IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JEFFREY HAVARD **APPELLANT**

v. **No. 2018-CA-01709-SCT**

STATE OF MISSISSIPPI **APPELLEE**

REPLY BRIEF OF APPELLANT
ORAL ARGUMENT REQUESTED

On Appeal from the
Circuit Court of Adams County, Mississippi
No. 02-KR-0141-J

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to MRAP 34(b), the Appellant requests oral argument. This is a complex case involving novel issues of scientific and medical consensus, changed testimony, and the appropriate application of Mississippi's post-conviction statutes in cases where new evidence is brought before the courts. Oral argument will assist the Court in evaluating these important issues.

REPLY ARGUMENT

The State, in typical fashion in these sorts of cases, clutters up its Brief with multiple arguments about procedural bars that are not applicable here. To begin, this matter was remanded by this Court to the Circuit Court of Adams County after the State had raised many procedural bar arguments in Case No. 2013-DR-01995-SCT. If any procedural bars applied to these issues, this Court would not have remanded them to the trial court. Second, the trial court did not find that any of Havard's claims or arguments were procedurally barred. (R.E. at 15-19). Since the State did not file a cross-appeal, it cannot now argue that procedural bars apply. *See MRAP* 4.

The State also argues frivolous procedural bars such as the failure of Havard to cite legal authority or the record in support of his claims of error. These assertions are patently incorrect, as a plain reading of each Issue in Havard's Principal Brief cites multiple legal authorities as well as the evidentiary record in support of Havard's arguments.[1]

The State's tactics should be seen for what they truly are: an attempt to distract the Court from the merits of this appeal. In a case that is about science, the State relies on semantics to try to cover the obvious: Havard's conviction is based upon flawed science and false facts. Havard's Principal Brief, and this Reply, cite to cold, hard facts in the record that show Havard

[1] For instance, for Issue 1, *see* Havard's Principal Brief at pp. 25-26, 29-31.

has met his burden of proving that he is entitled to have his conviction vacated. To not order a new trial under these circumstances dooms a man to spend the rest of his life in prison on the basis of a flawed conviction.

This case is in this position because the scientific underpinnings of Havard's conviction have dramatically changed since his 2002 trial. This is a rare event that could not have been anticipated. But now that it has happened, this Court should use its power to let a new jury hear all of the facts and science and decide whether Jeffrey Havard is guilty of capital murder or not.

Below, Havard responds to the arguments raised by the State with respect to Havard's three appeal issues.

I. THE CIRCUIT COURT ERRED BY NOT GRANTING HAVARD A NEW TRIAL, WHEN THE NEWLY DISCOVERED EVIDENCE HAD BEARING ON GUILT/INNOCENCE ISSUES AND WOULD DRAMATICALLY ALTER THE JURY QUESTION IF THE CASE WERE TRIED AGAIN USING THE NEW EVIDENCE

Dr. Steven Hayne, 2002 Trial Testimony:

> The cause of death of Chloe Britt was "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….I did not find any other cause of death, sir."

(Jeffrey Havard Trial Transcript, pp. 556-57)

Dr. Steven Hayne, 2017 Evidentiary Hearing Testimony:

Q: Are you familiar with the term, "Purely Shaken Baby Case?"

A: Yes.

Q: This case is not a Purely Shaken Baby Syndrome Case, is it?

A: Not a pure one, no.

(R. at V. 13, p. 39)

Dr. Michael Baden, 2017 Evidentiary Hearing Testimony:
(Responding to questions from the Court)

Q: The injuries that Dr. Hayne noted to that child, it's my understanding that it's your professional opinion that those injuries could not have been caused by shaking alone?

A: Yes, Your Honor.

Q: But they could have been caused by an impact without shaking?

A: Yes, sir.

(R. at V. 14, pp. 158-59)

Dr. Janice Ophoven, 2017 Evidentiary Hearing Testimony:

Q: Do you agree with Dr. Hayne's diagnosis [of SBS] as testified to at the 2002 trial?

A: Absolutely not.

