IN THE SUPREME COURT OF MISSISSIPPI

JEFFREY HAVARD, ***Petitioner***

vs. **No. 2013-DR-01995-SCT**

STATE OF MISSISSIPPI, ***Respondent***

PETITIONER'S MOTION TO AMEND AND
MOTION FOR EVIDENTIARY HEARING

Petitioner, Jeffrey Havard, by and through undersigned counsel, hereby submits his Motion to Amend and Motion for Evidentiary Hearing. For the reasons set forth herein, Havard should be granted leave to file an Amended Motion for Relief from Judgment or For Leave to File Successive Petition for Post-Conviction Relief and be granted an evidentiary hearing. In support of this Motion, Havard would show unto the Court as follows:

I. PERTINENT FACTS

On January 19, 2014, the *Clarion-Ledger* newspaper published an article about Havard's case. *See* Exhibit "A," Mitchell, Jerry, *The Death of Chloe Britt: Capital Murder or Accidental Fall?* (Jan. 19, 2014). In the article, new facts about Havard's case, and particularly the role that pathologist Dr. Steven Hayne played in that trial, were revealed. The new facts gleaned from this article are the basis of this Motion, since they demonstrate that the State violated the dictates of *Brady v. Maryland* and its progeny by failing to turn over exculpatory information in the form of pre-trial reports from Hayne about his inability to conclude that a sexual battery had occurred. When combined with prior testimony, sworn statements, and other statements of Dr. Hayne, the new information from the article further demonstrates the need for an evidentiary hearing in this matter.

Though the article published in the *Clarion-Ledger* on January 19, 2014 is quite lengthy and covers multiple issues in the case, the crucial part, for purposes of this Motion, concerns Dr. Hayne's autopsy of Chloe Britt, his failure to find evidence of sexual assault in that autopsy, and the State's pre-trial knowledge of Dr. Hayne's findings—which were exculpatory—that were not communicated to the defense.

The article reads:

> Havard is sitting on Mississippi's death row for a crime the state's pathologist believes never took place. Sexual assault was the underlying felony charge against Havard that enabled authorities to pursue the death penalty against him.
>
> "I didn't think there was a sexual assault," Hayne said of his 2002 autopsy of Chloe. "I didn't see any evidence of sexual assault."
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> During Havard's capital murder trial, doctors, nurses, the sheriff and others told jurors about tears, rips, lacerations and bleeding they saw in the child's anal area.
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> "Maybe they were looking at folds and thought they were tears," Hayne said. "We were very careful, and we also took sections." He examined those sections under a microscope. His conclusion? They were no tears, rips or similar injuries to the child's rectum, he said. "I would think that would be a definitive evaluation."
>
> When Chloe was brought into the emergency room of Natchez Community Hospital, physicians were focused on saving her life, Hayne said. At trial, doctors and nurses each described the dilation of the child's anus. Hayne said it would be wrong to assume such dilation means sexual assault, saying "that can happen with a child passing a harder stool."
>
> A 1996 study found anal dilation was common among children who died, especially those who suffered brain damage. Hayne said anal dilation could also take place in patients without significant brain function. One doctor testified Chloe was brain dead before they discovered the dilation.

Exh. "A," Mitchell, Jerry, *The Death of Chloe Britt: Capital Murder or Accidental Fall?* (Jan. 19, 2014).

The article continues in striking fashion: "The pathologist said **he informed prosecutors he couldn't say a sexual assault took place.** The **district attorney acknowledges Hayne was 'probably the weakest (prosecution) witness' on sexual assault** but that doctors, nurses and law enforcement verified that sexual abuse had taken place." Exh. "A," Mitchell, Jerry, *The Death of Chloe Britt: Capital Murder or Accidental Fall?* (Jan. 19, 2014) (emphases added).

With respect to Shaken Baby Syndrome, Dr. Hayne is quoted on page 4 as saying that there is "growing evidence" that his original diagnosis of Shaken Baby Syndrome in the Havard case is "probably not correct." Exh. "A," Mitchell, Jerry, *The Death of Chloe Britt: Capital Murder or Accidental Fall?* (Jan. 19, 2014).

