IN THE CIRCUIT COURT OF ADAMS COUNTY, MISSISSIPPI

JEFFREY HAVARD, ***Petitioner***

vs. **No. 02-KR-0141-J**

STATE OF MISSISSIPPI, ***Respondent***

PETITIONER'S REPLY TO THE STATE'S RESPONSE IN OPPOSITION TO PETITION FOR POST-CONVICTION RELIEF

Petitioner, Jeffrey Havard, by and through undersigned counsel, hereby submits his Reply to the State's Response in Opposition to Petition for Post-Conviction Relief ("State's Response"). For the reasons set forth in the Petition for Post-Conviction Relief ("the Petition") and all exhibits previously placed in the record in these proceedings and in this Reply, Havard is entitled to the relief requested in the Petition. Havard's capital murder conviction and death sentence are due to be vacated, and a new trial should be ordered.

I. INTRODUCTION

In this death penalty case, the State's expert, the only witness to testify at trial regarding the cause and manner of Chloe Britt's death and Shaken Baby Syndrome (SBS), has recanted. Moreover, the scientific foundation of SBS has eroded since Havard's trial in 2002, casting grave doubts on much of the testimony presented to the jury in Havard's trial. In the face of these significant developments, the State's Response is full of sound and fury as well as multiple attempts to change the subject, yet offers nothing substantive in response to these core defects with Havard's conviction and death sentence.

With a man's life hanging in the balance—and the evidentiary pillars of his conviction and sentence crumbling under objective facts and the scientific method—the State relies on procedural devices and factual misdirection in an attempt to save a flawed conviction and death

sentence. The State's arguments are easily overcome, and Havard should be granted the relief requested in the Petition following an evidentiary hearing in this Court.

II. THE SUPREME COURT'S REMAND OF THIS MATTER DEFEATS THE STATE'S ARGUMENTS OF PROCEDURAL AND TIME BARS

In its Response, the State has placed a great deal of reliance on the time bar [Section 99-39-5(2)], the successive writ bar [Sections 99-39-23(6) & 99-39-27(9)], procedural bars found in Section 99-39-21(1)-(3), and other procedural bars. In doing so, the State argues that this Court should not even address the merits of the claims raised in the Petition. However, this argument conflicts with Mississippi's post-conviction relief statutes and the Order of the Mississippi Supreme Court remanding this matter to this Court.

Miss. Code Ann. § 99-39-27(5) sets forth the procedure that the Mississippi Supreme Court follows in cases such as this one, where the original request for relief is required to be filed in that Court. That subsection reads:

> Unless it appears from the face of the application, motion, exhibits and the prior record that the claims presented by those documents are not procedurally barred under Section 99-39-21 and that they further present a substantial showing of the denial of a state or federal right, the court shall by appropriate order deny the application.

In cases like this one governed by *Miss. Code Ann.* § 99-39-27, the Mississippi Supreme Court conducts an initial screening of the request for relief and the claims set forth therein. Only when that Court determines (1) that the claims are not procedurally barred and (2) that they present a substantial showing of the denial of a state or federal right does it allow the request to move forward. The statute seemingly favors denial of applications following this screening process, and only allows claims that are procedurally viable and that substantially demonstrate a claim that would warrant post-conviction relief from a conviction or sentence to proceed.

In this case, the Mississippi Supreme Court, sitting *en banc*, employed this very procedure and ordered the case remanded to this Court for it to consider the merits of Havard's claims based on newly-discovered evidence. *See* Reply Exhibit "A", Remand Order. The Justices of the Supreme Court were unanimous in this decision. In that same Order, the Supreme Court did not permit two other claims presented by Havard to proceed further. Thus, under the operation of *Miss. Code Ann.* § 99-39-27 and simple logic, it is clear that the unanimous Mississippi Supreme Court ordered this Court to proceed on the merits of Havard's claims based on newly-discovered evidence.

Thus, the sole question before this Court is this: whether the newly-discovered evidence demonstrates that Havard is entitled to a new trial?[1] The threshold procedural questions have already been answered by the Supreme Court.

III. NEVERTHELESS, THE CLAIMS ARE NOT PROCEDURALLY BARRED OR TIME-BARRED

Since the State devotes so much of its Response to the procedural and time bars, Havard will respond to those arguments despite the Supreme Court's clear directive that the claims are not barred and are due to be considered on their merits. By responding to these arguments, Havard is not conceding that those procedural and time bars are at issue in this Court. This response is given out of an abundance of caution, so that the State's arguments do not pass without rebuttal.

To begin, Havard would point out that the Mississippi Supreme Court has held that successor petitions such as this one are not subject to time bars. *Bell v. State*, 66 So.3d 90 (Miss. 2011). In *Bell*, the Petitioner sought leave to file a successive petition in the trial court on several

[1] Havard also notes that the State is incorrect that, in this proceeding, he has to prove his actual innocence in order to be granted relief. While Havard is actually innocent, that is not the sole standard to be employed here. Havard is also entitled to relief if the newly-discovered evidence causes "grave doubts" about the reliability of Havard's conviction or death sentence.

issues, including mental retardation. *Id.* at 91. Bell had previously been denied post-conviction relief. *Id.* In examining whether Bell's matter should be remanded for further proceedings, this Court examined *Miss. Code Ann.* § 99-39-27(9) and the exceptions for filing successive petitions. *Id.* at 93. After reviewing the various exceptions, including the new evidence standard under which Havard's Petition was filed, the Supreme Court observed: "Noticeably absent from this statute is a time limitation in which to file a second or successive application if such application meets one of the statutory exceptions." *Id.* The Supreme Court, finding no time bar applied, remanded the case to the trial court for an evidentiary hearing. *Id.* at 94.

