IN THE CIRCUIT COURT OF ADAMS COUNTY, MISSISSIPPI

JEFFREY KEITH HAVARD, *Petitioner*

versus

Mississippi Supreme Court Case No. 2013-DR-01995-SCT
Circuit Court of Adams County, Mississippi, Cause No. 02-KR-0141

STATE OF MISSISSIPPI, *Respondent*

RESPONSE IN OPPOSITION TO PETITION FOR POST-CONVICTION RELIEF

Respectfully submitted,

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INTRODUCTION

Jeffrey Keith Havard, Petitioner, moves this Court for a new trial, because he wants to attack his conviction and sentence from a different angle. Petitioner has repeatedly and admittedly attacked the evidence supporting the underlying felony of his capital murder conviction, sexual battery.[1] He did so at trial, then on direct appeal, in his application for post-conviction relief, and again in his first successive PCR petition.[2] Now, he wants to attack the evidence showing Chloe Britt's death was the result of injuries associated with Shaken Baby Syndrome (SBS). Petitioner claims newly

[1] Petitioner admits his "appeal and post-conviction proceedings since his conviction have primarily focused on the issue of sexual battery, since that was the underlying felony that serves as the basis for the conviction and death sentence." (Petition for Post-Conviction Relief at 14, dated Jun. 16, 2015, *Jeffrey Keith Havard v. State of Mississippi*, No. 02-KR-0141).

[2] *See Havard v. State*, 86 So.3d 896, 904-07 (Miss. 2012) (ruling the claim that newly discovered evidence proved Petitioner was innocent of sexual battery, barred and without merit); *Havard v. State*, 988 So.2d 322, 329-33, 344-45 (Miss. 2008) (ruling ineffective assistance claim for failing to secure expert; and, claim that the HAC aggravator subsumed "sexual battery" aggravator, barred and without merit); *Havard v. State*, 928 So.2d 771, 788-89, 790-91, 801-04 (Miss. 2006) (ruling six claims— involving sexual battery—barred, without merit, or both).

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discovered evidence will prove Chloe Britt's death was accidental. It does not. His petition is barred. His claim must fail. Petitioner is not entitled to any relief, including a new trial.

STATEMENT OF THE CASE

On June 24, 2002, the Grand Jury returned an indictment, charging Petitioner with one count of capital murder for the killing of Chloe Britt in violation of Mississippi Code, Annotated sections 97-3-19(2)(e) and 97-3-95. (R. 1, 153.) Petitioner was convicted of the charged offense on December 18, 2002. (R. 213.) The following day, the sentencing jury returned a verdict recommending a sentence of death. (R. 214.)

Petitioner directly appealed to the Mississippi Supreme Court, claiming:

I. WHETHER TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO INSURE THAT A JUROR WAS EXCUSED FOR CAUSE AFTER EXHIBITING BIAS.

II. WHETHER TRIAL COUNSEL WERE INEFFECTIVE BY FAILING TO ASK "REVERSE-*WITHERSPOON*" QUESTIONS RELATING TO THE JURORS' POTENTIAL STRONG FEELINGS ABOUT THE DEATH PENALTY.

III. WHETHER HAVARD WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BECAUSE OF THE SEATING OF A JUROR WHO SUPPORTS THE DEATH PENALTY IN ALL MURDER CASES AND THAT JUROR'S FAILURE TO ANSWER THE TRIAL COURT'S COURT'S QUESTION ON POINT.

IV. WHETHER HAVARD WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DUE TO COUNSEL'S FAILURE TO ADEQUATELY SUPPORT THE DEFENSE STRATEGY.

    1. Failure to obtain DNA evidence
    2. Failure to secure a pathologist
    3. Failure to include a lesser offense instruction

V. WHETHER HAVARD WAS DENIED HIS CONSTITUTIONAL RIGHT OF A FUNDAMENTALLY FAIR TRIAL BECAUSE OF PROSECUTORIAL MISCONDUCT AT CLOSING ARGUMENT.

VI. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE INTRODUCTION OF VICTIM IMPACT TESTIMONY AT SENTENCING.

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VIII. WHETHER HAVARD WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN CLOSING ARGUMENT AT THE SENTENCING PHASE OF TRIAL.

IX. WHETHER THE TRIAL COURT ERRED IN OVERRULING AN OBJECTION TO A PHOTOGRAPH DEPICTING THE VICTIM DURING HER LIFETIME, THUS CAUSING PREJUDICIAL SYMPATHY.

X. WHETHER THE TRIAL COURT ERRED IN ANSWERING A QUESTION SUBMITTED BY THE JURY IN SUCH A WAY AS TO CAUSE SPECULATION OF EARLY RELEASE FROM A LIFE SENTENCE.

XI. WHETHER THE TRIAL COURT'S LIMITING INSTRUCTION OF AN AGGRAVATING CIRCUMSTANCE WAS ITSELF UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

XII. WHETHER THE INDICTMENT FAILED TO CHARGE THE NECESSARY ELEMENTS TO IMPOSE THE DEATH PENALTY.

XIII. WHETHER HAVARD WAS DENIED HIS CONSTITUTIONAL RIGHT TO A RELIABLE SENTENCE BECAUSE THE TRIAL COURT ALLOWED THE JURY TO CONSIDER AGGRAVATORS TO SUPPORT THE SENTENCE OF DEATH.

XIV. WHETHER AGGREGATE ERROR IN THIS CASE REQUIRES REVERSAL OF THE CONVICTION AND DEATH SENTENCE.

XV. WHETHER ANY STATUTORILY REQUIRED ISSUES HAVE MERIT, INCLUDING WHETHER THE SENTENCE WAS DISPROPORTIONATE TO THE PENALTY IN SIMILAR CASES.[3]

The Mississippi Supreme Court affirmed Petitioner's conviction and sentence on February 9, 2006, and denied his motion for rehearing on May 25, 2006. Petitioner moved the Supreme Court of the United States for *certiorari* review of:

I. IN A DEATH PENALTY CASE INVOLVING A CHARGE OF SEXUAL ASSAULT, DOES COUNSEL RENDER INEFFECTIVE ASSISTANCE OF COUNSEL WHERE HE FAILS TO REMOVE A PROSPECTIVE JUROR WHO STATES ON VOIR DIRE THAT AS A RESULT OF THE RAPE OF A

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FAMILY MEMBER SHE CAN NOT BE FAIR AND IN FACT SERVES ON THE JURY THAT FINDS THE DEFENDANT GUILTY AND SENTENCES HIM TO DEATH?

Certiorari was denied on January 8, 2007.[4] No petition for rehearing was filed.

On May 25, 2007, Petitioner applied for post-conviction relief, claiming:

I. INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO ADOPT DEFENSE STRATEGY DURING GUILT PHASE.

A) Failure to obtain DNA evidence.
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II. INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO INVESTIGATE, DEVELOP AND PRESENT MITIGATION EVIDENCE DURING THE PENALTY PHASE.

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VII. PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT AT THE GUILT PHASE.

VIII. VICTIM IMPACT TESTIMONY.

IX. WHETHER THE TRIAL COURT IMPROPERLY RESPONDED TO A QUESTION FROM THE JURY DURING THE SENTENCING PHASE.

X. LIMITING INSTRUCTION OF ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE.

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[4] Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi, *Havard v. Mississippi*, 549 U.S. 1119 (2007) (No. 06-9273).

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XII. JURY CONSIDERATION OF AGGRAVATING CIRCUMSTANCES.

XIII. COMPETENCY OF TRIAL COUNSEL.

XIV. CUMULATIVE ERROR.[5]

The Mississippi Supreme Court denied Petitioner's fourteen claims on May 22, 2008; and motion for rehearing on August 28, 2008.

On April 10, 2009, Petitioner filed a Petition for Writ of Habeas Corpus with United States District Court for the Southern District of Mississippi.[6] The State answered on May 8, 2009. Petitioner filed his Memorandum in Support of Petition for Issuance of the Writ of Habeas Corpus on July 31, 2009. The State responded, in turn, filing its Memorandum in Support of Answer to Petition for Issuance of Writ of Habeas Corpus on November 13, 2009.

While his federal habeas proceedings were stayed, Petitioner filed his first, successive post-conviction petition on April 12, 2011. On March 8, 2012, the Mississippi Supreme Court denied all five of his claims, summarizing them as:

I. THE STATE VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW AS GOVERNED BY *NAPUE V. ILLINIOS,* 360 U.S. 264, 79 S.Ct. 1173, 3 L.ED.2d 1217 (1959), AND RELATED AUTHORITY;

II. THE STATE WITHHELD EXCULPATORY INFORMATION IN VIOLATION OF *BRADY V. MARYLAND*, 373 U.S. 83, 83 S.Ct. 1994, 10 L.Ed.2d 215 (1963), AND ITS PROGENY;

III. ALTERNATIVELY TO THE IMMEDIATELY PRECEDING ISSUE, PETITIONER'S TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO

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[5] Application for Leave to Proceed in the Trial Court and Motion for Other Relief, *Havard*, 988 So.2d 322 (No. 2006-DR-01161-SCT).

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UTILIZE THE VIDEOTAPED STATEMENT AT ISSUE IF IT WAS DISCLOSED OR PRODUCED PRIOR TO TRIAL;

IV. NEWLY-DISCOVERED EVIDENCE DEMONSTRATES THAT PETITIONER IS INNOCENT OF THE UNDERLYING FELONY OF SEXUAL BATTERY-WHICH ALONE MADE PETITIONER'S CASE A CAPITAL MURDER CASE AND PETITIONER ELIGIBLE FOR THE DEATH SENTENCE THAT WAS IMPOSED; AND

V. NEWLY DISCOVERED EVIDENCE FURTHER DEMONSTRATES THAT PETITIONER'S TRIAL COUNSEL WERE INEFFECTIVE IN FAILING TO CHALLENGE THE UNDERLYING FELONY OF SEXUAL BATTERY.[7]

Petitioner filed a motion for rehearing, which was denied, as modified, on May 10, 2012.

Petitioner filed a second, successive post-conviction petition in the Mississippi Supreme Court on November 25, 2013. He raised the following claims for relief:

IV. NEWLY-DISCOVERED EVIDENCE DEMONSTRATES THAT PETITIONER IS INNOCENT OF CAPITAL MURDER OR AT LEAST PRESENTS GRAVE DOUBTS CONCERNING GUILT, AS THE STATE'S THEORY THAT CHLOE BRITT DIED FROM SHAKEN BABY SYNDROME HAS BEEN DISAVOWED BY THE STATE'S SOLE EXPERT WITNESS AND IS CONTRADICTED BY THE NEWLY-AVAILABLE OBJECTIVE MEDICAL EVIDENCE.

V. THIS CLAIM INVOLVES NEWLY DISCOVERED EVIDENCE AND A FUNDAMENTAL RIGHT, AND IS THUS EXCEPTED FROM ANY TIME BARS AND THE PROHIBITION AGAINST SUCCESSIVE WRITS.

VI. PETITIONER IS ENTITLED TO RELIEF FROM HIS CONVICTION AND SENTENCE OR, IN THE ALTERNATIVE, LEAVE TO FILE A SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF IN THE TRIAL COURT.

A. This Court Should Grant Petitioner Relief from His Unconstitutional Conviction and Sentence

B. In the Alternative, this Court Should Grant Petitioner Leave to File a Successive Petition for Post-Conviction Relief[8]

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[7] Motion for Relief from Judgment or for Leave to File Successive Petition for Post-Conviction Relief, *Havard*, 86 So.3d 896 (2011-DR-00539-SCT).

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The same day, Petitioner filed a companion motion in the United States District Court for Mississippi's Southern District requesting the district court to stay his federal habeas corpus proceedings pending the disposition of his second, successive petition.[9] The State filed its Response on February 5, 2014, followed by Petitioner's Reply on April 24, 2014.

Then on September 3, 2014, Petitioner amended his second, successive petition to include the following claim:

> CLAIM 2: HAVARD'S RIGHTS UNDER *BRADY V. MARYLAND* AND ITS PROGENY WERE VIOLATED BY THE STATE'S FAILURE TO DISCLOSE DR. HAYNE'S PRE-TRIAL REPORT THAT HE COULD NOT STATE THAT SEXUAL BATTERY HAD BEEN COMMITTED[10]

Petitioner also amended his second, successive petition with an alternative ineffective assistance of counsel claim for failing to investigate the case. On April 2, 2015, the Mississippi Supreme Court entered an Order, granting Petitioner limited leave to "file his petition for post-conviction relief in the trial court on the issues of newly discovered evidence presented in his application for leave."[11] Petitioner then filed his Petition for Post-Conviction Relief in this Court on June 16, 2015.

STATEMENT OF THE FACTS

The facts from the Mississippi Supreme Court's opinion on direct review of Petitioner's conviction and sentence appear below for the Court's convenience:

> Jeffrey Havard was living in Adams County with Rebecca Britt, the mother of six-month old Chloe Britt. Havard was not Chloe's father. Havard and Britt had been dating for a few months when Britt and Chloe moved in with Havard in his

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[9] Motion to Stay Proceedings, *Havard*, No. 08-00803 (S.D.Miss. filed Nov. 25, 2013).

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[11] Order, *Havard*, No. 2013-DR-01995-SCT (Miss. Nov. 25, 2015).

trailer located on property owned by Havard's grandfather. Around 8:00 p.m. on February 21, 2002, Havard gave Britt some money and asked her to go to the grocery store to get supper. Britt returned to find Chloe bathed and asleep. Havard told Britt he had given Chloe her bath and put her to bed. Havard had also stripped the sheets off the bed and told Britt he was washing them. Before that night, Havard had never bathed Chloe or changed her diaper. After Britt checked on Chloe, Havard insisted that Britt go back out to the video store to rent some movies. When Britt returned, Havard was in the bathroom, and Chloe was blue and no longer breathing. Britt performed CPR on Chloe in an attempt to resuscitate her. Britt and Havard drove Chloe to Natchez Community Hospital, where Britt's mother worked. The pathologist who prepared Chloe Britt's autopsy report would later testify that some of her injuries were consistent with penetration of the rectum with an object. Other injuries of the child included abrasions and bruises inside her mouth and internal bleeding inside her skull consistent with shaken baby syndrome. Both the hospital staff and the Sheriff observed anal injuries on Chloe as well, but no one at Chloe's day care had ever noticed bruises or marks on Chloe. No anal injuries or anything unusual about the child's rectum was noticed by the day care staff earlier on the day of February 21st Chloe was pronounced dead at the hospital later that night.

In the course of the investigation, Havard was charged with capital murder. In a videotaped statement two days after Chloe's death, Havard denied committing sexual battery on Chloe, but instead claimed he accidentally dropped her against the commode after bathing her, shook her in a panic, and then rubbed her down with lavender lotion before putting her to bed. The State presented DNA evidence which had been collected from the bed sheet. This evidence matched the DNA of both Havard and Chloe. A sexual assault kit testing for any of Havard's DNA in Chloe's rectum or vagina produced negative results. Havard offered no explanation for Chloe's injuries other than the possibility that he wiped her down too vigorously when preparing her for bed. Because Havard was indigent at trial, counsel was appointed to represent Havard, who also has court-appointed counsel for this appeal. Various events in the trial proceedings give rise to Havard's issues on appeal. In a pre-trial motion, defense counsel requested that any victim impact statement be excluded; and, the trial judge granted the motion as to the guilt/innocence phase of the trial. During the trial court's voir dire concerning any personal relationships jurors may have had with Havard, one juror stated she felt she could not be fair because her niece had been raped. The trial court later questioned the potential jurors to ascertain whether any one juror would either automatically vote for the death penalty, or would be unable to vote for the death penalty in the sentencing phase of the trial, regardless of the evidence presented at trial. One juror, who would later swear in a post-trial affidavit that he felt the death penalty was always appropriate in murder cases, was selected as a juror for the trial of this case. Trial counsel's defense strategy was to defend against any allegations of the underlying felony of sexual battery, consistent with Havard's version of the events of that night....

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Havard, 928 So.2d at 778-79 (internal citations omitted).

