No. 23-6960

IN THE
Supreme Court of the United States

TASHA MERCEDEZ SHELBY,
Petitioner,

v.

THE STATE OF MISSISSIPPI,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Mississippi Supreme Court properly deny petitioner's third application for state post-conviction relief when state law generally prohibits applications that are successive or untimely, that application was successive (it was petitioner's third application), that application was filed 18 years after the deadline, no exceptions to the successiveness and timeliness bars applied, and the state courts had already soundly rejected petitioner's claim based on a thorough record?

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The Mississippi Supreme Court's order denying petitioner Tasha Mercedez Shelby's third application for post-conviction relief (Petition Appendix (App.) 1a–2a) is not published. The Mississippi Supreme Court's order denying petitioner's motion for reconsideration (App.3a) is not published.

JURISDICTION

The Mississippi Supreme Court's judgment was entered on October 12, 2023. The court denied reconsideration on November 1, 2023. On January 22, 2024, Justice Alito extended the time to file a petition for a writ of certiorari to March 29, 2024. The petition for a writ of certiorari was filed on March 7, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

STATEMENT

In 2000, petitioner was convicted of capital murder for killing her two-year-old stepson, Bryan, during the commission of felony child abuse. She challenged her conviction and sentence on direct review, two rounds of state collateral review, and federal habeas review. After those challenges failed, she again sought state collateral review. The petition here arises from that third round of state collateral review.

1. In 1997, petitioner was living with her fiancé Bryan Thompson, their newborn Devon, petitioner's three-year-old son Dakota, and Thompson's two-year-old son Bryan. *Shelby v. State*, 311 So. 3d 613, 614 (Miss. Ct. App. 2020). The events giving rise to this case began on May 29. At about 7:30 pm that night, Thompson left the home to go to work. *Ibid.* At about 8:00 pm, petitioner's grandmother Honey Schalk and Schalk's husband Don arrived, stayed for an hour, then went home,

bringing Dakota with them for an overnight visit. *Ibid.* That left petitioner, at about 9:00 pm that night, as the only adult in the home with Bryan. Petitioner said that she put Bryan to bed soon after that. *Ibid.*

According to petitioner, "she was awakened" that night "by a 'big thump' around 3:30 or 4 a.m.," and found Bryan "on the floor of his bedroom," where "he appeared to be having a seizure and was not breathing." 311 So. 3d at 614.

Petitioner called Thompson. 311 So. 3d at 614–15. She told him to come home and said that "she could not get through to a 911 operator." *Id.* at 615. When Thompson arrived, petitioner was "standing in the doorway holding Bryan." *Ibid.* Bryan was, according to Thompson, "pretty much lifeless and limp and blue as could be." *Ibid*. Thompson tried "to administer CPR" and "then decided to take Bryan to the hospital." *Ibid*. When Thompson asked whether they should "call the hospital or 911," petitioner "said no." *Ibid.* They took Bryan and their newborn to the hospital. *Ibid.*

When Bryan arrived at the hospital, he had—according to Dr. Max Odom, the emergency-room doctor—"multiple bruises in various stages of healing on his head and under his armpits." 311 So. 3d at 615. Some bruises were recent, reflecting "injuries within twenty-four hours." *Ibid.* It was "apparent to" Dr. Odom, even "without any confirmatory tests," that Bryan "had significant brain injury from blunt trauma." *Ibid.* A CT scan of Bryan's head "[s]howed diffuse subarachnoid hemorrhage throughout the subarachnoid space" in Bryan's skull and a "small subdural hematoma on the right side of Bryan's head." *Ibid.*

Bryan was transported to a hospital in Mobile, Alabama, for further treatment. 311 So. 3d at 615. He died there the next day. *Ibid.*

2. A grand jury indicted petitioner for capital felony murder, for killing Bryan while committing felony child abuse. 311 So. 3d at 615. The State's theory at trial was that petitioner, when she was alone with Bryan the night of May 29–30, banged Bryan's head forcefully against something, causing multiple blunt-force injuries. *Id.* at 617. Petitioner advanced several theories in defense, including that Bryan was shaken by someone other than petitioner and died from Shaken Baby Syndrome or that Bryan died from injuries caused by a short fall from his bed. *Id.* at 614, 615, 617.

The trial evidence allowed the jury to conclude that Bryan was fatally injured, through blunt-force trauma, when he was alone with petitioner and that petitioner had a motive for killing Bryan. *Contra* Pet. 3 (claiming that "there was no evidence presented to the jury that contradicted [petitioner's] statements" about Bryan's injuries and death).

First, petitioner was the only adult with Bryan in the seven or so hours before he was fatally injured. As of about 9:00 pm on May 29, Thompson was at work and the grandparents had left. *See* 311 So. 3d at 614. Petitioner reported that she discovered an injured Bryan after a "big thump" woke her up "around 3:30 or 4 a.m." *Ibid.* Thompson did not return home until after that. *See ibid.*

Second, while Bryan was alone with petitioner, he was injured in ways that could be explained by blunt-force trauma but not by shaking alone (and thus not by Shaken Baby Syndrome) or a short fall from his bed.

Some testimony directly showed blunt-force trauma and cut against a single impact from a fall or something less than a blunt-force blow. Dr. Odom, the emergency-room doctor, testified that Bryan had "significant brain injury from blunt

force trauma," that Bryan had multiple bruises on his head and under his armpits (some inflicted recently), and that Bryan's injuries could not have resulted from a short fall. 311 So. 3d at 615. The diffuse hemorrhaging "was caused by ruptures to veins and arteries in that space" suggesting "multiple sights of bleeding or torn bridging veins." *Ibid.* Bryan's bedroom "had shag carpet and a padded floor" and "the top of Bryan's mattress was only sixteen inches from the floor"—undercutting a claim of injury from falling out of bed. *Id.* at 616.

Other testimony cut against any claim that Bryan was shaken or otherwise injured before petitioner was the only adult with Bryan. Thompson, who was shown photos of Bryan's bruises that were taken at the hospital, testified that he had not seen any bruises "either on [Bryan's] head or under his arms" before he left for work on May 29. 311 So. 3d at 616. Petitioner's grandmother testified that Bryan was "happy, giggling, and playing" during her visit on May 29. *Ibid.* She did not see "any marks or bruises on him." *Id.* at 614.

Expert testimony also supported the view that Bryan died of blunt-force trauma inflicted while he was alone with petitioner, not from Shaken Baby Syndrome or a short fall from his bed. Dr. Leroy Riddick, a forensic pathologist from Alabama who performed Bryan's autopsy, testified that Bryan "died from blunt force injuries to his head." 311 So. 3d at 616. Dr. Riddick testified that "the injury that killed" Bryan was "diffuse axonal damage," which occurs when someone "intentionally shake[s] a baby really hard and bang[s] its head." *Ibid.* Dr. Riddick observed multiple bruises on Bryan's head and face, some only an hour or two old. *Ibid.* The "bruises on the back and front of Bryan's head indicate[d] that his head impacted something with

enough force to tear the veins inside the arachnoid space and also to tear ... a large number of the [axons] in his brain." *Ibid.* Dr. Riddick testified that Bryan's "extensive brain injuries could not have been the result of an accident." *Ibid.* He also "opined that a fall from sixteen inches to a carpeted floor could not have caused all the contusions on Bryan's head or the internal brain injuries that he suffered." *Ibid.* Dr. Riddick testified that Bryan's injuries resulted from "shaking and impact" that "occurred no more than two to three hours before" arriving at the hospital. *Ibid.* On cross-examination by the defense, Dr. Riddick testified that Bryan did not die of Shaken Baby Syndrome—indeed, Dr. Riddick expressly disagreed with defense counsel's suggestion that Shaken Baby Syndrome caused Bryan's death. *Id.* at 616–17; *contra* Pet. 5 (claiming that Dr. Riddick "concluded that Bryan had died by" Shaken Baby Syndrome). Dr. Riddick distinguished blunt-force injuries from Shaken Baby Syndrome injuries: "blunt force injuries are bruises, abrasions, scrapes, hematomas, [ ] tears, [ ] lacerations, and fractures." 311 So. 3d at 617. Dr. Riddick said that Bryan's "head was forcefully 'banged' against something, causing blunt force injuries." *Ibid.*

Third, petitioner's statements and conduct suggested her guilt. Petitioner's grandmother said that "not long before Bryan's death," petitioner "had complained that 'she felt like she was dealing with a retarded child because [Bryan] was very slow' and 'still wasn't potty trained.'" 311 So. 3d at 616. Law enforcement officers who interviewed petitioner at the hospital testified that she "didn't seem very concerned" and "was not 'that upset' or crying." *Ibid.*

Against the State's case that Bryan died from blunt-force trauma inflicted while he was alone with petitioner, one of petitioner's defense theories was that Bryan

died from Shaken Baby Syndrome and that someone other than petitioner caused his injuries by shaking him. 311 So. 3d at 617. Petitioner's expert, neurosurgeon Dr. Anthony Ioppolo, opined "that Bryan had been shaken violently on prior occasions, which caused bleeding around his brain and seizures." *Ibid.* Dr. Ioppolo testified "that Bryan's condition gradually worsened ... until he had a seizure" that morning. *Ibid.* He also stated that a short fall from the bed "was a possible cause of Bryan's death" but a "less likely cause." *Ibid.* Another theory was that Bryan had a seizure disorder and, after suffering a seizure, he fell off his bed and hit his head. *Id.* at 622–24.

The jury convicted petitioner of capital murder and sentenced her to life imprisonment without parole. 311 So. 3d at 617. On direct review, the Mississippi Court of Appeals affirmed. *Shelby v. State*, 812 So. 2d 1144 (Miss. Ct. App. 2002). Petitioner applied for post-conviction relief, claiming ineffective assistance of trial counsel. 311 So. 3d at 618. The Mississippi Supreme Court denied that application. *Shelby v. State*, No. 2005-M-00615 (Miss. April 28, 2005).