Also, in *Grayson v. State*, 118 So. 3d 118, 129 (Miss. 2013), the petitioner obtained merits review of a successor petition despite the State urging the claims were time-barred. Likewise, the Mississippi Supreme Court recently remanded a successive petition for an evidentiary hearing without applying the time-bar as urged by the State, *see Walker v. State*, 131 So. 3d 562 (Miss. 2013), and also granted outright relief on a successive petition despite the State's arguments that the claims were procedurally barred. *See* En Banc Order, *Byrom v. State*, No. 2014-DR-00230-SCT (Miss. Mar. 31, 2014).

Simply put, if a Petitioner states a sufficient claim under the new evidence standard, then such a claim is not subject to any time or successive writ bar. The same result is required by *Miss. Code Ann.* § 99-39-5(2), which excepts from time bars claims that are based on new evidence. In this case, Petitioner has based his claims on the new evidence standard.

The new evidence concerning Shaken Baby Syndrome (SBS) is set forth in the Petition with exacting detail and supported by the opinions of numerous world-renowned expert witnesses. **The new evidence regarding SBS was the newly-formulated opinions of Dr. Steven Hayne, first made known in a Clarion Ledger newspaper article published on June**

16, 2013 (with the original Petition being filed approximately 5 months later). *See* Petition at Exh. "H". Had it not been for the article, Havard would still be in the dark about Dr. Hayne's true opinions regarding SBS and how those opinions have changed since Havard's 2002 trial.

Dr. Hayne's opinions, which differ substantially from his trial testimony in that they acknowledge the changes in science and medicine during the years since the trial and invoke a theory of cause and manner of death (blunt force trauma) that Dr. Hayne did not account for during the 2002 trial, are compelling new evidence that cause grave doubts about Havard's conviction and sentence. Viewing these facts set forth in the Petition and supporting exhibits, Havard has demonstrated that his Petition for Post-Conviction Relief falls within the new evidence exception under the UPCCR. As such, no time bar applies.

Furthermore, Petitioner has been diligent in seeking evidence in support of these claims. The significant changes in the scientific and medical consensus concerning Shaken Baby Syndrome and the fact that Dr. Hayne's opinions on SBS in **this case** had changed first became apparent when he was interviewed in connection with a news story written by a journalist. The article was published in June 2013. After reading the article, Petitioner's counsel did the only thing they could do: they asked to meet with Dr. Hayne to discuss the issue. This set in motion the events leading to the filing of this Petition in this Court. Dr. Hayne signed an Affidavit in July 2013 setting forth enough information to show the change in his opinions to demonstrate why an evidentiary hearing is needed. In less than 6 months from the publication of the article in which Hayne brought up SBS, a Motion for Relief was filed with the Mississippi Supreme Court, which then remanded the proceedings to this Court to consider this newly-discovered evidence. It cannot be argued with a straight face that Havard has been anything but diligent in pursuing this claim as soon as the new evidence demonstrating its pertinence to **this case** existed.

The July 2013 Affidavit from Dr. Hayne is essential to the evaluation of the SBS claim and whether it involves newly-discovered evidence. The State places great reliance on the fact that in other cases information discrediting Shaken Baby Syndrome has been presented for some time. This cannot be disputed, but it is a red herring in an attempt to get this Court to ignore the real question: whether the claims presented in Jeffrey Havard's case—**this case**—with respect to SBS are based on new evidence in **this case**. Comparing Dr. Hayne's trial testimony with his new Affidavit and statements, it is clear that this is newly-discovered evidence. Obviously, the Mississippi Supreme Court thought that this was the case when it remanded to this Court for consideration of Havard's claims based on newly-discovered evidence.

This newly-discovered evidence was not capable of being discovered or raised at trial, on direct appeal, or in Havard's post-conviction proceedings. Dr. Hayne, the only expert who gave an opinion as to the cause of death at trial, has only recently acknowledged the change in scientific consensus as it applies to this case and put forth an alternative theory—a theory consistent with Havard's innocence and with Havard's description of the accidental fall that Chloe suffered—that differs from his trial testimony in 2002. The difference is crucial: Dr. Hayne now acknowledges that simple blunt force trauma (separate and apart from any shaking or any other intentional, criminal act) such as that which could be produced from an accidental fall onto a hard surface could have caused Chloe's death and injuries. When Dr. Hayne expressed his new opinions, SBS became a new issue in Havard's case. Havard immediately investigated the claim, obtained analyses from leading experts on the issue, and presented it to the Mississippi courts with adequate and compelling supporting evidence.