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"Chloe died from complications of hypoxia injury to the brain associated with a history of a fall."

(R. at V. 14, pp. 204, 210)

Dr. Scott Benton, 2017 Deposition Testimony:

Q: Just so your testimony is clear, you're not believing that shaking alone killed Chloe Britt.

A: No. There's plenty of evidence she had impact trauma to her head and in multiple planes.

(R. at V. 8, p. 1058) (Dr. Benton Deposition, p. 51)

Dr. Scott Benton, 2017 Evidentiary Hearing Testimony:

"I believe this baby died of blunt force head trauma."

(R. at V. 16, p. 458)

The sole medical expert who testified in the 2002 trial of Jeffrey Havard testified that Chloe Britt died of intentional, violent shaking alone. Every single medical expert who testified at the 2017 evidentiary hearing, including the expert from the original trial, now says otherwise.

The State recognizes that the 2002 jury having heard that "shaking alone" killed Chloe (i.e., that this was a "Pure Shaken Baby Syndrome" case) would be fatal to its argument. Because of this, the State tries to act as if that is not the case. (*See* State's Brief at pp. 16-17). The State argues that "shaking alone" "does not accurately reflect what was presented at trial." (State's Brief at p. 16). A plain reading of Dr. Hayne's 2002 trial testimony, recounted above, belies that argument.[2] Even the State's new expert, Dr. Scott Benton, disagrees with the State's position. Dr. Benton testified:

> Q: Dr. Hayne testified that the cause of death was shaking alone in this trial, correct?
>
> A: He did. Yes.

(R. at V. 16, p. 459).

The State's semantics do not survive a plain reading of Dr. Hayne's trial testimony, even by its own expert. The 2002 jury was told that Chloe died from violent shaking alone by another person. Now, nobody says that. Standing alone, the change from "shaking alone" to "blunt force trauma" (which could have innocent causes—and, in fact, is consistent with Havard's statement to law enforcement), is sufficient new evidence to warrant a new trial. However, there is much more, as demonstrated in Havard's Principal Brief and herein. In 2002, it was widely accepted in the scientific community that shaking alone could cause death and that a triad of findings can be used to reliably diagnose shaking; since 2002, the scientific community has abandoned those beliefs.

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[2] Dr. Hayne is on record as previously testifying that "SBS occurs when a child is shaken without impacting the child's head on a hard surface." *Brandon v. State*, 109 So.3d 128, 131 (Miss. Ct. App. 2013) (the Brandon case was later remanded by this Court for post-conviction proceedings in Case No. 2014-M-00596).

This post-conviction proceeding concerning new evidence and scientific advances is, in some respects, complex and technical. But, at its essence, it is rather simple. When distilled to a comparison of what the jury heard in Havard's 2002 trial and what a new jury would hear, it is clear that Havard has met his burden and is entitled to a new trial. The chart below demonstrates, with precise citations, the stark differences between the 2002 trial testimony and state of SBS science and what was presented to the trial court at the 2017 evidentiary hearing.