3. More than a decade after she was first denied post-conviction relief, petitioner applied a second time for post-conviction relief. She claimed that her conviction should be set aside due to new evidence, including a 2016 affidavit from Dr. Riddick saying that he now believed that Bryan's death was an accident, not homicide. 311 So. 3d at 618. The Mississippi Supreme Court allowed petitioner to pursue that claim in trial court.

a. The trial court held a three-day evidentiary hearing. 311 So. 3d at 618. Four experts testified for petitioner, including Dr. Riddick. *Id.* at 618–21.

The hearing disclosed that, based on information that he received from the Innocence Project, Dr. Riddick changed his opinion about Bryan's cause of death. 311 So. 3d at 619. Dr. Riddick, by then retired, testified that the Innocence Project "provided information [to him] about a long family history of seizure disorder[s]," which he believed was "an adequate explanation for the swelling" of Bryan's brain. *Ibid.* Dr. Riddick now said that a seizure and a short fall were a "better explanation ... than intentional abuse" for Bryan's death and that Bryan "suffered blunt force injuries when he somehow fell off the bed." *Ibid.* Dr. Riddick's new view was that Bryan "died from massive cerebral edema secondary to seizure disorder with asthma and blunt force injuries as contributory, and the manner of death is accident." *Ibid.*

Cross-examination exposed problems with Dr. Riddick's new testimony. For one, Dr. Riddick admitted that there was "nothing in Bryan's medical records" about a seizure disorder: no doctor "had observed a seizure or diagnosed a seizure disorder," nor was there "any complaint[ ] about seizures." 311 So. 3d at 620. For another, Dr. Riddick "admitted that he signed his affidavit in support of [petitioner's] [post-conviction-relief] application without reviewing his own trial testimony or files" from years earlier. *Ibid*. He relied instead on what the Innocence Project chose to give him and tell him. *See id.* at 619. Last, Dr. Riddick admitted that he "was wrong" about another alternative explanation he had offered in his post-conviction-relief deposition for some of Bryan's injuries: that Bryan was in a car accident on the way to the hospital and had to be extricated from the wreck. *Id.* a 620. "[T]here was no auto accident en route to the hospital." *Ibid.*

Petitioner's experts also testified about short falls and Shaken Baby Syndrome. Dr. Riddick said that it would be "rare" and "uncommon" that a short fall could cause a fatal injury. 311 So. 3d at 619. Petitioner's other experts agreed. Dr. Monson (an expert in biomechanical engineering) and Dr. Ophoven (a forensic pathologist) said that it was "extremely rare" and "extraordinarily rare" for a short fall to result in death. *Id.* at 621, 624. Dr. Monson acknowledged that a "fall from a bed [would not] create bruises on multiple locations on" Bryan's head. *Id.* at 618. On Shaken Baby Syndrome diagnoses overall, Dr. Ophoven conceded that "there is a wide difference of opinion" in the medical community, with "voluminous literature supporting either side" about the theory's validity. *Id.* at 624. Dr. Ophoven opined that "the mechanism of shaking is not sound, and *unless there's evidence of blunt force trauma*, is not a reasonable or legitimate conclusion as to the mechanism of injury in a child" without "marks on their head or body." *Id.* at 620 (emphasis added). Petitioner's experts all agreed that "fatal blunt force injuries could have been inflicted by slamming Bryan's head against a hard object" and that "a blunt force injury (an impact) that occurs during shaking could cause serious brain injury and death in a child." *Id.* at 619, 621.

The State's expert, Dr. Benton (an expert in child-abuse pediatrics and pediatric forensic medicine) testified that Bryan "died of blunt force trauma to the head with additional acceleration/deceleration involved in that trauma mechanism." 311 So. 3d at 621. Dr. Benton opined that Bryan had no history of seizure disorder, that "seizures did not play a role in the cause of death," and that "no medical literature" showed that a "seizure disorder causes intra-cranial bleeding" (as Bryan had) anyway. *Ibid.* He also opined that a short fall could not have caused Bryan's

death. *Ibid.* As for "challenges" to Shaken Baby Syndrome, Dr. Benton recognized that there had been "some evolution" in the scientific community's "understanding of it." *Ibid.* But he stated that the medical community continued to have a "general acceptance" of the diagnosis. *Ibid.* And, he said, "no controversy" existed that "an impact causing a blunt force injury 'certainly' could be fatal." *Ibid.*

"In a detailed, twenty-seven page order," the trial court denied post-conviction relief, because petitioner "failed to demonstrate that her new evidence 'would probably produce a different result in a new trial.'" 311 So. 3d at 621–22. First, the trial court ruled that Dr. Riddick's new opinion was based on significant flaws and could not have changed the result. BIO Appendix (BIO.App.) 11–12, 22, 24, 27 (trial-court order); 311 So. 3d at 620, 623. Dr. Riddick admitted that he was wrong about the family history of seizures and wrong about a car accident involving Bryan—an accident that he attributed to causing Bryan's blunt-force injuries. BIO.App.11; 311 So. 3d at 620. Dr. Riddick also believed that a short fall caused the bruise on the back of Bryan's head yet ignored the other blunt-force injuries to the front of Bryan's head. BIO.App.10; 311 So. 3d at 619. Second, the trial court found that evidence about short falls was not new—petitioner raised this theory at trial—and so also could not affect the trial's outcome. BIO.App.23; 311 So. 3d at 614, 625. And even if it had been new, the court noted, the experts at trial and at the evidentiary hearing agreed that short falls resulting in fatal injuries rarely occur. BIO.App.23; 311 So. 3d at 623–24. Third, the trial court found that Shaken Baby Syndrome was still a valid diagnosis but emphasized that no expert testified that Bryan died from shaking alone. BIO.App.19.

The court added that the experts agreed that shaking and impact could cause fatal injuries. BIO.App.19; 311 So. 3d at 624.

b. The Mississippi Court of Appeals affirmed the denial of petitioner's second application for post-conviction relief. 311 So. 3d at 625.

First, the court of appeals upheld the trial court's ruling "that the reasons for Dr. Riddick's changed opinions were unreliable and unpersuasive" and so could not produce a different outcome. 311 So. 3d at 623. The court of appeals echoed the trial court's concern that Dr. Riddick's changed opinions rested on information that was false (Bryan was not involved in a car accident en route to the hospital) or lacked a sound basis (Bryan had never been diagnosed with a seizure disorder). *Id.* at 620, 623. Faced with "conflicting evidence," the trial court was "entitled to determine the credibility of the witnesses and the weight to afford their testimony" and reasonably did so in discounting Dr. Riddick's new opinion. *Id.* at 625.

Second, the court of appeals upheld the trial court's ruling that the further evidence presented on falls—that "short falls can cause fatal injuries"—"was not materially different from the trial testimony" and so also could not affect the outcome. 311 So. 3d at 623. Dr. Riddick testified both during trial and at the evidentiary hearing that short falls causing fatal injuries were rare. *Id.* at 623–24. Much like Dr. Ioppolo's trial testimony, two of petitioner's new experts testified at the evidentiary hearing "that it is extremely rare for a short fall to result in death." *Id.* at 624. The court of appeals concluded that the trial court did not err "by finding that the new-but-similar testimony would not probably produce a different verdict." *Ibid.*

Third, the court of appeals upheld the trial court's ruling that the new material on Shaken Baby Syndrome could not affect the outcome, since the verdict was based on blunt-force injuries to Bryan—not shaking alone and thus not Shaken Baby Syndrome. 311 So. 3d at 624–25. Dr. Riddick himself testified at trial that "Bryan 'probably' was shaken" but that he had injuries beyond shaking: "blunt force injuries" that "were inflicted when his head was 'banged' against something." *Id.* at 624. The court of appeals distinguished other cases that were "based solely on internal injuries": Bryan "had multiple bruises in different locations on his head, which were caused by impacts, not shaking alone," so this case "does *not* involve a victim with no external injuries suggestive of abuse or an accusation of shaking based solely on internal injuries." *Ibid.* "No expert" who testified at trial or at the evidentiary hearing "disputed that forcefully banging a child's head against a hard object can cause serious brain injury and death." *Ibid.* (The court of appeals also recognized that the evidentiary hearing showed "that a majority of practicing physicians continue to accept [Shaken Baby Syndrome] or abusive head trauma ... as valid diagnoses." *Ibid.*)

The Mississippi Supreme Court denied discretionary review. *Shelby v. State*, 310 So. 3d 830 (Miss. 2021). Petitioner then sought federal habeas relief. The district court ruled that her petition was time-barred. *Shelby v. Cain*, 2023 WL 2563229, at *6–8 (S.D. Miss. Mar. 17, 2023). The Fifth Circuit declined to issue a certificate of appealability. *Shelby v. Cain*, 2023 WL 11015614, at *1 (5th Cir. Aug. 23, 2023).

4. The petition for certiorari here arises from petitioner's third round of state post-conviction review. App.10a. In this latest round, petitioner raised two claims relevant here. First, she claimed that she was denied due process: newly discovered

evidence—in the form of an amended death certificate for Bryan—showed, according to this claim, that Dr. Riddick's trial testimony (and thus petitioner's conviction) was based on "unreliable science." App.31a. Second, petitioner claimed actual innocence of the crime. App.52a–55a.

To support those claims, petitioner presented a supplemental medical certification in which Dr. Riddick altered Bryan's listed causes of death (to be listed as "cerebral edema with herniation," "hypoxic encephalopathy," and "seizure disorder," with "asthma and blunt trauma of the head" added as "other significant conditions contributing to death") and manner of death (to be "accident" rather than "homicide"). App.9a. Dr. Riddick issued that certification in June 2018—after the evidentiary hearing on petitioner's second application for post-conviction relief, but before the trial court denied relief. App.14a. The supplemental certification did not present new information: it memorialized the opinions that Dr. Riddick testified to at the earlier evidentiary hearing.

