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**BEFORE THE VICTIM COMPENSATION BOARD
OF THE STATE OF CALIFORNIA**

In the Matter of the Claim of:

Shirley Ree Smith

Notice of Decision

On September 15, 2016, the California Victim Compensation Board adopted the attached Proposed Decision of the Hearing Officer as its Decision in the above-referenced matter.

Date: September 16, 2016



Tisha Heard
Board Liaison
California Victim Compensation Board

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6 **BEFORE THE VICTIM COMPENSATION BOARD**
7 **OF THE STATE OF CALIFORNIA**
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9 In the Matter of the Claim of:

10 **Shirley Ree Smith**

Proposed Decision

(Penal Code § 4900 et seq.)

11 **Introduction**

12
13 Shirley Ree Smith's (Smith) claim for compensation as an erroneously convicted person was
14 heard on April 22, 2016, in Sacramento, California. Senior Attorney Kyle Hedum was assigned to
15 hear this matter by the Executive Officer of the California Victim Compensation Board. Smith was
16 represented by Robert B. Humphreys, Justin Brooks, Alexander Simpson, and Raquel Cohen. The
17 California Department of Justice, Office of the Attorney General (AG), was represented by Clifford E.
18 Zall.

19 Smith bears the burden of proving by a preponderance of the evidence that she is innocent
20 of the crime of assault of a child causing death. Because there has been no finding of factual
21 innocence and because there is no consensus that the child's death was the result of natural causes,
22 it is determined that Smith has not proven by a preponderance of the evidence that she is innocent
23 and her claim for compensation is recommended for denial.

24 **Procedural Background**

25 On May 6, 1997, the Los Angeles County District Attorney's Office charged Smith with
26 assault on a child causing death.¹ The theory advanced at trial was that Smith inflicted a violent
27 shaking on her seven-week-old grandson, Etzel, which caused his quick demise.

28 ¹ Penal Code section 273ab.

1 Following a jury trial, Smith was found guilty as charged. On December 23, 1997, Smith
2 was sentenced to state prison for a term of 15-years-to life. In an unpublished opinion dated
3 February 10, 2000, the California Court of Appeal, Second Appellate District, Division Four, affirmed
4 the judgment in all relevant respects.

5 Following exhaustion of her state court options, Smith sought review in the federal courts.
6 In an opinion filed on February 9, 2006, the Ninth Circuit Court of Appeals granted Smith relief under
7 28 U.S.C. section 2254. The court determined that there was insufficient evidence to support Smith's
8 conviction. The appellate court ordered the district court to grant Smith's petition for writ of habeas
9 corpus. On August 11, 2006, Smith was released from the Central California Women's Facility.
10 Smith agreed to remain within the Central District of California pending further appeals. This and
11 additional conditions were to remain in force until either the deadline for the AG to file a writ of
12 certiorari passed or, if a writ was filed, until after the Supreme Court made its final ruling. On October
13 12, 2006, the AG filed a writ of certiorari. Over the next five years, Smith's case went back and forth
14 between the United States Supreme Court and the Ninth Circuit Court of Appeal without a final
15 resolution.

16 On October 31, 2011, the United States Supreme Court reversed the judgment of the Ninth
17 Circuit. In its 6-3 per curium opinion, the United States Supreme Court ordered Smith's conviction to
18 be reinstated. A majority of the Court acknowledged that doubts about whether Smith was in fact
19 guilty were understandable and that Smith's case may be appropriate for executive clemency.
20 Although her conviction was reinstated by the United States Supreme Court, Smith never returned to
21 custody following her 2006 release.

22 On December 21, 2011, Smith filed an application for commutation of her sentence with
23 Edmund G. Brown, the Governor of the State of California. On January 11, 2012, Los Angeles
24 County District Attorney Steve Cooley filed a letter responding to Smith's clemency request. The
25 letter to Governor Brown stated in part:
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1 "If, however, your decision whether to grant clemency to Ms. Smith is in any way predicated
2 on the issue of the underlying science that establishes the foundation for AHT² as a
3 medically approved finding, this office hereby requests an opportunity to be heard in order
4 to provide you with a full and complete record of the evidence supporting this well-
5 established and widely-accepted medical diagnosis. A decision to grant Ms. Smith's
6 clemency based upon a misunderstanding of the validity of the medical evidence presented
7 at Smith's trial would undermine the public confidence in well-established medical
8 diagnoses of child abuse, and it would contravene the work of myriad local and national
9 health organizations as well as public safety officials, which have for decades been working
10 to protect our communities from the dangers of AHT as it pertains to infants and toddlers."

