IN THE SUPREME COURT OF MISSISSIPPI

JEFFREY KEITH HAVARD, *Petitioner*

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

STATE OF MISSISSIPPI, *Respondent*

RESPONDENT'S AMENDED RESPONSE IN OPPOSITION TO PETITIONER'S AMENDED MOTION FOR RELIEF FROM JUDGEMENT OR LEAVE TO FILE SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF

COMES NOW the Respondent, the State of Mississippi, by and through undersigned counsel, and submits the State's Amended Response in Opposition to Jeffrey Keith Havard, the Petitioner's Amended Motion for Relief from Judgement or Leave to File Successive Petition for Post-Conviction Relief. The State respectfully requests that the Court dismiss Havard's Amended Motion for Relief from Judgement or Leave to File Successive Petition for Post-Conviction Relief and deny him the relief he seeks. The State submits the following in support.

INTRODUCTION

This matter comes to the Court on Havard's Amended Motion for Relief from Judgement or Leave to File Motion for Post-Conviction Relief, pursuant to the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution; Article 3, Sections 14 and 28 of the Mississippi State Constitution; the Uniform Post Conviction and Collateral Relief Act; and the Mississippi Rules of Appellate and Civil Procedure. Havard presents the Court with four claims for relief none of which entitle him any relief.

PROCEDURAL HISTORY

On June 24, 2002, an Adams County Grand Jury indicted Havard for the willful, unlawful and felonious killing and murder of Chloe Britt, a human being, with or without design to effect death, while engaged in the commission of the crime of sexual battery in violation of Miss. Code Ann. § 97-3-19(2)(e). CP at 153. Havard's capital murder trial began in December of 2002. A jury ultimately convicted Havard of capital murder on December 18, 2002. *Id.* at 213. The next day, the jury heard aggravating and mitigating evidence, deliberated, and returned a sentence of death in proper form. The verdict read:

> We, the jury, unanimously find from the evidence beyond a reasonable doubt that the following facts existed at the time of the commission of the capital murder:
>
> A. 1. That the defendant actually killed Chloe Madison Britt. Next, we the jury, unanimously find that the aggravating circumstances of:
>
> 2. That the capital offense was committed while the defendant was engaged in the commission of, or an attempt to commit, sexual battery.
>
> 3. That the capital offense was especially heinous, atrocious or cruel.
>
> exist beyond a reasonable doubt and are sufficient to impose the death penalty and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances, and we further find unanimously that the defendant should suffer death.
>
> (s) Cynthia Etheridge
> FOREMAN THE JURY

CP at 214, 216.

Havard directly appealed to this Court, raising the following fifteen claims:

I. WHETHER TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO INSURE THAT A JUROR WAS EXCUSED FOR CAUSE AFTER EXHIBITING BIAS.

II. WHETHER TRIAL COUNSEL WERE INEFFECTIVE BY FAILING TO ASK "REVERSE-*WITHERSPOON*" QUESTIONS RELATING TO THE JURORS' POTENTIAL STRONG FEELINGS ABOUT THE DEATH PENALTY.

III. WHETHER HAVARD WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BECAUSE OF THE SEATING OF A JUROR WHO SUPPORTS THE DEATH PENALTY IN ALL MURDER CASES AND THAT JUROR'S FAILURE TO ANSWER THE TRIAL COURT'S QUESTION ON POINT.

IV. WHETHER HAVARD WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DUE TO COUNSEL'S FAILURE TO ADEQUATELY SUPPORT THE DEFENSE STRATEGY.

1. Failure to obtain DNA evidence
2. Failure to secure a pathologist
3. Failure to include a lesser offense instruction

V. WHETHER HAVARD WAS DENIED HIS CONSTITUTIONAL RIGHT OF A FUNDAMENTALLY FAIR TRIAL BECAUSE OF PROSECUTORIAL MISCONDUCT AT CLOSING ARGUMENT.

VI. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE INTRODUCTION OF VICTIM IMPACT TESTIMONY AT SENTENCING.

VII. WHETHER TRIAL COUNSEL WERE INEFFECTIVE FOR NOT DEVELOPING AND PRESENTING COMPELLING EVIDENCE IN MITIGATION OF PUNISHMENT.

VIII. WHETHER HAVARD WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN CLOSING ARGUMENT AT THE SENTENCING PHASE OF TRIAL.

IX. WHETHER THE TRIAL COURT ERRED IN OVERRULING AN OBJECTION TO A PHOTOGRAPH DEPICTING THE VICTIM DURING HER LIFETIME, THUS CAUSING PREJUDICIAL SYMPATHY.

X. WHETHER THE TRIAL COURT ERRED IN ANSWERING A QUESTION SUBMITTED BY THE JURY IN SUCH A WAY AS TO CAUSE SPECULATION OF EARLY RELEASE FROM A LIFE SENTENCE.

XI. WHETHER THE TRIAL COURT'S LIMITING INSTRUCTION OF AN AGGRAVATING CIRCUMSTANCE WAS ITSELF UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

XII. WHETHER THE INDICTMENT FAILED TO CHARGE THE NECESSARY ELEMENTS TO IMPOSE THE DEATH PENALTY.

XIII. WHETHER HAVARD WAS DENIED HIS CONSTITUTIONAL RIGHT TO A RELIABLE SENTENCE BECAUSE THE TRIAL COURT ALLOWED THE JURY TO CONSIDER AGGRAVATORS TO SUPPORT THE SENTENCE OF DEATH.

XIV. WHETHER AGGREGATE ERROR IN THIS CASE REQUIRES REVERSAL OF THE CONVICTION AND DEATH SENTENCE.

XV. WHETHER ANY STATUTORILY REQUIRED ISSUES HAVE MERIT, INCLUDING WHETHER THE SENTENCE WAS DISPROPORTIONATE TO THE PENALTY IN SIMILAR CASES.

Havard v. State, 928 So.2d 771, 780-804 (Miss. 2006). The Court affirmed Havard's conviction and sentence. *See id.* He subsequently filed a motion for rehearing, which was denied on May 25, 2006.

Havard filed a petition for Writ of *Certiorari* with the Supreme Court of the United States and presented one question:

I. IN A DEATH PENALTY CASE INVOLVING A CHARGE OF SEXUAL ASSAULT, DOES COUNSEL RENDER INEFFECTIVE ASSISTANCE OF COUNSEL WHERE HE FAILS TO REMOVE A PROSPECTIVE JUROR WHO STATES ON *VIOR DIRE* THAT AS A RESULT OF THE RAPE OF A FAMILY MEMBER SHE CAN NOT BE FAIR AND IN FACT SERVES ON THE JURY THAT FINDS THE DEFENDANT GUILTY AND SENTENCES HIM TO DEATH?

Certiorari was denied. *Havard v. Mississippi*, 549 U.S. 1119, 127 S.Ct. 931, 166 L.Ed.2d 716 (2007). No petition for rehearing was filed.

Then on May 25, 2007, Havard filed an Application for Leave to Proceed in the Trial Court and Motion for Other Relief. This Court denied all fourteen claims raised in Havard's application on May 22, 2008, summarizing them as:

I. INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO ADOPT DEFENSE STRATEGY DURING GUILT PHASE.

A) Failure to obtain DNA evidence.
B) Failure to secure a pathologist.
C) Failure to include a lesser-offense instruction.

II. INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO INVESTIGATE, DEVELOP AND PRESENT MITIGATION EVIDENCE DURING THE PENALTY PHASE.

III. INEFFECTIVE ASSISTANCE OF FOR FAILING TO DEVELOP AND PRESENT COMPELLING EVIDENCE OF HAVARD'S CHILDHOOD AND FAMILY LIFE IN MITIGATION OF PUNISHMENT.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO DEVELOP AND INTRODUCE HAVARD'S SUCCESSFUL ADAPTATION AT CAMP SHELBY AS MITIGATION EVIDENCE DURING THE PENALTY PHASE.

V. INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO ASK POTENTIAL JURORS "REVERSE-*WITHERSPOON*" QUESTIONS DURING VOIR DIRE.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL DURING CLOSING ARGUMENT AT THE PENALTY PHASE.

VII. PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT AT THE GUILT PHASE.

VIII. VICTIM IMPACT TESTIMONY.

IX. WHETHER THE TRIAL COURT IMPROPERLY RESPONDED TO A QUESTION FROM THE JURY DURING THE SENTENCING PHASE.

X. LIMITING INSTRUCTION OF ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE.

XI. FAILURE OF THE INDICTMENT TO CHARGE A DEATH-PENALTY-ELIGIBLE OFFENSE.

XII. JURY CONSIDERATION OF AGGRAVATING CIRCUMSTANCES.

XIII. COMPETENCY OF TRIAL COUNSEL.

XIV. CUMULATIVE ERROR.

Havard v. State, 988 So.2d 322 (Miss. 2008). This Court denied Havard's motion for rehearing on August 28, 2008. *See id.*

Havard filed a Petition for Writ of Habeas Corpus with United States District Court for the Southern District of Mississippi in 2009. *Havard v. Epps*, *et al.*, 2010 WL1904852, 5:08-cv-0275-KS (S.D. Miss. 2010). The State responded accordingly. Havard filed his Memorandum in Support of Petition for Issuance of the Writ of Habeas Corpus on July 31, 2009. The State filed their Memorandum in Support of Answer to Petition for Issuance of Writ of Habeas Corpus, in turn.

Then on April 12, 2011, Havard filed his first, successive post-conviction petition. *Havard v. State*, 86 So.3d 896 (Miss. 2012). The Court unanimously dismissed Havard's first, successive post-conviction petition, summarizing the five claims raised therein as:

> I. THE STATE VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW AS GOVERNED BY *NAPUE V. ILLINIOS,* 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), AND RELATED AUTHORITY;
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> II. THE STATE WITHHELD EXCULPATORY INFORMATION IN VIOLATION OF *BRADY V. MARYLAND*, 373 U.S. 83, 83 S.Ct. 1994, 10 L.Ed.2d 215 (1963), AND ITS PROGENY;
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> III. ALTERNATIVELY TO THE IMMEDIATELY PRECEDING ISSUE, PETITIONER'S TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO UTILIZE THE VIDEOTAPED STATEMENT AT ISSUE IF IT WAS DISCLOSED OR PRODUCED PRIOR TO TRIAL;
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> IV. NEWLY-DISCOVERED EVIDENCE DEMONSTRATES THAT PETITIONER IS INNOCENT OF THE UNDERLYING FELONY OF SEXUAL BATTERY-WHICH ALONE MADE PETITIONER'S CASE A CAPITAL MURDER CASE AND PETITIONER ELIGIBLE FOR THE DEATH SENTENCE THAT WAS IMPOSED; AND
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> V. NEWLY DISCOVERED EVIDENCE FURTHER DEMONSTRATES THAT PETITIONER'S TRIAL COUNSEL WERE INEFFECTIVE IN FAILING TO CHALLENGE THE UNDERLYING FELONY OF SEXUAL BATTERY.

Id. at 899. Havard moved for rehearing, but was denied on May 10, 2012.

On November 23, 2013, Havard filed the initial motion in these proceedings with this Court, Cause Number: 2013-DR-01995-SCT. The same day, Havard filed a companion motion in the United States District Court for Mississippi's Southern District seeking to have his habeas corpus proceedings stayed and held in abeyance pending these proceedings. On May 22, 2014, the district court entered an order staying Harvard's habeas proceedings pending the resolution of these proceedings.

Eight days later on May 30, Havard moved this Court seeking to amend his second, successive post-conviction petition to include: a *Brady* claim and an alternative claim of ineffective assistance of trial counsel. Havard also sought leave to conduct an evidentiary hearing.

Finally, the Court entered an Order granting Havard's Motion to Amend and accepting his Amended Motion for filing on September 3, 2014. The Order denied Havard's request for leave to conduct an evidentiary hearing. The Court also invited the State to file an amended response and gave Havard an opportunity to rebut.

This is the State's Amended Response in Opposition to Havard's Amended Motion for Relief from Judgment or Leave to File Successive Petition for Post-Conviction Relief. The exhibits filed by the State in support of its initial response in opposition are referenced and incorporated herein. *See Jeffrey Keith Havard v. State of Mississippi*, Gen. Docket, Case No: 2013-DR-01995-SCT, (Exhibit vol. 1-5, Motion #2013-4089, dated Feb. 5, 2014).

STATEMENT OF FACTS

Havard's conviction and sentence were affirmed on direct appeal. *Havard v. State*, 928 So.2d 771 (Miss. 2006). The facts from the 2006 opinion appear below for the Court's convenience.

> Jeffrey Havard was living in Adams County with Rebecca Britt, the mother of six-month old Chloe Britt. Havard was not Chloe's father. Havard and Britt had been dating for a few months when Britt and Chloe moved in with Havard in his trailer located on property owned by Havard's grandfather. Around 8:00 p.m. on February 21, 2002, Havard gave Britt some money and asked her to go to the grocery store to get supper. Britt returned to find Chloe bathed and asleep. Havard told Britt he had given Chloe her bath and put her to bed. Havard had also stripped the sheets off the bed and told Britt he was washing them. Before that night, Havard had never bathed Chloe or changed her diaper. After Britt checked on Chloe, Havard insisted that Britt go back out to the video store to rent some movies. When Britt returned, Havard was in the bathroom, and Chloe was blue and no longer breathing. Britt performed CPR on Chloe in an attempt to resuscitate her. Britt and Havard drove

> Chloe to Natchez Community Hospital, where Britt's mother worked. The pathologist who prepared Chloe Britt's autopsy report would later testify that some of her injuries were consistent with penetration of the rectum with an object. Other injuries of the child included abrasions and bruises inside her mouth and internal bleeding inside her skull consistent with shaken baby syndrome. Both the hospital staff and the Sheriff observed anal injuries on Chloe as well, but no one at Chloe's day care had ever noticed bruises or marks on Chloe. No anal injuries or anything unusual about the child's rectum was noticed by the day care staff earlier on the day of February 21st Chloe was pronounced dead at the hospital later that night.
>
> In the course of the investigation, Havard was charged with capital murder. In a videotaped statement two days after Chloe's death, Havard denied committing sexual battery on Chloe, but instead claimed he accidentally dropped her against the commode after bathing her, shook her in a panic, and then rubbed her down with lavender lotion before putting her to bed. The State presented DNA evidence which had been collected from the bed sheet. This evidence matched the DNA of both Havard and Chloe. A sexual assault kit testing for any of Havard's DNA in Chloe's rectum or vagina produced negative results. Havard offered no explanation for Chloe's injuries other than the possibility that he wiped her down too vigorously when preparing her for bed. Because Havard was indigent at trial, counsel was appointed to represent Havard, who also has court-appointed counsel for this appeal. Various events in the trial proceedings give rise to Havard's issues on appeal. In a pre-trial motion, defense counsel requested that any victim impact statement be excluded; and, the trial judge granted the motion as to the guilt/innocence phase of the trial. During the trial court's voir dire concerning any personal relationships jurors may have had with Havard, one juror stated she felt she could not be fair because her niece had been raped. The trial court later questioned the potential jurors to ascertain whether any one juror would either automatically vote for the death penalty, or would be unable to vote for the death penalty in the sentencing phase of the trial, regardless of the evidence presented at trial. One juror, who would later swear in a post-trial affidavit that he felt the death penalty was always appropriate in murder cases, was selected as a juror for the trial of this case. Trial counsel's defense strategy was to defend against any allegations of the underlying felony of sexual battery, consistent with Havard's version of the events of that night . . . .

Id. at 778-79 (internal citations omitted).

GROUNDS SUPPORTING THE DISMISSAL OF HAVARD'S AMENDED MOTION FOR RELIEF FROM JUDGMENT OR FOR LEAVE TO FILE SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF AND ALL CLAIMS THEREIN.