STATEMENT OF JURISDICTION

This Court's jurisdiction is limited by the Mississippi Supreme Court's Mandate. On April 2, 2015, the Mississippi Supreme Court published Its Mandate, granting Petitioner leave to proceed in this Court with a petition for post-conviction relief, but only "the issues of newly discovered evidence presented in [Petitioner's] application for leave."[12]

In addition to the newly discovered evidence issues, this Petition impermissibly contains assertions and arguments related to sexual battery. The Court's jurisdiction is limited only to newly-discovered evidence issues arising out of SBS. *Jackson v. State*, 67 So.3d 725, 730 (Miss. 2011) (citing Miss. Code Ann. §§ 99-39-7; 99-39-27)). This Court does not have jurisdiction to consider any claims related to the sexual battery. It would be inconsistent with the Mississippi Supreme Court's Mandate to do so. Sexual battery is not a newly discovered evidence issue. Petitioner has repeatedly claimed no sexual battery occurred. He did so at trial, on direct appeal, in his application for post-conviction relief, and first successive PCR petition. *See Havard*, 86 So.3d at 904-07 (ruling Petitioner's actual innocence claim based on newly discovered evidence concerning sexual battery, procedurally barred and without merit); *Havard*, 988 So.2d at 329-333, 344-45 (barring and ruling Petitioner's ineffective assistance claim for failing to secure an expert; and; that HAC aggravator subsumed "sexual battery" aggravator claim without merit); *Havard*, 928 So.2d at 788, 790-91, 801-04 (barring and ruling six of Petitioner's claims—all involving sexual battery—were without

[12] Mandate, *Havard*, No. 2013-DR-01995-SCT (Miss. filed Apr. 24, 2015).

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merit).[13] He sought out and obtained expert assistance in preparing claims attacking the sexual battery. He deposed and obtained multiple sworn statements from Dr. Hayne concerning sexual battery. (Depo. of Dr. Steven Hayne, dated Nov. 23, 2010; Respondent's Ex. A). Petitioner has raised multiple claims on direct and collateral review concerning sexual battery. The Mississippi Supreme Court has rejected those claims as: procedurally barred, and entirely without merit.

This Court does not have jurisdiction to consider any claim related to the sexual battery. It would be inconsistent with the Mississippi Supreme Court's Mandate to do so. Sexual battery is not before the Court.

ARGUMENT

Petitioner seeks a new trial on the ground that newly discovered evidence proves he is actually innocent of capital murder. (Pet. at 32-39). According to him, newly discovered evidence will show Chloe Britt's death was caused by injuries sustained when Petitioner accidentally dropped her. He tells the Court that Dr. Hayne, the forensic pathologist who testified at trial, has changed his opinion as to Chloe Britt's cause and manner of death. Petitioner tells the Court that Dr. Hayne's opinion has changed due to recent advances in science and medicine unavailable at the time of trial. In addition, Petitioner offers the sworn statements of three pathologists and one biomechanical engineer. They attack Dr. Hayne's trial testimony and opinion. They denounce Shaken Baby Syndrome, (SBS), as a myth, as junk science, as an impossible diagnosis. And, they opine, in

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similar, if not identical fashion, that the cause of Chloe Britt's death was a short, accidental fall, not SBS. (Pet. at 33, 39). Petitioner believes this evidence proves his innocence, because it conflicts with the evidence presented at trial. It does not.

There are two issues before the Court. The first is whether Petitioner's PCR petition and claims therein are procedurally barred under Mississippi's Uniform Post-Conviction and Collateral Relief Act. (UPCCRA). Miss. Code Ann. §§ 99-39-5(2); 99-39-23(6). If the answer to that question is yes, then the UPCCRA's procedural bars apply, and the inquiry ends. If not, then the Court must decide whether Petitioner's claim is precluded by Miss. Code Ann. § 99-39-21(1)-(3). If not, then the Court must consider the second issue.

The second issue the Court must consider is whether Petitioner has shown a new trial is warranted. A new trial is warranted if Petitioner can demonstrate newly-discovered evidence will probably prove he is actually innocent of capital murder. The State submits that Petitioner's claim is not based on newly-discovered evidence. And even if it were, Petitioner fails to show he is innocent of capital murder. The Court should dismiss this petition, and deny Petitioner's claim. Petitioner is entitled to no relief.

I. PETITIONER'S ACTUAL INNOCENCE CLAIM IS PROCEDURALLY BARRED AND WITHOUT MERIT.

Petitioner's actual innocence claim is subject to the UPCCRA's procedural bars. His actual innocence claim is not based on newly-discovered evidence, and the fundamental rights exception to the UPCCRA's procedural bars do not apply. (See Pet. 40-42). Petitioner's actual innocence claim is time barred, amounts to a successive writ, and subject to the procedural bars of waiver and, in turn, *res judicata*. Petitioner's actual innocence claim has no merit. A new trial is not warranted.

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A. The Petition is Time-Barred.

The PCR petition is barred by the statute of limitations found in Section 99-39-5(2), and does not fall under the newly-discovered evidence or fundamental rights exceptions to the time bar. Section 99-39-5(2) states that:

> (2) A motion for relief under this article shall be made within three (3) years after the time in which the petitioner's direct appeal is ruled upon by the Supreme Court of Mississippi or, in case no appeal is taken, within three (3) years after the time for taking an appeal from the judgment of conviction or sentence has expired, or in case of a guilty plea, within three (3) years after entry of the judgment of conviction. Excepted from this three-year statute of limitations are those cases in which the petitioner can demonstrate either:
>
> (a)(i) That there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence; or
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> (a)(ii) That, even if the petitioner pled guilty or nolo contendere, or confessed or admitted to a crime, there exists biological evidence not tested, or, if previously tested, that can be subjected to additional DNA testing that would provide a reasonable likelihood of more probative results, and that testing would demonstrate by reasonable probability that the petitioner would not have been convicted or would have received a lesser sentence if favorable results had been obtained through such forensic DNA testing at the time of the original prosecution.
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Miss. Code Ann. § 99-39-5(2).

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Miss. Code Ann. § 99-39-5(2).

The Mississippi Supreme Court issued Its Mandate on June 1, 2006.[14] Beginning on June 1, 2006, the UPCCRA provided Petitioner one year in which to prepare and file an application for leave to proceed in the trial court with a petition for post-conviction relief. Miss. Code Ann. § 99-39-5(2)(b). "[F]ilings for post-conviction relief in capital cases are to be made within one year after conviction.... [A]bsent an applicable exception, an untimely filed motion for post-conviction relief is procedurally time-barred." *Havard*, 86 So.3d at 899 (citing Miss. Code Ann. § 99-39-5(2)(b)); *Puckett v. State*, 834 So.2d 676, 677 (Miss. 2002). The one-year statute of limitations lapsed long ago. Furthermore, Petitioner's claim does not fall under the newly-discovered evidence or the fundamental rights exceptions to the time bar. This petition is time-barred.

B. The Petition is Barred as a Successive Writ.

Petitioner's PCR petition amounts to a successive writ. And because no exception applies, this petition is procedurally barred by Section 99-39-23(6). Section 99-39-23(6) states that:

> The order as provided in subsection (5) of this section or any order dismissing the petitioner's motion or otherwise denying relief under this article is a final judgment and shall be conclusive until reversed. It shall be a bar to a second or successive motion under this article. Excepted from this prohibition is a motion filed under Section 99-19-57(2), raising the issue of the convict's supervening mental illness before the execution of a sentence of death. A dismissal or denial of a motion relating to mental illness under Section 99-19-57(2) shall be res judicata on the issue and shall likewise bar any second or successive motions on the issue. Likewise excepted from this prohibition are those cases in which the petitioner can demonstrate either that there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that, if it had been introduced at trial, it would have caused a different result in the conviction or sentence. Likewise excepted are those cases in which the petitioner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked. Likewise excepted are those cases in which the

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Miss. Code Ann. § 99-39-23(6).

This is Petitioner's third attempt at obtaining post-conviction relief.[15] *Havard*, 988 So.2d 322. In 2012, the Mississippi Supreme Court denied Petitioner's first, successive post-conviction petition. *Havard*, 86 So.3d 896.[16] This petition is successive. Petitioner's claim is barred from collateral review.

C. Waiver, Different Theories, and Res Judicata Bar Review of Petitioner's Claim.

Petitioner's actual innocence claim is subject to the procedural bars of waiver, different theories, and *res judicata* listed at Section § 99-39-21. Section § 99-39-21 states that:

(1) Failure by a prisoner to raise objections, defenses, claims, questions, issues or errors either in fact or law which were capable of determination at trial and/or on direct appeal, regardless of whether such are based on the laws and the Constitution of the state of Mississippi or of the United States, shall constitute a waiver thereof and shall be procedurally barred, but the court may upon a showing of cause and actual prejudice grant relief from the waiver.

(2) The litigation of a factual issue at trial and on direct appeal of a specific state or federal legal theory or theories shall constitute a waiver of all other state or federal legal theories which could have been raised under said factual issue; and any relief sought under this article upon said facts but upon different state or federal legal theories shall be procedurally barred absent a showing of cause and actual prejudice.

(3) The doctrine of res judicata shall apply to all issues, both factual and legal, decided at trial and on direct appeal.

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[15] *Havard*, No. 2013-DR-01995-SCT (Miss. Nov. 25, 2013); *see Havard*, 86 So.3d 896 (denying collateral relief); *Havard*, 988 So.2d 322 (same).

[16] Section 99-39-23(6) bars review of Petitioner's claim as evidence by the Mandates issued in *Havard*, 86 So.3d 896 (Miss. 2013) (2011-DR-00359-SCT), and *Havard*, 988 So.2d 322 (No. 2006-DR-01161-SCT).

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(4) The term "cause" as used in this section shall be defined and limited to those cases where the legal foundation upon which the claim for relief is based could not have been discovered with reasonable diligence at the time of trial or direct appeal.

(5) The term "actual prejudice" as used in this section shall be defined and limited to those errors which would have actually adversely affected the ultimate outcome of the conviction or sentence.

(6) The burden is upon the prisoner to allege in his motion such facts as are necessary to demonstrate that his claims are not procedurally barred under this section.

Miss. Code Ann. § 99-39-21. "The procedural bars of waiver, different theories, and res judicata and the exception thereto as defined in Miss. Code Ann. § 99-39-21(1-5) are applicable in death penalty PCR Applications." *Havard*, 988 So.2d at 333 (citations and internal quotations omitted).

Petitioner has, at no time, raised an actual innocence claim predicated on the theory that Chloe Britt died from the injuries she sustained when he accidentally dropped her. He concedes this point. (Pet. 14). His failure to do so serves as a waiver of his present claim. *Id.* at 345 (¶ 84) (citing Miss. Code Ann. § 99-39-21(1)); *see also Bennett v. State*, 933 So.2d 930, 950 (¶¶ 75-76) (Miss. 2006). Petitioner claims that newly-discovered evidence proves Chloe Britt died from injuries she sustained when Petitioner accidentally dropped her. He emphasizes the point that this evidence is consistent with the statement that he gave to Deputies Manly and Smith on February 23, 2002. (Pet. 33). But, Petitioner's defense theory at trial—on direct appeal and throughout his post-conviction proceedings—was "that no sexual battery occurred ...[,]" not that Chloe Britt's death was accidental. *Havard*, 988 So.2d at 327. The Mississippi Supreme Court recognized this defense theory when analyzing and denying Petitioner's claim that trial counsel were ineffective for, among other things, failing to adopt a defense strategy during the guilt phase of trial. *Havard*, 988 So.2d at 327-29.

Petitioner attempts to show cause to excuse his waiver. He asserts that the evidence

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(6) The burden is upon the prisoner to allege in his motion such facts as are necessary to demonstrate that his claims are not procedurally barred under this section.

Miss. Code Ann. § 99-39-21. "The procedural bars of waiver, different theories, and res judicata and the exception thereto as defined in Miss. Code Ann. § 99-39-21(1-5) are applicable in death penalty PCR Applications." *Havard*, 988 So.2d at 333 (citations and internal quotations omitted).

Petitioner has, at no time, raised an actual innocence claim predicated on the theory that Chloe Britt died from the injuries she sustained when he accidentally dropped her. He concedes this point. (Pet. 14). His failure to do so serves as a waiver of his present claim. *Id.* at 345 (¶ 84) (citing Miss. Code Ann. § 99-39-21(1)); *see also Bennett v. State*, 933 So.2d 930, 950 (¶¶ 75-76) (Miss. 2006). Petitioner claims that newly-discovered evidence proves Chloe Britt died from injuries she sustained when Petitioner accidentally dropped her. He emphasizes the point that this evidence is consistent with the statement that he gave to Deputies Manly and Smith on February 23, 2002. (Pet. 33). But, Petitioner's defense theory at trial—on direct appeal and throughout his post-conviction proceedings—was "that no sexual battery occurred ...[,]" not that Chloe Britt's death was accidental. *Havard*, 988 So.2d at 327. The Mississippi Supreme Court recognized this defense theory when analyzing and denying Petitioner's claim that trial counsel were ineffective for, among other things, failing to adopt a defense strategy during the guilt phase of trial. *Havard*, 988 So.2d at 327-29.

Petitioner attempts to show cause to excuse his waiver. He asserts that the evidence

supporting his short-distance fall theory did not exist at the time of trial. (Pet. at 33). This is specious. A claim that could have been, but was not, raised at trial or on direct appeal has been waived. *Havard*, 86 So.3d at 900-901 (¶¶ 15-16) (citing Miss. Code Ann. § 99-39-21(1)). He could have raised this defense theory at trial. The evidence he offers in support of his actual innocence claim is, according to him, consistent with *his* statement. *His* statement was available months before trial began. Petitioner also blames others for not considering his statement and version of events. (Pet. 33). He had Dr. Hayne's autopsy report and Chloe Britt's medical records. He hired Dr. James Lauridson, a forensic pathologist, after trial and before directly appealing to the Mississippi Supreme Court. *See Havard*, 928 So.2d at 787. He could have spoken with Dr. Hayne prior to trial. He could have questioned Dr. Hayne on cross examination. He chose not to do so. Petitioner waived this issue. He cannot raise it now, more than a decade later, simply because he wants to present a different strategy.

Additionally, the record reflects Petitioner's cross examination of Dr. Laurie Patterson included questioning about the possibility that Chloe Britt's head injuries could have been caused by a short, accidental fall. During his cross examination of Dr. Patterson, Petitioner asked:

> Q: Dr. Patterson, when you were talking about the torn frenulum you talked about – I think you said a lot of times especially in children that a fall will cause that to happen?
>
> A: Uh-hum. Yes.
>
> Q: Well, even though this child wasn't walking, *if this child had fallen from a height of, say, three feet onto a hard surface that could cause that frenulum to burst or to bleed*; isn't that correct?
>
> A: Yes. Anything that would cause – you know – something, a force type type of effect, yes.
>
> Q: Like a porcelain toilet top or something like that. Some solid object like that.
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> A: If she fell on to it with her mouth.

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(Tr. 409.) (emphasis added). Petitioner touched on the issue at trial. Nevertheless, he failed to present an actual innocence claim on the ground that he accidentally dropped Chloe Britt on direct appeal, or at any time during his earlier post-conviction proceedings. *See Brown v. State*, 948 So.2d 405, 415-16 (¶ 39) (Miss. 2006) (holding an actual innocence claim procedurally barred even though the defendant "touch[ed] on this issue during cross examination of witnesses at trial ... but failed to raise actual innocence based on the claim that he did not match the description of the murderer on direct appeal."); *see id.* at 415 n. 1.[17] Petitioner waived this claim. Miss. Code Ann. § 99-39-21(1). His waiver bars further review of his actual innocence claim. *Id.* at § 99-39-21(3).

Petitioner is merely asking this Court to grant him a second bite at the apple, and allow him to re-litigate his guilt under a new legal theory. Earlier, it was noted that Petitioner's defense theory has consistently been "that no sexual battery occurred...." *Havard*, 988 So.2d at 327 (¶ 8).[18,19] As Petitioner is aware, this theory, as a matter of law, would have "eliminat[ed] the underlying felony

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[17] The *Brown* Court addressed the failure to raise actual innocence on direct appeal, stating:

> The outcome would be the same even if Brown's claim was construed as an argument that his conviction or sentence was against the weight or sufficiency of the evidence. While Brown did raise a claim regarding the sufficiency and weight of the evidence on direct appeal, the basis for that claim was different than what he is claiming now.

Brown, 948 So.2d at 415 n 1.