11 In responding to the request for clemency, the Los Angeles District Attorney's Office also
12 requested a number of medical experts to review the findings in the criminal case. Their conclusions
13 are as follows.

14 Dr. Carpenter, Senior Deputy Medical Examiner, maintained that Etzel's death was from a
15 markedly severe blunt force head trauma. In his opinion, death was not due to natural causes or
16 Sudden Infant Death Syndrome.

17 Dr. Lakshmanan, Los Angeles County Chief Medical Examiner, reviewed the records and
18 was of the opinion that Etzel died from inflicted trauma. He would classify the death as a homicide.

19 Dr. Ribe, Senior Deputy Medical Examiner, was less certain as to the cause of death. Due
20 to numerous diagnostic issues, Dr. Ribe determined that the cause of death should be diagnosed as
21 undetermined with intracranial hemorrhage listed under other significant consideration.

22 Dr. Berkowitz, Executive Vice-Chair of the Department of Pediatrics at Harbor-UCLA
23 Medical Center and Professor of Clinical Pediatrics at UCLA, determined that there was evidence that
24 Etzel suffered acute and recurrent abusive head trauma but she could not say with certainty the
25 precise time these injuries were inflicted.

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28 ² Abusive Head Trauma formerly referred to as Shaken Baby Syndrome.

1 On April 6, 2012, Governor Brown commuted Smith's sentence to a sentence of credit for
2 time served, citing that "significant doubts surround Ms. Smith's conviction." Notwithstanding the
3 Commutation by Governor Brown, Smith's conviction remained undisturbed.

4 On March 28, 2014, Smith filed a timely claim for compensation pursuant to Penal Code
5 section 4900 et seq. In her claim, Smith seeks compensation for the 3,168 days she was in custody
6 from the date of her conviction until her release from custody in August 2006. Smith also seeks
7 additional compensation for 2,058 days after her release on August 12, 2006, until her commutation
8 on April 6, 2012, claiming that she was under "release-related restrictions by the State of California"
9 during that time. Thus, Smith claims compensation for a total of 5,226 days.

10 **Facts³**

11 In 1996, Smith (age 34) moved to the Los Angeles area from Illinois with her daughter
12 Tomeka (age 18) and grandchildren Yondale (age 14 months) and Yolanda (age 4). Tomeka
13 subsequently gave birth to her third child, Etzel, in Los Angeles. Smith helped Tomeka care for Etzel,
14 Yolanda, and Yondale. Smith, Tomeka, and the children stayed in Hollywood with Smith's brother
15 Stephen. They also occasionally stayed with Smith's sister Rene at her apartment on Sepulveda
16 Place in Los Angeles.

17 Shortly after his birth, Etzel was diagnosed with jaundice and a grade one heart murmur. The
18 heart murmur was not harmful and it disappeared three days after it was diagnosed. Etzel was
19 gaining weight at a normal rate, his health was completely normal, and he exhibited no signs of child
20 abuse. Two weeks before his death, Etzel had no noticeable physical problems. He was eating
21 formula and cereal approximately every two hours. On November 29, 1996, Tomeka was at Rene's
22 apartment on Sepulveda Place with Smith, Etzel, Yondale, and Yolanda. Etzel ate well that day. He
23 smiled and moved his arms and legs. He urinated and had bowel movements.

24 That night Tomeka fed, changed, and washed Etzel before rocking him to sleep and laying
25 him on the couch in the living room. She placed him on his stomach with his face to the side.

26
27 ³ The "facts" are based upon appellate opinions, the crime report, investigative reports, trial testimony,
28 court transcripts, and other claim-related documents. Some or much of the substantive content of
these documents and statements may be disputed by Smith.

1 Yondale also slept on the couch. Yolanda slept on the love seat. Rene left the apartment for work at
2 approximately the same time Tomeka laid Etzel down to sleep. Tomeka remained in the living room
3 for approximately one and a half hours. She checked on Etzel and saw that his face was still turned
4 to the side toward the back of the couch. He moved when she checked his diaper. Tomeka went to
5 the bathroom. When she returned, she checked on Etzel again. She moved him back up on the
6 couch pillow because his feet were hanging off the pillow.

