

**IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS**

JENNIFER DEL PRETE,

Petitioner.

PEOPLE OF THE STATE OF ILLINOIS

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CASE No. 2003 CF 199

Judge Carmen Goodman

PETITION FOR A CERTIFICATE OF INNOCENCE

Petitioner Jennifer Del Prete, by and through her counsel LOEVY & LOEVY and BLEGEN & ASSOCIATES, moves, pursuant to 735 ILCS 5/2-702, for this Court to grant her a Certificate of Innocence based on the petition and the attached evidentiary record.

I. Introduction

Jennifer Del Prete spent nine years, one month and twenty-six days imprisoned for a crime for which she is totally innocent, and indeed may not have even been a crime at all. In 2005, Ms. Del Prete was falsely convicted for causing the death of a child who was cared for at a home daycare where Ms. Del Prete was employed. Ms. Del Prete had nothing whatsoever to do with the tragic death of the child, who had a preexisting chronic brain bleed and health complications. Indeed, it is likely that the child died of accidental or natural causes, rather than an intentional injury. What is clear from the evidentiary records is that Ms. Del Prete caused no physical harm to the child. Rather, when the child suddenly lost consciousness while in her care, Ms. Del Prete called 911, performed CPR and worked to resuscitate the child until the paramedics arrived. The child was treated and survived, although with impairment to her ability to function independently. Ten months later, the child died. This was a tragic loss of life as any loss of a young child is, but this tragedy was compounded by another tragedy—Ms. Del Prete being wrongfully accused and prosecuted as having caused the child’s death simply because she

was the childcare provider, who had the misfortune of being present when the child suffered an acute medical event.

For more than two decades, Ms. Del Prete has steadfastly proclaimed her innocence throughout the investigation, criminal prosecution, conviction, and years of imprisonment. The decades of having her life upended, falsely accused of killing an infant, missing out on parenting her own two children, who were only fourteen and seven years old when she was ripped from their young lives, have extracted a considerable toll on Ms. Del Prete, her children, and her family.

Ms. Del Prete respectfully petitions this court for a Certificate of Innocence to declare her innocent and clear her name of these charges. For the reasons set forth below and the evidentiary record submitted with this petition, Ms. Del Prete has demonstrated her innocence by preponderance of the evidence and has satisfied all the statutory requirements for the Court to award her a Certificate of Innocence.

II. Factual Background

Ms. Del Prete is a loving mother of two children--a daughter and son. Ms. Del Prete also cared for children in her professional life, working as a daycare provider for a home daycare in Romeoville, Illinois. Prior to the position she held during this incident, Ms. Del Prete had over a decade of childcare experience, including working as a nanny and caretaker in a church nursery. Exhibit 1 (Trial Tr.) at 271-274 & 526-690. Despite a history of caring for her own and other children with love and care, Ms. Del Prete ended up in a terrible tragedy of being accused, charged and convicted for the death of a three-month old in her care.

A. Ms. Del Prete Cared for I.Z. on the Day I.Z. Suffered a Severe Medical Event

On December 27, 2002, a three-month-old child, I.Z., was in Ms. Del Prete's care at the home daycare when she stopped breathing. Exhibit 1 (Trial Tr.) at 349. Ms. Del Prete called 911

and performed CPR while she waited for the paramedics to arrive. Exhibit 1 (Trial Tr.) at 17-19. No signs of injury or trauma were found on I.Z. when the paramedics arrived, and Ms. Del Prete was performing CPR appropriately on I.Z. when they arrived. *Id.* at 19.

Taking a step back, prior to this incident, when she was only a few weeks old, I.Z. had been sick and hospitalized in October 2002. Exhibit 16 (Dr. Teas Report) at 2. About ten days prior to the incident on December 27th, I.Z. had had a fever and was prescribed antibiotics for an ear infection. *Id.* In the weeks prior to the incident, I.Z. was also exhibiting signs of discomfort and distress, such as being fussy, difficult to soothe and feed. Exhibit 1 (Trial Tr.) at 562 & 656. At the time of her collapse on December 27th, I.Z. also had a chronic subdural hematoma that was approximately three weeks old. The existence of the chronic subdural hematoma was not known at the time, but was discovered on medical imaging after the incident at the daycare when I.Z. stopped breathing. Exhibit 2 (Provena St. Joseph Records) at 17-18; Exhibit 3 (Innocence Tr.) at 35-42.

B. I.Z.'s Medical Treatment and Shaken Baby Syndrome Diagnosis

I.Z. was taken to St. Joseph's hospital for treatment. The first CT scan showed both chronic and acute subdural hematomas. Exhibit 2 (Provena St. Josephs's Medical Reports); Exhibit 3 (Innocence Tr.) at 39-42. The treating physician indicated that the onset of I.Z.'s injuries was 24 to 48 hours prior to the incident, which was prior to when I.Z. was in Ms. Del Prete's care as I.Z. had been with her family for the Christmas holidays and had only returned back to childcare on December 27th, the morning of the incident.

