evidence in the medical records. Dr. Benton agreed that Ms. Shelby described

seizures to the ER nurse. (RE 702.) ("The seizures described by Ms. Shelby to the ER nurse and the other descriptions of it are eyes rolling back, staring, and then coming back after a couple of minutes. That used to be called petit mal."). However, Dr. Benton testified there was no doctor diagnosis of a seizure disorder, despite the documentation of a history of seizures in the family. (HT 364-65: 11–25, 1–4.) He likewise discounted the statements of family members who saw Bryan displaying behaviors that he described as being consistent with partial complex or petit mal seizures. (HT 568-69: 15–22.)

In contrast, Dr. Benton accepted the father's statements about hitting Bryan's head on the car door on the way to the hospital as verification that the injury was "insignificant" and that Bryan III "didn't think it accounted for the bruises on the child." (HT 544: 1–6.) Bryan III's lay opinion on the cause of bruising was accepted, but his observation of his child having seizures, and an appointment with a neurologist—scheduled for the week after Bryan IV's death—were not.

In *Mixon*, Dr. Benton testified that "many of the head injuries, particularly with involving the bleeds that we see here, have what's called non-convulsive seizures. **So, we already suspect the child may have had a seizure by what the father reported.** That has the sounds of a seizure and the recovery from a seizure. You can't just look at an infant or all infants and know that they're seizing. You have to put an EEG on them." (*Mixon* Transcript 39 (emphasis added).) He testified *in favor of a diagnosis of seizures*, unless there was an EEG to rule them out.

No EEG was performed in Mixon's case, thus the child *likely* had seizures based on the other evidence. But, in Ms. Shelby's case, no EEG was performed, and despite the family reports, Dr. Benton concluded Bryan IV *had not* had seizures. Similarly, Dr. Benton testified in *Mixon* that the lack of CT scans of the child's neck for neck injuries – which would indicate shaking – left the cause of death undetermined. (*Mixon* Transcript 27.) In Ms. Shelby's case, even though Dr. Riddick's original autopsy found no neck injuries, Dr. Benton claimed a subdural hemorrhage near the cervical cord was a neck injury and then testified that the brain bleed was from "an injury associated with a whiplashing-type event." (HT 553: 8-13.)

5. *Dr. Benton gave contradictory testimony about subdural hemorrhages (brain bleed) in Mixon's case as an expert witness, conflicting with his testimony in Shelby's case.*

In post-conviction testimony against Ms. Shelby, Dr. Benton said Bryan IV's injuries could be timed to correlate with the child's collapse, because the subdural hemorrhage (brain

bleed) showed "intact red blood cells with no organization," which indicates the blood is "fresh" and "the body hasn't yet had time to respond to it." (RE 572-73.) Diffuse subarachnoid hemorrhage was found in the autopsy. However, at the time the child was admitted to the hospital and radiology images were taken, *the hemorrhage was trace in size and only on one side of the brain*, consistent with an impact on one side from a short fall. (HT 192: 15-22.) Dr. Benton did not correlate the pathology results with the radiology results in order to show the progression of Bryan IV's brain injuries while he was in the hospital. (HT 541: 17-19; *but see* HT 192: 15-22.) Instead, he testified that the brain bleed from autopsy showed the injury and collapse were immediate, and the brain bleed, itself, indicated shaking.

In *Mixon*, Dr. Benton testified that it was impossible to say when the child sustained his injuries, testifying instead that "blood can look fresh on a CT for up to two weeks. So you can't look at it and say that it happened in a specific time interval. That's not possible." (TT 41.) Thus, in *Mixon*, Dr. Benton allowed for what is called a "lucid interval," where an injury takes place at an interval of time before the collapse and during which the child appears fine. This allows for other causes of the injury, instead of abuse by a caretaker who was with the child at the time of collapse. Dr. Benton made no such allowance in his testimony against Ms. Shelby.

6. *The Harrison County Circuit Court denied relief to Ms. Shelby based largely on Dr. Benton's testimony at the Post-Conviction Relief hearing.*

Had Dr. Benton testified similarly in Ms. Shelby's case as he did in *Mixon*, his opinion would have supported relief for Ms. Shelby. His testimony would have supported the finding that Bryan IV had seizures; would have supported a cause of the brain bleed other than ruptured bridging veins (which necessarily requires tremendous force); and would have supported impact from a short fall as a cause of the brain bleed instead of shaking.