The Mississippi Supreme Court denied relief. App.1a. The court found that petitioner's third application was barred on two independent state-law procedural grounds—the application was successive and untimely. App.1a. The application was impermissibly successive because petitioner had already twice sought state post-conviction relief, including on the core claim that she pressed here. App.1a; Miss. Code Ann. § 99-39-27(9); *see* 311 So. 3d at 618. And the application was untimely: petitioner had 3 years from the time direct review proceedings ended to seek post-conviction relief, Miss. Code Ann. § 99-39-5(2); her conviction was affirmed on direct appeal in 2002, *Shelby v. State*, 812 So. 2d 1144, 1147 (Miss. Ct. App. 2002); and her

third application was filed in 2023—about 18 years too late. App.1a; *see* App.10a. The Mississippi Supreme Court added that there was "no arguable basis" for petitioner's claims. App.1a (citing *Means v. State*, 43 So. 3d 438, 442 (Miss. 2010) (petitioner must have "some basis for the truth of the claim" to surmount the procedural bars)). Petitioner's claim that Dr. Riddick's supplemental certification was "newly discovered evidence" lacked an arguable basis because the evidence was "merely cumulative" and would not "probably produce a different result or verdict." *Brown v. State*, 306 So. 3d 719, 744 (Miss. 2020) (defining "newly discovered evidence"). Petitioner's actual-innocence claim lacked an arguable basis because the supplemental certification did not "withdraw" any of the State's evidence of petitioner's guilt. *Contra* Pet. 8. The state supreme court thus ruled that petitioner failed to show that her claims are "not procedurally barred" and failed to present "a substantial showing of the denial of a state or federal right." App.1a. So the court denied post-conviction relief. *Ibid.*; *see* Miss. Code Ann. § 99-39-27(5) ("Unless [both showings are made] the court shall ... deny the application."). The court denied reconsideration.

The petition for certiorari followed.

REASONS FOR DENYING THE PETITION

Petitioner asks this Court to decide whether the Due Process Clause permits a State to "refuse to resentence petitioner, who was sentenced to life in prison for murder based on the Shaken Baby Syndrome theory, when the official medical examiner, who signed the death certificate that was the principal evidence supporting her conviction, has signed a new certificate stating that the cause of death was an accident, not homicide." Pet. i; *see* Pet. 8. This case does not present that question,

the decision below is correct, and this case is otherwise a poor vehicle that does not satisfy any of the traditional certiorari criteria. The petition should be denied.

1. The question that petitioner asks this Court to decide is not presented here. Petitioner's conviction was *not* based on a theory of Shaken Baby Syndrome (*contra* Pet. i, 5), the death certificate was *not* the principal evidence supporting petitioner's conviction (*contra* Pet. i, 2), and the State of Mississippi has *never* withdrawn either "the key evidence against" petitioner or "the death certificate" (*contra* Pet. 8).

To start, petitioner's conviction was based on blunt-force trauma (shaking *and impact*)—not shaking alone, and so not on Shaken Baby Syndrome. *Contra* Pet. i, 5. At trial Dr. Riddick did not "conclude[ ] that Bryan had died by" Shaken Baby Syndrome. Pet. 5 (repeatedly so claiming, without citing any opinion, record material, or anything else). Dr. Riddick never—at trial or the evidentiary hearing—opined that Shaken Baby Syndrome caused Bryan's death. At trial he opined that "there probably was shaking" but that Bryan's "multiple blunt force injuries" could be caused only from forcefully banging his head against something. 311 So. 3d at 616–17. Indeed, Dr. Riddick *refuted* the *defense's* suggestion that Shaken Baby Syndrome caused Bryan's death. *Id.* at 617. Even at the later evidentiary hearing Dr. Riddick maintained that blunt-force injuries caused Bryan's death (he changed his view only as to how those injuries came about—now based on a seizure and fall from the bed). *Id.* at 619. So this case does not involve a sentence "based on the Shaken Baby Syndrome theory." Pet. i.

Next, the death certificate was not the "principal evidence" supporting petitioner's conviction. *Contra* Pet. i. The death certificate was not even introduced

at trial. *Contra* Pet. 14. Nor was Dr. Riddick's trial testimony the "only significant evidence that contradicted petitioner's insistence that she did nothing to harm Bryan." Pet. 13; *accord* Pet. 2, 8 (making a similar claim). The evidence showed that petitioner was the only adult with Bryan in the seven or so hours in which he was fatally injured. 311 So. 3d at 614. The emergency-room doctor, Dr. Odom, testified about the many bruises on Bryan, that some were recent, and that Bryan "had significant brain injury from blunt trauma." *Id.* at 615. The jury heard testimony showing petitioner's frustration with Bryan, including from petitioner's grandmother, who testified that petitioner said that "she felt like she was dealing with a retarded child because he was very slow" and "he still wasn't potty trained and stuff." *Id.* at 616. An investigator testified that petitioner was not crying and "didn't seem very concerned" when he interviewed her soon after she arrived at the hospital with Bryan. *Ibid.* Petitioner did not immediately call 911 after supposedly discovering Bryan's injuries, and she waited for Thompson to come home before driving to the hospital. *Id.* at 615. None of the people who saw Bryan in the hours before his death noticed any visible injuries or that Bryan was not otherwise in good health. *Id.* at 614, 616. The flooring in Bryan's room was "shag carpeted" and "padded." *Id.* at 616. No expert believed that a short fall caused Bryan's head injuries—not even petitioner's expert. *Id.* at 615, 617 (a short fall was "the less likely cause" of death). Given all this, the question that petitioner presses is—for these reasons too—not presented here: the conviction did not rely, principally or at all, on a death certificate.

Last, it is not true that "the State itself has withdrawn the key evidence against [petitioner]—the death certificate that found she had committed a homicide."

Pet. 8; *accord* Pet. 2–3. As just explained, the never-introduced death certificate was not "the key evidence" against petitioner. And the State has never "withdrawn" that certificate. Dr. Riddick has changed *his* opinion (based on a flawed, partial presentation from the Innocence Project) and has apparently purported to change the death certificate. Neither action is a withdrawal by the State, which has maintained—with repeated backing from the courts—that petitioner's conviction is well grounded. *Contra* Pet. 15 (erroneously claiming that "the State's official position is that Bryan's death was an accident and that no crime occurred"); Pet. 16 (repeating that claim).

This case is not a vehicle for resolving the question set forth in the petition. The Court should deny the petition on this basis alone.

2. The decision below is correct.

a. To start, the state supreme court was right to reject petitioner's third effort at post-conviction relief as untimely and successive—state-law procedural grounds.

Because petitioner's conviction and sentenced were affirmed on direct appeal, state law required her to seek permission from the Mississippi Supreme Court to pursue post-conviction relief in the trial court. Miss. Code Ann. § 99-39-7. In doing that, she faced hurdles: the Mississippi Supreme Court grants leave to proceed only if it appears "from the face of the application, motion, exhibits and the prior record" that her claims "are not procedurally barred" and "present a substantial showing of the denial of a state or federal right." *Id.* § 99-39-27(5).

Petitioner failed to overcome those hurdles. Her third application was successive and untimely. She had already twice sought post-conviction relief, so her

third application was impermissibly successive. Miss. Code Ann. § 99-39-27(9). And she filed her third application some 21 years after her direct-review proceedings ended—18 years late—so her application was time-barred. *Id.* § 99-39-5(2).

Petitioner invoked the newly-discovered-evidence exception to those procedural bars. App.17a, 31a, 34a; Miss. Code Ann. §§ 99-39-5(2)(a)(i) (exceptions to untimely applications), 99-39-27(9) (exceptions to successive applications). Petitioner thus had to show that "new evidence has been discovered since the close of trial and that it could not have been discovered through due diligence before the trial began." *Havard v. State*, 312 So. 3d 326, 337 (Miss. 2020). She also had to show that this new evidence was "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." *Powers v. State*, 371 So. 3d 629, 659 (Miss. 2023) (quoting Miss. Code Ann. § 99-39-5(2)(a)(i)).

Petitioner could not make those showings. Her third application made the same core claims based on the same core evidence as her rejected second application. For years petitioner has been attacking her conviction using Dr. Riddick's change in opinion and the controversy around Shaken Baby Syndrome. She was given a full hearing on that claim—on her second application. After a three-day hearing, the trial court ruled that Dr. Riddick's change in opinion was "unreliable," "unpersuasive," and "not supported by the evidence." 311 So. 3d at 623, 625. Petitioner also showed only that Shaken Baby Syndrome was subject to controversy, which did not help her since her conviction was not based on Shaken Baby Syndrome. *Id.* at 624. The Mississippi Supreme Court properly rejected her third application on state-law grounds.

b. Even if the Mississippi Supreme Court's order could be read to have decided a federal question, it rightly rejected petitioner's argument. Dr. Riddick's change in opinion did not establish a due-process violation. An expert witness "does not have the power to nullify a criminal conviction by simply recanting prior testimony." 311 So. 3d at 623. Recanted testimony is generally "exceedingly unreliable" and "regarded with suspicion" and "skepticism." *Howell v. State*, 989 So. 2d 372, 384 (Miss. 2008). Recanted testimony can support granting an evidentiary hearing—and petitioner was granted such a hearing, in her second round of post-conviction review, where she presented extensive testimony. 311 So. 3d at 623–25. The trial court considered that testimony and reasonably ruled that the testimony would not likely produce a different result. *Id.* at 625. Petitioner has received ample process. Her failure to carry the day on her claim did not deny her due process. And the Mississippi Supreme Court did not deny her due process when it refused to let her to pursue in a third round of post-conviction review a claim that is materially the same as the one the state courts had already rejected. App.1a.

