IN THE SUPREME COURT OF MISSISSIPPI

JEFFREY HAVARD, ***Petitioner***

vs. **No. 2013-DR-01995-SCT**

STATE OF MISSISSIPPI, ***Respondent***

PETITIONER'S REBUTTAL TO THE STATE'S RESPONSE TO MOTION TO AMEND AND MOTION FOR EVIDENTIARY HEARING

Petitioner, Jeffrey Havard, by and through undersigned counsel, hereby submits his Rebuttal to the State's Response to Petitioner's Motion to Amend and Motion for Evidentiary Hearing, filed on July 9, 2014 ("State's Response"). For the reasons set forth in the original Motion and herein, Petitioner should be granted leave to file an Amended Motion for Relief from Judgment or For Leave to File Successive Petition for Post-Conviction Relief and be granted an evidentiary hearing.

I. PROCEDURAL POSTURE

The State seems to misunderstand the procedural posture of the instant Motion. The matter that is currently being litigated is simply a Motion to Amend filed in a civil proceeding. Post-conviction proceedings are unquestionably civil in nature. So, the question presented is simply whether Havard has presented sufficient information under the liberal amendment standards of the *Mississippi Rules of Civil Procedure* to add a claim that has only recently been discovered. The indisputable answer to this question is "yes", notwithstanding the 37 page Response of the State that addresses nearly every issue but the narrow question presented to this Court. The questions the State raises—a myriad of procedural arguments—will be properly handled after the amendment is permitted.

II. PETITIONER HAS MET THE STANDARDS FOR AMENDMENT OF PLEADINGS UNDER RULE 15

As set forth in the original Motion, Rule 15(a) of the *Mississippi Rules of Civil Procedure* states that a party may amend a pleading by obtaining "leave of court," and that "leave shall be freely given when justice so requires." *See Estes v. Starnes*, 732 So.2d 251, 253 (Miss. 1999) ("Rule 15(a) allows for the liberal amendment of pleadings…."). *See also Hall v. State*, 800 So.2d 1202 (Miss. Ct. App. 2001) (noting application of Rule 15 to post-conviction proceedings, which are civil in nature).

Though admitting that the *Mississippi Rules of Civil Procedure* apply to post-conviction proceedings and that Rule 15 permits liberal amendments of pleadings, the State nevertheless argues that these standards do not apply to Havard's Motion to Amend. This, however, is not the case.

Amendments under Rule 15 are necessary "when justice so requires". *See Burrell v. Mississippi State Tax Com.*, 536 So.2d 848 (Miss. 1988), overruled on other grounds by *Commonwealth Brands v. Morgan*, 110 So.3d 752 (Miss. 2013)). Justice requires full and fair presentation of all claims in a capital case in which the death sentence has been handed down. The interest of justice particularly demands the opportunity to fully present claims based upon evidence that was not disclosed to the defendant by the State in violation of constitutional protections and rules of court.

Expounding upon the liberal amendment standards of Rule 15, this Court has stated:

> Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded … if the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance

> of the amendment, futility of the amendment, etc.--the leave sought should, as the rules require, be 'freely given.'

Moeller v. Am Guar. & Liab. Ins. Co., 812 So.2d 953 (Miss. 2002) (quoting *Estes v. Starnes*, 732 So.2d 251, 252 (Miss. 1999)).

Examining the evidence and argument presented in the original Motion and herein, it is clear that Havard has met the test for amending his claims to add the *Brady* and ineffective assistance of counsel claims to this post-conviction proceeding. Justice requires granting this amendment and a full and fair presentation of these claims to the courts. The Motion to Amend should be granted.

