Statement in Support of Application for Commutation of Sentence for Shirley Ree Smith

On December 8, 1997, Shirley Ree Smith was convicted of assault on a child causing death, in violation of California Penal Code Section 273ab. She was subsequently sentenced to 15 years to life in prison.

In the fall of 1996, Ms. Smith, her daughter, Tomeka Smith and Tomeka's two children, Yandale and Yolanda, moved from Illinois to Los Angeles, California. On October 10, 1996, Tomeka Smith gave birth to Etzel Smith, a 5 pound, 4 ounce baby boy.

On the evening of November 29, 1996, Ms. Smith, her daughter, Tomeka, and Tomeka's children were staying at a relative's apartment in the Los Angeles area. That evening Tomeka placed Etzel on the living room couch to sleep, the same room in which Ms. Smith and Tomeka's two other children were sleeping. Tomeka went to sleep a few feet away in a nearby bedroom.

In the early morning hours of November 30, 1996, Ms. Smith awoke to find Etzel unresponsive and not breathing. Ms. Smith rushed into the bedroom holding Etzel and told Tomeka to call 911.

Firefighters received the 911 call and responded promptly to the apartment where they observed the baby lying on the bed, clothed, warm, but not breathing and with no heartbeat. The emergency personnel did not observe any external injuries to the baby. They began CPR and other resuscitative efforts, without success. The infant was taken by ambulance to a nearby hospital in full arrest, with no pulse, respiration or blood pressure. The attending physician at the hospital thereafter pronounced the infant dead and indicated that the cause of death was

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Sudden Infant Death Syndrome ("SIDS"), a death with no known cause.

An autopsy of the infant was performed by Dr. Stephanie Erlich, an associate deputy medical examiner, who was not board certified in forensic pathology and who had never performed an autopsy on an infant who had died of suspected Shaken Baby Syndrome. At autopsy, a small amount of recent bleeding (approximately 1 - 2 tablespoons) was found on the brain. There was also evidence of old subdural bleeding, and both old and new bleeding around the optic nerves. Also there was a small abrasion, approximately 1/16 x 3/16 of an inch, on the lower skull and a recent bruise below this abrasion. No photographs were taken of the blood on the brain and no photographs were taken of the bruise inside the scalp. Dr. Eugene Carpenter, Jr., supervised the autopsy of the infant, but was not physically present until Dr. Erlich observed the small amount of blood on the brain. Based upon these findings, Carpenter and Erlich reported to authorities that they had concluded that the infant died as a result of violant shaking causing instant death. Ms. Smith was charged with the crime.

At trial, both Dr. Carpenter and Dr. Erlich agreed that the two most common causes of death in Shaken Baby Syndrome cases are massive bleeding within an infant's skull or massive swelling of an infant's brain, both causing the brainstem to be crushed resulting in the infant's death. Both doctors agreed that the infant did not die as a result of massive bleeding nor massive swelling of his brain. Both doctors agreed that in Shaken Baby Syndrome cases there is usually other evidence of physical trauma to the infant, including fractured bones, displacement or dislocation of the infant's joints, and/or hemorrhaging of the joints in the neck. Both doctors agreed that Etzel did not suffer from any fractured bones, did not have any displaced or dislocated joints, nor did he have any hemorrhaging of the joints in the neck.

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Both doctors also agreed that the small amount of blood on the brain, the old and new subdural hemorrhages, and the hemorrhaging around the optic nerves were not in isolation or in combination the cause of death of the infant.

Despite the absence of physical findings which both doctors admitted were normally present in cases involving Shaken Baby Syndrome, Carpenter and Erlich testified at trial that the infant's death was caused by the shearing or tearing of the brainstem or the brain itself, as a result of violent shaking. The autopsy, however, had revealed no physical evidence of such injury, either grossly or microscopically. Dr. Carpenter was unable to identify which particular areas of the brain were injured. The neuropathological examination, which was performed after the autopsy, did not produce any evidence of specific brain injury. Neither Dr. Erlich nor Dr. Carpenter located any observable tear or shearing of the brain or the brainstem. In fact, neither Dr. Erlich nor Dr. Carpenter cut open Etzel's brainstem nor did they submit the brainstem for neuropathological examination, because, in their own words, "we wouldn't have seen anything anyway."

Neither doctor testified to ever having performed an autopsy on an infant in which they had reached a similar conclusion, nor did either physician refer to any medical literature supporting their conclusion that instant shearing or tearing of the brainstem or the brain, without supporting physical findings, could have caused Etzel's death. The doctors conclusions turned on, as Dr. Erlich testified, "[d]irect trauma which we don't see to the brainstem." Dr. Erlich conceded that "[i]t is a difficult concept to absorb."