The Harrison County Circuit Judge who ruled against Ms. Shelby in her first Petition for Post-Conviction Relief relied heavily on Dr. Benton and his testimony. (Ex. S, Trial Order Den. Tasha Shelby's Mot. for PCR 2018.) ("Dr. Benton, after reviewing the entire case, opined that there is no new evidence that would change his opinion as to the cause of death and that current science supports the original conclusions from Dr. Riddick at trial."). The court even went so far as to say, referring to Dr. Benton's testimony, "Bryan's injuries were from severe blunt force trauma because they were fatal," adopting Dr. Benton's opinion that a short fall could not cause bleeding in the brain. (*Id.* at 18.)

Dr. Benton's testimony is different today, at least for a different defendant. Where at the hearing in 2018, there were three defense experts, one state expert who became a defense expert, and one lone state expert, today the State could not prevail in any "battle of the experts" with its theory of SBS, ruptured bridging veins being the cause of the bleeding in Bryan IV's brain, and that seizures can be excluded as a cause of Bryan IV's death. Dr. Benton's testimony was crucial at the post-conviction hearing because, at trial, the state relied almost exclusively on Dr. Riddick's testimony – testimony that Dr. Riddick recanted. At trial, the State presented no direct evidence that Tasha caused Bryan IV's injuries and relied nearly entirely on Dr. Riddick's medical diagnosis that violent shaking and abuse must have occurred. (HT at 108, 109–110, 111, 114–116). No medical expert other than Dr. Riddick testified for the State and Ms. Shelby's trial as to the manner and cause of Bryan IV's death. Dr. Benton's testimony at the post-conviction hearing was therefore critical to supporting Dr. Riddick's pivotal testimony from trial—testimony now contradicted by the amended death certificate Dr. Riddick, himself, changed. (HT 249) By his testimony in *Mixon*, Dr. Benton contradicted his own testimony at Ms. Shelby's post-conviction hearing and thereby proven the court's reliance on his testimony was misplaced,

Finally and perhaps most importantly, in light of Dr. Benton's *Mixon* testimony, the State could not rebut what the 2018 amended death certificate says: Bryan IV's death was accidental, caused by a seizure, and not the direct result of blunt-force trauma to the head.

C. Ms. Shelby is entitled to a new trial because a juror withheld crucial information that he was the great-uncle of the deceased child and new about the child's death, denying Tasha Shelby a fair trial.

Ms. Shelby is entitled to a new trial because newly discovered evidence undermines her conviction.

Two British law students, Emily Girvan-Dutton and Astrid Parrett, spent the Summer of 2022 in Biloxi, Mississippi investigating Ms. Shelby's case and meeting with jurors from the trial. One of the jurors was Juror 42, Daniel Mullen. When interviewed by the law students and reporter Andy Pierrotti, Mr. Mullen shared that during jury selection, he saw his sister-in-law – his brother's wife – in the courtroom. (Ex. W, Unofficial Tr. Interview Juror Daniel Mullen 2022.) He thought she may be a potential juror. But when his sister-in-law, Ida Mary Mullen, stayed for the first day of trial, it clicked for Daniel Mullen: she was related to the deceased child. "I remembered that her

nephew's baby had died from shaking syndrome… And that's what she was there for." *See also* Andy Pierrotti, *Woman Convicted on Controversial Medical Diagnosis Staying in Prison,* ATLANTA NEWS FIRST (Feb. 9, 2023), https://www.atlantanewsfirst.com/2023/02/09/woman-convicted-controversial-medical-diagnosis-stay-prison/; Andy Pierrotti, *'I made a mistake' - Medical examiner changes homicide finding, but convicted woman still behind bars*, ATLANTA NEWS FIRST (Oct. 3, 2022), https://www.atlantanewsfirst.com/2022/10/03/i-made-mistake-medical-examiner-changes-homicide-finding-convicted-woman-still-behind-bars/.

Mr. Mullen was the Bryan IV's great-uncle by marriage. He had not disclosed the relationship during voir dire, so he asked to speak to the judge. "I didn't want to have the defense come up and say . . . your relatives was out there and all that stuff… I didn't want anything to reflect back on the case because, you know, I knew somebody that was sitting in the courtroom or was kin to somebody." (Ex. W, Unofficial Tr. Interview Juror Daniel Mullen 2022.) In Mr. Mullen's recollection, "[the judge] asked me would it interfere with my judgment, I said no. I don't even know the boy. I don't know the mother…. I never met the child. Never met him, never met her." *(See id.)*

The transcript of the brief side bar between the judge, counsel, and Mr. Mullen, reads as follows:

THE COURT: You approached the bailiff and said something about you might be -- your wife's family might be related to somebody in this case. What are we talking about?