Havard presents four claims for relief in his Amended Motion for Relief from Judgment or for Leave to File Successive Petition for Post-Conviction Relief. First, Havard claims that newly-discovered evidence debunks Shaken Baby Syndrome as a legitimate medical diagnosis. Second, Havard argues that the prosecution, prior to trial, possessed favorable evidence which it failed to disclose in violation of *Brady v. Maryland* and its progeny. As an alternative to his *Brady* claim, Havard alleges that trial counsel were ineffective in their investigative efforts, including those related to Dr. Hayne's findings from Chloe Britt's autopsy. Finally, Havard asks that the Court grant him extraordinary relief pursuant to Rule 60(b) of the Mississippi Rules of Civil Procedure.

The State submits Havard is not entitled any relief based on the claims raised in his Amended Motion for Relief from Judgment or for Leave to File Successive Petition for Post-Conviction Relief. The claims for collateral relief in Havard's amended second, successive post-conviction petition do not satisfy the UPCCRA's pleading requirements. They must be dismissed for failure to state cognizable claims upon which collateral relief may be granted. Additionally, Havard's request for extraordinary relief should be denied. The extraordinary relief of Rule 60(b) is reserved for the extremely rare circumstances, which are not present in this case. The State's amended response addresses the claims raised in Havard's Amended Motion for Relief from Judgment or for Leave to File Successive Petition for Post-Conviction Relief in two ways. The discussion below addresses Havard's claims against the UPCCRA's procedural requirements. Then, the discussion turns to the substance of Havard's claims.

A. Havard's Amended Motion for Relief from Judgment or for Leave to File Successive Petition for Post-Conviction Relief is Procedurally Barred by the UPCCRA.

Havard's Amended Motion for Relief from Judgment or for Leave to File Successive Petition for Post-Conviction Relief is procedurally barred from this Court's consideration pursuant to the time bar in Miss. Code § 99-39-5(2), the successive-writ bar found in Miss. Code § 99-39-27(9) as well as those found in Miss. Code Ann. § 99-39-21. None of Havard's claims fall within any of the exceptions to the UPCCRA's bars. Additionally, this Court's fundamental rights exception does not apply to any of Havard's claims. *See Rowland v. State*, 42 So.3d 503 (Miss. 2010). Therefore, the UPCCRA's procedural bars apply with full force and preclude further review of Havard's claims.

1. *Time Bar.*

Havard's Amended Motion for Relief from Judgment or for Leave to File Successive Petition for Post-Conviction Relief is barred by the statute of limitations found in Section 99-39-5(2) and does not fall under any of the exceptions to that bar. Section 99-39-5(2) states that:

> (2) A motion for relief under this article shall be made within three (3) years after the time in which the petitioner's direct appeal is ruled upon by the Supreme Court of Mississippi or, in case no appeal is taken, within three (3) years after the time for taking an appeal from the judgment of conviction or sentence has expired, or in case of a guilty plea, within three (3) years after entry of the judgment of conviction. Excepted from this three-year statute of limitations are those cases in which the petitioner can demonstrate either:
>
> (a)(I) That there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence; or
>
> (a)(ii) That, even if the petitioner pled guilty or nolo contendere, or confessed or admitted to a crime, there exists biological evidence not tested, or, if previously tested, that can be subjected to additional DNA testing that would provide a reasonable likelihood of more probative results, and that

> testing would demonstrate by reasonable probability that the petitioner would not have been convicted or would have received a lesser sentence if favorable results had been obtained through such forensic DNA testing at the time of the original prosecution.
>
> (b) Likewise excepted are those cases in which the petitioner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked. Likewise excepted are filings for post-conviction relief in capital cases which shall be made within one (1) year after conviction.

Miss. Code Ann. § 99-39-5(2).

Havard had one year following his conviction within which to raise the claims raised his Amended Motion for Relief from Judgment or for Leave to File Successive Petition for Post-Conviction Relief. On May 25, 2006, rehearing of Havard's direct appeal was denied. *See Puckett v. State*, 834 So.2d 676, 677 (Miss. 2002) (stating that the one year statute of limitations begins to run on the date that "mandatory state appellate review is complete."). Havard's Amended Motion for Relief from Judgment or for Leave to File Successive Petition for Post-Conviction Relief was accepted by this Court on September 2, 2014, well-beyond the time for filing a post-conviction petition. Havard's Amended Motion for Relief from Judgment or for Leave to File Successive Petition for Post-Conviction Relief does not fall under any of the exceptions to the time bar. Therefore, the State submits Havard's Amended Motion for Relief from Judgment or for Leave to File Successive Petition for Post-Conviction Relief and the claims raised therein are procedurally barred by time. *See* Mississippi Code Ann. § 99-39-5(2)(b).

2. *Successive-Writ Bar.*

Additionally, Havard's Amended Motion for Relief from Judgment or for Leave to File Successive Petition for Post-Conviction Relief is subject to the successive-writ bar found at Miss. Code Ann. § 99-39-27(9). Section 99-39-27(9) states that:

(9) *The dismissal or denial of an application under this section is a final judgment and shall be a bar to a second or successive application under this article.* Excepted from this prohibition is an application filed under Section 99-19-57(2), raising the issue of the offender's supervening mental illness before the execution of a sentence of death. A dismissal or denial of an application relating to mental illness under Section 99-19-57(2) shall be *res judicata* on the issue and shall likewise bar any second or successive applications on the issue. Likewise excepted from this prohibition are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States that would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, that is of such nature that it would be practically conclusive that, if it had been introduced at trial, it would have caused a different result in the conviction or sentence. Likewise exempted are those cases in which the prisoner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked.

Miss. Code Ann. § 99-39-27(9) (emphasis added).

Havard's Amended Motion for Relief from Judgment or for Leave to File Successive Petition for Post-Conviction Relief amounts to a successive writ. *Havard*, 86 So.3d at 899, 910 (quoting *Knox v. State*, 75 So.3d 1030, 1036 (Miss. 2011); citing Miss. Code Ann. § 99-39-27(9)). This Court denied Havard's application for post-conviction relief on May 22, 2008. *Havard*, 988 So.2d 322. In 2012, the Court unanimously denied Havard's first, successive post-conviction petition. *Havard*, 86 So.3d 896. This is Havard's third attempt to obtain post-conviction review and collateral relief. As such, Havard's Amended Motion for Relief from Judgment or for Leave to File Successive Petition for Post-Conviction Relief is barred as a successive writ. And, the claims raised in his second, successive petition do not fall under any of the exceptions to Section 99-39-27(9)'s successive-writ bar. Havard's Amended Motion for Relief from Judgment or for Leave to File Successive Petition for Post-Conviction Relief amounts to a successive-writ and is procedurally barred .

3. *Havard's Newly-Discovered Evidence Claims.*

Havard alleges the claims raised in his Amended Motion for Relief from Judgment or for Leave to File Successive Petition for Post-Conviction Relief are based on newly-discovered evidence and are excepted from the UPCCRA's time and successive-writ bars. Collateral claims based on newly-discovered evidence may not be subject to the UPCCRA's time and successive-writ bars. *See* Miss. Code Ann. §§ 99-39-5(a)(I) & 99-39-27(9). That said, Havard's Shaken Baby Syndrome claim as well as his *Brady* and ineffective assistance of counsel claims are not based on newly-discovered evidence. Those claims are discussed below in light of the newly-discovered evidence exception.

i. Havard's Shaken Baby Syndrome Claim.

According to Havard, recent advances in science and medicine made within this decade expose scientific flaws in Shaken Baby Syndrome as a mechanism or cause of death. Pet'r's Amended Mot. at 1-2. He goes on to state this new evidence was unknown until 2013–some eleven years following his December 19, 2002 conviction and sentencing. *Id.* at 34-35. This is utterly false and further investigation belies his assertion.

