No. 07-1483

IN THE SUPREME COURT OF THE UNITED STATES

DEBORAH L. PATRICK, Warden, *Petitioner*

v.

SHIRLEY REE SMITH, *Respondent.*

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

RESPONDENT'S BRIEF IN OPPOSITION

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I.

STATEMENT OF THE CASE

A. Introduction.

On November 30, 1996, at approximately 3:00 a.m., a six week old infant, Etzel Smith, was found unresponsive in an apartment occupied by Respondent Smith, the infant's grandmother, as well as the infant's mother, the infant's aunt and four other minor children. Later that morning, the infant was pronounced dead at a local hospital after paramedics failed to revive the infant. There were no obvious signs of trauma to the infant and the death was declared a Sudden Infant Death Syndrome (SIDS) case, pending autopsy.

Thereafter, Respondent Smith was convicted by jury trial of assault on a child causing death and sentenced to 15 years-to-life in prison.

After being incarcerated some ten years, the Ninth Circuit Court of Appeals, on February 9, 2006, remanded Smith's state habeas corpus petition to the United States District Court with instructions to grant her writ. As a result of this decision, Respondent Smith was released from custody and has been abiding by the terms of her bond for a period of some 18 months.

By her petition for writ of certiorari, Petitioner seeks to have this court reverse the December 4, 2007 decision by the Ninth Circuit Court of Appeals,

which reinstated its 2006 decision, and return Ms. Smith to custody to resume serving a life term.

This Court should decline Petitioner's application.

B. Respondent Smith's State Court Trial.

The state's two principal medical experts, Dr. Eugene Carpenter and Dr. Stephanie Erlich, both employed by the Los Angeles County Coroner's Office, testified similarly with respect to their medical findings during the autopsy of the deceased infant, agreed upon the subsequent neuropathological and eye examination findings and testified similarly with respect to their opinion concerning the cause of death of the infant.

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

Next, both doctors observed a small abrasion on the back of the infant's head, which they also agreed was not the cause of death. RT 576, 711-13. This

abrasion, which measured 1/16 of an inch by 3/16 of an inch, was described by Dr. Erlich by being the size of a "match head." RT 1287.

Both doctors testified that they saw small subdural hemorrhages in the outer membrane surrounding the brain, which were located in the back and bottom part of the skull. Some of this subdural hemorrhaging was bleeding which had occurred at least two weeks prior to the infant's death. RT 570-73, 710, 718-22, 770-71.

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

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

When asked about Shaken Infant Syndrome, Carpenter testified:

> "The Shaken Infant Syndrome includes, but does not require edema (swelling of the brain.) Bleeding on top of the brain. Retinal hemorrhages. Bleeding at the joints of the back of the neck. Bruises at the arms. Fractures of the ribs at the back of the rib cage that occurred during the shaking process. And sometimes internal injuries of the muscle to the buttocks or internal injuries to the abdominal organs. Sometimes chest organs."

RT 575.

Carpenter testified that babies who have been violently shaken commonly suffer bone and/or joint fractures in the process. RT 681. He stated:

> "If the baby is grabbed by the shoulders, the collar bones can fracture during the shaking of the head back and forth. If the baby is grabbed by the upper arms, the bones of the upper arms can fracture. Usually just one. Very commonly, if the baby is grabbed by the chest, mainly the ribs will fracture all along near the spine at the back because of the fingers of the hands as they grasp the chest dining (sp) into the ribs as the body is shaken back and forth.

RT 681-82.

Erlich testified that photographs of the infant's body were taken prior to the autopsy, as well as x-rays of the infant's body. RT 784. The pictures, x-rays and subsequent autopsy did **not** disclose any fractures or dislocations of any of the infant's bones or joints and **no** external abnormalities were observed. RT 784.

Carpenter also agreed that the infant had **not** suffered any fractures of his bones or joints, that there were **no** hemorrhages of the joints and **none** of the joints were displaced. RT 682.