MR. MULLEN: My brother's wife.

THE COURT: Your brother's wife?

MR. MULLEN: Right.

THE COURT: What is her name?

MR. MULLEN: Ida Mary Mullen.

THE COURT: Ida Mary Mullen.

MR. MULLEN: I think Bryan --**I don't know if she is kin to him or what**, but as he left the courtroom this morning or when he was on the witness stand, he motioned at her and she nodded back at him. She knows him and I know her. That's --

THE COURT: Okay. **So you don't even know if they are related?**

MR. MULLEN: **I don't know if they are related,** but I just told him that he knows my sister-in-law. And, personally, I don't know Bryan.

THE COURT: You have never heard of him or met him?

MR. MULLEN: **I can't say I never heard of him. She may have mentioned him to –**

The COURT: **To your memory, though, you have never heard of him?**

MR. MULLEN: **To my memory, I don't know the boy.**

THE COURT: **Okay. So you don't know if she is related to him or not?**

MR. MULLEN: **No, sir, I don't.**

THE COURT: Okay. State have any questions?

MR. WARD: No, sir.

THE COURT: Defense?

MR. SMITH: Just one. Sir, whether she was related to him or not, that fact, in and of itself, would in no way affect any decision you would make in this case?

MR. MULLEN: No, sir.

MR. SMITH: Regardless of what that decision might be, you wouldn't feel like you owed her any type of explanation?

MR. MULLEN: No, sir.

MR. SMITH: I have no other questions, Judge.

(TT 481:24-29; 482:1-29; 483:1-18; 484. (Emphases added).)

In a recent affidavit, Mr. Mullen attested he spoke with family members about the child's death before the trial. (Ex. U, Aff. Juror Daniel Mullen 2022.) He had heard of the child and his death and also knew his sister-in-law was related to him.

Mullen further attested that he didn't remember any testimony being presented about the child's history of seizures nor about Ms. Shelby's health issues, size, and difficult pregnancy. (*Id.)* Neither the prosecution nor the defense raised Ms. Shelby's health issues, her stature as a "little person," (4'10" while Bryan IV was 3' tall), nor her difficult pregnancy, emergency c-section and

tubal ligation surgery two weeks before Bryan's death. The testimony about Bryan's seizures, in a trial transcript of 600 pages, was 18 pages, total. (Tasha's recounting to Officer Warren Newman about Bryan having a seizure (TT 247; 371); familial seizures documented in a letter from Attorney John McDonnell when representing Bryan III – a letter that was excluded from trial (TT 385-86); Bryan IV's grandmother, Honey Schalk, identifying the child having a seizure (TT 395-397); Bryan IV's father, Bryan III, discussing the child's seizures (TT 342-343); defense expert, Dr. Ioppolo, discussing the child having seizures (TT 496-500; 509-511; 527); and the prosecutors' closing arguments that a seizure had nothing to do with this child's death (TT 584).) As Mr. Mullen said, "If it was mentioned during the trial, it was not discussed in depth or emphasized in a memorable way. If this information about Bryan having seizures would have been emphasized more during the trial, or discussed as a possibility of Bryan's cause of death, this information alone would have been enough reasonable doubt for me to vote not guilty." (Ex. U, Aff. Juror Daniel Mullen 2022.).

Ms. Shelby should be granted a new trial because of the relation of Mr. Mullen to the deceased child in the case, and his belief before the trial began that the child died from shaking. "The right to a fair trial by an impartial jury is fundamental and essential to our form of government." *Johnson v. State*, 476 So. 2d 1195, 1209 (Miss. 1985). "To preserve this fundamental right, courts must stand guard and be vigilant against even the appearance of impropriety, much less actual impropriety, in trial proceedings." *Hyundai Motor Am. v. Applewhite*, 319 So. 3d 987, 1002 (Miss. 2021).

