

**IN THE CIRCUIT COURT FOR GILES COUNTY  
PULASKI, TENNESSEE**

<b>WAYNE J. BURGESS,</b>	)	<b>POST-CONVICTION</b>
	)	<b>NO. 8401</b>
<b>Petitioner</b>	)	
	)	
<b>vs.</b>	)	
	)	
<b>STATE OF TENNESSEE,</b>	)	
	)	
<b>Respondent.</b>	)	

**ORDER REOPENING POST-CONVICTION PROCEEDINGS**  
**AND**  
**VACATING THE CONVICTION**

This matter was heard on March 30-31, 2023, on Wayne Burgess’s (Petitioner) Motion to Reopen his Petition for Post-Conviction Relief (Petition). The Court has considered the record developed in trial and previous court proceedings. Additionally, the Court reviewed all materials and pleadings submitted by the parties in support of their positions. Finally, the Court considered the testimony and evidence presented at the hearing.

The Court is satisfied that the Petitioner presented clear and convincing new scientific evidence establishing that he is innocent of the convicted offense. Accordingly, the Court orders that the post-conviction proceedings be reopened and that the conviction in this matter be vacated and rendered void.

**Procedural Background**

In September of 1997, the Giles County Grand Jury indicted Mr. Burgess for first-degree felony murder. On January 28, 1999, a Pulaski jury convicted him of the indicted offense. Mr. Burgess was sentenced to life in prison. The Tennessee Court of Criminal Appeals affirmed the conviction on January 18, 2001.

On March 8, 2002, Mr. Burgess filed a pro se Petition for Post-Conviction Relief in the Circuit Court for Giles County, Tennessee. On March 30, 2004, the court denied Mr. Burgess's Petition. There was no appeal of this ruling.

The pending Petition was filed on September 20, 2022. The State filed a Response on January 20, 2023. Mr. Burgess filed a Reply to the Response on February 17, 2023. A hearing was held on the Petition on March 30–31, 2023.

### **New Scientific Evidence of Innocence**

#### ***Dr. Adele Lewis***

On March 30, 2023, the Court heard testimony from Dr. Adele Lewis, a forensic pathologist, and the Chief Medical Examiner for the State of Tennessee. Dr. Lewis testified concerning the new scientific evidence of actual evidence. Dr. Lewis specifically addressed the inaccuracy of the medical opinion presented to the jury by Dr. Charles Harlan. Dr. Harlan was the medical examiner who performed the autopsy in this case and provided the critical opinion as to the timing of the relevant injury. His medical license was subsequently revoked by the State of Tennessee.

Dr. Lewis testified that it is not medically possible that Mr. Burgess committed the crime. The theory of guilt presented at trial was that Mr. Burgess caused the death of an infant child, Nakevia Rivers. The prosecution argued that on August 7, 1997, Mr. Burgess struck the child in the abdomen shortly before presentation to the hospital. It was alleged that this trauma caused an exsanguinating liver laceration. The child presented at the hospital in critical condition and passed away later that evening.

Dr. Lewis testified that this version of events is not medically possible. The blood volume observed at autopsy was not consistent with an injury that happened shortly before presentation at the hospital. The amount of blood and fluid observed in the child's abdomen at autopsy would take hours to days to gather. The blood volume is objective evidence, never heard by a judge or jury, that Mr. Burgess could not have struck the child shortly before her arrival at the hospital.

Dr. Lewis additionally addressed the pulmonary contusion (bruise on the lung) and pleural effusion (fluid buildup around the lung) observed at autopsy. Dr. Lewis stated that the fluid around the lung, much like the fluid observed in the abdomen, takes

hours to days to gather. She testified that this constitutes independent medical confirmation that the injury to the child occurred hours to days before presentation at the hospital. The observed blood volume in the abdomen and the fluid buildup around the lung constitute new scientific evidence that it is not medically possible that Mr. Burgess caused the injury. The theory presented at trial, that Mr. Burgess harmed the child just before presentation at the hospital, is not medically possible. Harlan's opinion is contrary to the medical evidence. The Court credits the testimony and report of Dr. Adele Lewis as new scientific evidence of innocence.

### ***Dr. Thomas Rauth***

Dr. Thomas Rauth testified on March 30, 2023. Dr. Rauth is the National Medical Director for the Children's Services Clinical Operations Group for HCA North America. Additionally, he serves as the Medical Director of Pediatric Surgical Services at The Children's Hospital at Tristar Centennial in Nashville, TN. Dr. Rauth is a pediatric surgeon who cares for children with liver injuries.