Both Carpenter and Elich agreed that in the vast majority of cases involving Shaken Infant Syndrome, the infants present at autopsy with retinal hemorrhages. RT 575, 681, 765-66. Both doctors agreed that there were **no** retinal hemorrhages in the infant.

Carpenter testified that "if one finds nothing but retinal hemorrhages in a dead infant, that's almost diagnostic by itself that the infant was shaken to death. Very rarely does one ever find, nor have I ever found retinal hemorrhages in dead infants - - in the bodies - - in the dead bodies of infants that weren't due to shaken infant death. RT 575.

Both Carpenter and Erlich agreed with **all** the medical experts who testified in this case that the two recognized causes of death in Shaken Infant Syndrome cases are significant swelling of the brain itself, and significant bleeding inside the

infant's skull, both of which force the brain down upon the brainstem, ultimately crushing the brainstem and causing the infant's death. RT 541, 693, 730, 801-04, 1274-76. Again, Carpenter and Erlich agreed that there was **no** significant bleeding within the infant's skull and **no** significant swelling of the infant's brain, concluding that the two recognized causes of death in Shaken Infant Syndrome cases did **not** occur in this case. RT 692-93, 1273-74.

Most importantly, Carpenter and Erlich both testified that there was **no** observable injury to the brain or brainstem which could be identified as the cause of death in this case. RT 609-10, 696-97, 747-48, 763, 803-04, 1298. The neuropathological exam, which involved the sectioning (cutting) of the brain itself, did **not** reveal any observable trauma to the brain, there were **no** abnormalities or hemorrhages observed in the cortex of the brain, the cerebellum was intact and there was **no** herniation or other observable trauma to the brainstem itself. RT 802-04, 1298.

When Dr. Carpenter was asked to describe the infant's injuries which caused his death, he testified as follows:

> Q: Doctor, specifically, what are the organs that were damaged from the autopsy findings?
>
> A: *One cannot know specifically*. It would be the areas that were destroyed

during the shaking upon which the body - - depends for its survival such as the area in the medulla of the brainstem that controls the heart and the area in the medulla of the brainstem that controls respiration.

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

A: Yes.

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

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

RT 694-96. (emphasis added.)

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

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

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

Q: Okay. So, doctor, you are saying that it is either the swelling of the brain or a herniation of the brainstem? The *damage* to the brainstem?

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

Q: Well, so doctor - -

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

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

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

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

A: *We did not even section the brainstem*. There is no need because it

happened so fast that ***we wouldn't even see*** *anything*.

RT 1298-99. (Emphasis added).

Both Carpenter and Erlich were asked to describe Sudden Infant Death Syndrome, known by its acronym S.I.D.S. Carpenter testified that S.I.D.S. is "a legitimate cause of death that is natural death. The cause of which is not known and the diagnosis is made in a situation where there is a dead infant, no history of foul play." RT 697.

When Erlich was asked to define S.I.D.S., she stated:

"I would define S.I.D.S. as the sudden - - the death of a child by definition, we have a cut-off of one year. Less than one year old, the sudden death. And we have no - - nothing to explain it.

RT 748.

At the time she performed the autopsy, Dr. Erlich had only been involved in some fifty pediatric autopsies, and this case was assigned to her because it was presented to the coroner's office as a Sudden Infant Death Syndrome case. Dr. Erlich had never previously performed an autopsy in a case involving suspected child abuse. Dr. Erlich was not board certified in forensic pathology.

In rebuttal, the State called Dr. David L. Chadwick, a pediatrician who had never performed an autopy, nor was he board certified in any field related to

pathology. Chadwick testified that he reviewed the medical reports and opined that due to the bleeding in the infant's head and the small abrasion on the outside of the head, this was a Shaken Baby Syndrome case. However, Chadwick agreed that there was no large volume of blood within the skull and the blood which was found was not causing the infant any difficulty.

