

COPY

IN THE SUPREME COURT OF MISSISSIPPI

JEFFREY HAVARD,

FILED

Petitioner

vs.

SEP 14 2011

No. 2011-DR-00539-SCT

STATE OF MISSISSIPPI,

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

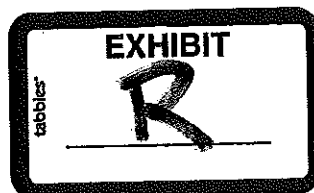
Respondent

PETITIONER'S REBUTTAL TO THE STATE'S RESPONSE TO MOTION FOR RELIEF FROM JUDGMENT OR FOR LEAVE TO FILE SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF

Petitioner, Jeffrey Havard, by and through undersigned counsel, hereby submits his Rebuttal to the State's Response to Motion for Relief from Judgment or for Leave to File Successive Petition for Post-Conviction Relief ("State's Response"). To a large extent, the State centers its Response on unprofessional personal attacks on Petitioner's counsel, unreasonable quibbling about insignificant discrepancies in two versions of a transcript, mischaracterizations of the record, and reliance on a trial attorney who apparently has not disclosed his entire file. More significantly, the State fails to engage the overwhelming scientific evidence, including sworn testimony from Steven Hayne, M.D., that the evidence does not support a finding that sexual abuse had been committed. For the reasons set forth in the original Petition and herein, Petitioner is entitled to the relief requested in the Petition.

I. THE STATE HAS NOT DISPUTED, AND HAS THUS CONCEDED, THE NEW EVIDENCE OF ACTUAL INNOCENCE AS TO THE UNDERLYING FELONY OF SEXUAL BATTERY

In the Petition, there is included an extensive review of relevant medical literature, authorities that demonstrate that there were non-criminal explanations for the evidence used by the State in support of the sexual battery allegation, the sole basis for this being a capital case. Similarly, the Petition cites to a wealth of medical literature stating that physical findings alone



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(as used here) are insufficient to make a medical diagnosis of sexual abuse. Rather, the medical literature demonstrates that sexual abuse is a medical diagnosis, which is only to be rendered using certain techniques, including a complete medical evaluation and differential diagnosis, none of which were employed here. In the face of this great body of medical literature that negates the underlying felony of sexual battery in this case, the State offers nothing in response. The Respondents' silence is deafening, as the literature presented points to undeniable inadequacies with Petitioner's conviction and sentence, which are based solely on a factually unsupportable allegation of sexual abuse. Having no response, Respondents have simply chosen to ignore this area entirely.

The State either miscomprehends or misrepresents the nature of Petitioner's actual innocence claim based upon the deposition of Dr. Steven Hayne. The State appears to argue that Dr. Hayne's deposition testimony must be "materially inconsistent" with his trial testimony in order to support that claim. That is not the case. The claim rises and falls on whether there is sufficient evidence to prove to a reasonable degree of medical certainty that Chloe Britt was sexually abused. Dr. Hayne was not asked about the sufficiency of evidence at trial. He was asked about it during his deposition, and he affirmatively stated that he cannot conclude to a reasonable degree of medical certainty that Chloe Britt was sexually abused. No other expert was proffered by the State who can do so based upon the reliable application of accepted scientific principles. In a case where the evidence in support of sexual battery was 100 percent circumstantial, that is not good enough. The objective evidence and the State's own expert cannot meet the standards set forth by this Court to sustain a conviction. *See Williams v. Mississippi*, 35 So.3d 480 (Miss. 2010) To the contrary, the objective, medical evidence and

opinions of Dr. Hayne and Dr. James Lauridson all point to alternative explanations for the sexual battery allegation.

In defense of the conviction and sentence, the State relies on the testimony of those who treated Chloe in the hospital that night. However, it must be remembered that **none** of these witnesses were tendered or qualified as expert witnesses. Furthermore, many of their observations are contradicted by Dr. Hayne's carefully documented autopsy findings. (*See* Petition at pp. 30-34). These treating witnesses, none of whom were qualified to testify concerning sexual battery of a minor, were all permitted to offer their opinions on this subject, while defense counsel sat idly by. However, Dr. Hayne, the only properly tendered and qualified expert witness, was not asked these questions, and the newly-discovered evidence from Dr. Hayne demonstrates why: Dr. Hayne could not offer the opinions that the State wanted, and the District Attorney knew it. (*See* Depo. of Hayne, Petition Exh. "H" at p. 28). Petitioner's trial was thus infected by improper opinion testimony from those not tendered or qualified as experts and relative silence (as to the sexual battery issue) from Dr. Hayne, the only witness who could properly offer opinions on this subject matter. This is completely backwards from how trials are supposed to operate.

The State discusses Jeffrey Havard's statements about "shaking" Chloe to revive her after the accidental fall. It must be pointed out that, though Chloe died from a closed head injury, the underlying felony was not felonious child abuse. It was sexual battery of a minor. Prior to trial, the State amended the indictment to drop the additional underlying felony of child abuse, and the trial proceeded on the sole underlying felony of sexual battery. Thus, Petitioner's claim of actual innocence as to the underlying felony must remain focused on the allegation of sexual battery.