Dr. Rauth testified that the injury at issue in this case was a Grade II liver laceration. Liver lacerations are graded on a scale of I to V. I is the least severe and V is the most severe. The liver injury in this case was a superficial, slow bleeding, Grade II liver laceration. Dr. Rauth testified that children do not die from this type of injury. In almost 100% of cases, children do not require surgical intervention for this type of injury. Dr. Rauth testified that it is not medically possible that a child would bleed out and die from this injury under the timeline presented at trial. Dr. Rauth agreed with the conclusion of Dr. Lewis: that the blood volume, in addition to the grade of injury, proved that the liver laceration occurred hours to days before presentation at the hospital.

Additionally, Dr. Rauth explained the body's physiologic response to injury. He stated the child suffered trauma which resulted in a liver laceration. Over hours to days, her body became dehydrated because the fluid in her body that migrated to the site of the injury was not replaced. She went into hypovolemic shock, her circulation stopped working properly, and her body shut down. That was the actual cause of her death. This process took hours to days to happen. It could not medically happen based upon an injury inflicted just prior to presentation at the hospital. Dr. Rauth addressed the

mechanism of injury, response to injury, grade of the injury and blood volume. He testified that it was not medically possible that Wayne Burgess caused the injury just prior to presentation at the hospital. The Court credits the testimony and report from Dr. Thomas Rauth as new scientific evidence of actual innocence.

***Dr. Feng Li***

The State called Dr. Feng Li, the Medical Examiner for Davidson County, Tennessee, as a witness. Dr. Li did not dispute the findings or opinions of Dr. Lewis and Rauth. Importantly, he agreed with them on critical issues.

Dr. Li testified that the injury at issue in the case was either a Grade I or II liver laceration. He further agreed that low grade liver lacerations do not exsanguinate in a short period of time without major vessel damage. Dr. Rauth testified that, based on the autopsy report and his review of the autopsy photos, it was his opinion that there was no major vessel damage. He further testified that Harlan's medical opinion on blood volume presented at trial was incorrect. Dr. Li agreed with the opinions of Drs. Lewis and Rauth concerning the blood volume evidence.

Dr. Li did not provide an opinion on the timing of the laceration in the case nor did he submit a report. He testified the laceration may have occurred hours before presentation at the hospital and it was in the realm of possibility that the laceration could have happened shortly before presentation at the hospital, but he conceded there was no medical evidence to support that theory. Dr. Li was not willing to provide an opinion on the timing of the injury, but he did not dispute the opinions of the other medical experts.

Dr. Adele Lewis testified as a rebuttal witness to address whether it was within the realm of possibility that the injury happened shortly before presentation at the hospital. Dr. Lewis provided two distinct medical reasons why that was impossible. First, she explained that was not enough time for the blood and fluid to gather in the abdomen. It would take hours to days for the blood and fluid to gather at that location. Secondly, the injury, a Grade II liver laceration, is not the type a child would exsanguinate from in this amount of time. For a child to bleed out from a liver

laceration in this amount time, it would need to be catastrophic, the type of injury received from falling out of a building or a major automobile accident.

The Court finds there is no dispute amongst the experts. All experts agreed on the grade of injury and blood volume evidence. The Court credits the timing of the injury presented by Drs. Lewis and Rauth as hours to days before presentation at the hospital. This constitutes new scientific evidence of Petitioner's innocence.

### **Legal Analysis**

Post-conviction relief is available “when the conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.” Tenn. Code Ann. § 40-30-103. A petitioner bears the burden of proving the allegations of fact in his postconviction petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). “Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.” *State v. Holder*, 15 S.W.3d 905, 911 (Tenn. Crim. App. 1999) (quoting *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992)).

Section 40-30-117(a)(2) allows a petitioner to file a motion to reopen a previous post-conviction petition “if the following applies:” “[t]he claim in the motion is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted,” and it “appears” there is “clear and convincing evidence” that the conviction must be set aside. Tenn. Code Ann. §§ 40-30-117(a)(2), (4). Simply put, § 40-30-117(a)(2) “allows a petitioner to reopen the first post-conviction petition by claiming actual innocence based on new scientific evidence.” *Dellinger v. State*, 279 S.W.3d 282, 291 (Tenn. 2009). “New” evidence in the context of actual-innocence litigation just means evidence “that was not presented at trial.” *Schulp v. Delo*, 513 U.S. 298, 324 (1995); accord *Jones v. Calloway*, 842 F.3d 454, 461 (7th Cir. 2016) (“New evidence in this context does not mean ‘newly discovered evidence’; it just means evidence that was not presented at trial.” (italics in original)). “Actual innocence” means “that the person in question truly did not commit

the crime for which they have been convicted.” *Keen v. State*, 398 S.W.3d 594, 610 (Tenn. 2012).