Newly discovered evidence is not evidence which is beneficial, advantageous or helpful to Havard. Newly discovered is not synonymous with "newly-available." *Id.* at 34. Rather, newly discovered evidence refers to evidence "not reasonably discoverable at the time of trial . . . [and is] of such a nature that it would be practically conclusive that, if it would have been introduced at trial, it would have caused a different result in the conviction or sentence." *Havard*, 86 So.3d at 901 (citations and some internal quotation marks omitted). Havard "must show that evidence has been discovered since trial, that it could not have been discovered before trial by the exercise of due diligence, that it is material to the issue, and that it is not merely cumulative or impeaching." *Williams v. State*, 669

So.2d 44, 55 (Miss. 1996).

First, Havard cannot show that the evidence he touts as newly-discovered could not have been discovered prior to his 2002 trial with reasonable diligence. This evidence existed prior to Havard's trial and was "capable of being raised at trial and / or on direct appeal." *Havard*, 86 So.3d at 901; *see Williams*, 669 So.2d at 55. The State submits this evidence is not newly-discovered evidence for purposes of overcoming the UPCCRA's procedural bars. And, this position is based, in part, on one of Havard's exhibits— a newspaper article titled, *The Death of Chloe Britt: Capital Murder or Accidental Fall?*[1] The article expressly references studies related to biomechanics and short, accidental falls which pre-date Havard's trial.

Havard relies on statements appearing in that article as evidence supporting his assertion that advances in the scientific and medical communities debunking Shaken Baby Syndrome as a correct mechanism of death did not exist at the time of his trial and direct appeal. Yet, the article does just the opposite. The article briefly summarizes the history of biomechanical engineering as an emerging fielding of science and references significant points in the field's development. For example, the article notes that:

> [i]n **1987**, public questions began to arise when **biochemical engineers** from Penn State University tested the [Shaken Baby Syndrome] hypothesis. They found shaking alone failed to cause the blood vessels in the brain to rupture. It was only when the head made impact that researchers observed bleeding in the brain.

Jerry Mitchell, *The Death of Chloe Britt: Capital Murder or Accidental Fall?*, CLARION LEDGER, Jan. 20, 2014. The article goes on to reference a 1995 criminal prosecution, explaining that:

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[1] Pet'r's Ex. "1", Jerry Mitchell, *The Death of Chloe Britt: Capital Murder or Accidental Fall?*, CLARION LEDGER, Jan. 20, 2014).

> [i]n 1995, prosecutors in Wisconsin charged caregiver Audrey Edmunds with murder, concluding she had shaken 7-months-old Natalie Beard to death — despite no witnesses and no outside evidence of trauma . . . The jury convicted Edmunds, who insisted on her innocence but had no explanation for the injuries . . . In the years since, medical belief that the shaken baby syndrome's triad of symptoms provided ironclad proof of homicide has begun to crumble with several studies raising doubts . . . .

Id. The article goes on to reference a 1979 study of short, accidental falls of children. *Id.* at 4. The article also references Dr. John Plunkett's 2001 study concerning the force produced by short, accidental falls as capable of producing injuries traditionally associated with Shaken Baby Syndrome. *Id.* at 5. The previous references clearly demonstrate evidence existed at the time of Havard's trial and subsequent direct appeal.

Havard's biomechanical evidence was available at the time of Havard's trial. Havard ignores this point and emphasizes the fact that biomechanical engineering studies have gained greater acceptance in the scientific and medical communities. Thus, Havard argues that he could not challenge Shaken Baby Syndrome with this evidence, because it lacked credibility and acceptance at the time of trial. That may be true, but does not make the evidence, new.[2] The evidence he offers

[2] It is important to note that the fierce debate reference to evidence concerning Shaken Baby Syndrome is a refers greater acceptance in the medical and scientific communities. The *debate* is just that, a debate, not a situation where a defendant's conviction was based on science subsequently, debunked. Likewise, the fierce debate reference is unlike situations involving the methods used in DNA analysis to exclude a defendant. There are no set procedures for diagnosing Shaken Baby Syndrome, because the practice of medicine involves consideration of symptoms and deducing possibilities from probabilities. The point being, biomechanics has not debunked Shaken Baby Syndrome. The fierce debate reference describes the evolution of opinions concerning the diagnosis of Shaken Baby Syndrome. The position Havard adopts is that biomechanics debunks Shaken Baby Syndrome, because an adult cannot produce enough force to cause symptoms traditionally attributable to Shaken Baby Syndrome solely by shaking a child. Yet, a recent study involving seven (7), ten-day-old lambs suggests otherwise. *See* Resp.'s Ex. "F" at 122 (Sandeep Narang, M.D., J.D. et al, *A Daubert Analysis of Abusive Head Trauma / Shaken Baby Syndrome– Part II: An Examination of the Differential Diagnosis*, 2013 Hous. J. Health L. & Pol'y 203 (Fall 2013). Lambs were used in the study for their anatomical similarities with human infants. The lambs were shaken

in support clearly shows this evidence existed well-before trial. The State submits that Havard could have discovered this evidence prior to trial, direct appeal, and during his earlier attempts to obtained post-conviction review. "[W]here a party fails to call a witness who was available during trial, the testimony of that witness cannot be considered newly discovered evidence." *United States v. Beasley*, 582 F.2d 337, 339 (5th Cir. 1978). Havard's Shaken Baby Syndrome claim is not supported by newly-discovered science-based evidence.

This science-based, biomechanical evidence was nationally recognized at least as early as **1987**. *See* Resp's Ex. "D". The Journal of Neurosurgery first published *The Shaken Baby Syndrome: A Clinical, Pathological, and Biomechanical Study* in **1987**. *See* Ann-Christine Duhaime, et. al., *The Shaken Baby Syndrome: A Clinical, Pathological, and Biomechanical Study*, 66 J. Neurosurgery 409-415 (1987).[3] The study's date is significant, because Havard's expert affiant, Dr. Van Ee, describes this 1987 study as a "landmark" paper which "quantif[ies] the mechanics of shaking[.]" Pet'r's Ex. "E" at 5. Dr. Van Ee cites several other sources dating before Havard's trial

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ten times, each time for thirty seconds. *Id*. Two lambs suffered sub-dural hematomas, while two others suffered "retinal hemorrhages." *Id.* Importantly, the injuries were produced by shaking, alone. *Id.*

[3] *But see* Cory, C.Z. & Jones, M.D., *Can Shaking Alone Cause Fatal Brain Injury?—A Biomechanical Assessment of the Duhaime Shaken Baby Syndrome Model*, 43 Med. Sci. L. 317, 325-329 (2003) (demonstrating the results of the 1987 study wholly inaccurate and unreliable); *see also* Sandeep K. Narang, M.D., J.D., *A Daubert Analysis of Abusive Head Trauma / Shaken Baby Syndrome*, 11 Hous. J. Health L. & Pol'y 505, 543-546, 554, 560 (2011) (discussing various studies conducted by Duhaime *et al*.); and Narrang *et al*., *A Daubert Analysis of Abusive Head Trauma / Shaken Baby Syndrome–Part II: An Examination of the Differential Diagnosis*, 13 Hous. J. Health L. & Pol'y 203, 220-222, 248-254, 284 (Fall 2013) (further discussing Duhaime's studies), attached respectively as Resp's Ex. "E" and "F".

and direct appeal as bases for his short-distance fall theory.[4] Another "landmark" paper, Dr. Van Ee relies upon, the dissertation of M. Prange, et al., "*Biomechanics of Traumatic Brain Injury in the Infant*," (Unv. Penn. 2002) was published in **2003**. Pet'r's Ex. "E" at 5-6.

Further, Dr. Van Ee was tendered and qualified as an expert witness in the proceedings of *Virginia v. Estrella*, CR03051857-00, (Newport News Cir. Ct. 2004) in **2004**. *See* Resp's Ex. "G" (Transcript Excerpt of Dr. Van Ee's testimony). In *Estrella*, Dr. Van Ee testified that a short-distance fall caused a child's death, which is entirely consistent with his sworn statement Havard currently offers as newly discovered evidence.[5] *See Beasley*, 582 F.2d at 339.