Havard had no way of knowing of Dr. Hayne's change in opinion. In prior interactions between Dr. Hayne and Havard's attorneys, Dr. Hayne made no indication of any shift in his

opinions on the topic of SBS. Further, as demonstrated in the Court of Appeals opinion in *Brandon v. State*, 109 So.3d 128, 131 (Miss. Ct. App. 2013), Dr. Hayne was testifying as late as 2009 to opinions that mirror his opinions from Havard's 2002 trial, and the State was relying on those opinions from Hayne as late as 2013. The Court of Appeals summarized Hayne's testimony in Brandon's trial as follows:

> Pathologist Dr. Steven Hayne performed Xavier's autopsy. He too found Xavier had fatal bleeding behind the retina and on the surface of the brain. Dr. Hayne determined that the cause of death was SBS. Dr. Hayne testified that SBS occurs when a child is shaken without impacting the child's head on a hard surface. The shaking generates a force "equivalent to . . . a motor vehicle crash," causing the brain and skull to move in different rotations, tearing the blood vessels between them. He described SBS as a violent death, listing in his autopsy the manner of Xavier's death as "homicide." But on cross-examination, Dr. Hayne acknowledged disagreement among pathologists on whether SBS is a valid cause of death. He noted that some pathologists believed that other circumstances could cause the same types of injuries as SBS.

Id.

Clearly, in the Brandon trial, Dr. Hayne acknowledged that "some pathologists" believed that something other than shaking could cause injuries that other pathologists, such as Hayne, call SBS. Dr. Hayne's new opinions concerning SBS, described in his Affidavit attached to Havard's Petition, contrast with his testimony from the Brandon trial in 2009 as well as Havard's trial in 2002.[2] Clearly, Dr. Hayne's shift in opinions concerning SBS is a recent development and was not discoverable by Havard at trial, on direct appeal, or during his PCR proceedings. The newly discovered evidence is that Dr. Hayne admits to his fallibility due to changing research and the evolving nature of scientific evidence, and has disclosed how that impacts his original diagnosis and trial testimony in this case, which he now recants as "probably not

[2] In the post-conviction proceeding in the *Brandon* case, the Mississippi Supreme Court ordered an evidentiary hearing in the trial court. *See* Order from *Brandon v. State*, No. 2014-M-00596 (Miss. Aug. 13, 2014).

correct". As soon as Dr. Hayne made his change of opinion known in this case, Havard's counsel investigated the issue and presented this claim.

Finally, the claims herein involve fundamental rights, and thus the procedural bars cited by the State do not apply. *See Rowland v. State*, 42 So.3d 503 (Miss. 2010). Havard has discussed in detail in the Petition how the fundamental rights exception to procedural bars applies, and will not repeat those same arguments here.

Under any formulation, this Court should not disregard as a matter of form over substance the significant new evidence that casts grave doubts on Havard's conviction and sentence. A man's life hangs in the balance. He stands convicted of capital murder and sentenced to death in a case where the objective science and medicine cast grave doubts on the validity and trustworthiness of the conclusions that led to the charge and, ultimately, his conviction and death sentence.

The one and only expert witness (Dr. Hayne) on whom the State relied to obtain a guilty verdict has now given a sworn affidavit disavowing his trial opinion that shaking alone caused Chloe's injuries. He now says his original diagnosis and trial testimony are "probably not correct". Dr. Hayne now accounts for another, non-criminal possibility: blunt force trauma such as that caused by an accidental fall onto a hard surface, as described by Havard in his interview with law enforcement. Dr. Hayne did not account for this possibility at trial. Most significantly, the jury never heard **any** of this, and Havard's conviction and death sentence—both decisions made by the jury—rest on incomplete, inaccurate, and flawed information. At the very least, a jury should be allowed to make these weighty and serious decisions after all of the information is presented.

The newly-discovered developments in SBS and Dr. Hayne's recantation of trial testimony regarding SBS are precisely the sort of scenarios that the newly-discovered evidence and fundamental right exceptions were designed to address: to correct serious errors and resolve grave doubts in the most serious of cases.

IV. PETITIONER'S CLAIMS MERIT FURTHER FACTUAL DEVELOPMENT THROUGH AN EVIDENTIARY HEARING

It is worth noting the procedural posture of this post-conviction proceeding and how this Court is to view the claims raised by the Petitioner and the State's Response to those claims. Under the Mississippi Uniform Post-Conviction Collateral Relief Act, *Miss. Code Ann.* § 99-39-1 *et seq.*, the procedural posture here "is analogous to that when a defendant in a civil action moves to dismiss for failure to state a claim." *Neal v. State*, 525 So. 2d 1279, 1280 (Miss. 1987). Havard is entitled to an evidentiary hearing on claims raised in his Petition unless it appears **beyond a doubt** that he cannot prove any set of facts entitling him to relief. *See Marshall v. State*, 680 So. 2d 794, 794 (Miss. 1996) ("a post-conviction collateral relief petition which meets basic requirements is sufficient to mandate an evidentiary hearing unless it appears beyond doubt that the petitioner can prove no set of facts in support of his claim which would entitle him to relief"); *accord Archer v. State*, 986 So. 2d 951, 957 (Miss. 2008) ("If [petitioner's] application states a *prima facie* claim, he then will be **entitled** to an evidentiary hearing on the merits of that issue in the Circuit Court . . . .") (emphasis added).