Despite there being likely natural causes for I.Z.'s symptoms, including an old brain bleed that predated the time of I.Z.'s event by multiple weeks, the law enforcement authorities turned to a child abuse pediatric child abuse specialist, Dr. Emalee Flaherty at the Children's

Memorial Hospital in Chicago. Dr. Flaherty issued a report that found that I.Z.'s injuries were the result of shaken baby syndrome or SBS. Exhibit 4 (Flaherty Report). After her report was issued, I.Z.'s medical care was also transferred to Dr. Flaherty.

Not only have the scientific underpinnings of the SBS "diagnosis" been significantly challenged since that time, but based on the existence and age of the old brain bleed (confirmed by CT scans and a surgical procedure), Ms. Del Prete could not have been the cause even if the brain bleeds were caused by inflicted trauma. Based on the age of the chronic subdural hematoma, that old brain bleed likely began before I.Z. even started attending the daycare where Ms. Del Prete worked. Thus, if any trauma was inflicted on I.Z., Ms. Del Prete could not have done it. Moreover, it is significantly more likely that I.Z.'s condition was the result of accidental or natural causes. Either way, Ms. Del Prete is innocent of causing any harm to I.Z.

Based on the report by Dr. Flaherty, that wrongly concluded I.Z. was abused by the person caring for her at the time of her collapse, Ms. Del Prete was charged in February of 2003 with two counts of aggravated battery to a juvenile. I.Z. lived for many months after her collapse but unfortunately died of breathing complications in November 2003. An autopsy was performed by Dr. Jeff Harkey, a forensic pathologist from the DuPage County Coroner's Office, who questioned the SBS diagnosis and requested I.Z.'s medical records to evaluate the cause of death. Evidence of Dr. Harkey questioning the SBS diagnosis was withheld, however, and not turned over to Ms. Del Prete or her criminal defense team. Exhibit 5 (Autopsy Report). That evidence was ultimately uncovered during federal *habeas corpus* proceedings, via a FOIA request from journalism students. Moreover, Dr. Flaherty prepared a report which was relied on by Dr. Harkey

but neglected to mention that I.Z. suffered from a chronic subdural hematoma.¹ Instead Dr. Flaherty's report presented what appeared to be a clear cut SBS diagnosis.

After the federal habeas hearings and nine days of testimony, the federal district court found it "significant" that "a majority of both sides' experts opined that I.Z. had injuries that existed prior to her collapse on December 27, 2002. Exhibit 6 (Federal Habeas Opinion (*Del Prete v. Thompson*, 10 F. Supp. 3d 907 (N.D. Ill. 2014)) at 10 F. Supp. 3d at 956.

C. The Kroll Letter

Dr. Flaherty knew that the SBS diagnosis was questionable. That is because the investigating officer from the Romeoville Police Department, Detective Kenneth Kroll, wrote Dr. Flaherty a letter explaining to her that Dr. Harkey was questioning her SBS diagnosis and was seeking I.Z.'s complete medical records. Exhibit 7 (Kroll Letter). The Kroll Letter provided:

¹ A chronic subdural hematoma is a "collection of blood found in the subdural space that is of three weeks of age or older." Exhibit 9 (May 6, 2016 Hearing Tr., Dr. Harkey Testimony) at 19:4-6. The subdural space is the between the dura and the brain, which is deeper than the dura but not as deep as the brain. *Id.* at 18:12-24. When blood exists in that space, it is characterized as a subdural hematoma. *Id.*

If you haven't already heard, Isabella died 11-09-03. I'm writing to inform you of a "twist" in our case presented by the DuPage County Medical Examiner. On 11-09-03, I received a phone call from an Attorney who notified me that Isabella would undergo a "post" medical exam on 11-10-03. This Attorney specifically called to inform me that the pathologist scheduled to perform the autopsy does not agree with SBS, and has testified for the defense in two DuPage County SBS cases.

On 11-10-03, I spoke to a Plainfield Police Evidence Tech (ET) who was present at the autopsy. The ET advised that Dr. Jeff Harky did in fact question the diagnosis of SBS. I was told that Dr. Harky specifically looked for fractures in the rib cage (adult grabbing point) and found none. Dr. Harky intends to summons all of Isabella's medical records to see who determined this was SBS, and why they reached that diagnosis.

I have great confidence in your findings, and our investigation. This correspondence is FYI. However, I anticipate having to answer several questions for my prosecuting Attorney. Please call me when you have a few minutes to discuss the case.

THANKS!!!

Exhibit 7 (Kroll Letter).

Critically, that letter was never turned over to the defense. Exhibit 8 (May 5, 2016 Hearing Tr. – Mr. Charles Bretz) at 10:5-14:12 (Ms. Del Prete's criminal defense attorney testified that he was never provided any of the information contained in the Kroll Letter regarding Dr. Harkey questioning the SBS diagnosis, wanting I.Z.'s full medical records or testifying for the defense in two prior SBS cases). The letter was uncovered only years later when Northwestern journalism students served a FOIA request on the Romeoville Police Department.