Chadwick agreed that there was **no** evidence revealed in the neuropathological report showing damage to the nerve centers attached to the brainstem, **nor** was there any evidence of specific brain injury.

In her defense, Respondent Smith called Dr. Richard Siegler, a pathologist who had worked at Martin Luther King Hospital in Los Angeles, California, for more than 20 years, had taught pathology at UCLA Medical Center and USC Medical Center, had published some 14 books and articles related to pathology, and had performed some 5,000 - 8,0000 autopsies during his medical career, including autopsies of children with trauma to the brain.

Siegler testified that when the gross autopsy was performed, fresh blood was observed. However, a month later, when the neuropathological exam was performed, old blood was found. At that point, Siegler testified that it should have been apparent to everyone concerned that there was a lesion in the brain that was weeks old and the trauma was incompatible with Shaken Baby Syndrome.

Siegler testified that he had never heard of infants dying as a result of sudden shearing or tearing of brain tissues such that the respiratory centers of the brain are repressed and death occurs instantly. Such a proposition is "fantasy . . . it is possible, it is also not possible and . . . that is what we call fantasy . . . there is no way to confirm it or deny it." RT 1249. Siegler testified that he had never read any medical literature that dealt with sudden compression which damaged brain tissue and caused death unless there was hemorrhaging. While hemorrhaging was present in this case, it was superficial. The photographs from the neuropathological exam demonstrated that there was **no** hemorrhaging inside the brain, **nor** was there any destruction of any tissue inside the brain.

Sieger testified that when, as a result of an autopsy, coroners are unable to microscopically observe the mechanism of death, they cannot assign a cause of death. In those cases, the cause of death must be signed out as "indeterminate," meaning that they have done the best they can and they really can't say what the cause of death was." R.T. 1162.

Respondent Smith also called Dr. William Goldie, a doctor who specialized in neurology and pediatric neurology at Standford Medical School, and who had taught neurology at the University of Texas Health Center, the University of Southern California Medical School and the UCLA Medical School.

Based upon his review of the autopsy protocol, the neurological report and the eye report, Dr. Goldie testified that Erlich and Carpenter could determine the cause of death in this case. The autopsy findings were trivial and could not explain the infant's death. The brainstem was normal and the condition of the brain itself did not show any serious injury or swelling. There was no evidence of herniation of the brain and the small amount of blood which was found on the brain could not have crushed the brain.

Goldie testified that death in Shaken Baby Syndrome cases is typically not immediate. Infants are not found dead in bed, rather they have seizures or an apneic event and are taken to the hospital. Then, if they experience brain swelling, it normally takes hours for the infant to die. There was no massive swelling or massive bleeding in the brain in this case. The findings at autopsy were clinically insignificant and the absence of such findings at autopsy more likely diagnose the case as a Sudden Infant Death Syndrome case. The markers observed at autopsy and during the subsequent neuropathological exam and eye pathology, were classically those of Sudden Infant Death Syndrome cases, as opposed to Shaken Baby Syndrome cases.

C. The State Court Opinion.

The California Court of Appeals affirmed Smith's conviction and sentence

in an unpublished opinion, filed February 10, 2000. See Petition, Appendix A. With respect to Smith's contention on appeal that there was insufficient evidence to prove that the infant died from Shaken Baby Syndrome, the Court of Appeal summarized the trial testimony by the prosecution's medical experts in three pages of its twenty-three page opinion.

First, the court reported the physical findings at autopsy by Carpenter and Erlich, that being the blood on the top of the infant's brain, the abrasion on the back of his head, the subdural and subarachnoid hemorrhages and the bleeding around the optic nerves. App. A, pgs. 6a - 7a.

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

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

A, pg.. 8a.

