IN THE CIRCUIT COURT OF ADAMS COUNTY, MISSISSIPPI

CAUSE NO. _____

JEFFREY HAVARD, *Petitioner*

vs.

STATE OF MISSISSIPPI, *Respondent*

PETITION FOR POST-CONVICTION RELIEF

I. INTRODUCTION

Petitioner, Jeffrey Havard, asks this Court to vacate his capital murder conviction and death sentence, and grant him a new trial or other appropriate relief, on the following ground:

(1) Newly-discovered evidence demonstrates that the cause and manner of death of Chloe Britt was not Shaken Baby Syndrome, as was testified to at Havard's trial. Newly-discovered evidence of advances in the scientific and medical fields since Havard's trial demonstrates that the testimony presented at trial concerning Shaken Baby Syndrome is ill-founded and no longer supported by the scientific and medical communities. In light of these circumstances, Petitioner's conviction and death sentence violate due process and constitute a manifest injustice that this Court is empowered to correct by way of post-conviction relief. At the very least, Petitioner is entitled to have this claim and the factual basis of the claim fully explored in proceedings in

this court by way of an evidentiary hearing and any other mechanism allowed by this court. This ground for relief has not previously been raised in Mississippi's state courts, because the factual grounds for the claim were not discovered until recently and could not have been discovered with reasonable diligence. This claim also involves a fundamental right.

Havard makes this motion pursuant to the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution; Article 3, Sections 14 and 28 of the Constitution of the State of Mississippi; the Mississippi Uniform Post-Conviction Collateral Relief Act, codified at *Miss. Code Ann.* § 99-39-1 *et seq.* ("the UPCCR"); *Miss. R. App. Proc.* 22; *Miss. R. Civ. Proc*. 60, and other applicable law.

II. INFORMATION PROVIDED PURSUANT TO *MISS. CODE ANN.* § 99-39-9(1)

1. **The identity of the proceedings in which the prisoner was convicted:** Petitioner was convicted of capital murder and sentenced to death in the Circuit Court of Adams County, Mississippi, the Honorable Forrest A. Johnson, Judge presiding, Cause No. 0141.
2. **The date of entry of the judgment of conviction and sentence of which complaint is made:** The date of the Final Judgment of Conviction and Sentence Instanter was December 19, 2002.
3. **A concise statement of the claim or grounds upon which the motion is based:** Newly-discovered evidence demonstrates that the basis for the State's theory of murder—the mode and mechanism of death, Shaken Baby Syndrome—is flawed. This newly-discovered evidenced demonstrates Petitioner's actual innocence on the charge of capital murder. At the very

least, it entitles Petitioner to a new trial so that a jury can hear all of the evidence, including the newly-discovered scientific evidence, and make a decision based upon all of the facts.

4. **A separate statement of specific facts which are within the personal knowledge of the prisoner and which shall be sworn to by the prisoner:** No such facts are necessary at this time for the determination of this Motion.

5. **A specific statement of the facts which are not within the prisoner's personal knowledge:** *See* attached Affidavits/Declarations 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"). *See also* Section III, *infra*. Petitioner reserves the right to rely upon other facts obtained through additional investigation, discovery, and/or evidentiary hearings.

6. **The identity of any previous proceedings in federal or state courts that the prisoner may have taken to secure relief from his conviction and sentence:** Petitioner appealed his conviction and sentence directly to the Mississippi Supreme Court. The docket number of the direct appeal was 2003-DP-00457-SCT. Petitioner's direct appeal was denied, *Havard v. State*, 928 So.2d 711 (Miss. 2006), as was Petitioner's motion for rehearing. Petitioner then sought relief from the United States Supreme Court by petition for writ of certiorari, but the petition was denied, *Havard v. Mississippi*, 127 S. Ct. 931 (2007).

Petitioner then filed post-conviction proceedings in the Mississippi Supreme Court. The docket number for the post-conviction proceeding was 2006-DR-01161-SCT. Petitioner was denied post-conviction relief, *Havard v. State*, 988 So.2d 322 (Miss. 2008), as well as rehearing. No evidentiary hearing was held in the initial state post-conviction proceedings.

Petitioner filed a second post-conviction proceeding in the Mississippi Supreme Court. The docket number for that post-conviction proceeding was No. 2011-DR-00539-SCT. Petitioner was denied post-conviction relief, *Havard v. State*, 86 So.3d 896 (Miss. 2012), as well as rehearing (though the original opinion of March 8, 2012 was slightly modified at ¶ 20 by the opinion dated May 10, 2012). No evidentiary hearing was held in the second state post-conviction proceedings.

Petitioner is currently engaged in federal habeas corpus proceedings in the United States District Court for the Southern District of Mississippi, Western Division, the Honorable Keith Starrett, presiding. The Civil Action Number for those habeas proceedings is 5:08-cv-275-KS. Petitioner intends to file a Motion to Stay and Abate the federal habeas proceedings, pending the resolution of this Petition.

III. FACTUAL BASIS FOR PETITION

On February 21, 2002, Jeffrey Havard was babysitting Chloe Madison Britt, the six month old daughter of his girlfriend, Rebecca Britt. At the time, the infant was

suffering from an ear infection and a cough. Tr. at 334-45, 554-55. Except for the fact that Chloe had been fussy that evening, she was behaving normally. Tr. at 554-55. Around 8:00 p.m., Rebecca left the trailer home the couple shared and went to the grocery store, leaving Chloe in Havard's care. Tr. at 346-47. When she returned, Havard had given Chloe a bath and put her to sleep. Rebecca picked up Chloe, who made a noise in her throat, but, otherwise, the child appeared "normal" and asleep. Tr. at 346-47.

Rebecca left the house again to rent a movie and was gone about fifteen minutes. When she returned, she checked in on Chloe again. Tr. at 348. At this point, the child was blue, and was not breathing. Tr. at 349. Rebecca performed CPR on the child, but was unable to resuscitate her. Tr. at 349. She and Havard then took Chloe to the community hospital; the child was not breathing during the entire trip and Rebecca continued to administer CPR. Tr. at 350-51.

When Chloe arrived at the hospital, she was still blue, was not breathing, and did not have a pulse. Tr. at 372.Hospital personnel intubated the child, but Chloe never breathed on her own again. Tr. at 300-305. Two nurses and two physicians testified for the State about the injuries they saw on Chloe's body that night in the emergency room. R. at 374-417. *See also Havard v. State*, 988 So.2d 322, 332 (2008). Nurses Angel Godbold and Patricia Murphy, and Drs. Laurie Patterson and Ayesha Dar, each of whom was with Chloe in the emergency room that night, testified that they saw some bruising on the inside of each of Chloe's thighs, as well as on her forehead. Tr. at 374, 393-95, 417-18. Dr. 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. 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 a head injury, which she testified "was consistent with . . . Shaken Baby Syndrome." Tr. at 396.

Patterson, Dar, Godbold, and Murphy also testified about the abnormal appearance of the baby's anus, which was observed to be dilated following intubation. With the exception of Dr. Dar (who also noted the dilation), the three other ER witnesses said that Chloe's anus looked dilated to "the size of a quarter." Tr. at 377, 393, 405-06, 416. All four of these witnesses added that they had seen injuries to the anal area itself. The two doctors and Nurse Murphy testified that the condition of the child's anus indicated sexual trauma, and was consistent with a large object being inserted into the rectum. Tr. at 399-400, 407, 418. None of these medical providers were tendered by the State or qualified by the Court to provide expert testimony at trial.