Petitioner's trial counsel requested exculpatory evidence by sending a letter to the District Attorney's office, requesting all discoverable materials including exculpatory evidence (Exh. "B", Letter from Sermos to Harper) and filing a Motion for Discovery of Information Necessary to Receive a Fair Trial (hereafter "Motion for Discovery"). (Exh. "C", Motion for Discovery). The Motion for Discovery sought information "favorable to the Defendant on the issue of guilt," including ""[u]nfavorable evidence with respect to prosecution witnesses" (Paragraph 9(a); "any and all other information respecting any prosecution witness which is favorable to the Defendant on the issue of guilt" (Paragraph 9(c); and "[s]tatements made by any persons which are exculpatory with respect to the Defendant, including all statements made by prospective prosecution witnesses" (Paragraph 9(d). More specifically, the Motion for Discovery requested "All records and reports of every kind reflecting the conduct or results of any medical, pathological, toxicological, chemical, biochemical, criminalistic, laboratory, forensic or scientific examinations, investigations and analysis undertaken with the investigation or preparation of this case." (Paragraph 13).

Significantly, during pre-trial hearings, the Court took up the above-referenced Motion for Discovery. The following exchange occurred in open court:

> BY MR. SERMOS: [W]e filed this motion to make sure that we had everything covered that we may possibly need and knew that the able counsel for the State would read all of this, and if there's anything in here that remind the State prosecutor of something else that we needed to provide, that's the reason I filed this motion, and we wanted to make sure we covered all the basis, not just what it says exactly in Rule 9.04.
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> BY THE COURT: Does the State have anything in regard to this motion?
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> BY MR. ROSENBLATT: Your Honor, I would agree that we have been in fairly close communication with counsel for this defendant. They've done a good job of coming to us and reviewing the evidence that we have that we not able to just hand over to them. **The only thing we're waiting on now, I think I was - - I'm printing up some color photographs so that they can have actual color copies of the photographs involved in this case. I can't think of anything else that we're still holding up on.**
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> * * *
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> BY THE COURT: Let the record show that the Court will order that discovery be provided pursuant to Rule 9.04, and this will include the provisions of the rule for reciprocal discovery also. **I would caution the State that this is a capital murder case, and that if there's any late disclosure of evidence, it will be very carefully reviewed by the Court because the Court will more strictly scrutinize any late disclosure of evidence in this particular case than it normally does because this is a capital murder case.**

(T. at pp. 26-27) (emphases added).

Despite the defense requests and the trial court's admonition, upon information and belief, Dr. Hayne's pre-trial report about his inability to state that a sexual assault had occurred were not disclosed to Havard or his trial counsel.

II. AMENDMENT STANDARDS

Rule 15(a) of the *Mississippi Rules of Civil Procedure* states that a party may amend a pleading by obtaining "leave of court," and that "leave shall be freely given when justice so requires." *See Estes v. Starnes*, 732 So.2d 251, 253 (Miss. 1999) ("Rule 15(a) allows for the liberal amendment of pleadings…."). *See also Hall v. State*, 800 So.2d 1202 (Miss. Ct. App. 2001) (noting application of Rule 15 to post-conviction proceedings, which are civil in nature).

III. PETITIONER SHOULD BE PERMITTED TO AMEND HIS MOTION FOR RELIEF TO ASSERT A *BRADY* CLAIM

In *Brady v. Maryland*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). *See also Banks v. Dretke*, 540 U.S. 668 (2004); *Kyles v. Whitley*, 514 U.S. 419 (1995).

A failure on the part of the government to disclose favorable evidence requires a new trial, or a new sentencing hearing, if disclosure of the evidence creates a reasonable probability of a different result. As the Supreme Court explained in *Kyles*, "the adjective is important," and "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434.

In *Banks*, the Supreme Court considered the Fifth Circuit's use of a defendant-due-diligence requirement to dismiss the defendant's *Brady* claim. The diligence question in *Banks* was whether the defendant "should have interviewed a witness who could have furnished the exculpatory evidence the prosecutor did not disclose." *Banks*, 540 US at 688. The Supreme Court rejected this requirement in no uncertain terms. The Supreme Court stated:

> The state here nevertheless urges, in effect, that "the prosecution can lie and conceal and the prisoners still has the burden to… discover the evidence," so long as the "potential existence" of a prosecutorial misconduct claim might have been detected. A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendant due process. "Ordinarily we presume that public officials have properly discharged their official duties." We have several times underscored the "special role played by the American prosecutor in the search for truth in criminal trials." Courts, litigants, and juries properly anticipate that "obligations [to refrain from improper methods to secure a conviction]… which plainly rest upon the prosecuting attorney, will be faithfully observed." Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial appropriation.' *See Kyles*, 514 U.S. at 440 ("The prudence of the careful prosecutor should not . . . be discouraged.").