The state failed to present any forensic or other scientific evidence to support the conclusions reached by Carpenter and Erlich. Moreover, it was uncontroverted that Ms. Smith

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The state failed to present any forensic or other scientific evidence to support the conclusions reached by Carpenter and Erlich. Moreover, it was uncontroverted that Ms. Smith

had no history of violence, no history of any social problems, no history of any child abuse upon her children or her grandchildren, no history or infliction of corporal punishment upon her children or grandchildren and no evidence of a predisposition to commit the violent act attributed to her. The infant, Etzel, had no history of any abuse and presented at the hospital with no observable evidence of any physical abuse.

The state failed to present any motive or precipitating event that might have led Ms. Smith to shake Etzel violently. While caregivers have certainly been known to shake crying infants, no evidence was presented to show that Etzel was crying in the hours before he died. In fact, any loud crying would have awoken his siblings in the same room and his mother, who was asleep in the nearby bedroom. No one was disturbed prior to Ms. Smith finding Etzel unresponsive.

After Ms. Smith had been convicted and sentenced, she exhausted her post-conviction remedies in the California state courts prior to filing a petition for writ of habeas corpus in the United States District Court for the Central District of California in 2001. After briefing, Magistrate Judge Patrick J. Walsh recommended to the district court that the petition be denied but, in so doing, he described the troubling state of the evidence in the case as follows:

> 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 was helping her daughter raise her other children (a 2-year-old and a 14-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

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> night. In fact, there is 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 telltale signs usually found in shaken baby cases did not exist in this case.

See Exh. A., *Smith v. Mitchell*, 437 F.3d 884, 889 (9th Cir. 2006)

Ms. Smith appealed the district court's denial of her petition to the Ninth Circuit Court of Appeals, asserting that her conviction violated due process because the evidence was constitutionally insufficient.

After reviewing the evidence presented at trial by the state, the Ninth Circuit agreed with Ms. Smith that no rational trier of fact could have found beyond a reasonable doubt that she had caused the child's death. The court further found that the state court's affirmance of Ms. Smith's conviction constituted an unreasonable application of *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), which established the standard for constitutional sufficiency of evidence.

First, the Ninth Circuit found that there was no non-medical evidence supporting the state's assertion that Ms. Smith had killed the infant. The court concluded that any constitutionally permissible finding of guilt in the case therefore depended upon the state's expert testimony concerning the cause of death.

In reviewing the expert testimony by the state, that being the testimony of Carpenter and Erlich, the Ninth Circuit stated:

> There is no question that the prosecution experts testified that a shaking had caused the death, but they conceded the absence of the usual indicators of violent shaking such as bruises on the body, fractured arms or ribs, or retinal bleeding. There was bleeding on the brain, both old and new, but not enough to cause death. All of the prosecution witnesses based their opinion of Shaken Baby Syndrome on their hypothesis that violent shaking had torn or sheared the brain stem in an undetectable way. Their testimony was not that the brain demonstrated death in the usual manner of Shaken Baby Syndrome,

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> caused by excessive bleeding or swelling that crushes the brain stem. Instead, their testimony was that death was caused by shearing or tearing of the brain stem and they reached this conclusion because *there was no evidence in the brain itself of the cause of death*. Thus, as the defense expert, Dr. Siegler stated, the tearing might have occurred or it might not have occurred; there is simply no evidence to permit an expert conclusion one way or the other on the point. This is simply not the stuff from which guilt beyond a reasonable doubt can be established, especially in the face of all other circumstances, many of which were recited by the magistrate judge, making the crime unlikely. An expert's testimony as to a theoretical conclusion or inference does not rescue a case that suffers from an underlying insufficiency of evidence to convict beyond a reasonable doubt. (citation omitted)

Exh. A., *Smith* at 890.

The Ninth Circuit reversed the judgment of the district court and remanded the case with instructions to grant the writ. In 2006, after the district court granted the writ and set aside Ms. Smith's underlying conviction and sentence, Ms. Smith was released from custody having served some ten years in prison.

Unfortunately, the decision by the Ninth Circuit Court of Appeals overturning Ms. Smith's state court conviction was simply the beginning of an unfortunate tug-of-war between the Ninth Circuit and the United States Supreme Court. For more than six years, Ms. Smith's case moved from the Ninth Circuit to the United States Supreme Court, which granted a petition for writ of certiorari filed by the state on two separate occasions, with the court vacating the Ninth Circuit's decision and remanding the case to the circuit court for reconsideration. Twice the Ninth Circuit reinstated the decision it reached in 2006. In 2011, the Supreme Court reviewed Ms. Smith's case for a third time. On October 31, 2011, the court issued a per curiam opinion reversing the Ninth Circuit's decision setting aside Ms. Smith's conviction. *See*, Exhibit B., *Cavazos v. Smith*, 565 U.S. ____ (2011).