A great deal of the State's Response does nothing more than underscore the need for further factual development of these claims in this Court. Specifically, the State goes to great lengths to criticize, citing other cases, some of the experts who have provided affidavits in support of Havard's SBS claims. In the course of its Response, the State criticizes the qualifications, methodologies, and opinions of all of the experts (except Dr. Steven Hayne) that

have provided affidavits demonstrating the unquestionable shift in the scientific and medical communities with respect to Shaken Baby Syndrome and how that shift applies to the facts of Havard's case.

However, parsing expert qualifications, methodologies, underlying data, and opinions is a task best left to this Court in an evidentiary hearing. In *Chase v. State*, 873 So. 2d 1013, 1030 (¶ 82) (Miss. 2004), the Mississippi Supreme Court remanded for a hearing on whether the petitioner was mentally retarded, even though it recognized potential weaknesses with his proffered evidence. Likewise, in *Bell v. State,* 66 So. 3d 90, 94 (¶ 10) (Miss. 2011), the majority granted an evidentiary hearing though it acknowledged that the dissenting justice highlighted significant points that the State would be able to raise at the hearing.

An evidentiary hearing in this court will afford the opportunity to fully explore each expert witness's credentials, training, and experience as related to the medical issues in this case and determine who is a qualified expert in these respective fields and who will be permitted to offer opinion testimony. From there, the parties and the court can fully explore the facts relied upon by each expert, any assumptions upon which they rely, their methodologies, and other information undergirding their opinions. Finally, the court can receive the opinions of these various experts and determine what effect the new evidence presented should have on Havard's conviction and sentence.

A major flaw in the State's argument is that it mistakes the existence of any professional opinions questioning Shaken Baby Syndrome as the newly-discovered evidence at the heart of this Petition. The State goes to great lengths to demonstrate that there existed at the time of Petitioner's trial and/or direct appeal voices in the scientific and medical communities questioning whether Shaken Baby Syndrome could cause a head injury. From this, the State

concludes that Petitioner has not shown newly discovered evidence for purposes of overcoming procedural bars. But, the newly discovered evidence asserted in the Petition is not the mere existence of those opinions, but rather the significant and legitimate debate within the scientific and medical communities that has recently emerged in which many, if not most, experts now express grave doubts about Shaken Baby Syndrome.[3]

The significant and legitimate debate taking place in academic and professional circles has now emerged in **this case** by virtue of the shift in Dr. Hayne's opinions on the matter of Shaken Baby Syndrome and its relation to his investigation of Chloe Britt's death and his trial testimony concerning his investigation. Dr. Hayne is willing to—indeed, he desires to—testify at an evidentiary hearing about his change of opinion. (*See* Petition Exhibit "A," July 2014 Affidavit at p. 2; July 2013 Hayne Affidavit at ¶ VIII). Based upon prior conversations with Dr. Hayne, it is unclear if prior to trial Dr. Hayne was provided with Havard's explanation of the accidental fall. If he was not, this would have precluded him from accounting for this in his evaluation of Chloe's death and his resulting trial testimony. What is clear from the record is that neither Dr. Hayne nor the non-expert medical providers accounted for Havard's description of the short accidental fall onto a hard surface in their trial testimony. Havard's statement, coupled with (a) the significant and legitimate debate on the science of Shaken Baby Syndrome and (b) the alternative, non-criminal explanation for Chloe's injuries and death, both as described by Dr. Hayne, demonstrate that the cause and manner of death in this case are in serious question. Indeed, Dr. Hayne now acknowledges that Chloe's death could **not** have been caused by shaking alone, which directly contradicts his trial testimony and the State's theory at trial. Dr.

[3] Even assuming, for the sake of argument, that the State's assertion that the shift in medical consensus is not newly-discovered evidence, without this expert assistance at trial, Havard could not affirmatively establish his defense. Certainly, without medical expertise, Havard could not challenge the State's case against him in any meaningful way.

Hayne describes his original diagnosis that he testified to at trial as "probably not correct." As a result, Havard's conviction and sentence are subject to grave doubts and deserve serious review by this Court by way of an evidentiary hearing.

With the proper focus on what actually constitutes the asserted newly-discovered evidence in this petition, it becomes clear that Petitioner has established such under the UPCCR. *Miss. Code Ann.* § 99-39-3 states that "the purpose of [the UPCCR] is to provide prisoners with a procedure, limited in nature, to review those objections, defenses, claims, questions, issues or errors which in practical reality could not be or should not have been raised at trial or on direct appeal." Here, Petitioner could not have previously presented the claims in this petition because they are based upon (a) significant changes in Dr. Hayne's opinions since Havard's trial in 2002 and (b) a paradigm shift in opinion within the medical and scientific communities with respect to shaken baby syndrome, a shift that had not taken place and therefore was not reasonably discoverable at the time of trial, direct appeal, or during PCR proceedings.