Concerning forensic pathology, the American Journal of Forensic Pathology published a study in which Dr. John Plunkett[6] concluded that symptoms associated with fatal injuries often times mimic Shaken Baby Syndrome caused by short-distance falls. Pet'r's Ex. "E" at 9 (citing John Plunkett, *Fatal Pediatric Head Injuries Caused by Short-Distance Falls*, 22 Am. J. Forensic Med. Path. 1 (2001)). This article was published in **2001**. Before Dr. Plunkett's 2001 article published, his short, accidental

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[4] *See* Pet'r's Ex. "E" at 8 (*e.g.*, citing Holbourn, AHS, Mechanics of head injuries. Lancet, ii, 438-441, **1943**; Gurdjan ES. Impact Head Injury, Charles C Thomas, **1975**; McClean Al and Anderson RWG, "Chapter 2: Biomechanics of closed head injury," Head Injury, Chapman and Hall Medical, editors: P. Reilly and R. Bullock, **1997**; Accidental Injury., **2002**; eds. Melvin JW and Nahum AM, Springer Verlag, 637 pgs "Injury Risk Assessments Based on Dummy Responses, author Mertz HJ.) (emphasis added).

[5] Dr. Van Ee's testimony in *Estrella* consisted of ten (10) drops of a test dummy from a height consistent with being dropped "from the arms of a five-foot-six-inch male onto a linoleum floor with a hardwood or wood underneath . . . ." Resp's Ex. "G" at 31:15-18.

[6] Dr. Van Ee also cites to "case studies" published in **2001** by Dr. John Plunkett's as bases for his conclusions. Pet'r's Ex. "E" at 3. It should be noted that Dr. Plunkett is a forensic pathologist. Dr. Van Ee has no medical education, experience or training. For additional examples of Dr. Van Ee's testimony, *see* Resp's Ex. "G1" and "G2". Dr. Plunkett has also testified as an expert witness. *See In re Green*, 2003 WL 2165472 (Minn. Ct. App. 2003) attached as Resp's Ex. "H1"; *see State v. Butts*, 2004 WL 449245 (Ohio Ct. App. 2003) attached as Resp's Ex. "H2".

fall theory was gaining momentum with one of Havard's expert affiants, Dr. George R. Nichols, II.

In *State v. Edmunds*, which Havard improperly cites as legal basis for granting him relief, Dr. Nichols testified as an expert for the petitioner, Edmunds.[7] *Edmunds*, 746 N.W.2d 590 (Wis. Ct. App. 2008). Dr. Nichols testified that as early as **1996**, he was influenced by Dr. John Plunkett, a forensic pathologist and short-distance fall proponent.[8] Dr. Nichols testified that "in 1996, I believed that Shaken Baby Syndrome indeed could cause a head injury. I do not believe that that's true now . . . ." Resp's Ex. "H" at 138:4-6, 139:3-13, 142:11,153:16-22. When asked why his opinion had changed, Dr. Nichols recalled hearing Dr. John Plunkett testify in a **1996** evidentiary hearing where Shaken Baby Syndrome was at issue. *Id.* at 137:9-10. Dr. Nichols was taken aback by Dr. Plunkett's testimony, so much so that Dr. Nichols "went back and did some basic physics" to gain an understanding and an appreciation of published biomechanical studies and their effect on the forensic pathology community. *Id.* at 137:9-10. Nichols specifically noted that since **1996**, "changes reflected in the medical literature that I believe are valid . . . ." *Id.* at 154:3-8. Dr. Nichols, as early as **1996**, recognized the effect of biomechanical engineer had in cases involving Shaken Baby Syndrome, which predates Havard's trial by some six (6) years. *See Beasley*, 582 F.2d at 339.

Likewise, Dr. Michael Baden has long-held a position which is entirely consistent with his present findings and conclusions. In a **1998** American Bar Association Journal article, Dr. Baden,

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[7] The portion of the evidentiary hearing transcript in which Dr. Nichols testifies on behalf of the petitioner in *Edmunds* is attached hereto as Resp's Ex. "H".

[8] Dr. John Plunkett reviewed the cases of eighteen (18) reported deaths of children as old as six who died as a result of short accidental falls related to playground equipment. His review of those cases led Dr. Plunkett to conclude that serious head injuries such as hematomas could result *if* a child's fall generates sufficient rotational force. *See* John Plunkett, *Fatal Pediatric Head Injuries Caused by Short Distance Falls*, 22 Am. J. For. Med. & Path 1 (2001). Dr. Plunkett's review ranged from **January of 1988** to **June of 1999**.

who at the time had thirty-five (35) years of experience as a forensic pathologist, was quoted as having "only seen two or three [cases of Shaken Baby Syndrome] in [his] lifetime." *See* Resp's Ex. "I" (Mark Hansen, *WHY ARE IOWA's BABIES DYING?*, 84 A.B.A.J. 74 (Aug. 1998)). That position continued to evolve as evidenced by an unpublished California Court of Appeals opinion. *See* Resp's Ex. "J" (the opinion from *People v. Tison*, 2003 WL 23034287 (Cal. Ct. App. 2003)).

In *Tison*, Dr. Baden provided prior testimony entirely consistent with his present findings and conclusions–that Chloe Britt's death was caused by blunt-force trauma sustained as a result of a short-distance fall. The court in *Tison* took note of Dr. Baden's position on Shaken Baby Syndrome as a cause of death. *Id*. at *5. Specifically, it noted that "[a]ccording to Dr. Baden, **shaken baby impact syndrome [wa]s impossible to prove**." *Id.* (emphasis added). Dr. Baden's present testimony is consistent with his testimony in *People v. Tison*.[9] Again, Dr. Baden's testimony rests on information published at or around the time of Havard's trial or direct appeal. *See Beasley*, 582 F.2d at 339.

The same is true of Dr. Janice Ophoven, forensic pathologist. She too provides a sworn statement in which she specifically references material available prior to Havard's trial. In her sworn statement, Dr. Ophoven points to a **2001** position paper issued by the National Association of Medical Examiners (NAME). Pet'r's Ex. "E" at 17. She points out that "this paper did not pass peer review, was never endorsed by the membership, and many leading forensic pathologist voiced their opposition to its content." *Id.*

The State would also direct the Court's attention to *State v. Huynh*, in which Dr. Janice

[9] For additional examples supporting the State's position that Dr. Baden is testifying consistent with his position at the time of Havard's December 2002 trial, please find attached hereto, Resp's Ex. "J1" and "J2".

Ophoven testified in a manner consistent with the statement she has provided Havard. *See* Resp's Ex. "K" (*State v. Huynh*, 2005 WL 3159704, *2 (Minn. Ct. App. 2005)). The opinion was handed down in late **2005**. In *Huynh*, Dr. Janice Ophoven provided expert testimony during a post-conviction relief evidentiary hearing. *Id.* at *2. Dr. Ophoven's testimony identified blunt-force trauma, not Shaken Baby Syndrome, as the cause of a two year-old child's death. *Id.* She went on to state that the child could have sustained injuries from some blunt-force trauma up to seventy-two hours prior to death. *Id.* Dr. Ophoven opined the child's brain was compensating for swelling, during a lucid interval. *Id.* According to her, time of death was a primary issue. *Id.* Dr. Ophoven initially rejected the notion that the injuries sustained by the child could have occurred minutes before the child's arrival at an emergency room, but admitted on cross that the child's unresponsiveness could have occurred immediately after sustaining the injuries. *Id.* The Minnesota court of appeals characterized Dr. Ophoven's testimony as supporting a theory of "we don't know what happened . . ." and described her as an "inconsistent" expert witness. *Id.* at *4. The court went on to state that "[g]iven the possible problems with Dr. Ophoven's testimony on timing, appellant has not met her burden of proving a reasonable probability that the outcome of trial would have been different." *Id.*

In 2006, the United States Circuit Court of Appeals for the Eighth Circuit, in *United States v. Red Bird*, also commented on testimony given by Dr. Ophoven. *See* Resp's Ex. "K1" (*Red Bird*, 450 F.3d 789, 792 (8th Cir. 2006)). There, the Eighth Circuit noted that Dr. Ophoven was of the opinion that the infant was incapable of "suffer[ing] traumatic brain injury serious enough to develop symptoms and die ***by virtue of shaking alone***, and that there ***must*** be evidence of impact."[10] *Id.* at 792

[10] *Cf.* Resp.'s Ex. "F" at 122 (Sandeep Narang, M.D., J.D. et al, *A Daubert Analysis of Abusive Head Trauma / Shaken Baby Syndrome– Part II: An Examination of the Differential Diagnosis*, 2013 Hous. J. Health L. & Pol'y 203 (Fall 2013).