As discussed in greater detail below, this evidence was crucial to Ms. Del Prete's defense. Had Dr. Harkey been aware of the chronic subdural hematoma, he would **not** have found that I.Z. suffered "abuse head trauma" dating back to December 27th. Exhibit 9 (May 5, 2016 Hearing Tr.-Harkey.) at 20. Instead, he would have found that the cause of death was undetermined. *Id.*

Moreover, he would **not** have indicated that the injury was inflicted by another. Exhibit 9 (May 5, 2016 Hearing Tr.) at 25.

D. Ms. Del Prete Was Wrongfully Convicted after a Bench Trial and Sentenced to Twenty Years' Imprisonment Leaving her Two Young Children Without Their Mother

Ms. Del Prete was charged with first degree murder. On March 4, 2005. After a bench trial, Ms. Del Prete was convicted. The trial evidence against Ms. Del Prete largely relied on the expert testimony of Dr. Flaherty, who testified for the State at trial that she had diagnosed I.Z. as having suffered abusive head trauma. Dr. Flaherty further testified that the trauma must have occurred just prior to I.Z.'s collapse, because I.Z. had taken milk from a bottle, and that the effects of abuse would have been immediate. Exhibit 1 (Trial Tr.) at 490-91. In addition, Dr. Flaherty testified that only shaking can cause retinal hemorrhages to extend to the ora serrata - a statement that is unequivocally incorrect and was later contradicted by other State experts. Exhibit 1 (Trial Tr.) at 503 (Flaherty Trial Testimony); Exhibit 6 (Federal Habeas Opinion) at 10 F. Supp. 3d at 955 & n. 8.² Dr. Harkey also testified as to his autopsy conclusions, however, Dr. Harkey admitted that he had not seen all of I.Z.'s medical records but relied on Dr. Flaherty's description of those records in her report.

There was no evidence that Ms. Del Prete had ever mistreated I.Z. There was no evidence that I.Z. had any bruising or physical injury to her body, which even Dr. Flaherty admitted to on cross-examination and for which she had no explanation. Exhibit 1 (Trial Tr.) at 498.

The court conducted a four-day sentencing hearing, during which Ms. Del Prete testified and maintained her innocence and that she did nothing to harm I.Z. Exhibit 10 (Sentencing Tr.) at

² At the federal habeas hearing on Ms. Del Prete's actual innocence petition, experts for both Ms. Del Prete and the respondent State testified that Dr. Flaherty's testimony regarding only SBS causing retinal hemorrhages to extend to the ora serrata was not true. Exhibit 6 (Federal Habeas Opinion) at 10 F. Supp. 3d. at 955-56 & n. 8.

1442-43. Rather, Ms. Del Prete had tried to save I.Z.'s life. *Id.* at 1432. In addition, thirty-seven additional witnesses testified, including Ms. Del Prete's children, along with family and friends about how she lovingly cared for her children and other children in her care. 1. *Id.* at 1120-1396. The Court sentenced Ms. Del Prete to 20 years' imprisonment. Exhibit 10 (Sentencing Tr.) at 4:18-5:4.

When Ms. Del Prete was taken into custody, she left behind her daughter, who was only fourteen years old, and her young son, who was only seven years.

E. Ms. Del Prete Pursued Her Direct Appeal and State Court Post-Conviction Proceedings

In March 2008, Ms. Del Prete filed a petition for post-conviction relief, raising ineffective assistance of trial counsel based on trial counsel's failure to investigate or call expert witnesses to challenge the prosecution's expert testimony and counsel's failure to disclose that he had been suspended from the practice of law due to unethical behavior when he was a prosecutor in Will County. Exhibit 37 (PC Petition). The Will County Circuit Court dismissed Ms. Del Prete's petition, and the Illinois Appellate Court denied Del Prete's appeal and petition for rehearing, and on November 25, 2009, the Illinois Supreme Court denied her petition for leave to appeal.

The precise dates related to Ms. Del Prete's initial post-conviction filings are as follows. Ms. Del Prete timely filed her post-conviction petition on March 24, 2008, which was summarily dismissed on May 30, 2008. Ms. Del Prete appealed the dismissal of her post-conviction petition. On July 20, 2009, the Illinois Appellate Court affirmed the dismissal. Ms. Del Prete's request for leave to appeal to the Illinois Supreme Court was denied on November 25, 2009. *People v. Del Prete*, 234 Ill.2d 531, 920 N.E.2d 1076 (2009).

Ms. Del Prete subsequently filed a federal habeas petition initially raising three claims: (1) the trial evidence was insufficient to find Ms. Del Prete guilty; (2) that trial counsel was ineffective for failing to investigate and rebut the State's SBS theory through sufficient expert testimony; and (3) that trial counsel was ineffective for failing to challenge the admission of expert testimony on the State's SBS theory under *Frye*. The federal court conducted an actual innocence hearing in order to determine whether claim (3) could be heard. That hearing is discussed below.