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TOPIC	THE 2002 JURY HEARD	A NEW JURY WOULD HEAR
CAUSE OF DEATH	**Violent, deliberate shaking alone.** (Dr. Hayne; Tr. at 556-57)	**Blunt Force Trauma/ Hypoxic Brain Injury Associated With a Fall/Not Shaking Alone** (Dr. Hayne; R. at V. 13, p. 25) (Dr. Baden; R. at V. 13, pp. 77-79) (Dr. Ophoven; R. at V. 14, pp. 204, 210) (Dr. Benton; R. at V. 16, pp. 457-58)
USE OF SBS "TRIAD"	**Diagnostic of SBS** (Hayne; Tr. at 556-57)	**Not Diagnostic of SBS** (Baden, R. at. V. 13, p. 83) (Ophoven; R. at V. 14, pp. 227-28) (Benton; R. at V. 15, p. 411, V. 16, p. 461)
POSSIBILITY THAT CHLOE'S DEATH CAUSED BY ACCIDENT?	**No** (Hayne; Tr. at 556-57)	**Yes** (Baden; R. at V. 13, pp. 86-87) (Ophoven; R. at V. 14, p. 211) (Dr. Van Ee; R. at V. 14, pp. 295-97, V. 15, p. 323)
RETINAL HEMMORHAGE ONLY CAUSED BY SHAKING	**Yes** (Dr. Patterson; Tr. at 407-408) (Dr. Dar; Tr. at 415-16)	**No** (Baden; R. at V. 13, p. 85) (Ophoven; R. at V. 14, pp. 202-203) (Benton; R. at V. 16, p. 468)
SHORT FALL COULD HAVE CAUSED CHLOE'S INJURIES/DEATH?	**No** (Hayne; Tr. at 557)	**Yes** (Hayne; R. at V. 13, p. 28) (Baden; R. at V. 13, pp. 86-87) (Ophoven; R. at V. 14, pp. 211, 247) (Dr. Van Ee; R. at V. 14, pp. 295-97, V. 15, p. 323) (Benton; R. at V. 16, pp. 461, 463)
SBS CONTROVERSIAL?	**No** (Hayne; Tr. at 556) General acceptance in 2002 confirmed by: (Baden; R. at V. 13, p. 82) (Ophoven; R. at V. 14, pp. 214-16)	**Yes** (Hayne; R. at V. 13, p. 54) (Baden; R. at V. 13, pp. 97-102) (Ophoven; R. at V. 14, p. 204) (Benton; R. at V. 16, pp. 462-63)
AMERICAN ACADEMY OF PEDIATRICS ENDORSED SBS & DIAGNOSTIC TRIAD?	**Yes** (2001 AAP paper; Evidentiary Hearing Transcript Exhibit 14)	**No** (2009 AAP paper; Evidentiary Hearing Transcript Exhibit 15)
NATIONAL ASSOCIATION OF MEDICAL EXAMINERS ENDORSED SBS?	**Yes** (2001 NAME position paper; Evidentiary Hearing Transcript Exhibit 12)	**No** (Ophoven; R. at V. 14, p. 214-16) (2001 NAME position paper not renewed)

It bears repeating that Havard was denied independent expert assistance at his 2002 trial. Thus, another difference between the 2002 trial and a new trial is that the jury would hear expert testimony about the scientific underpinnings of SBS from both sides. This Court has recently ruled that independent expert assistance is critical in these types of cases. *See, e.g., Isham v. State*, 161 So.3d 1076 (Miss. 2015) (reversing felonious child abuse conviction because expert assistance was denied in a case involving allegations of blunt force trauma); *Brown v. State*, 152 So.3d 1146 (Miss. 2014) (reversing conviction due to lack of expert assistance in another SBS case where Dr. Hayne testified that shaking alone was the cause of death of a child). *See also McWilliams v. Dunn*, 137 S. Ct. 1790 (2017) (due process requires appointment of an expert independent of the prosecution if reasonably necessary). In 2002, Havard was denied expert assistance, a "basic tool of an adequate defense". He will not be without such assistance if there is a new trial.

The differences between what the 2002 jury heard and what a new jury would hear paint an entirely different picture of this case. The new evidence also supports the defense theory that Chloe died after being accidentally dropped. These differences substantially alter the jury question. *See Hunt v. State*, 877 So.2d 503 (Miss. Ct. App. 2004), *cert. denied*, 878 So.2d 66 (Miss. 2004). They also "give rise to **grave doubts** of [the defendant's] guilt ... or raise a **reasonable probability**, that if presented in a new trial, it would cause a jury to reach a different verdict") *Entrenkin v. State*, 134 So.2d 926, 927 (Miss. 1961) (emphases added). The differences are such that they certainly would raise reasonable doubt of Havard's guilt. *See Hannah v. State*, 943 So.2d 20, 25 (Miss. 2008) (holding that it was reasonable to conclude the outcome of a jury trial would be different with the introduction of new evidence that raised reasonable doubt of the defendant's guilt). Under any of these descriptions of the standard for obtaining post-conviction relief, Havard has met his burden of proof. The record from the trial

court overwhelmingly shows—and certainly shows by a mere preponderance of the evidence—that the result of the 2002 trial is untrustworthy. This Court should vacate Havard's capital murder conviction and order a new trial.