III. PETITIONER HAS ARTICULATED VIABLE CLAIMS AND THE MOTION TO AMEND SHOULD BE GRANTED

Havard based his Motion to Amend on quotations made by and statements attributed to Dr. StevenHayne in a newspaper article, a copy of which was attached to the Motion. The State, while citing no legal authority, argues that a newspaper article and statements made in it are not evidence that this Court can consider. While Havard disputes this contention, out of an abundance of caution, Havard's counsel has secured an affidavit from Dr. Hayne to address these concerns. In the most recent affidavit, Dr. Hayne states that he has reviewed the January 19, 2014, newspaper article at issue, including "statements and direct quotations attributed to me." Exhibit "1," Affidavit of Dr. Steven T. Hayne dated July 21, 2014 at pp. 1-2. Dr. Hayne continues: "I recall making those statements and quotations, they are accurate, and I stand by them to this day." Exhibit "1," Affidavit of Dr. Steven T. Hayne dated July 21, 2014 at p. 2. Clearly, the statements of Dr. Hayne, both in the newspaper article and in the new affidavit, are sufficient evidence for this Court to consider. Furthermore, the facts set forth in them are unrebutted.

The State seems to argue that its *Brady* obligation were met because Dr. Hayne's written autopsy report was disclosed to the defense. But that is not the basis of the claim at issue. Havard does not deny that Dr. Hayne's written autopsy report was disclosed and available to trial counsel. The basis of this claim is the failure of the State to disclose Dr. Hayne's pre-trial oral reports and statements to the District Attorney and others in the District Attorney's office that he saw no evidence of sexual assault and could not support a finding of sexual assault in this case.

There can be no question that Dr. Hayne's pre-trial oral reports to prosecutors are covered under *Brady* and other disclosure rules. To begin, Rule 9.04 of the *Uniform Circuit and County Court Rules* provided that "the prosecution must disclose to each defendant or defendant's attorney…the substance of any oral statement" made by witnesses in chief that the prosecution may call. UCCCR 9.04(A)(1). That same rule contains additional requirements for prosecution experts such as Dr. Hayne, requiring disclosure of: "[a]ny reports, statements, or opinions of experts, written, recorded or otherwise preserved, made in connection with the particular case and **the substance of any oral statement made by any such expert**." UCCCR 9.04(A)(4) (emphasis added). *See also Woodward v. State*, 843 So.2d 1, 13 (Miss. 2003) (noting the requirement of disclosure of oral reports from prosecution expert witnesses). Finally, that same rule requires disclosure of "[a]ny exculpatory material concerning the defendant." UCCCR 9.04(A)(6).

Courts nationwide have long concluded that oral or verbal reports are *Brady* material. *See, e.g., Carter v. Rafferty*, 826 F.2d 1299, 1308–09 (3d Cir. 1987) (affirming habeas relief for Rubin "Hurricane" Carter based on *Brady* violation where prosecution failed to disclose preliminary oral reports on polygraph test of key prosecution witness); *McCollum v. Bahl*, 711 F. Supp. 2d 802, 812 (W.D. Mich. 2010) (concluding that oral information conveyed in addition to

written reports was *Brady* material); *Watkins v. Miller*, 92 F. Supp. 2d 824, 852 (S.D. Ind. 2000) (holding that the prosecution's suppression of the fact that another suspect failed a polygraph test was a *Brady* violation sufficient by itself to warrant habeas relief).

Dr. Hayne's pre-trial oral reports to prosecutors were also exculpatory and valuable impeachment evidence. This case was a capital case solely because of the presence of the sexual battery allegation. Sexual battery of a minor was the sole underlying felony on which the State proceeded at trial. The other underlying felony, felonious child abuse, was dropped by the State on the eve of trial. There was not an issue in this case that was more important than that of sexual battery. And yet the State failed to disclose Dr. Hayne's pre-trial oral reports to prosecutors that he could not support a finding of sexual battery in this case. This is a clear, fundamental violation of *Brady* and other disclosure rules that this Court cannot abide. *See, e.g.*, *Ham v. State*, 760 S.W.2d 55, (Tex. Ct. Crim. App. 7th Dist. 1988) (reversing conviction for *Brady* violation when State withheld reports of an expert medical examiner who investigated the case and provided prosecutors with oral reports of findings that would have been supportive of defense theory).

A recent dissenting opinion joined by several federal appeals court judges illustrates the nationwide problem of *Brady* violations such as the one at issue here. The words bear repeating here, to illustrate the importance of the issue not only in this case but in our state and national justice system, which is built on the foundation of due process and fair disclosure by prosecutors, and not gamesmanship and hiding of evidence:

> But protecting the constitutional rights of the accused was just not very high on this prosecutor's list of priorities. The fact that a constitutional mandate elicits less diligence from a government lawyer than one's daily errands signifies a systemic problem: Some prosecutors don't care about *Brady* because courts don't make them care.