Adams County law enforcement officers detained Havard almost immediately after the child's arrival at the hospital. *Havard v. State*, 928 So.2d 771, 778 (Miss. 2006). Havard gave an initial written statement to police, in which he wrote that while Chloe's mother was out at the grocery store, he gave the child a bath and put her to bed. Tr. at 455. The mother came home from the grocery store later and checked on the baby; she then left again to go the video store. Tr. at 455. When she returned, according to Havard's first statement, Havard was in the bathroom, and he heard her start screaming because Chloe was not breathing. Tr. at 455. In that first statement, Havard did not tell police that he had accidentally dropped the child onto the toilet, her head hitting it, as he would state in a subsequent statement. Tr. at 455-56.

In that second statement of February 23, 2002, videotaped by law enforcement, Havard said that he gave the child a bath, and that she slipped out of his hands while he was drying her off; "her leg hit the lid on the toilet bowl, and I think her head hit the tank." Exhibit "F," Interview Transcript at p. 5. Havard described the distance of the fall as approximately three feet, as he was standing up after removing Chloe from the bathtub. Exhibit "F," Interview Transcript at p. 12. Havard picked her up after the fall, and Chloe "kind of gasped for air like I had scared her or something." Exhibit "F," Interview Transcript at p. 5. He then "took her and . . . shook her," but "[not] hard," because he "was scared that he [had] hurt her [by dropping her onto the toilet]." Exhibit "F," Interview Transcript at pp. 5-6, 12. Chloe began crying, and Havard put her on his shoulder, tried to comfort her, changed her diaper, and then put her to bed. Rebecca Britt returned soon after, but Havard did not tell her that he had dropped Chloe in the bathroom, because Havard thought "she would . . . fuss at me." Exhibit "F," Interview Transcript at pp. 6-7. When law enforcement asked Havard whether he could explain the conditions reported by the emergency room staff regarding sexual battery, Havard, a 23 year old layman, said, "I can't explain [them]." Exhibit "F," Interview Transcript at pp. 19, 25.

On February 22, 2002, Dr. Steven Hayne performed an autopsy on Chloe's body. Tr. at 429. Dr. Hayne's concluded that his autopsy findings were "consistent with Shaken Baby Syndrome" (SBS). Exhibit "G," Final Report of Autopsy. The autopsy made no finding as to whether the child was also a victim of sexual battery. *See Havard v. State*, 86 So.3d 896, 905 (Miss. 2012).

Havard was eventually indicted for capital murder during the course of sexual battery and felonious child abuse. On September 18, 2002, defense counsel for Havard filed a "Motion for Independent Evaluation of Autopsy Report," which stated that "[d]efense counsels (*sic*) do not have any medical training and need assistance interpreting the autopsy in order to adequately prepare a defense for Jeffery Havard."

During the September 25, 2002 pre-trial hearing on the motion for an independent evaluation of Dr. Hayne's autopsy report, defense counsel pointed out their lack of medical training and knowledge, and that a defense expert was therefore necessary to interpret "what exactly the autopsy says concerning the baby's death." Tr. at 37. At the same hearing, defense counsel also moved for access to the child's medical records. Tr. at 37. Havard's attorney stated 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. at 37-38.

Arguing against defense counsel's motion for an independent expert, the prosecutor emphasized that "the State is not medically trained either and when we want to know what the autopsy report says or seek an explanation, we call Dr. Hayne and he discusses it with us. Dr. Hayne is not an agent for us, and Dr. Hayne is certainly available to the defense also to explain or discuss the report." Tr. at 40.

Later that day, September 25, 2002, the trial court ruled that Havard did not present the requisite basis for obtaining a medical expert to conduct an independent evaluation of the autopsy report. In its Order denying Havard an independent expert, the trial court agreed with the State that "the report of Dr. Hayne, and any supplements, are

in the possession of the defendant, and that Dr. Hayne is available to answer any questions that defense counsel may have of him." Tr. at 44. The court stated, "[u]nder discovery, whatever report of Dr. Stephen Hayne that he did or supplemental reports should already be provided to counsel, and also he's available if they see the need to go talk to him personally as the State would have, but the Court finds no basis or need on what's before the Court to seek out an independent medical expert, for the Court to do that and to appoint somebody to do that." Tr. at 44-45. The court did, however, order the medical records be turned over to the District Attorney as well as defense counsel. Tr. at 44-45.

Havard was initially indicted for capital murder during the course of two underlying felonies: felonious child abuse and sexual battery of a minor. However, on the eve of trial, the State moved to amend the indictment to drop the underlying felony of felonious child abuse. Tr. at 99. The defense did not object to the amendment of the indictment, and the trial court granted the motion. Tr. at 100-101.

Following the amendment of the indictment, the defense advanced a motion *in limine*, seeking to preclude evidence of Shaken Baby Syndrome, since felonious child abuse was no longer being advanced as an underlying felony. Tr. at 102. The defense urged that permitting testimony about Shaken Baby Syndrome during the guilt phase would unfairly allow the State to present two underlying felonies to the jury but only have to meet its burden of proof as to the underlying felony in the amended indictment, that of sexual battery. Tr. at 102-103.

The State opposed the motion *in limine*. Tr. at 103. The State 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.

The trial 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, the trial court ruled that evidence presented at trial regarding Shaken Baby Syndrome and similar issues was only admissible to show manner and cause of death.

Havard's criminal trial began on December 16, 2002.

The State alleged that Chloe's cause of death was SBS, and the manner of death homicide; the bulk of the State's case was premised upon medical evidence, provided by Dr. Hayne and the two doctors and two nurses who were in the ER the night Chloe died. Tr. at 367-420.[1] Dr. Hayne was tendered by the State, without defense objection, as an expert witness, and the Court permitted Dr. Hayne to offer opinion testimony. The medical providers from the ER were not tendered or qualified as expert witnesses.

Dr. 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. He also explained that the subdural hemorrhaging indicated that the child suffered from ripped

[1] See detailed description of the testimony of these ER personnel, *supra.*

"small bridging [blood] vessels,"[2] likely caused by the child being shaken violently. Tr. at 552. Furthermore, according to Dr. Hayne, the blood-pooling in the brain indicated trauma and injury. Tr. at 552. Dr. Hayne then asserted that the infant's symptoms – subdural hemorrhage[3] and retinal hemorrhage[4] –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 explained that his iteration of the "triad" required both "inclusionary and exclusionary" thinking on his part. Tr. at 557. 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

[2] Dr. Hayne explained that such "bridging" veins "go from the inner surface of the skull to the outer surface of the brain." Tr. at 552.
[3] Subdural hemorrhage is bleeding beneath the dura mater tissue surrounding the brain.
[4] Retinal hemorrhage is bleeding in the retina of the eyes.

"another person". Tr. at 557. Dr. Hayne's testimony is devoid of any analysis of the accidental dropping of Chloe as described by Havard.

Dr. Hayne also provided testimony concerning sexual battery of the child. He testified that the child had a one-inch-long contusion on her rectum, which, he explained, was "consistent with penetration of the rectum with an object." Tr. at 546, 551. It should be noted that the autopsy report lists that contusion as measuring one centimeter. Dr. Hayne's 2009 deposition testimony in Havard's federal habeas proceedings confirms the one centimeter measurement. There was no semen found in the child's anus, and the rape kit found no identifiable foreign DNA on the child. Tr. at 535.

