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 AMENDED 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 Amended Motion for Relief from Judgment or for Leave to File Successive Petition for Post-Conviction Relief ("State's Response"). For the reasons set forth in the Amended Motion for Relief from Judgment and all exhibits previously placed in the record in these proceedings and in this Rebuttal, Petitioner is entitled to the relief requested in the Amended Motion for Relief.

I. INTRODUCTION

In this death penalty case, the State's expert, the only witness to testify at trial regarding the cause of Chloe Britt's death and Shaken Baby Syndrome, has recanted. Further, it has been revealed that the State withheld the same expert's pre-trial oral reports that he saw no evidence of sexual assault and could not support a finding of sexual assault, in a capital murder case where the sole underlying felony was sexual battery. With the rug having now been pulled out from under the State's case and a *Brady* violation revealed, the State's only argument is that Petitioner should be executed—despite the unreliability of his conviction—for no other reason than that he failed to get the State's expert to disclose these matters sooner. The State's argument is easily overcome, and Havard should be granted the relief requested in the Amended Motion.

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

Havard has long anticipated that the State would argue that the claims raised in these proceedings 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)], procedural bars found in Section 99-39-21(1)-(3), and other procedural bars.

To begin, Havard would point out that this Court has held that successor petitions such as this one are not subject to time bars. *Bell v. State*, 66 So.3d 90 (Miss. 2011). In *Bell*, the Petitioner sought leave to file a successive petition in the trial court on several issues, including mental retardation. *Id.* at 91. Bell had previously been denied post-conviction relief. *Id.* In examining whether Bell's matter should be remanded for further proceedings, this Court examined *Miss. Code Ann.* § 99-39-27(9) and the exceptions for filing successive petitions. *Id.* at 93. After reviewing the various exceptions, including the new evidence standard under which Havard's instant Amended 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. Likewise, the Mississippi Supreme Court recently remanded a successive petition for an evidentiary hearing without applying the time-bar as urged by the state, *see Walker v. State*, 131 So. 3d 562 (Miss. 2013), and also granted outright relief on a successive petition despite the State's arguments that the claims

were procedurally barred. *See* En Banc Order, *Byrom v. State*, No. 2014-DR-00230-SCT (Miss. Mar. 31, 2014).

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

The new evidence concerning Shaken Baby Syndrome (SBS) is set forth with exacting detail and supported by the opinions of numerous world-renowned expert witnesses. **The new evidence regarding SBS was the newly-formulated opinions of Dr. Steven Hayne, first made known in a Clarion Ledger newspaper article published on June 16, 2013 (with the original Petition being filed approximately 5 months later).** *See* Original Motion Exh. "H". Had it not been for the article, Havard would still be in the dark about Hayne's true opinions regarding SBS and how those opinions have changed since Havard's 2002 trial.

Dr. Hayne's opinions, which differ substantially from his trial testimony in that they acknowledge the changes in science and medicine during the years since the trial and invoke a theory of cause and manner of death (blunt force trauma) that Dr. Hayne did not account for during the 2002 trial, are compelling new evidence that cause grave doubts about Havard's conviction and sentence. Viewing these facts set forth in the Amended Motion as true—which, at this stage, the Court must do—Havard has demonstrated that this Amended Motion falls within the new evidence exception under the UPCCR. As such, no time bar applies.

There is also new evidence in support of the *Brady* claim that was recently added to these proceedings when the Amended Motion for Relief was filed. Despite 1) the State's obligations to turn over exculpatory information and oral reports of expert witnesses; 2) pre-trial requests for discovery from Havard's trial counsel; and 3) promises from the State that all such information

had been disclosed, significant exculpatory information was not turned over by the State. Dr. Steven Hayne, the sole expert who testified on sexual abuse issues in a case built entirely on an allegation of sexual battery, has sworn that he does not believe a sexual assault took place in this case and that he informed prosecutors he could not support such a finding. Dr. Hayne has also recently described his "definitive evaluation," including the evaluation of tissue samples, that contradicts and impeaches his closely couched trial testimony and the trial testimony of non-expert medical providers. The failure to turn over all of this information from Dr. Hayne—information that was clearly exculpatory and was subject to pre-trial disclosure rules—was a clear *Brady* violation that taints Havard's conviction and death sentence.

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

The July 2013 Affidavit from Dr. Hayne is essential to the evaluation of the SBS claim and whether it involves newly-discovered evidence. The State places great reliance on the fact

that in other cases information discrediting Shaken Baby Syndrome has been presented for some time. This cannot be disputed, but it is a red herring in an attempt to get this Court to ignore the real question: whether the claims presented in Jeffrey Havard's case—**this case**—with respect to SBS are based on new evidence in **this case**. Comparing Dr. Hayne's trial testimony with his new Affidavit, both of which are set forth in the Amended Motion, it is clear that this is newly-discovered evidence.

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 Dr. Hayne, the only expert who gave an opinion as to the cause of death at trial, has only recently acknowledged the change in scientific consensus as it applies to this case and put forth an alternative theory—a theory consistent with Havard's innocence and with Havard's description of the accidental fall that Chloe suffered—that differs from his trial testimony. The difference is crucial: Dr. Hayne now acknowledges that simple blunt force trauma (separate and apart from any shaking or any other intentional, criminal act) such as that which could be produced from an accidental fall onto a hard surface could have caused Chloe's death and injuries. When Dr. Hayne expressed his new opinions, SBS became a new issue in Havard's case. Havard immediately investigated the claim, obtained analyses from leading experts on the issue, and presented it to this Court with adequate and compelling supporting evidence.

Havard had no way of knowing of Dr. Hayne's change in opinion. In prior interactions between Dr. Hayne and Havard's attorneys, Dr. Hayne made no indication of any shift in his opinions on the topic of SBS. Further, as demonstrated in the Court of Appeals opinion in *Brandon v. State*, 109 So.3d 128, 131 (Miss. Ct. App. 2013), Dr. Hayne was testifying as late as 2009 to opinions that mirror his opinions from Havard's 2002 trial, and the State was relying on

those opinions from Hayne as late as 2013. The Court of Appeals summarized Hayne's testimony in Brandon's trial as follows:

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

Id.

Clearly, in the Brandon trial, Dr. Hayne acknowledged that "some pathologists" believed that something other than shaking could cause injuries that other pathologists, such as Hayne, call SBS. Dr. Hayne's new opinions concerning SBS, described in his Affidavit attached to Havard's Motion for Relief, contrast with his testimony from the Brandon trial in 2009 as well as Havard's trial in 2002.[1] Clearly, Dr. Hayne's shift in opinions concerning SBS is a recent development and was not discoverable by Havard at trial, on direct appeal, or during his PCR proceedings. The newly discovered evidence is that Dr. Hayne admits to his fallibility due to changing research, and has disclosed how that impacts his original diagnosis and trial testimony in this case, which he now recants as "probably not correct". As soon as Hayne made his change of opinion known in this case, Havard's counsel investigated the issue and presented this claim.

Havard has similarly been diligent in pursuit of the *Brady* evidence. To begin, the only persons who could know of the content of Dr. Hayne's pre-trial oral reports were (a) Dr. Hayne and (b) those who received the reports, the District Attorney and other members of his staff.

[1] In the post-conviction proceeding in the *Brandon* case, this Court ordered an evidentiary hearing in the trial court. *See* Exhibit "12," Order from *Brandon v. State*, No. 2014-M-00596 (Miss. Aug. 13, 2014).

There was no way for Havard to discover the existence of this evidence until either Dr. Hayne or one of the prosecutors disclosed the contents of their pre-trial interaction, which was not done until January 2014 by Dr. Hayne.

As detailed below, Dr. Hayne has provided a variety of statements regarding Havard's case over the years since the 2002 trial. Each time he speaks, new information comes to light. And the 2014 statements in the January 2014 newspaper article and July 2014 Affidavit are the most compelling to date. But it must be remembered that there has never been an opportunity to fully explore the entirety of Dr. Hayne's opinions in this case. The 2010 deposition was limited in its scope by the federal judge who ordered it. Hayne's pre-trial interactions with prosecutors were not the subject of that deposition, and Dr. Hayne certainly did not reveal in that 2010 deposition that he "didn't think there was a sexual assault" or "I didn't find any evidence of sexual assault". He also did not state that he informed prosecutors, on more than one occasion prior to trial, that he could not support a finding of sexual assault in the case. These statements came out in January 2014, and within months Havard was placing the *Brady* issue before this Court. Havard has been diligent in seeking and presenting the evidence of the *Brady* claim.

Further, in January 2014, Dr. Hayne told newspaper reporter, "We were very careful, and we also took sections." Dr. Hayne explained that he examined those sections under a microscope and was able to conclude that there were no tears, rips or similar injuries to the child's rectum. Most importantly, Dr. Hayne stated, "I would think that would be a definitive evaluation." Strikingly, this is the same result that Dr. James Lauridson reached in his evaluation of tissue samples during Havard's original post-conviction proceedings, when he opined that that the tissues samples he was provided by Dr. Hayne showed no evidence of any contusion or laceration. Further, Dr. Lauridson found: "[t]he conclusions that Chloe Britt suffered sexual

abuse are not supported by objective evidence and are wrong." (Exhibit "13," Cumulative Collection of James Lauridson Affidavits and Reports at pp. 10-11). But the same "definitive" findings of the State's sole expert, Dr. Hayne, concerning those tissue samples were not known until 2014.