[18] Petitioner has repeatedly claimed newly-discovered evidence proves his innocence. He attempted to discredit Dr. Hayne's trial testimony with the Dr. Hayne's testimony taken at a 2010 deposition and the opinion of pathologist, Dr. James Lauridson. *See Havard*, 86 So.3d at 904-07 (barring and denying Petitioner's claim "that ... newly discovered evidence demonstrates that Havard is innocent of the underlying felony[of sexual battery]".). (Deposition of Dr. Steven T. Hayne, dated Nov. 23, 2010; Respondent's Ex A).

[19] *See e.g.*, *Havard*, 988 So.2d at 327; *Havard*, 928 So.2d at 787-88; Trial Transcript at 560-63, *Havard*, No. 2003-DP-00457-SCT.

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to the capital murder charge." *Id.* It has proven to be unsuccessful.[20] Petitioner now proposes a second legal theory that Chloe Britt's death was accidental. But, the issue he hopes to re-litigate remains the same—his guilt. He cannot do this. *Grayson v. State*, 118 So.3d 118, 133-34 (Miss. 2013) (quoting Miss. Code Ann. § 99-39-21(2)). In *Brown v. State*, the Mississippi Supreme Court, in rejecting an actual innocence claim, held that:

> Brown makes the blanket statement that he is innocent of all three murder charges and that imposition of the death sentence violates his constitutional rights. This Court specifically found on direct appeal that Brown's conviction of capital murder and death sentence were supported by evidence in the record. 690 So.2d at 298. The issue is barred from further review by res judicata. Miss. Code Ann. § 99-39-21(2).

Brown, 798 So.2d at 505.

This claim is nothing more than an attempt to litigate an issue previously decided by a jury and reviewed by multiple courts. *See e.g.*, *Grayson*, 118 So.3d at 133-34 (¶¶ 32-37) (holding the petitioner's attempt to "recast his argument made on direct appeal—regarding the denial of funds—under a different legal theory ..." procedurally barred). Petitioner was certainly capable of presenting this theory at trial, regardless of what he argues. A short, accidental fall? An accident? Could he really have not raised this at trial? He absolutely could have. The reason why Petitioner did not raise this claim is clear. It would have required him to take responsibility for Chloe's death. Because it could have been, but was not, raised and litigated at trial and / or direct appeal, Petitioner has waived this claim. Miss. Code Ann. § 99-39-21(2). Petitioner's actual innocence claim is barred. *Id.* at § 99-39-21(3).

Petitioner's actual innocence claim is subject to the time bar under Section 99-39-5(2), the

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[20] *Havard*, 86 So.3d at 904-07; *Havard*, 988 So.2d at 329-33, 344-45; *Havard*, 928 So.2d 788-89, 790-91, 801-04.

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successive-writ bar found at Section 99-39-23(6), and the provisions listed under Section 99-39-21. Petitioner's claim does not fall under the newly-discovered evidence or the fundamental rights exceptions to the UPCCRA's procedural bars. (See Pet. at 40-43) (citing *Rowland v. State*, 42 So.3d 503, 507 (Miss. 2010). The UPCCRA's procedural bars fully apply to Petitioner's actual innocence claim.

D. Petitioner's Actual Innocence Claim Does Not Fall Within the Fundamental Rights Exception to the UPCCRA's Procedural Bars.

With respect to the fundamental rights exception, Petitioner is mistaken. The fundamental rights exception to the UPCCRA's procedural bars does not apply to Petitioner's actual innocence claim. And, the State will show that the UPCCRA's procedural bars fully-apply in this case.

In *Avery v. State*, ___ So.3d ___, 2015 WL 3948769 (Miss. Ct. App. Jun. 9, 2015), the Court of Appeals dismissed an ineffective assistance of counsel claim. In doing so, the Court of Appeals briefly discussed the fundamental rights exception. The petitioner, in *Avery*, appealed the summary dismissal of a PCR petition that asserted an ineffective assistance of counsel claim related to a guilty plea. *Avery*, 2015 WL 3948769, at *1 (¶ 1). The petition was filed five years after the plea was entered. *Id.* at *5 (¶ 12). The Court of Appeals also noted that the petitioner's PCR motion was successive, premised on an ineffective assistance claim previously dismissed. *Id.* (citing *Avery v. State*, 95 So.3d 765, 768 (Miss. Ct. App. 2012)) (footnote omitted). Ultimately, the Court of Appeals held the claim "time-barred and subsequent-writ barred ... and without merit." *Id.* at *1 (¶ 1). The Court of Appeals, in a footnote, stated that:

> We find intellectually stimulating the argument that a PCR movant's claim that his fundamental constitutional rights were somehow violated forever insulates his claim from any procedural bar. The very first ground for relief in the UPCCRA, section 99–39–5(1)(a), permits a collateral attack on a final conviction based on a violation of the Constitution of the United States or the Constitution or laws of Mississippi.

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> There is no distinction in the statute between "fundamental" and "nonfundamental" constitutional rights. Additionally, the Legislature has given the movant three years to make such a claim. Furthermore, the Legislature has statutorily prohibited the successive filing of PCR motions absent certain statutory exceptions. Avery has already litigated his ineffective-assistance claim once to a final mandate. He now wants to relitigate that same claim, again claiming the procedural bars do not apply. Approving such a procedure would create a perpetual cause of action, authorizing relitigation of the same claim decades after it occurred. We believe such to be nonsensical.

Id. at *5 (¶ 12) n. 4.

Two days later, the Mississippi Supreme Court, in *Fluker v. State*, 170 So.3d 471 (Miss. Jun. 11, 2015), elaborated on Its fundamental rights exception. The *Fluker* Court explained that:

> Fluker's claim that his motion for PCR implicates the fundamental-rights exception to the procedural bars. Although "errors affecting fundamental constitutional rights are excepted from the procedural bars of the UPCCRA," *Rowland v. State*, 42 So.3d 503, 506 (Miss. 2010), "merely asserting a constitutional-right violation is insufficient to overcome the procedural bars." *Means v. State*, 43 So.3d 438, 442 (Miss. 2010). "There must at least appear to be some basis for the truth of the claim before the [procedural bar] will be waived." *Means*, 43 So.3d at 442 (quoting *Crosby v. State*, 16 So.3d 74, 79 (Miss. Ct. App. 2009)). As the Court of Appeals correctly held, Fluker's claim that the circuit court lacked jurisdiction to revoke his post-release supervision because he was on earned-release supervision is belied by the record showing he was on post-release supervision on the day of his arrest. Therefore, Fluker has not made a showing sufficient to implicate the fundamental-rights exception to the successive-pleadings bar.

Fluker, 170 So.3d at 475-76 (¶ 12).

Like Fluker, Petitioner merely asserts that he has been deprived his "fundamental rights." (Pet. at 41). He tells the Court, "[w]hen fundamental rights are involved ... procedural bars cannot operate to deprive a person of that right." (Pet. at 41) (citation omitted). And, he calls attention to the fact "that citizens may not be deprived of constitutional rights without due process of law and that due process requires reasonable advance notice and a meaningful opportunity to be heard." (Pet. at 41) (citations and internal punctuation omitted). Petitioner cites and discusses the Mississippi

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Supreme Court's decision in *Rowland v. State*, 42 So.3d 503 (Miss. 2010). (Pet. at 41-42). But, *Rowland* does not hold the proposition that a court must review a petitioner's claim simply because he has claimed a deprivation of his fundamental rights. "Merely asserting a constitutional violation is insufficient to overcome the [UPCCRA's] procedural bars." *Means v. State*, 43 So.3d 438, 442 (Miss. 2010); *Fluker*, 170 So.3d at 475-76.

In this case, Petitioner has merely asserted a deprivation of his fundamental rights. There is no basis that supports his assertion. "'There must at least appear to be some basis for the truth of the claim before the [procedural bar] will be waived.'" *Fluker*, 170 So.3d at 475 (quoting *Means*, 43 So.3d at 442). It is not a violation of due process for the prosecution to rely on expert testimony as evidence in support of its theory of the case where that testimony is admissible. In *Brown v. State*, 798 So.2d 481 (Miss. 2001), the Mississippi Supreme Court rejected a similar argument, stating that:

> Brown claims that the prosecutor improperly relied on Dr. Michael West, a dentist, to take impressions from the teeth of Evangela Boyd and thereafter allowing another dentist to testify concerning these impressions and the bite-mark on Brown's arm. Brown asserts that such evidence was unreliable because of this Court's first decision in *Howard v. State*, 697 So.2d 415, 429 (Miss. 1997) which held that testimony concerning "bite marks in soft, living flesh has not been scientifically accredited at this time." On petition for rehearing, the Court retracted its comment on the scientific reliability of bite-mark evidence and held only that the testimony of a bite-mark expert was for the jury to weigh. *Howard v. State*, 701 So.2d 274 (Miss. 1997). The Court held that where such evidence was admitted, "it should be open to the defendant to present evidence challenging the reliability of the field of bite-mark comparisons." *Id.* at 288. The contention that the State committed an act of prosecutorial misconduct by employing such an expert is unsupported. This issue is without merit and is denied.

Brown, 798 So.2d at 492.

In *Middleton v. State*, 980 So.2d 351, 356-357 (Miss. Ct. App. 2008), the appellant, Middleton, was convicted of felonious child abuse. At trial, the State introduced three experts who testified that the infant's injuries were permanent and consistent with Shaken Baby Syndrome.

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Middleton, 980 So.2d at 353. The experts included: (1) an emergency room physician who treated the infant; (2) a pediatrician who treated the infant; and, (3) a radiologist, who specialized in pediatric care and who treated the child. *Id.* Middleton appealed, raising three challenges to his conviction.

As it relates to this case, "Middleton argued that Shaken Baby Syndrome is not a generally accepted theory in the medical community...." *Id.* at 356. The Mississippi Court of Appeals affirmed Middleton's conviction, noting that the one of the State's expert witnesses "testified that the theory of Shaken Baby Syndrome is a widely accepted theory, but he also admitted there are a few well-respected physicians who disagree regarding the theory." *Id.* at 356-357 (citations omitted). Like Middleton, Petitioner asserts that SBS is not generally accepted, has been debunked, or has been seriously called into question as a valid medical diagnosis. He is mistaken.

Dr. Hayne's testimony and opinion were properly admitted as evidence. And importantly, Petitioner was provided ample opportunity to challenge Dr. Hayne's testimony and opinion. *Brown*, 798 So.2d at 492 (citing *Howard v. State*, 701 So.2d 274, 288 (Miss. 1997)). SBS was, and is, a widely-accepted medical diagnosis within the medical community. As one author puts it:

> recent authors and cases have cited "a shift in mainstream medical opinion" against the validity of AHT as a medical diagnosis. Other proffers have included: "[a]nd as technology and scientific methodology advanced, researchers questioning the basis for SBS reached a critical mass." There is but one simple question for these assertions: Where is the evidence/data for these assertions (other than the opinions of known defense experts)?
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> Rather than respond in like, with unsupported generalizations, this author will simply cite, with supporting, verifiable references, the various international and domestic medical organizations that have publicly acknowledged the validity of AHT as a medical diagnosis:
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8) The American Association for Pediatric Ophthalmology and Strabismus
9) The American College of Radiology
10) The American Academy of Family Physicians
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12) The American Association of Neurologic Surgeons
13) The Pediatric Orthopaedic Society of North America
14) The American College of Emergency Physicians
15) The American Academy of Neurology

> While it is certainly true that the public promulgations of the various international and domestic medical societies are not representative of each and every member of that society, it is safe to conclude they are representative of the majority of its members. The notable subspecialties that have some discord amongst their members are pathologists (represented by the National Association of Medical Examiners) and biomechanical engineers.

(Resp't's Ex. B) (Sandeep Narang, M.D., J.D., A DAUBERT ANALYSIS OF ABUSIVE HEAD TRAUMA / SHAKEN BABY SYNDROME, 11 Hous. J. Health L. & Pol'y 505, 574-76 (2011) (footnotes omitted)).

SBS has not been debunked. SBS has not been invalidated. Rather, SBS has been generally accepted in courts across the country as a valid medical diagnosis. Some examples include: *State v. McClary*, 541 A.2d 96, 102 (Conn. 1988) (recognizing SBS to be a generally accepted diagnosis in the medical community); *Johnson v. State*, 933 So.2d 568, 570 (Fla. Dist. Ct. App. 2006) (stating that "SBS testimony has been admitted in Florida and other jurisdictions, ... [and] is no longer a new or novel scientific principle subject to a Frye analysis"); *People v. Yates*, 736 N.Y.S.2d 798, 801 (N.Y. App. Div. 2002) (explaining that SBS "is no longer a novel scientific theory ..."); *State v. Leibhart*, 662 N.W.2d 618, 628 (Neb. 2003) (acknowledging that "for some time, courts in other states have found [SBS] to be a generally accepted diagnosis ..."); *Day v. State*, 303 P.3d 291, 296 (Ok. Ct. App. 2013) (Oklahoma courts have "upheld convictions based on evidence of violent

4) The Royal College of Ophthalmologists
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7) The American Academy of Ophthalmology
8) The American Association for Pediatric Ophthalmology and Strabismus
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10) The American Academy of Family Physicians
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shaking, or explicitly of SBS, since at least 1989."); *State v. Lopez*, 412 S.E.2d 390, 393 (S.C. 1991) (holding testimony relating to SBS admissible); *In re Morris*, 355 P.3d 355, 360 (Wash. Ct. App. 2015) (citing Dr. Sandeep Narang, A DAUBERT ANALYSIS OF ABUSIVE HEAD TRAUMA/SHAKEN BABY SYNDROME, 11 Hous. J. Health L. & Pol'y 505, 574-76 (2011)), and holding expert testimony concerning AHT admissible). And most notably, expert testimony concerning SBS has been admitted in this State. *See e.g.*, *Middleton*, 980 So.2d at 356-357; *see generally Bennett*, 933 So.2d at 949-50.

As for the constitutionality of Miss. Code Ann. § 97-3-19(2)(e), the Mississippi Supreme Court has consistently held the statute constitutional. In *Bennett*, the Mississippi Supreme Court addressed Bennett's arguments that Miss. Code Ann. § 97-3-19(2)(f) was unconstitutional. Bennett contended that the statute was unconstitutional, because he could be convicted of capital murder without any proof showing he intended to commit murder or felonious child abuse. *Bennett*, 933 So.2d at 950. The Mississippi Supreme Court rejected both arguments, noting that:

> [T]he intent of the Legislature was that serious child abusers would be guilty of capital murder if the child died. These are the precise facts before this Court. As this Court has stated in prior decisions, the Legislature's prerogative is to define crimes and set the punishment for offenders, and this prerogative is given great latitude.

Id. at 951 (quoting *Faraga v State*, 514 So.2d 295, 302 (Miss. 1987). The Court also called attention to the fact that "in *Gray v. State*, 351 So.2d 1342, 1345 (Miss.1977), ... [It] held that the 'with or without any design to effect death' language of Section 97-3-19(2)(e) was not unconstitutionally vague.'" *Id.* (quoting *Gray*, 351 So.2d at 1345).

Petitioner merely asserts a deprivation of his fundamental rights. There is no basis for his assertion. As discussed above, expert testimony concerning SBS is accepted across the nation, including Mississippi. The statute Petitioner was convicted under, Miss. Code Ann. § 97-3-19(2)(e),

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has been held constitutional. Petitioner's fundamental rights have not been violated. Therefore, the State submits that the fundamental rights exception to the UPCCRA's procedural bars does not apply to Petitioner's actual innocence claim.

E. Petitioner's Actual Innocence Claim Supported by Evidence that is Not Newly Discovered Evidence and Without Merit.

As an initial matter, Petitioner cites to *Herrera v. Collins*, 506 U.S. 390, 398 (1993). (Pet. at 32). *Herrera* has no application in this case. This is a state court action proceeding under the state's post-conviction relief act. *Herrera* addresses the actual innocence exception to AEDPA's prohibition of procedurally defaulted *federal habeas claims*. 28 U.S.C. § 2254.[21] *Herrera* applies in *federal* court actions proceeding under *federal* law. Additionally, actual innocence is not a freestanding claim for relief, but an exception to a federal procedural bar. *See Pruitt v. Mack*, 2013 WL 3479422, *2 (N.D.Miss. 2013) (recognizing actual innocence has "never been held to state a ground for federal habeas relief....") (citing *Herrera*, 506 U.S. at 400; *Coleman v. Thaler*, 2013 WL 2264347 (5th Cir. 2013); *Graves v. Cockrell*, 351 F.3d 143, 151 (5th Cir. 2003)). In *Howard v. State*, 945 So.2d 326 (Miss. 2006), Mississippi Supreme Court noted that:

> Howard cites several United States Supreme Court and federal court decisions on the "actual innocence" exception to the procedural bar raised in successive, abusive or defaulted federal habeas claims. We are not sure what Howard is attempting to add with this argument. However, even if the federal habeas cases applied here, Howard has failed to prove that he is actually innocent.