Dr. Hayne described other "significant" injuries he saw and photographed during his autopsy: bruises on the child's upper lip, forehead, and on the back of her head. Tr. at 548-51. Dr. Hayne did not testify that these other injuries contributed to his SBS diagnosis. Tr. at 548-51. He 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.

On his cross-examination of Dr. Hayne, defense counsel focused on the alleged sexual assault, and did not ask any questions about Dr. Hayne's conclusion that SBS caused the child's death. Tr. at 560-63. Defense counsel did not ask Dr. Hayne about consideration, if any, he gave to Havard's statement describing Chloe's accidental head-first fall onto a hard surface. Defense counsel's cross-examination of Dr. Hayne makes up two-and-a-half pages of the trial transcript. Tr. at 560-63.

The State presented witnesses to establish the fact that Havard was the only person who had the opportunity to assault the child. Tr. at 314-15, 345-48, 446. In

closing, the prosecution stated, "[Havard was] the only person in the house with the baby. That's correct." Tr. at 609. There was, however, no medical testimony establishing a link between the time of any injury and the time of death.

In the defense's case-in-chief, counsel for Havard called no medical witnesses to address either the death of the child or the SBS diagnosis. The defense's single witness, Nurse Brian Rabb, testified that he performed the collection of the rape kit from Havard, but did not know any of the results of the testing on it. Tr. at 578-81. Defense counsel's entire presentation consists of just over three transcript pages. Tr. at 578-81.

During closing argument, the State went to great lengths to work the finding of Shaken Baby Syndrome into the case. The State did so by concocting a theory that Havard had sexually abused Chloe and then intentionally shaken her to death to quiet her and cover up his actions. The State spoke of the finding of "retinal hemorrhage" and brain damage caused by Chloe's injuries. Tr. at 611. The State continued: "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 concluded the first part of the State's closing argument: "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.

Following the defense's closing argument, the State concluded the guilt phase with the second part of its closing argument. The prosecutor again mentions "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 then states its overall theory of capital murder, including cause and manner of death and the relation to the alleged sexual battery:

> [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.

The jury returned a verdict of guilty for capital murder (murder during the commission of sexual battery) on December 18, 2002 and agreed to a sentence of death for Jeffrey Havard on December 19, 2002. Tr. at 692-93.

Havard's 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. The evidence debunking the sexual battery in this case is compelling and only continues to mount. With respect to Shaken Baby Syndrome, which was presented at trial as the manner and mechanism of death, new evidence demonstrates that this finding is also ill-founded and should not serve as the basis for any conviction, much less a conviction by which the State intends to take a man's life. This new evidence warrants a new trial.

Dr. Steven Hayne

On June 16, 2013, an article was published in the *Clarion Ledger* newspaper regarding several cases, including Havard's, involving the testimony of Dr. Steven Hayne. *See* Exhibit "H". The article reads, in pertinent part: "At trial, [Hayne] testified the baby's death was a homicide, consistent with shaken baby syndrome. But Hayne now disavows that conclusion, saying biochemical [sic] engineers believe shaking alone doesn't produce enough force to kill." This was the first indication that Dr. Hayne was possibly backing away from his trial testimony regarding Shaken Baby Syndrome.

Following publication of the above article, Havard's counsel met with Dr. Hayne in order to ask him about the article and his opinions regarding Shaken Baby Syndrome in this case. Dr. Hayne executed an Affidavit on July 22, 2013. *See* Exhibit "A," Hayne Affidavit. As before, Dr. Hayne reiterated that he "found no definitive evidence of sexual abuse based upon my findings" in the Havard case. *See* Exhibit "A," Hayne Affidavit at ¶ V.

With respect to Shaken Baby Syndrome, Hayne stated: "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 the 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**." *See* Exhibit "A," Hayne Affidavit at ¶ VI (emphasis added). These statements were made with a reasonable degree of medical certainty. *See* Exhibit "A," Hayne Affidavit at ¶ VII. Dr. Hayne also stated that he is willing to be deposed or

testify in court regarding his autopsy and related opinions. *See* Exhibit "A," Hayne Affidavit at ¶ VIII.

Dr. Hayne's new position on Shaken Baby Syndrome in this case echoes nationwide concerns and evolutions of opinion in this field over the past 11 years. These developments are described below by leading experts in the fields of anatomic and clinical pathology, forensic pathology, and biomechanical engineering.

Nationally and internationally leading experts who have reviewed the facts and circumstances of the death of Chloe Britt have come to the conclusion that her death was not connected to Shaken Baby Syndrome but was, to the contrary, consistent with an accidental drop as described by Havard. These experts also discuss the significant developments that have occurred since Havard's trial in medical and scientific research in the area of Shaken Baby Syndrome. The opinions of these experts are set forth in detail in their respective Affidavits, which are attached as exhibits, and are summarized below.

Dr. Michael G. Baden

Dr. Michael Baden is a world-renowned expert in the fields of anatomic, clinical, and forensic pathology. Dr. Baden worked in the Office of the Chief Medical Examiner in New York City from 1961 to 1985, at which point he became the Director of the Medicolegal Investigations Unit for the New York State Police. He has chaired Congressionally-formed panels that investigated the deaths of President John F. Kennedy and Dr. Martin Luther King, Jr. He is widely published in the field of pathology, and is a frequent lecturer on pathology and medicolegal issues, including Shaken Baby Syndrome. Dr. Baden's Affidavit and prior federal court Declaration, setting forth his

opinions, and Curriculum Vitae, setting forth his qualifications, are attached hereto as cumulative Exhibit "B."

Dr. Baden has reviewed the facts and circumstances of the death of Chloe Britt and the prosecution of Jeffrey Havard for her murder. Dr. Baden rejects the State's trial theory that Chloe Britt was "caused by 'Shaken Baby Syndrome' based on the presence of brain and retinal hemorrhages." Exh. "B," Baden Affidavit at ¶ 2. To the contrary, it is Dr. Baden's opinion "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." Exh. "B," Baden Affidavit at ¶ 3.

Dr. Baden elaborates further on his opinions and the bases for them. To begin, Dr. Baden notes that advances in medical and other scientific research in the time that has passed since Havard's conviction demonstrate "that shaking a baby cannot cause the very prominent external bruises and contusions on Chloe's head and the prominent subcutaneous bleeding that she incurred." Exh. "B," Baden Affidavit at ¶ 4. Rather, in order to produce injuries such as these a "blunt force impact is necessary" and that such a blunt force external impact "can also cause a subdural hemorrhage, retinal hemorrhages and brain swelling to develop, which, in this matter, were misattributed to shaking." Exh. "B," Baden Affidavit at ¶ 4. In short, "both the external and internal injuries to Chloe could be caused by the impact of a short fall as described by Mr. Havard." Exh. "B," Baden Affidavit at ¶ 4.

Dr. Baden notes that Chloe did not have "neck injuries, chest injuries, spine or rib fractures that further research has shown can be produced by the abusive shaking of a baby." Exh. "B," Baden Affidavit at ¶ 5. Medical literature concludes that retinal folds that were described during trial testimony and attributed solely to shaking "do occur as the result of many types of innocent head trauma, such as from short accidental falls." Exh. "B," Baden Affidavit at ¶ 6.