The statement regarding the tissue samples is critical for a number of reasons, one of which is that Dr. Hayne has never before revealed that additional scientific testing was conducted which yielded highly exculpatory results. Dr. Hayne examined anal tissue under a microscope and was able to definitively determine that no tears existed. Nowhere in Dr. Hayne's autopsy report, testimony at the 2002 trial, 2009 declaration, 2010 deposition, or 2013 affidavit does Dr. Hayne indicate that he took sections of the child's anal tissue and that none of those sections revealed evidence of a tear. Although Dr. Hayne mentioned in his autopsy report that he conducted a microscopic analysis of anal tissue, the autopsy report mentions that only a single section of anal tissue was analyzed, and that analysis revealed the presence of a contusion. The fact that Dr. Hayne took multiple tissue samples which definitively excluded the possibility of a tear was not included in the autopsy report and never mentioned until the January 2014 newspaper article. The issue of whether or not the child's anus was torn has been a highly contested issue throughout the trial and post-conviction proceedings in this case; yet it was not discovered by Havard until 2014 that Dr. Hayne had this definitive, scientific proof that supported his innocence.

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

However, Havard does offer additional argument here about the fundamental right standard as it relates to the recently-added *Brady* claim. Mississippi courts have, on a case-by-case basis, found certain rights to be fundamental for purposes of overcoming procedural bars in post-conviction proceedings. In *Manning v. State*, 884 So.2d 717 (Miss. 2004), this Court remanded for further proceedings the Petitioner's claim of a violation of *Brady* and related claims. In so doing, the Court explicitly relied upon the fundamental right exception to procedural bars. *Id.* at 723. Thus, this Court has already recognized *Brady* as a fundamental right that is not subject to procedural bars.

Additionally, in *Parisie v. State*, 848 So. 2d 880, 885 (Miss. Ct. App. 2002), the Court of Appeals stated: "Applying [the test for determining whether *Brady* violations have occurred], we cannot find that Parisie's claims constitute infringements on his fundamental rights under *Brady*."

Mississippi courts have previously relied on precedent from other jurisdictions to find a fundamental right for purposes of overcoming procedural bars in the post-conviction context. *See, e.g., McGleachie v. State*, 800 So. 2d 561, 562 (Miss. Ct. App. 2001) ("McGleachie accurately cites *United States v. Sine*, 461 F.Supp. 565, 568 (D.S.C.1978), as precedent supporting the right to be free from an illegal sentence as a fundamental right. He further concludes that due to the fact that his fundamental rights were violated, the time bar should not apply to his post-conviction relief motion."); *Chancellor v. State*, 809 So. 2d 700, 702 (Miss. Ct. App. 2001) (same).

At least two other jurisdictions have found that *Brady* involves fundamental rights for purposes of overcoming procedural bars in post-conviction proceedings. *See State v. Wright*, 67 A.3d 319, 324 (Del. 2013) ("Rule 61(i)(5) provides an exception to the procedural bars for 'a colorable claim that there was a miscarriage of justice because of a constitutional violation that

undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.' A colorable claim of a *Brady v. Maryland* violation falls within this exception."); *Duley v. State*, 304 S.W.3d 158 (Mo. Ct. App. 2009) ("[F]undamental fairness requires that Duley be allowed to fully challenge the State's admitted failure to follow [*Brady*]. This prosecutorial nondisclosure presents a 'rare and exceptional circumstance' that warrants post-conviction review of trial error.").

Under any formulation, this Court should not disregard as a matter of form over substance the significant new evidence that casts grave doubts on Havard's conviction and sentence. A man's life hangs in the balance. He stands convicted of capital murder and sentenced to death in a case where the objective science and medicine cast grave doubts on the validity and trustworthiness of the conclusions that led to the charge and, ultimately, his conviction and death sentence. The one and only expert witness (Dr. Hayne) on whom the State relied to obtain a guilty verdict has now given a sworn affidavit disavowing his trial opinion that shaking alone caused Chloe's injuries. Dr. Hayne now accounts for another, non-criminal possibility: blunt force trauma such as that caused by an accidental fall onto a hard surface, as described by Havard in his interview with law enforcement. Dr. Hayne did not account for this possibility at trial. Dr. Hayne further states that his original diagnosis of SBS and trial testimony regarding that diagnosis "is probably not correct."

On top of this, 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. More compelling, Dr. Hayne says that following his examination he "didn't think there was a sexual assault" and "didn't find any evidence of sexual assault". Further, Dr. Hayne

describes analysis of tissue samples that he characterizes as "definitive" in showing that Chloe Britt did not have tears or other lacerations to her anus, in direct contradiction to the testimony of the non-expert medical providers that testified otherwise at trial. These pre-trial oral reports and definitive tissue examination results were not disclosed by the prosecution prior to trial, in direct violation of *Brady* and related protections (including the explicit state court rule, UCCCR 9.04, requiring disclosure of such pre-trial oral reports of experts). The State does not even assert that they were disclosed, instead choosing to hide behind procedural bars to assert that Havard is not entitled to relief.

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

III. PETITIONER'S CLAIMS ARE SUFFICIENT FOR THIS COURT TO REMAND THE MATTER TO THE TRIAL COURT FOR FURTHER FACTUAL DEVELOPMENT

It is worth noting the procedural posture of this post-conviction proceeding and how this Court is to view the claims raised by the Petitioner and the State's Response to those claims. Under the Mississippi Uniform Post-Conviction Collateral Relief Act, *Miss. Code Ann.* § 99-39-1 *et seq.*, the procedural posture here "is analogous to that when a defendant in a civil action moves to dismiss for failure to state a claim." *Neal v. State*, 525 So. 2d 1279, 1280 (Miss. 1987). Havard is entitled to an evidentiary hearing on claims raised in his Amended Petition unless it appears **beyond a doubt** that he cannot prove any set of facts entitling him to relief. *See Marshall v. State*, 680 So. 2d 794, 794 (Miss. 1996) ("a post-conviction collateral relief petition

which meets basic requirements is sufficient to mandate an evidentiary hearing unless it appears beyond doubt that the petitioner can prove no set of facts in support of his claim which would entitle him to relief"); *accord Archer v. State*, 986 So. 2d 951, 957 (Miss. 2008) ("If [petitioner's] application states a *prima facie* claim, he then will be **entitled** to an evidentiary hearing on the merits of that issue in the Circuit Court . . . .") (emphasis added).

Havard's claims are substantial and warrant this Court's granting him full relief pursuant to Section 99-39-27(7)(a). At the very least, however, Havard's allegations entitle him to an evidentiary hearing pursuant to Section 99-39-27(7)(b).

The factual allegations in Havard's proposed motion for post-conviction relief are more than enough under this Court's precedents to warrant an evidentiary hearing. *See, e.g.*, *Spicer v. State*, 973 So. 2d 184, 190-91 (Miss. 2007) (remanding for an evidentiary hearing where post-conviction counsel identified 15 additional witnesses who had not been contacted by defense counsel and were willing to testify regarding defendant's character and childhood history); *Doss v. State*, 882 So. 2d 176, 189 (Miss. 2004) (finding that trial counsel's efforts fell short of the prevailing standard, and thus warranted an evidentiary hearing, where trial counsel did not seek any school, medical, mental health, or other records, seek advice from a mental health expert, obtain records resulting from prior criminal charges, or follow-up on witnesses identified by investigator); *Davis v. State*, 743 So. 2d 326, 338-40 (Miss. 1999) (ordering evidentiary hearing on ineffective assistance of counsel when on post-conviction review, affidavits of an additional six witnesses were presented); *Leatherwood v. State*, 473 So. 2d 964 (Miss. 1985) (remanding case for an evidentiary hearing where post-conviction counsel submitted affidavits of several more mitigation witnesses who had not been contacted by defense counsel).

Under well-established post-conviction procedure, this Court must accept as true Mr. Havard's allegations. *Simon v. State*, 857 So. 2d 668 (Miss. 2003); *Myers v. State*, 583 So. 2d 174 (Miss. 1991). An evidentiary hearing is mandated unless it appears beyond a doubt that Havard can prove no set of facts in support of his claim which would entitle him to relief. *Robertson v. State*, 669 So. 2d 11 (Miss. 1996); *Sanders v. State*, 846 So. 2d 230, 234 (Miss. Ct. App. 2002) ("'[A] post-conviction collateral relief petition which meets basic requirements is sufficient to mandate an evidentiary hearing unless it appears beyond a doubt that the petitioner can prove no set of facts in support of his claim . . . .'" (quoting *Marshall v. State*, 680 So. 2d 794, 794 (Miss. 1996)).

A great deal of the State's Response does nothing more than underscore the need for further factual development of these claims in the trial court. Specifically, the State goes to great lengths to criticize, citing other cases, some of the experts who have provided affidavits in support of Havard's SBS claims. In the course of its Response, the State criticizes the qualifications, methodologies, and opinions of all of the experts (except Dr. Steven Hayne) that have provided affidavits demonstrating the unquestionable shift in the scientific and medical communities with respect to Shaken Baby Syndrome and how that shift applies to the facts of Havard's case.