In *State v. T'Kia Bevily*, Bevily was convicted of capital murder for the death of her 14-month old stepdaughter, Jurayah Smith. *State v. T'Kia Bevily,* 1:20-cr-00008-THI (Cir. Ct. Claiborne Cnty, Sept. 7, 2021). **On September 7, 2021, Circuit Court Judge Tomika H. Irving reversed T'Kia Bevily's conviction and granted a new trial because one of the jurors was a great-uncle to the child Jurayah.** "A fair trial is denied when improper influences are actually brought to bear on the jury." *State v. T'Kia Bevily, Order Granting Supplemental Motion for New Trial,* Sept. 7, 2021 (citing *Gladney v. Clarksdale Beverage Co., Inc.*, 625 So. 2d 407, 413 (Miss. 1993)). At Bevily's retrial, a jury found her not guilty.

Under the Sixth Amendment, a defendant is entitled to a fair and impartial jury. A party is entitled to a new trial, or the court must reverse on appeal, if a juror withholds information that would have provided a "legitimate basis for challenge." *Langston v. State*, 791 So. 2d 273, 281

(Miss. Ct. App. 2001); *see also Myers v. State*, 565 So. 2d 554, 558 (Miss. 1990). Mr. Mullen's sister-in-law was present every day in the courtroom, and Bryan IV was Mr. Mullen's grand-nephew by marriage. These both are powerful influences on this juror's decision to find Ms. Shelby guilty.

Furthermore, a juror's knowing concealment is itself "evidence that the juror was likely incapable of rendering a fair and impartial verdict in the matter." *State v. Furutani*, 76 Haw. 172, 175, 873 P.2d 51, 54 (1994). When under pressure from the court, Mr. Mullen denied knowing they were relatives; when the court cut off his answer to whether he knew about Bryan's death before the trial, the juror pivoted to saying "I don't know the boy." When the trial court is unsure about the juror's relationship to the case and potential prejudices that could have influenced the case, the trial court should order an examination of the juror. *Gladney v. Clarksdale Beverage Co.* 625 So.2d 407, 419 (Miss. 1993). Instead, the trial court here pressured Mr. Mullen to quickly respond that he did not know he was related to the deceased child and that he did not know of the child's death before trial. Both of these were false. Indeed, Mr. Mullen ultimately said, "I feel the Judge was convinced that Tasha was guilty." (Ex. U, Aff. Juror Daniel Mullen 2022.)[7]

Finally, the United States Court of Appeals for the Fifth Circuit recently held that a District Court had abused its discretion by failing to hold an evidentiary hearing on the question of juror bias. *United States v. Gemar*, No. 21-30666, 2023 WL 3000946 (5th Cir. Apr. 19, 2023). The Fifth Circuit remanded the case for a hearing on whether a juror was biased because he was closely acquainted with the defendant's wife during high school and had failed to disclose said acquaintance. *Id.* at *1. Accordingly, Ms. Shelby's should at least be entitled to an evidentiary hearing on her Sixth Amendment claim of juror bias.

D. Ms. Shelby's petition is not time-barred and meets the statute of limitations to file for post-conviction relief.

Ms. Shelby's petition is properly filed within the three-year statute of limitations on filing a Petition for Post-Conviction Relief. None of her claims are time-barred, as discussed in turn below.

[7] The judge would also have lunch in the same space as the jurors each day. (Ex. V, Aff. Juror Timothy Cipolla 2022). The prosecutors would also sometimes eat in this same location near the jurors; notably the defense attorneys did not.

1. Newly discovered evidence of the amended death certificate for Bryan Thompson IV is properly filed within the statute of limitations.

The amended death certificate did not exist until June 2018, when Dr. Riddick took the proper steps to amend it. The death certificate was not amended until after Ms. Shelby's Post-Conviction Relief Hearing in Spring 2018. This vital statistic and substantive evidence that Bryan IV's death was accidental was in no way related to the claim decided in the Post-Conviction Relief Hearing in 2018. The death certificate could not have been raised and properly before any court until the prior proceedings had concluded. Newly discovered evidence is furthermore exempted from the statute of limitations under the UPCCRA. Miss. Code Ann. § 99-39-5.

Additionally, Ms. Shelby's claim under *Tucker* and *Townsend* is not time-barred or subject to a procedural bar because it is a due process claim with respect to sentencing. A denial of due process in sentencing is not subject to any of the procedural bars to post-conviction relief. *See Smith v. State*, 477 So. 2d 191, 195 (Miss. 1985) (denial of due process in sentencing not subject to post-conviction procedural bars); *accord Rowland v. State*, 98 So. 3d 1032, 1036 (Miss. 2012) (collecting cases). *See also Madden v. State*, 165 So. 3d 468, 468–69 (Miss. 2015) (Objection with written statement by Kitchen, J., to dismissal after grant of certiorari) (citing Rowland and collecting cases).