II. THE CIRCUIT COURT COMMITTED ERROR BY ADMITTING THE OPINIONS OF THE STATE'S NEW EXPERT, DR. SCOTT BENTON

This Court granted leave for Havard to file his petition for post-conviction relief in the trial court on the issue of newly discovered evidence presented in his application for leave. (Order, R. at V. 1, P. 1; R.E. at 13-14). The primary focus of this post-conviction proceeding was scientific and technical issues related to Shaken Baby Syndrome (SBS) and the cause and manner of death. (*See* Petition for Post-Conviction Relief, R. at V. 1, p. 3). The State designated only one expert: Dr. Scott Benton. (R. at V. 7, pp. 901-902).

Dr. Benton is a pediatrician who focuses on child abuse pediatrics. He is not a forensic pathologist, engineer, or biomechanics expert. (R. at V. 15, pp. 366-69). When Dr. Benton's qualifications and opinions are viewed in the context of this Court's mandate, it is clear that he lacked the necessary qualifications and experience to testify on the issue of cause and manner of death, and his opinions and methodologies presented to the trial court lacked the necessary reliability. Dr. Benton should not have been allowed to testify in this case as an expert witness, and the admission of his testimony prejudiced Havard.

A. Review is not barred.

The State begins its argument with the nonsensical assertion that this issue is barred due to a failure to cite "relevant authority" and "record evidence." (State's Brief at pp. 36-38). However, this argument ignores the extensive citations throughout Havard's entire brief, including the section at issue. (Havard Principal Brief, Part II, at pp. 63-72). The entire premise of Havard's argument against Dr. Benton's testimony is that he was an unqualified expert

witness under *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1983) and Miss. R. Evid. 702. Havard cited to those crucial authorities and their progeny. Just to name a few, Havard cited to *Kumho Fire Co. v. Carmichael*, 526 U.S. 137, 143 L.Ed. 2d 238, 119 S. Ct. 1167 (1999); *Troupe v. McAuley,* 955 So.2d 848, 856 (Miss. 2007); and *Miss. Transp. Comm'n v. McLemore*, 863 So.2d 31, 39 (Miss. 2003). Havard then proceeded to apply this case law to facts in the record. The State's argument that Havard failed to cite relevant authority or point out record evidence that supports and proves the issues under this assignment of error is without merit. Review of these issues by this Court is appropriate.

B. The trial court's Daubert determination was clearly erroneous and an abuse of discretion.

The Supreme Court of the United States has mandated that courts are required to apply a "gatekeeping" function and ensure that a proposed expert's opinion is reliable before they are allowed to testify. *Daubert*, 509 U.S. at 597. Specifically, the Supreme Court stated:

> [I]n order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation – i.e., "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.

Id. at 590. Dr. Benton's testimony fails to meet this standard of evidentiary reliability.

The crucial issue of this case is Shaken Baby Syndrome (SBS) as it relates to cause and manner of death. Dr. Benton was not qualified to testify on this issue as he is not a forensic pathologist. (R. at V. 15, p. 372). The State recognized that Dr. Benton was not qualified to testify to such, and specifically asserted that he would testify "'to changes in the science regarding Shaken Baby Syndrome[,]…' *not cause and manner of death.*" (State's Brief at pp. 41-42) (emphasis added). Yet in the evidentiary hearing, Dr. Benton did just that. (*See e.g.*, R. at V. 15, p. 373) ("I was asked to review the materials that you sent me with an eye to looking to see if the science has evolved since the trial of Jeffrey Havard that altered the opinion *as to the*

cause and manner of death of Chloe Britt.") (emphasis added). Due to Dr. Benton's lack of training and experience in the determining cause and manner of death, he was unqualified to render such opinions. The State has offered no argument to say differently.