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

acknowledged that the dissenting justice highlighted significant points that the State would be able to raise at the hearing.

Because the matters listed above are best handled in the trial court, the case should be remanded to the Circuit Court of Adams County for an evidentiary hearing on these issues. With respect to the SBS issue, an evidentiary hearing in the trial court would afford the opportunity to fully explore each expert witness's credentials, training, and experience as related to the medical issues in this case and determine who is a qualified expert in these respective fields and who will be permitted to offer opinion testimony. From there, the parties and the trial court can fully explore the facts relied upon by each expert, any assumptions upon which they rely, their methodologies, and other information undergirding their opinions. Finally, the trial court can receive the opinions of these various experts and determine what effect, if any, the new evidence presented should have on Havard's conviction and sentence.

With respect to the *Brady* issue, an evidentiary hearing will allow further fact development on the issue of Dr. Hayne's conclusions, the details of his analysis of the "definitive" tissue samples that contradict the non-expert medical providers' trial testimony, the content of Dr. Hayne's pre-trial oral reports to prosecutors, and what of the above information (if any) was disclosed to Havard's trial counsel. While there is ample evidence before the Court to grant Havard relief outright on his *Brady* claim, there is unquestionably more to develop if the Court finds the claim to be in any doubt. That further development should take place in the trial court with a full evidentiary hearing on the *Brady* issue.

Another reason that this matter should be remanded for an evidentiary hearing is the evolving nature of Dr. Hayne's numerous statements regarding this case. Since the 2002 trial of Havard, Dr. Steven Hayne has provided a string of sworn and unsworn statements related to

Havard's case. Dr. Hayne has provided a Declaration (2009) (Exhibit "1"), deposition testimony (2010) (Exhibit "2"), an Affidavit in July 2013 (Exhibit "3"), an Affidavit in July 2014 (Exhibit "4"), and has been interviewed for newspaper articles that appeared in the *Clarion-Ledger* in June 2013 (Exhibit "5") and January 2014 (Exhibit "6").

In the 2009 Declaration (Exhibit "1"), Dr. Hayne stated that he cannot "include or exclude to a reasonable degree of medical certainty that she [Chloe] was sexually assaulted." Further, Dr. Hayne noted that the one centimeter contusion that he found on Chloe's anus "could have a variety of causes and is not sufficient in and of itself to determine that a sexual assault occurred." Dr. Hayne also stated that, during the autopsy, he "found no tears of her rectum, anus, anal sphincter, or perineum."

Most significantly, Dr. Hayne noted in the Declaration that "[d]ilated anal sphincters may be seen on persons who have died, **as well as on a person prior to death without significant brain function**. My experience as well as the medical literature recognize that **a dilated anal sphincter is not, on its own, evidence of anal sexual abuse**, but must be supported by other evidence." (emphases added).

In the 2010 deposition testimony (Exhibit "2") Dr. Hayne acknowledged that he was specifically asked, prior to conducting the autopsy of Chloe Britt, to look for evidence of sexual assault. (Depo. at pp. 10-11). Dr. Hayne testified that there is no mention of sexual battery in the Final Report of Autopsy that he produced, because "I could not come to final conclusion as to that." (Depo. at 11). Dr. Hayne continued: "There was one injury that I indicated would be consistent with the penetration of the anal area, but that, in and of itself, I didn't feel was enough to come to a conclusion that there was a sexual assault in this particular death." (Depo. at 11). Dr. Hayne confirmed that he found no tearing to the rectum, anus, anal sphincter, or perineum

during the autopsy, and that he would have noted such tearing if he had found it. (Depo. at 12, 14). Dr. Hayne further opined that it would not be possible for any tears to have healed between the time Chloe Britt was in the emergency room to the time he performed the autopsy, one day later. (Depo. at 14-15).

Dr. Hayne further testified:

> Q: And, Dr. Hayne, can you say from your autopsy evidence, and from the coroner's inquest, the medical records that you reviewed, the photographs, and the laboratory findings, that this child, Miss Britt, was sexually assaulted?
>
> A: I could not come to that final conclusion, Counselor. As I remember in trial testimony, I said that the contusion would be consistent with a sexual abuse, but I couldn't say that there was sexual abuse, and, basically, I deferred to the clinical examination conducted at the hospital.

(Depo. at 25).

In the June 2013 newspaper article (Exhibit "5"), Hayne's interview with the reporter revealed: "At the 2002 trial, Hayne testified there was a 1-inch anal bruise, 'consistent with penetration of the rectum with an object.' He acknowledged to *The Clarion-Ledger* that such a bruise can be caused by nothing more than 'a hard stool.' At trial, he testified the baby's death was a homicide, consistent with shaken baby syndrome. But Hayne now disavows that conclusion, saying biochemical engineers believe shaking alone doesn't produce enough force to kill."

In the July 2013 Affidavit (Exhibit "5"), Hayne states that he "found no definitive evidence of sexual abuse" based upon his autopsy findings. "A finding of sexual assault was not conclusively demonstrated." Dr. Hayne also made statements about his prior opinions concerning Shaken Baby Syndrome in Havard's case, cited above. Dr. Hayne's statements in the July 2013 Affidavit are made to a reasonable degree of medical certainty. Further, Dr. Hayne

states that he is willing to testify at an evidentiary hearing or in a deposition about his findings and opinions in the Havard case.

In the January 2014 newspaper article (Exhibit "6"), Dr. Hayne told the reporter that he "didn't think there was a sexual assault" and that he "didn't see any evidence of a sexual assault". Further, in contrast with his 2010 deposition testimony, Hayne disagrees with the testimony of non-experts in the case (emergency room medical providers) who testified about "findings" that Hayne, the sole forensic expert and only qualified pathologist in the case, did not observe during the autopsy. Hayne points out that the medical providers were focused on saving Chloe Britt's life and that he did a "very careful" post-mortem examination which did not confirm the medical providers testified-to findings.[2] Dr. Hayne states that his careful, expert examination, in contrast to the testimony of the treating physicians and nurses, "would be a definitive evaluation." Finally, Dr. Hayne describes his prior diagnosis of SBS as "probably not correct" in light of scientific advancements.

In the July 2014 Affidavit (Exhibit "4"), Dr. Hayne affirmed all quotations and statements attributed to him in the January 2014 article detailed immediately above. He also affirms that those quotations and statements were made to a reasonable degree of medical certainty. Dr. Hayne further stated 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." Finally, Dr. Hayne stated his desire, and not just his willingness, to testify at an evidentiary hearing on this case.

[2] Though in opening statement, the State told the jury that Dr. Hayne had "confirmed" the worst fears of the medical providers that Chloe had been sexually abused. This was simply not true. And we now know that the State knew it was not true. This constitutes a violation of rights under *Napue v. Illinois*, 360 U.S. 264 (1959), which prohibits prosecutors from presenting juries with information that they know to be false.

Each time that Dr. Hayne has spoken on Havard's case and his opinions related to it, new information emerges. Indeed, Hayne's statements in the January 2014 newspaper article (which were affirmed in the sworn affidavit of July 2014) lack many of the equivocations previously expressed by Dr. Hayne. For instance, Dr. Hayne had previously and consistently deferred to the observations of the non-expert medical providers (as shown by his 2002 trial testimony and 2010 deposition testimony). In his latest statements, he clearly disagrees with those observations and states that his careful forensic evaluation would be "definitive" when compared to the hectic emergency room environment where the providers' focus was on saving a life.

On more than one occasion, new information from Dr. Hayne has led Petitioner to file successive post-conviction petitions with this Court (the *Havard III* proceedings and the instant matter). Hayne's continued statements, which have resulted in piecemeal litigation when the statements reveal new information, further demonstrate the need for an evidentiary hearing in this matter. This Court should remand this matter to the trial court so that Dr. Hayne can be placed under oath and examined on all topics related to the case.

In short, the inquiry at this point is whether Havard has set forth facts which, if true, could entitle him to relief. If so, and these facts are based upon newly-discovered evidence—evidence that was not available to Havard at trial in 2002[3]—then this Court must remand this matter to the Adams County Circuit Court for a full evidentiary hearing on the claims raised in the Amended Motion.

[3] It bears noting that, during Havard's 2002 trial, the State never asked Dr. Hayne if Havard's description of Chloe's accidental fall and striking her head on the toilet was a plausible explanation of her injuries. This fact, combined with Dr. Hayne's new opinions regarding SBS, demonstrate the significance of the new evidence. A jury hearing that shaking alone could not produce enough force to cause Chloe's death but that blunt force trauma to the head—such as from falling from a short distance onto a hard surface like a toilet—could cause such injuries could certainly find that Chloe's death was a tragic accident, and not an intentional homicide as argued by the State at Havard's trial.