7 Tomeka went into Rene's room to listen to music. Usually Tomeka slept in the living room
8 with her children and Smith; however, Tomeka dozed off in Rene's room while listening to music.
9 Sometime later that night, Smith entered the room and woke up Tomeka. Smith was carrying Etzel.
10 Etzel appeared limp and was quiet. Tomeka called 911. Over the telephone, paramedics instructed
11 Tomeka and Smith on CPR methods. At approximately 3:36 a.m., Los Angeles City Fire Department
12 personnel arrived at Rene's apartment and began CPR. Etzel was not breathing, he had no pulse,
13 and there was blood coming from his nose. Paramedics arrived in an ambulance and CPR continued
14 during the two minutes it took to get to Mission Community Hospital. Etzel was still warm, but he
15 appeared "chalky." He was not breathing and had no pulse or blood pressure. His eyes were dilated
16 and there was no brain activity.

17 Etzel was brought into Mission Community Hospital in full cardiac arrest at approximately
18 3:50 a.m. A physician evaluated Etzel and pronounced him dead. The physician noticed no obvious
19 sign of trauma. He suspected Etzel died as a result of Sudden Infant Death Syndrome; however, the
20 cause of death could not be determined without an autopsy.

21 Associate Medical Examiner Dr. Erlich performed the autopsy on Etzel's body. Following the
22 autopsy, Dr. Erlich concluded that the cause of death was Shaken Baby Syndrome. Senior Medical
23 Examiner Dr. Carpenter also participated in Etzel's autopsy. Dr. Carpenter was also of the opinion
24 that Etzel's cause of death was Shaken Baby Syndrome.

25 Dr. Siegler, a pathologist and professor of pathology at Harvard Medical School, was a
26 defense witness. He testified that Etzel did not die as a result of Shaken Baby Syndrome nor did he
27 die as a result of Sudden Infant Death Syndrome. Dr. Siegler believed the cause of death should
28 have been deemed "indeterminate."

1 Dr. Goldie, a pediatric neurologist with expertise on childhood brain trauma, was also a
2 defense witness. Dr. Goldie testified that Etzel was predisposed to Sudden Death Infant Syndrome
3 due to his low birth weight, jaundice, heart murmur, and sleeping on his stomach. Dr. Goldie did not
4 believe the autopsy findings supported a diagnosis of Shaken Baby Syndrome.

5 When Tomeka was first interviewed by police, she stated Smith told her that at 1:30 a.m. Etzel
6 had fallen off the couch and that she consoled him and put him back to sleep. Then later that night at
7 approximately 3:20 a.m. she was awakened again, checked on Etzel, and found him non-responsive.
8 Tomeka told police that Smith later told her that it was not Etzel but rather Yondale who had fallen off
9 the couch. The following day, Smith told Tomeka it was Yolanda who had fallen off the couch and
10 woke her up. It was at this time that Smith noticed that Etzel needed a diaper change. When she
11 went to change him, she discovered that he was limp.

12 A social worker spoke to Smith about a week after Etzel's death and she informed Smith that
13 the cause of death had been changed from an accident to a homicide. Smith told her that she had
14 been asleep on the living room floor and was awakened by Yondale. After she consoled Yondale
15 and got him back to sleep on the couch, she checked on Etzel who was also sleeping on the couch.
16 Smith discovered that Etzel was face down on the couch and was not moving. Smith told her that
17 she picked Etzel up and when he did not move, she became scared and worried. Smith said she
18 shook Etzel and demonstrated the shaking motion. Smith then said "Oh my god, what have I done?
19 Did I do it? Did I do something?" Smith then turned to Tomeka and said "Tomeka I'm so sorry. Did I
20 do it? Did I do it?"

21 Twelve days later, Smith told detectives that sometime in the early morning she was
22 awakened by Yolanda falling off the love seat and onto Smith's head. Smith stated that she put
23 Yolanda back on the love seat and checked on Yondale and covered him up. She then checked on
24 Etzel and smelled that he had a dirty diaper. She picked him up to change him and his head flopped
25 back. Detectives asked Smith if before she found Etzel non-responsive, had any of the other children
26 been crying. She responded "no." She was asked if any kids other than Yolanda had awoken. She
27 responded that Yondale had "woke up earlier." There was no mention of Etzel waking up. There was
28 no mention of any children other than Yolanda falling onto the floor.