Petitioner contends that Dr. Riddick's trial testimony was the "only significant evidence that contradicted petitioner's" actual-innocence claim and suggests that her conviction cannot stand when that testimony has been undermined. Pet. 13; *accord* Pet. 9–11 (maintaining that petitioner has shown that she is "actually innocent"). But as shown, plenty of other evidence supported petitioner's conviction. *Supra* pp. 3–6, 14–15. And in any event the state courts rejected petitioner's effort to undermine Dr. Riddick's testimony: those courts sided (based on still more expert testimony) with

Dr. Riddick's original testimony and rejected the demonstrably flawed, Innocence-Project-fueled testimony that he offered many years later. 311 So. 3d at 623–25.

3. This case does not satisfy any of the traditional certiorari criteria and is otherwise a poor vehicle for this Court's review.

a. There is no lower-court conflict. Petitioner does not appear to claim that the lower courts are divided over a rule of law. She does cite half a dozen decisions from other jurisdictions, Pet. 11–13, but none conflicts with the decision below.

Four of those cases involve expert medical testimony that was later recanted or shown to be false. *Souter v. Jones*, 395 F.3d 577, 589–92, 602 (6th Cir. 2005) (credible actual-innocence claim, based on recanting of the only evidence linking petitioner to the crime, can toll statute of limitations); *Ex parte Tiede*, 448 S.W.3d 456, 459–60 (Tex. Crim. App. 2014) (Alcala, J., concurring) (defendant granted resentencing on a lesser offense based on expert's false testimony); *Ex parte Robbins*, 478 S.W.3d 678, 692 (Tex. Crim. App. 2014) (defendant entitled to new trial when the only evidence used to convict him was recanted); *Ex parte Henderson*, 246 S.W.3d 690, 691 (Tex. Crim. App. 2007) (defendant entitled to proceed on claim that new evidence showed that the victim's head injuries "could have been caused by an accidental short fall onto concrete" and the medical examiner was no longer certain the defendant intentionally injured the victim). All those cases show is that when petitioners meet their burden under federal habeas or state post-conviction requirements, courts let their claims proceed and grant relief when appropriate. This case applies that same approach: the Mississippi Supreme Court barred relief

because petitioner failed to make the showing needed to proceed. The difference in facts dictates the difference in outcome. There is no conflict.

Petitioner also cites two federal habeas cases in claiming that federal courts have recognized "the right to a hearing when defendants have raised a credible Due Process claim that seriously flawed scientific evidence was a significant basis for their convictions." Pet. 13 (citing *Gimenez v. Ochoa*, 821 F.3d 1136, 1145 (9th Cir. 2016), and *Lee v. Glunt*, 667 F.3d 397, 405, 407–08 (3d Cir. 2012)). But petitioner got a post-conviction hearing—a three-day evidentiary hearing—on her claim that her conviction rested on flawed evidence. She lost that claim on the merits. There is, again, no conflict.

b. The petition does not show that the question presented is recurring or carries nationwide importance. The question presented is on its face highly specific to the facts here and has no significance beyond this case. (And, as explained, that question rests on a flawed view of the case and the facts. *Supra* pp. 13–16.) Petitioner cites no other cases even debunking the Shaken Baby Syndrome theory that she faults.

c. This case is a poor vehicle for this Court's review. *Contra* Pet. 2, 10 (suggesting that this case is a good vehicle because it is not an AEDPA case). As explained, this case does not present the question that petitioner asks this Court to decide. *Supra* pp. 13–16. And the decision below rests on an adequate and independent state-law ground that blocks this Court's review.

This Court lacks jurisdiction "to entertain a federal claim on review of a state court judgment" when an adequate and independent state-law ground supports that judgment. *Foster v. Chatman*, 578 U.S. 488, 497 (2016). A state-law ground is

independent of the merits of the federal claim when resolving the state-law question does not "depend[ ] on a federal constitutional ruling." *Stewart v. Smith*, 536 U.S. 856, 860 (2002) (per curiam). And a state-law rule is an adequate bar to federal review if it was "firmly established and regularly followed" when applied by the state court. *Ford v. Georgia*, 498 U.S. 411, 424 (1991) (quotation marks omitted).

The Mississippi Supreme Court rejected petitioner's third post-conviction application on state-law grounds. To proceed on that application, petitioner had to show that her claims were not procedurally barred *and* presented a "substantial showing" of a denial of a state or federal right. Miss. Code Ann. §§ 99-39-5(2), 99-39-27(5), 99-39-27(9). Petitioner failed to overcome two procedural bars—successiveness and untimeliness—that alone required denying relief. Those state-law grounds are independent of federal law. And they are "adequate" because they are consistently and regularly applied. *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989). The Mississippi Supreme Court regularly applies those statutory bars. *See*, *e.g.*, *Turner v. State*, 364 So. 3d 601, 601 (Miss. 2021); *Young v. State*, 364 So. 3d 634, 635 (Miss. 2020); *Forkner v. State*, 364 So. 3d 631, 632 (Miss. 2020); *Sanders v. State*, 364 So. 3d 627, 627 (Miss. 2020).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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May 13, 2024

Appendix A to
Respondent's Brief in Opposition

Order Denying Post-Conviction Relief
December 10, 2018

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

TASHA MERCEDEZ SHELBY **PETITIONER**

VERSUS **NO. 24CI2:16-cv-0114**

STATE OF MISSISSIPPI **RESPONDENT**

ORDER

CAME ON FOR HEARING on April 24, 2018, Tasha Mercedez Shelby's Petition for Post-Conviction Collateral Relief. The Court has considered the record in this cause as well as the underlying criminal cause, the testimony and evidence produced, the pleadings, the law, arguments of counsel, the proposed findings of fact and conclusions of law, and finds and orders as follows:

PROCEDURAL HISTORY

On January 29, 1998, Tasha Shelby was indicted and charged with capital murder in the death of Bryan Thompson IV pursuant to the Felony Child Abuse Act, §97-5-39(2) **Miss. Code Ann**. Her trial began in the Circuit Court of Harrison County on June 12, 2000. On June 15, 2000, the jury returned a verdict of guilty. The following day Shelby was sentenced to life in prison without parole. She appealed and her conviction was affirmed on appeal. *See* ***Shelby v. State***, 812 So.2d 1144 (Miss. App. 2002). In 2005, through counsel, Shelby applied to the Mississippi Supreme Court for leave to file a Petition for Post Conviction Collateral Relief which was denied. (2005-M-00615) On July 30, 2015, present counsel filed a Motion for Leave to File a Petition for Post Conviction Relief. The motion was granted by the Mississippi Supreme Court on August 8, 2016. The Petition for Post Conviction Collateral Relief was filed in the Circuit

Court on August 19, 2016. Following discovery and motion hearings, an evidentiary hearing was conducted beginning April 24, 2018. Proposed findings of fact and conclusions of law were submitted by each side on June 7, 2018.

FACTS BEFORE THE JURY IN 1998

In 1997 Tasha Shelby [Shelby] and Bryan Thompson III [Thompson] were living together in Biloxi, Mississippi. On May 29, 1997, the household consisted of Shelby and Thompson along their two week old daughter, Devin, born by emergency c-section on May 14, 1997, Bryan IV [Bryan], Thompson's 30 month old son from a previous relationship, and three years old Dakota, Shelby's son from a previous relationship. Dakota and Bryan had moved in with them within weeks of each other around the end of February 1997. On May 17, 1997, Shelby had come home from the hospital following Devin's birth.

On the evening of May 29, 2017, Shelby and Thompson were home with Bryan, Dakota, and baby Devin. Thompson left for work at approximately 7:30 p.m. Around 8:00 p.m. Shelby's grandmother "Honey" Schalk and her husband Don came to pick up Dakota for the night. They left around 9:00 p.m. This left Shelby, Bryan and Devin in the home. Both Thompson and Honey Schalk testified that Bryan did not have any bruises or injuries when they left him. Honey Schalk also testified that Bryan appeared fine, alert, happy, and healthy.

At approximately 3:30 a.m. on May 30, 1997, Shelby called Thompson at work and told him that Bryan wasn't breathing. Thompson rushed home and they drove Bryan to Biloxi Regional Hospital. As they got into their van to drive to Biloxi Regional, Thompson bumped the child's head on the van door. Thompson testified that the facial injuries that appeared in a photograph of Bryan in the hospital were not caused by his bumping the van on entry.

Bryan entered the Biloxi Regional Hospital Emergency Room "limp and lifeless." ER physician, Dr. Max Odom, found Bryan with "no clinical signs of viability" and not breathing. That morning Shelby and Thomspon gave statements to Biloxi Police Department Investigator Warren Newman. Shelby's statement was presented to the jury at her trial. Shelby stated that she was asleep when she heard a thump. She got up, went into Bryan's room, and found him lying on the carpeted floor where he appeared to be having a seizure. She advised Investigator Newman that she had called her husband and the Ocean Springs Hospital and was told to get the baby to Biloxi Regional, the closest hospital. Investigator Newman stated Shelby did not "seem very concerned." The jury also viewed a video tape of Investigator Newman's June 4, 1997, search of the couple's trailer which showed Brian's bed was sixteen inches from the top of the mattress to the carpeted floor.

At the Biloxi ER Bryan's heart had stopped completely. He did not have a pulse. At trial Dr. Max Odom, who qualified as an expert in emergency room techniques, testified concerning the extensive efforts to save Bryan's life and the bruises on his head and in his armpits, some occurring within the previous 24 hours. Brian was soon transferred from Biloxi to USA Hospital in Mobile, Alabama. At USA he was determined to be brain dead at 2:28 a.m., May 31, 1997. An autopsy was performed on Bryan at 10:30 a.m. June 1, 1997.