The court then addressed the testimony of Dr. Erlich, who corroborated Dr. Carpenter's testimony about the autopsy findings of the infant. The court also included Dr. Erlich's testimony concerning the neuropathological examination which she conducted on the infant's brain, along with Dr. Hidelo Itabashi, and Dr. Erlich's testimony concerning the presence of subarachnoid and subdural hemorrhages. The court reported Dr. Erlich's testimony that in her opinion the cause of death was trauma to the brain. App. A, pgs. 9a - 10a.

The significance of the court's opinion concerning the testimony of the prosecution's medical experts was not that which was included in the opinion, but rather the more significant testimony from Carpenter and Erlich which was **not** mentioned in the opinion at all. The court **failed** to mention that Carpenter and Erlich agreed that two of the recognized causes of death in Shaken Infant Syndrome cases are massive swelling of the brain or massive bleeding within the infant's skull, which both cause the brain to be pushed downward within the skull ultimately crushing the brainstem, causing the infant's death. The court **failed** to mention that Carpenter and Erlich agreed that there was no massive swelling of the brain and no massive bleeding within the infant's skull.

More importantly, the court **failed** to mention that Erlich and Carpenter both

agreed there was no observable injury to the brain, either during the autopsy or during the microscopic examination of the brain during the neuropathological examination. Further, the court **failed** to include the testimony of both Carpenter and Erlich that the brainstem itself was intact when it was examined during the autopsy and had not been submitted for the neuropathological examination because neither doctor expected that any damage would be found.

Having omitted any mention of the most significant admissions of the prosecution experts, that being the fact that both experts agreed that their opinion that the infant had died as a result of direct injury to his brain could not be substantiated in any way by the medical findings by these experts after the infant's death, the court of appeal simply concluded that there was conflicting expert evidence presented to the jury and it was for the jury to resolve such conflicts. App. A, pg. 12a. This conclusion, without any meaningful analysis of the trial testimony nor any analysis of the federal standard concerning sufficiency of evidence to support a criminal conviction, particularly in a case which resulted in a life sentence, was an unreasonable application of Jackson v. Virginia, 443 U.S. 309, 319 (1979).

D. The Federal Court Proceedings.

During the federal habeas proceedings, Magistrate Judge Patrick J. Walsh,

in his report and recommendation to the district court, stated:

> This is not the typical Shaken Baby case. Grandmothers, especially those not serving as the primary-care takers, are not the typical perpetrators. Further, Petitioner [Smith] was helping her daughter raise her other two children (a two-year-old and a fourteen-month-old) and there was no hint of Petitioner abusing or neglecting these other children, who were in the room with Etzel when he died. Still further, there was no evidence of any precipitating event that might have caused Petitioner to snap and assault her grandson. She was not trapped in a hopeless situation with a child she did not want or love. Nor was she forced to single-handedly care for a baby that had been crying all day and all night. In fact, there was no evidence that Etzel was doing anything other than sleeping the night that he died. The medical evidence was not typical either, in that some of the tell tale signs usually found in Shaken Baby cases did not exist in this case.

Petition, Appendix C, pgs. 37a - 38c.

In fact, the baby's mother, Tomeka Smith, was sleeping in the adjoining bedroom, a few feet away from Respondent Smith and Etzel the night he died.

II.

REASONS FOR DENYING THE PETITION

A. The Ninth Circuit Court of Appeals Did Not Simply Accept the Defense Experts' Opinions and Reject the Prosecution's Experts' Opinions in Granting the Writ of Habeas Corpus, but Rather Correctly Found That the Prosecution Experts' Opinions Were Not Supported by Any Reasonable Evidence.