2. Newly discovered evidence about Dr. Scott Benton's testimony is properly filed within the statute of limitations.

The contradictory testimony by Dr. Benton was discovered on April 29, 2022, when Dr. Benton testified as a defense expert in the case of *Alabama v. Mixon. State of Alabama v. Michael Wayne Mixon*, CC 2019-2834 (Thirteenth Judicial Circuit Court, Mobile County, Alabama, Apr. 28, 2022). Thanks in part to Dr. Benton's testimony, Mr. Mixon, facing a charge of felony aggravated child abuse, was acquitted. Dr. Benton was the state's only expert witness at Ms. Shelby's Post-Conviction Relief Hearing in April 2018. This evidence about his testimony did not exist, and thus could not have been discovered, until April 29, 2022. The further evidence of Dr. Benton's more wide-spread questionable findings was discovered through the Mississippi Today investigative series, published in February 2023.

3. *Newly discovered evidence about Juror Mullen is properly filed within the statute of limitations.*

Again, under the Sixth Amendment, a defendant is entitled to a fair and impartial jury. The information about Juror Mullen was discovered in an interview with him on July 21, 2022 by reporter Andy Pierrotti of Gray TV. *See* Ex. W, Unofficial Tr. Interview Juror Daniel Mullen 2022. It was further memorialized in an affidavit by Mr. Mullen. (Ex. U, Aff. Juror Daniel Mullen 2022).

This information about Juror Mullen's familial relationship to the deceased child is appropriately within the statute of limitations because until Juror Mullen's disclosed in 2022 that he was truly related to the child and that he knew about the child's death prior to the trial, the claim did not ripen and the statute of limitations did not begin running.

In *Foster v. Chatman*, 578 U.S. 488 (2016), a capital case, the United States Supreme Court reversed the denial of state habeas relief—the Georgia equivalent of Mississippi post-conviction relief—even though the trial had been held thirty years earlier. In *Foster*, the Court recognized a claim as timely and granted *state* post-conviction relief because of a *Batson* violation.

Mr. Foster had brought a claim in state court that, 30 years prior, at trial, the prosecutor had discriminatorily struck all four Black prospective jurors in violation of *Batson*. The claim was based on documents in the prosecutor's file obtained through a Georgia Open Records Act request. The Georgia habeas court denied relief, finding that the defendant failed to show "any change in the facts sufficient to overcome" the state *res judicata* procedural bar, and the Georgia Supreme Court summarily affirmed. *Id.* at 497. However, the Supreme Court found the evidence was new and sufficient to overcome the procedural bar, even though the evidence of a *Batson* violation was from a prosecution file available since the time of trial. That is, the Supreme Court found the state's application of *res judicata* insufficient, even though, theoretically, the prosecutor notes could have been discovered immediately after trial. Similarly, here, although Mr. Mullen's relationship to the deceased child could have been discovered immediately after trial, this information was not available, and the statute of limitations did not begin to run, until Mr. Mullen himself revealed this relationship. If a juror withholds material information, the statute of limitations simply cannot begin until that information is actually discovered.

Relatedly, a recent trial court decision shows the potential prejudice. On Sept. 7, 2021, T'Kia Bevily's Mississippi conviction for capital murder for the death of her 14-month-old stepdaughter was vacated because one of the jurors was a great-uncle to the child. *State v. T'Kia*

Bevily, 1:20-cr-00008-THI (Cir. Ct. Claiborne Cnty, Sept. 7, 2021). At re-trial, a jury found T'Kia Bevily not guilty. *State v. Bevily* is directly on point with Ms. Shelby's conviction because 1) Ms. Bevily was, like Ms. Shelby, a stepmother charged and convicted of capital murder for the death of her stepchild and sentenced to life in prison; 2) Ms. Bevily was, like Ms. Shelby, convicted based on testimony about blunt force trauma injuries to the child's head; and 3) a juror in Ms. Bevily's case was, like in Ms. Shelby's case, the great-uncle of the deceased child, related through the parent who was not criminally charged.

Finally, the plain language of the statute creating the three-year statute of limitations, Miss. Code Ann. § 99-39-5, exempts newly discovered evidence from the statute's time bar.