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That battle of judicial wills was rooted in differences not over Ms. Smith's guilt or innocence of the charged crime, but in a conflict between the justices concerning the role of federal courts in habeas corpus cases filed by state prisoners. The per curiam majority acknowledged that "[d]oubts about whether Smith is in fact guilty are understandable. But it is not the job of this court, and was not that of the Ninth Circuit to decide whether the state's theory was correct." Exh. B, *Cavazos* at 7.

The majority went on to state the following:

> It is said that Smith, who already has served years in prison, has been punished enough, and that she poses no danger to society. These or other considerations perhaps would be grounds to seek clemency, a prerogative granted to executive authorities to help ensure that justice is tempered by mercy. It is not clear to the Court whether this process has been invoked, or, if so, what its course has been. It is not for the Judicial Branch to determine the standards for this discretion. If the clemency power is exercised in either too generous or too stingy a way, that calls for political correctives, not judicial intervention.

Exh. B, *Cavazos* at 8.

Justice Ginsburg, joined by Justice Bryer and Justice Sotomayor, dissented. Justice Ginsburg pointed out that there is reason to question the Carpenter-Erlich cause of death theory due to changes in the thinking of the medical community concerning Shaken Baby Syndrome. Justice Ginsburg stated:

> ...Doubt has increased in the medical community "over whether infants can be fatally injured through shaking alone." *State v. Edmunds,* 2008 WI App. 33, ¶15, 308 Wis. 2d 374, 385, 746 N. W. 2d 590, 596. See, e.g., Donohoe, Evidence- Based Medicine and Shaken Baby Syndrome, Part I: Literature Review, 1966-1998, 24 Am. J. Forensic Med. & Pathology 239, 241 (2003) (By the end of 1998, it had become apparent that "there was inadequate scientific evidence to come to a firm conclusion on most aspects of causation, diagnosis, treatment, or any other matters pertaining to SBS," and

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> that "the commonly held opinion that the finding of [subdural hemorrhage] and [retinal hemorrhage] in an infant was strong evidence of SBS was unsustainable."); Bandak, Shaken Baby Syndrome: A Biomechanic's Analysis of Injury Mechanisms, 151 Forensic Sci. Int'l 71, 78 (2005) ("head acceleration and velocity levels commonly reported for SBS generate forces that are far too great for the infant neck to withstand without injury .... [A]n SBS diagnosis in an infant ... without cervical spine or brain stem injury is questionable and other causes of the intracerebral injury must be considered."); Minns, Shaken Baby Syndrome: Theoretical and Evidential Controversies, 35 J. Royal College of Physicians of Edinburgh 5, 10 (2005) ("[D]iagnosing 'shaking' as a mechanism of injury ... is not possible, because these are unwitnessed injuries that may be incurred by a whole variety of mechanisms solely or in combination.");Uscinski, Shaken Baby Syndrome: An Odyssey, 46 Neurol. Med. Chir. (Tokyo) 57, 59 (2006) ("[T]he hypothetical mechanism of manually shaking infants in such a way as to cause intracranial injury is based on a misinterpretation of an experiment done for a different purpose, and contrary to the laws of injury biomechanics as they apply specifically to the infant anatomy."); Leestma, Case Analysis of Brain-Injured Admittedly Shaken Infants, 54 Cases, 1969-2001, 26 Am. J. Forensic Med. & Pathology 199, 211 (2005) ("[M]ost of the pathologies in allegedly shaken babies are due to impact injuries to the head and body."); Squier, Shaken Baby Syndrome: The Quest for Evidence, 50 Developmental Med. & Child Neurology 10, 13 (2008) ("[H]ead impacts onto carpeted floors and steps from heights in the 1 to 3 feet range result in far greater ... forces and accelerations than shaking and slamming onto either a sofa or a bed.").

Exh. B, *Cavazos*, Ginsberg dissent, pg. 5

Justice Ginsberg also noted that Ms. Smith had been represented "poorly at trial. In a case as trying as this one, competent counsel might have persuaded the jury to disbelieve the prosecution's case." *Id.* at pg. 8. In the view of the dissenting justices, "[w]hat is now known about shaken baby syndrome (SBS) casts grave doubt on the charge leveled against Smith; and uncontradicted evidence shows that she poses no danger whatever to her family or anyone else in society." *Id.* at pg. 3.

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Given the paucity of evidence supporting Ms. Smith's finding of guilt, the fact that she has been a law-abiding citizen for more than 50 years, save this single conviction, and given the fact that she has served more than ten years in custody for a conviction about which the U.S. Supreme Court acknowledges "doubts" about her guilt, it is respectfully requested that the governor commute her sentence to a time-served sentence, allowing the conviction to stand, but directing that she not be reincarcerated as a result of the conviction.

Dated: 12/21/11

s/ Michael J. Brennan
Michael J. Brennan
Attorney for Shirley Ree Smith

Dated: 12/22/11

/s/ Dennis P. Riordan
Dennis P. Riordan
Attorney for Shirley Ree Smith