Petitioner attempts to characterize this case as one in which the Ninth Circuit Court of Appeals re-weighed conflicting expert testimony concerning the cause of the infant's death and substituted its view that the defense experts were more persuasive than the prosecution's experts. See Petition, pg. i, 17, 20. Petitioner mischaracterizes the Ninth Circuit's decision in an obvious attempt to garner this Court's attention to the case. The Ninth Circuit did not choose the defense experts' testimony over that of the prosecution, but rather found that the scientific evidence agreed upon by all five medical experts in the case did not support the prosecution experts' opinion that the infant died as a result of Shaken Baby Syndrome. The Ninth Circuit relied upon the admissions of the

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

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

The very existence of the reasonable doubt test set forth in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979), presupposes that juries, accurately charged on the elements of a crime and on the strict burden of persuasion to which they must hold the prosecution, nevertheless "may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt. [The test] was adopted to provide an additional safeguard against that possibility, and was to give added assurance that guilt should never be found except on a rationally supportable state of near certitude." West v. Wright, 931 F.2d 262, 268 (4th Cir. 1991), rev'd on other grounds, 505 U.S. 277, 112 S.Ct. 2482 (1992)(quoting Jackson v. Virginia, 443 U.S. at 315, 99 S.Ct. at 2786).

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

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

In addition, the infant, Etzel Smith, had no history of any abuse and

presented at the hospital with no observable signs of any physical abuse inflicted upon him. The infant had acted normally the evening he died, going to sleep on his stomach in the living room area of the apartment, with his mother asleep a few feet away in an adjoining bedroom. Smith found the infant to be unresponsive and limp at approximately 3:20 a.m. on November 30, 1997. Emergency personnel were summoned, but the infant could not be revived. The diagnosis by the emergency room doctor was that the infant died as a result of Sudden Infant Death Syndrome.

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

Except for the minor bleeding, there were no other findings indicating any

trauma to the infant, either internally or externally. There were no fractures of any of the infant's bones, there was no bruising observed on the infant's body, there were no sprains or dislocations of any of the infant's joints, there was no swelling of the infant's brain and no significant bleeding within the infant's skull.

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

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

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

brainstem were normal and intact.

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

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

This case has nothing to do with the Ninth Circuit choosing one set of experts over the other set of experts, but rather the court's correct conclusion that the hypothesis offered by the prosecution experts had no evidentiary support of any kind from the agreed upon medical findings of the gross autopsy, the neuropathological examination of the brain and the eye pathology of the infant's eyes. The Ninth Circuit was correct in concluding that a defendant cannot be found guilty beyond a reasonable doubt and sentenced to life in prison based upon an **absence of evidence** to support the hypothesis of the state's experts.

B. The Case Law Relied upon by Petitioner Does Not Support Her Argument Concerning a Violation of Principles of Constitutional Sufficiency Regarding the Review of Jury Decisions Based upon Conflicting Expert Opinions Offered at Trial.

Respondent argues that the substantial evidence rule, and the deference it mandates, applies to judicial review of a jury's resolution of conflicts in expert witness opinion testimony. See Petition, pg. 16-23. While this statement, on its face, is somewhat unremarkable, the case law upon which Petitioner then relies to argue that the Ninth Circuit abused this rule does not support her contention.

In Moore v. Deckworth, 443 U.S. 713 (1979), this Court did not consider the issue of a jury's verdict based upon conflicting expert testimony, but rather, simply affirmed a decision of the Seventh Circuit Court of Appeals, upholding an

Indiana State law which allowed the jury to make sanity decisions based upon lay testimony, and its finding that there was sufficient lay testimony to support the jury's verdict.

Petitioner relies upon Knapp v. Leonardo, 46 F.3d 170 (2nd Cir. 1994), a case in which experts offered different opinions concerning the time of death of the victim. However, the issue decided by the jury was whether the defendant "consciously disregarded an unjustifiable risk to [the victim's] health." Id. at 178. In addition to the expert's differing opinions, the jury was able to rely upon a co-defendant's testimony that the defendant had asked him to falsely testify to an alibi, that the defendant had admitted murdering the victim, and that the defendant was arrested when he attempted to move the victim's corpse from one location to another, evidence which supported the jury's second-degree manslaughter verdict.