> I wish I could say that the prosecutor's unprofessionalism here is the exception, that his propensity for shortcuts and indifference to his ethical and legal responsibilities is a rare blemish and source of embarrassment to an otherwise diligent and scrupulous corps of attorneys staffing prosecutors' offices across the country. But it wouldn't be true. *Brady* violations have reached epidemic proportions in recent years, and the federal and state reporters bear testament to this unsettling trend. *See, e.g., Smith v. Cain*, —– U.S. ——–, 132 S.Ct. 627, 181 L.Ed.2d 571 (2012); *United States v. Sedaghaty*, 728 F.3d 885 (9th Cir.2013); *Aguilar v. Woodford*, 725 F.3d 970 (9th Cir.2013); *United States v. Kohring*, 637 F.3d 895 (9th Cir.2010); *Simmons v. Beard*, 590 F.3d 223 (3d Cir.2009); *Douglas v. Workman*, 560 F.3d 1156 (10th Cir.2009); *Harris v. Lafler*, 553 F.3d 1028 (6th Cir.2009*); United States v. Zomber*, 299 Fed.Appx. 130 (3d Cir.2008); *United States v. Triumph Capital Grp., Inc.*, 544 F.3d 149 (2d Cir.2008); *United States v. Aviles–Colon*, 536 F.3d 1 (1st Cir.2008); *Horton v. Mayle*, 408 F.3d 570 (9th Cir.2004); *United States v. Sipe*, 388 F.3d 471 (5th Cir.2004); *Monroe v. Angelone*, 323 F.3d 286 (4th Cir.2003); *United States v. Lyons*, 352 F.Supp.2d 1231 (M.D.Fla.2004); *Watkins v. Miller*, 92 F.Supp.2d 824 (S.D.Ind.2000) ; *United States v. Dollar*, 25 F.Supp.2d 1320 (N.D.Ala.1998); *People v. Uribe*, 162 Cal.App.4th 1457, 76 Cal.Rptr.3d 829 (2008); *Miller v. United States*, 14 A.3d 1094 (D.C.2011); *Deren v. State*, 15 So.3d 723 (Fla.Dist.Ct.App.2009); *Walker v. Johnson*, 282 Ga. 168, 646 S.E.2d 44 (2007); *Aguilera v. State*, 807 N.W.2d 249 (Iowa 2011*); DeSimone v. State*, 803 N.W.2d 97 (Iowa 2011); *Commonwealth v. Bussell*, 226 S.W.3d 96 (Ky.2007); *State ex rel. Engel v. Dormire*, 304 S.W.3d 120 (Mo.2010); *Duley v. State*, 304 S.W.3d 158 (Mo.Ct.App.2009); *People v. Garrett*, 106 A.D.3d 929, 964 N.Y.S.2d 652 (N.Y.App.Div.2013); *Pena v. State*, 353 S.W.3d 797 (Tex.Crim.App.2011); *In re Stenson*, 174 Wash.2d 474, 276 P.3d 286 (2012); *State v. Youngblood*, 221 W.Va. 20, 650 S.E.2d 119 (2007).
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> When a public official behaves with such casual disregard for his constitutional obligations and the rights of the accused, it erodes the public's trust in our justice system, and chips away at the foundational premises of the rule of law. When such transgressions are acknowledged yet forgiven by the courts, we endorse and invite their repetition.

U.S. v. Olsen, 737 F.3d 625, 631-32 (9th Cir. 2013) (Kozinski, C.J., dissenting).