IV. THE STATE HAS MISCONSTRUED THE *EDMUNDS* CASE FROM WISCONSIN, WHICH IS STRIKINGLY SIMILAR TO HAVARD'S CASE

The State misconstrues Petitioner's reliance on *State v. Edmunds*, 746 N.W.2d 590 (Wis. Ct. App. 2008) and ignores the pertinent findings and conclusions of that decision. Petitioner relies on *Edmunds* primarily to support his claim that recent advances in the scientific and medical community regarding Shaken Baby Syndrome constitute new evidence sufficient to overcome the procedural bars. In *Edmunds*, the Wisconsin Court of Appeals[4] found that the change in mainstream medical opinion regarding Shaken Baby Syndrome amounted to newly discovered evidence for purposes of overcoming procedural bars and obtaining a new trial. The Court found that even though there were medical opinions questioning the shaken baby syndrome at the time of the trial, "there was not a significant debate about th[e] issue . . . and [] the medical opinions . . . would have been considered minority or fringe medical opinions." *Id.* at 593. The court concluded that "it is the emergence of a **legitimate and significant dispute** within the medical community [regarding shaken baby syndrome] that constitutes newly discovered evidence." *Id.* at 599 (emphasis added).

In an attempt to discredit *Edmunds*, the State cites a later decision of the Wisconsin Court of Appeals, *State v. Cramer*, 351 Wis. 2d 682, 2013 Wisc. App. LEXIS 847 (Wis. Ct. App. 2013), to erroneously suggest that the court now recognizes that Shaken Baby Syndrome is accepted in the medical community without controversy. The quotation lifted from *Cramer* and relied upon—with emphasis—by Respondent, however, came not from the court, but from the state's medical expert witness. 2013 Wisc. App. LEXIS 847 at *5. And the only reason the expert testimony was included in the court's opinion was because it was the subject of a claim by the criminal defendant that it was demonstrably false and misleading, given the medical literature

[4] In the original Motion, it was inadvertently stated that *Edmunds* was an opinion by the Wisconsin Supreme Court.

showing that shaking alone, without some type of impact, cannot cause the type of brain injury commonly associated in the past with shaken baby syndrome. *Id.* at *10.

In addressing the claim, the Court expressly acknowledged the medical literature relied upon by the defendant by citing and quoting *Edmunds*. *Id.* ("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."). The court chose not to grant the defendant relief on that basis, however, but only because the State's expert testified that the victim died from abusive head trauma, not shaken baby syndrome. *Id.* In contrast, **the testimony in Havard's trial was that Chloe had died from shaking alone**. Dr. Hayne testified that the cause of death was "consistent with a person violently shaking a small child," and that he "**did not find any other cause of death**." Tr. at 556-57 (emphasis added). Also, in *Cramer*, the court noted that there was no evidence in the record that the child victim had ever fallen, *id.* at *21-22; such evidence is present in the record in Havard's case. *See* Motion Exh. "F," Havard Interview Transcript. Havard's account of an accidental short fall onto a hard surface was never rebutted by Hayne or the non-expert medical providers. Thus, rather than discrediting it, *Cramer* actually bolsters *Edmunds*, and further demonstrates why Havard is entitled to relief in this case.

Another similar case from a sister jurisdiction is that of Cathy Lynn Henderson. In 2007, the Texas Court of Criminal Appeals, in a post-conviction proceeding similar to what Havard has filed in this matter, remanded the case to the trial court for further proceedings. *Ex Parte Henderson*, 246 S.W.3d 690 (Tex. Crim. App. 2007). Henderson was convicted of capital murder for the death of a three-and-a-half month old child. *Id.* at 691. The key dispute in Henderson's case was whether the child was intentionally killed or died as a result of an accidental short distance fall onto a hard surface (concrete). *Id.* The medical examiner who

testified in Henderson's trial described her description of an accidental fall as "impossible," "false," and "incredible". *Id.* However, Henderson presented affidavits from several experts (including Dr. Janice Ophoven, who has provided an affidavit in this case), who demonstrated that subsequent advances in the scientific and medical communities supported Henderson's theory. *Id.* In light of those developments, the medical examiner questioned his original testimony and stated that he would not be able to testify in a similar manner if the trial were held anew. *Id.* at 691-92.

The Texas Court of Criminal Appeals held that the advances in the scientific and medical communities concerning SBS subsequent to Henderson's trial and the testifying medical examiner's change in opinion because of those advances were "material exculpatory facts". *Id.* at 692. Accordingly, the Court stayed Henderson's execution and remanded the case for further proceedings on her claims. *Id.*

Following the remand, additional proceedings were held and the case returned to the Texas Court of Criminal Appeals. *Ex Parte Henderson*, 384 S.W.3d 833 (Tex. Crim. App. 2012). The Court described the proceedings held in the trial court as follows:

> In accordance with our remand order, the trial court held an evidentiary hearing. Applicant presented the testimony of six expert witnesses. Relying on new developments in the science of biomechanics, these witnesses testified that the type of injuries that Brandon Baugh suffered could have been caused by an accidental short fall onto concrete. Dr. Roberto Bayardo, the medical examiner who testified at trial that applicant's position that Brandon's injuries resulted from an accidental fall was false and impossible, testified at the evidentiary hearing that he now believes that there is no way to determine with a reasonable degree of medical certainty whether Brandon's injuries resulted from an intentional act of abuse or an accidental fall. The State presented five expert witnesses who testified that, notwithstanding the studies cited by applicant's experts, it was very unlikely that Brandon's injuries were caused by an accidental short fall onto concrete.
>
> Following the evidentiary hearing, the trial court recommended granting a new trial. The court found that all of the expert witnesses were truthful and credible. The court further found that Dr. Bayardo's re-evaluation of his 1995 opinion is

> based on credible, new scientific evidence and constitutes a material exculpatory fact. The trial court concluded that applicant has proven by clear and convincing evidence that no reasonable juror would have convicted her of capital murder in light of her new evidence.

Id. at 833-34.

Following the evidentiary hearing, the trial court found that Henderson was actually innocent and vacated Henderson's conviction and death sentence and ordered that she be given a new trial. *Id.* at 834. While unwilling to go so far as to declare Henderson "actually innocent," the Court of Criminal Appeals accepted the trial court's recommendation to vacate the conviction and sentence and to grant Henderson a new trial. *Id.* The close parallels between Havard's case and Henderson's show that Havard should similarly be permitted to advance his claim in the trial court to flesh out the paradigm shift in the medical and scientific communities concerning SBS and how they undermine his conviction and death sentence. Havard's case also mirrors *Henderson* since Dr. Hayne, like the pathologist in *Henderson,* has recanted his trial testimony and stated that his original diagnosis of SBS is "probably not correct." *See also Prete v. Thompson*, 2014 U.S. Dist. LEXIS 9472 (N.D. Ill. Jan. 27, 2014) (finding, in a federal habeas case, that petitioner had established that no reasonable juror could find her guilty beyond a reasonable doubt based upon scientific advances in SBS).

Similarly, in *Paradis v. Arave*, 240 F.3d 1169 (9th Cir. 2001), petitioner's *Brady* claim was based on handwritten notes taken by the prosecutor recording the oral opinions of the state's expert medical witness, opinions the expert held shortly after performing the victim's autopsy. These opinions were exculpatory and supported the Petitioner's theory of defense at trial. Petitioner did not discover the notes until over ten years after his conviction. In affirming the district court's grant of habeas relief, the Ninth Circuit found as fully supported by the evidence the district court's conclusion that petitioner had been prejudiced by the failure of the

prosecution to disclose the notes, as "the nondisclosure of the notes appears to have put the defense team at a substantial disadvantage in preparing the case." *Id.* at 1175. The same can certainly be said here of the failure of the State to turn over Dr. Hayne's pre-trial oral reports and findings, such as the "definitive" evaluation produced by the examination of the tissue slides.

The State also places improper reliance on *Middleton v. State,* 980 So. 2d 351 (Miss. Ct. App. 2008) to vaguely and misleadingly assert that "petitioner's claim is not a novel one." *Middleton* had nothing to do with whether the recent advances in the scientific and medical community regarding Shaken Baby Syndrome constitute new evidence sufficient to overcome procedural bars. Nor did it involve whether a recantation by the sole expert in the case amounted to newly discovered evidence. Rather, *Middleton*, in pertinent part, addressed whether the State's expert in pediatric trauma was qualified to testify about Shaken Baby Syndrome, which the court found that he was. *Id.* at 355-57. The quote lifted by the State from the *Middleton* decision was merely from the court's reporting of the substance of the expert's testimony. *Id.* at 357. It has no legal or binding significance.