In citing to United States v. Boynton, 63 F.3d 337 (4th Cir. 1995), Petitioner asserts there was a conflict among "prosecution and defense experts." See Petition, pg. 20. In fact, the prosecution called experts in its case in chief, while the defense called one of the defendants and the defendant's father, a state natural resources police officer. No defense experts testified.

Petitioner's reliance upon Aucion v. Jones, 759 F.2d 449 (5th Cir. 1985), is misplaced since there was no issue of conflicting expert testimony in the case.

The defendant presented evidence that she was intoxicated on drugs at the time she killed her young daughter. In response, the prosecution psychiatric expert testified that she was nonetheless capable of forming the necessary intent to kill despite her drugged condition. No defense expert testified to the contrary.

In relying upon Weeks v. Scott, 55 F.3d 1059 (5th Cir. 1995), petitioner characterizes the court's decision as an issue involving a conflict between prosecution and defense experts concerning whether the H.I.V. virus could be spread by saliva. The two H.I.V.- qualified experts called by the prosecution testified that H.I.V. could possibly be transmitted by saliva, citing to approximately ten cases of transmission through saliva, while the defense H.I.V. - qualified expert opined that the chance of such transmission was "extremely remote. . ." 55 F.3d at 1063.

Next, Petitioner relies upon Brewer v. Overburg, 624 F.2d 51 (6th Cir. 1980), for the proposition that a murder conviction rested upon conflicting expert testimony regarding the possible accidental firing of the murder weapon. While the court indicated that there was conflicting testimony about the possibility of an accidental firing of the murder weapon, the court went on to point out that there was other substantial evidence supporting the conviction including the testimony of the victim's son, who testified that the defendant had argued with his mother,

had gone to a bedroom and obtained the gun and the son then heard his mother cry "Oh no," followed by a gun shot. In addition, other witnesses testified about frequent arguments between the defendant and the deceased. 624 F.2d at 52. While there was conflicting expert testimony, the jury's verdict was based upon other substantial evidence of guilt.

Petitioner then relies upon an unpublished opinion in Harding v. Bock, 107 Fed. Appx. 471 (6th Cir. 2004), for the proposition that the parties' experts differed as to the cause of death. In fact, the prosecution called two experts who were qualified as forensic pathologists, who testified as to the cause of death. Defendant called a family practitioner, who offered a different opinion as to the cause of death. While the defense expert offered a different opinion, he hardly had the qualifications to support his opinion.

Petitioner then relies upon Miller v. Leapley, 34 F.3d 582 (8th Cir. 1994), again a case in which there was differing expert testimony concerning the time of the victim's death. Petitioner fails to point out that there was other substantial evidence pointing to the defendant's guilt, including the fact that the defendant demanded ransom money in exchange for the safe return of the victim, retrieved the ransom money, gave police five differing and conflicting stories concerning his involvement in the case, as well as evidence of hair, fiber and blood samples

supporting the prosecution's assertion that the victim had been transported in the defendant's car. This is yet another case in which the jury had substantial evidence, other than the expert testimony, upon which to base their verdict.

Petitioner then cites to United States v. Oliver, 278 F.3d 1035 (10th Cir. 2001), for the proposition that expert testimony is "solely within the province of the jury" to weigh and resolve. See Petition, pg. 21. While there was conflicting expert testimony concerning the reliability of a bank teller's eyewitness identification of the defendant, Petitioner fails to point out that the jury also was able to rely upon the testimony of a cooperating co-defendant who implicated the defendant in the bank robberies, as well as surveillance photographs of the defendant from the bank which the jury relied upon in convicting the defendant. 278 F.3d at 1042-43.