V. THE PARADIGM SHIFT IN MEDICAL AND SCIENTIFIC OPINIONS CONCERNING SHAKEN BABY SYNDROME

In light of the State's refusal to recognize the paradigm shift in the scientific and medical communities with respect to Shaken Baby Syndrome (SBS), Havard details herein and in Appendix "A" to his Petition filed previously with this Court, with citations to supporting source material, those developments. The Appendix offers a more detailed review of those developments, but a brief overview is provided below.

In 2002 (when Havard was arrested, tried, and convicted), virtually no one in mainstream medicine openly questioned the existence of SBS. Today, such questioning is mainstream. *See, e.g.,* Szalavitz, *The Shaky Science of Shaken Baby Syndrome*, TIME (Healthland) (online, Jan. 17, 2012); Bazelon, *Shaken-Baby Syndrome Faces New Questions in Court*, N.Y. TIMES (Dec.

2, 2011); Hansen, *Unsettling Science*, ABA. J. (Dec. 2011); Gabaeff, *Challenging the Pathophysiologic Connection Between Subdural Hematoma, Retinal Hemorrhage and Shaken Baby Syndrome*, 12 W. J. EMER.MED. 144, (2011) ("It appears that SBS does not stand up to an evidence-based analysis."); Miller, et al. *Overrepresentation of Males in Traumatic Brain Injury of Infancy and in Infants with Macrocephaly: Further Evidence that Questions the Existence of the Shaken Baby Syndrome*, 31 AM. J. FORENSIC MED. PATH. 165, 169 (2010) ("Several recent observations have converged to raise serious questions about SBS and whether shaking alone can cause the triad. . . . How could such a diagnosis based on such flimsy evidence and with such far-reaching implications become so entrenched in pediatric and legal medicine?"); Talbert, *Shaken Baby Syndrome: Does It Exist?*, 72 MED. HYPOTHESES 131 (2009); Anderson, *Does Shaken Baby Syndrome Really Exist?*, DISCOVER (Dec. 2, 2008). *See also* Affidavits/Declarations attached to original Petition of Dr. Steven Hayne (Exhibit "A"); Dr. Michael Baden (Exhibit "B"); Dr. Janice Ophoven (Exhibit "C"); Dr. George Nichols (Exhibit "D"); and Dr. Chris Van Ee (Exhibit "E").

In Havard's trial, medical providers and Dr. Hayne testified that the SBS triad of findings was unique to SBS. Today, the list of other conditions currently known to mimic the SBS symptoms -- which were not considered by the doctors or the medical examiner in 2002 -- is long and growing. In other words, it is now known that many other conditions and events can cause the SBS findings, while there is tremendous debate about whether those findings can even be caused by shaking. Dr. Hayne now says that they cannot, in contrast to his trial testimony from 2002. Moreover, as the understanding about SBS has progressed, several particular aspects of the SBS testimony given at Havard's trial have been exposed as wrong. For instance, it has now been established that retinal hemorrhages are not traumatic injuries caused by shaking, but

occur in a wide variety of non-traumatic and accidental circumstances as a result of intracranial bleeding and pressure.

These changes in understanding -- and others discussed herein and in the original Petition – have accelerated rapidly in the last decade. At a minimum, these developments constitute significant new evidence that was not available to Jeffrey Havard to defend himself more than a decade ago. The changes in science have been significant enough to cause the medical examiner, Dr. Hayne, to significantly revise his medical conclusion, recant his original diagnosis and trial testimony regarding SBS as "probably not correct," and account for a non-criminal possibility (simple blunt force trauma) that (a) he did not find before and (b) that Havard's jury never heard.

To assist the Court in examining this claim and the significant shifts that have occurred in the medical and scientific communities concerning SBS, a comprehensive history of the evolution in SBS from its founding as a theory to the present was included as Appendix "A" to the Petition. This detailed history shows how SBS gained quick acceptance despite the lack of any objective or science-based foundation. The history further shows, however, how SBS has not withstood increasing scrutiny and scientific rigor, particularly in the years since Havard's 2002 trial. Simply put, in 2002, SBS was gospel, and those who questioned it were outliers. Now, those who question SBS are in the mainstream, and there exists, as the Wisconsin Court of Appeals put it in *State v. Edmunds*, 746 N.W. 2d 590 (Wis. Ct. App. 2008), "legitimate debate" about many aspects of SBS that were previously accepted without question.

VI. THE NEW EVIDENCE CASTS GRAVE DOUBTS ON HAVARD'S GUILT AND THERE IS A REASONABLE PROBABILITY THAT IT WOULD CAUSE A JURY TO REACH A DIFFERENT VERDICT

The State goes to great lengths in its Response to assert that all of this talk about Shaken Baby Syndrome is irrelevant and much ado over nothing. Contrary to the State's assertion, the new evidence in this case—(1) the paradigm shift in the medical and scientific communities concerning SBS and how the new mainstream analysis of SBS fits into this case and (2) Dr. Hayne's new opinions concerning SBS with respect to the death of Chloe Britt—is material.

It must be remembered that it was the State that insisted in the original 2002 trial that SBS was relevant, important, and necessary for jury consideration. When the indictment was amended to remove the underlying felony of felonious child abuse, Havard filed a motion to preclude any discussion or consideration of SBS. The State objected, and argued that "it would be incumbent upon us as an element of the crime [capital murder during the course of sexual battery] to prove that a murder resulted from that commission of that crime 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. at 103. The State continued, arguing that it was required to prove that "the murder was committed and how it was committed while the crime of sexual battery was being committed." Tr. at 104.