The State places heavy reliance on an alleged lack of diligence by Havard's trial counsel in failing to uncover the substance of Dr. Hayne's pre-trial oral reporters to prosecutors. In *Banks v. Dretke*, 540 U.S. 668 (2004), the Supreme Court considered the Fifth Circuit's use of a defendant-due-diligence requirement to dismiss the defendant's *Brady* claim. The diligence question in *Banks* was whether the defendant "should have interviewed a witness who could

have furnished the exculpatory evidence the prosecutor did not disclose." *Banks*, *Id.* at 688. The Supreme Court rejected this requirement in no uncertain terms. The Supreme Court stated:

> The state here nevertheless urges, in effect, that "the prosecution can lie and conceal and the prisoners still has the burden to… discover the evidence," so long as the "potential existence" of a prosecutorial misconduct claim might have been detected. A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendant due process. "Ordinarily we presume that public officials have properly discharged their official duties." We have several times underscored the "special role played by the American prosecutor in the search for truth in criminal trials." Courts, litigants, and juries properly anticipate that "obligations [to refrain from improper methods to secure a conviction]… which plainly rest upon the prosecuting attorney, will be faithfully observed." Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial appropriation.' *See Kyles*, 514 U.S. at 440 ("The prudence of the careful prosecutor should not . . . be discouraged.").

Id. at 696 (internal citations omitted).

Clearly, the diligence or lack of diligence of Havard's trial counsel with respect to uncovering the substance of Dr. Hayne's pre-trial oral reports and statements is irrelevant to a *Brady* inquiry. The prosecution hid this exculpatory evidence. Whether trial counsel sought it or not is of no consequence.

In the alternative, to the extent that this Court finds a lack of diligence on the part of trial counsel was the reason for Havard not discovering the substance of Dr. Hayne's pre-trial oral reports, then that lack of diligence would constitute ineffective assistance of counsel. Havard has sought leave to amend this PCR petition to add this alternative claim as well.

That Havard was prejudiced by the State withholding Dr. Hayne's pre-trial oral reports is also clear. One need only consider the difference between a trial where State's sole expert would testify that he did not think a sexual battery occurred, he saw no evidence of sexual assault, and he could not support a finding of sexual assault in the case and Havard's actual trial, where this information was not presented to the jury. This contrast is even more striking when one

considers that the State, in its opening statement, told jurors that Dr. Hayne "will come and testify for you about his findings and how he confirmed the nurses' and doctors' worst fears this child had been abused and the child had been penetrated…He'll explain that for you today." Tr. at p. 300. The State thus previewed Dr. Hayne's testimony in a way that it knew was false but the defense did not. This compounded the *Brady* violation with a violation of a corresponding principle articulated in *Napue v. Illinois*, 360 U.S. 264 (1959), which prohibits prosecutors from presenting juries with information that they know to be false. In a case where sexual battery was the crucial issue, these failures produced prejudice that Havard could not overcome.

Further, the State built its sexual battery case on the testimony of non-expert medical providers. Dr. Hayne's recent statements in the newspaper article reveal a fundamental disagreement between Dr. Hayne and those non-expert emergency room medical providers who testified at Havard's trial. Dr. Hayne has reviewed the trial testimony of those medical providers and their claims of seeing rips and tears and unquestionable evidence of sexual assault. Dr. Hayne states that their testimony does not match up to his autopsy findings and forensic opinions and that he would think his opinions would be definitive in light of the specialized nature of his review. Indeed, Dr. Hayne states that the medical providers were in a tense situation and were trying to save a life, while he was focused on conducting a forensic examination.

Dr. Hayne's autopsy findings directly contradict the alleged findings of the non-expert medical providers. This disagreement would be powerful testimony for a jury to hear and could very likely have led to a different result. If the State had disclosed Dr. Hayne's exculpatory pre-trial oral reports to the District Attorney and his staff, as they were required to do under *Brady* and other disclosure rules, then Havard's trial counsel could have used these oral reports to

effectively cross-examine Dr. Hayne and impeach the State's entire case, which was built upon lay testimony of medical providers whose testimony contradicted the autopsy findings.