Howard v, 945 So.2d at 369-70. *Herrera* does not apply here.

That said, the State submits that the evidence Petitioner offers in support of his actual innocence is not newly discovered evidence. A claim that is based on newly-discovered evidence

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[21] Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (1996).

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may be exempt from the UPCCRA's time and successive writ bars. Miss. Code Ann. §§ 99-39-5(2)(a)(i); 99-39-23(6). Newly discovered evidence is evidence "not reasonably discoverable at the time of trial ..." that is "'of such nature that it would be practically conclusive that, if it had been introduced at trial, it would have caused a different result in the conviction or sentence." *Havard*, 86 So.3d at 901 (¶ 17) (citation and internal punctuation omitted); *see Havard*, 988 So.2d at 331-33 (¶¶ 26-31) (finding expert opinion offered to rebut Dr. Hayne's opinion cumulative, and unlikely produce a different result at trial). Petitioner must show the evidence supporting his claim: (1) will probably produce a different result or verdict, (2) was discovered after trial and could not have been discovered at the time of trial or direct appeal with reasonable diligence, (3) is material to the issue, and (4) is not cumulative or impeaching. *Id.*; *Williams v. State*, 669 So.2d 44, 55 (Miss. 1996); *Ormond v. State*, 599 So.2d 951 (Miss. 1992). All four factors must be satisfied. *Brown v. State*, 890 So.2d 901, 917 (Miss. 2004) (citations omitted).

The Court must determine whether Petitioner's evidence is newly discovered evidence. In making that determination, the Court must consider "whether a new trial should be granted ...[,]" because newly discovered evidence exists and will probably result in a different outcome or verdict if presented. *Brown*, 890 So.2d at 916 (quoting *Moore v. State*, 508 So.2d 666, 668 (Miss. 1987)). This inquiry "is made ... on a case-by-case basis, taking into account all the relevant facts and circumstances.... In making the decision, the [Court] must first look to see whether [P]etitioner has sufficiently proved the underlying allegations of [his actual innocence claim]." *Id.* (*Moore*, 508 So.2d at 668). As discussed below, Petitioner fails to show this evidence is newly-discovered evidence.

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1. *Dr. Hayne's Statements Were Reasonably Discoverable Before Trial*

The statements appearing in the affidavits and declaration executed by Dr. Hayne, which Petitioner offers in support of his actual innocence claim, were capable of being discovered and presented at trial and on direct appeal. Newly discovered evidence is evidence that was discovered after trial, and could not have been discovered at the time of trial or direct appeal with reasonable diligence. *Havard*, 86 So.3d at 901. Dr. Hayne's statements were discoverable before trial. And because they were, Dr. Hayne's affidavits and declaration are not newly discovered evidence.

Petitioner offers two affidavits executed by Dr. Hayne, as evidence that proves Dr. Hayne has changed his opinion with respect to the cause of Chloe Britt's death. Petitioner calls attention to the second Hayne affidavit that he has attached to his petition. (Pet. at 15-16) (Affidavit of Steven T. Hayne, dated Jul. 22, 2013; Pet'r's Ex. A). Turning to the second Hayne affidavit attached to his petition, Dr. Hayne states that:

> At trial, I testified that the cause of death of Chloe Britt was consistent with Shaken Baby Syndrome. Recent advances in the field of biomechanics demonstrate that shaking alone could not produce enough force to produce those injuries that caused the death of Chloe Britt. The current state of the art would classify those injuries as shaken baby syndrome with impact or blunt force trauma.

(Hayne Aff. ¶ VI., dated Jul. 22, 2013; Pet'r's Ex. A). Petitioner places emphasis on the phrase, "blunt force trauma[,]" appearing in preceding excerpt. (Pet. at 16) (quoting Hayne Aff. ¶ VI., dated Jul. 22, 2013; Pet'r's Ex. A). According to Petitioner, this is Dr. Hayne's "new position on Shaken Baby Syndrome...." (Pet. at 16).

As the Court is aware, Petitioner's trial took place at the end of 2002—December 16-19, 2002. Approximately two-and-a-half months after Petitioner's trial, Dr. Hayne testified in *Bennett*

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v. State, 933 So.2d 930 (Miss. 2006), a factually similar case.[22] The Mississippi Supreme Court's recitation of the facts in *Bennett v. State*, states, in part, that:

> After Brandon's death, an autopsy was performed by Dr. Steven Hayne ("Dr. Hayne"), who would later testify as the State's expert in forensic pathology. Dr. Hayne testified that Brandon, who weighed only twelve pounds, had two skull fractures corresponding with a hemorrhage on the left side of his head and smaller hemorrhages on the right side of his head. Dr. Hayne also linked the hematoma to blunt force trauma, noting that the significant injury to the left side of the head, combined with the separate injuries on the right side, were consistent with a direct blow to the head. Dr. Hayne testified that in addition to the subdural hematoma, there were areas of hemorrhage over the surface of the brain itself. Dr. Hayne discredited the defense's theory that Brandon caused these injuries to himself, noting "it would be highly unlikely that a two month old could even raise himself up and sit on the edge of his carrier." Dr. Hayne opined to a reasonable degree of medical certainty that these injuries did not occur from a fall from an infant carrier located on the floor. Dr. Hayne also stated to a reasonable degree of medical certainty that Brandon's injuries were not consistent with Brandon falling from the carrier located on the bed. According to Dr. Hayne, even if the carrier fell over from the bed, it would not produce a subdural hematoma or cause the severe diffuse brain injury Brandon suffered. ***Dr. Hayne concluded that Brandon was the victim of shaken baby syndrome followed by some blunt force trauma impact.***

Bennett, 933 So.2d at 937 (¶ 14) (emphasis added).

When compared with Petitioner's case, the excerpt above entirely contradicts Petitioner's allegations concerning Dr. Hayne's "new position," which will be discussed later. But for present purposes, the State would point out, Dr. Hayne testified in this case just two and a half months after Petitioner's trial. *See id.* at 938 (¶ 16) (Bennett was convicted and sentenced on February 28, 2003). Dr. Hayne performed Brandon Bennett's *before* Chloe Britt's. Dr. Hayne believed "Brandon was the victim of shaken baby syndrome followed by some blunt force trauma impact[,]" *before* forming his opinion as to the cause of Chloe Britt's death on February 21, 2002. Dr. Hayne's affidavits and

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[22] Dr. Hayne performed the autopsy of Brandon Bennett after his death on August 27, 2000. Brandon was approximately three months old at the time of his death. *Bennett*, 933 So.2d at 934.

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declaration are not newly discovered evidence.

Petitioner's short, accidental fall theory was capable of being discovered *before* Petitioner's trial and direct appeal. Problematic for Petitioner is the fact that he cannot show Dr. Hayne's opinion was discovered after trial and could not have been discovered at the time of trial or direct appeal with reasonable diligence. *Havard*, 86 So.3d at 901; *see Brown v. State*, 890 So.2d at 917 (Petitioner bears the burden of proving his evidence is newly discovered). This is particularly true given: (1) that Dr. Hayne was available to Petitioner prior to trial;[23] (2) that Petitioner had Dr. Hayne's autopsy report;[23] (3) that Petitioner had "any and all medical records ..." of Chloe Britt, and the names of "any and all medical providers that provided any medical services ..." to Chloe Britt;[24] and (4) that Dr. Hayne testified at trial and was subject to cross-examination.[25]

The State would also point to the first Hayne affidavit attached to the petition. Dr. Hayne, in his incorporated statements in a newspaper article, acknowledges short distance falls are capable of causing head injuries like Chloe Britt's. In doing so, Dr. Hayne cites a 1979 study. This study, he notes, "measur[ed] the falls of children[...,]" and arrived at the conclusion that short falls "can generate tremendous G forces in a short distance when you hit a very hard surface[.]" (Hayne Aff., dated Jul. 21, 2014; Pet'r's Ex. A). Dr. Hayne's reference to the 1979 study is relevant to the Court's newly discovered evidence determination in two ways.

For one, by citing to the 1979 study, the first Hayne affidavit shows research on the force

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[23] R. 94 (Order, *Havard*, 928 So.2d 771 (No. 2003-DP-00457-SCT)).

[24] R. 95 (Order for Medical Records, *Havard*, 928 So.2d 771 (No. 2003-DP-00457-SCT)); (See also Coroner and Medical Records of Chloe Britt, dated Feb. 21, 2002; Resp't's Ex. C).

[25] Tr. 560-63.

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capable of being generated by short falls was conducted, studied, published, and disseminated decades before trial. Petitioner does not explain why he was unable to present his short fall theory at trial, except to say that the evidence supporting his claim did not exist. The first Hayne affidavit shows that it did exist. *See Brown*, 890 So.2d at 917 (holding the petitioner bears the burden of proving his evidence is newly discovered, which includes demonstrating his evidence could not have been discovered at the time of trial or direct appeal). And two, by citing the 1979 study, the first Hayne affidavit corroborates the passage in *Bennett v. State*, 933 So.2d at 937 (¶ 14). Like the *Bennett* opinion, the 1979 reference shows that Dr. Hayne was aware of and accounted for other causes of death, including short falls, when investigating and forming his opinion as to what caused Chloe Britt's death. The first Hayne affidavit reference to the 1979 study shows Dr. Hayne knew of other possible causes of death, contrary Petitioner's assertion.

Nevertheless, Petitioner asserts that Dr. Hayne did not consider any other cause of death. (Pet. at 33-34). That allegation is unsupported, save Petitioner's conclusory assertion that:

> In his testimony, Dr. Hayne stated that the cause of death was consistent with Shaken Baby Syndrome, or a violent shaking by another person. Period. He did not account for the history of the short distance, accidental fall described by Havard in his statement to the police; indeed, there is no evidence that Dr. Hayne was presented with this significant statement. That head-first fall onto a hard surface from a height approximately three feet, would certainly constitute "blunt force trauma," which Dr. Hayne now accounts as a possible cause of the injuries he found during the autopsy. Dr. Hayne's trial testimony said nothing about blunt force trauma, and the jury was never presented with this reasonable hypothesis consistent with Havard's innocence.

(Pet. at 33-34). Petitioner's allegation is focused solely on Dr. Hayne's testimony.

That Dr. Hayne ignored the possibility Chloe Britt's death was the result of some other cause is specious. As to the cause of Chloe Britt's death, Dr. Hayne testified that:

> the classic triad for shaken baby syndrome is one, the presence of a subdural hemorrhage; and, two, the presence of retinal hemorrhage; and, three, the absence of

capable of being generated by short falls was conducted, studied, published, and disseminated decades before trial. Petitioner does not explain why he was unable to present his short fall theory at trial, except to say that the evidence supporting his claim did not exist. The first Hayne affidavit shows that it did exist. *See Brown*, 890 So.2d at 917 (holding the petitioner bears the burden of proving his evidence is newly discovered, which includes demonstrating his evidence could not have been discovered at the time of trial or direct appeal). And two, by citing the 1979 study, the first Hayne affidavit corroborates the passage in *Bennett v. State*, 933 So.2d at 937 (¶ 14). Like the *Bennett* opinion, the 1979 reference shows that Dr. Hayne was aware of and accounted for other causes of death, including short falls, when investigating and forming his opinion as to what caused Chloe Britt's death. The first Hayne affidavit reference to the 1979 study shows Dr. Hayne knew of other possible causes of death, contrary Petitioner's assertion.

Nevertheless, Petitioner asserts that Dr. Hayne did not consider any other cause of death. (Pet. at 33-34). That allegation is unsupported, save Petitioner's conclusory assertion that:

> In his testimony, Dr. Hayne stated that the cause of death was consistent with Shaken Baby Syndrome, or a violent shaking by another person. Period. He did not account for the history of the short distance, accidental fall described by Havard in his statement to the police; indeed, there is no evidence that Dr. Hayne was presented with this significant statement. That head-first fall onto a hard surface from a height approximately three feet, would certainly constitute "blunt force trauma," which Dr. Hayne now accounts as a possible cause of the injuries he found during the autopsy. Dr. Hayne's trial testimony said nothing about blunt force trauma, and the jury was never presented with this reasonable hypothesis consistent with Havard's innocence.

(Pet. at 33-34). Petitioner's allegation is focused solely on Dr. Hayne's testimony.

That Dr. Hayne ignored the possibility Chloe Britt's death was the result of some other cause is specious. As to the cause of Chloe Britt's death, Dr. Hayne testified that:

> the classic triad for shaken baby syndrome is one, the presence of a subdural hemorrhage; and, two, the presence of retinal hemorrhage; and, three, the absence of

other potentially *lethal* causes of death. *Other etiologies or causes of death.* So it's inclusionary and exclusionary. Both inclusionary findings were present. The subdural hemorrhage, the retinal hemorrhage, and also there was an exclusionary component [sic]. *I did not find any other cause of death, sir.*

(Tr. 556-57.) (emphasis added).

Before giving his opinion of what caused Chloe Britt's death, Dr. Hayne testified about the injuries he found and considered "lethal" injuries. As to those injuries, Dr. Hayne testified that:

A. ... When the scalp was reflected, there were bruises located over the scalp. There was also as the calvarium or skull cap was removed. There was also a collection of blood located between the skull and the brain itself, an it - - what's called the subdural space, collection of a volume of approximately thirty CC's which would be several tablespoons of blood located at that site.

Q. Would that be normal for that - - for that blood to be in the - -

A. No. It would indicate injury. It would indicate trauma had occurred.

....

A. ... The scalp is moved forward and back exposing the skull cap itself, and located underneath the skin surface of the scalp itself, there were multiple bruises as I indicated. After removal of the skull cap itself, there was a collection of blood between the inner surface of the skull and outer surface of the brain. There are small bridging vessels, small veins that go from the inner surface of the skull to the outer surface of the brain, and when the head is injured, there's transfer of force. The brain usually oscillates back and forth, and it will tear these vessels, and that will allow for the collection of blood in that space, the subdural space, between the inner surface of the skull and the outer surface of the brain. There's also other injury to the brain itself, and that is that surface of the brain had extensive hemorrhage or bleeding over it called a subarachnoid hemmorrhage. So when you actually held the brain in your hand, that blood remained in contact with the brain itself as opposed to the subdural hemorrhage which was left inside the skull itself when the brain was removed. There was also other injury that was identifiable and subsequently confirmed by microscopic examination. That is that the eyes when they were enucleated or removed and sectioned. There was obvious blood in those in the chambers of the eye and the optic nerves that run to the eye from the brain also had hemorrhage that one could readily recognize at the time of the autopsy. The eye is actually part of the brain. It's an extension of the brain. So it's included in the examination of the brain, and there was, I felt, significant - - there was bleeding inside the eyes called retinal hemorrhages as well as bleeding over the surface of the scalp, bleeding between the inner surface of the

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skull and the brain and also bleeding over the surface of the brain itself.

Q. Would you term it incidental bleeding in these areas that you've described or excessive bleeding? How would you term that?

A. I consider them lethal.

Q. Lethal.

A. Lethal. It would produce death, sir.

(Tr. 552-53.) Dr. Hayne also testified to the manner of Chloe Britt's death, stating that:

A. I thought it was consistent with homicide, sir.

Q. Obviously the child was six months old. Could she do this to herself?

A. No, sir.

Q. Okay. It would have to be someone else that did it?

A. It was another person, sir.

Q. Violently shaken.

A. Violently shaking, producing these injuries and, of course, there were other injuries that were identified on the body, but were not participatory in the death of the child.

Q. And, again, this is what your concentration on is what caused the death. So I would assume that your examination, although thorough, was on the head injuries?

A. Yes, sir. As opposed to a clinician physician who is treating an individual who obviously is alive or has a potential of being resuscitated, and that, of course, focuses different than a person like me who I am looking at the cause and manner of death, sir.

....

A. The other significant findings were the collection of evidence.

Q. Okay, sir.

A. Photograph documentation, evidence that was submitted to the Mississippi State Crime Lab.

Q. Okay, sir. Would that include the extraction of blood from the victim?

A. Yes, sir. There were several tubes of blood extracted, removed, phlebotomized for different reasons. Toxicology, DNA, serology, and the like, sir.