Dr. Baden also takes issue with the sexual battery aspects of Mr. Havard's case. He states that anal dilation, which was observed in the emergency room when Chloe was brought in for treatment, can be accounted for by her other injuries and is not indicative of sexual battery. Dr. Baden opines: "the sphincter muscles around the anus—and around the urinary bladder—normally relax when a baby loses consciousness and becomes comatose, and when death occurs. Relaxation of the sphincter muscles causes dilation of the anus which is common and entirely normal…." Exh. "B," Baden Affidavit at ¶ 7.

Ultimately, Dr. Baden concludes, "to a reasonable degree of medical certainty, based on my education, training and fifty years' experience as a forensic pathologist and medical examiner, that Chloe Britt's clinical, medical and autopsy findings, including her head bruises, are entirely consistent with having resulted from a short accidental fall are not consistent with Shaken Baby Syndrome." Exh. "B," Baden Affidavit at ¶ 8. Dr. Baden also opines "that there is absolutely no evidence—no circumstantial, medical, forensic, or autopsy evidence—that Chloe was sexually abused." Exh. "B," Baden Affidavit at ¶ 9.

These opinions of Dr. Baden are echoed in the Declaration submitted in Havard's federal habeas corpus proceedings. *See* Exh. "B," Baden Declaration.

Dr. Janice Ophoven

Dr. Janice Ophoven is a pediatric forensic pathologist. She has over 30 years of experience in her fields, and is board certified in pathology and forensic pathology. Her practice is focused on child abuse and injuries to children. Dr. Ophoven's Affidavit with her opinions and her curriculum vitae detailing her qualifications are attached hereto as cumulative Exhibit "C."

Dr. Ophoven begins her analysis by noting that, when viewing infant deaths, "it is critical in reaching an opinion on the cause and manner of death to review the clinical history as well as the autopsy results." Exh. "C," Ophoven Affidavit ¶ 3. She then cites professional literature indicating that "there has been a substantial shift in the literature in the decade since Chloe's death, when a small number of findings (typically subdural hemorrhage, retinal hemorrhage and cerebral edema, or brain swelling) were widely viewed as diagnostic or even pathognomonic[5] of a shaking type injury." Exh. "C," Ophoven Affidavit at ¶ 3. She continues by noting that the traditional Shaken Baby Syndrome triad described above "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." Exh. "C," Ophoven Affidavit at ¶ 3.

At the outset of her case-specific analysis, Dr. Ophoven states that "the anal findings are particularly important since the misdiagnosis of anal abuse at the hospital distorted the entire investigation and trial." Exh. "C," Ophoven Affidavit at ¶ 4. With

[5] Defined as "specifically characteristic or indicative of a particular disease or condition."

this foundation laid, Dr. Ophoven begins her review of the case with a summary of her conclusions, found at paragraphs 5-8 of her Affidavit. Her conclusions are: (1) there is no evidence of sexual abuse in this case; rather, the anal findings "were misinterpreted by hospital personnel who did not have experience or expertise in post-mortem changes in infants; (2) Chloe's "collapse was most likely triggered by the short fall described by Mr. Havard; however, other predisposing factors may have contributed to the outcome"; (3) Havard's conviction was virtually guaranteed because he was not provided access to expert assistance to help his attorneys understand the significant medical and forensic issues in the case; and (4) a thorough review of this case is necessary to ensure that justice is done. Exh. "C," Ophoven Affidavit at ¶¶ 5-8.

Dr. Ophoven begins her analysis with a detailed review of Chloe's medical history. Exh. "C," Ophoven Affidavit at ¶¶ 9-65. This history is comprised of prenatal records, birth records, pediatric records from before the incident leading to her death, treatment records from the night Chloe died, preliminary death reports, the final autopsy report by Dr. Steven Hayne, and the videotaped statement provided by Havard to law enforcement officials in which he details the events of the night Chloe died.

Significant highlights from the prenatal, birth, and pediatric medical histories include: (1) Chloe's birth was a "traumatic delivery," as evidenced by head molding/distortion with cephalohematomas on both sides of her head, meaning that "it is likely that she had a subdural hemorrhage at birth" (¶ 15); Chloe's growth rate was substantial during her 6 months of life, "potentially increasing vulnerability to illness or minor impact" (¶ 18); (3) Chloe exhibited constipation during her pediatric check-ups, a condition that could have bearing on the anal findings that served as the basis for the

sexual battery allegation (¶¶ 19, 20, 22); (4) Chloe was chronically ill, suffering from multiple infections, bacterial issues, and the like (¶¶ 21, 22, 23, 25, 26).

After summarizing the trial testimony of multiple witnesses and Dr. Hayne's 2008 deposition testimony (which was presented to this Court in the 2011 post-conviction petition), Dr. Ophoven begins her discussion of the forensic issues in this case. At the outset of this discussion, she states: "even a brief records review makes clear, the evidence in this case inflammatory and internally contradictory. It also dealt with highly controversial issues that have been the subject of major changes in the literature over the past decade." Exh. "C," Ophoven Affidavit at ¶ 107. Dr. Ophoven then details the problems with the anal findings, which she finds to be misinterpreted, non-existent in most respects, and highly prejudicial to the entire trial. After noting that the autopsy findings did not find the existence of many of conditions testified to by the treating medical providers, Dr. Ophoven states: "The autopsy is the gold standard in determining the existence of tears or lacerations, and I do not understand why the hospital staff was permitted to testify to something that did not exist." Exh. "C," Ophoven Affidavit at ¶ 112. "[T]he objective medical findings…establish that there was no tear yet the hospital staff was permitted to testify that it existed, a physiological impossibility. The lack of objectivity casts doubt on the reliability of other clinical observations made by the hospital staff." Exh. "C," Ophoven Affidavit at ¶ 112. Dr. Ophoven concludes that there is no evidence in this case that is diagnostic of sexual battery, and that the misdiagnosis and incorrect testimony by the treating providers infected the trial with a prejudice that was impossible to overcome. Exh. "C," Ophoven Affidavit at ¶¶ 113-15.

Dr. Ophoven then moves into an analysis of Shaken Baby Syndrome in this case. She notes that during the time since Havard's trial "the theoretical underpinnings of shaken baby syndrome (SBS) have been severely criticized, and it is now recognized that there are many natural causes for subdural and retinal hemorrhages." Exh. "C," Ophoven Affidavit at ¶ 116. "It is also now understood that short falls can be fatal, albeit rarely, and that the forces of impact far exceed the forces of shaking." Exh. "C," Ophoven Affidavit at ¶ 116. Havard's case was tried, however, "at the height of the SBS hypothesis," and post-trial developments cast extreme doubt on the accuracy and reliability of the opinions presented to Havard's jury, who did not have the full picture presented to them.

"As a result of the changes in the literature, it is now rare to hear the type of testimony given in this case, which suggested subdural hemorrhage and retinal hemorrhage indicate forces comparable to those in motor vehicle accidents or falls from great heights. There is no medical or scientific support for this claim." Exh. "C," Ophoven Affidavit at ¶ 118. Even so, Dr. Ophoven notes that even Dr. Hayne's "consistent with" diagnosis of Shaken Baby Syndrome should have been viewed as a suspicious, non-definitive diagnosis. However, the lack of expert assistance and medical knowledge on the part of Havard's trial counsel prevented the jury from being made aware of the distinction between findings that are "diagnostic of" and "consistent with" SBS. Exh. "C," Ophoven Affidavit at ¶ 119.