This Court granted the motion *in limine* in part and denied it in part. Tr. at 105. The Court ruled: "[T]he State is still required to prove the element that the defendant did kill and murder the victim with or without design to affect death. Therefore, the State will be allowed to present any evidence of the matters referred to by defense counsel as long as they go to the manner or the cause of death." Tr. at 105-106. Thus, this Court ruled that evidence presented at trial regarding SBS and similar issues was admissible to show manner and cause of death.

Having fought to put SBS before the jury and then doing so during trial, the State cannot now argue that SBS is irrelevant. The State cannot be allowed to use evidence to secure a conviction and sentence (especially a death sentence) and then avoid post-conviction review of newly-discovered evidence on that topic by arguing that it is irrelevant. That is fundamentally unfair. Further, the fact that a unanimous Mississippi Supreme Court remanded this matter to this Court for merits review of this claim undermines the State's argument that SBS is irrelevant or immaterial. If the matter could be so easily dispensed with, the Supreme Court would not have remanded the case to this Court.

To further its argument that SBS evidence is not relevant, the State also takes the extraordinary position that Havard has never before argued that Chloe Britt's death was an accident. *See* State's Response at pp. 15, 18. That argument is, politely put, wrong and contradicted by the trial transcript. Havard has always maintained that Chloe's death was a tragic accident, and not murder. That he now has new evidence to support that position is the point of these proceedings. Aided now by the change in Dr. Hayne's opinions, the availability of expert assistance, and the intervening change in scientific consensus on SBS in the 13 years that have passed since trial, Havard's position is now proving to be correct and supported by objective scientific proof. The same cannot be said of the State's theory that Chloe Britt died from shaking alone committed by Havard and that her death had no other possible cause.

To see, as the Supreme Court did, the relevance of this newly-discovered evidence, one need only compare what the jury from Havard's 2002 trial heard with respect to SBS and what a jury in a new trial would hear on SBS. In doing so, it is clear that the new evidence casts grave doubts on the reliability of Havard's conviction and death sentence.

What the 2002 Jury Heard About SBS

As demonstrated in detail in Havard's original Petition, the following is a summary of the evidence and argument that the jury heard regarding SBS during Havard's 2002 trial:

- Testimony from witnesses was used to establish that Chloe Britt was a normal, healthy baby prior to her death.
- Dr. Ayesha Dar observed "hemorrhages in [Chloe's] retina . . . which is so very specific of this kind of injury . . . [b]eing a shaken baby. **Nothing else causes that** . . ." Tr. at 415 (emphasis added).
- Dr. Laurie Patterson also noticed the retinal hemorrhaging, describing it as "indicative . . . of a shaken baby type thing . . ." Tr. at 407-408.
- ER Nurse Patricia Murphy saw that Chloe had injuries "consistent with . . . Shaken Baby Syndrome." Tr. at 396.
- Dr. Hayne's autopsy report concluded that Chloe's cause and manner of death was "consistent with Shaken Baby Syndrome." Petition Exh. "G," Final Report of Autopsy.
- Dr. Steven Hayne reiterated Dr. Patterson's testimony that, at the time of her death, the child had both retinal and brain hemorrhaging. Tr. at 407-408, 415, 420, 551-56.
- Dr. Hayne also explained that the subdural hemorrhaging indicated that the child suffered from ripped "small bridging [blood] vessels," likely caused by the child being shaken violently. Tr. at 552.
- Dr. Hayne said that blood-pooling in the brain indicated trauma and injury. Tr. at 552.

- Dr. Hayne also asserted that Chloe's symptoms – subdural hemorrhage and retinal hemorrhage –were "consistent with the shaken baby syndrome." Tr. at 556-57. Dr. Hayne further clarified: "It would be consistent with a person violently shaking a small child. Not an incidental movement of a child, but violently shaking the child back and forth to produce the types of injuries that are described as shaken baby syndrome, which is a syndrome known for at least forty-five years now. . . .We're talking about very violent shaking." Tr. at 556-57. He further explained to the court and the jury that the "classic triad for shaken baby syndrome" – the three primary indicators of SBS – is the presence of subdural hemorrhage, the presence of retinal hemorrhage, and the absence of other potentially lethal causes of death. Tr. at 556.
- Dr. Hayne concluded that Chloe's death was homicide caused solely by "violent shaking". Tr. at 557. He testified at trial that he "did not find any other cause of death." Tr. at 557.
- Dr. Hayne described SBS as a well-established diagnosis, acknowledged for many decades.
- According to Dr. Hayne, the child's symptoms were exclusively diagnostic of SBS: "[b]oth inclusionary findings were present. The subdural hemorrhage, the retinal hemorrhage, and also there was an exclusionary component. I did not find any other causes of death." Tr. at 557. Dr. Hayne described the injuries resulting from the shaking in this case as similar to those from "motor vehicle crashes, falls from significant heights and the like." Tr. at 557. He concluded that Chloe's

death was a homicide caused by "violent shaking" committed by "another person". Tr. at 557.