Prejudice to Havard is also clear for another reason. At trial, the State advanced two physical findings to support its allegation of sexual battery: (1) the condition of Chloe's anus and (2) the tear to Chloe's frenulum (a piece of skin in the mouth). The trial court granted a directed verdict on the frenulum evidence, as there was not sufficient evidence to take it to the jury, in light of testimony that this injury could have resulted from a fall. Tr. at 569-70. In ruling against Petitioner's similar motion as to the anal condition, the court stated that Petitioner "can offer no explanation whatsoever to the condition of the child's anus." Tr. at 571 (emphasis added). If the State had complied with its obligations under Brady and Rule 9.04 and disclosed the pre-trial oral reports and statements of Dr. Hayne that (a) he found no evidence of sexual assault and (b) could not support a finding of sexual assault in the case, then there is a reasonable probability that Havard would have received a directed verdict on the entirety of the case. The State seized on this "inability to explain" the sexual battery throughout the trial. For instance, during closing argument, the prosecutor argued: "They asked him over and over and over again in that tape, and he kept saying, "I can't explain it. I don't know. I just can't explain how that happened. There ain't no other way to explain it than to admit that he committed sexual battery, ladies and gentleman. No other way." Tr. at p. 624.

If the State had disclosed its pre-trial oral reports from Dr. Hayne, there is a reasonable probability of a different result in this case. *Kyles v. Whitley*, 514 U.S. 419 (1995). As the Supreme Court stated in *Kyles*, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 434.

Clearly, Havard's trial was not fair, due to the *Brady* violations detailed here. The Motion to Amend should be granted so that Havard can present this claim to this Court.

IV. THE CLAIMS ARE NOT PROCEDURALLY BARRED OR TIME-BARRED

In the Motion, Havard anticipated that the State would argue that the claims Havard seeks to add are procedurally barred or time-barred. In its Response, the State has indeed placed a great deal of reliance on the time bar [Section 99-39-5(2)], the successive writ bar [Sections 99-39-23(6) & 99-39-27(9)], and other procedural bars found in Section 99-39-21(1)-(3). While these procedural arguments are better left to proceedings after the amendment is granted, Havard will address the State's arguments regarding procedural bars out of an abundance of caution.

To begin, Petitioner would point out that this Court has held that successor petitions such as the proceedings in which this Motion to Amend was filed are not subject to time bars. *Bell v.* State, 66 So.3d 90 (Miss. 2011). In *Bell*, the Petitioner sought leave to file a successive petition in the trial court on several issues, including mental retardation. *Id.* at 91. Bell had previously been denied post-conviction relief. *Id.* In examining whether Bell's matter should be remanded for further proceedings, this Court examined *Miss. Code Ann.* § 99-39-27(9) and the exceptions that it makes for filing successive petitions. *Id.* at 93. After reviewing the various exceptions, including the new evidence standard under which Havard's instant Motion was filed, the Court observed: "Noticeably absent from this statute is a time limitation in which to file a second or successive application if such application meets one of the statutory exceptions." *Id.* The Supreme Court, finding no time bar applied, remanded the case to the trial court for an evidentiary hearing. *Id.* at 94.

Also, in *Grayson v. State*, 118 So. 3d 118, 129 (Miss. 2013), the petitioner obtained merits review of a successor petition despite the State urging the claims were time-barred, though petitioner

did not ultimately prevail. Likewise, the Mississippi Supreme Court recently remanded a successive petition for an evidentiary hearing without applying the time-bar as urged by the state, *see Walker v. State*, 131 So. 3d 562 (Miss. 2013), and also granted outright relief on a successive petition despite the State's arguments that the claims were procedurally barred. *See* En Banc Order, *Byrom v. State*, No. 2014-DR-00230-SCT (Miss. Mar. 31, 2014).

Simply put, if a Petitioner states a sufficient claim under the new evidence standard, then such a claim is not subject to any time or successive writ bar. The same result is required by *Miss. Code Ann.* § 99-39-5(2), which excepts from time bars claims that are based on new evidence. The claims in Petitioner's Motion to Amend are based on the new evidence standard. The new evidence that triggered the Motion to Amend was statements of Dr. Steven Hayne published in a Clarion Ledger newspaper article on January 19, 2014 (with the Motion to Amend being filed approximately 4 months later).

Dr. Hayne disclosed to the Clarion-Ledger that he told prosecutors prior to Havard's trial that "he couldn't say a sexual assault took place". Exhibit "1," Affidavit of Dr. Steven T. Hayne dated July 21, 2014 at Exh. "A," p. 6. Hayne affirmed this statement in a recent affidavit, specifically stating that "[p]rior to trial and before taking the witness stand at trial, I informed the prosecutor, Ronnie Harper, and members of his office that I could not support a finding of sexual abuse in this case." Exhibit "1," Affidavit of Dr. Steven T. Hayne dated July 21, 2014 at p. 2. These statements, made in 2014, unquestionably fall within the new evidence exception under the UPCCR. As such, no time bar applies.