"Perhaps the most notable aspect of this case is that evidence of impact (facial bruising combined with a described impact) was ignored in favor of hypotheses (shaking and sexual battery) for which there no medical or evidentiary support. These preliminary

conclusions by hospital personnel prejudiced the subsequent investigation, which attempted to find evidence to support these claims rather than conducting an open-ended investigation. Even in this context, the evidence obtained was insufficient to reach any definitive conclusions on sexual assault or the cause and manner of death." Exh. "C," Ophoven Affidavit at ¶ 120. Dr. Ophoven then discusses a case from Canada that bears a striking resemblance to Havard's case (misdiagnosed and misinterpreted anal findings in conjunction with allegations of Shaken Baby Syndrome). Exh. "C," Ophoven Affidavit at ¶ 121. That case led to an official inquiry resulting in "a reevaluation of all shaken baby cases in Ontario." Exh. "C," Ophoven Affidavit at ¶ 121. The conviction in the underlying case was quashed. Exh. "C," Ophoven Affidavit at ¶ 121.

Dr. Ophoven's opinions culminate in several conclusions, which mirror those summarized at the outset. First, she finds that there is no evidence to support a finding of sexual assault in this case. Exh. "C," Ophoven Affidavit at ¶ 122. Second, "there is no evidence to support a finding of shaking in this case; instead, the evidence is of impact." Exh. "C," Ophoven Affidavit at ¶ 123. Finally, Dr. Ophoven states that she is "very concerned that this case represents a serious miscarriage of justice, particularly given the capital nature of the case." Exh. "C," Ophoven Affidavit at ¶ 124. She urges further review and pledges her personal participation to conduct a proper analysis. Exh. "C," Ophoven Affidavit at ¶ 124.

Dr. George Nichols

Dr. George Nichols is a medical doctor who is board certified in the fields of anatomic and clinical pathology and forensic pathology. He is the retired Chief Medical Examiner for the Commonwealth of Kentucky, a position that he held for twenty years.

Dr. Nichols' opinions are set forth in his Affidavit and his qualifications are set forth in his Curriculum Vitae. The Affidavit and Curriculum Vitae are attached hereto as cumulative Exhibit "C."

Dr. Nichols has also reviewed materials related to Mr. Havard's conviction as well as autopsy and medical records related to Chloe Britt. Dr. Nichols' opinion is that "Chloe Britt's death is entirely consistent with a short fall, and not an abusive shaking. At the time of Mr. Havard's trial many medical experts in the world likely would have agreed with the State's medical expert, Dr. Hayne, that Chloe's death was caused by Shaken Baby/Impact Syndrome." Exh. "D," Nichols Affidavit at ¶ 4. At the time of Havard's trial, "an infant who presented with subdural hematomas and retinal hemorrhages (without a history of motor vehicle accidents or a fall from an appreciable height) was likely to lead to the medical conclusion of intentional abuse—Shaken Baby/Impact Syndrome." Exh. "D," Nichols Affidavit at ¶ 4.

However, Dr. Nichols describes how the scientific and medical consensus has changed in the intervening years. "There has been considerable new medical literature since Mr. Havard's trial that subdural hematomas and retinal hemorrhages are not necessarily indicative of abusive shaking; indeed, with only these two symptoms, the classic triad of Shaken baby Syndrome is not fully established. Significant research papers published in prestigious medical journals in the United States and other western countries cast serious doubt on the conclusions that retinal hemorrhages and subdural hematomas in infants are specific signs of vigorous shaking." Exh. "D," Nichols Affidavit at ¶ 5.

Since Havard's trial in 2002, "the medical community has begun to accept a number of alternative explanations that can account for deaths that would previously have been attributed to 'shaken baby syndrome.'" Exh. "D," Nichols Affidavit at ¶ 6. Among these alternative explanations are "various infections" and "simple impact trauma". Exh. "D," Nichols Affidavit at ¶ 6. In this case, Chloe was sick at the time of her death. She was suffering from an ear infection and cough, for which she was taking prescription medication. Tr. at 344. In addition, Havard described dropping Chloe from a height of approximately three feet on the night in question, causing her to strike her head on the hard surface of a nearby toilet.

Dr. Nichols then contrasts his opinions with those presented to the jury in Havard's capital murder trial, where "the State's medical expert testified that Chloe's injuries must have been caused by intentional force equivalent to the force of a motor vehicle accident or a fall from a significant height." Exh. "D," Nichols Affidavit at ¶ 9. Dr. Nichols notes that "[i]t 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." Exh. "D," Nichols Affidavit at ¶ 9. Further, "it is now generally accepted that some long distance falls do not cause severe injury while other shorter distance falls may cause significant injury and death. It is further now understood that while most short distance falls do not lead to serious injuries, a subset of short distance falls result in skull fractures and lethal intracranial hemorrhage." Exh. "D," Nichols Affidavit at ¶ 9.

Dr. Nichols concludes by noting that the medical and scientific advances after Mr. Havard's trial have led the medical and legal communities of many states and foreign

nations "to reconsider diagnoses of intentional abuse." Exh. "D," Nichols Affidavit at ¶ 10.

Dr. Chris Van Ee

Dr. Chris Van Ee holds a Ph.D. in Biomedical Engineering from Duke University and is a licensed professional engineer. Dr. Van Ee's qualifications and opinions are set forth in Exhibit "E" to this Petition. Dr. Van Ee's "academic and scientific research has been focused on determining injury causation and evaluating injury prevention strategies from a biomechanical engineering perspective. Biomechanical engineering is a subdiscipline of biomedical engineering that uses the application of the principles of mechanical engineering and physics to quantify the effects of forces on and within the human body, including tolerance levels and injury mechanisms." Exh. "E," Van Ee Affidavit at ¶ 1.

Significantly, Dr. Van Ee has "specific expertise in the analysis and risk assessment of head injury in the infant and adult populations. I am a co-author of the only peer reviewed publication (Prange et al. 2004) in which the infant head mechanical response to impact was directly measured experimentally and compared to the CRABI-6 infant crash test dummy response." Exh. "E," Van Ee Affidavit at ¶ 3. He has recently authored other publications regarding "pediatric head injury tolerance for skull fracture and intracranial trauma." Exh. "E," Van Ee Affidavit at ¶ 3. Dr. Van Ee has performed "multiple forensic investigations into infant and adult head injuries" in a variety of environments. Exh. "E," Van Ee Affidavit at ¶ 4.

Dr. Van Ee has examined the facts and circumstances surrounding the death of Chloe Britt and the trial and conviction of Jeffrey Havard related to that death. The

information he has reviewed "is sufficient to comment generally on the biomechanics of shaking v. impact" and on whether Havard's description of Chloe's accidental fall is "biomechanically consistent with the head injuries described in the autopsy." Exh. "E," Van Ee Affidavit at ¶ 5. Dr. Van Ee does "not address the veracity" of Havard's relation of events to law enforcement but instead on whether the fall and impact he described is "biomechanically consistent" with the autopsy findings. Exh. "E," Van Ee Affidavit at ¶ 6. The autopsy findings and trial testimony of Dr. Steven Hayne are recounted in detail by Dr. Van Ee. Exh. "E," Van Ee Affidavit at ¶ 8.