- Dr. Hayne noted that "there were no contusions or bruises and no tears on the brain itself . . . [and] there were no [skull] fractures . . . [or] breaking of the bones composing . . . [any part of the skull]." Tr. at 554-55.
- Dr. Hayne's testimony is devoid of any analysis of the accidental dropping of Chloe as described by Havard. No other witness tendered or qualified as an expert witness analyzed Havard's explanation of an accidental short fall onto a hard surface.
- Havard's defense team presented no evidence—and certainly no expert medical evidence—to contest the State's theory of Shaken Baby Syndrome.
- In closing argument, the State urged: "Remember the testimony of Dr. Hayne who told you that this baby died of head trauma of being shaken violently. A violent shaking would be the equivalent of being in a car wreck, of being dropped from a high height is the injury that this baby suffered to her head. Again shaken violently. And after having been sexually penetrated." Tr. at 611-12. The prosecutor continued: "This baby was shaken to death having been sexually assaulted, and ladies and gentlemen, don't try to understand it. Don't try to figure out how it could have happened. Just know what did happen and render your verdict of guilty of capital murder because that's what this man is over there for doing that to this child." Tr. at 612.
- The State's closing argument concluded by reiterating "what Dr. Hayne said would have to happen for this shaking to cause the injuries that baby had,"

another reference to the alleged force of the shaking described by Dr. Hayne. Tr. at 624.

- The State concluded its closing argument with this overall theory: "[H]e hurt that child more than he intended to in this sexual battery. He hurt her. Your heard him talking about how she was injured in her rectal area, and what does a child do—what's the only defense an infant baby has got when something like that happens to them? They scream. They don't just cry, folks. They scream in pain. When they're in pain, they scream. And what's he going to do then? She's screaming. He's injured her. Stop her. I got to stop her from screaming. Well, he stopped her all right. She ain't screaming now. And then what does he do? Now, he's not only injured her rectally, but he shook her so hard that results in her death." Tr. at 626.

In short, the jury was told that the SBS symptoms allegedly observed by medical providers and Dr. Hayne could lead to only one conclusion: homicide by shaking alone. No other evidence was adduced at trial. Simply put, Havard's 2002 trial jury was told unequivocally that the cause and manner of death was Shaken Baby Syndrome, a well-established and non-controversial diagnosis. Period.

What a New Jury Would Hear About SBS

In Havard's Petition, he details, with supporting affidavits, the new evidence regarding SBS. If Havard's case was tried today, the following is a summary of what the jury would hear:

- SBS has moved from a recognized, mainstream diagnosis to a diagnosis that is highly controversial and routinely questioned.

- Many of the previously described "unique" SBS markers have been proven to not be confined to being caused by SBS (for instance, retinal hemorrhages).
- Dr. Hayne, who previously affirmed the long-standing acknowledgement of the SBS diagnosis, now acknowledges recent advances in the scientific and medical communities in the field of SBS. In particular, Dr. Hayne acknowledges advances in the field of biomechanics, finding that shaking alone could not have produced enough force to kill Chloe Britt.
- Dr. Hayne's trial testimony regarding the severity of shaking Chloe endured (equivalent to a fall from a great distance or forces present in high speed motor vehicle collisions) has been disproved by objective science (i.e., falls from short distances, especially onto hard surfaces can produce significant, fatal injuries).
- Dr. Hayne acknowledged in the January 2014 newspaper article that there is "growing evidence" that his original diagnosis of Shaken Baby Syndrome in the Havard case is "probably not correct." These statements were affirmed under oath in the July 2014 Affidavit.
- Havard now has multiple expert witnesses who would testify on his behalf that Chloe's death was definitively not caused by shaking alone and that the objective, forensic evidence supports Havard's history of a short accidental fall onto a hard surface.
- Dr. Michael Baden concludes "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."

- The external and internal injuries found on Chloe Britt "could be caused by the impact of a short fall as described by Mr. Havard," according to Baden.
- Dr. Baden notes that Chloe Britt did not have other injuries that are typically associated with violent shaking injuries in infants.
- Dr. Baden states that retinal folds are not solely indicative of SBS but can "occur as the result of many types of innocent head trauma."
- Dr. Janice Ophoven has conducted an in-depth anlaysis of Chloe's birth and pediatric records and found multiple instances of chronic issues that are often mistaken for SBS symptoms.
- Dr. Ophoven states that "[t]here is no medical or scientific support" for Dr. Hayne's comparisons of the forces involved in the shaking death of Chloe Britt as the equivalent of those seen in high speed car collisions and falls from great heights.
- Dr. Ophoven rejects any finding of shaking as causing the death of Chloe Britt. Rather, the available evidence supports a finding of death by impact, such as that resulting from a short distance fall onto a hard surface.
- Dr. George Nichols opines that, at the time of Havard's trial in 2002, many medical experts would have agreed with the SBS conclusion found and expressed in 2002 by Dr. Hayne.
- Dr. Nichols describes academic research that casts "serious doubt on the conclusions that retinal hemorrhages and subdural hematomas in infants are specific signs of vigorous shaking."