Aside from these specific errors, however, the overall and fundamental flaw in the State's argument is that it mistakes the existence of any professional opinions questioning Shaken Baby Syndrome as the newly-discovered evidence at the heart of this petition. The State goes to great lengths to demonstrate that there existed at the time of Petitioner's trial and/or direct appeal voices in the scientific and medical community questioning whether Shaken Baby Syndrome could cause a head injury. From this, the State concludes that Petitioner has not shown newly discovered evidence for purposes of overcoming the procedural bars. But, the newly discovered evidence asserted in the petition is not the mere existence of those opinions, but rather the significant and legitimate debate within the scientific and medical communities that has recently

emerged in which many, if not most, experts now express grave doubts about shaken baby syndrome.[5]

The significant and legitimate debate taking place in academic and professional circles has now emerged in **this case** by virtue of the shift in Dr. Hayne's opinions on the matter of Shaken Baby Syndrome and its relation to his investigation of Chloe Britt's death and his trial testimony concerning his investigation. Dr. Hayne is willing to—indeed, he desires to—testify at an evidentiary hearing about his change of opinion. (*See* Petition Exhibit "A," Hayne Affidavit at ¶ VIII; July 2014 Affidavit at Exh. 4). Based upon prior conversations with Dr. Hayne, it is unclear if prior to trial Dr. Hayne was provided with Havard's explanation of the accidental fall. If he was not, this would have precluded him from accounting for this in his evaluation of Chloe's death and his resulting trial testimony. What is clear from the record is that neither Dr. Hayne nor the non-expert medical providers were accounted for Havard's description of the short accidental fall onto a hard surface in their trial testimony. Havard's statement, coupled with (a) the significant and legitimate debate on the science of Shaken Baby Syndrome and (b) the alternative, non-criminal explanation for Chloe's injuries and death, both as described by Dr. Hayne, demonstrate that the cause and manner of death in this case are in serious question. Indeed, Dr. Hayne now acknowledges that Chloe's death could not have been caused by shaking alone, which directly contradicts his trial testimony and the State's theory at trial. Dr. Hayne describes his original diagnosis that he testified to at trial as "probably not correct." As a result, Havard's conviction and sentence are subject to grave doubts and deserve

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

serious review by this Court or by the Circuit Court of Adams County upon remand to that court for an evidentiary hearing.

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

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

In light of the State's refusal to recognize the paradigm shift in the scientific and medical communities with respect to Shaken Baby Syndrome (SBS), Havard details herein and in Appendix "A", with citations to supporting source material, those developments.

In 2002 (when Havard was arrested, tried, and convicted), virtually no one in mainstream medicine openly questioned the existence of SBS. Today, such questioning is mainstream. *See, e.g.*, Szalavitz, *The Shaky Science of Shaken Baby Syndrome*, TIME (Healthland) (online, Jan. 17, 2012); Bazelon, *Shaken-Baby Syndrome Faces New Questions in Court*, N.Y. TIMES (Dec. 2, 2011); Hansen, *Unsettling Science*, ABA. J.

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

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

trial have been exposed as wrong. For instance, it has now been established that retinal hemorrhages are not traumatic injuries caused by shaking, but occur in a wide variety of non-traumatic and accidental circumstances as a result of intracranial bleeding and pressure.

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

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

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

Contrary to the State's assertion, the new evidence in this case—(1) the paradigm shift in the medical and scientific communities concerning SBS and how the new mainstream analysis of SBS fits into this case and (2) Dr. Hayne's new opinions concerning SBS with respect to the death of Chloe Britt—is material. One need only compare what the jury from Havard's 2002 trial heard with respect to SBS and what a jury in a new trial would hear to see how the new evidence cast grave doubts on the reliability of Havard's conviction.

What the 2002 Jury Heard About SBS

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

- Testimony from witnesses was used to establish that Chloe Britt was a normal, healthy baby prior to her death.
- Dr. Ayesha Dar observed "hemorrhages in [Chloe's] retina . . . which is so very specific of this kind of injury . . . [b]eing a shaken baby. **Nothing else causes that** . . ." Tr. at 415 (emphasis added).
- Dr. Laurie Patterson also noticed the retinal hemorrhaging, describing it as "indicative . . . of a shaken baby type thing . . ." Tr. at 407-408.
- ER Nurse Patricia Murphy saw that Chloe had injuries "consistent with . . . Shaken Baby Syndrome." Tr. at 396.
- Dr. Hayne's autopsy report concluded that Chloe's cause and manner of death was "consistent with Shaken Baby Syndrome." Motion Exh. "G," Final Report of Autopsy.

- Dr. Steven Hayne reiterated Dr. Patterson's testimony that, at the time of her death, the child had both retinal and brain hemorrhaging. Tr. at 407-408, 415, 420, 551-56.
- Dr. Hayne also explained that the subdural hemorrhaging indicated that the child suffered from ripped "small bridging [blood] vessels," likely caused by the child being shaken violently. Tr. at 552.
- Dr. Hayne said that blood-pooling in the brain indicated trauma and injury. Tr. at 552.
- Dr. Hayne also asserted that Chloe's symptoms – subdural hemorrhage and retinal hemorrhage –were "consistent with the shaken baby syndrome." Tr. at 556-57. Dr. Hayne further clarified: "It would be consistent with a person violently shaking a small child. Not an incidental movement of a child, but violently shaking the child back and forth to produce the types of injuries that are described as shaken baby syndrome, which is a syndrome known for at least forty-five years now. . . .We're talking about very violent shaking." Tr. at 556-57. He further explained to the court and the jury that the "classic triad for shaken baby syndrome" – the three primary indicators of SBS – is the presence of subdural hemorrhage, the presence of retinal hemorrhage, and the absence of other potentially lethal causes of death. Tr. at 556.
- Dr. Hayne concluded that Chloe's death was homicide caused solely by "violent shaking". Tr. at 557. He testified at trial that he "did not find any other cause of death." Tr. at 557.

- Dr. Hayne described SBS as a well-established diagnosis, acknowledged for many decades.
- According to Dr. Hayne, the child's symptoms were exclusively diagnostic of SBS: "[b]oth inclusionary findings were present. The subdural hemorrhage, the retinal hemorrhage, and also there was an exclusionary component. I did not find any other causes of death." Tr. at 557. Dr. Hayne described the injuries resulting from the shaking in this case as similar to those from "motor vehicle crashes, falls from significant heights and the like." Tr. at 557. He concluded that Chloe's death was a homicide caused by "violent shaking" committed by "another person". Tr. at 557.
- Dr. Hayne noted that "there were no contusions or bruises and no tears on the brain itself . . . [and] there were no [skull] fractures . . . [or] breaking of the bones composing . . . [any part of the skull]." Tr. at 554-55.
- Dr. Hayne's testimony is devoid of any analysis of the accidental dropping of Chloe as described by Havard. No other witness tendered or qualified as an expert witness analyzed Havard's explanation of an accidental fall onto a hard surface.
- Havard's defense team presented no evidence—and certainly no expert medical evidence—to contest the State's theory of Shaken Baby Syndrome.
- In closing argument, the State urged: "Remember the testimony of Dr. Hayne who told you that this baby died of head trauma of being shaken violently. A violent shaking would be the equivalent of being in a car wreck, of being dropped from a high height is the injury that this baby suffered to her head. Again shaken

violently. And after having been sexually penetrated." Tr. at 611-12. The prosecutor continued: "This baby was shaken to death having been sexually assaulted, and ladies and gentlemen, don't try to understand it. Don't try to figure out how it could have happened. Just know what did happen and render your verdict of guilty of capital murder because that's what this man is over there for doing that to this child." Tr. at 612.

- The State's closing argument concluded by reiterating "what Dr. Hayne said would have to happen for this shaking to cause the injuries that baby had," another reference to the alleged force of the shaking described by Dr. Hayne. Tr. at 624.
- The State concluded its closing argument with this overall theory: "[H]e hurt that child more than he intended to in this sexual battery. He hurt her. Your heard him talking about how she was injured in her rectal area, and what does a child do—what's the only defense an infant baby has got when something like that happens to them? They scream. They don't just cry, folks. They scream in pain. When they're in pain, they scream. And what's he going to do then? She's screaming. He's injured her. Stop her. I got to stop her from screaming. Well, he stopped her all right. She ain't screaming now. And then what does he do? Now, he's not only injured her rectally, but he shook her so hard that results in her death." Tr. at 626.

In short, the jury was told that the SBS symptoms allegedly observed by medical providers and Dr. Hayne could lead to only one conclusion: homicide by shaking alone. No other evidence was adduced at trial. Simply put, Havard's 2002 trial jury was told unequivocally

that the cause and manner of death was Shaken Baby Syndrome, a well-established and non-controversial diagnosis. Period.

What a New Jury Would Hear About SBS

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

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

- Havard now has multiple expert witnesses who would testify on his behalf that Chloe's death was definitively not caused by shaking alone and that the objective, forensic evidence supports Havard's history of a short accidental fall onto a hard surface.
- Dr. Michael Baden concludes "to a reasonable degree of medical certainty, that Chloe Britt's autopsy findings are entirely consistent with having occurred as a result of a short accidental fall, as Mr. Havard has consistently described, and are not consistent with the baby having been shaken to death."
- The external and internal injuries found on Chloe Britt "could be caused by the impact of a short fall as described by Mr. Havard," according to Baden.
- Dr. Baden notes that Chloe Britt did not have other injuries that are typically associated with violent shaking injuries in infants.
- Dr. Baden states that retinal folds are not solely indicative of SBS but can "occur as the result of many types of innocent head trauma."
- Dr. Janice Ophoven has conducted an in-depth anlaysis of Chloe's birth and pediatric records and found multiple instances of chronic issues that are often mistaken for SBS symptoms.
- Dr. Ophoven states that "[t]here is no medical or scientific support" for Dr. Hayne's comparisons of the forces involved in the shaking death of Chloe Britt as the equivalent of those seen in high speed car collisions and falls from great heights.