Petitioner then relies upon Bottoson v. Moore, 234 F.3d 526 (11th Cir. 2000), for the proposition that "where there is conflicting testimony by expert witnesses, as here, discounting the testimony of one expert constitutes a credibility determination, a finding of fact." See Petition, pg. 22. Petitioner fails to mention that this is not a case involving a sufficiency of evidence issue after a jury trial, but rather an issue related to a defendant's claim of ineffective assistance of counsel after the defendant was convicted and sentenced to death.

At an evidentiary hearing concerning a habeas petition, a state judge, not a jury, accredited the testimony of a prosecution psychiatrist concerning the defendant's mental health and competency at the time of his trial, some ten years earlier, and discredited the opinion of a defense psychiatrist concerning the defendant's mental health. This decision is hardly relevant to the issue raised in this case.

Petitioner then offers a series of cases for the proposition that a determination of whether to credit expert testimony is within the exclusive province of the jury. In these cases, while there is differing expert testimony presented to the juries, the issues in all of the cases concern the defendant's sanity, mental health, and/or competency to stand trial. These cases include United States v. Bramlet, 820 F.2d 821 (7th Cir. 1987); Strickland v. United States, 316 F.2d 656 (D.C. Cir. 1963); United States v. Segna, 555 F.2d 226 (9th Cir. 1977); People v. Ledesma, 39 Cal.4th 641 (2006); People v. Marshall, 15 Cal.4th 1 (1997); People v. Wolff, 61 Cal.2d 795 (1964). See Petition, pg. 22.

Cases in which expert psychiatrists offer differing opinions concerning the defendant's sanity and/or mental health are hardly comparable to the sufficiency of evidence issue raised in this case, where a group of pathologists and one pediatrician relied upon uncontroverted medical evidence from a gross autopsy, a

neuropathological exam and an eye pathology exam in reaching their various opinions concerning the infant's cause of death.

Next, Petitioner cites to People v. Poe, 74 Cal.App 4th 826, 88 Cal.Rptr.2d 437 (1999), for the proposition that the jury has the exclusive province to credit expert testimony. The Poe case does not involve any determination by a trial jury concerning conflicting expert testimony but rather is a decision by a state court judge finding that there was sufficient evidence that an inmate was likely to engage in violent sexual behavior if released from prison. The decision has nothing to do with any jury determination concerning expert testimony.

In citing to state court opinions, Petitioner relies upon State v. Trask , 234 Mont. 380 (1988), concerning "expert witness conflicts . . ." See Petition, pg. 23. Again, in Trask, no expert prosecution witness testified but the prosecution did provide substantial evidence of defendant's requisite memo state to commit the charged felony assault. In Mickens v. State, 277 Ga. 627 (2004), there was conflicting expert evidence concerning the cause of the fire in question, but the jury was able to rely upon overwhelming prosecution evidence of guilt, including the defendant's confession to the crime. Similarly, in State v. Sosa, 921 S. 2d 94 (La. 2006), there was conflicting expert evidence concerning the cause of a fire, but the jury again was able to rely upon substantial prosecution evidence of guilt,

including surveillance evidence of a defendant entering and leaving the residence late at night shortly before the fire started. The defendant also had substantial economic motive to set the fire.

III.

CONCLUSION

The death of an infant, such as Etzel Smith, is an unnatural tragedy and, in the face of such a tragedy, there is a societal need to assign blame, to hold someone responsible. However, much as the death of an infant child demands an explanation, society must also be concerned about due process and the constitutional mandate that all persons be presumed innocent until proven guilty. The Ninth Circuit Court of Appeals was correct when it found that the hypothesis advanced by Los Angeles County Coroners Erlich and Carpenter, that the baby died as a result of violent shaking which tore or sheared the brain and/or the brainstem, failed to meet the mandate of proof beyond a reasonable doubt since the same experts admitted that there was no medical evidence of any tearing or shearing of the brain or the brainstem in this case. The coroners' hypothesis of

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"instant death/no observable brain injury" was constitutionally insufficient to support the jury's finding of guilt. The petition must be denied.

Dated: _____

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