In March 2013, the Kroll letter was disclosed by the Medill Justice Project after it was obtained through a FOIA request by journalism students and posted on the Project's website. Shortly thereafter, Ms. Del Prete then filed a motion for leave to file a second successive post-conviction petition and also sought to reopen the actual innocence hearing in federal court, which was reopened for additional testimony on the *Brady* violation and its impact on Dr. Harkey's opinions as to the manner of death as set forth below. Exhibit 11 (Motion for Leave to File a Second Successive Post- Conviction).

On January 2, 2014, the Circuit Court denied Ms. Del Prete's second successive post-conviction petition. Exhibit 12 (Jan. 3, 2014 Circuit Court Ruling). Ms. Del Prete appealed. On April 1, 2015, the Illinois Appellate Court reversed the ruling and found Ms. Del Prete had met the "cause and prejudice" requirement for a successive post-conviction petition to be filed based on the *Brady* violation. Exhibit 13 (*People v. Del Prete*, 2015 IL App (3d) 140008-U (Apr. 1, 2015)).

F. Judge Matthew Kennelly of the Northern District of Illinois Finds Actual Innocence after Conducting Nine Days of Expert Testimony

On August 12, 2010, Ms. Del Prete filed a habeas petition in the Northern District of Illinois. Exhibit 14 (Habeas Petition and Exhibits).

In the winter of 2013-2014, Judge Matthew Kennelly held an evidentiary hearing for nine days on the issue of actual innocence, which was contested by the State. Exhibit 6 (Federal Habeas Opinion). If Ms. Del Prete established actual innocence, then the Court was free to consider all claims by Ms. Del Prete, even those she had not previously raised and which would otherwise have been procedurally defaulted. The Court summarized the testimony of Ms. Del Prete's experts in its opinion finding that Ms. Del Prete had established actual innocence.³

1. Dr. Patrick Barnes⁴ (Expert in the field of pediatric neuroradiology)

First, Ms. Del Prete called Dr. Barnes to testify in the field of pediatric neuroradiology. At the time of the hearing, Dr. Barnes served as the chief of pediatric neuroradiology and co-medical director of the MRI and CT Center at the Lucile Packard Children's Hospital. Dr. Barnes was also a professor of radiology at Stanford University Medical Center. *Del Prete*, 10 F. Supp. 3d at 923. Dr. Barnes also co-founded the northern California child abuse task force, referred to as the Child Abuse and Neglect Team ("SCAN"), which was comprised of multidisciplinary team to review cases of suspected child abuse and/or neglect. *Id.*

Dr. Barnes submitted two expert reports in support of Ms. Del Prete's case on June 29, 2012, and supplemental report on December 13, 2012. Exhibits 16 & 17. Dr. Barnes testified that his initial review of I.Z.'s case was performed "totally blind" by which he meant without reference to any other expert's reports or I.Z.'s medical records. Dr. Barnes explained that "this is what a radiologist is supposed to do is not be biased by what the doctors say, what even the medical records say. We're supposed to let the imaging speak for itself..." *Id.* at 933 (quoting in part the Habeas Hearing Tr. at 78).⁵

³ Judge Kennelly's summaries of the State's experts can also be found in his actual innocence opinion.

⁴ Dr. Barnes expert reports and CV are attached hereto as Exhibits 15, 16, and 17.

⁵ The federal habeas evidentiary hearing transcript is attached hereto as Exhibit 3.

Dr. Barnes opined that the significant finding from the images taken of I.Z. was that they depicted chronic collections of fluid between I.Z.'s brain and skull. *Id.* at 923. Dr. Barnes referred to these as "chronic extracerebral collections," which could have been "several weeks to months old or could even date back to I.Z.'s birth in September 2002." *Id.* at 923. Second, Dr. Barnes testified that the recent hematoma or hemorrhage was found within the chronic brain bleed. *Id.* Third, Dr. Barnes testified that I.Z. had a brain injury caused by the lack of oxygen or blood to her brain. *Id.* Finally, Dr. Barnes testified that it was significant that no signs of "direct traumatic injury" were found on I.Z.'s head, skull, brain or neck.

Based on his review of the CT scans taken of I.Z.'s brain taken on December 27th and 28th, Dr. Barnes opined that he did not think the brain bleed was caused by ruptured bridging veins, but rather that cortical venous thrombosis or CVT as the likely cause of I.Z.'s brain abnormalities. *Id.* at 925. With respect to the MRI taken on January 7, 2003, Dr. Barnes identified two separate collections of chronic collections of cerebral fluid on the left and right sides of I.Z.'s brain that were of different ages, but both likely several weeks old, as well identifying new areas of small bleeding. *Id.* at 926. The MRI on January 7th was consistent with is opinion that CVT was the likely cause of I.Z.'s brain injury. As the court summarized:

According to Barnes, his differential diagnosis would have suggested an investigation into possible bleeding or clotting problems, an examination of any problems I.Z. may have had at birth, an investigation into potential changes in I.Z.'s head circumference throughout the first few months of her life, and an exploration of possible recent triggers like infection that may have caused I.Z.'s collapse. Barnes testified that based on I.Z.'s radiological imaging, he would not conclude that I.Z. suffered abusive head trauma on December 27 that led to ruptured bridging veins. "[W]e can't blame everything we see on something happening that day," he stated; "[a] number of the components stretch out long before that...." Hrg. Tr. at 78. He stated that there were other conditions that could explain what appeared on the imaging of I.Z.'s brain. Barnes stated that the chronic collections were "probably the most important aspect as a predisposing

condition,” which tended to negate the hypothesis of abusive head trauma. Hrg. Tr. at 79.