Three recent decisions by Tennessee Trial Courts addressed the definition of new scientific evidence under the Post-Conviction Procedure Act (the “Act”) as evidence “that was not presented at trial” and/or “evidence not presented or available for presentation to a jury.” *Joyce Watkins and the Estate of Charlie Dunn*, No. 87-S-1186, at 8 (Tenn.Crim.Ct. Jan. 6, 2022); *Paul Shane Garrett v. State of Tennessee*, No. 2002-A-465, at 16 (Tenn.Crim.Ct. Aug. 2, 2021); *Claude Garrett v. State of Tennessee*, No. 1992-B-961, at 14 (Tenn.Crim.Ct. May 6, 2022). This definition is supported by analysis of the Act’s provisions. The Act’s absence of a one-year requirement from “time of discovery” of new scientific evidence of innocence indicates that the scientific evidence upon which the petitioner relies must simply be “new” relative to the conviction which he or she seeks to vacate. Sections 102(b)(2) and 117(a)(2) do not use the same language that is plainly written into the writ of error *coram nobis* statute of “newly discovered” or recently discovered. By comparison, a post-conviction petition may be based on “new scientific evidence,” without reference to “subsequent discovery” or a showing of diligence that establishes the petitioner’s actual innocence. TENN. CODE ANN. §§ 40-30-102(b)(2) and 117(a)(2). As such, the medical evidence presented in the Petition and at the subsequent hearing constitutes new scientific evidence as contemplated by the Act.

The Court finds that the Petitioner has presented clear and convincing evidence of new scientific evidence of actual innocence, and therefore re-opens the Petition for relief.

### ***The Doctrine of Waiver is Not Applicable***

The doctrine of waiver, Tenn. Code Ann. § 40-30-106(g), does not apply to Petitioner’s claims. First, Petitioner establishes actual innocence, and the doctrine does not apply when actual innocence is established. *Van Tran v. State*, 66 S.W.3d, 790, 799 (Tenn. 2001); *Keen v. State*, 398 S.W.3d 594, 607-08 (Tenn. 2012). Moreover, the doctrine does not apply because the State has not asserted waiver. *Walsh v. State*, 166 S.W.3d 641, 645 (Tenn. 2005) (“we conclude that the State’s waiver argument has itself been waived” in postconviction context); *Yarbro v. State*, No. W2017-125-CCA-R3-PC, 2018 Tenn. Crim. App. LEXIS 704, \*21 (Tenn. Crim. App. Sept. 17, 2018). Additionally,

Petitioner did not waive his claim because he did not have the opportunity to present the new medical new evidence in any previous litigation.

Similarly, the Court finds the doctrine of previous determination, Tenn. Code Ann. § 40-30-106(h), is inapplicable and does not bar relief. This doctrine has no bearing to the new scientific evidence presented by Drs. Lewis and Rauth. No prior court has heard this evidence or ruled on this evidence. The State has not raised this issue, and additionally, even if the doctrine were to apply, it would not bar relief here because Petitioner has shown actual innocence, and due process concerns trump the previous-determination doctrine. *Allen v. State*, No. M2009-2151-CCA-R3-PC, 2011 Tenn. Crim. App. LEXIS 287, \*23 (Tenn. Crim. App. Apr. 26, 2011 (citing *Phedrek T. Davis v. State*, No. M2009-1616-CCA-R3-PC, 2010 Tenn. Crim. App. LEXIS 386 (Tenn. Crim. App. May 14, 2010))).

The Court can adjudicate the Petitioner's claims on the present record.

### ***The Court Vacates the Conviction***

The Petitioner seeks for relief based on two claims in the alternative: (1) a “freestanding claim of actual innocence based on new scientific evidence” under *Dellinger v. State*, 279 S.W.3d 282, 290 (Tenn. 2009); and/or (2) a violation of the federal and Tennessee due process clause. *Lee v. Glunt*, 667 F.3d 397, 403, 407-08 (3d Cir. 2012); *Han Tak Lee v. Superintendent Houtzdale SCI*, 798 F.3d 159, 166 (3d Cir. 2015); *Gimenez v. Ochoa*, 821 F.3d 1136, 1145 (9th Cir. 2016); see *Waterford v. State*, No. M2017-1968-CCA-R3-PC, 2018 Tenn. Crim. App. LEXIS 772, \*49 (Tenn. Crim. App. July 17, 2018). The Court finds both claims have merit.