F. Ms. Shelby is factually innocent, and no procedural bar should stand in the way of any of her claims for relief.

Ms. Shelby has consistently maintained her innocence of the crime for which she was convicted and for which she has been incarcerated, now, for almost twenty-six years. The United States Supreme Court has affirmed the ability of courts to evaluate the substantive constitutional issues in an actual innocence case without heed to a procedural bar or expired statutes of limitations. *See generally, e.g., Herrera v. Collins,* 506 U.S. 390 (1993); *Schlup v. Delo*, 513 U.S. 298 (1995); *McQuiggin v. Perkins*, 569 U.S. 383 (2013).

In *Schlup*, the Supreme Court elucidated the concept of innocence as a "gateway" allowing review of underlying constitutional claims that would otherwise be procedurally barred. The *Schlup* Court said: "Schlup's claim of innocence is thus 'not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.'" *Id.* at 315 (quoting *Herrera,* 506 U.S. at 404). The Supreme Court's jurisprudence in this area is consistent with its longstanding recognition that "in appropriate cases . . . principles of comity and finality . . . must yield to the imperative of correcting a fundamentally unjust incarceration." *Murray v. Carrier*, 477 U.S. 478, 495 (1986) (quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982)). In *Larsen v. Soto*, 742 F.3d 1083 (9th Cir. 2013), the Ninth Circuit Court of Appeals noted that the *Schlup* standard is satisfied where petitioner's post-conviction evidence casts doubt on the conviction by undercutting the reliability of the proof of guilt, even if the evidence does not affirmatively prove innocence. *Id.* at 1095.

The *Schlup* gateway for claims of actual innocence has been adopted by several state courts[8] and has also been discussed in several other states.[9]

Like the United States Supreme Court, Mississippi courts have considered the *Schlup* standard in several cases. *See, e.g.*, *Bell v. State*, 66 So. 3d 90, 92 (Miss. 2011) ("Notwithstanding the bar, the Court finds that Bell has not demonstrated, in light of all the evidence, that it is more likely than not that no reasonable juror would have convicted him, and this issue is without merit."); *Trotter v. State*, 907 So. 2d 397, 401–02 (Miss. Ct. App. 2005) ("The United States Supreme Court has held that, notwithstanding the time bar imposed on most collateral challenges to guilty pleas, a petitioner's claim can be reviewed if he can establish that the constitutional error 'has probably resulted in the conviction of one who is actually innocent.'").

Ms. Shelby's underlying constitutional claims, which under *Schlup* would be addressed regardless of any procedural bar because of her innocence, are based on Sixth Amendment and the Fourteenth Amendment's Due Process Clause. The Due Process Clause "'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [s]he is charged.'" *Francis v. Franklin*, 471 U.S. 307, 313 (1985) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)). Ms. Shelby's innocence claim is the gateway through which this Court can review her constitutional claims.[10]

The evidence of Ms. Shelby's innocence is powerful. The 2018 amended death certificate says unequivocally Bryan IV's death was accidental and caused by a "seizure disorder." The only

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[8]*See Reedy v. Wright*, No. CL00000-23, 2002 WL 598434, at *5 (Va. Cir. Ct. Apr. 8, 2002); *Pelligrini v. State*, 117 Nev. 860, 877 (2001) (noting statutory miscarriage of justice standard and *Schlup* gateway innocence standard); *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. 2000) (adopting federal *Schlup* miscarriage of justice standard and gateway innocence claims in Missouri state post-conviction cases); *Ex parte Franklin*, 72 S.W.3d 671, 675 (Tx. Crim. App. 2002) (applying *Schlup* standard); *State v. Redcrow*, 294 Mont. 252, 260 (1999) (adopting *Schlup* gateway in Montana post-conviction cases).

[9]*See generally Pethel v. McBride*, 219 W. Va. 578 (2006); *In re Turay*, 153 Wash. 2d 44 (2004); *Seeley v. State*, 782 N.E.2d 1052 (Ind. Ct. App. 2003); *State v. Huss*, 657 N.W.2d 447 (Iowa 2003); *Bates v. Commonwealth*, 434 Mass. 1019 (2001); *Hays v. State*, 132 Idaho 516 (1999); *In re Novaock*, 572 N.W.2d 840 (S.D. 1998); *State v. Frederick*, 223 Wis. 2d 267 (Wis. Ct. App. 1998) (*mem.*); *People v. Pecoraro*, 175 Ill. 2d 294 (1997); *Ohio v. Campbell*, No. 95-3566, 1997 WL 1582 (Ohio App. Jan. 2, 1997); *Turks v. Tennessee*, No. 02C01-9502-CR-00035, 1997 WL 1883 (Tenn. Crim. App. Jan. 3, 1997).