Dr. Van Ee next describes his methodology for conducting his biomechanical review of Havard's case. This section of his Affidavit includes a detailed summary of relevant scientific and medical literature regarding head injuries and short falls. Significant aspects of that literature review include: (1) "short distance falls of three feet or less can result in serious, and sometimes fatal, head injury" [Exh. "E," Van Ee Affidavit at ¶ 12]; (2) "low level falls can result in serious and fatal head trauma including subdural and retinal hemorrhage" [Exh. "E," Van Ee Affidavit at ¶ 13]; (3) "skull fractures and intracranial trauma as a consequence of short falls are not as uncommon as many have been lead to believe" [Exh. "E," Van Ee Affidavit at ¶ 14]; (4) as in this case, where Chloe fell head first onto a hard-surfaced toilet tank, "[i]t is in the relatively rare case where the head makes a primary impact, and the impact surface is squarely oriented and firm, that a severe, or fatal, head injury may result from a short distance fall" [Exh. "E," Van Ee Affidavit at ¶ 15].

Dr. Van Ee's own laboratory studies have shown "that low level falls of even 2-3 feet can result in injurious level head impacts resulting in skull fracture and intracranial

hemorrhage." [Exh. "E," Van Ee Affidavit at ¶ 16]. He expounds: "Laboratory testing contained in Van Ee et. Al 2009 indicates that 32" [inches] falls onto concrete using the CRABI-6 Anthropomorhic Test Device (ATD based on the anthropometry and biomechanics of a 6 month old child) can result in head impact forces over 500 lbs and angular accelerations exceeding those that are experimentally known to cause subdural hemorrhage in adults (10,000 rad/s^2—see Depreitere et al)." [Exh. "E," Van Ee Affidavit at ¶ 16].

Analyzing the circumstances of Havard's case, Dr. Van Ee notes that Chloe's fall was from approximately three feet and "onto a particularly hard surface (porcelain toilet)." Exh. "E," Van Ee Affidavit at ¶ 18. While Dr. Van Ee states that he cannot come to more specific conclusions based upon the available information, he states that "it would be biomechanically incorrect to dismiss the history of fall as a causal factor resulting in the findings described at autopsy." Exh. "E," Van Ee Affidavit at ¶ 19. "Shaking is a less likely explanation for these findings." Exh. "E," Van Ee Affidavit at ¶ 19. As shown above, the trial testimony of Dr. Hayne, the sole expert to testify about SBS, did not consider in any way the accidental fall described by Havard.

Dr. Van Ee takes issue with the information presented to the jury "that baby shaking can produce results similar to those caused by multi-story falls or high speed motor vehicle accidents," as testified to by Dr. Hayne. Exh. "E," Van Ee Affidavit at ¶ 21. "The rotational forces attained in manual shaking cannot be equated to those occurring as a result of a multistory fall or a high speed motor vehicle accident. To suggest otherwise is without scientific foundation. Given the relative forces, it would be illogical to dismiss a given history of a fall and attribute the injuries to the rotational

accelerations of manual shaking, which produces much lower angular accelerations than short falls of 1 foot or less." Exh. "E," Van Ee Affidavit at ¶ 22.

In conclusion, Dr. Van Ee states that the accidental fall described by Havard "should not be dismissed without further investigation." Exh. "E," Van Ee Affidavit at ¶ 23. He further opines that attributing Chloe's injuries to shaking and dismissing the reported history of an accidental fall "is not supported by the current science." Exh. "E," Van Ee Affidavit at ¶ 24. Dr. Van Ee's opinions are to a reasonable degree of biomedical certainty. Exh. "E," Van Ee Affidavit at ¶ 25. Finally, he states that he is willing to conduct a further review of Havard's case and answer any questions. Exh. "E," Van Ee Affidavit at ¶ 25.

In summary, new evidence now demonstrates that the evidence offered at Havard's trial in 2002 regarding Shaken Baby Syndrome—the purported cause and manner of death in this capital murder case—is no longer supported by the consensus of the scientific and medical communities. This fact is recognized by Dr. Steven Hayne, the only trial expert who testified regarding this topic. He now states that advances in science and medicine show that shaking alone cannot cause the injuries he observed during the autopsy. At trial, his testimony, and that of medical providers, was that only violent shaking could have produced those injuries. Dr. Hayne also described the force of the violent shaking as equivalent to that experience in a serious car collision or a long-distance fall. The scientific and medical communities now agree that there is no scientific basis for such comparisons, and that the injuries observed on Chloe could have been caused by the accidental short-distance fall onto a hard surface, as described by

Havard to law enforcement. Indeed, there is now a consensus that short falls can produce higher degrees of force than manual shaking.

IV. CLAIM FOR RELIEF

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

The United States Supreme Court has emphasized that the "central purpose of any system of criminal justice is to convict the guilty and free the innocent." *Herrera v. Collins*, 506 U.S. 390, 398 (1993) (emphasis added). In *Herrera*, a majority of the Supreme Court agreed that punishing a defendant for a crime he did not commit would violate due process and the protection against cruel and unusual punishment when a "truly persuasive" showing of actual innocence can be made. *Herrera*, 506 U.S. at 417. *See also In re Davis*, 130 S. Ct. 1 (2009).

Likewise, state law permits a successive petition such as this one when there is new evidence that was not reasonably discoverable at the time of trial. For a post-conviction petitioner to succeed on a motion for a new trial based on newly discovered evidence, "the petitioner must prove that new evidence has been discovered since the close of trial and that it could not have been discovered through due diligence before the trial began." *Crawford v. State*, 867 So.2d 196, 203-4 (Miss. 2003) (citing *Meeks v. State*, 781 So.2d 109, 112 (Miss. 2001) and *Smith v. State*, 492 So.2d 260, 263 (Miss. 1986)). In *Crawford*, the Court also enunciated the materiality standard: to succeed in obtaining relief based on *Miss. Code Ann.* § 99-39-5(1)(e), a "petitioner must show that the newly discovered evidence **will probably produce a different result** or induce a different

verdict, if a new trial is granted. This requires a showing that the evidence is material and is not merely cumulative or impeaching." *Crawford*, 867 So.2d at 204 (emphasis added) (internal citations omitted). *See also Entrenkin v. State*, 134 So.2d 926, 927 (Miss. 1961) (evidence is material if it "give[s] rise to **grave doubts** of [the defendant's] guilt ... or raise[s] a **reasonable probability**, that if presented in a new trial, it would cause a jury to reach a different verdict") (emphases added).

The evidence presented herein demonstrates that Petitioner is entitled to relief from his conviction and sentence, or at least entitled to an evidentiary hearing in state court, because he is actually innocent of capital murder. At the very least, the new evidence gives rise to grave doubts of Havard's guilt, given the significant scientific and medical advances and the failure at trial to account for the accidental fall that Havard described to law enforcement. The evidence presented herein is clearly material, as it has bearing on the manner and cause of death advanced by the State in this capital murder trial.

The State presented a concerted theory at trial that Havard sexually abused Chloe Britt and then intentionally killed her by violently shaking her. This testimony included descriptions of the force of such shaking as similar to that experienced in a high speed motor vehicle collision or a fall from a significant height. 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 even presented with this significant statement. That head-first fall onto a hard surface from a height of 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.