(emphasis added). It is significant to note that in this case Dr. Ophoven testified as an expert witness in a manner wholly consistent with those statements in her presently attached affidavit. Clearly, Dr. Ophoven was available as early as 2005 to offer the same opinion Havard now avers is new. Further, her current position–that Shaken Baby Syndrome cannot occur absent impact trauma–rests on information available prior to Havard's 2002 trial.

Among the affidavits attached to Havard's petition is one given by Dr. Steven Hayne. In his July 22, 2013 affidavit, Dr. Hayne clearly states "with a reasonable degree of medical certainty" that Chloe's cause-of-death would be classified "as **shaken baby syndrome** with impact or blunt force trauma."[11] Pet'r's Ex. "A" at 2 (emphasis added). Havard offers no insight as to why this information was undiscoverable at the time of Havard's trial and or direct appeal. Dr. Hayne testified at trial concerning Chloe's injuries and Havard had an opportunity to cross-examine Dr. Hayne on that issue. *See Havard*, 988 So.2d at 345. Additionally, Havard has deposed Dr. Hayne and hired an independent pathologist in earlier post-conviction proceedings. *See Havard*, 86 So.3d at 904-910.

It is worth noting that, except for Dr. Hayne, Havard's experts focus on the selected

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[11] Dr. Hayne's 2002 report of Chloe Britt's autopsy is attached as Resp's Ex. "L". In his report, Dr. Hayne states beneath the "CAUSES OF DEATH & PATHOLOGIC FINDINGS:" at "IMMEDIATE CAUSE OF DEATH:" that Chloe's death was caused by "[c]hanges consistent with shaken baby syndrome *and* closed head injuries." Additionally, Dr. Hayne testified at trial that "[violent] shaking produc[ed] these injuries and, of course, there were other injuries that were identified on the body, but were not participatory in the death of the child." Tr. at 558:1-4, attached as Resp's Ex. "M". Those injuries included: "bruises or contusions . . . located on the back of the scalp . . . measuring approximately two and one half inches . . . a bruise located over the nose, measuring approximately one quarter of an inch . . . a contusion to involve the upper lip that measured approximately one half inch, and there was a tear of the frenulum just inside the mouth . . . that measured approximately one quarter of an inch . . . [t]here was also bruising located over the front surface of the right thigh, measuring approximately one inch, and there was also a bruise located over the front surface of the left thigh that . . . measured slightly larger, almost an inch and a half at that site." *Id.* at 545-46.

information from Havard's statement to police as basis to support this short, accidental fall theory. Havard, during a video-recorded interview, told law enforcement officials that he accidentally dropped Chloe. Pet'r's Ex. "F" at 4. The experts do not discuss the fact that Havard admittedly shook Chloe after dropping her. And, Havard offers no explanation for not raising this challenge at trial, on direct appeal or in his application for post-conviction relief.

This is not new evidence as it was "capable of being raised at trial and / or on direct appeal." *Havard*, 86 So.3d at 901; *see Williams*, 669 So.2d at 55; *Beasley*, 582 F.2d at 339. The evidence Havard relies on clearly establishes this point. All of the Havard's expert affiants were either: (a) testifying in a manner entirely consistent with their present sworn statements; (b) relying on "landmark" information published and recognized in the field of biomechanical engineering prior to and / or at the time of Havard's trial and/or direct appeal; or (c) both. The fact Havard has recently discovered it or recently deemed it sufficiently credible does not make it newly-discovered. Havard's Shaken Baby Syndrome claim is not supported by newly-discovered evidence and is subject to the UPCCRA's time and successive-writ bars.

ii. Havard's Brady Claim.

Havard avers statements appearing in the January 19, 2014, *Clarion Ledger* article—one in which his federal habeas corpus is directly quoted—as newly-discovered evidence, which entitles him to collateral relief or, at a minimum, to collateral review.[12] He is mistaken. The statements that appear in the January 19, 2014, *Clarion Ledger* article are not evidence. And even if they were, those statements do not satisfy the requirements for newly-discovered evidence. *See Havard*, 86

[12] Pet'r's Amended Mot. for Relief from Judgment at 30-33, 39-41 (Pet'r's Ex. "I", Jerry Mitchell, *The Death of Chloe Britt: Capital Murder or Accidental Fall?*, CLARION LEDGER, Jan. 20, 2014).

So.3d at 906 (citing Miss. Code Ann. 99-39-27(9)). In an earlier pleading, the State argued that Havard had not satisfied the UPCCRA's requirements applicable to post-conviction motions. The State maintains that position. Statements appearing in a newspaper article are not—particularly for purposes of the UPCCRA—evidence.

> [a] specific statement of the facts which are not within the petitioner's personal knowledge. The motion shall state how or by whom said facts will be proven. Affidavits of the witnesses who *will testify* and copies of documents or records that will be offered shall be attached to the motion. The affidavits of other persons and the copies of documents and records may be excused upon a showing, which shall be specifically detailed in the motion, of good cause why they cannot be obtained. This showing shall state what the petitioner has done to attempt to obtain the affidavits, records and documents, the production of which he requests the court to excuse.

Miss. Code Ann. § 99-39-9(1)(e). Havard may challenge the State's position that statements appearing in a newspaper article are not evidence by attacking the legal authority supporting that position. The State's position is based on state law—the UPCCRA. *See* Miss. Code Ann. §§ 99-39-9, 99-39-11.

As it relates to the newly-discovered evidence exception, Havard's second, successive post-conviction petition must provide a statement of facts within his knowledge and / or a separate statement of facts not within his knowledge. *See* Miss. Code Ann. §§ 99-39-9, 99-39-11. Havard must explain how those facts not within his personal knowledge will be proven and who will prove them. He does not. Havard relies on an affidavit from Dr. Steven Hayne on July 21, 2014—executed more than seven months after the January 19, 2014, *Clarion Ledger* article was published.

In doing so, Havard has confirmed the statements in the newspaper article are not newly-discovered evidence. After all, Dr. Hayne's involvement in this case pre-dates Havard's trial—as

noted in the January 19, 2014, *Clarion Ledger* article. Newly-discovered evidence refers to evidence "not reasonably discoverable at the time of trial . . .[and is] of such a nature that it would be practically conclusive that, if it would have been introduced at trial, it would have caused a different result in the conviction or sentence." *Havard*, 86 So.3d at 901. Havard bears the burden of demonstrating those statements are newly-discovered evidence are not subject to the time and successive writ bars. *See id.* at 899, 904-910. In order to carry his burden, Havard must show that the statements appearing in the January 19, 2014, *Clarion Ledger* article (1) will probably produce a different result or verdict, (2) have been discovered since trial and could not have been discovered before trial by the exercise of reasonable diligence, (3) are material, and (4) are not cumulative or impeaching. *Gray v. State*, 887 So.2d 158, 162 (Miss. 2004) (quoting *Ormond v. State*, 599 So.2d 951, 962 (Miss. 1992)). It is clear Havard has not carried his burden.

First, this evidence was discoverable at prior to trial. The State would direct the Court's attention to one of Havard's exhibits, Dr. Hayne's July 21, 2014, affidavit. Pet'r's Ex. "1". The July 21, 2014, affidavit unequivocally proves that the statements appearing in the January 19, 2014, *Clarion Ledger* article were made prior to trial and were discoverable at prior to trial. This evidence existed prior to trial and cannot be considered, newly-discovered. *Havard*, 86 So.3d at 906 (citing Miss. Code Ann. 99-39-27(9)) (explaining "new evidence must be 'evidence, not reasonably discoverable at the time of trial . . . .'").