Id. at 926. Finally, Dr. Barnes opined that there was no evidence on the scans of any traumatic abnormalities, such as injury in the upper neck or base of I.Z.’s skull. *Id.*

2. Dr. Michael Prange⁶ (Expert in the field biomechanical engineering)

Dr. Prange is a biomedical engineer, who studied pediatric brain injuries during his Ph.D. studies. Dr. Prange explained that the “the mechanism that purportedly causes injury is rotational acceleration to the infant’s head that causes the brain to move relative to the skull.” *Del Prete*, 10 F. Supp. 3d at 928–29. Dr. Prange conducted studies to extrapolate the force required to cause the injuries to I.Z.’s brain by shaking alone. *Id.* at 929. Dr. Prange concluded that “the levels of acceleration that he was able to achieve in his study of actual shaking were well below the threshold for head injury. Prange further explained that the threshold for neck injury is far lower than that for head injury, and he concluded that even if an adult could, by shaking, inflict the levels of acceleration required to inflict head injury on a child, the victim necessarily would sustain serious neck injury as well.” *Id.*

3. Dr. Patrick Lantz – (Expert in pathology testifying regarding retinal hemorrhages)

Dr. Lantz is a pathologist at Wake Forest University’s Medical Center and a professor at the medical school there as well. Dr. Lantz reviewed I.Z.’s medical records and observed that in the imaging taken December 30, 2002, there were “numerous retinal hemorrhages, including superficial hemorrhages, some deeper in the layers of the retina, and some pre-retinal hemorrhages. He said that he did not observe any evidence of perimacular folds, a particular type of retinal hemorrhage, or retinoschisis, a splitting of the retina.” *Del Prete*, 10 F. Supp. 3d at 930.

⁶ Dr. Prange’s CV and expert report is attached hereto as Exhibits 18 & 19.

Dr. Lantz opined that there are non-traumatic causes for retinal hemorrhages. *Id.* In other words, abusive head trauma is not the only cause. Dr. Lantz testified that they can be “caused by infections, spontaneous intracranial hemorrhage, and coagulation disorders, and can also result from CPR.” *Id.* Dr. Lantz also testified regarding a case study he had conducted that identified “eleven infants with retinal hemorrhages who had died from sudden infant death syndrome (SIDS).” *Id.* at 930. “These eleven infants had collapsed and been resuscitated through CPR prior to their eventual death from SIDS. Of those eleven children, four infants had retinal hemorrhages that extended to the ora serrata.” *Id.* at 930-31.

Finally, Dr. Lantz disagreed with Dr. Flaherty’s testimony at Ms. Del Prete’s criminal trial that “hemorrhages to the ora serrata are only caused by acceleration and deceleration forces or shaken baby syndrome.” *Id.* at 931. Dr. Lantz said that is not true and there are other causes, such as resuscitation efforts. *Id.*

4. Dr. Joseph Scheller – (Expert in pediatric neurology)⁷

Dr. Scheller testified as an expert in pediatric neurology. At the time of his testimony, Dr. Scheller worked at Winchester Valley Medical Center in Winchester, Virginia, where he practices as a child neurologist and serves as a fellow in neuroradiology. *Del Prete*, 10 F. Supp. 3d 922. Previously, he had served as a child neurologist at Children’s National Medical Center and was an associate professor of pediatrics at George Washington University in Washington, D.C. Scheller currently. *Id.*

Dr. Scheller testified that he had reviewed I.Z.’s medical records since birth and her brain imaging studies. Dr. Scheller opined that there was no evidence that I.Z. had been subjected to abusive head injury. *Id.* at 933. That is because: (1) There is no evidence of any physical or

⁷ Dr. Scheller’s expert report and CV are attached hereto as Exhibits 20 & 21.

bodily physical trauma to I.Z. such as a broken bone; (2) There is no evidence that of brain swelling or brain edema on I.Z.'s scans take on December 27th and 28th as would be expected with a head injury; (3) There is no evidence on injury to I.Z.'s neck ligaments or bones and shaking would put the neck under stress to cause injury; (4) I.Z.'s medical records indicate additional evidence such as high blood platelet levels that can lead to clotting, virus and infections; (5) I.Z.'s scans show a blood clot in the brain; (6) I.Z.'s head circumference grew at an abnormally fast pace, suggesting chronic subdural hematomas; and (7) I.Z. had a mildly traumatic birth. *Id.*