That Petitioner is entitled to the relief he seeks is directly supported by the decision of Wisconsin's Supreme Court, which found that the change in mainstream medical opinion regarding shaken baby syndrome amounts to newly discovered evidence that establishes sufficient grounds for ordering a new trial. In *State v. Edmunds*, 746 N.W. 2d 590 (Wis. 2008), the petitioner was convicted in 1996 for first-degree manslaughter following the death of a seven-month old girl whom petitioner was babysitting. The state alleged that the child's death was caused by violent shaking or violent shaking combined with impacts that caused a fatal head injury, and presented expert testimony regarding shaken baby syndrome in support of its allegations. *Id.* at 379.

The petitioner filed a motion for a new trial, asserting (as Havard does here) that there were significant developments in the medical community around shaken baby syndrome in the time since her trial and that the developments amounted to newly discovered evidence establishing a reasonable probability of a different trial result. *Id.* at 380-81.The circuit court, after holding an evidentiary hearing, agreed that the development in thought regarding shaken baby syndrome amounted to newly discovered evidence, but concluded that there was not a reasonable probability of a different result with the new evidence. *Id.* The Wisconsin Supreme Court disagreed with the latter finding, and held that petitioner was entitled to a new trial.

Regarding whether the new medical testimony amounted to newly discovered evidence, the Wisconsin Supreme Court explained:

> [Petitioner] presented evidence that was not discovered until after her conviction, in the form of expert medical testimony, that a significant and legitimate debate in the medical community has developed in the past ten years over whether infants can be fatally injured through shaking alone, whether an infant may suffer head trauma and yet experience a significant lucid interval prior to death, and whether other causes may mimic the symptoms traditionally viewed as indicating shaken baby or shaken impact syndrome. [Peititioner] could not have been negligent in seeking this evidence, as the record demonstrates that the bulk of the medical research and literature supporting the defense position, and the emergence of the defense theory as a legitimate position in the medical community, only emerged in the ten years following her trial. The evidence is material to an issue in the case because the main issue at trial was the cause of [the child's] injuries, and the new medical testimony presents an alternate theory for the source of those injuries.

Id. at 596.

As to whether the newly discovered evidence warranted a new trial, the court found that while the evidentiary hearing held by the circuit court revealed "competing medical opinions as to how [the child's] injuries arose and that the new evidence does not completely dispel the old evidence, . . . [a]t trial, and on [petitioner's] first postconviction motion, *there was no such fierce debate*." (emphasis added). *Id.* at 392. The court explained:

> [I]t is the emergence of a legitimate and significant dispute within the medical community as to the cause of those injuries that constitutes newly discovered evidence. At trial, and on [petitioner's] first postconviction motion, there was no such fierce debate. Thus, the State was able to easily overcome [petitioner's] argument that she did not cause [the child's] injuries by pointing out that the jury would have to disbelieve the medical experts in order to have a reasonable doubt as to [petitioner's] guilt. Now, a jury would be faced with competing credible medical opinions in determining whether there is a reasonable doubt as to [petitioner's] guilt. Thus, we conclude that the record establishes that there is a reasonable probability that a jury, looking at both the new medical testimony and the

> old medical testimony, would have a reasonable doubt as to [petitioner's] guilt.

Id. at 599. Accordingly, the court reversed the circuit court and remanded the case for a new trial. *Id.*

The standard applied by the Wisconsin Supreme Court for granting the new trial, *i.e.*, "whether there is a reasonable probability that a jury, looking at both the old and the new evidence, would have a reasonable doubt as to the defendant's guilt," *id.* at 390-91, is essentially the same as that applied by this Court, *i.e.*, whether the new evidence gives rise to 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). And in Havard's case, not only was there no "fierce debate" at trial regarding the legitimacy of the state's shaken baby theory, there was *no* debate, as Dr. Hayne's trial shaken baby testimony was not challenged and he was never asked to assess the plausibility of Havard's explanation for how Chloe was injured.

In the years since Havard's conviction, the scientific and medical consensus concerning Shaken Baby Syndrome has evolved. The sole expert witness who testified at Havard's trial—Dr. Steven Hayne—has recognized this shift. He now states that shaking alone could not cause the injuries that he observed during his autopsy. His trial testimony attributed those fatal injuries to shaking alone. Dr. Hayne also now accounts for another possibility: blunt force trauma. Havard's explanation of the accidental, short-distance fall onto a hard surface would fall under that category. Yet Dr. Hayne's trial testimony did not account for that explanation, since Dr. Hayne was of the opinion that only violent shaking could have caused Chloe's death. Dr. Hayne and the litany of experts described above show that this is simply not the case.

In addition, other aspects of the evidence presented at trial are now known to contradict objective, scientific findings. It is now widely accepted that short distance falls onto hard surfaces can produce serious, and fatal, injuries. Dr. Hayne's comparison of the force of the alleged shaking to that experienced in violent car collisions or falls from significant heights has been exposed as not having a scientific basis, despite being an accepted view previously. These developments cast grave doubts on the conviction and death sentence in this case, since a great deal of the scientific testimony from the 2002 trial is now recognized as incorrect and incomplete. Havard's conviction and sentence should be vacated, so that a new trial at which all of this information is available for consideration by the jury can be held.

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

Petitioner anticipates that the State will argue that this proceeding is time-barred or should be barred as a successive writ or under the principles of res judicata or collateral estoppel. However, this proceeding clearly falls within the UPCCR exceptions to those defenses. To begin, consideration of claims such as those presented here is precisely what the UPCCR is designed to allow. *See Miss. Code Ann.* § 99-39-3(2) ("[T]he purpose of this article 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."). Consideration of this claim thus falls directly within the Legislature's intent in adopting the UPCCR. Petitioner could not previously present these claims, because they are based upon evidence that was not reasonably discoverable at the time of trial due to advances in

the medical and scientific communities with respect to SBS, as recently recognized by the State's sole trial expert, Dr. Hayne.

In addition, this claim falls within specific exceptions to the procedural defenses that Petitioner anticipates the State will raise. With respect to any argument that this claim is time-barred, Petitioner would point to *Miss. Code Ann.* § 99-39-5(2), which provides an exception to the deadlines set forth therein when the prisoner "has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had it been introduced at trial it would have caused a different result in the conviction or sentence." With respect to any argument that this claim is barred by the general prohibition of "successive writs," Petitioner would point to *Miss. Code Ann.* § 99-39-27(9), which contains an identical exception to that quoted above with respect to the time limitations under the UPCCR. Accordingly, these claims are not barred under the plain language of the UPCCR. *See also* White, Marvin L., Jr., THE ENCYCLOPEDIA OF MISSISSIPPI LAW, *Post-Conviction Review* at §§ 56:7 & 56:21 (describing the "newly discovered evidence" exception to time limitations and successive writ prohibition of the UPCCR).

Furthermore, the claims set forth herein involve deprivations of fundamental rights. When fundamental rights are involved, this Court has held that procedural bars cannot operate to deprive a person of that right. *See Smith v. State*, 477 So.2d 191, 195 (Miss. 1985) (holding that "errors affecting fundamental rights are exceptions to" procedural rules such as time limitations). Moreover, "[t]his Court recognizes 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." *Id.* *See also Grubb v. State*, 584 So.2d 786 (Miss. 1991) (exempting a claim from the prohibition against successive petitions); *Luckett v. State*, 582 So.2d 428, 430 (Miss. 1991) ("Errors affecting fundamental constitutional rights may be excepted from procedural bars which would otherwise prohibit their consideration . . . .").