Second, Dr. Hayne's affidavit is not material to Havard's *Brady* claim. Dr. Hayne's affidavit in no way speaks to suppressed evidence. Likewise, a newspaper article in no way proves any evidence was suppressed. Those documents do not prove evidence was suppressed. The prosecution and Havard's trial counsel would be the parties capable of proving whether evidence was suppressed.

Havard has offered nothing more than bald allegations, which are incapable of proving the prosecution suppressed evidence. The newspaper article and Dr. Hayne's July 21, 2014, affidavit are immaterial to Havard's *Brady* claim.

Third, this evidence does not create a reasonable probability of a different outcome at trial. The nature of newly-discovered evidence makes it "practically conclusive that, if it would have been introduced at trial, it would have caused a different result in the conviction or sentence." *Havard*, 86 So.3d at 901. Considering all of the facts in this case, the evidence offered to support Havard's *Brady* does not meet the "practically conclusive" standard. Havard's *Brady* claim is based on evidence wholly consistent with the evidence at trial and presented to the jury.

The record reflects that on September 25, 2002, approximately three months before trial, the trial court entered an order, stating that:

> the report of Dr. Hayne, and any supplements, are in the possession of the defendant, and that Dr. Hayne is available to answer any questions that defense counsel may have of him.

CP at 94. Additionally, the appendices to Havard's direct appeal brief and exhibits submitted with his post-conviction relief application clearly indicate trial counsel had Dr. Hayne's autopsy report listed as inventory in their case file.[13] Trial counsel's cross-examination of Dr. Hayne clearly demonstrates a high level of familiarity with contents of the autopsy report. Looking to the trial transcript, trial counsel's cross of Dr. Hayne began:

> Mr. Sermos: Dr. Hayne, as far as your examination and I don't want to even try to put words in your mouth, but, essentially, the shaken baby syndrome here and the cause of death and then the manner of death, those two things, especially the shaken baby syndrome, that is a totally separate

[13] *See* Resp's Ex. "T" (Excerpt of Appendices to Havard's Original Direct Appeal Brief, dated Oct. 4, 2004) & Resp's Ex. "U" (Excerpt of Havard's Petition for PCR, dated Apr. 26, 2007).

item from any allegations or indications of rectal or sexual abuse; is that correct?

Dr. Hayne: The cause of - - yes. The cause of death that I addressed was the shaken baby syndrome. The manner of death, of course, is a product of the cause of death. The other findings were separate, sir. They did not constitute lethal injuries that would place death in and of themselves, sir.

Mr. Sermos: And then the next question is ***when you use the word in your report*** "contusion" - - excuse me one moment, please, and I'll get right to. You had used the word in the rectum there would have been a contusion. In your definition from a medical expert standpoint, is a contusion and a tear the same thing?

Dr. Hayne: No, sir.

Mr. Sermos: Okay. Would you please tell the jury what the difference would be?

Dr. Hayne: A tear is a laceration most commonly whether it's a complete, full thickness disruption of the - - in this case, the mucosal surface as opposed to a skin surface. A contusion is a collection of blood underneath the mucosal surface.

Mr. Sermos: Okay.

Dr. Hayne: It's a produce of tearing of vessels underneath the skin or mucosal surface and bleeding at that site with the subsequent collection of blood.

Mr. Sermos: So that could be caused by something different than would cause a tear; is that correct?

Dr. Hayne: Could be, or it could be the same object.

Mr. Sermos: If there were any tears down there ***in your report*** when you put a ***contusion of the anus is noted***, I presume you would have also written tears were noticed also; is that correct?

Dr. Hayne: If I had seen them, I would have put down laceration. I did not see it in this case, and I did not exclude it, but I just didn't see it.

Mr. Sermos: The next part of that is you mention ***in your report*** on - - actually it's page two after your cover sheet. You put well-formed stool is present within the luminal space of the large bowel.

Dr. Hayne: Yes, sir.

Mr. Sermos: Is the large bowel by what you're referring to here, the descending colon?

Dr. Hayne: It would include the descending colon, yes.

Mr. Sermos: Okay. So where the next question comes from is this. At the time the baby was deceased, was in the hospital, the other witness [sic] have testified that there was feces coming out of the baby's anus and rectal area, and that it was basically diarrhea type. Now, is there a difference in diarrhea and well-formed stool?

Dr. Hayne: Yes, sir.

Mr. Sermos: Okay. My next question would then be what would cause - - if these witnesses testified to this that there was diarrhea, loose bowels, and basically this was at the time of death. When would the well-formed stool form? Was it already there?

Dr. Hayne: I think the well-formed stool is already present, and that would include the ascending as well as transverse colon. Now, if there was injury to a lower part of the colon that could be a transfer of fluid in that site, and you can get a semi-liquid stool while you have solid stool in the first part of the colon.

Mr. Sermos: Okay. And then that would go to the next part of what you probably have done - - ***it's not in your report*** anywhere, and I don't presume it existed, but had there been some damage into or of the descending colon, you would have noticed that; is that correct?

Dr. Hayne: I would have, sir.

Mr. Sermos: And when you stated that around the rectum or the anular ring, the sphincter. That there was that contusion there, and that could be caused - - ***I believe you said by an object***?

Dr. Hayne: Yes.

Mr. Sermos: If an object had - - when you state that, the object merely has to come into contact with the anus and it doesn't necessarily imply any massive insertion, does it?

Dr. Hayne: No. It implies force.

Mr. Sermos: Right.

Dr. Hayne: It implies injury to the mucosal surface subsequently tearing the small vessels underneath the mucosal surface.

Mr. Sermos: Okay. And then, shall we say, and I'll ask you for your expert opinion on this also. If some object were to have been inserted in that child's anus and even gone into the descending colon or the rectal area and that object were found, then that object should have either some form of tissue, matter, blood, or feces on it. Wouldn't

you expect that?

Dr. Hayne: I would expect to at least to see fecal matter on it, sir. Maybe other items.

Mr. Sermos: Okay . . . .

Tr. at 560-63 (emphasis added).

Trial counsel's cross of Dr. Hayne focused solely on Dr. Hayne's findings concerning sexual battery to emphasize the lack of supporting evidence. (*e.g.*, no indication of massive insertion of an object, no fecal matter on objects submitted to forensic analysis, well-formed stool versus loose stool others witnessed, distinguishing laceration from contusion, and the absence of any finding pertaining to lacerations listed in Dr. Hayne's report). The jury heard Dr. Hayne testify that his findings prevented him concluding that a sexual battery had or occurred or had not occurred. *See Havard*, 86 So.3d at 909-10.

The State submits this evidence does not create a reasonable probability of a different result at trial. The evidence offered to support his *Brady* violation is entirely consistent with what was presented to the jury. Dr. Hayne found evidence that was consistent with Chloe Britt's rectum being penetrated by an object. In 2012, this Court discussed, at length and in-depth, the very statements attached with Havard's Amended and Motion for Evidentiary Hearing. *Havard*, 86 So.3d at 904-07. There, the Court noted that:

Havard relies on the following deposition testimony of Dr. Hayne:

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 Chloe 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.

. . . .

A: I did not think that was an insertion injury from a rectal thermometer by medical personnel. I could not exclude it, but I think it was unlikely, Counselor.

Id. at 907. The evidence Havard claims to be newly-discovered was heard by the jury at trial, and reviewed by this Court on direct and on collateral review. This Court found that Dr. Hayne's testimony did not prove his innocence, in part because it was not the only evidence offered to prove sexual battery. *Id.* This Court held that this evidence had was without merit and not newly-discovered evidence. *Id*.