1 Smith denied making the statements attributed to her by the social worker. She maintained
2 that she told her the same story that she told detectives. When the detectives told Smith the social
3 worker told them that she said Yondale – not Yolanda – had fallen on her, she claimed that both kids
4 had awoken. First, Yondale woke up crying and she consoled him and then later Yolanda fell on her
5 and woke her up and that is when she discovered Etzel non-responsive. During this exchange, there
6 was no mention of Etzel falling onto the floor or waking up earlier that night.

7 Fire Captain Marcione told detectives that when he arrived on scene, he went into the back
8 bedroom. Another firefighter was in the room with Smith and he informed Captain Marcione of the
9 blood coming from Etzel's nose. In response to hearing this, Smith stated "I think the baby fell."

10 Smith's Hearing Testimony

11 Smith was not present at the hearing but instead testified via telephone. Smith provided no
12 new information at the hearing. She continued to deny that she did anything to Etzel that could have
13 caused his death. She denied that she told anyone that she shook Etzel or that she was in any way
14 responsible for his death. She testified that she has no history of violence and that she had no reason
15 or motive to harm her grandson. She claimed that she never spanked any child or disciplined any
16 child in a physical manner. Smith further testified that she was used to crying babies and that such
17 crying was normal and would not cause her to lose control and shake or harm a child.

18 According to Smith, the social worker and others who were involved in this case lied when
19 they said she admitted to shaking Etzel. They also lied when they said that she demonstrated the
20 shaking motion that she used upon finding Etzel unresponsive. Smith testified that the social worker
21 lied because she was upset because Tomeka had so many children at such a young age. Smith also
22 testified that the detectives lied when they said that she shook Etzel in an attempt to see what was
23 wrong with him. Instead, she twisted Etzel back and forth to see if he was okay.

24 Smith also testified that she was present at Etzel's birth at Kaiser Hospital and that a midwife
25 used forceps to aid in Etzel's birth. She believes that the use of forceps might have contributed to
26 Etzel's death. Smith could not explain the reason this information was not presented at her trial,
27 habeas proceedings, or her request for clemency nor was she able to explain the reason Etzel's birth
28 records contained no mention of the use of forceps.

1 Smith presented documentary evidence that new research has shown that short falls (defined
2 as falls less than 3-4 feet) can be fatal to infants. Given the evidence that Etzel fell at least twice from
3 the couch on which he was sleeping, Smith argued that this new research supports the possibility that
4 shaking had nothing to do with Etzel's death. Smith also presented documentation from two
5 physicians and a mechanical engineer who offered opinions on the cause of Etzel's death.

6 Dr. Leetsma is a board-certified pathologist with certifications in anatomic pathology and
7 neuropathology. According to Dr. Leetsma, Etzel was not the victim of Shaken Baby Syndrome. He
8 concurred with Dr. Siegler, who testified at trial, that Etzel's cause of death is undeterminable.

9 Dr. Ophoven is board-certified in pathology and forensic pathology with over 30 years'
10 experience in this field. Dr. Ophoven states in her conclusion, "While I cannot identify the precise
11 cause of death with certainty, I can say-based on my years of training and experience as a forensic
12 pediatric pathologist-there is no scientific evidence to conclude that Etzel Glass was subjected to
13 shaking or any other form of inflicted trauma."

14 Mr. Monson, Associate Professor in Mechanical Engineering and an Adjunct Assistant
15 Professor in Bioengineering, reviewed Etzel's records and determined that, "In the absence of other
16 evidence of abuse, such as first-hand witness accounts, mechanics cannot distinguish an intentional
17 head injury from an accidental one."

18 **AG's Position**

19 Almost 20 years ago, Smith was arrested, charged, and convicted of the death of seven-
20 week-old Etzel. Smith's stories about what happened the night Etzel died are strikingly inconsistent,
21 other evidence casts grave doubt on her credibility and on her persistent claim of innocence, and the
22 medical evidence strongly suggests that her actions were a significant factor in Etzel's death. The
23 arguments in her claim may raise questions about her conviction – indeed, these doubts were
24 explicitly cited by the Governor in granting clemency. But doubts do not equate to proof of innocence
25 by a preponderance of the evidence.