MEDICAL RECORDS AND THE EXPERTS AT TRIAL[1]

A CT scan performed at Biloxi Regional showed diffuse subarachnoid hemorrhage throughout the subarachnoid space and a small subdural hematoma on the right side of Bryan's

[1]All medical opinions at the trial and at the PCCR evidentiary hearing were expressed within a reasonable degree of medical probability.

head. Dr. Odom stated that the time line from when the bleeding first began to when the child presented lifeless in the emergency room would be "from thirty minutes to three hours." In his opinion Bryan had a "significant brain injury from blunt trauma" not consistent with a short fall. Dr. Odom had never seen such injuries in a child as a result of falling off a bed sixteen inches from the floor.

Dr. Leroy Riddick, who performed Bryan's autopsy, testified as the State's only expert in forensic pathology. Dr. Riddick opined that Bryan "died from blunt force injuries to his head" with both external and internal injuries which could not be accidental absent "a documented motor vehicle crash," and which could not have been caused by a short fall. He listed Bryan's external injuries including: four bruises to his face (a quarter inch bruise to left forehead, three-eighths inch bruise to outer portion of the right side of his face, one-eight inch bruise to outer portion of his eyebrow, a one and a quarter inch bruise on his right cheek), a bruise to his left shoulder blade, a bruise at the midline on his lumbar region, and a bruise on the outer portion of his left thigh. According to Dr. Riddick, Bryan's bruises were fresh, occurring recently within a two day time period. Brian's scalp had an internal zone of blood three and one-half (3 ½) inches across, a large bruise at the front, and a four and one-half (4 ½) inches wide bruise across the back of his head which were indications of blunt force injuries.

Bryan also had a subdural hemorrhage, a diffuse subarachnoid hemorrhage which covered his brain, and a hemorrhage into the optic sheath. Dr. Riddick explained that the combination of the subarachnoid, the subdural, and the optic sheath hemorrhages, are indicative of diffuse axonal damage. He explained that if you intentionally shake a baby really hard and bang its head you tear all of the little axons. That diffuse axonal damage is what killed Bryan. The bruises on his

head showed he "impacted something with enough force to tear the bridging veins." It was Dr. Riddick's opinion that Bryan had suffered the injuries within two or three hours of being brought to the emergency room.

Dr. Riddick testified that multiple blunt force injuries were not the same as shaken baby syndrome and that he thought there was "probably" shaking, but also impact. Dr. Riddick was specifically asked on cross examination if multiple blunt force injuries were the same as shaken baby syndrome, and he responded, "No, it's not the same." Dr. Riddick testified that a short fall would not have caused Bryan's injuries, although a short fall could result in a fatal injury. He further testified that Bryan's injuries were not accidental unless there was a documented motor vehicle crash, and Bryan's death was not caused by hitting his head on a van door.

DEFENSE AT TRIAL

Shelby's expert at trial, pediatric neurosurgeon, Dr. Anthony Ioppolo, testified that the cause of Bryan's death was herniation from brain swelling. The brain swelling was from a combination of subarachnoid hemorrhage, which means bleeding surrounding the brain, and seizure activity, "which subarachnoid hemorrhage can cause." He agreed that the total picture certainly fit the syndrome of what has been described as shaken baby syndrome, and that shaken baby syndrome certainly accounted for everything he saw and/or reviewed. Dr. Ioppolo opined that Bryan died as a result of shaken baby impact syndrome which would correspond with the recent bruising that was found on his shoulders and underarms. He further testified that if there was just one event of shaking, it would be more likely that the subarachnoid hemorrhage was followed by the development of edema, which then led to the seizure and coma. Dr. Ioppolo thought it "more likely" such pathophysiology would probably develop within a time frame of

twelve hours, *i.e.* hours before Bryan allegedly fell out of bed and before Shelby was alone with him.

Dr. Ioppolo also opined that if Bryan was having episodes of the eyes rolling back and then becoming unresponsive as reported by Shelby, it sounded like *petit mal* seizures. He further testified that if Bryan was having some type of seizure activity, there was already some type of brain injury, presumably bleeding or subarachnoid blood causing the irritation of the surface of the brain. Dr. Ioppolo discussed a cascade of events, leading to the proverbial straw that breaks the camel's back. "I think the final seizure that presumably occurred when there was that thump" and Bryan was found on the floor seizing. That was the final event that the brain couldn't compensate for any longer and it caused the herniation and the death of Bryan. However, despite Dr. Ioppolo's review of the medical records from the Biloxi Regional Medical Center and the victim's pediatricians, he did not recall anything about seizures in those records. He felt that a reported referral to a neurologist was extremely suggestive that there was some credibility to those seizure-like symptoms.

In addition to Dr. Ioppollo's testimony regarding the timing of the injury and possibility of seizures, the defense introduced additional testimony regarding seizures and family seizure history. Thompson said that Bryan would occasionally close his eyelids with his eyes looking up. He also testified that Bryan had bloodshot eyes three to four weeks before his death. According to Thompson, Bryan's doctor had recommended that a neurologist check him, but one was not seen before his death. Thompson also testified that his mother had seizures from a condition caused by work. There were no medical records introduced to support a medical diagnosis of Bryan's seizures or a referral to a neurologist. Honey Schalk told Investigator

Newman she had seen Bryan close his eyes for five to ten minutes but she wasn't sure if it had been a seizure. It was also reported to Investigator Newman that Bryan's eyes were closed all day Saturday of the Memorial Day weekend[2]. At trial Newman could not recall the context of the comment.

During the course of the investigation Shelby provided several statements. She told Harrison County Sheriff's Deputy Teddy Rose that Bryan fell out of bed and onto the floor and stopped breathing. She told Thompson that Bryan wasn't breathing and she thought he had fallen out of bed. She called her stepmother Karen Morehouse, but didn't tell her that Bryan stopped breathing or that he was lifeless when she called Thompson. Shelby also told Morehouse she thought Brian was having a seizure, but didn't say anything about hearing a thump.

THE PCCR

SHELBY'S POSITION

Tasha Shelby brought this action pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act, **Mississippi Code Annotated** § 99-39-1, et seq. seeking to vacate her conviction. Shelby maintains her conviction was based on flawed medical evidence of shaken baby syndrome, a controversial unproven hypothesis unfit to serve as the exclusive basis for a murder prosecution. At trial, the State made three essential contentions, all of which were supported by medical expert testimony: (1) Bryan Thompson IV's injuries and death must have been caused by shaking and some sort of intentional impact; (2) the shaking – or shaking and impact – must have been inflicted with tremendous force, equivalent to that of a violent car accident, indicating deliberate design to kill; and (3) after the alleged abusive episode, Bryan

[2]Memorial day was May 26, 1997.

became immediately comatose, so the harm must have occurred while the child was in Shelby's exclusive care. In Shelby's opinion, new evidence fundamentally undermines these contentions. She maintains it is now an outdated theory that a triad of medical findings indicate, to the exclusion of all other possibilities, that an infant or young child has been violently shaken to death.

Shelby maintains she was convicted by a jury who heard that the State's expert witnesses and the defense expert witness agreed that Bryan died from violent shaking and that his injuries were not caused by a short fall or other non-abuse accident. At the time of the trial it was understood that Bryan's brain injuries required a severe impact, and there was no evidence of a severe impact. Therefore, Shelby contends that the State needed shaking, which was incorrectly believed to create forces equivalent to a severe impact, to explain the internal brain injuries. She further contends that in the eighteen years since trial, advancement in medicine and biomechanical engineering have undermined all three of the State's essential contentions and as a result, Dr. Riddick has changed his opinion on the cause and manner of death. Shelby concludes that since it is now "untrue" that violent shaking causes deaths like Bryan's, that Bryan's seizure history and the fact that he fell out of his bed can explain the events leading up to his death. Shelby seems to assert that Bryan's bruises can be explained by the efforts made to save his life and should not be considered against her which leaves only the medical conclusion that violent shaking caused Bryan's death as evidence against her, and her conviction must be overturned in light of the new medical evidence which contradicts this.

STATE'S POSITION

The State argues shaken baby syndrome is a valid diagnosis, was at the time of Shelby's

trial, and that Bryan died from blunt force trauma, accompanied by acceleration/deceleration trauma. Consequently, nothing Shelby presented at the hearing suffices as "new evidence" which would cause her conviction to be overturned.

The State argues that Shelby has simply re-urged testimony that the jury considered in 1999 and which is not newly discovered evidence. This includes evidence related to seizures, injuries which might have occurred during the efforts to save Bryan's life and to stabilize him, and the potential effects of a short fall. Any medical history of seizures, or family history of medical problems including seizures was presented to the jury in Shelby's trial. The State contends there is nothing in the trial transcript or record that supports Shelby's contentions that Bryan actually suffered from seizures and any new information concerning seizures would have been cumulative to the evidence at trial. The State also argues that any evidence concerning an understanding that short falls can be lethal which has evolved since the trial is merely cumulative to evidence presented at trial. The State contends that Shelby's witnesses at the PCCR hearing "speculated" as to how a short fall could have occurred which is not new evidence and is not included in the post conviction relief authorization for review. The State's position is that blunt force trauma killed Bryan and Shelby's conviction should be affirmed.

STANDARD

This court must determine whether the Petitioner has proffered newly discovered evidence, *i.e.* "evidence not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that, if it had been introduced at trial, it would have caused a different result in the conviction or sentence." ***Kidd v. State***, 221 So.3d 1041 (Miss. Ct. App. 2016), citing §99-39-23(6) **Miss. Code Ann**. There are four factors to be considered:

(1) the proffered evidence could not have been discovered earlier by the exercise of reasonable diligence; (2) it is material to the issue; (3) it is not merely cumulative or impeaching; and (4) it would likely produce a different result or verdict. *See*, ***Gray v. State***, 887 So.2d 158 (Miss. 2004).