(Tr. 557-59.)

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Dr. Hayne did consider other explanations when forming his opinion of what caused Chloe Britt's death. The record clearly reflects that Dr. Hayne stated, under oath, that as to "other lethal causes of death[,] [o]ther etiologies or causes of death ... I did not find any other cause of death, sir." (Tr. 556-57.) (emphasis added). Petitioner's allegation that Dr. Hayne did not account for a short fall as "a possible cause of the injuries he found during the autopsy[,]" is not supported by the portions of the record quoted above. (Pet. at 33).

The same is true of Dr. Hayne's Final Report of Autopsy. (See Final Report of Autopsy, dated Feb. 22, 2002; Pet'r's Ex. G). It, like Dr. Hayne's testimony, shows that Dr. Hayne conducted extensive examinations of Chloe Britt's remains to determine the cause and manner of death. (See Autopsy Report; Pet'r's Ex. G). The Final Report of Autopsy states, in part, that:

A. IMMEDIATE CAUSE OF DEATH:

1. Changes consistent with shaken baby syndrome and closed head injuries.

B. ACUTE TRAUMATIC INJURIES:

1. Cephalohematoma.
2. Subdural hemorrhage.
3. Subarachnoid hemorrhage.
4. Retinal hemorrhage, bilateral.
5. Contusions of the forehead.
6. Contusion of the bridge of the nose.
7. Contusion of the upper lip.
8. Tear of frenulum.
9. Contusion of the posterior aspect of the scalp.
10. Contusion of the anterior surface of the right thigh.
11. Contusion of the anterior surface of the left thigh.

C. OTHER PATHOLOGIC FINDINGS:

1. Pulmonary vascular congestion and edema.
2. Atelectasis of the lungs.
3. Acute hepatic congestion.
4. Acute splenic congestion.
5. Reactive lymphoid hyperplasia of the perihilar lymph node.
6. Acute renal congestion, bilateral.

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7. Persistence of fetal lobulation of the kidneys.

MANNER OF DEATH: Homicide.

DISCUSSION OF THE CASE: The decedent was noted to succomb secondary to a combination of closed head injury and changes consistent with Shaken Baby Syndrome. The manner of death is ruled homicide.

(Autopsy Report at 6-7; Pet'r's Ex. G). Petitioner had a copy of Dr. Hayne's autopsy report before trial. (R. 94.)

Petitioner argues that "there is no evidence that Dr. Hayne was presented with [the statement Petitioner gave to law enforcement]." (Pet. at 33). But, the converse of his statement is that there is no evidence that Dr. Hayne was *not* presented with Petitioner's statement. And in these proceedings, he bears the burden of demonstrating this evidence was not discoverable at the time of trial. *Havard*, 86 So.3d at 901; *Brown*, 890 So.2d at 917. He has offered no proof this evidence was not presented to Dr. Hayne. Petitioner forgets: (1) that Dr. Hayne and his autopsy report were available to him prior to trial;[26] (2) that Dr. Hayne testified at trial;[27] and (3) that he was given Chloe Britt's medical records as well as the names of the physicians who had provided her with any medical service and the names of the emergency room health care givers who saw her on February 21, 2002.[28] He has offered no explanation as to why this evidence, *his* statement, was not and could not have been presented to Dr. Hayne.

Petitioner was capable of presenting *his* statement and short, accidental fall theory to Dr. Hayne prior to trial and on direct appeal. He certainly did when cross-examining Dr. Laurie

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[26] (R. 94.)

[27] (Tr. 560-65.)

[28] (R. 95-96.) Petitioner also deposed Dr. Hayne and hired an independent pathologist in earlier proceedings. *See Havard*, 86 So.3d at 904-910. (See Resp't's Exs. A and C).

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Patterson. During his cross-examination of Dr. Patterson, Petitioner asked:

> Q: Dr. Patterson, when you were talking about the torn frenulum you talked about – I think you said a lot of times especially in children that a fall will cause that to happen?
>
> A: Uh-hum. Yes.
>
> Q: Well, even though this child wasn't walking, *if this child had fallen from a height of, say, three feet onto a hard surface that could cause that frenulum to burst or to bleed*; isn't that correct?
>
> A: Yes. Anything that would cause – you know – something, *a force type of effect*, yes.
>
> Q: *Like a porcelain toilet top or something like that.* Some solid object like that.
>
> A: If she fell on to it with her mouth.

(Tr. 409.) (emphasis added).[29]

Petitioner's allegation that Dr. Hayne did not consider of other causes of death conflicts with the record. Dr. Hayne considered other alternative causes of death, but found no other causes of death. Petitioner has not shown, and cannot show, that Dr. Hayne did not consider his statement. He admits as much. And, he offers no explanation or proof that shows he could not have presented Dr. Hayne with his statement before trial, during trial, or at any time before direct appeal. After all, he asked Dr. Patterson about a three-foot fall onto a hard surface "[l]ike a porcelain toilet top or something like that ..." at trial.

The Hayne affidavits and declaration Petitioner offers in support of his actual innocence claim are not newly discovered evidence. This information was capable of being discovered before

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[29] During a September 25, 2002, pre-trial motions hearing, defense counsel sought Chloe Britt's medical records, noting that "there are situations where shaken baby syndrome *can be other things*, and vice versa, of course, and to have those medical records would give us an indication as to whether or not there could be additional things or situations that may have caused the baby's death." (Tr. 37-38.) (emphasis added).

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2. *Drs. Baden, Ophoven, Nichols, and Van Ees' Statements Were Reasonably Discoverable Before Trial*

Likewise, the statements of Drs. Baden, Ophoven, Nichols and Van Ee were discoverable at the time of trial and direct appeal. Petitioner has not shown, and cannot show, that the statements, conclusions, and opinions of Drs. Baden, Ophoven, Nichols, and Van Ee could not have been discovered at the time of trial or direct appeal with reasonable diligence. *Havard*, 86 So.3d at 901. Because he has not, Petitioner's claim must fail. *Id.*; *see Brown*, 890 So.2d at 917 (requiring the petitioner to satisfy all four factors of newly discovered evidence).

To begin, the affidavit executed by Dr. Chris Van Ee, Ph.D in biomechanical engineering, does not qualify as newly discovered evidence. Dr. Van Ee cites and relies on several sources that were available long before Petitioner's trial. A couple of them are worth noting. Looking to his affdiavit, Dr. Van Ee cites Dr. Ann-Christine Duhaime's 1987 study that was published in the Journal of Neurosurgery, THE SHAKEN BABY SYNDROME: A CLINICAL, PATHOLOGICAL, AND BIOMECHANICAL STUDY.[30] Dr. Van Ee describes the Duhaime study as a "landmark" paper that "quantif[ies] the mechanics of shaking[.]" (Aff. of Chris Van Ee, Ph.D. at ¶ 22, dated Nov. 13, 2013; Pet'r's Ex. E). The Duhaime study was published in Journal of Neurosurgery in 1987, fifteen years before trial. The 1987, Duhaime study shows that Dr. Van Ee's opinion is based, to some degree, on evidence that pre-dated Petitioner's trial by more than a decade. Dr. Van Ee also cites to a 2001 study conducted by Dr. John Plunkett. (Van Ee Aff. at ¶ 12; Pet'r's Ex. E). He describes Dr.

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[30] (Resp't's Ex. D) (Ann-Christine Duhaime, et. al., THE SHAKEN BABY SYNDROME: A CLINICAL, PATHOLOGICAL, AND BIOMECHANICAL STUDY, 66 J. Neurosurg 409-415 (Mar. 1987)).

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All four doctors were testifying as expert witnesses on behalf of other defendants at the time of Petitioner's trial or direct appeal, consistent with their sworn statements. For example, Dr. Van Ee testified as an expert witness in the case of *Virginia v. Estrella*, CR03051857-00 (Vir. Cir. Ct. 2004). (See Trial Transcript, *Virginia v. Estrella-Perez*, No. CR03051857-00; Resp't's Ex. E). In *Estrella-Perez*, Dr. Van Ee testified that a short-distance fall caused a child's death, which is consistent with his present opinion as well as those given by Drs. Baden, Ophoven, and Nichols.[31] A point worth noting is that Petitioner could have reasonably discovered this evidence. Dr. Van was working in Michigan at the time he testified in *Estrella-Perez* on behalf of a defendant, who was being tried several states away in Virginia. (See Van Ee Aff.; Pet'r's Ex. E).

Dr. Michael Baden has long-held a position which is entirely consistent with his present findings and conclusions. In a 1998 American Bar Association Journal article, Dr. Baden, who at the time had thirty-five years of experience as a forensic pathologist, was quoted as having "only seen two or three [cases of Shaken Baby Syndrome] in [his] lifetime." Mark Hansen, WHY ARE IOWA'S BABIES DYING?, 84 A.B.A.J. 74 (Aug. 1998) (Resp't's Ex. F). In *People v. Tison, 2003 WL*

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23034287 (Cal. Ct. App. 2003) (not reported in Cal.Rptr.3d), Dr. Baden testified on behalf of the defendant, Tison. (Resp't's Ex. G). Tison was charged and convicted of "voluntary manslaughter ... and felony child endangerment ... for killing his 13-month-old daughter ... who was in his sole care when she suffered fatal blunt trauma injuries to her head." *Tison*, 2003 WL 23034287 at *1. According to Tison, his daughter fell from a second-story window. *Id.* She was playing on his desk while he was using his computer at his desk. *Id.* She lunged, and fell out of the window. *Id.* The officers who arrived at Tison's residence noted that Tison's desk was in front of the window. *Id.* at *3. The window was opened, but no more than three quarters of an inch. *Id.* Officers noted the items on the desk were pushed against the window sill and appeared to be undisturbed. *Id.* They also found a "small pool of blood" on the deck in the backyard. *Id.* A blood splatter analyst believed the blood fell from less than a distance of less than a foot from a stationery source. *Id.* The prosecution's medical experts were of the opinion that Tison's daughter was shaken and then slammed onto some hard surface. *Id.* They found her injuries were inconsistent with a thirteen foot fall, noting that "it [wa]s unusual for young children to suffer fatal injuries from 15 feet to as much as 70 feet because their bodies are flexible and resilient." *Id.*

As to Dr. Baden's testimony, the California Court of Appeal noted that:

> Forensic pathologist Michael Baden testified that Isabel died of cardiac arrest due to high potassium during neurosurgery, which is not a normal feature for head injuries. Dr. Baden opined that Isabel's injuries were consistent with a child who fell from a height of 12 to 15 feet and landed on her head, and not from a direct blow to her head with an object. A person falling from a height of 13 feet onto a deck has a vertical speed of 19.7 miles per hour upon impact, while a person who is thrown out a window at sufficient speed to travel a horizontal distance of nine feet, four inches from the house, would skid from the contact point to the resting point.
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> According to Dr. Baden, *shaken baby impact syndrome is impossible to prove*. Nevertheless, he concluded this was not a shaken baby case because there was a very severe impact sight which would account for all the medical findings.

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Id. at *5 (emphasis added).

Dr. Baden's *Tison* testimony is similar to the statements in his affidavit and declaration that are attached to Petitioner's petition. For example, Dr. Hayne States that SBS is "a condition which now many forensic pathologists have concluded does not exist ...." And yet, he states that "there was no bruising within the brain tissue itself as one might expect if the brain were to have been violently thrown back and forth within the skull during an abusive shaking as required by the Shaken Baby Syndrome theory." (See Declaration of Dr. Michael M. Baden at ¶¶ 7-8 , dated Mar. 13, 2013; Pet'r's Ex. B). Petitioner could have reasonably discovered this evidence. Dr. Baden's *Curriculum Vitae* shows he was working in the Northeastern region of the United States when he testified in *Tison*, on the West Coast of the United States. (See Michael M. Baden, M.D., C.V.; Pet'r's Ex. B).

Dr. Janice Ophoven's affidavit and the statements are consistent with the testimony she gave in *State of Minnesota v. Chanda Thi Huynh*, Hennepin County Dist. Ct. No. 02074350. *See Huynh v. State*, 2005 WL 3159704, *2 (Minn. Ct. App. 2005) (Resp't's Ex. H). Huynh was charged with the second-degree murder of her two-year-old daughter. *Id.* Huynh admitted to spanking her daughter. *Id.* at *1. She also admitted that "[m]aybe I shook her harder than I thought." *Id.* At trial, at least two doctors testified that the victim's cause of death was SBS and shaking with blunt force trauma to the head. *Id.*

Dr. Ophoven testified as an expert witness for the petitioner during a post-conviction relief hearing in *Huynh*. *Id.* at *2. It was her opinion that the injuries that caused the two-year-old's death were the result of blunt-force trauma, not SBS. *Id.* However, she did concede that the child's death could have caused by blunt force trauma and having been shaken. *Id.* She went on to speculate that the child could have sustained the fatal injuries from some blunt-force trauma seventy-two hours

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prior to collapse while the child's brain was compensating for swelling during a lucid interval. *Id.* Dr. Ophoven also conceded that the child could have been immediately unresponsive after she was injured. *Id.*

The Minnesota Court of Appeals, when reviewing Huynh's appeal of her post-conviction hearing, described Dr. Ophoven as an "inconsistent" expert witness. *Id.* at *4. The court also characterized her testimony as grounds supporting a theory of "we don't know what happened...." *Id.* And in turn, the court held that "[g]iven the possible problems with Dr. Ophoven's testimony on timing, appellant has not met her burden of proving a reasonable probability that the outcome of trial would have been different." *Id.* The Eighth Circuit has also commented on testimony given by Dr. Ophoven. *U.S. v. Red Bird*, 450 F.3d 789, 792 (8th Cir. 2006) (Resp't's Ex. I). In that case, the Eighth Circuit took interest with the portion of Dr. Ophoven's opinion where she stated that the infant victim was incapable of "suffer[ing] traumatic brain injury serious enough to develop symptoms and die by virtue of shaking alone, and that there must be evidence of impact." *Red Bird*, 450 F.3d at 792.

Dr. Ophoven's current position is similar to her testimony in *Huynh*. The statements appearing in Dr. Ophoven's affidavit are consistent with her testimony in *Huynh* and *Red Bird*. Dr. Ophoven's present statements are consistent with her testimony in cases where she was testifying as an expert witness on behalf of defendants at the time of Petitioner's trial and direct appeal.

In *State v. Edmunds*,746 N.W.2d 590 (Wis. Ct. App. 2008), Dr. Nichols testified about his evolving opinion of SBS after hearing Dr. Plunkett[32] opine on SBS during an evidentiary hearing. (Evidentiary Hearing Transcript at 136-37, *State of Wisconsin v. Audrey A. Edmunds*, No. 96 CF 555, dated Jan. 25, 2007; Resp't's Ex. J). When asked about the timing of his revelation, Dr. Nichols

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testified that he believed "that the investigation of potential causes other than Shaken Baby Syndrome ... changed ... [s]ince at least '98." (*Edmunds* Evid. Hear'g Tr. at 142; Resp't's Ex. J). Dr. Nichols found Dr. Plunkett's testimony so persuasive that he studied the articles that Dr. Plunkett cited, including articles authored by biomechanical engineers. (*Edmunds* Evid. Hear'g Tr. at 137; Resp't's Ex. J). After gaining an understanding of unfamiliar scientific and medical communities, Dr. Nichols came to question and doubt the validity of SBS diagnosis based on the presence of the triad of symptoms historically attributed to it. (*Edmunds* Evid. Hear'g Tr. at 137; Resp't's Ex. J). Dr. Nichols confirmed "that more recent literature" and "the research since 1996 has made it clear that the kind - - the triad of injuries that we see in the brain can be caused by asphyxia or any number of other causes aside from shaking or impact[.]" (*Edmunds* Evid. Hear'g Tr. at 154; Resp't's Ex. J). These alternative explanations, according to Dr. Nichols, were capable of producing injuries such as subdural hematomas. (*Edmunds* Evid. Hear'g Tr. at 154-55; Resp't's Ex. J). Dr. Nichols's testimony, contrary to Petitioner's actual innocence claim, proves that evidence of his short, accidental fall was capable of being presented at trial and on direct appeal.