- Dr. Nichols describes how advances in medicine have led to recognition of other causes for what have traditionally been considered SBS symptoms—such causes include "various infections" (from which Chloe suffered during her young life) and "simple impact trauma" (as caused by a short fall onto a hard surface).
- Dr. Nichols also takes to task Dr. Hayne's descriptions of the forces involved in causing Chloe's injuries, stating that it "is now generally agreed by most forensic pathologists and biomechanical scientists and engineers that such comparisons are without scientific merit and should not be made."
- Dr. Chris Van Ee, a biomechanical engineer, has conducted research of many of the scientific underpinnings of SBS theory and have found many of them lacking or completely unfounded.
- Dr. Van Ee opines that "short distance falls of three feet or less can result in serious, and sometimes fatal, head injury" and that "low level falls can result in serious and fatal head trauma including subdural and retinal hemorrhage." Dr. Van Ee also specifically notes that a short distance fall head-first onto a hard surface such as a porcelain toilet tank could cause "a severe, or fatal, head injury."
- Dr. Van Ee opines that shaking—advanced at the 2002 trial as the sole cause and manner of death—is a "less likely" explanation for Chloe's injuries than the short distance accidental fall onto a "particularly hard surface" as described by Havard.
- Dr. Van Ee also criticizes Dr. Hayne's trial testimony describing the forces involved in producing Chloe's injuries as equivalent to a multi-story fall or high speed motor vehicle accident as "without scientific foundation."

- Analysis of the short distance accidental fall as described by Havard by renowned experts demonstrates that Chloe's injuries could have been caused by the short distance, accidental fall onto a hard surface as consistently described by Havard.
- Dr. Hayne would acknowledge that Chloe's injuries and death could have been caused by simple "blunt force trauma" such as could be caused by a fall, even at a short distance, onto a hard surface (porcelain toilet tank).
- Testimony regarding Chloe's medical history as derived from her birth and pediatric records reveals chronic issues that can causes symptoms that were historically attributed to SBS.

A comparison of what Havard's trial jury was told about SBS in 2002 and what a jury would hear about SBS in a trial held today is striking. The differences are significant and have direct bearing on Havard's conviction and death sentence, since SBS alone was the sole theory of cause and manner of death advanced by the State. With the new evidence detailed in the original Petition and herein, grave doubts exist as to Havard's guilt. Thus, this Court should vacate Havard's conviction and sentence and grant Havard a new trial.

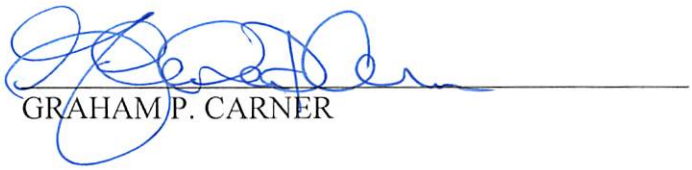
VII. CONCLUSION

As demonstrated in the Petition and herein, Petitioner has raised claims that are not procedurally or otherwise barred from consideration. Petitioner's conviction and death sentence should be vacated and a new trial ordered following an evidentiary hearing and consideration of the merits of Havard's claims.

Respectfully submitted, this the 21st day of December, 2015.

Respectfully submitted,

JEFFREY HAVARD, PETITIONER



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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing to the following by U.S. Mail and e-mail:

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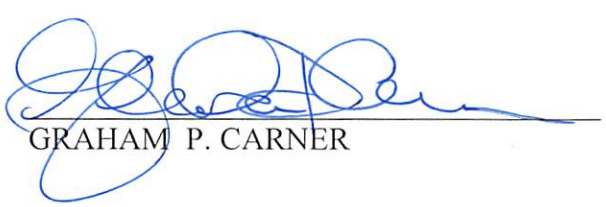
This the 21st day of December, 2015.



GRAHAM P. CARNER

Serial: 197568

IN THE SUPREME COURT OF MISSISSIPPI

No. 2013-DR-01995-SCT

JEFFREY KEITH HAVARD — *Petitioner*

v.

STATE OF MISSISSIPPI — *Respondent*

ORDER

This matter comes before the Court, *en banc*, on the Motion for Relief from Judgment or Leave to File Successive Petition for Post-Conviction Relief and the subsequent Amended Motion For Relief From Judgment or Leave to File Successive Petition for Post-Conviction Relief, filed by counsel for Jeffrey Keith Havard. Also before the Court are the responses filed by the State of Mississippi and the replies thereto filed by Havard. Having duly considered the aforementioned filings, we find that Havard should be granted leave of this Court 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.

The Court finds no merit in Havard's assertion that the prosecution suppressed favorable evidence and, thereby, violated his due process rights. *See **Brady v. Maryland***, 373 U.S. 83 (1963). Likewise, we find no merit in Havard's assertion that his counsel was ineffective for failing to interview Dr. Steven Hayne prior to trial. Accordingly, Havard is not granted leave to proceed in the trial court on those two claims.

IT IS THEREFORE ORDERED that Havard's application for leave to proceed in the trial court is granted as herein stated.

SO ORDERED, this the 27 day of March, 2015.

JOSIAH DENNIS COLEMAN, JUSTICE
FOR THE COURT

TO GRANT: ALL JUSTICES.