Tasha Shelby bears the burden of proof and must show that she is entitled to the relief sought by a preponderance of the evidence. ***Smith v. State***, 129 So. 3d 243, 245 (Miss. Ct. App. 2013) Whether or not a new trial should be granted on recanted testimony or newly discovered evidence is examined under an abuse-of-discretion standard. ***Johnson v. State***, 70 So.3d 262, 263 (¶ 6) (Miss.Ct.App.2011); ***Esco v. State***, 102 So. 3d 1209, 1214 (Miss. Ct. App. 2012) At the evidentiary hearing on a PCR motion, this Court sits as the trier of fact and resolves any credibility issues. ***Id.***

SHELBY'S PCCR HEARING EVIDENCE

Dr. Leroy Riddick

Dr. Leroy Riddick, now retired, returned to testify on behalf of Tasha Shelby. Dr. Riddick no longer believed Bryan's injuries were intentionally caused by another person. In his opinion the cause of death was massive cerebral edema secondary to seizure disorder with asthma and blunt force injuries as contributory causes. Dr. Riddick explained that a condition called "hypoxic encephalopathy" causes swelling of the brain and a resulting lack of oxygen to the brain. His opinion was that Bryan's documented asthma would affect his breathing, the fall could take care of the contusion on the back of the head, and "the seizure disorder" which would stop his breathing would lead to the hypoxic encephalopathy which was the final mechanism of death. He feels that his opinion is consistent with changes in science since the time of trial and

with Bryan's medical history. In addition, Dr. Riddick testified that child abuse was at the forefront of his mind when he conducted Bryan's autopsy.

The blunt force trauma is now explained by Bryan's fall from the bed and hitting his head on the car door on the way to the hospital. Dr. Riddick supported this with testimony that upon his review of a report on the CT Scans and the images themselves he saw no herniation, only a small subdural hematoma, and only trace hemorrhage at Bryan's admission in Biloxi. The tearing of the bridging veins caused the small subdural hemorrhage. Dr. Riddick confirmed that he would no longer testify, as he had at trial, that this could only be accidental if there was a motor vehicle crash. Dr. Riddick no longer believes shaking a toddler can produce the forces necessary to tear the axons in the brain. Ultimately, he testified, it had to be shaking with some sort of impact, shaking in and of itself would not do it. Forensic pathologists "pretty well" accept that you have to have impact. He stated that a majority of doctors agree that shaking with impact is injurious to a child.

On cross examination, Dr. Riddick admitted that he was wrong about what paperwork he received from counsel for Shelby. He admitted he was wrong when he testified at his deposition prior to the hearing that the child had been in an automobile accident on the way to the hospital. He admitted he was mistaken about EMTs responding to a crash which involved the victim because there was no automobile crash on the way to the hospital. Additionally, he admitted that his new affidavit of recanted opinions was based on Dr. Ophoven's affidavit and was done before he reviewed his file from the Alabama Department of Forensic Sciences which included his autopsy report, his autopsy notes, the diagrams, and his photos, before he reviewed the police reports, before he saw any of the photographs in this case, and before he reviewed any of the

medical records. Especially telling about his testimony was when he was asked why he was testifying at the hearing he responded, "Ms. Thompson has been incarcerated for a period of time," indicating that his testimony was, at least in part, an appeal for clemency.

Dr. Kenneth Monson

Dr. Kenneth Monson qualified as an expert in the field of biomechanical engineering, and testified to the forces of shaking and short falls. In his opinion, biomechanical research has found that shaking is unlikely to cause the injuries classically identified as Shaken Baby Syndrome, but that a short fall can. Bryan's age (2½ years old), height (30 inches), weight (33 pounds), and Shelby's recounting of the facts are important for a biomechanical understanding of whether Bryan could have been shaken sufficiently forcefully to cause his fatal brain conditions, and whether a short fall could have caused them. Dr. Monson discussed biomechanical studies and necessary forces for falls and shaking. Dr. Monson confirmed that a slam produces many times higher accelerations than shaking does. Dr. Monson admitted that it's possible that Bryan's injuries in this case were intentionally inflicted through a slamming of his head into or on a hard object.

Dr. Monson discussed biomechanical studies and necessary forces for falls and shaking. His opinion concerning the fall was, "if he [Bryan] were standing on his bed and he somehow fell off his bed to the floor in such a way where he was unable to protect his head, that it absorbs the full energy of that fall, then it is my opinion that such a fall could produce the significant brain injury to be fatal." When asked about falls, Dr. Monson clarified, "so to be clear, when I'm talking about the fall off the bed, I'm specifically talking about from a standing height on the bed. Now, certainly if a child were to be lying on the bed and roll off the bed to the floor, I would not expect that fall to exceed the injury threshold. I don't believe if the child rolled off the bed

that these injuries could have been sustained." Dr. Monson further opined that the scientific literature now proves that shaking produces low accelerations, and would not cause Bryan's condition because the acceleration would not reach the necessary injury thresholds, to cause such injuries, particularly in a toddler weighing over thirty pounds. Dr. Monson also testified that while the equations and mechanics he referenced were available at the time of trial, the vital information on injury thresholds, tissue properties, and tissue response, were not. At the time of trial, shaking was understood as being able to create sufficient force to rupture bridging veins in the brain. Developments in biomechanical studies have, however, established that shaking cannot create the injury thresholds needed to rip bridging veins.

Dr. Janice Ophoven

Dr. Janice Ophoven also testified at the hearing. Dr. Ophoven is a board-certified forensic pathologist with forty years of experience, including serving as a medical examiner and as a pediatrician although she had not seen patients since the 1970's and had performed her last autopsy in 2009. She was accepted as an expert in forensic pathology with a special interest in pediatric forensic pathology. Dr. Ophoven reviewed Bryan's complete medical records and the autopsy report. She found important that Bryan had a history of "poorly treated" asthma, a history of possible seizures observed by multiple individuals, as well as a past family history of seizure disorders. However, she did not find a diagnosed seizure disorder for Bryan.

Dr. Ophoven found evidence of papilledema or optic nerve swelling an extremely unusual finding in traumatic brain injury which suggested a correlation between his brain swelling and the reports of observed seizures. This also raised the existence of preexisting pathology in Bryan. The alleged neurological appointment for the week after Bryan died and the observed seizure at the time of his collapse, confirmed for her the preexisting condition. In Dr.

Ophoven's opinion, seizures can cause brain damage and brain swelling and Bryan's seizures played an important role in his ultimate death. She also discussed conditions that can look like shaken baby but actually are not. Relevant to this were increased intracranial pressure, accidental injury, and hypoxia from any number of causes. If Bryan had seizures before that last night he may have been suffering from "whatever it was that took him" or at least one of the mechanisms that was involved. In her opinion, Bryan's brain stem did not herniate until he was at the hospital. The herniation of Bryan's brain stem is not an indication of the severity of the impact; rather, it indicates the ongoing swelling of the brain while in the hospital. Bryan's death was the result of hypoxic ischemic encephalopathy, failure of oxygenation of the brain. It could have been accidental, inflicted, or a constellation of natural causes so the manner is undetermined.

Dr. Ophoven discussed the changes in shaken baby syndrome since Shelby's indictment and trial in 1999. Historically, shaken baby was the term used for a child that had been abused and had a head injury. Ultimately, a triad of findings were described as the basis for the finding; a subdural hematoma, brain injury, and retinal hemorrhages. At the time of Shelby's 1999 trial, if a child presented with those three findings the assumption was the child was the victim of abuse. Diffuse axonal injury was considered the damage that took place when the infant was shaken. It is a conclusion that is not supported by science today. Later studies led to concerns about using the triad of subdural hematoma, brain injury, and retinal hemorrhages as absolute evidence of abusive injury to a child. This occurred around the turn of the century, 2001– 2002 and resulted in a dramatic split in the medical field. In Dr. Ophoven's opinion, it's been established that the mechanism of shaking is not sound, and unless there's evidence of blunt force trauma abuse` is not a reasonable conclusion in a child who has no marks on their head or body. At the time of trial Dr. Riddick's testimony that if there were a motor vehicle crash or

intentional hard shaking and banging of a baby's head there would be a tearing of the little axons and that is what killed Bryan was common and accepted. Today it is not. She felt that this critical testimony established for the state that Bryan was murdered. However, Dr. Ophoven agreed that if an infant were shaken and then slammed against a wall, the slam would cause a fatal injury

In her opinion, abuse appears to have been an assumption on the part of Dr. Riddick at the trial, and there was nothing to indicate that a differential diagnosis was performed. She agreed with him that lethal injuries from short falls are very rare and that blunt force impact can kill. But having considered the absence of significant preexisting evidence of rough handling, fractures, excessive bruising, and excessive marks that would have suggested chronic abuse she concluded, "This is not what abuse looks like." Still she could not say that Bryan was not the victim of an inflicted injury.

Dr. Ophoven referred to a number of findings at trial that, in her opinion, have since "changed" or should lead to a different outcome. At trial Dr. Riddick testified that Bryan did not have retinal hemorrhaging a part of the shaken baby syndrome triad. Subarachnoid hemorrhaging is not considered an indicator of shaken baby syndrome and diffuse subarachnoid hemorrhaging occurred in this case. Dr. Riddick's testimony at trial about bridging veins causing the bleeding would have been common and accepted then. Today "we" are aware of another source of blood that is more likely in cases that have hypoxic damage and that is the dural venous plexus.

While there were two major bruises to Bryan's head, they did not necessarily mean that he suffered two fatal impacts. She believed Bryan's injuries were contributed to by a short fall, or may have been caused by the fall or the fall may have been a consequence of his fatal process.