This is information that was not capable of being discovered or raised at trial, on direct appeal, or in Havard's post-conviction proceedings, because the information was withheld by the prosecution and has remained hidden until Dr. Hayne's revelations. The State cannot fail to

disclose evidence and then claim that Havard is barred from presenting the claim because he was not aware of the information that the State concealed.

The State also urges that these claims are barred by res judicata. However, there are significant distinctions between the issues raised in the Motion to Amend and the issues previously raised by Havard in this Court. Simply put, Havard has never raised a *Brady* claim regarding the State's failure to disclose Dr. Hayne's exculpatory pre-trial oral reports to the District Attorney. That is because Havard only recently learned of the existence of the facts to support such a claim. This claim is different from any claim previously asserted by Havard. Thus, res judicata does not apply.

Finally, the claims involved in the Motion to Amend affect fundamental rights, and thus the procedural bars cited by the State do not apply. 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), this Court recently clarified the law regarding the procedural bars found in the UPCCR. There, this 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, this 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, this 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.* Indeed, in *Parisie v. State*, 848 So.2d 880, 885 (Miss. 2003), this Court described the rights conferred by *Brady v. Maryland* as "fundamental rights".

Under any formulation, this Court should not disregard as a matter of form over substance the significant new evidence that casts grave doubts on Havard's conviction and sentence. A man's life hangs in the balance. He stands convicted of capital murder and sentenced to death in a case where forensic issues regarding sexual abuse were paramount. The sexual battery allegation was the sole factor that made this a capital murder case and made Havard eligible for the death penalty.

The one and only expert witness (Dr. Hayne) on whom the State relied to obtain a guilty verdict has now made statements and given a sworn affidavit stating that he gave exculpatory pre-trial reports regarding his inability to support a sexual abuse allegation in this case. This evidence was not disclosed by the prosecution prior to trial. The State does not even argue in its Response that Dr. Hayne's pre-trial oral reports to prosecutors were disclosed. This is precisely the sort of scenario that the newly-discovered evidence and fundamental right exceptions were designed to address: to correct serious errors and resolve grave doubts in the most serious of cases. This is especially clear in cases where the new evidence was previously concealed by the State.

No procedural or other bars apply to the claims to be added by way of the Motion to Amend. The Motion should be granted and Havard should be allowed to file his Amended Motion for Relief from Judgment or For Leave to File Successive Petition for Post-Conviction Relief.

V. HAVARD IS ENTITLED TO AN EVIDENTIARY HEARING

In the original Motion to Amend, Havard demonstrated that an evidentiary hearing is needed in this matter in light of the numerous statements, both sworn and unsworn, that Dr. Steven Hayne has made regarding this case. Havard set forth in detail the contents of the various

statements and showed how, over the years, Dr. Hayne has progressively provided more and more information concerning Havard's case. In its Response to the Motion, the State questioned whether statements attributed to Dr. Hayne in a newspaper article were sufficiently evidentiary to support the claims that Havard proposes to add in these proceedings. To address these concerns, though unfounded, Havard's counsel once again met with Dr. Hayne and secured another affidavit, in which Dr. Hayne affirmed the statements made in the newspaper article. *See* Exhibit "1," Affidavit of Dr. Steven T. Hayne dated July 21, 2014.

The latest affidavit constitutes the sixth recorded statement of Dr. Hayne about this case. The latest affidavit further underscores the necessity of holding an evidentiary hearing in this matter. To begin, Dr. Hayne himself states that he would like to testify under oath at an evidentiary hearing in this matter. Dr. Hayne states: "I am willing to be deposed or testify to the Court regarding my autopsy of Chloe Britt and related opinions. **Indeed, I would prefer to testify regarding all matters related to Mr. Havard's case**." Exhibit "1," Affidavit of Dr. Steven T. Hayne dated July 21, 2014 at p. 2 (emphasis added).