Furthermore, Dr. Benton is also not qualified to testify as to the science of biomechanics, which is a crucial piece of the recent scientific developments in SBS research. (*See* R. at V. 15, pp. 367, 372; V. 16, p. 465). In the words of Dr. Hayne, "Recent advances in the field of biomechanics demonstrate that shaking alone could not produce enough force to produce the injuries that caused the death of Chloe Britt." (R. at V. 13, p. 24).

Dr. Benton was not admitted as an expert in biomechanics, and he was not qualified to give any testimony on the subject. (R. at V. 15, p. 372). The State seems to acknowledge Dr. Benton's complete lack of experience in this field, as it goes to great lengths to argue that Dr. Benton did not given any testimony rooted in biomechanics. (State's Brief at p. 48) ("Dr. Benton did not express biomechanical opinions."). This assertion is completely contradicted by the record and the State's Brief. As reflected in the evidentiary hearing transcript, the State specifically asked Dr. Benton to give his "opinion on biomechanical models, and […] cite any to support [his] position." (R. at V. 15, p. 383).

In the State's Brief, it points out numerous examples of Dr. Benton testifying to biomechanics. For example, Dr. Benton stated during the evidentiary hearing that he does "not see that [biomechanics] is ripe to say that you cannot shake and injure a child in part, because it's based on animal models, adult primates…." (State's Brief at p. 54 (citing R. at V. 15, p. 388)).[3] Additionally, as the State concedes in its argument, Dr. Benton testified at "great length" in AHT biofidelity, which is in the field of biomechanics. (State's Brief at p. 54). The State then proceeds to cite almost two full pages worth of the evidentiary hearing transcript—spanning 5

[3] This statement is misleading and is contradicted by the testimony of Dr. Chris Van Ee, the only biomechanical engineering expert who testified in the case.

pages of the record—where Dr. Benton testified extensively to biomechanics. (*Id.* at pp. 55-56 (citing R. at V. 15, pp. 384-88)).

Faced with an expert who is definitely unqualified to testify about (1) cause and manner of death and (2) biomechanics, the State tries to have its cake and eat it too. The State repeatedly says Dr. Benton is not testifying about these very matters which are outside of his expertise, but then repeatedly cites testimony from Dr. Benton that clearly falls in those areas. This is another example of the State playing word games. This Court must focus on the science and not the State's semantics. Dr. Benton is not qualified to testify on these topics. Accordingly, his testimony should have been excluded.

1. The State's misplaced attacks on Mr. Havard's experts do not render Dr. Benton qualified or his opinions reliable.

The State next attempts to use Dr. Benton's testimony to discredit the credentials and methodologies of Havard's expert witnesses who were accepted by the trial court as experts in their respective fields of pathology and biomechanics. (*See e.g.*, State's Brief at pp. 58-60). This attack is inappropriate as the State has not filed a cross-appeal challenging any of Havard's experts. *See MRAP* 4(a). If the State wished to rebut the expert testimony of esteemed pathologists and biomechanical engineers, it had every opportunity to proffer its own expert(s) in those fields at the appropriate time or to move to exclude Havard's experts in advance of the evidentiary hearing.

In its efforts to challenge Havard's expert witnesses absent a cross-appeal, the State ignores the shortcomings of its own expert witness. Despite the State's argument in opposition, Dr. Benton testified that he did not have the video recorded statement of Jeffrey Havard or the transcript of it before he gave his report and deposition. (R. at V. 15, p. 370:11-15). Further, Dr. Benton admitted that he did not have the *actual* medical records in this case. (*Id.* at 371:3-10) ("The medical records are contained within various trial testimony and expert's affidavits for

lack of better term, but the actual records I don't think I had."). Dr. Benton also ignored the biomechanical implications in this case by failing to request a biomechanical analysis, or use any other objective, reliable data in coming to his conclusions. (R. at V. 16, pp. 465-66). The State once again tries to point the finger back at Havard in its accusation that Havard's biomechanical expert did "absolutely no testing whatsoever in this case." (State's Brief at p. 66). However, neither did Dr. Benton, and his qualifications, methodologies, and opinions are at issue here. The State's numerous attempts to divert the Court's attention to Havard's experts do not disguise the fact that there are significant problems with Dr. Benton's qualifications, methodologies, and opinions. The trial court abused its discretion in allowing him to testify.