[10] The innocence gateway standard clearly requires a constitutional violation in conjunction with an innocence claim; however, it is also clear that the innocence analysis is entirely separate from the determination of the underlying claims. In *Schlup*, "Schlup's claim of innocence does not by itself provide a basis for relief. Instead, his claim for relief depends critically on the validity of his *Strickland* and *Brady* claims." *Id.* at 315.

evidence presented at trial from which the jury could have concluded guilt was the testimony that, given the particular injuries Bryan sustained, he had to have been violently shaken and intentionally impacted. New science undermines the evidence presented, and the person who presented much of that evidence—Dr. Riddick—acknowledges that he "made a mistake" and misdiagnosed the cause of death for the child. Now, the only state expert who testified against Ms. Shelby in support of Dr. Riddick's original opinion – Dr. Benton – has now been called into question for his testimony in this case and others.

As to Ms. Shelby's physical condition, at the time of Bryan's collapse and subsequent death, Ms. Shelby was two weeks postpartum. On May 14, 1997, she delivered a daughter via emergency C-section and also had her fallopian tubes removed at that time. She remained in the hospital for three days and, once discharged, was instructed to avoid bending over and straining to lift anything. (Ex. D, Tasha Shelby Hospital Discharge Summ.) Aside from the surgery, Ms. Shelby is small in stature. At under five feet tall, she stands not even two feet taller than the two-and-a-half year-old child she supposedly shook to death.

As to whether an adult could fatally shake a child of Bryan's size, Dr. Monson states in his affidavit that it does not square with the laws of physics: "Even if someone were to have shaken Bryan Thompson, the associated accelerations would have been relatively low and would not have impacted his health. A determination that the injury resulted from shaking is not supported by current science." (Ex. O, Aff. Dr. Kenneth Monson at ¶ 12.)

As does the 2018 amended death certificate, the most up-to-date scientific evidence points to the conclusion that Bryan's death was purely accidental. We now know that the theory of shaking Dr. Riddick relied on at Ms. Shelby's trial defies the laws of physics. Even Dr. Riddick acknowledges that "the forensic evidence supporting 'The Shaken Baby Syndrome' and severe brain reactions to minor traumas has changed significantly since 1997." (Ex. Q, Aff. Dr. Leroy Riddick at ¶3.) In particular, as Dr. Monson's affidavit makes clear, a woman in Ms. Shelby's physical condition could not have fatally shaken a child of Bryan's size and weight. Dr. Ophoven's affidavit, meanwhile, makes clear that there is no basis on which to conclude anyone violently shook Bryan. Finally, there is no evidence of intentionally inflicted impact. Accordingly, there is simply *no* evidence, direct or circumstantial, that Ms. Shelby—or anyone else—intentionally harmed Bryan.

For the past twenty-five years plus, Ms. Shelby has consistently maintained her innocence. She has never made any statements that could even be arguably characterized as confessions. She has always been consistent in her narration of the events surrounding Bryan's collapse: sound of a thump, Bryan out of bed on the floor, exhibiting some sort of seizure behavior that had been seen before, and struggling to breathe. (TT 259; Ex. F, Statement Tasha Shelby Biloxi Police Department.) Moreover, no evidence was presented at Ms. Shelby's trial of any motive or precipitating event that could explain how or why she could have fatally injured a child she cared for.

This Court should vacate Ms. Shelby's conviction. *See* Miss. Code Ann. §§ 99-39-5 & 19.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioner Tasha Mercedez Shelby respectfully requests that this Court vacate her conviction.

Respectfully submitted,

TASHA MERCEDEZ SHELBY, PETITIONER

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CERTIFICATE OF SERVICE

I, Valena Elizabeth Beety, do hereby certify that I served a true and correct copy of the above and foregoing document by electronically filing the same in accordance with this Court's electronic filing procedures, resulting in notice to ALL COUNSEL OF RECORD.

So certified this 28th day of April, 2023.

/s/ Valena Elizabeth Beety

VALENA ELIZABETH BEETY