Both Drs. Nichols and Van Ee cite to the research of Dr. Plunkett. Dr. Plunkett was testifying as an expert witness on behalf of defendants in state courts years before Petitioner's 2002 trial. (See *Edmunds* Evid. Hear'g Tr. at 136-37, 154; Resp't's Ex. J). Only three months after Petitioner's trial, in March of 2003, Dr. Plunkett testified in the case of *State v. Butts*, 2004 WL 449245, **1, 4 (Ohio 2004) (not reported in N.E.2d) (Resp't's Ex. K). Dr. Plunkett testified as an expert witness on behalf of an Ohio defendant charged with one count of murder, one count of involuntary manslaughter, one count of felonious assault, and two counts of child endangering. *Butts*, 2004 WL 449245 at *1.

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In *People v. Snell*, 2011 WL 10088352 (Ill. App. Ct. 2011), the Appellate Court of Illinois noted that the defendant's allegation:

> that, beginning in **1999**, several studies emerged that challenged the validity of the shaken-baby-syndrome diagnosis. In particular, defendant alleged, the studies revealed that falls of short distances may lead to significant brain injuries such as cerebral edema, subdural hemorrhaging, and retinal hemorrhaging-symptoms that previously had been considered indicative of shaken baby syndrome; lucid intervals may in fact exist between **trauma** that causes brain injury and the appearance of behavioral symptoms; retinal hemorrhaging cannot be scientifically attributed to shaking; and, due to the force necessary to elicit brain injuries by shaking, the brain injuries cannot occur without a corresponding neck injury—a finding often absent in shaken-baby-syndrome cases.

Snell, 2011 WL 10088352, at *10 (emphasis added and in the original). The *Snell* Court noted the evidence Petitioner claims did not exist, pre-dated his trial by approximately three years. *Snell, supra.* The *Snell* Court also noted the testimony at Snell's 2004 jury trial. Specifically, the *Snell* Court noted the portion of Dr. Jeffrey M. Jentzen's testimony where he stated that:

> **"blunt force trauma" implies that some type of mechanism**—blunt trauma or another type of mechanism—caused the tearing of the blood vessels and the brain movement. He said that the term could include impact **or violent acceleration and deceleration movement that caused a tearing of the blood vessels.** According to Dr. Jentzen, "**[i]mpact**" means "a massive slamming of a child **or a violent shaking of some type to cause enough motion of the brain to cause the damage that was described.** It would not be consistent with a trivial fall or what we typically see. It would be an intentional type injury."

Id. at *7 (emphasis added).

As the discussion above shows, this evidence was capable of being discovered and presented to the jury prior to Petitioner's trial. The statements of Drs. Baden, Ophoven, Nichols and Van Ee were discoverable at the time of trial and direct appeal. It is not newly-discovered evidence. Petitioner fails to show this evidence was not capable of being discovered at the time of trial or direct appeal. Petitioner bears the burden of proof. And, the State submits he has not shown, and cannot

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show, this evidence was unavailable at the time of trial and could not have been discovered at the time of trial or on direct appeal.

3. *Petitioner's Evidence Would Not Cause a Different Outcome at Trial*

The documents executed and provided by Drs. Hayne, Baden, Ophoven, Nichols, and Van Ee, which Petitioner offers in support of his actual innocence claim, would not cause a different outcome or verdict if this Court were to grant him a new trial. According to Petitioner, their statements support his claim in three ways. First, they are evidence of recent advances in the scientific and medical communities that did not exist at the time of trial. Second, he believes that their statements prove SBS has been debunked, or at least raised serious concerns as to the validity of SBS as a medical diagnosis. And third, he contends these statements show the "nationwide concerns and evolutions of opinions ..." among professionals within the scientific and medical communities concerning SBS. (Pet. at 16). The State disagrees, entirely.

The Hayne affidavits reaffirm Dr. Hayne's trial testimony and opinion. Newly-discovered evidence must be material to the case. Material evidence is evidence that "will probably produce or induce a different verdict, if a new trial is granted." *Crawford*, 867 So.2d at 204 (citing *Meeks v. State*, 781 So.2d 109, 112 (Miss. 2001)); *see Havard*, 86 So.3d at 901 (same). Petitioner must show Dr. Hayne's affidavits and declaration are material. To do so, he must "sufficiently prove[] the underlying allegations of ..." his actual innocence claim in light of "all the relevant facts and circumstances" of this case. *Brown*, 890 So.2d at 916-17 (citing *Moore*, 508 So.2d at 668). This he cannot do.

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Mar. 5, 2009; Pet'r's Ex. A). Because it does not concern SBS, Dr. Hayne's declaration is not material to Petitioner's actual innocence claim. It cannot be considered newly discovered evidence. *Havard*, 86 So.3d at 901.

As for the Hayne affidavits attached to the PCR petition, Petitioner argues they prove Dr. Hayne has changed his opinion to account for the possibility that blunt force trauma generated by a "head-first fall onto a hard surface from a height approximately three feet ..." caused Chloe Britt's injuries. (Pet. at 33). The State has found no instance where Dr. Hayne has changed his opinion in this case. Nevertheless, Petitioner points to the second Hayne affidavit attached to his PCR petition, where Dr. Hayne acknowledges that "[r]ecent advances in the field of biomechanics demonstrate that shaking alone could not produce enough force to produce those injuries that caused the death of Chloe Britt." (Hayne Aff. at ¶ VI, dated Jul. 22, 2013; Pet'r's Ex. A). Dr. Hayne goes on to point out the fact that "[t]he current state of the art would classify those injuries as shaken baby syndrome with impact or blunt force trauma." (Hayne Aff. at ¶ VI; Pet'r's Ex. A). Petitioner believes that Dr. Hayne has changed his opinion to include blunt force trauma as an additional mechanism that could have caused Chloe Britt's fatal head injuries. (See Pet. at 33). He is mistaken.

The Hayne affidavits do not show Dr. Hayne's opinion has changed. Petitioner offers them, hoping to discredit Dr. Hayne's trial testimony and opinion. Newly discovered evidence must be more than merely impeaching. *Crawford*, 867 So.2d at 204; *see e.g.*, *Havard*, 86 So.3d at 901-03 (¶¶ 17-24). The State submits that the Hayne affidavits actually undermine Petitioner's claim in light of the Mississippi Supreme Court's opinion in *Bennett v. State*. Petitioner's claim centers around the assertion that Dr. Hayne has changed his opinion to account for blunt force trauma as a possible cause. This change, according to Petitioner, is attributed to recent advances in science and medicine

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that have taken place since trial. But, Dr. Hayne considered the possibility that a short, accidental fall caused the death of an infant in *Bennett v. State*. There, Dr. Hayne opined that the child's injuries were not consistent with a short, accidental fall. According to Dr. Hayne, the child's injuries were consistent with a "victim of shaken baby syndrome followed by some blunt force trauma impact[.]" *Bennett*, 933 So.2d at 937 (¶ 14). *Bennett* shows that Dr. Hayne was accounting for this type of force at the time of Petitioner's trial. And, *Bennett* contradicts Petitioner's allegation that recent advances since Petitioner's trial have caused Dr. Hayne to change his opinion.

It is also important to note that Dr. Hayne's opinion that Chloe Britt's death was caused by SBS with blunt force or impact trauma is consistent with the 2009 policy statement published by the American Academy of Pediatrics, (AAP). In its policy statement, the AAP recommends that pediatricians "embrace a less mechanistic term, abusive head trauma, when describing injury to the head and its contents." Christian C W, M.D., Block R, M.D., ABUSIVE HEAD TRAUMA IN INFANTS AND CHILDREN, 123 Pediatrics 1409, 1410 (2009) (footnote omitted).[33] The AAP made its recommendation, because:

> Medical terminology should accurately reflect the medical diagnosis. The term "shaken baby syndrome" has become synonymous in public discourse with AHT in all its forms. The term is sometimes used inaccurately to describe infants with impact injury alone or with multiple mechanisms of head and brain injury and focuses on a specific mechanism of injury rather than the abusive event that was perpetrated against a helpless victim. Legal challenges to the term "shaken baby syndrome"can distract from the more important questions of accountability of the perpetrator and/or the safety of the victim. The goal of this policy statement is not to detract from shaking as a mechanism of AHT but to broaden the terminology to account for the multitude of primary and secondary injuries that result from AHT, some of which contribute to the often-permanent and significant brain damage sustained by abused infants and children.

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that have taken place since trial. But, Dr. Hayne considered the possibility that a short, accidental fall caused the death of an infant in *Bennett v. State*. There, Dr. Hayne opined that the child's injuries were not consistent with a short, accidental fall. According to Dr. Hayne, the child's injuries were consistent with a "victim of shaken baby syndrome followed by some blunt force trauma impact[.]" *Bennett*, 933 So.2d at 937 (¶ 14). *Bennett* shows that Dr. Hayne was accounting for this type of force at the time of Petitioner's trial. And, *Bennett* contradicts Petitioner's allegation that recent advances since Petitioner's trial have caused Dr. Hayne to change his opinion.

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> Medical terminology should accurately reflect the medical diagnosis. The term "shaken baby syndrome" has become synonymous in public discourse with AHT in all its forms. The term is sometimes used inaccurately to describe infants with impact injury alone or with multiple mechanisms of head and brain injury and focuses on a specific mechanism of injury rather than the abusive event that was perpetrated against a helpless victim. Legal challenges to the term "shaken baby syndrome"can distract from the more important questions of accountability of the perpetrator and/or the safety of the victim. The goal of this policy statement is not to detract from shaking as a mechanism of AHT but to broaden the terminology to account for the multitude of primary and secondary injuries that result from AHT, some of which contribute to the often-permanent and significant brain damage sustained by abused infants and children.

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[33] ABUSIVE HEAD TRAUMA IN INFANTS AND CHILDREN, 123 Pediatrics 1409, *available at* http://pediatrics.aappublications.org/content/123/5/1409.full.pdf.

Id. at 1410.[34] The second Hayne affidavit reflects the current state of the art. (Hayne Aff. at ¶ VI, dated Jul. 22, 2013). SBS is a "subset" of Abusive Head Trauma, (AHT). *Id.* at 1410.

Turning back to the second Hayne affidavit, Dr. Hayne states that:

> At trial, I testified that the cause of death of Chloe Britt was consistent with Shaken Baby Syndrome. Recent advances in the field of biomechanics demonstrate that shaking alone could not produce enough force to produce those injuries that caused the death of Chloe Britt. The current state of the art would classify those injuries as *shaken baby syndrome* with impact or blunt force trauma.

(Hayne Aff. ¶ VI., dated Jul. 22, 2013; Pet'r's Ex. A) (emphasis added). This statement is not proof that shows Dr. Hayne has changed his opinion to account for the blunt force trauma generated by a "head-first fall onto a hard surface from a height approximately three feet ..." as the force that caused Chloe Britt's injuries. (Pet. at 33). This is because brain injury associated with SBS may be the result of shaking. 123 Pediatrics at 1409-10. But, brain injury associated with SBS may *also* be the result of "blunt impact trauma or impact *combined* with shaking can result in infant head injuries." *Id.* (emphasis added) (footnote omitted).

The statement above is not evidence that shows Dr. Hayne has changed his opinion as to the cause of Chloe Britt's death. Dr. Hayne has not changed his opinion. He has reaffirmed it. What has changed is, as Dr. Hayne points out, the terminology. The only other change is Petitioner's strategy, which now accounts for information (*i.e.*, Chloe Britt's injuries) that has been in his possession before the start of his trial. Dr. Hayne's statement reflects the current policy in medicine with regard to SBS,

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[34] Compare the passage above, directly quoting the AAP's 2009 policy statement with the following statement appearing in the ClarionedLedger.com article. The article states that: "In 2009, the American Academy of Pediatrics recommended the diagnosis of the syndrome be discarded and replaced with 'abusive head trauma.'" (Mitchell J, *The Death of Chloe Britt: Capital murder or accidental fall?*, ClarionLedger.com at p. 3, dated Jan. 20, 2014; Pet'r's Ex. I).

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as explained in the 2009 policy statement published by the AAP.[35]

In light of the preceding, the State submits that Petitioner has not shown, and cannot show Dr. Hayne's affidavits and declaration will probably cause a different outcome or verdict if presented at trial. They are not material. Petitioner offers Dr. Hayne's affidavits as evidence showing Dr. Hayne disavows his trial testimony and opinion. They do not. And, they do not constitute newly discovered evidence.

The statements appearing in the affidavits and declarations executed by Drs. Baden, Ophoven, Nichols and Van Ee, which Petitioner offers in support of his actual innocence claim, would not cause a different outcome or verdict if this Court were to grant him a new trial. Petitioner claims that advances in science and medicine prove the lethal head injuries Chloe Britt sustained were the result of a short, accidental fall. (Pet. at 39). And because his evidence proves Chloe Britt's death was the result of an accident, Petitioner argues that he can prove he is innocent of capital murder. In other words, Petitioner claims he is innocent of capital murder and can prove his innocence by showing that he did not intend to kill Chloe Britt. The State disagrees.[36]

Looking to Dr. Van Ee's affidavit, under the section titled "Comparing the Trauma in Falls to Manual Shaking[,]" Dr. Van Ee attacks Dr. Hayne's autopsy report. He states that: "[u]nfortunately, some medical clinicians and others have come to believe that manual shaking can create rotational acceleration / deceleration forces sufficient to cause the tearing of bridging veins and

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[36] "There is nothing about [section 97–3–19(2)(e)] which requires any intent to kill when a person is slain during the course of a [sexual battery]. It is no legal defense to claim accident, or that it was done without malice." *Griffin v. State*, 557 So.2d 542, 549 (Miss. 1990).

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that shaking creates greater shear forces within the brain those those produced in low level falls." (Aff. of Chris Van Ee, Ph.D. at ¶ 21, dated Nov. 13, 2013; Pet'r's Ex. E). *Crawford*, 867 So.2d at 204 (holding newly discovered evidence is more than merely impeaching evidence). Dr. Van Ee believes that there must have been some other mechanism of force, specifically force acceleration from a short fall like the one Petitioner described on February 23, 2002. (Van Ee Aff. at ¶¶ 21-22; Pet'r's Ex. E). Here, Dr. Van Ee cites Dr. Duhaime's 1987 study.

Briefly, Dr. Duhaime's 1987 study's conclusion is also significant. Dr. Duhaime and her colleagues' conclusion was "that the shaken baby syndrome at least in its most severe acute form, is not caused by shaking alone. Although shaking may in fact, be part of the process, it is more likely that infants suffer blunt impact." THE SHAKEN BABY SYNDROME: A CLINICAL, PATHOLOGICAL, AND BIOMECHANICAL STUDY, 66 J. Neurosurg. at 414 (Resp't's Ex. D). The 1987, Duhaime study involved various biomechanical experiments where a model of an infant, constructed of metal and rubber, was shaken, shaken and struck, and subjected to impacts that simulated short falls. During these experiments, devices that measured acceleration speed were attached to the model's head. The devices recorded the acceleration speeds of the model's head as it moved during the experiments. The highest acceleration speeds from those experiments were then compared with the injury thresholds recorded from earlier data gathered from experimental testing of adult primates. In those tests, adult primates sustained head injuries caused by varying amounts of whiplash force. The injury thresholds that Dr. Duhaime's 1987 study used were those of the primates who sustained injuries associated with SBS. Those thresholds and the acceleration speeds that caused them were scaled to

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the model infant's accelerations.[37]

Dr. Duhaime's study, THE SHAKEN BABY SYNDROME: A CLINICAL, PATHOLOGICAL, AND BIOMECHANICAL STUDY, has been cited as research, supporting the proposition that a cause, like a short fall, or condition, such as an infection, can mimic abuse injuries like those Chloe Britt suffered. Dr. Van Ee, in this case, states "rotational accelerations of manual shaking ... produces much lower angular accelerations that short falls of 1 foot or less." (Van Ee Aff. at ¶ 22; Pet'r's Ex. E). Dr. Van Ee's statement is "[b]ased on Prange et al.'s results...." (Van Ee Aff. at ¶ 22; Pet'r's Ex. E). Dr. Duhaime was a co-author of the Prange et al. study that Dr. Van Ee references. See Michael T. Prange, Brittany Coats, Ann-Christine Duhaime & Susan S. Margulies, ANTHROPOMORPHIC SIMULATIONS OF FALLS, SHAKES, AND INFLICTED IMPACTS IN INFANTS, 99 J. Neurosurgery 143, 144 (2003). The Prange study specifically addresses Dr. Duhaime's 1987 study. As one source explains:

> In a follow-up biomechanics study published in 2003, Dr. Duhaime and her coauthors specifically acknowledge several limitations of their original 1987 research study.[101] Over the past two decades, other researchers have identified additional limitations of Dr. Duhaime's work, including (1) a lack of biofidelity in the model infants and the model infants' neck mechanisms; (2) the use of tests that did not involve strains on actual tissue samples and did not measure the effects of repetitive tissue strains; (3) force calculations and injury thresholds for human infants based on scaled findings from adult animal research (adult animals, like adult humans, have different anatomical properties as compared with immature infant brains); (4) the use of animal research involving only single whiplash events (as compared with the repetitive whiplash events routinely associated with AHT/SBS); (5) the failure to address retinal injuries or cranio-cervical junction injuries; (6) the failure to address the effect of head rotations in different directions and different mechanisms for shaking; and (7) the failure to address the fact that injury thresholds for infants at different ages vary and at different ages vary and have never been determined.[102]
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FN 101: See Michael T. Prange, Brittany Coats, Ann-Christine Duhaime & Susan S. Margulies, Anthropomorphic Simulations of Falls, Shakes, and Inflicted Impacts in Infants, 99 J. Neurosurgery 143, 144 (2003); see also Ann-Christine Duhaime & Carter P. Dodge, Closer But Not There Yet: Models in Child Injury Research, 2 J. Neurosurgery: Pediatrics 320 (2008) (**noting the shortcomings of using doll models and the need for future research to determine injury thresholds in specific tissue types**).