2. Dr. Benton's testimony and opinions are unreliable.

In its final efforts to discredit Doctors Baden and Ophoven, the State again ignores the fact that Dr. Benton failed to meaningfully consider non-abusive possibilities in his "expert" opinion. Although Dr. Benton acknowledged on cross-examination that Chloe "could have suffered a fall in this incident," he also acknowledges that he did not review the video recorded statement of Mr. Havard describing the short fall or the transcript of the statement. (*See* R. at V. 16, p. 461) (R. at V. 15, p. 370). Despite the State's argument that he did have access to the video and transcript, Dr. Benton clearly testified under oath that he did not review those items. (R. at V. 15, p. 370) ("No, I did not have the video recorded statement. I also didn't have the transcript of it."). But Dr. Benton's tendencies to jump to unsupported conclusions should come as no surprise when Dr. Benton classified Havard as a "killer" based only on a newspaper article before conducting any investigation. (R. at V. 15, p. 402).

The State's attempts to bolster Dr. Benton's credibility by referencing other cases where he was admitted as an expert witness does nothing to solve the deficiencies of his opinions in this case. (*See* State's Brief at pp. 44-45). Further, the State fails to address a more recent opinion

where Dr. Benton's opinions were called into question. *See Darnell v. Darnell*, 167 So. 3d 195, 205 (Miss. 2014) ("Dr Benton's conclusions about 'protective placement' […] amounts to a speculative, unsubstantiated, and unsupported opinion which this Court finds should not be admissible in evidence.").[4] Dr. Benton's opinions in this case also lack sufficient scientific rigor and reliability, and his opinions should have been entirely excluded by the trial court at the evidentiary hearing.

The State further fails to address a recent opinion where the Court of Appeals of Mississippi reversed a murder conviction based largely on the admission of a pediatrician's testimony in a Shaken Baby Syndrome case, finding her opinions unreliable. *Clark v. State*, No. 2017-KA-00411-COA, 2019 WL 5566234 (Miss. Ct. App. Oct. 29, 2019), *reh'g denied* (Mar. 3, 2020). Just like Dr. Benton, the pediatrician expert in *Clark*, Dr. Lakin, admitted that, "unlike a pathologist, she had no training or expertise in determining cause of death." *Id.* at *9. The Court of Appeals explained that its focus was not on whether she was qualified as a child abuse expert, but whether she could reliably testify as to *causation* of the child's injuries and death. *Id.* at *7. In finding her opinions unreliable, the Court recognized that though Dr. Lakin had been accepted as an expert in other child abuse and SBS cases, an expert's "prior acceptance as an expert does not automatically award her continued certification as an expert in her field or subspecialty in any future litigation." *Id.*

In *Clark*, Dr. Lakin agreed that other disciplines (including biomechanical engineering) discount SBS as a reliable diagnosis. The Court of Appeals took note of this and noted that though the Circuit Court Judge stated he determined Dr. Lakin to be qualified, he made "no actual on-the-record findings regarding her qualifications or the reliability of her testimony." *Id.* at *9. The Court of Appeals found this to be an abuse of discretion. *Id.* Similarly, here, the

[4] When initially asked if he had ever been excluded from testifying by any court in Mississippi, Dr. Benton incorrectly answered "no". (R. at V. 15, p. 372).

Court never ruled on Mr. Havard's motion to exclude Dr. Benton, deferring ruling until the evidentiary hearing. (R. at Supp. Transcript at pp. 29-30). And at the hearing, after voir dire of Dr. Benton, the Circuit judge merely stated:

> Let the record show while the witness Doctor Benton is not a pathologist or a biomechanic engineer he clearly has expertise in the field of children when generally referred to as Shaken Baby Syndrome and also injury from falls; therefore, the Court will accept him as an expert in the field of Child Abuse Pediatrics.