In *Rowland v. State*, 42 So.3d 503 (Miss. 2010), the Supreme Court recently clarified the law regarding the procedural bars found in the UPCCR. There, the Court took the "opportunity to hold, unequivocally, that errors affecting fundamental constitutional rights are excepted from the procedural bars of the UPCCRA." *Id.* at 506. In *Rowland*, the defendant Robert Rowland pled guilty to two counts of armed robbery and two counts of capital murder in 1979. *Id.* at 504. Years later in 2007, Rowland filed a petition for post-conviction relief in Washington County Circuit Court, *id*. at 505, but it was not his first petition for post-conviction relief challenging his convictions. *Rowland v. State*, 43 So.3d 545, 549 (Miss. Ct. App. 2009). The circuit court dismissed his petition, and Rowland appealed. The Mississippi Court of Appeals found Rowland's claims barred by the statute of limitations, the successive writ, and the waiver provisions of *Miss. Code Ann.* § 99-39-21(1). *Rowland v. State*, 43 So.3d 503, 505 (Miss. 2010) (citing *Rowland v. State*, 42 So.3d 545, 553 (Miss. Ct. App. 2009)).

On grant of certiorari, the Supreme Court found that **none** of the procedural bars applied to Rowland's case. The Court, relying on *Smith v. State*, found, "a procedural bar cannot be applied in the face of 'errors affecting fundamental rights,'" because such a violation "'is too significant a deprivation of liberty to be subjected to a procedural bar.'" *Rowland*, 42 So.3d at 507 (Miss. 2010) (quoting *Smith v. State*, 477 So.2d 191 (Miss. 1985)). Thus, the Supreme Court found that courts have no discretion in determining

whether or not to apply procedural bars to claims involving fundamental constitutional rights. *Rowland*, 42 So.3d at 507. The Court also went so far as to expressly overrule *Luckett v. State*, 582 So.2d 428, 430 (Miss. 1991); *Mann v. State*, 490 So.2d 910, 911 (Miss. 1986); *Jennings v. State*, 700 So.2d 1326, 1328 (Miss. 1997); and *Pinkney v. State*, 757 So.2d 297, 298-99 (Miss. 1997) to the extent they conflict with the Court's holding. *Rowland*, 42 So.3d at 508. The Court reversed and remanded for an evidentiary hearing on Rowland's claims. *Id.*

Accordingly, under both the statutory language of the UPCCR and precedents of this Court, the claim asserted herein, which involves fundamental rights, is not subject to time bars or the successive writ prohibition.

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

Under Rule 60(b)(6) of the *Mississippi Rules of Civil Procedure*, a court may vacate its judgment for "any other reason justifying relief from the judgment." As this Court has explained, "[r]elief under Rule 60(b)(6) is reserved for extraordinary and compelling circumstances." *Briney v. United States Fid. & Guar. Co.*, 714 So.2d 962, 966 (Miss. 1998) (reversing the denial of relief from judgment granting right of subrogation); *see also R.K. v. J.K.*, 946 So.2d 764, 776 (Miss. 2007) (reversing denial of relief from judgment to prevent double recovery). "The Rule is a grand reservoir of equitable power to do justice in a particular circumstance." *R.K.*, 946 So.2d at 776; *M.A.S. v. Miss. Dep't of Human Serv.*, 842 So.2d 527, 530 (Miss. 2003) (reversing denial of relief to vacate paternity order).

This Court has enumerated several considerations for determining whether to grant relief pursuant to Rule 60: "(1) that final judgments should not be lightly disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) [relevant only to default judgments]; (6) whether if the judgment was rendered after a trial on the merits the movant had a fair opportunity to present his claim or defense; (7) whether there are any intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack." *R.K.*, 946 So.2d at 776. Because this Court had original jurisdiction over the initial petition for post-conviction relief, the second factor is not at issue; likewise, because this case does not involve a default judgment, the fifth factor is also inapplicable. However, a consideration of the remaining factors supports the grant of relief.

Petitioner is not asking the Court to lightly disturb its prior judgment affirming Petitioner's conviction and sentence of death. Rather, Petitioner seeks this extraordinary relief due to the violations of fundamental rights, violations that taint both his conviction for capital murder and sentence of death. Simply put, in our system of justice, convictions and sentences that involve insufficient and flawed scientific proof and significant changes in crucial expert testimony cannot stand because they violate fundamental rights. For those same reasons, relief should be granted so as to "achieve substantial justice."[6]

[6] Especially in light of the heightened standards that this Court is to employ whenever reviewing a conviction carrying a death sentence. *See, e.g., Balfour v. State*, 598 So.2d 731, 739 (Miss. 1992).

Furthermore, this claim has been made in a reasonable time. The evidence upon which the claim is based has only recently been discovered, during the course of Petitioner's federal habeas corpus proceedings.

In addition, as demonstrated throughout this pleading, Petitioner has not had a fair opportunity to present this claim, since the evidence supporting the claim has only recently been uncovered. Simply put, this Court (or the trial court) must consider this claim in order for Petitioner to get any opportunity to fairly present it. Petitioner submits that when the claims are considered on their merits, it is clear that he is entitled to the extraordinary relief afforded by Rule 60.

Finally, there are no intervening equities that would make granting Petitioner's request for relief inequitable. There is nothing equitable about allowing a capital murder conviction and death sentence to stand when there is insufficient scientific and medical evidence to support the charge and there has been significant change in the expert testimony that was crucial in securing the conviction and sentence. It would be inequitable for Petitioner to not be granted relief under these circumstances. This is precisely the type of scenario where Rule 60, and its command to "achieve substantial justice," should be applied to vindicate the fundamental rights of Petitioner, who faces the ultimate punishment under Mississippi law. Accordingly, Petitioner prays that this Court will vacate his conviction and sentence, by reversing and rendering its prior judgment or by at least granting Petitioner a new trial as to both guilt and sentencing issues.

In addition to being entitled to relief under Rule 60, under these circumstances, Havard is also entitled to relief under the UPCCR. Pursuant to the UPCCR, Petitioner

prays that this Court will vacate his conviction and sentence, by reversing and rendering its prior judgment or by at least granting Petitioner a new trial as to both guilt and sentencing issues.

VI. CONCLUSION

Both the capital murder conviction and death sentence of Jeffrey Havard stand on the twin pillars of (1) sexual battery and (2) Shaken Baby Syndrome. These pillars have crumbled under the weight of objective, scientific evidence. In the interests of justice, this Court should provide Petitioner the opportunity to at least secure a new, fair trial where all of this objective, scientific evidence is placed before a jury.

For the reasons set forth herein, Petitioner respectfully requests that this Court enter an order vacating his conviction of capital murder and sentence of death, and for any other relief to which Petitioner is entitled in the premises.

Respectfully submitted,

JEFFREY HAVARD, PETITIONER

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ATTORNEYS FOR PETITIONER JEFFREY HAVARD

CERTIFICATE OF SERVICE

I hereby certify that I have this day served via Hand Delivery a true and correct copy of the above and foregoing to the following:

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This the ____ day of _____, 20___.

_____
GRAHAM P. CARNER