FN 102: See, e.g., Minns, supra note 87, at 7; Cory & Jones, supra note 87; Dias, supra note 35; Betty Spivack, Biomechanics, in Abusive Head Trauma in Infants and Children: A Medical, Legal, and Forensic Reference, supra note 28, at 29; Narang et al., supra note 15, at 246-58 (noting that the **biomechanical literature is conflicting and prone to multiple errors due to the difficulties of modeling complex biological systems within the infant brain and concluding that "continued assertion of the principle--that biomechanics clearly demonstrates that SDHs and/or serious brain injury cannot result from shaking is disinegenuous and scientifically irresponsible."**).

FN103: See, e.g., Cory & Jones, supra note 87, at 317 (**concluding that there exists sufficient doubt in Duhaime's original results to preclude reliance on this study in court proceedings**); Wolfson et al., supra note 87, at 68-69 (**noting that injury criteria used by Duhaime are scaled from studies examining single impact events in auto crashes, and by using these criteria, SBS is studied as a single-impact event and any effects of cumulative loading are ignored**). "Although more suitable criteria based on cyclic loading are not available, it is inappropriate to apply current injury criteria, scaled or otherwise, to this syndrome." Wolfsone et al., supra note 87, at 69.

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And in a 1998 paper, Dr. Duhaime states, in part, that short falls lack sufficient force to cause injuries associated with SBS. Duhaime AC, et al., CURRENT CONCEPTS: NONACCIDENTAL HEAD INJURY IN INFANTS–THE "SHAKEN-BABY SYNDROME," 338 New Eng. J. Med. 1822 (1998). Her position is that short falls have been deemed insufficient cause for injuries resulting from substantial rotational forces. *Id.* To rely on Dr. Duhaime's studies as evidence supporting a short, accidental fall theory, as Dr. Van Ee and Petitioner do, is to misconstrue Dr. Duhaime's studies.

Dr. Van Ee, along with Drs. Baden, Ophoven, and Nichols, opine that Chloe Britt's death was caused by blunt force impact injuries sustained from a short distance fall. Dr. Van Ee states that

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"[b]ased on the literature and research (some of which is mine), short distance falls of three feet or less can result in serious, and sometimes fatal, head injury." (Van Ee Aff. at ¶ 12; Pet'r's Ex. E). More importantly, he cites to a 2001 study conducted by pathologist, Dr. John Plunkett. (Van Ee Aff. at ¶ 12; Pet'r's Ex. E). He describes Dr. Plunkett's study as one involving "18 fatal head injuries resulting from short-distance falls. In these studies of short falls, many of which were witnessed by a non-caregiver...."[39] (Van Ee Aff. at ¶ 12; Pet'r's Ex. E).

Petitioner also relies on the affidavits and declarations of Drs. Baden, Ophoven, Nichols, and Van Ee. Like Dr. Hayne's, their affidavits and declarations do not constitute newly discovered evidence that "will probably produce or induce a different verdict, if a new trial is granted." *Crawford*, 867 So.2d at 204 (citing *Meeks*, 781 So.2d at 112); *Havard*, 86 So.3d at 901 (¶ 17). Petitioner cannot "sufficiently prove[] the underlying allegations of ..." his actual innocence claim in light of "all the relevant facts and circumstances" of this case. *Brown*, 890 So.2d at 916-17 (citing *Moore*, 508 So.2d at 668).

Looking to Dr. Baden's affidavit, he opines "to a reasonable degree of medical certainty, that Chloe Britt's autopsy findings are entirely consistent with having occurred as a result of a short accidental fall, as Mr. Havard has consistently described, and are not consistent with the baby having been shaken to death for which Mr. Havard was convicted." (Pet. at 17) (quoting Aff. of Dr. Michael M. Baden at ¶ 3, dated Nov. 23, 2013; Pet'r's Ex. B). Dr. Baden found external and internal injuries, which led him to the conclusion that Chloe Britt's death was caused by injuries she sustained when her head hit a hard surface, like the tank of a commode. (Pet. at 17-18). Dr. Baden states that

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[39] Dr. Plunkett's study was comprised of more than 75,000 case records. Dr. Plunkett's study is focused solely on 18 case records. Plunkett J, *Fatal Pediatric Head Injuries Caused by Short-Distance Falls*, 22(1) Am. J. Forensic Med. Path. 1-12 (2001).

"[b]ased on the literature and research (some of which is mine), short distance falls of three feet or less can result in serious, and sometimes fatal, head injury." (Van Ee Aff. at ¶ 12; Pet'r's Ex. E). More importantly, he cites to a 2001 study conducted by pathologist, Dr. John Plunkett. (Van Ee Aff. at ¶ 12; Pet'r's Ex. E). He describes Dr. Plunkett's study as one involving "18 fatal head injuries resulting from short-distance falls. In these studies of short falls, many of which were witnessed by a non-caregiver...."[39] (Van Ee Aff. at ¶ 12; Pet'r's Ex. E).

Petitioner also relies on the affidavits and declarations of Drs. Baden, Ophoven, Nichols, and Van Ee. Like Dr. Hayne's, their affidavits and declarations do not constitute newly discovered evidence that "will probably produce or induce a different verdict, if a new trial is granted." *Crawford*, 867 So.2d at 204 (citing *Meeks*, 781 So.2d at 112); *Havard*, 86 So.3d at 901 (¶ 17). Petitioner cannot "sufficiently prove[] the underlying allegations of ..." his actual innocence claim in light of "all the relevant facts and circumstances" of this case. *Brown*, 890 So.2d at 916-17 (citing *Moore*, 508 So.2d at 668).

Looking to Dr. Baden's affidavit, he opines "to a reasonable degree of medical certainty, that Chloe Britt's autopsy findings are entirely consistent with having occurred as a result of a short accidental fall, as Mr. Havard has consistently described, and are not consistent with the baby having been shaken to death for which Mr. Havard was convicted." (Pet. at 17) (quoting Aff. of Dr. Michael M. Baden at ¶ 3, dated Nov. 23, 2013; Pet'r's Ex. B). Dr. Baden found external and internal injuries, which led him to the conclusion that Chloe Britt's death was caused by injuries she sustained when her head hit a hard surface, like the tank of a commode. (Pet. at 17-18). Dr. Baden states that

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"'shaking a baby cannot cause the very prominent external bruises and contusions on Chloe's head and the prominent subcutaneous bleeding that she incurred.'" (Pet. at 17) (quoting Baden Aff. at ¶ 4, Pet'r's Ex. B).

Turning to Dr. Ophoven's affidavit, she announces that the triad of symptoms as being indicative of SBS "'is acknowledged to be a myth, and it is necessary to examine a long list of factors and possibilities in determining the cause and manner of any infant death.'" (Pet. at 19) (quoting Ophoven Aff. at ¶ 3, Pet'r's Ex. C). She believes Chloe Britt's death could have been caused when a existing subdural hematoma was re-injured and began to re-bleed. Her pre-existing injury theory is based on her review of Chloe's "prenatal, birth, and pediatric medical histories[.]" (Pet. at 20-21). Dr. Ophoven, like Dr. Baden, believes Chloe injuries could been have caused by a short fall, consistent with Petitioner's statement. (Pet. at 20). She notes that short falls can be fatal, but admits this is rarely the case. (Pet. at 22) (citing Ophoven Aff. at ¶ 116; Pet'r's Ex. C). And she, like Dr. Baden, reports that "'there is no evidence to support a finding of shaking in this case; instead, the evidence is of impact.'" (Pet. at 23) (quoting Ophoven Aff. at ¶ 123; Pet'r's Ex. C).

As for Dr. George Nichols, his findings, like Drs. Baden and Ophovens', lead him to conclude that "'Chloe Britt's death is entirely consistent with a short fall, and not an abusive shaking.'" (Pet. at 24) (quoting Nichols Aff. at ¶ 4; Pet'r's Ex. D). He agrees with Dr. Ophoven in that Chloe Britt's prenatal, birth, and pediatric medical histories provide "alternative explanations" to SBS as potential explanations for the cause of Chloe Britt's death. (Pet. at 25) (quoting Nichols Aff. at ¶ 6; Pet'r's Ex. D). Dr. Nichols also concedes that death is rarely the result of injuries sustained from a short distance fall. Nevertheless, he bases his opinion on "'a subset of short distance falls [that can] result in skull fractures and intercranial hemorrhage.'" (Pet. at 25) (quoting Nichols Aff. at ¶ 9; Pet'r's Ex. D).

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In this case, Drs. Ophoven and Nichols base their opinions on pre-existing injuries as alternative explanation for Chloe Britt's cause of death. (Pet. at 20-21). Dr. Ophoven cites Chloe Britt's "prenatal, birth, and pediatric medical histories" as grounds supporting her opinion. (Pet. at 20). And, Dr. Nichols points to the general consensus in the medical community. (Nichols Aff. at ¶ 6; Pet'r's Ex. D). He states that:

> In the years since Mr. Havard's trial, the medical community has begun to accept a number of alternative explanations that can account for deaths that would have previously been atributed to "shaken baby syndrome." Some of these underlying medical conditions that can provide an alternative explanation for sudden death include: chronic subdural hematomas, hydrocephalus ... cogulopathies ... thrombocytopenia ... *various infections*, and a number of inherited abnormalities of brain chemistry, as well as *simple impact trauma*....

(Nichols Aff. at ¶ 6; Pet'r's Ex. D) (emphasis added).

Dr. Nichols believed SBS was invalid and that alternative causes for deaths would explained injuries attributed to SBS years before Petitioner's case. In *State v. Edmunds*, Dr. Nichols acknowledged studies that "indicate[d] that the triad of signs - - subdural hematomas, retinal bleeding, the brain swelling - - are not exclusively diagnostic of Shaken Baby Syndrome ... that other things can cause that...." (*Edmunds* Evid. Hear'g Tr. at 141-42; Resp't's Ex. J). When asked about the timing of his revelation, Dr. Nichols testified that he believed "that the investigation of potential causes other than Shaken Baby Syndrome or shaken with impact ... changed ... [s]ince at least '98." (*Edmunds* Evid. Hear'g Tr. at 142; Resp't's Ex. J).

Dr. Nichols's statements, appearing in the affidavit attached to Petitioner's PCR petition are inconsistent with his testimony in *Edmunds*. (Nichols Aff. at ¶ 6; Pet'r's Ex. D). The affidavit attached to Petitioner's PCR petition states that these alternative explanations became accepted in the medical community in the years following Petitioner's trial. (Nichols Aff. at ¶ 6; Pet'r's Ex. D). In

In this case, Drs. Ophoven and Nichols base their opinions on pre-existing injuries as alternative explanation for Chloe Britt's cause of death. (Pet. at 20-21). Dr. Ophoven cites Chloe Britt's "prenatal, birth, and pediatric medical histories" as grounds supporting her opinion. (Pet. at 20). And, Dr. Nichols points to the general consensus in the medical community. (Nichols Aff. at ¶ 6; Pet'r's Ex. D). He states that:

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Edmunds, Dr. Nichols confirmed that he was aware that professionals in various scientific and medical communities were researching and reporting the findings from studies of alternative explanations causing the symptoms historically attributed to SBS as early as 1998. This evidence existed at the time of Petitioner's trial, and was capable of being presented. After all, Dr. Nichols, by his own account, began to question SBS and the cause of the symptoms historically attributed that diagnosis after listening to the testimony of forensic pathologist, Dr. John Plunkett in the 1990s. (*Edmunds* Evid. Hear'g Tr. at 136-37; Resp't's Ex. J).

Petitioner does not "sufficiently prov[e]" his short distance fall theory. This is particularly true in light of all the facts and circumstances of the case. *Brown*, 890 So.2d at 916-17 (citing *Moore*, 508 So.2d at 668). For example, Drs. Baden, Ophoven, and Nichols base their opinions as to the cause of Chloe Britt's death on the statement that Petitioner gave at the Adams County Jail on February 23, 2002. All three pathologists opine that Chloe Britt's death is consistent with Petitioner's statement. All three pathologists opine that Chloe Britt's death was consistent with a short, accidental fall. And importantly, all three pathologists state that no evidence exists which would support a finding of shaking.

And yet, on February 23, 2002, Petitioner gave a statement to Deputies Manley and Smith at the Adams County Jail. Petitioner told the deputies that he dropped Chloe while removing her from a bathtub. (Transcript of a Video Taped Statement of Jeffrey Havard Taken at the Adams County, Mississippi, Jail at 12, dated Feb. 23, 2002; Pet'r's Ex. F). He admitted to dropping Chloe over a commode, approximately a foot and a half away from her tub. Petitioner remembered that Chloe's head hit the tank of the commode, and that one of her legs hit the lid of the bowl. (Havard Statement Tr. at 12; Pet'r's Ex. F). Petitioner caught Chloe, and admittedly shook her several times. (Havard

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Statement Tr. at 12-13; Pet'r's Ex. F). He remembered that:

> When I dropped her, I panicked. I thought that I done killed her right then when I dropped her. I thought that I hurt her bad. I was upset. I was frantic. *I was shaking her. I may have shaken her too hard....*

((Havard Statement Tr. at 19; Pet'r's Ex. F) (emphasis added). When asked about the extent of Chloe's injuries, Petitioner conceded that he:

> *may have shaken her that hard.* I was just scared. I dropped her. She wasn't paying a -- just like she wasn't even in this world when I dropped her, and I picked her back up, and *I shook her*, just frantic, scared what would happen if Becky come home and I done hurt her baby....

(Havard Statement Tr. at 20; Pet'r's Ex. F) (emphasis added). And when asked why he refused to tell emergency room staff about Chloe's injuries, Petitioner admitted that he was:

> scared they were going to say she had been *shaken or something. I am knowing that I am the one that shook her....*

(Havard Statement Tr. at 21; Pet'r's Ex. F) (emphasis added).

Petitioner fails to sufficiently prove his allegation that Chloe Britt's death was the result of a short, accidental fall considering the facts and circumstances of the case—or even those in his statement. Drs. Baden, Ophoven, and Nichols state that there is no evidence to support a finding of shaking. And yet, all three base their opinions on Petitioner's February 23, 2002, statement—the statement in which he repeatedly admits to shaking Chloe. If Petitioner's admissions do not qualify as evidence, what does?

Petitioner has not shown Chloe Britt's death resulted from a short fall. He has alleged a possible alternative cause of death, but nothing more. Petitioner shook Chloe Britt. He admitted it. And considering all of the facts and circumstances in this case, Drs. Baden, Ophoven, and Nichols' opinions do not "sufficiently prove the underlying allegations of ..." Petitioner's actual innocence

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claim. *Brown*, 890 So.2d at 917. Their affidavits and declarations are not material to this case, and cannot be considered newly discovered evidence. They amount to impeaching evidence at best. *See Crawford*, 867 So.2d at 204 (holding newly discovered evidence must be more than "merely cumulative or impeaching").