(R. at V. 15, p. 372). Dr. Benton testified over Havard's continuing objection. (R. at V. 15, p. 372).

The Court's written Order after the evidentiary hearing states only that it finds Dr. Benton's testimony "credible and persuasive." Just like in *Clark*, this lack of actual on-the-record findings regarding Dr. Benton's reliability and qualifications was an abuse of discretion. Dr. Benton's testimony was unreliable, and he should have been excluded.

C. Havard was prejudiced when the trial court failed to exclude Dr. Benton's testimony.

Finally, the State argues that Havard cannot show resulting prejudice from the trial court's error in allowing Dr. Benton to testify. However, this is simply not true. In *Daubert*, the Supreme Court of the United States recognized that expert evidence "can be both powerful and quite misleading because of the difficulty in evaluating it." *Daubert*, 509 U.S. at 595, 113 S. Ct. at 2798. The Court should reverse the admission of expert evidence if the error resulted in prejudice and harm or adversely affected a substantial right of a party. *Palmer v. Volkswagen of America, Inc.*, 904 So.2d 1077, 1092 (Miss. 2005).

In *Palmer*, this Court held that the trial court abused its discretion when it allowed a lay opinion witness, albeit an engineer, to "stray into the realm of scientific, technical and specialized knowledge that only could be admitted as expert testimony after assessment pursuant to Rule 702." 904 So.2d at 1092. The Court held that the plaintiff was prejudiced by the

impermissible expert testimony because that testimony was used to rebut the testimony of the plaintiff's own expert witness. *Id.* Similarly, here the admission of Dr. Benton as an expert witness was unduly prejudicial to Havard. Dr. Benton was the State's sole expert witness. Not only was Dr. Benton giving opinions outside the scope of his expertise, but the State attempted to use Dr. Benton's unreliable opinions to rebut Havard's experts. (*See Supra* Part II.B.).

It is reasonable to conclude that if the State's only designated expert was disqualified by the Court due to his lack of relevant experience and unreliable opinions that there would have been a different outcome at the trial court level. Indeed, the Circuit Court specifically found Dr. Benton's testimony to be "credible and persuasive". (R.E. at 17-18). Thus, the trial court's error in admitting Dr. Benton's opinions was prejudicial to Havard.

III. THE CIRCUIT COURT ERRED BY EXCLUDING EVIDENCE THAT CHLOE BRITT WAS NOT SEXUALLY ABUSED

The State uses 15 pages in its Brief to discuss the trial court's wholesale exclusion of the plethora of evidence that Chloe Britt was not sexually abused. (*See* State's Brief at pp. 76-91). This includes the proffered evidence cited in Havard's Brief that every single expert witness possibly qualified to discuss sexual battery at the evidentiary hearing has concluded there was no evidence that Chloe Britt suffered any sexual battery, including Dr. Steven Hayne (the State's trial expert); Dr. Scott Benton (the state's expert at the post-conviction evidentiary hearing); Dr. Michael Baden (one of Havard's forensic pathology experts); and Dr. Janice Ophoven (Havard's pediatric forensic pathology expert). In that 15 pages, the State does not engage the merits of the proffered testimony a single time. Instead, the State retreats to lengthy discussions of procedural and other bars. The State disregards the merits because it cannot engage the merits: even its experts agree that the sexual battery issue in this case is a sham.

This Court has ruled that trial courts do not have jurisdiction over post-conviction **claims** that have not been specifically remanded by the Supreme Court. *See Davis v. State*, 897 So. 2d

960, 970-71 (Miss. 2004). In *Davis*, the inmate sought to amend his post-conviction petition in the trial court following remand by this Court. *Id.* The trial court ruled that it lacked jurisdiction over the new claims and this Court upheld that ruling. *Id.*

Here, Havard did not advance a new claim beyond this Court's remand order. Rather, he sought to introduce evidence that there was no sexual battery in support of the claims that were remanded. Thus, this is not a jurisdictional issue. This is an evidentiary issue.