- Dr. Ophoven rejects any finding of shaking as causing the death of Chloe Britt. Rather, the available evidence supports a finding of death by impact, such as that resulting from a short distance fall onto a hard surface.
- Dr. George Nichols opines that, at the time of Havard's trial in 2002, many medical experts would have agreed with the SBS conclusion found and expressed in 2002 by Dr. Hayne.
- Dr. Nichols describes academic research that casts "serious doubt on the conclusions that retinal hemorrhages and subdural hematomas in infants are specific signs of vigorous shaking."
- Dr. Nichols describes how advances in medicine have led to recognition of other causes for what have traditionally been considered SBS symptoms—such causes include "various infections" (from which Chloe suffered during her young life) and "simple impact trauma" (as caused by a short fall onto a hard surface).
- Dr. Nichols also takes to task Dr. Hayne's descriptions of the forces involved in causing Chloe's injuries, stating that it "is now generally agreed by most forensic pathologists and biomechanical scientists and engineers that such comparisons are without scientific merit and should not be made."
- Dr. Chris Van Ee, a biomechanical engineer, has conducted research of many of the scientific underpinnings of SBS theory and have found many of them lacking or completely unfounded.
- Dr. Van Ee opines that "short distance falls of three feet or less can result in serious, and sometimes fatal, head injury" and that "low level falls can result in serious and fatal head trauma including subdural and retinal hemorrhage." Dr.

Van Ee also specifically notes that a short distance fall head-first onto a hard surface such as a porcelain toilet tank could cause "a severe, or fatal, head injury."

- Dr. Van Ee opines that shaking—advanced at the 2002 trial as the sole cause and manner of death—is a "less likely" explanation for Chloe's injuries than the short distance accidental fall onto a "particularly hard surface" as described by Havard.
- Dr. Van Ee also criticizes Dr. Hayne's trial testimony describing the forces involved in producing Chloe's injuries as equivalent to a multi-story fall or high speed motor vehicle accident as "without scientific foundation."
- Analysis of the short distance accidental fall as described by Havard by renowned experts demonstrates that Chloe's injuries could have been caused by the short distance, accidental fall onto a hard surface as consistently described by Havard.
- Dr. Hayne would acknowledge that Chloe's injuries and death could have been caused by simple "blunt force trauma" such as could be caused by a fall, even at a short distance, onto a hard surface (porcelain toilet tank).
- Testimony regarding Chloe's medical history as derived from her birth and pediatric records reveals chronic issues that can causes symptoms that were historically attributed to SBS.

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

Havard's conviction and sentence or, at the very least, grant Havard permission to file his PCR petition in the trial court, so that further proceedings can be held.

VII. THE STATE CLEARLY VIOLATED HAVARD'S FUNDAMENTAL RIGHTS UNDER BRADY V. MARYLAND BY FAILING TO DISCLOSE EXCULPATORY INFORMATION FROM DR. HAYNE, INCLUDING PRE-TRIAL ORAL REPORTS AND DEFINITIVE TISSUE SAMPLING THAT CONTRADICTED AND IMPEACHED THE FINDINGS OF THE NON-EXPERT MEDICAL PROVIDERS AS WELL AS DR. HAYNE'S TRIAL TESTIMONY

The first newly-discovered evidence that demonstrated a *Brady* violation was quotations made by and statements attributed to Dr. Steven Hayne in a January 2014 newspaper article. In addition, Havard's counsel has now secured an affidavit from Dr. Hayne to address the State's prior concerns that a newspaper article is not proper evidence in a post-conviction proceeding. 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 "4," 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 "4," 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 by the State. Glaringly missing from the State's Response is any shred of evidence that (a) Dr. Hayne did not make the pre-trial disclosures to the prosecutors that he has described or (b) that any such disclosures were produced to Havard's trial counsel. To the contrary, the State obtained an Affidavit from Havard's lead trial counsel, Gus Sermos, that proves that such disclosures were not made to Havard's trial counsel. Sermos states that, before trial, he "was aware that the pathologist who

performed Chloe Britt's autopsy, Dr. Steven T. Hayne, found evidence consistent with her being sexually battered." Exhibit "7," Sermos 2014 Affidavit at ¶ 3. This proves Havard's *Brady* claim, as this awareness differs from what Dr. Hayne told the prosecutors.[6] Thus, the evidence before the Court is that Dr. Hayne made pre-trial exculpatory reports to prosecutors about the single most important issue in the case (sexual abuse) and Mr. Sermos was not aware of them. This shows a classic *Brady* violation.

In light of Dr. Hayne's July 2014 Affidavit and statements in the 2014 newspaper article, one must wonder how Sermos would have been "aware" of Hayne's conclusions regarding sexual abuse? It certainly was not from the autopsy report, which contained not a single reference to sexual abuse. Exhibit "9," Autopsy Report. It was also not from Sermos meeting with Dr. Hayne, because that was never done. Exhibit "2," Hayne Depo. at p. 29. The only known avenues for Sermos to gain this "awareness" come from State sources such as (1) material disclosed by the State in discovery such as the Sheriff's Investigative Report (Exhibit "10"), (2) statements by State actors to newspapers stating, falsely we now know, that autopsy findings "confirmed" the presence of sexual assault (Exhibit "11"), or (3) oral reports from the District Attorney's office.

The Sheriff's Investigative Report includes statements attributed to Dr. Hayne that supposedly confirm the sexual battery allegation but that contradict the findings that Dr. Hayne has described as well as his oral reports to prosecutors. Either Dr. Hayne initially believed the child's "mouth and anus had positively been invaded by a foreign object" and later changed his mind, or Dr. Hayne never held that belief nor communicated that belief to Coroner Lee, and its

[6] Indeed, the District Attorney is quoted in the January 2014 *Clarion-Ledger* article (*See* Exhibit "6") as saying that Dr. Hayne was the State's **weakest** witness in the area of sexual abuse. We now know why the District Attorney thought that his sole expert witness was his weakest witness. The problem is that the reasons why the District Attorney felt this way before trial were never disclosed to Havard or his counsel.

inclusion within Sheriff Ferrell's report was an error. Either way, the State had a responsibility under *Brady* and UCCCR 9.04 to update discovery or to correct errors in the discovery it had already provided.

The newspaper articles contain quotes from Coroner James Lee, who testified for the State at trial, stating that "[t]he autopsy also showed the baby's private parts were violated." Exhibit "11," Natchez Democrat article from Feb. 24, 2002. This statement is clearly false when compared with Dr. Hayne's findings and statements as set forth in the January 2014 newspaper article and the July 2014 Affidavit affirming, under oath, his statements in that article.

Clearly, Sermos's awareness was shaped solely by information disclosed by the State. The State cannot provide misleading information and fail to disclose material, exculpatory information such as Dr. Hayne's oral reports to prosecutors, and then complain that Havard should have known the truth the whole time. The State's actions created detrimental reliance on the misleading information, leading to Sermos's "awareness" that Dr. Hayne held opinions that he actually did not hold.

The State argues that its *Brady* obligations 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. The failure to turn over the results of Dr. Hayne's "definitive" evaluation that contradicted the findings of the non-expert medical providers, including tissue sample analysis, further underscores the *Brady* violation.

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 and his "definitive evaluation" that contradicted the non-expert medical providers 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. Tr. at 99-101. 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 and the results of Dr. Hayne's "definitive evaluation" that contrasted with the findings of the non-expert medical providers that the State intended to call as witnesses. 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).

In *Ham*, the defendant was convicted of the offense of injury to a child and sentenced to life imprisonment. The prosecution's theory was that the child died from a subdural hemorrhage caused by severe shaking that occurred while the child was in the exclusive care of the defendant. The state supported its theory with the testimony of the treating pediatrician and an expert pathologist, both of whom opined that the injuries occurred during that time period. The defendant's theory, on the other hand, was that the injuries occurred before the child was in his care and while the child was with her mother and stepfather. In support, the defendant presented the testimony of an expert medical examiner who opined that the injury occurred during that time period.

On appeal, the defendant argued that the trial court erred in failing to grant his *Brady* motion for a new trial because of the state's suppression of exculpatory evidence from another expert medical examiner who examined the child's death at the request of the prosecution.

During the week of trial, that medical examiner orally reported to the prosecution that he could not rule out the injuries having occurred during the time period the child was with her mother and stepfather. Despite knowing that the defendant's theory was that the injury occurred during that time period, the prosecution did not reveal the medical examiner's oral report to the defendant. Concluding that the medical examiner's oral report to prosecutors was of material importance to the defendant's theory of the case, and relying solely on that ground, the court of appeals reversed the judgment of the trial court and then remanded the case for a new trial. *Id.* at 57-58.

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).
>
> 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 reports 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).