26 By all accounts, Smith was the only adult in the room with her three young grandchildren on the
27 night Etzel died. She claims now, as she has for almost 20 years, that she did not shake Etzel. Belief
28 in her protestations of innocence requires belief in her story about what happened that night. Yet, her

1 sleep. Smith got up again because Yolanda had fallen off the love seat onto her head. She noticed
2 Etzel had a dirty diaper. Smith went to the restroom. When she returned to change Etzel's diaper, he
3 was not breathing or moving. That same day, Smith told Stephen that both Etzel and Yondale had
4 fallen off the couch. She stated she pulled Yondale back on the couch, and he went back to sleep.
5 She said that Etzel was crying and that she rocked him back to sleep and placed him back on the
6 couch.

7 The trial testimony of the social worker and Detective Nelson showed that Smith gave them a
8 different version of events from her initial statements that Etzel had fallen from the couch. The social
9 worker testified that after she informed Smith and Tomeka of the change in the diagnosis of the cause
10 of Etzel's death, she asked Smith and Tomeka what happened. Smith stated that at approximately
11 3:20 a.m., Yondale awakened and she got up to comfort him. While comforting him, she noticed Etzel
12 was face down and he did not respond to her touch. There was no mention of Etzel falling earlier or
13 her rocking Etzel back to sleep after he had fallen and was crying. Detective Nelson testified that
14 Smith stated that she woke up because Yondale had a nightmare and screamed. She checked on
15 Etzel and did not notice anything unusual. Smith awoke again because Yolanda had fallen off the
16 loveseat. She placed Yolanda back onto the love seat. She noticed the smell of a bowel movement
17 coming from Etzel. She went to the bathroom and returned to change Etzel's diaper. Etzel was face
18 down. No mention was made of any interaction between Smith and Etzel after he was put to bed and
19 before he was found non-responsive.

20 In early 2015, the AG's Office undertook an investigation preparatory to responding to Smith's
21 PC 4900 claim. In the course of this investigation, they first reviewed medical literature on shaken
22 baby syndrome and the transcripts of Smith's trial. They also spoke with the social worker who
23 testified for the prosecution at Smith's trial. They spoke to the original detective on this case,
24 Detective Nelson. Additionally, they interviewed the four physicians who reviewed this case for the
25 Los Angeles District Attorney's Office in 2012. Finally, they conducted videoconference interviews
26 with both Smith and her daughter, Tomeka. The evidence is summarized below.

27 The social worker maintained that Smith had indeed demonstrated to her how she had shaken
28 Etzel after she found him non-responsive. Smith was clear that she had shaken Etzel but also that

1 this was after she found him non-responsive. Smith did not appear to the social worker to have been
2 aware that an infant could die from shaking. The social worker recalled, as she did at trial, that Smith
3 said something to the effect of "Did I do it? Did I do it?" Based upon her interactions with Smith, she
4 did not feel that Smith was the type of person capable of purposely shaking her grandson to death.

5 Detective Nelson maintained that Smith was responsible for Etzel's death. She noted that
6 Smith was extremely inconsistent in her stories about what happened the night Etzel died. Smith told
7 different people at different times that Etzel had fallen off the couch, then she would say that the one-
8 year-old (Yondale) had fallen. Then later it was the four-year-old (Yolanda) who had fallen off the
9 couch. For example, on December 9, 1996, Smith told her brother that Etzel had fallen off the couch
10 and then the same day in her interview with detectives she denied that Etzel had fallen recently.

11 Additionally, Detective Nelson noted that when Smith initially talked to Tomeka, she told her
12 that Etzel had fallen off the couch at 1:30 a.m. and that she consoled him and put him back to sleep.
13 Later, when interviewed by the police, Smith denied that Etzel had fallen off the couch at all. This first
14 statement is very specific and contains details about what Smith did to Etzel whereas the next
15 statement eliminates that interaction completely. According to Detective Nelson, these large
16 inconsistencies strongly suggest Smith is not credible.

17 The other item that Detective Nelson pointed to was the demonstration of what Smith did when
18 she found Etzel non-responsive. Detective Nelson called it bizarre. Smith demonstrated how she held
19 Etzel outstretched away from her and then performed a rocking/twisting motion. In Detective Nelson's
20 view, this would not have been a normal reaction to finding your grandchild non-responsive. Detective
21 Nelson could not see how what Smith demonstrated would have accomplished the purpose of
22 determining if Etzel was okay and that it "was just very slow and deliberate and she was holding the
23 baby away from her body and it was very odd." Detective Nelson felt that the demonstration was too
24 contrived.