Havard acknowledges that sexual battery was not a standalone claim in his post-conviction petition. He has not stated otherwise. But Havard has consistently argued in this proceeding that the issues of SBS and sexual battery are intertwined, as he does in his Principal Brief. This was the argument presented to the trial court when the State sought to exclude this evidence prior to the evidentiary hearing. This was the same argument that Havard utilized at the evidentiary hearing when attempting to introduce similar evidence. This is not an issue that Havard has made up for this appeal.

Again, the issues of SBS and sexual battery are intertwined because the State intertwined them at the 2002 trial. This is explained in detail in Havard's Principal Brief and will not be unnecessarily repeated here. But the most important fact is that the State presented at trial—from opening statement to closing argument—a theory of the case that Havard sexually abused Chloe Britt and then deliberately and violently shook her to cover up that deed. That was the State's express theory of the case. Indeed, that was exactly what the State said it had to prove and the reason it advanced for keeping the SBS evidence in. The State argued it had to prove that "the murder was committed and how it was committed while the crime of sexual battery was being committed." (Tr. at 104).

Science now shows that the State's 2002 case is flawed in both respects, with even the State's new expert agreeing on both of these critical points: (1) Chloe was not sexually abused

and (2) her cause of death was not violent, intentional shaking alone. The State, having intertwined SBS with sexual battery in 2002, cannot now act as is they are separate and distinct from one another.

Contrary to the State's assertion, Havard has argued that the trial court's jurisdiction permitted introduction of this evidence. The trial court had jurisdiction to hear the new evidence claims raised by Havard, which were chiefly focused on SBS. But given the intertwined nature of SBS and sexual battery, the sexual battery evidence that Havard desired to present was relevant to the SBS issues. This is made particularly clear by the proffered testimony of Dr. Michael Baden, who would have testified, if permitted, that allegations of sexual abuse of a child often cloud the judgment of law enforcement and medical personnel and lead to erroneous or unsupported findings (such as some of the SBS underpinnings in this case).

The tainting effect that the sexual battery allegation had on this matter in 2002 is clear—and it has persisted to this day. It is Havard's position—supported by facts and law in his Principal Brief—that the trial court's jurisdiction did not require exclusion of this relevant evidence. The exclusion of the relevant evidence was an abuse of discretion. This Court should rule accordingly and give the evidence whatever weight it is due when considering the underlying scientific issues related to Shaken Baby Syndrome and the impact of that evidence on Havard's capital murder conviction.

CONCLUSION

Because the newly discovered evidence presented at the 2017 evidentiary hearing would dramatically alter the jury question from that presented to the 2002 jury, Havard is entitled to a new trial. The Circuit Court's decision affirming the capital murder conviction should be reversed. This Court should render a decision in favor of Havard's request for post-conviction relief, vacate his conviction, and order a new trial.

Further, this Court should reverse the Circuit Court's decision to admit the expert opinions of Dr. Scott Benton. Dr. Benton was not qualified to provide the opinions he gave in this case and both his methodologies and opinions are fatally unreliable.

Finally, the Court should reverse the Circuit Court's decision to exclude all evidence that Chloe Britt was not sexually abused. This Court should consider the excluded evidence in deciding the merits of this matter.

RESPECTFULLY SUBMITTED, this the 15th day of April, 2020.

JEFFREY HAVARD,
APPELLANT

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CERTIFICATE OF SERVICE

I, Graham P. Carner, certify that I have served a copy of the above and foregoing document to ALL COUNSEL OF RECORD via filing with the MEC electronic filing system.

I, Graham P. Carner, do hereby certify that I have this date mailed a true and correct copy of the above and foregoing document, via United States Mail, postage pre-paid to:

Hon. Debra Blackwell
Circuit Court Judge
115 S. Wall St.
Natchez, MS 39120

Hon. Forrest A. Johnson
Retired Circuit Court Judge
211 S. Commerce St.
Natchez, MS 39120

DATED this, the 15th day of April, 2020.

/s/ Graham P. Carner
GRAHAM P. CARNER