### ***Freestanding Claim of Actual Innocence***

In *Dellinger*, the Tennessee Supreme Court established that, in either an initial postconviction petition or a motion to reopen, a petitioner can raise a freestanding claim of actual innocence based on new scientific evidence that can succeed without showing any independent constitutional violation. *Dellinger*, 279 S.W.3d at 290.

The Court finds that Petitioner has proven such a claim. New scientific evidence proves that it is not medically possible that Mr. Burgess committed the crime for which

he was convicted. The medical theory presented at trial, specifically that the liver laceration occurred shortly before presentation to the hospital, was inaccurate. The new scientific evidence proves the injury occurred hours to days earlier. Mr. Burgess had not seen the child in the week prior to the day of her death. Mr. Burgess was with the child and the child's mother for approximately two and a half hours before the child presented to the hospital. The only time that Mr. Burgess was alone with the child occurred immediately before presentation to the hospital and only lasted a few minutes. As such, Mr. Burgess could not have committed the crime and is innocent of the offense. Petitioner has established by clear and convincing evidence that no reasonable jury would convict him in light of the new scientific evidence. *See Cribbs v. State*, No. W2006-01381-CCA-R3-PD, 2009 Tenn. Crim. App. LEXIS 524, \*97 (Tenn. Crim. App. July 1, 2009); *Brown v. State*, No. M2013-00825-CCA-R3-PC, 2014 Tenn. Crim. App. LEXIS 1014, at \*51 (Crim. App. Nov. 6, 2014). Accordingly, the Court must vacate the conviction.

### ***Due Process Violation***

A conviction is unconstitutional when an error—*e.g.*, the presentation of inadmissible evidence or argument—“so infected [the defendant’s] trial with unfairness as to make the resulting conviction a denial of due process.” *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Accordingly, a conviction violates the due process clause when it is predicated on what new scientific evidence has proven to be fundamentally unreliable expert testimony. *Lee v. Glunt*, 667 F.3d 397, 403, 407-08 (3d Cir. 2012); *Han Tak Lee v. Superintendent Houtzdale SCI*, 798 F.3d 159, 166 (3d Cir. 2015); *see Gimenez v. Ochoa*, 821 F.3d 1136, 1145 (9th Cir. 2016). In such a case, false and unreliable scientific evidence has “so infected” the trial as to render “the resulting conviction a denial of due process.” *Darden*, 477 U.S. at 181. *See Waterford*, 2018 Tenn. Crim. App. LEXIS 772 at \*49 (citing *Han Tak Lee* and endorsing the view that a petitioner can prove a constitutional violation in these circumstances upon showing “the challenged conduct undermined the fundamental fairness of the entire trial”).

As explained above, new scientific evidence proves that Dr. Harlan’s expert testimony was fundamentally unreliable and, in fact, wrong. As in *Han Tak Lee*,



Harlan's expert testimony has been proven to be plainly unreliable yet at trial it "constituted the principal pillar of proof" against the petitioner. *Han Tak Lee*, 798 F.3d at 167 (quoting *Han Tak Lee v. Tennis*, 2014 U.S. Dist. LEXIS 110766, \*7 (M.D. Pa. Aug.7, 2014)). Dr. Harlan's erroneous expert testimony was highly prejudicial to Mr. Burgess. No other inculpatory evidence, even in the light viewed most favorably to the State, overcomes the new scientific evidence that proves Mr. Burgess is innocent. As such, the Court determines it is unnecessary to address the reliability of the statement obtained from Mr. Burgess by the police. The reliability of the statement is immaterial because the new scientific evidence proves Mr. Burgess is innocent. This Court holds that Petitioner's conviction violates due process under both the Tennessee and federal constitutions. Accordingly, in the alternative, the Court must vacate the conviction on this basis.

### **Conclusion**

In consideration of all that which is set forth above, the Court finds that Petitioner has established the claims set forth in the Motion to Reopen the Petition for Post-Conviction Relief by clear and convincing evidence.

**IT IS ORDERED, ADJUDGED and DECREED** that the Motion to Reopen the Petition for Post-Conviction Relief is hereby GRANTED.

Additionally, the relief sought is hereby GRANTED and the conviction in this case is rendered void and shall be vacated.

Entered this 13<sup>th</sup> day of April, 2023.

  
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David L. Allen, Judge