In her opinion there was not enough information to determine what happened to Bryan. There was not enough evidence to conclude that Bryan was the victim of violence, although that was a possibility. Dr. Ophoven concurred with the conclusions from a 2007 Goudge Inquiry that found pediatricians were encouraged to assume abuse in order to protect children. She and Dr. Julie Mack both testified to having this experience in their professional lives.

Dr. Julie Mack

Dr. Julie Mack is an expert in diagnostic radiology with a particular interest in pediatric radiology and the anatomy of the dura. She reviewed Bryan's CT scans and MRIs and testified that the belief that shaking caused bridging vein ruptures was widely held at the time of Shelby's trial, but that this belief is no longer widely held. 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. On Bryan's images, Dr. Mack identified the subdural hemorrhage as a "trace hemorrhage" meaning very small. She could conclude from the very small amount of hemorrhage that it would not be consistent with a bridging vein rupture. Smaller vessels, which can bleed without trauma or with moderate trauma, are more likely to have caused the trace hemorrhage. The hemorrhage continued to grow while Bryan was in the hospital, from "probably less than" 10 ccs to 30 ccs by the time of autopsy. The trace hemorrhage cannot be dated – it could have been an hour old or seven to ten days old. None of this information on subdural hemorrhages caused by bleeding in small vessels was known in 2000, at the time of trial. She also opined that blood around the brain can trigger a seizure. She was taught in the 1990s that bridging veins could only be ruptured using great force and that meant either a car crash or child abuse.

Dr. Mack agreed that there was a dense falx, which indicates bleeding and swelling in the

brain. It was a small amount of bleeding, but the dense falx was seen in most of the CT slides. Both sides of the brain showed swelling, and the normal contrast between grey matter and white matter had been lost. Dr. Mack confirmed that the loss of grey-white differentiation is entirely consistent with no palpable pulse and lack of breathing. The loss of oxygen to the brain would explain why the loss of grey-white occurred. Dr. Mack agreed Bryan had both a subdural hematoma and subarachnoid hemorrhage.

THE STATE'S EXPERT AT HEARING

Dr. Scott Benton

Scott Benton, MD, FAAP, University of Mississippi Medical Center, acknowledged that shaken baby syndrome has had challenges. There have been evolutions as to understanding but "the majority of physicians that are involved in these types of determinations have accepted that shaking, and certainly shaking with impact, is injurious to a child." 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. Ophoven discussed the deterioration of the shaken baby syndrome theory as a result of research using models to determine potential for injury and the concerns of using the triad of retinal hemorrhage, brain swelling and the subdural hemorrhage as absolute evidence of abusive injury to a child. However, as noted by Dr. Benton, Dr. Riddick was clear in his testimony at trial that the child did not have retinal hemorrhaging and that he did not use the triad as the only evidence to authenticate the child's injuries. Dr. Benton also clarified the failure of the seizure hypothesis, "One, seizures don't cause intra cranial bleeding. Two, seizures can cause hypoxia, but hypoxia doesn't cause intra cranial bleeding. So, [they are] missing the traumatic factor." In his opinion, Dr. Ophoven's opinions don't fit with the facts of this case. Dr. Benton reviewed

and explained the different types of possible seizures, but found that none of them would lead to the events found in this case.

Dr. Benton stated that the two biggest factors related to the timing of the victim's injuries revealed at trial *visa vis* the possibility of preexisting seizures are that (1) at 9:00pm, the child was alert and engaged, and "performing high order activities" that generally require an intact brain, and (2) at autopsy, the subdural blood cells were intact and without organization, "which means the blood is fresh and the body hasn't yet had time to respond to it." These markers indicate that the child was functioning as a normal child at 9:00 p.m., and that the injuries documented at autopsy were all recent. Dr. Benton's opinion was that Bryan "died of blunt force trauma to the head with additional evidence of acceleration/deceleration involved in that trauma mechanism." Bryan's injuries were from severe blunt force trauma because they were fatal. "If you look at the size of the hematomas, at least the front and back of the head, the degree of subarachnoid hemorrhage is disproportionate to the ones that we see in children who survive their injuries." Dr. Benton reviewed all of the medical records and concluded that the medical experts in this case, including Dr. Odom and Dr. Riddick, indicated that the cause of death was blunt force trauma with acceleration / deceleration injuries, and not simply shaking or shaken baby syndrome.

With regard to the possibility of a fall causing Bryan's death, Dr. Benton testified that rarely are there subdural hemorrhages from a fall and when there are, "they tend to be what we call contact subdurals or contact subarachnoids." Impact can cause subdurals and contact subarachnoids, "but they tend to be focal underneath the site where the impact is, not diffuse across the entire brain." it was Dr. Benton's opinion that, "Because of the multiple bruises around the head a 16" fall should not cause death in this child." Shelby argues that Dr. Benton is

neither a radiologist nor a pathologist and was not qualified in this hearing to opine about either subject.

THE COURT'S CONCLUSIONS

SHAKEN BABY SYNDROME

The majority of physicians have accepted that shaking, and certainly shaking with impact, is injurious to a child. All of the experts who testified at the hearing agreed that shaking with impact can be fatal. Dr. Monson stated that slamming produces times higher accelerations than shaking does. Dr. Monson agreed that adding impact to a shaking event was enormously injurious and has been upheld in almost every biomechanical model. He admitted that it was possible that Bryan's injuries were intentionally inflicted through a slamming of his head into or on a hard object which could have been intentional. Dr. Ophoven also agreed that if an infant were shaken and then slammed against a wall, the slam would cause a fatal injury. Dr. Ophoven could not say that Bryan was not the victim of an inflicted injury. At the hearing, Dr. Riddick testified that there was a question whether shaking in and of itself would cause the triad of retinal hemorrhage, brain swelling, and subdural hemorrhage as absolute evidence of abusive injury, and that it is "pretty well accepted" that you have to have impact, at least among forensic pathologists. At the trial, Dr. Riddick was clear in his testimony that Bryan did not have retinal hemorrhaging and he didn't use the triad as the only evidence to authenticate the child's injuries. Dr. Benton agrees with Dr. Riddick's trial testimony. As Dr. Riddick testified, both at the trial and at the hearing, Bryan died of blunt force trauma. Dr. Benton agreed and noted that in his review of the records Dr. Odom and Dr. Riddick both indicated that Bryan's death was from blunt force trauma with acceleration/ deceleration injuries and not simply shaking. The State has never alleged that shaking alone caused Bryan's death.

Shaken baby syndrome may have been involved in legitimate debates in the years since Bryan's death and Shelby's trial but it has not been "debunked" as alleged. The majority of physicians agree that shaken baby syndrome is a valid diagnosis. Shelby has failed to establish "newly discovered evidence" which would result in her conviction being overturned. The State established at the 1999 trial that Bryan's injuries were the result of blunt force trauma with acceleration / deceleration injuries, not just shaking. The medical records and testimony from trial were consistent with current science. Further, Shelby's version of events by her statement and her theories regarding falls and/or seizures introduced through the opinions of her experts at the evidentiary hearing failed to establish a cause or explanation for all of the injuries that Bryan presented at the hospital.

Courts across the country have reviewed similar facts and cases and they continue to support a finding of guilt related to a diagnosis of shaken baby syndrome. In ***Wolfe v. Texas***, 509 S.W. 3d 325 (Texas 2017), the court looked at a criminal appeal where the child suffered only internal injuries and the defendant argued that shaken baby syndrome (abusive head trauma), was unreliable because of vigorous debate and growing unrest. The State's expert confirmed "that there is no 'unrest' within the various sub-fields of pediatrics, including pediatric ophthalmology, radiology, and neurosurgery, about abusive head trauma." ***Wolfe*** at 331. Also, the sources challenging the reliability of a diagnosis of abusive head trauma were based on shaking alone and the experts in ***Wolfe*** testified that the injuries could not have occurred by shaking alone. ***Wolfe*** at 342. The Texas Appellate Court agreed with its Court of Appeals and held that the trial court did not abuse its discretion by admitting the State's experts' medical opinion testimony on abusive head trauma. ***Wolfe*** at 345.

Sissoko v. State of Maryland, 182 A.3d 874 (Maryland 2018), involved the appeal from a

conviction for murder of the defendant's eleven week old son. The Court noted, based on reliable medical literature, that in the latter decades of the 20th century, it was widely accepted that shaking was the likely mechanism of brain injury "when infants and young children presented with subdural hematomas, retinal hemorrhages, and brain swelling, but without external evidence of trauma or a reported history of a significant traumatic event." ***Sissoko v. State***, 236 Md. App. 676 182 A.3d 874 *cert. denied*, 460 Md. 1, 188 A.3d 917 (2018) In ***Sissoko***, the pediatrician expert testified that "'[a]busive head trauma is injury to the head and its contents as a result of an inflicted event or events.' The shift from the use of the term shaken baby syndrome to abusive head trauma was a reflection of the medical (and scientific) consensus that 'there can be a variety of mechanisms that take place for any given child or different children.'" ***Sissoko*** at 885. The court held that the diagnosis of abusive head trauma remains generally accepted in the relevant medical/scientific communities. ***Sissoko*** at 906. Unanimity of opinion is not required for medical experts to be accepted by a trial court. Shelby has failed to prove by a preponderance of the evidence that shaken baby syndrome with impact is either debunked or unreliable particularly as applied to the facts in this case.

SEIZURES

Dr. Benton testified that seizures did not lead to Bryan's death. He reviewed and explained the different types of possible seizures, but found that none of them would lead to the events found in this case. At 9:00pm, by all accounts, Bryan was alert and engaged, and performing high order activities that generally require an intact brain, and at autopsy the subdural blood cells were intact and without organization, indicating the blood was fresh and the injuries documented at autopsy were all recent. Shelby takes the position that Bryan had a medical history of seizures and a family history of well-documented medical problems including seizures.