5. Dr. Jan Leestma (Expert in neuropathology)⁸

Dr. Leestma is neuropathologist in private practice who performed a neuropathological examination in 2012 of I.Z.'s brain with Dr. Shaku Teas, an expert in forensic pathology for Del Prete, along with an expert for the State. *Del Prete*, 10 F. Supp. 3d at 941. The crux of Dr. Leestma's testimony is that there was evidence of previous subdural hemorrhages in I.Z.'s brain and also a recent rebleed shortly before her death in November 2002. *Id.* at 942. Dr. Leestma also disagreed with the State's expert, Dr. Rorke-Adams, that there was evidence of a contusion on the underside of I.Z.'s frontal lobe. *Id.* That is because the State's expert mislabeled the location of the slide of where the brain tissue was from and further what the State's expert misidentified as a contusion was actually necrosis—or death of the brain tissue. *Id.*

6. Dr. Shaku Teas (Expert in Forensic Pathology)⁹

Finally, Dr. Teas testified on behalf of Ms. Del Prete. Dr. Teas worked with the Cook County Medical Examiner's Office for fourteen years as well as other county coroner's offices.

⁸ Dr. Leetsma's expert report and CV are attached hereto as Exhibits 22 & 23.

⁹ Dr. Teas's expert report and CV are attached hereto as Exhibits 24 & 25.

Dr. Teas was also a member of one of the nine Illinois child death review team. *Del Prete*, 10 F. Supp. 3d at 947.

Dr. Teas opined that based on her review of I.Z.'s medical records, autopsy photographs, along with her own neuropathological examination of the brain, I.Z.'s collapse was the result of cortical venous thrombosis (CVT). Dr. Teas identified several risk factors I.Z. had for this condition and explained that CVT is difficult to diagnosis. *Id.* at 948.

Dr. Teas further opined that there was nothing in the record to support the view that I.Z.'s collapse on December 27th was due to abusive head trauma. *Id.* Finally, Dr. Teas opined that the medical literature recognized that children can remain conscious or have a lucid interval even after suffering abusive head trauma. *Id.*

7. Additional Hearing on Kroll Letter – June 21, 2013

The federal court held an additional day of hearings with respect to the discovery of Detective Kroll's letter to Dr. Flaherty in which he conveyed to her that during I.Z.'s autopsy, Dr. Harkey was questioning the SBS diagnosis and wanted to obtain I.Z.'s full medical records.

At that hearing, Dr. Harkey testified that it was his opinion that a chronic subdural hematoma would be more than three weeks old. Exhibit 26 (6/21/13 Hearing Tr.) at 48:8-10. Dr. Harkey further testified that he found no evidence of physical injury to I.Z.'s brain, though there was evidence of injury due to the deprivation of oxygen at the time of her death. *Id.* at 51:3-18. At the time of the autopsy report, Dr. Harkey did not have any information about I.Z. having chronic subdural hematoma. *Id.* at 71:5-6. Dr. Flaherty's reports on I.Z. did not include any information about the chronic subdural hematomas. Exhibit 4 (Flaherty's report). Dr. Harkey testified that had Dr. Flaherty done so, he believed he would have included the fact that I.Z. had a chronic subdural hematoma in his autopsy report. Exhibit 26 (6/21/13 Hearing Tr.) at 73:7-18.

He would have also considered a recent re-bleed of the chronic subdural hematoma as a possible consideration. *Id.* at 28:21-31:18.

The Court found persuasive that both Del Prete's and the respondent's experts agreed that the chronic subdural hematoma existed prior to I.Z.'s collapse on December 27th and that contradicted Dr. Flaherty's trial testimony that I.Z. had been healthy and well prior to her collapse.

Ultimately, the Court found that "in light of all of the evidence presented at Del Prete's trial and at the evidentiary hearing before this Court, the Court finds that Del Prete has established that it is more likely than not that no reasonable juror would have found her guilty of murder beyond a reasonable doubt." *Del Prete v. Thompson*, 10 F. Supp. 3d 907, 957 (N.D. Ill. 2014)

G. Ms. Del Prete's Release on Bond

The federal court granted Ms. Del Prete's release on bond on April 30, 2014, after serving over nine years while her state court post-conviction proceedings were exhausted. Exhibit 27 (4/20/14 Bond Order).

H. State Court Successive Post-Conviction Petition and Evidentiary Hearing on May 5, 2016

Based on the disclosure of the Kroll letter and the need to first be presented to the State courts, Ms. Del Prete filed a second successive post-conviction petition in July 2015. Exhibit 28 (Second Successive PC Petition). After initially denying the petition and a reversal on appeal, the State court held an evidentiary hearing before the Honorable Carla Allesio Policandriotes regarding the Kroll letter and its impact on Dr. Harkey's conclusion of I.Z.'s cause of death. Exhibit 9 (May 5, 2016 Hearing Tr.-Harkey).