25 In the AG Office's interviews with Smith and Tomeka on June 10, 2015, Smith denied telling
26 different stories about what occurred that evening. According to Smith, the first time she woke up that
27 night, Etzel and Yondale were on the floor crying so she got up and put them back onto the couch.
28 Smith theorized that "maybe Etzel woke up and Dale [Yondale] woke up from hearing Etzel and he

1 caught himself since no one else was around he tried to pick up Etzel and ended up putting them both
2 on the floor because they were both on the floor.” She was awakened by their crying. When asked
3 about the discrepancy between her prior statements and her statement to us, Smith stated she had
4 not changed her story and that she had always maintained that both Etzel and Yondale had been on
5 the floor crying. In the transcript of the tape recorded interview that LAPD detectives conducted with
6 Smith in December 1996, there is no mention of Smith having an interaction with Etzel from the time
7 he was put down to sleep until the time Smith found him non-responsive.

8 Tomeka told the AG’s Office that the social worker was lying because she (the social worker)
9 was upset that Tomeka had three children by age 18. She also denied that Smith told the social
10 worker that Smith shook Etzel. Furthermore, both offered up a new and novel theory as to what might
11 have caused Etzel’s brain trauma which was discovered at autopsy. During the interview, Tomeka
12 was asked if she had any possible explanation for the trauma found in Etzel’s brain. She stated that
13 she remembered during Etzel’s birth, the “midwife” used forceps to deliver Etzel. She also stated that
14 Etzel’s delivery was very painful. She wondered if that birth had something to do with Etzel’s injuries.

15 Smith offered the same explanation as Tomeka; a midwife in the hospital (Kaiser) where Etzel
16 was born used forceps during Etzel’s birth. “She wasn’t supposed to use forceps but she did.” “The
17 forceps are what caused the injuries—the first injuries.” “They don’t know that there was a midwife
18 and the thing that bothers me is the records—the hospital lied and said that basically on paper the
19 doctor delivered my grandson but that’s not true. I was in the room with my daughter when my
20 grandson was being born. There was only one other person in the room and that was the midwife.
21 When my grandson was born I knew something was wrong—I knew it. I felt it in my gut and I even
22 asked her—I asked her because my grandson, my daughter was in a lot of pain. Everything in me told
23 me that something was wrong.” Later, Smith acknowledged that this was not in the medical records of
24 Etzel’s birth. “It’s not in there. It’s not in there. I looked at them. I have them. I have them.”

25 The four medical experts who reviewed this case for the Los Angeles District Attorney’s Office
26 in 2012 were re-interviewed by the AG in 2015. No physician had what was viewed as a definitive
27 answer regarding whether Etzel’s death was accidental or due to a criminal act. There was little
28 medical evidence that affirmatively pointed to Smith’s innocence and none of the experts confidently

1 suggested that the medical evidence explained Etzel's injuries in a way which completely exonerated
2 Smith.

3 When the AG's Office interviewed Dr. Carpenter, he maintained his theory that the cause of
4 Etzel's death was adult inflicted trauma – most likely violent shaking, but he was no longer as adamant
5 about the mechanism of death. Dr. Carpenter now opined that Etzel had massive brain swelling. This
6 is entirely different from his trial testimony. Death by swelling, which leads to brainstem compression,
7 can take many hours. Dr. Carpenter stated that the mechanism of death could be either direct
8 brainstem injury or swelling leading to brainstem compression. Nonetheless, he maintained beyond
9 any medical certainty that the cause of death, regardless of the mechanism, was still abusive head
10 trauma most likely the result of violent shaking.

11 Dr. Lakshmanan was Chief Medical Examiner for Los Angeles County at the time of Smith's
12 trial in 1997 and through the time he reviewed this case in 2012. Dr. Lakshmanan still believes that
13 Etzel's death was a homicide that was inflicted by Smith.

14 Dr. James Ribe stated that he cannot be certain as to the cause of death. The death might be
15 due to shaking, accidental suffocation, or a combination of the two. He would have classified Etzel's
16 death as undetermined.