Id. at 696 (internal citations omitted).

In this case, the prosecutor was informed by Dr. Hayne that "he couldn't say a sexual assault took place." However, upon information and belief, this was never shared with Havard or his trial counsel prior to trial, despite the fact that it is clearly exculpatory. In a case in which sexual battery was the underlying felony (making the case both a capital murder case and one in which the death penalty was sought), information from the State's sole expert witness on forensic issues that he could not say that a sexual assault had occurred is clearly exculpatory. Further, such information had been explicitly requested. Thus, it is clear that Havard has a viable prima facie *Brady* claim to present to this Court.

In the alternative, if the Court determines that a *Brady* violation has not been articulated, Dr. Hayne's statements regarding his pre-trial assessment of the underlying felony of sexual battery demonstrates that Petitioner's trial counsel were ineffective in their efforts to investigate the case, including by failing to speak with Dr. Hayne prior to trial.[1] *See Strickland v. Washington*, 466 U.S. 668 (1984).

[1] Indeed, both the State and the trial court encouraged Havard's trial counsel to speak to Dr. Hayne if they had questions about his report and findings. T. at 40, 45-46. While trial counsel's diligence—or lack of diligence—does not excuse the State's violation of *Brady*, if the Court determines that a *Brady* claim is not stated then Hayne's pre-trial opinions certainly demonstrate a claim of ineffective assistance of counsel.

Based upon the facts and law set forth above, Havard should be granted leave to amend his Motion for Relief from Judgment or For Leave to File Successive Petition for Post-Conviction Relief.[2] The proposed amended pleading is attached hereto as Exhibit "D".

IV. HAYNE'S CONTINUED STATEMENTS FURTHER DEMONSTRATE THE NEED FOR AN EVIDENTIARY HEARING IN THIS MATTER

Since the 2002 trial of Havard, Dr. Steven Hayne has provided a string of sworn and unsworn statements related to Havard's case. Dr. Hayne has provided a Declaration (2009) (Exhibit "E"), deposition testimony (2010) (Exhibit "F"), an Affidavit (July 2013) (Exhibit "G"), and has been interviewed for newspaper articles that appeared in the *Clarion-Ledger* in June 2013 (Exhibit "H") and January 2014 (Exhibit "A").

In the 2009 Declaration (Exhibit "E"), Dr. Hayne stated that he cannot "include or exclude to a reasonable degree of medical certainty that she [Chloe] was sexually assaulted." Further, Dr. Hayne noted that the one centimeter contusion that he found on Chloe's anus "could have a variety of causes and is not sufficient in and of itself to determine that a sexual assault occurred." Dr. Hayne also stated that, during the autopsy, he "found no tears of her rectum, anus, anal sphincter, or perineum."

Most significantly, Dr. Hayne noted in the Declaration that "[d]ilated anal sphincters may be seen on persons who have died, **as well as on a person prior to death without significant brain function**. My experience as well as the medical literature recognize that **a dilated anal sphincter is not, on its own, evidence of anal sexual abuse**, but must be supported by other evidence." (emphases added).

[2] In anticipation of the State's argument that this claim would be procedurally barred or time barred, Havard would note that the claim is based upon newly discovered evidence (the January 19, 2014 newspaper article), and thus not subject to such bars. Further, the claim involves a fundamental right, thus excepting it from such bars. *See Rowland v. State*, 42 So.3d 503 (Miss. 2010). *See also Parisie v. State*, 848 So.2d 880, 885 (Miss. 2003) (describing rights under *Brady v. Maryland* as "fundamental rights").