During that evidentiary hearing, Dr. Harkey testified that had he known that I.Z. had a chronic subdural hematoma, he would **not** have concluded in I.Z.'s autopsy that the cause of death was "abusive head trauma." Exhibit 9 (May 5, 2016 Hearing Tr.-Harkey) at 20:8-12. Instead, he would have stated that the cause of death was the "result of chronic and acute subdural hematomas." *Id.* at 20:14-17. In addition, had Dr. Harkey known about I.Z.'s chronic subdural hematoma, he would **not** have indicated that the injury was inflicted by another. Exhibit 9 (May 5, 2016 Hearing Tr.-Harkey) at 25:16-21. Dr. Harkey explained that it was possible that the symptoms I.Z. exhibited could have been caused by a rebleed of the chronic subdural hematoma, rather than due to any abuse or blunt force trauma. *Id.* at 29:2-31:18 & 65:8-16. Moreover, had Dr. Harkey known of the chronic subdural hematoma at the time of Ms. Del Prete's criminal trial in 2005, he would **not** have agreed with the State expert that I.Z. collapsed as a result of abuse. *Id.* at 65:4-7.

I. The Third District Affirms the Circuit Court's Grant of a New Trial Based on a Brady Violation

On August 29, 2016, and after having conducted the hearing described above, the trial court ordered a new trial for Ms. Del Prete. Exhibit 29 (Order). The State appealed that decision but was denied by the Third District. Exhibit 30 (State's Appeal); Exhibit 31 (Opinion (*People v. Del Prete*, No. 3-16-0535 (Nov. 8, 2017))). The State also filed a PLA to the Illinois Supreme Court from the appellate court's decision, but it was again denied.

On May 2, 2018, the final judgement from the appellate court was entered, and on May 14, 2018, Ms. Del Prete's case was placed on the trial call. Ms. Del Prete waited more than four additional years pending her new trial. The trial was reset multiple times, and Ms. Del Prete had to appear at court approximately twenty times over the course of those four years and remained under conditions of bond and the supervision of the Probation Department as well.

J. Del Prete's Additional Experts

In preparation for the criminal retrial, Ms. Del Prete disclosed additional reports by experts in the field of forensic pathology, biomechanical engineering and neuroradiology, consistent with her previous experts that I.Z.'s death was not the result of abusive head injury. *See* Exhibit 32 (Report by Dr. Roland Auer); Exhibit 33 (Report by Chris Van Ee, Ph.D); and Exhibit 34 (Report by Dale Vaslow).

K. State's New Forensic Pathologist's Report

In preparation for the criminal retrial in November 2022, the State disclosed a new expert in the field of forensic pathology by Dr. Thomas L. Bennett, M.D. Exhibit 35 (Bennett Report). In Dr. Bennett's report, he summarized and reviewed the prior experts on both sides of the case. Dr. Bennett addressed the issue of whether the brain bleeds could have been the result of a natural cause such as cerebral venous sinus thrombosis (CVST) - as defense experts had opined. He noted that CVST can produce many of the findings interpreted as non-accidental trauma, but that CVST can also result from head trauma. He described this as a classic chicken or egg, situation. Dr. Bennett further opined that the medical evidence could support a finding of abusive head trauma, but only if the fact finder could identify a neck injury to I.Z. that occurred on December 27th. Exhibit 35 (Bennett Report) at 52. There was, as Dr. Bennett noted, great disagreement as to whether there was, in fact, any evidence of a neck injury.

In summary, Dr. Bennett's conclusion was really no conclusion at all. Ultimately, the State's newly proposed expert on cause and manner of death (Dr. Bennett) did not render an opinion. He simply stated that "if" something could be proved, then a conclusion could be reached. He rendered no opinion, however, that the "if" could in fact be proven. Exhibit 35 at 52. In other words, the State lacked essential evidence - an expert that could testify in support of its

theory that I.Z. suffered “abusive head trauma” on December 27, 2002. Dr Bennett did not so conclude, and the original pathologist, Dr. Harkey, had retracted his prior conclusion in light of the chronic subdural hematomas.

L. Will County State’s Attorney Dismissed Charges

Approximately a month before her scheduled re-trial, and shortly after turning over Dr. Bennett’s non-conclusion, the State made a motion to *nolle prosequi* the matter. On October 5, 2022, the Court dismissed the indictment and released Ms. Del Prete from her bond obligations. Exhibit 36 (Dismissal Order).

All told, Ms. Del Prete spent nine years, one month and twenty-six days incarcerated and another six years under supervision while on bond.

III. Legal Standard

Illinois law provides that a petitioner is entitled to a certificate of innocence if she can demonstrate by a preponderance of the evidence that:

- a. The petitioner was convicted of one or more felonies by the State of Illinois and subsequently sentenced to a term of imprisonment, and has served all or part of any sentence;
- b. the judgment of conviction was reversed or vacated, and the indictment or information dismissed...
- c. the petitioner is innocent of the offenses charged in the indictment or information...; and
- d. the petitioner did not by his or her own conduct voluntarily cause or bring about his or her conviction.

735 ILCS 5/2-792(g).

In determining whether to grant a petitioner a certificate of innocence, a court must consider the materials attached to the petition. *People v Fields*, 2011 IL App (1st) 100169, ¶19.