This is particularly true when considering all of the evidence that the jury heard, which this Court must. *Brown*, 890 So.2d at 916-17 (citing *Moore*, 508 So.2d at 668). The jury heard that Chloe and her mother had been living with Petitioner for approximately three weeks. (Havard Statement Tr. at 8, dated Feb. 23, 2002; Pet'r's Ex. F). The jury heard that Petitioner was unemployed, and ill-prepared to care for Chloe.[40] (Tr. at 341). The jury heard that on February 21, 2002, Petitioner ignored Rebecca Britt and pre-occupied himself with television to avoid having to help care for Chloe. (Havard Statement Tr. at 4-5, 7; Pet'r's F). The jury heard that Chloe was fussy, but otherwise alive and well at 8:00 p.m. on February 21, 2002. The jury heard that Chloe was near death just two hours later. (Tr. at 325-27, 333-334, 345). And, the jury heard that Chloe was in Petitioner's exclusive custody for a significant amount of that time. (Havard Statement Tr. at 4; Pet'r's Ex. F).

The jury heard that Petitioner wanted to watch a movie and sent Rebecca out to rent one. The jury heard that when Petitioner was alone with Chloe, she began to cry. (Havard Statement Tr. at 5, 10; Pet'r's F). The jury heard that Petitioner changed Chloe's diaper. (Havard Statement Tr. at 5; Pet'r's F). The jury heard that Petitioner had never given Chloe a bath, but decided to bathe her while Rebecca was out getting their dinner and a movie. (Havard Statement Tr. at 5; Pet'r's F). The jury

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[40] *See Havard*, 988 So.2d at 335-336 (noting Petitioner's grandfather recalled buying Petitioner a truck to get to work only to learn that Petitioner quit his job after the truck was given to him; and that Petitioner "would have people over using drugs....").

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heard that Petitioner wiped Chloe's bottom with a wipie, even though he had just bathed her. The jury heard that Petitioner may have wiped her too hard. The jury heard that Petitioner may have been too rough with her. (Havard Statement Tr. at 6, 17-18; Pet'r's F). The jury heard that Petitioner's finger penetrated Chloe's anus too far when he was wiping her. (Havard Statement Tr. at 5-6, 17-19; Pet'r's F).

The jury heard that Petitioner was prone to fits of anger.[41] The jury heard that Petitioner experienced a flashback to a violent time of his childhood during Chloe's bath. (Havard Statement Tr. at 19-20; Pet'r's Ex. F). The jury heard Petitioner admit to shaking Chloe, several times. (Havard Statement Tr. at 5-6; Pet'r's Ex. F). The jury heard that Petitioner may have shaken Chloe too hard. (Havard Statement Tr. at 11-13, 19-20; Pet'r's Ex. F). The jury heard that Petitioner shook her until she cried. (Havard Statement Tr. at 6; Pet'r's Ex. F). And, the jury heard that Petitioner knew Rebecca would be home soon, so he quickly wiped blood from Chloe's face, rubbed her with lotion, diapered her, dressed her, and left her in her crib with the door shut. (Havard Statement Tr. at 6-7; Pet'r's Ex. F).

The jury heard that Petitioner attempted to hide what he had done from Rebecca. (Havard Statement Tr. at 7, 23; Pet'r's Ex. F). The jury heard that Petitioner was listening for Rebecca's car. (Havard Statement Tr. at 7, 23; Pet'r's Ex. F). The jury heard Petitioner pretended as though nothing had happened. (Havard Statement Tr. at 7, 23; Pet'r's Ex. F). The jury heard Petitioner attempt to keep Rebecca from checking on Chloe. (Havard Statement Tr. at 7, 23; Pet'r's Ex. F). The jury heard

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that Petitioner attempted to destroy evidence. (Havard Statement Tr. at 7; Pet'r's Ex. F).[42] The jury heard that Petitioner was aware of conditions like SIDS. (Havard Statement Tr. at 22; Pet'r's Ex. F). And, the jury heard that Petitioner left Chloe all alone even though he knew he hurt her. (Havard Statement Tr. at 24-25; Pet'r's Ex. F). The jury heard that Petitioner attempted to hide what he had done from Rebecca, health care providers, and law enforcement officers. (Havard Statement Tr. at 5-7, 9-10, 16-25; Pet'r's Ex. F). Because, Petitioner was "scared they were going to say she had been shaken...." (Havard Statement Tr. at 21; Pet'r's Ex. F). And, petitioner knew he was "the one that shook her." (Havard Statement Tr. at 21; Pet'r's Ex. F). Petitioner knew Chloe "was like she [wa]s ... [n]ot breathing." (Havard Statement Tr. at 20; Pet'r's Ex. F).

The jury heard about the law enforcement search of Petitioner's mobile home in the first hours of February 22, 2002. The jury heard that law enforcement found evidence that tended to show Petitioner was in the process of destroying evidence. The jury heard evidence that suggested Petitioner and Rebecca left the mobile home in a hurry. The jury heard that DNA belonging to Petitioner and Chloe was identified on the bed sheets, a bed comforter, a towel and clothes officers recovered from the mobile home. (Tr. at 457-59; 472-73.) And, the jury heard that law enforcement found no evidence of Chloe being bathed. (Tr. at 457-59; 472-73, 492.)

Petitioner's actual innocence claim is without merit. This is largely due to Petitioner's confusion as to what the State was required to prove. He seems to suggest that the State was required to prove that he intentionally killed Chloe Britt by violently shaking her. (Pet. at 33-39). It was not.

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[42] DNA analysis confirmed both Petitioner's DNA and Chloe's DNA and blood were contained within one spot on the bed sheets Petitioner attempted to wash. Chloe lived in petitioner's home for approximately 21 days. It was entirely reasonable for the jury to infer that petitioner took measures to deceive Rebecca Britt by making Chloe's injuries appear accidental.

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As Petitioner points out, the State moved this Court, seeking to amend the indictment. (Pet. at 9-10). The State explained that it intended to prove Chloe Britt's "murder resulted from the commission of [a sexual battery] or while that crime was being committed or shortly there - - or in the general vicinity or at the time that that crime was committed." (Tr. 103.) The Court granted the State's motion, in part, noting that the State's burden required it "to prove the element that [Petitioner] did kill and murder the victim *with or without* design to affect death." (Tr. 106.) (emphasis added). The indictment was subsequently amended, and charged:

[Petitioner]

> late of the County aforesaid, in said County, on or about the 21st day of February 2002, did willfully, unlawfully, and feloniously kill and murder one Chloe Madison Britt, a human being, *with or without design to effect death*, while engaged in the commission of the crime of sexual battery;
>
> contrary to the form of the statute in such cases made and provided, and without authority of law, against the peace and dignity of the State of Mississippi.

(R. 1, 153.) (emphasis added).

A person commits capital murder in violation of Miss. Code Ann. § 97-3-19(2)(e), if he:

> kill[s] ... a human being without authority of law by *any means or in any manner*
> ....
> *When done with or without any design to effect death*, by any person engaged in the commission of ... sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or in any attempt to commit such felonies....

Id. at § 97-3-19(2)(e) (emphasis added). A person commits sexual battery if he:

> engages in sexual penetration with:
>
> (a) Another person without his or her consent;
> (b) A mentally defective, mentally incapacitated or physically helpless person;
> (c) A child at least fourteen (14) but under sixteen (16) years of age, if the person is thirty-six (36) or more months older than the child; or
> (d) A child under the age of fourteen (14) years of age, if the person is twenty-four (24) or more months older than the child.

As Petitioner points out, the State moved this Court, seeking to amend the indictment. (Pet. at 9-10). The State explained that it intended to prove Chloe Britt's "murder resulted from the commission of [a sexual battery] or while that crime was being committed or shortly there - - or in the general vicinity or at the time that that crime was committed." (Tr. 103.) The Court granted the State's motion, in part, noting that the State's burden required it "to prove the element that [Petitioner] did kill and murder the victim *with or without* design to affect death." (Tr. 106.) (emphasis added). The indictment was subsequently amended, and charged:

[Petitioner]

> late of the County aforesaid, in said County, on or about the 21st day of February 2002, did willfully, unlawfully, and feloniously kill and murder one Chloe Madison Britt, a human being, *with or without design to effect death*, while engaged in the commission of the crime of sexual battery;
>
> contrary to the form of the statute in such cases made and provided, and without authority of law, against the peace and dignity of the State of Mississippi.

(R. 1, 153.) (emphasis added).

A person commits capital murder in violation of Miss. Code Ann. § 97-3-19(2)(e), if he:

> kill[s] ... a human being without authority of law by *any means or in any manner*
>
> ....
>
> *When done with or without any design to effect death*, by any person engaged in the commission of ... sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or in any attempt to commit such felonies....

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> (d) A child under the age of fourteen (14) years of age, if the person is twenty-four (24) or more months older than the child.

Id. at § 97-3-95(1). A sexual battery also occurs if that person:

> engages in sexual penetration with a child under the age of eighteen (18) years if the person is in a position of trust or authority over the child including without limitation the child's teacher, counselor, physician, psychiatrist, psychologist, minister, priest, physical therapist, chiropractor, legal guardian, parent, stepparent, aunt, uncle, scout leader or coach.

Id. at § 97-3-95(2).

The Court properly instructed the jury. In particular, jury instructions 12 and 13 read:

> If you believe from all the evidence in this case beyond a reasonable doubt that the defendant, Jeffrey Keith Havard, in Adams County, Mississippi, on or about the 21st day of February 2002, wilfully, unlawfully and feloniously engaged in sexual penetration with Chloe Madison Britt, an infant of six months, when he was over twenty-one years older than the child, then the same would constitute sexual battery.
>
> If you believe from all the evidence in this case, beyond a reasonable doubt, that the defendant, Jeffrey Keith Havard, on or about the 21st day of February 2002, in Adams County, Mississippi, did wilfully, unlawfully, feloniously, *with or without deliberate design*, then and there, kill Chloe Madison Britt, a human being, without authority of law, when engaged in the commission of sexual battery, then, if you so believe from all the evidence in this case beyond a reasonable doubt, the defendant is guilty of capital murder, and it is your duty to say so by your verdict.

(R. 161-62.) (emphasis added).[43]

The record shows that the amended indictment charged Petitioner with one count capital murder in violation of Miss. Code Ann. § 97-3-19(2)(e), during the commission of sexual battery as defined by Miss. Code Ann. § 97-3-95. (R. 1, 153.) The record shows the jury was properly instructed on the law. What the record does not show is that the State bore the burden of proving Petitioner sexually abused Chloe Britt, and "then intentionally killed her by violently shaking her." (Pet. at 33).

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[43] Jury instruction 14 provided the jury with the legal definition of sexual penetration in the statutory context. Jury instruction 15 instructed the jury as to the act that constituted the offense of sexual battery. (R. 163, 164.)

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[43] Jury instruction 14 provided the jury with the legal definition of sexual penetration in the statutory context. Jury instruction 15 instructed the jury as to the act that constituted the offense of sexual battery. (R. 163, 164.)

Petitioner's allegation that Chloe Britt's death was the result of an accident is irrelevant. To be clear, the State in no way suggests Chloe Britt's death was accidental. But for the sake of argument, whether Petitioner accidentally dropped Chloe Britt is not material to his actual innocence claim. "There is nothing about [section 97–3–19(2)(e)] which requires any intent to kill when a person is slain during the course of a [sexual battery]. It is no legal defense to claim accident, or that it was done without malice." *Griffin v. State*, 557 So.2d 542, 549 (Miss. 1990). Whether Chloe Britt's death was accidental is irrelevant to his claim. "[A]n intentional act followed by an unintended consequence cannot serve as a basis for excusable homicide, accident, and misfortune." *Booker v. State*, 64 So.3d 988, 998 (¶ 27) (Miss. Ct. App. 2010) (citing *Montana v. State*, 822 So.2d 954, 962 (¶ 30) (Miss. 2002) (citation omitted). The exhibits Petitioner relies on in support of his accidental fall theory are not material to his case.

And the same is true of the cases he cites in support of his claim. (See Pet. at 34-39) (citing *State v. Edmunds*, 746 N.W.2d 590 (Wis. Ct. App. 2008); *Ex Parte Henderson*, 246 S.W.3d 690 (Tex. Crim. App. 2007); *Prete v. Thompson*, 10 F.Supp.3d 907, 2014 WL 296094 (N.D.Ill. Jan. 27, 2014); and *The People of the State of New York v. Rene Bailey a/k/a Renee Bailey*, Ind. No.: 2001-0490 (Monroe County Ct. Dec. 16, 2014)). Even if those cases were controlling, none of them are like this one. For example, the Monroe County Court, in *People v. Bailey*, noted that Bailey asked for an evidentiary so that she could challenge the prosecution's "uncorroborated evidence" relating to SBS. (*People v. Bailey*, Ind. No.: 2001-0490; Appendix B to Pet. at 1-2).

But in this case, the jury heard evidence that was corroborated by multiple witnesses, including Petitioner's statement. To reiterate, Petitioner, after two days in jail, requested to speak with law enforcement. He unequivocally told them that:

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But in this case, the jury heard evidence that was corroborated by multiple witnesses, including Petitioner's statement. To reiterate, Petitioner, after two days in jail, requested to speak with law enforcement. He unequivocally told them that:

> I thought that I done killed her ... I thought that I hurt her bad ... I may have shaken her too hard.... I admit I may have shaken her that hard ... I shook her, just frantic ... I was just scared they were going to say she had been shaken or something. I am knowing that I am the one that shook her....

(Havard Statement Tr. at 19-21; Pet'r's Ex. F). If any evidence is uncorroborated, it is Petitioner's.

The State submits Petitioner's actual innocence claim is procedurally barred. This petition comes years after one year statute of limitations ran. This petition is also successive. Beyond that, Petitioner waived this claim when he chose not to raise it at trial or on direct appeal. He is clearly seeking to litigate the issue of his guilt—an issue decided at trial, affirmed on direct appeal, and denied on collateral review, twice. It is *res judicata*. No exception to the UPCCRA's procedural bars applies. Petitioner has been deprived of absolutely no right, much less a fundamental one. Further, his claim is not supported by newly-discovered evidence. This evidence was available at trial and on direct appeal, and would not compel a different outcome or result if presented at trial.

And finally, Petitioner cannot show he is actually innocent, because he is not. And because, SBS is not a myth, a junk science, or an impossible diagnosis. SBS is a real, valid medical diagnosis that is recognized internationally and supported by decades of research and evidence. This research and evidence shows that Petitioner's actual innocence claim is without merit.

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CONCLUSION

For the reasons stated above, the State respectfully requests that this Court dismiss the petition, and deny Petitioner's actual innocence claim. Petitioner is entitled to no relief.

Respectfully submitted,

JIM HOOD
ATTORNEY GENERAL
STATE OF MISSISSIPPI

by: 

BRAD A. SMITH
Special Assistant Attorney General
Miss. Bar No. 104321

CONCLUSION

For the reasons stated above, the State respectfully requests that this Court dismiss the petition, and deny Petitioner's actual innocence claim. Petitioner is entitled to no relief.

Respectfully submitted,

JIM HOOD
ATTORNEY GENERAL
STATE OF MISSISSIPPI

by: 

BRAD A. SMITH
Special Assistant Attorney General
Miss. Bar No. 104321

CERTIFICATE OF SERVICE

This is to certify that I, Brad A. Smith, Special Assistant Attorney General for the State of Mississippi, mailed the foregoing Response in Opposition to Petition for Post-Conviction Relief and Exhibits A-L attached thereto to the Clerk of the Adams County Circuit Court for filing, and a true and correct copy of the same to:

The Honorable Forest A. Johnson
Presiding Judge
Circuit Court of Adams County, Mississippi
P.O. Box 1383
Natchez, MS 39121

Mark D. Jicka, Esq.
Watkins & Eager, PLLC
P.O. Box 650
Jackson, MS 39205

Graham P. Carner, Esq.
Graham P. Carner, PLLC
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This, the 30th day of September, 2015.

by: 

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Special Assistant Attorney General

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This is to certify that I, Brad A. Smith, Special Assistant Attorney General for the State of Mississippi, mailed the foregoing Response in Opposition to Petition for Post-Conviction Relief and Exhibits A-L attached thereto to the Clerk of the Adams County Circuit Court for filing, and a true and correct copy of the same to:

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