The Sixth Circuit's opinion in *United States v. Tavera*, 719 F.3d 705 (6th Cir. 2013), is a recent illustration of the principles set forth in *Banks*. In *Tavera*, like in Havard's case, the prosecution failed to reveal pretrial statements which were favorable to the defense made to the prosecution by one of its key witnesses. The defendant in *Tavera* had been charged with conspiracy to distribute methamphetamine, and prior to trial the codefendant had informed prosecutors that *Tavera* knew nothing about the conspiracy; however, when the codefendant was offered a plea deal, he retracted his original version of events. The prosecution did not disclose the codefendant's original statement to the defense. The Defendant was ultimately convicted, and on appeal he argued that *Brady* required disclosure of the original, exculpatory statement the codefendant had made to the prosecution prior to trial. The Sixth Circuit agreed.

The *Tavera* court pointed out that "*Brady* itself was a case like this one in which the prosecution failed to disclose a statement by a codefendant that Brady did not shoot the victim. Neither Brady nor his counsel had made any attempt to interview the witness prior to trial." The State argued that Tavera or his counsel should have discovered the statement through their own exercise of diligence by simply asking the codefendant if he had previously spoken with prosecutors. The Sixth Circuit rejected that argument, finding that there is no requirement of defendant due diligence when analyzing a *Brady* claim, because such a requirement "places the burden of discovering exculpatory information on the defendant and releases the prosecutor from the duty of disclosure. It relieves the government of its *Brady* obligations." The Sixth Circuit based its holding on the United States Supreme Court's rule from *Banks*.

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.

The State also argues that Havard should have raised this claim following the 2010 deposition of Dr. Hayne where Dr. Hayne described discussing with prosecutors prior to trial that all he "could tell the district attorney, prior to trial, was that there was a contusion, and that would be consistent with sexual abuse, but I'd like to see more evidence before I made that next and more significant evaluation and conclusion." This 2010 statement is much different than what Hayne told the newspaper reporter in January 2014 and swore in his affidavit in July 2014. Hayne's most recent statements are that he told prosecutors he could not support a finding of sexual abuse in the Havard case. He further stated "I didn't think there was a sexual assault. I didn't see any evidence of sexual assault." Dr. Hayne also described his thorough evaluation which produced results that contradicted the testimony of non-expert medical providers as well as the tightly couched trial testimony of Dr. Hayne himself. Dr. Hayne described those evaluations in the January 2014 newspaper article (and verified the description under oath in the July 2014 Affidavit): "We were very careful, and we also took sections." After examining those sections, Hayne concluded there "were no tears, rips or similar injuries to the child's rectum." "I would think that would be a definitive evaluation," Hayne said. The non-expert medical providers perhaps mistook what they described as tears as naturally-occurring folds. What is certain is that there could not have been violent tearing as described by the non-expert medical providers that was then not found hours later during the detailed, thorough autopsy examination by Dr. Hayne. That is a physical impossibility.

These statements stand in contrast to the 2010 deposition testimony, where Dr. Hayne stated that he deferred to the evaluations of those same medical providers. (Exhibit "2," Hayne Depo. at p. 25). Further, the statement highlighted by the State is not exculpatory like the new statements. The statement from 2010 that Hayne told the prosecutor "there was a contusion, and that would be consistent with sexual abuse" is exactly how Hayne testified at trial. *See* Tr. at 551 (describing a small bruise as "consistent with penetration of the rectum with an object, sir."). There was no *Brady* significance to the isolated statement in the 2010 deposition. Clearly, there is powerful exculpatory and *Brady* value in the new statements of Dr. Hayne. Havard is clearly entitled to relief under *Brady* and its progeny.

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 the 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 statements directly contradict the alleged findings of the non-expert medical providers. The "definitive" tissue samples that Dr. Hayne describes as showing "no tears, rips or similar injuries to the child's rectum" render physical and forensically impossible the testimony of the non-expert medical providers that described seeing such injuries in the emergency room. There is no middle ground on this point. If a forensic examination did not find evidence of "tears, rips or similar injuries" then testimony by non-expert medical providers that they were there is plainly wrong, and Dr. Hayne now says as much when he describes his evaluation as "definitive". This disagreement between the State's sole expert and the non-expert medical providers 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 Dr. Hayne's findings.[7]

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). The Court reasoned: "The clear inference from this testimony [from the non-expert medical providers], the clear conclusion from this testimony is that the child's anus suffered some type of violent intrusion into it….there is sufficient evidence that's been presented to support some type of insertion of penetration into the minor victim's anus of such a violent nature as to cause the condition as observed by the medical personnel at the Community Hospital emergency room." Tr. at 571. "[F]rom all the testimony, a reasonable jury could clearly find beyond a reasonable doubt that and even excluding any reasonable hypothesis consistent with innocence that the defendant being admittedly without question the sole one that was with the child at the time of these apparent injuries and whatever happened to her anus, committed a sexual battery upon a six-month-old child, he being twenty-three years of age at the time, by insertion of his penis or some other object into the child's anus, partially or clearly to some extent." Tr. at 572.

[7] Further, if the defense had been aware that there was conclusive evidence that the child's anus was not injured (from Dr. Hayne's "definitive" evaluation of tissue samples, for instance), the testimony of expert witness Amy Winter regarding the DNA found on the sheets and towels in the home would also have been eliminated because it would have been irrelevant. The State offered the evidence of mixed DNA found on the sheet in order to show the child was sexually assaulted and bleeding from her rectum. But if there were no injuries to the child's rectum, then the miniscule stains of biological material found on the bed sheets would have been irrelevant to a fact that was in dispute in the case.

The trial judge thus denied directed verdict because of the unexplained "injuries" to Chloe's anus; injuries that we now know were definitively not found by Dr. Hayne's microscopic tissue analysis. Dr. Hayne further states that he did not believe upon completing his autopsy that a sexual battery had occurred. For this reason, he told the State before trial that he could not support a sexual battery allegation in this case. 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"[8] the sexual battery throughout the trial. Indeed, the State used Havard's "inability to explain" as direct proof of his guilt. 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.

This not only demonstrates prejudice for the purpose of the *Brady* claim, but it also shows that the State presented false and misleading argument, given that prosecutors knew before trial that Dr. Hayne could not support a sexual battery allegation. Thus, the State knew there was more than one explanation for the condition of the anus (which, as described by

[8] Clearly, the burden was consistently shifted to Havard to explain the anal condition. However, it is a longstanding principle in our legal system that allegations of child sexual abuse require expert witness testimony in support of such an allegation. Not only was the State's own testimony lacking in this regard, since we now know that Dr. Hayne told prosecutors he could not support that allegation, but Havard himself did not have the benefit of his own expert assistance. Thus, Havard was deprived of any ability to explain the condition. This was compounded by the fact that the full extent of Dr. Hayne's opinions, including those that were highly exculpatory, were unknown to the trial judge, the jury, and Havard's trial counsel. Had all of this been known, there is a reasonable probability that Havard would have received a directed verdict on the entirety of the case or a different result if the case had survived directed verdict and been submitted to the jury.

Havard previously, was caused by numerous natural conditions related to oxygen-deprivation and brain death) besides sexual battery. The State's own and sole expert could not support the sexual battery theory. And yet the State acted as if there was but one conclusion the jury could reach: a sexual battery had occurred. This is clearly not the case and, making matters worse, Dr. Hayne's new statements show that the State knew this at the time of trial.[9]

The importance of Dr. Hayne's "definitive" analysis of the microscopic sections also demonstrates prejudice to Havard. Those tissue samples and Dr. Hayne's analysis of them show that Chloe's anus was NOT, in fact, ripped, abraded, torn or otherwise similarly injured in any way, and that the non-expert medical providers testimony to the contrary had to be mistakens. The results of that analysis are clearly favorable to Havard, both as evidence of innocence and for purposes of impeachment. These "definitive" results could have been used to impeach the testimony of eight of the State's most critical witnesses: Nurse Godbold, Nurse Murphy, Dr. Patterson, Dr. Dar, Sheriff Ferrell, Deputy Manley, Coroner Lee and Dr. Hayne himself. This shows that the State's failures to disclose the entirety of Dr. Hayne's findings and his pre-trial oral reports resulted in a colossal *Brady* violation that impacted the entirety of the case. Also, Dr. Hayne's trial testimony that he could have missed a tear seen by the doctors and nurses due to rigor mortis, in light of the "definitive" tissue samples Dr. Hayne now speaks of, demonstrates that Dr. Hayne's trial testimony in this respect was misleading. This is yet another *Napue* violation that the State allowed to go uncorrected and instead seized upon in seeking Havard's conviction and death sentence.

[9] The State has similarly placed great reliance on the supposed findings of Dr. Hayne for years. The State has consistently—through direct appeal, post-conviction proceedings, and federal habeas proceedings—emphasized that Dr. Hayne supports the sexual battery allegation in this case. The State cannot now act as if Dr. Hayne's recent statements are immaterial. The State cannot have it both ways. Either Dr. Hayne's previously-known opinions supported the State's case and the new ones which do not are newly-discovered evidence or Dr. Hayne's findings have never supported a finding of sexual battery in this case. In either event, Havard's conviction and death sentence are utterly tainted and zero confidence should be placed in the jury's verdict. Havard deserves a new trial where all of the evidence can be placed before a jury.