Further, the statements made by Dr. Hayne in both the affidavit and the newspaper article attached to the affidavit underscore the need for further development of the facts of the case. For example, Dr. Hayne unequivocally states that, on at least two separate occasions prior to the trial of Havard, he told the District Attorney and members of the District Attorney's office that he "could not support a finding of sexual abuse in this case." Exhibit "1," Affidavit of Dr. Steven T. Hayne dated July 21, 2014 at p.2. Dr. Hayne also affirmed all of the statements and direct quotations attributed to him in the January 19, 2014 Clarion-Ledger newspaper article written by Jerry Mitchell. Among the statements that Dr. Hayne affirmed is this direct quotation about Dr. Hayne's findings following his autopsy: **"I didn't think there was a sexual assault. I didn't**

see any evidence of sexual assault."[1] Exhibit "1," Affidavit of Dr. Steven T. Hayne dated July 21, 2014 at Exh. "A," p. 5 (emphasis added). Dr. Hayne also stated that "growing evidence" shows his original autopsy findings and trial testimony regarding Shaken Baby Syndrome "**is probably not correct**." Exhibit "1," Affidavit of Dr. Steven T. Hayne dated July 21, 2014 at Exh. "A," p. 4 (emphasis added).

These striking and significant statements are sufficient, standing alone, to grant post-conviction relief from Havard's conviction for capital murder. Short of this, the statements demonstrate that the facts of this matter, and particularly Dr. Hayne's forensic findings and opinions and pre-trial discussions with prosecutors, need to be more fully developed in an evidentiary hearing in the trial court. Several days ago, in another post-conviction proceeding in a case involving disputed trial testimony from Dr. Hayne regarding Shaken Baby Syndrome, this Court ordered an evidentiary hearing in the trial court. *See* Exhibit "2," Order from *Brandon v. State*, No. 2014-M-00596 (Miss. Aug. 13, 2014). The facts of this case, with the above statements of Dr. Hayne and the detailed forensic evidence regarding the evolution of Shaken Baby Syndrome science in the years since Havard's conviction, are even more compelling than in *Brandon*. And, unlike *Brandon*,[2] this is a capital murder case in which the death penalty was

[1] Again, Dr. Hayne's role in performing a systematic autopsy must be contrasted with those of the non-expert medical providers who were acting in a tense, emergency situation in which they were trying to save an infant's life. Hayne's statements that he did not see evidence of sexual assault and did not think that "there was a sexual assault" are entitled to more weight than non-expert medical providers whose supposed findings were not found by Dr. Hayne during the autopsy.

[2] *Brandon* is a depraved heart murder case in which the Defendant was sentenced to life imprisonment following conviction. *Brandon v. State*, 109 So.3d 128 (Miss. Ct. App. 2013). Another difference between *Brandon* and Havard's case is that medical providers in *Brandon* dispute that the victim could have been injured as described by the Defendant. In Havard's case, the medical providers and Dr. Hayne provided no testimony that analyzed the possibility of whether the accidental fall described by Havard could have caused Chloe's fatal injuries, which we now know, due to scientific advances, is indeed probable.

employed, which warrants the highest level of scrutiny. Just as this Court granted an evidentiary hearing in the *Brandon* case, so it should remand this case to the trial court for an evidentiary hearing.

VI. CONCLUSION

For the reasons set forth in the original Motion to Amend and Motion for Evidentiary Hearing, Petitioner, Jeffrey Havard, respectfully requests that this Court enter its Order granting Havard leave to file an Amended Motion for Relief from Judgment or For Leave to File Successive Petition for Post-Conviction Relief and be granted an evidentiary hearing.

Respectfully submitted, this the 18th day of August, 2014.

Respectfully submitted,

JEFFREY HAVARD, PETITIONER

/s/ Graham P. Carner
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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing with the MEC filing system, which sent notice to the following:

Jim Hood
Marvin L. White, Jr.
Brad A. Smith
Office of the Attorney General
P.O. Box 220
Jackson, MS 39205

This the 18th day of August, 2014.

/s/ Graham P. Carner
GRAHAM P. CARNER