IV. Parties to the Case

Under Illinois law, the Attorney General or County State's Attorney are entitled to intervene as parties when a petitioner files a certificate of innocence. 735 ILCS 5/2-702(e).

Assuming all parties have been properly served, Illinois courts routinely grant certificates of innocence on the pleadings and supporting documentation when no other parties have intervened. *See, e.g., People v Chatman*, 2016 IL App (1st) 152395, ¶10.

In *People v. Hood*, 2020 IL App (1st) 162964, ¶¶19, 30, the court explained that when no parties intervene, the matter is “uncontested,” and “where uncontested pleadings and exhibits are sufficient to state a claim and establish a basis for relief, a party can obtain relief based on the pleadings and attached exhibits.” In such circumstances, the petitioner need only establish a *prima facie* case for relief. *Id.* at ¶31.

V. Ms. Del Prete meets the procedural requirements of 735 ILCS 5/2-702

Ms. Del Prete satisfies all the procedural requirements of 735 ILCS 5/2-702. First, Ms. Del Prete was convicted of murder and sentenced to twenty years in prison.

Second, on October 5, 2022, the State dismissed all charges and Del Prete's conviction was vacated. Exhibit 38 (Dismissal Order).

Third, Ms. Del Prete's petition is timely because she files her petition within the two years of when the State dismissed all charges against her. *See* 735 ILCS 5/2-702(i).

VI. Ms. Del Prete Has Demonstrated Her Innocence by a Preponderance of the Evidence

Ms. Del Prete also satisfies the third statutory requirement in that she can prove by a preponderance of the evidence that she is “innocent of the offenses charged in the indictment.” 735 ILCS 5/2-702(g)(3). Although the evidence in this case includes complex medical issues, the issues of Ms. Del Prete's innocence are straightforward.

First, it is undisputed that prior to Ms. Del Prete's care for I.Z. on December 27, 2002, I.Z. already had a chronic subdural hematoma that Ms. Del Prete had nothing whatsoever to do with causing. The medical evidence makes clear that the chronic subdural hematomas were at least three weeks old. Furthermore, the medical evidence and testimony is that I.Z.'s newer brain bleeds could have likely been a re-bleed of the chronic subdural hematoma given the location of the new bleed.

Second, there is no physical evidence to support that Ms. Del Prete shook I.Z. due to the fact that there was not bruising on I.Z., injury to her ribs, neck or skull. Indeed, the State's most recent expert Dr. Bennett concluded, without evidence of any neck or lower skull injury to I.Z., there is simply no way for the fact-finder to conclude that I.Z.'s head injury was caused by shaking.

Third, had the original coroner, Dr. Harkey, known at the time of his autopsy that I.Z. had a chronic subdural hematoma, a fact that was not included in Dr. Flaherty's report he relied upon, he never would have rendered the conclusion that I.Z.'s cause of death was abusive head trauma or indicated that I.Z.'s injuries were caused by someone. Instead, he would have concluded that he would have stated that the cause of death was the "result of chronic and acute subdural hematomas." *Id.* at 20:14-17. Moreover, he would have found that I.Z.'s symptoms could have been caused by the chronic subdural hematoma.

Fourth, Dr. Flaherty's unequivocal testimony at Ms. Del Prete's criminal trial that shaking is the **only** cause of a retinal hemorrhage that reaches the ora serrata, was not true. The medical experts, including those presented by the State and credited by Judge Kennelly at the federal habeas evidentiary hearing, all testified that there are other causes of retinal hemorrhages of this nature. The medical evidence, which has been lengthy and considerable over weeks of testimony

in both state and federal court, along with I.Z.'s medical records, support the conclusion that I.Z.'s brain injuries had nothing whatsoever to do with Ms. Del Prete or her attempt to care and save her when she collapsed in her care on December 27, 2002.

In addition to the medical records and testimony, the Court should also consider Ms. Del Prete's longstanding and persistent claim of innocence, including her cooperation with law enforcement to explain her care for I.Z. that day.

VII. Ms. Del Prete Did Not Voluntarily Bring About Her Own Conviction

Ms. Del Prete did not bring about her own conviction. She never confessed nor did she do anything to indicate to investigators that she had harmed I.Z. in any way. Rather, when the child collapsed in her presence, she called 911 and performed CPR in an effort to resuscitate I.Z. In addition, Ms. Del Prete's was deprived of crucial evidence, the Kroll Memo, that she could have used to demonstrate her innocence at her original trial. Instead, that evidence was hidden and not turned over until 2013.

Ms. Del Prete insisted from the beginning that she was innocent and did not harm I.Z., even while she cooperated with the investigating authorities. Ms. Del Prete went to trial and has maintained her innocence after her conviction, including succeeding on an actual innocence petition in federal court.

Conclusion

For the reasons set forth above, Ms. Jennifer Del Prete respectfully requests that the Court grant her a certificate of innocence and that this Court order the Clerk to send the certificate to the Court of Claims in accordance with 735 ILCS 5/2-702(h) or 730 ILCS 5/5-5-4(c).

Respectfully submitted,

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