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. In this case, which rests completely on the sexual battery allegation, how can the jury's verdict be worth of confidence when even the State's sole expert witness on sexual abuse says (a) he did not think that a sexual battery occurred and (b) he told prosecutors before trial that he could not support a theory of sexual battery in the case? The answer, simply, is that there can be no confidence in this verdict, since the jury never heard any of this. Havard's conviction and sentence should be vacated. At the very least, the case should proceed with an evidentiary hearing on these issues in the trial court.

VIII. ALTERNATIVELY TO THE BRADY CLAIM, NEW EVIDENCE DEMONSTRATES THAT HAVARD'S TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO UNCOVER DR. HAYNE'S CONCLUSIONS AND FINDINGS

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 and other evaluations, then that lack of diligence would constitute ineffective assistance of counsel. Havard was granted leave to amend this post-conviction petition to add this alternative claim as well.

Under the Sixth Amendment, the "'right to counsel is the right to effective assistance of counsel.'" *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the

defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland,* 466 U.S. at 687.

To the extent that this Court deems that the failure to discover prior to trial the findings and reports of Dr. Hayne was based on a lack of diligence, then Havard's trial counsel were ineffective in failing to adequately investigate, obtain, and utilize that information. A wealth of authorities illustrates how Havard's trial counsel were ineffective in failing to obtain information about Dr. Hayne's analyses, findings, and pre-trial reports to prosecutors. *See Strickland v. Washington*, 466 U.S. 668, 680 (1984) (counsel has a duty to conduct an "independent examination of the facts, circumstances, pleadings and laws involved"); *Foster v. Wolfenbarger*, 687 F.3d 702 (6th Cir. 2012) (holding trial counsel ineffective when he "chose not to investigate an avenue that potentially could have bolstered the defense that counsel was already pursuing"); *Elmore v. Ozmint*, 661 F.3d 783 (4th Cir. 2011) (holding trial counsel rendered ineffective assistance of counsel for "blind acceptance of State's forensic evidence" and failing to investigate or adequately challenge that evidence); *Bell v. Miller*, 500 F.3d 149 (2d Cir. 2007) (counsel ineffective for failing to ask any questions about underlying medical evidence and failing to obtain assistance of expert witness that could have assisted with crucial effort to attack victim's memory loss due to medical conditions); *Rolan v. Vaughn*, 445 F.3d 671 (3d Cir. 2006) (holding that the failure to conduct any pretrial investigation is objectively unreasonable). *See also* Shanks, Laurie, CHILD SEXUAL ABUSE: MOVING TOWARD A BALANCED AND RATIONAL

APPROACH TO THE CASES EVERYONE ABHORS, 34 Am. J. Trial Advoc. 517, 536 (2011) ("As in any serious case, the lawyer must conduct an appropriate investigation in order to competently represent her client. This task is particularly imperative in cases involving sexual abuse allegations given the very real possibility that the police have not conducted a thorough investigation.").

Decisions from the Fifth Circuit Court of Appeals also demonstrate that Petitioner's counsel were ineffective in this regard. In *Soffar v. Dretke*, 368 F.3d 441 (5th Cir. 2004), the defendant's murder conviction was reversed by virtue of ineffective assistance of counsel. The court faulted defense counsel for failing to investigate ballistics evidence and for failing to consult or call a ballistics expert when the prosecution's case was largely based on expert testimony about ballistics. *Id.* at 477-78. The court held that defense counsel's failures could "not be described as a reasonable exercise of professional judgment or as 'part of a calculated trial strategy, but is likely the result of either indolence or incompetence.'" *Id.* at 478 (quoting *Anderson v. Johnson*, 338 F.3d 382, 393 (5th Cir. 2003)). In *Anderson*, the Fifth Circuit found that trial counsel was ineffective when "he relied exclusively on the investigative work of the State and based his own pre-trial 'investigation' on assumptions divined from a review of the State's files.").

As shown above, the 2014 Affidavit from Havard's trial counsel, Gus Sermos, reveals that he must have relied exclusively on the State's files and statements to come to his "awareness" that Dr. Hayne's finding supported the sexual battery allegation. This is a clear example of an ineffective investigation, in light of the fact that Dr. Hayne now describes his pre-trial opinions as not believing a sexual assault had occurred and not finding any evidence in support of that allegation.

The failure to uncover this information infected the entire case. A 2004 Affidavit from Sermos shows that he understood the importance of the sexual battery allegation in preparing the defense. He states: "We believed that our best defense to the capital murder charge was to challenge the evidence of sexual battery, the underlying felony...." (Exhibit "8", 2004 Affidavit of Sermos at ¶ 6). Sermos continues: "I believe that a pathologist could have assisted in the that aspect of the case but had no funding to hire a pathologist and I did not consult a pathologist." (Exhibit "8", 2004 Affidavit of Sermos at ¶ 6). Thus, Sermos chose a defense strategy but did not conduct an independent investigation or familiarize himself with the forensic issues in the case, including delving into the full opinions of Dr. Hayne. He took what was provided by the State at face value and then failed to do anything on his own. In a case that was built primarily on an allegation of sexual battery, this is prejudicial ineffective assistance of counsel.

Simply put, if the Court finds that the Hayne information detailed in the July 2014 Affidavit and January 2014 newspaper article was not discovered by Havard due to a lack of diligence, that lack of diligence can only be placed on Havard's trial counsel. Havard's trial counsel did not properly investigate the underlying felony of sexual abuse—the most important issue in the case—or even simply talk with Dr. Hayne prior to trial to determine his opinions and the evaluation that his opinions were based upon. In doing so, they also failed to reveal significant disparities between Dr. Hayne's findings (which he describes as "definitive") and the findings of non-expert medical providers. The non-expert providers testified to things that were a physical impossibility in light of Dr. Hayne's autopsy findings (such as the "definitive" tissue sample analysis). But without a proper investigation, trial counsel could not present Dr. Hayne's disagreements with the non-expert medical providers or his determination that he did not believe a sexual battery had occurred and could not support a finding of sexual battery in the case.

Again, if there was a lack of diligence, it was trial counsel who should be found wanting and ineffective, not Havard himself, a layman with no scientific or legal training.

These failures by trial counsel constitute violations of Guidelines 11.4.1 (Investigation) and 11.4.7 (General Trial Preparation) of the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989).[10]

For the same reasons as set forth in the Brady claim detailed above, Havard was prejudiced by this ineffective assistance of counsel and there is a reasonable probability that, but for this ineffectiveness, the result of the proceeding would have been different. Therefore, Petitioner is entitled to relief under *Strickland* and related case law, as an alternative claim to the *Brady* claim.

IX. REBUTTAL TO THE STATE'S ARGUMENTS REGARDING THE APPLICATION OF RULE 60

Petitioner has detailed in the Amended Motion for Relief the rationale for his request for relief under Rule 60, and will not repeat those arguments here. However, in rebuttal to the State's Response on this issue, Petitioner would simply clarify what he is seeking with respect to the request for Rule 60 relief. Petitioner is asking for relief from this Court's prior judgments, and specifically requests this Court to recall the mandate issued in Petitioner's initial PCR proceedings and re-open those proceedings, in light of the newly-discovered evidence. The Court is certainly empowered to do so in the interest of justice, particularly in a case involving the serious and irreversible penalty at issue here: death. *See, e.g.*, En Banc Order, *Byrom v. State*, No. 2014-DR-00230-SCT (Miss. Mar. 31, 2014). Given all of the questions surrounding the conviction and sentence of Jeffrey Havard, justice would only be served by this Court granting

[10] The United States Supreme Court has consistently held that the ABA Guidelines are to be used when "determining what is reasonable" when examining claims of ineffective assistance of counsel. *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Williams v. Taylor*, 529 U.S. 362, 396 (2000).

extraordinary relief and granting Havard a new trial. However, in the alternative, Petitioner requests leave to proceed with further post-conviction proceedings in the trial court.

X. CONCLUSION

As demonstrated in the Amended Motion and herein, Petitioner has set forth claims based upon new evidence which, if proven, would entitle Petitioner to relief. In these claims, Petitioner has raised facts, which this Court must assume at this stage are true, sufficient to warrant an evidentiary hearing. None of these claims are procedurally or otherwise barred from consideration. The Amended Motion should, accordingly, be granted. Petitioner's conviction and death sentence should be vacated and a new trial ordered. In the alternative, Petitioner should be allowed to file his Motion for Post-Conviction Relief in the Circuit Court of Adams County and proceed with an evidentiary hearing in that court.

Respectfully submitted, this the 13th day of October, 2014.

Respectfully submitted,

JEFFREY HAVARD, PETITIONER

/s/ Graham P. Carner
GRAHAM P. CARNER

GRAHAM P. CARNER (MSB # 101523)
GRAHAM P. CARNER, PLLC
771 N. Congress Street
Jackson, MS 39202
Tel: 601-949-9456
Fax: 601-354-7854
graham.carner@gmail.com

MARK D. JICKA (MSB # 8969)
WATKINS & EAGER PLLC

400 E. Capitol Street
Jackson, MS 39201
Tel: 601-965-1900
Fax: 601-965-1901
mjicka@watkinseager.com

ATTORNEYS FOR PETITIONER JEFFREY HAVARD

CERTIFICATE OF SERVICE

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

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

This the 13th day of October, 2014.

/s/ Graham P. Carner
GRAHAM P. CARNER