In the 2010 deposition testimony (Exhibit "F") Dr. Hayne acknowledged that he was specifically asked, prior to conducting the autopsy of Chloe Britt, to look for evidence of sexual assault. (Depo. at pp. 10-11). Dr. Hayne testified that there is no mention of sexual battery in the Final Report of Autopsy that he produced, because "I could not come to final conclusion as to that." (Depo. at 11). Dr. Hayne continued: "There was one injury that I indicated would be consistent with the penetration of the anal area, but that, in and of itself, I didn't feel was enough to come to a conclusion that there was a sexual assault in this particular death." (Depo. at 11). Dr. Hayne confirmed that he found no tearing to the rectum, anus, anal sphincter, or perineum during the autopsy, and that he would have noted such tearing if he had found it. (Depo. at 12, 14). Dr. Hayne further opined that it would not be possible for any tears to have healed between the time Chloe Britt was in the emergency room to the time he performed the autopsy, one day later. (Depo. at 14-15).

Dr. Hayne further testified:

Q: And, Dr. Hayne, can you say from your autopsy evidence, and from the coroner's inquest, the medical records that you reviewed, the photographs, and the laboratory findings, that this child, Miss Britt, was sexually assaulted?

A: I could not come to that final conclusion, Counselor. As I remember in trial testimony, I said that the contusion would be consistent with a sexual abuse, but I couldn't say that there was sexual abuse, and, basically, I deferred to the clinical examination conducted at the hospital. (Depo. at 25).

In the June 2013 newspaper article (Exhibit "H"), Hayne's interview with reporter revealed: "At the 2002 trial, Hayne testified there was a 1-inch anal bruise, 'consistent with penetration of the rectum with an object.' He acknowledged to The Clarion-Ledger that such a bruise can be caused by nothing more than 'a hard stool.' At trial, he testified the baby's death was a homicide, consistent with shaken baby syndrome. But Hayne now disavows that

conclusion, saying biochemical engineers believe shaking alone doesn't produce enough force to kill."

In the July 2013 Affidavit (Exhibit "G"), Hayne states that he "found no definitive evidence of sexual abuse" based upon his autopsy findings. "A finding of sexual assault was not conclusively demonstrated." Dr. Hayne also made statements about his prior opinions concerning Shaken Baby Syndrome in Havard's case, cited above. Dr. Hayne's statements in the July 2013 Affidavit are made to a reasonable degree of medical certainty. Further, Dr. Hayne states that he is willing to testify at an evidentiary hearing or in a deposition about his findings and opinions in the Havard case.

In the January 2014 newspaper article (Exhibit "A"), Dr. Hayne told the reporter that he "didn't think there was a sexual assault" and that he "didn't see any evidence of a sexual assault". Further, in contrast with his 2010 deposition testimony, Hayne now disagrees with the testimony of non-experts in the case (emergency room medical providers) who testified about "findings" that Hayne, the sole forensic expert and only qualified pathologist in the case, did not observe during the autopsy. Hayne points out that the medical providers were focused on saving Chloe Britt's life and that he did a "very careful" post-mortem examination which did not confirm the medical providers testified-to findings. Dr. Hayne states that his careful, expert examination, in contrast to the testimony of the treating physicians and nurses, "would be a definitive evaluation". Finally, Dr. Hayne describes his prior diagnosis of SBS as "probably not correct" in light of scientific advancements.

Each time that Dr. Hayne has spoken on Havard's case and his opinions related to it, new information emerges. Indeed, Hayne's statements in the January 2014 newspaper article lack many of the equivocations previously expressed by Dr. Hayne. On more than one occasion, such

new information from Dr. Hayne has led Petitioner to file successive post-conviction petitions with this Court (the *Havard III* proceedings and the instant matter). Hayne's continued statements, which have resulted in piecemeal litigation when the statements reveal new information, further demonstrate the need for an evidentiary hearing in this matter. This Court should remand this matter to the trial court so that Dr. Hayne can be placed under oath and examined on all topics related to the case.

V. CONCLUSION

For the reasons set forth herein, Petitioner, Jeffrey Havard, respectfully requests that this Court grant him leave to file his proposed Amended Motion for Relief from Judgment or For Leave to File Successive Petition for Post-Conviction Relief (attached hereto as Exhibit "D"). In addition or in the alternative, Havard again requests that this Court remand this matter to the Circuit Court of Adams County, Mississippi for an evidentiary hearing.

Respectfully submitted, this the 30th day of May, 2014.

Respectfully submitted,

JEFFREY HAVARD, PETITIONER

/s/ Graham P. Carner
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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing with the MEC filing system, which sent notice to the following:

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This the 30th day of May, 2014.

/s/ Graham P. Carner
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