This is without support in the record. The issue of seizures was raised during the trial through testimony related to Bryan's behavior which was considered possible seizure activity. Bryan's father testified at trial that his mother had work-related seizures, but that there was not a history of seizures in the Thompson family. No medical records were introduced at trial to support any family history of seizures. No medical evidence was proffered in support of the existence of seizures at the hearing. Even if it had been, it would necessarily have been information that was available to Shelby at the time of her trial.

A number of opinions rendered for Shelby at the hearing were based on the assumption that Bryan had a seizure disorder. Dr. Riddick based a new opinion on a "documented seizure disorder," but admitted that there was no diagnosis of a seizure disorder. Dr. Riddick admitted there were no medically documented seizures at all. Dr. Ophoven admitted that she didn't think "any doctor has given a diagnosis of seizure disorder" for Bryan. Dr. Benton's testimony was that seizures did not play a role in the cause of death in this case.

The issues of seizure type behaviors and a history of seizures were raised at the time of trial, and any evidence related to seizures or seizure history was available at that time. As such, any "new" seizure evidence would simply have been cumulative. Further, any opinions based on the assumption that Bryan suffered from seizures which led to his death are purely speculative and without basis in the facts.

FALLS

Shelby also argues that Bryan possibly died as a result of an accidental short fall. She presented testimony that knowledge concerning the lethal effect of short falls has evolved since the time of her trial. However, the short fall scenarios provided by Shelby's experts did not address the multiple injuries found on Bryan. As Dr. Monson stated, "if we're including multiple

impact sites as part of this head injury… then certainly the fall from the bed is not going to create bruises in multiple locations on the head." Dr. Ophoven agreed that there wouldn't be two bruises from a simple roll off the bed and admitted that a roll off a bed from 16 inches onto the floor could cause a bruise, but she would be surprised if it caused a fatal injury. Dr. Benton also agreed you would expect to see one injury, not the four to six separate injuries seen on Bryan.

The possibility of an accidental fall is not new evidence. Shelby's version of the events has always included the fact that she heard a "thump" and found Bryan on the floor. At the hearing, Dr. Monson, the biomechanical engineering expert, discussed biomechanical studies and the potential severity of a relatively short fall. He acknowledged that the debate existed as early as the Duhaime Study in 1987 as to whether or not short falls would be expected to cause death in some circumstances. According to Dr. Monson, if Bryan was standing on his bed and fell off his bed to the floor in such a way where he was unable to protect his head so that it absorbed the full energy of that fall, then such a fall could produce a significant brain injury. Dr. Monson clarified he was specifically talking about a fall from a standing height on the bed, but a roll off the bed would not be expected to exceed the injury threshold. Evidence of injuries potentially caused by a fall was reasonably discoverable at the time of trial, which necessarily means it is not newly discovered evidence. Even assuming that there have been advances in science that weren't available at the time of trial, the possibility that Bryan fell from a standing position on the bed without protecting his head is not evidence of such a nature that would be practically conclusive and would have caused a different result in Shelby's conviction or sentence.

BLUNT FORCE TRAUMA

The Court finds that the facts of this case support abusive head trauma, with blunt force injuries and acceleration / deceleration. Dr. Riddick testified, both at trial and at the evidentiary

hearing, that the victim's injuries were blunt force impact. At the hearing he again stated that shaken baby syndrome is not the same thing as multiple blunt force injuries and he still agreed that blunt force trauma caused the child's injuries. Bryan suffered impact injuries. Dr. Benton stated that shaking alone will not give a child the injuries that were present. Dr. Monson admitted that it's possible that Bryan's injuries were intentionally inflicted through an intentional slamming of his head into or on a hard object. Dr. Ophoven admitted that she could not say that Bryan Thompson IV was not the victim of an inflicted injury.

Dr. Riddick was asked at the hearing what led to his changed opinions and he replied, "Mrs. Thompson has been incarcerated for a period of time and it felt incumbent upon me to try to rectify that." To the extent that he recanted his prior opinion, he did so without reviewing the file, medical records, or transcript. He reviewed only the information provided by Shelby's lawyers. He offered no explanation of the cause of the injuries and bruises he observed and noted at Bryan's autopsy, which he identified as "fresh" bruises. Recanted testimony "has been shown to be extremely unreliable and should be approached with suspicion." ***VanNorman v. State***, 114 So.3d 799 (MS. Ct. of App. 2013). Shelby is not necessarily entitled to a new trial based on the recantation of a witness; she must show that the new evidence would probably produce a different verdict. ***Pruitt v. State***, 100 So.3d 971 (Ms. Ct. App. 2013).

Dr. Benton testified that after reviewing all evidence, reports and prior testimony, that the cause of death was blunt force trauma with acceleration / deceleration injuries. This testimony corroborates Dr. Odom's testimony from the trial. This court must determine whether Shelby has produced evidence not reasonably discoverable at the time of trial which is of such nature that it would be practically conclusive that if it had been introduced at trial, it would have caused a different result in the conviction or sentence. That determination should not and will not be

persuaded by the length of time since the conviction and sentence.

Opinion evidence presented at this hearing by Shelby's experts is full of speculation, ifs, maybes, perhaps, and could haves. Dr. Ophoven's testimony was just possibilities. She discussed short falls which "may have contributed, may have been the cause or may have been a consequence..." Finally, she determined that "there are too many scenarios that could have been . . . to allow me to conclude with any certainty what the factors were that precipitated the initial event." This proffered testimony would not be material to issues presented at trial, as it is speculation. Further, it does not meet the requirements of new evidence, as it is not "practically certain to produce a different result or verdict, if presented during a new trial." ***Kidd v. State***, 221 So.3d. 1041, 1043.

Shelby argues that the Mississippi Supreme Court has acknowledged the controversy in shaking cases by either reversing convictions or allowing post-conviction hearings in four shaking cases, where the defendants did not have an expert who challenged the state's theory of shaking. However, those cases held not that the defendant is entitled to a particular expert but that it is a denial of due process to refuse an indigent defendant an expert when the State relies on expert testimony alone to connect him or her to the offense charged. In ***Brown v. State***, 152 So.3d 1146 (Dec. 11, 2014) the appellate court held that the trial judge deprived an indigent defendant of a fundamentally fair trial by refusing him funds to procure an expert. In ***Isham v. State***, 161 So.3d 1076 (Miss. 2015) Isham's conviction was reversed because the court denied an indigent's request for funds to hire an expert witness, thereby denying him due process.

In ***Havard v. State*** 2013- DR-01995-SCT (2014) the trial court has ordered a new sentencing trial on a capital murder death penalty case which involved an infant's death and allegations that she was sexually assaulted and killed by the defendant Havard. Issues included

denial of funds for an expert, shaken baby syndrome, and the validity of the sexual abuse evidence, but the only issue the court gave Havard permission to pursue was the validity of shaken baby syndrome.[3] In ***Brandon v. State*** 2014-M-00596, the Mississippi Supreme Court in 2014 granted Brandon leave to proceed in the trial court on eight issues, including the trial court's denial defendant's request for funds to retain an expert witness , Shaken Baby Syndrome testimony as a violation of substantive rights under **MRE** 702, ineffective assistance of counsel and a number of issues surrounding the testimony of one-time Mississippi State Medical Examiner, Dr. Steven Hayne.[4]

CONCLUSION

At Shelby's 1999 trial the jury heard the evidence and resolved any conflicts, as instructed by the court. There were multiple theories of causation introduced at trial, including blunt force trauma with shaking, shaken baby syndrome, seizures, short falls, and accident. The evidence was sufficient to support the jury's conclusion that the victim died from blunt force injuries, now called abusive head trauma. That verdict was affirmed on appeal. ***Shelby v. State***, 812 So.2d 1144 (Miss. 2002). At her PCCR hearing Shelby failed to demonstrate by a preponderance of the evidence that new evidence discovered after trial was material and would probably produce a different result or verdict if she receives a new trial. ***Ormond v. State***, 599 So.2d 951, 962 (Miss. 1992). Shelby argues the "now-discredited evidence" at trial was the only

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[3]Havard was granted a new sentencing hearing in September 2018. In November 2018, the State announced is would not seek the death penalty. The latest information is that his sentencing has been set for mid-December 2018.

[4] Dr. Hayne admitted that he was not certified in forensic pathology by the American Board of Pathology which made him unqualified to serve as Mississippi State Medical Examiner. Miss.Code Ann. § 41–61–55 (Rev.2005). There were also serious questions concerning his credibility in a number of areas. See ***Edmonds v. State***, 955 So. 2d 787, 802 (Miss. 2007)

evidence against her. Yet a review of the testimony from the hearing and the trial fails to convince this court that the trial evidence has been discredited. There are no new revelations about Bryan's health conditions as argued by Shelby. Dr. Riddick was not shown to have presented false evidence against Shelby at trial, nor has the "shift in science" resulted in material evidence which undermines the evidence against Shelby at trial. Shelby argues that "if the State's medical examiner were to testify that Tasha did not harm Bryan," no reasonable jury could find her guilty. A review of Dr. Riddick's testimony reveals that he did not testify that Shelby did not harm Bryan and it is clear that his "new" opinions were based on the erroneous assumption that Bryan had a seizure disorder and was having "multiple seizures" in the days before his death. While the experts who testified for Shelby at the hearing presented studies and testimony regarding shifts and refinements in the understanding of shaken baby syndrome these changes do not undermine the evidence that Bryan Thompson IV died of blunt force head trauma. It is, therefore,

ORDERED AND ADJUDGED that the Petition for Post Conviction relief is denied.

SO ORDERED AND ADJUDGED, this the 7 day of December, 2018.

Roger T Clark

ROGER T. CLARK
CIRCUIT COURT JUDGE

FILED
DEC 10 2018
CONNIE LADNER
CIRCUIT CLERK
BY _____ D.C.

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