17 Dr. Berkowitz goes further than Dr. Ribe. While she cannot say with medical certainty what
18 caused Etzel's death, she provided her view that Etzel died as a result of a combination of factors.
19 According to Dr. Berkowitz, the shakes had their desired impact and Etzel quieted down. He may
20 have been knocked out to some degree. Nevertheless, Smith then laid Etzel down on the couch and
21 went back to sleep. Thereafter, a compromised Etzel suffocated to death due to a combination of his
22 unsafe sleeping surface and the shaking. In Dr. Berkowitz's view, the shaking itself would not have
23 been fatal but was so in combination with the unsafe sleep position. This better explains why the
24 trauma that showed up in Etzel's brain at autopsy was not that significant. Dr. Berkowitz also stated
25 that in her view, the cause of death should be classified as "undetermined" and due to unexplained
26 trauma. She believes that the finding of homicide was "fairly thin."

27 In closing, the AG argued that all of the available evidence simply does not point to innocence.
28 In a PC 4900 proceeding, it is not enough to raise questions about the criminal case against Smith.

1 and the crime with which she was charged. Finally, the Board may also consider any information that
2 it may deem relevant to the issue before it.⁸

3 Smith's testimony at her hearing did not provide any new or additional evidence in support of
4 her claim for compensation. She continued to deny any involvement or responsibility in Etzel's death.
5 Based on the following, it is determined that Smith has not proven by a preponderance of the
6 evidence that she is innocent of the crime of assault of a child causing death:

- 7 1. Although the Ninth Circuit Court of Appeals granted Smith relief under 28 U.S.C. section
8 2254 (writ of habeas corpus), she was never determined to be innocent.
- 9 2. The United States Supreme Court, in a 6-3 per curium opinion overturning the Ninth
10 Circuit Court of Appeal's decision, found that there was sufficient evidence in the record to
11 support the verdict of guilt. Thus, Smith's conviction was reinstated.
- 12 3. On January 11, 2012, Los Angeles County District Attorney Steve Cooley wrote the
13 Governor that he did not formally oppose Smith's request for clemency if it was based on
14 grounds of equity but he adamantly defended the viability of shaken baby syndrome.
- 15 4. On April 6, 2012, Governor Brown commuted Smith's sentence to a sentence of credit for
16 time served, citing that "significant doubts surround Ms. Smith's conviction." Although
17 Smith received clemency, the conviction remained undisturbed.
- 18 5. The various medical opinions offered at trial either deemed Etzel's death to be the result of
19 a criminal act or the result of an undetermined or indeterminate cause or causes. None of
20 the experts definitively classified Etzel's death as accidental.
- 21 6. Documentary evidence provided by Smith from various physicians and other experts who
22 reviewed the record and offered opinions failed to provide sufficient evidence that Smith was
23 not the cause of Etzel's death.
- 24 7. There was no evidence that a midwife used forceps in Kaiser Hospital during Etzel's
25 delivery even though there was a box assigned to the birth forms solely for indicating that
26 forceps were used. Smith would have the Board believe that Kaiser Hospital lied about

27 ⁸ Cal. Code Regs., tit. 2, § 641.
28

1 such facts but this defies logic. This theory, which came to light in June 2015, is
2 contradicted by Kaiser Hospital medical records and impacts Smith's credibility.

3 8. There is not sufficient evidence that the social worker lied about statements she heard
4 Smith make and about the description of how Smith shook Etzel after Smith found him
5 unresponsive. This impacts Smith's credibility.

6 9. There is not sufficient evidence to show that the detectives lied about the statements they
7 heard from Smith following Etzel's death. This impacts Smith's credibility.

8 Smith is not eligible for compensation as an erroneously convicted person. Thus, it is not
9 necessary to determine if she sustained injury as a result of her erroneous conviction and
10 imprisonment.⁹ Smith's claim for compensation is recommended for denial.

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13 Date: June 29, 2016

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15 Kyle Hedum
16 Hearing Officer
17 California Victim Compensation Board

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26 ⁹ Although the issue is moot, Smith's argument that she is entitled to compensation for the time she
27 spent under federal supervised release will be addressed. Smith states that because the term
28 "incarceration" is not defined in Penal Code section 4904, she should be compensated for the entirety
of the time that she was under federal supervised release while her case was under appellate review.
Claimant ignores Penal Code section 4900 that includes the terminology in discussing eligibility "...for
which he or she was imprisoned in the state prison..."