Finally, Havard offers this evidence, evidence available at trial, in yet another attempt to impeach Dr. Hayne. Havard has missed no opportunity to point out the fact that Dr. Hayne was the sole expert witness presented by the prosecution. But as this Court recognized, Dr. Hayne was not the prosecution's sole evidentiary source. *Id.* Most notably, the jury heard Havard's statements concerning his contact with Chloe Britt on the night she died. Specifically, the jury heard Havard state, "[i]t's possible . . . . I was too rough with her. Maybe I shook her too hard . . . . Maybe I went too far in on her when I was wiping her out, inside of her butt." *Id.*

In fact, the prosecution called Dr. Hayne to testified as an expert in field of forensic pathology. When asked to define his role as an expert witness in this case, Dr. Hayne told the jury that "[t]he primary purpose of [a forensic pathologist] is to come to a conclusion as to the cause and manner of death." Tr. at 543. He subsequently qualified that statement, explaining that his investigative efforts and examination of Chloe Britt's remains were "focused driven." *Id.* at 544. The focus of his efforts and examination was reaching a conclusion as to Chloe Britt's "cause and manner of death, the two most important aspects of . . . [his] written report . . . ." *Id.* When asked which

aspect of his examination of Chloe Britt's remains and his review of relevant information was most important, Dr. Hayne answered "[c]ause of death and then the classifications of that death." *Id.* at 544-45. The prosecution's primary purpose for calling Dr. Hayne to testify, which according to Dr. Hayne was the most important part of his autopsy investigation, was to tell the jury his conclusion as to the cause and the manner of Chloe Britt's death.

When considering the entire record, Havard's post-conviction application, all motions and petitions and exhibits, it is readily apparent that Dr. Hayne has consistently maintained and reiterated his autopsy report findings and trial testimony. In particular, Dr. Hayne has consistently maintained the position that his findings revealed evidence consistent with penetration of Chloe Britt's rectum with an object. Dr. Hayne could not conclude to a reasonable degree of medical certainty that a sexual battery occurred. But, Dr. Hayne could not rule out the possibility that Chloe Britt had not been sexually battered. He merely found evidence consistent with Chloe Britt having been sexually battered. Havard's most recent *Brady* claim is based exclusively on Dr. Hayne's statements, which are consistent with his trial testimony—as they have been for more than a decade. Havard's evidence cannot be newly-discovered, because it is cumulative offered for the purpose of impeaching Dr. Hayne's testimony.

Not only does Havard fail to carry his burden to prove the evidence was newly discovered, but he also fails to explain why the evidence was undiscoverable. *See id.* at 906. He has not, because he cannot. He cannot "show that evidence has been discovered since trial, that it could not have been discovered before trial by the exercise of due diligence, that it is material to the issue, and that it is not merely cumulative or impeaching." *Williams*, 669 So.2d at 55. On November 23, 2010, Havard's federal habeas counsel—who currently represent Havard—deposed Dr. Hayne. The

following exchange occurred during that 2010 deposition:

> Mr. Jicka: And you were not asked, actually, about sexual battery during that trial, were you, sir?
>
> Dr. Hayne: Not specifically, no.
>
> Mr. Jicka: But you were aware, from even from the coroner's permit, that that was an issue in the case, correct?
>
> Dr. Hayne: Oh, yes, and I knew before I even stepped on the witness stand that was going to be an issue.
>
> Mr. Jicka: Okay. And prior to the trial, you discussed this with the district attorney whether you could say to a reasonable degree of medical certainty or even to a probability that sexual abuse occurred, correct?
>
> Dr. Hayne: That's correct. But all I 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.
>
> Mr. Jicka: Okay. You - - if you had been asked the same questions we - - that I've been asking you today in court sexual abuse, would you have answered them in the same manner, sir?
>
> Dr. Hayne: Exact way. I think I at least touched on some of those, and I have not changed my opinion, and it would make no difference whether defense or prosecution was asking me, the answer would be the same.
>
> Mr. Jicka: That leads me to my next question. Did you ever meet with Gus Sermos or Robert Clark, Mr. Havard's attorneys about this case?
>
> Dr. Hayne: I don't remember that, Counselor . . . .

Resp's Ex. "N" at 477-78 (Depo. of Dr. Steven Hayne, dated Nov. 23, 2010). Nearly four years earlier, Havard's counsel, who recently raised this *Brady* claim, asked Dr. Hayne the very question which Havard now represents to this Court as newly-discovered evidence.

And not only did he know this as early as 2010, Havard argued this point in his 2011 Rebuttal to the State's Response to Motion for Relief from Judgment or for Leave to File Successive Petition for Post-Conviction Relief. *See* Resp's Ex. "R" at 1-3 (Havard's 2011 Rebuttal to the State's

Response to Motion for Relief from Judgment or for Leave to File Successive Petition for Post-Conviction Relief at 1-3, dated Sept. 14, 2011). In 2011, Havard faulted the prosecution's questioning of Dr. Hayne. As it relates to his newly-discovered evidence assertion, Havard argued that "Dr. Hayne, the only properly tendered and qualified expert witness, was not asked these questions, and the newly-discovered evidence from Dr. Hayne demonstrates why: Dr. Hayne could not offer the opinions that the State wanted, and the District Attorney knew it. (*See* Depo. of Hayne, Petition Exh. "H" at p. 28)." *Id.* at 3.

The questions answered by Dr. Hayne in 2010 as well as Havard's 2011 arguments—which cite the 2010 Deposition of Dr. Hayne—prove this purported *Brady* claim is not based on newly-discovered evidence.[14] To argue that the January 19, 2014, *Clarion Ledger* article alerted Havard to a potential *Brady* violation directly contradicts his earlier interactions with Dr. Hayne and subsequent arguments presented to this Court. Havard has offered no explanation why this evidence was undiscoverable, because he cannot. Therefore, Havard's *Brady* claim is subject to the UPCCRA's time and successive-writ bars. Miss. Code Ann. §§ 99-39-5(2) & 99-39-27(9). Havard's *Brady* claim is procedurally barred.

4. *Waiver, Defenses and the Doctrine of Res Judicata.*

Further, this Court's review of Havard's shaken baby syndrom and *Brady* claims are precluded by Section § 99-39-21. Section 99-39-21 states that:

> (1) Failure by a prisoner to raise objections, defenses, claims, questions, issues or errors either in fact or law which were capable of determination at trial and/or on direct appeal, regardless of whether such are based on the laws and the

[14] The State does not concede to Havard's *Brady* violation assertion. To the contrary, the State submits no *Brady* violation occurred. The substance of Havard's *Brady* claim is addressed later in this Amended Response.

Constitution of the state of Mississippi or of the United States, shall constitute a waiver thereof and shall be procedurally barred, but the court may upon a showing of cause and actual prejudice grant relief from the waiver.

(2) The litigation of a factual issue at trial and on direct appeal of a specific state or federal legal theory or theories shall constitute a waiver of all other state or federal legal theories which could have been raised under said factual issue; and any relief sought under this article upon said facts but upon different state or federal legal theories shall be procedurally barred absent a showing of cause and actual prejudice.

(3) The doctrine of res judicata shall apply to all issues, both factual and legal, decided at trial and on direct appeal.

(4) The term "cause" as used in this section shall be defined and limited to those cases where the legal foundation upon which the claim for relief is based could not have been discovered with reasonable diligence at the time of trial or direct appeal.

(5) The term "actual prejudice" as used in this section shall be defined and limited to those errors which would have actually adversely affected the ultimate outcome of the conviction or sentence.

(6) The burden is upon the prisoner to allege in his motion such facts as are necessary to demonstrate that his claims are not procedurally barred under this section.

Miss. Code Ann. § 99-39-21(1)-(6). "The procedural bars of waiver, different theories, and res judicata and the exception thereto as defined in Miss. Code Ann. § 99-39-21(1-5) are applicable in death penalty PCR Applications." *Havard*, 988 So.2d at 333 (citations and internal quotations omitted); *see Havard*, 86 So.3d at 901. As before, the State will address both the shaken baby and *Brady* claims along with an alternative ineffective assistance of trial counsel claim, in turn, below.

i. Havard's Shaken Baby Syndrome Claim.

Havard challenges Chloe Britt's cause-of-death.[15] This challenge could have been, but was not raised at trial. As will be demonstrated below, Havard's present claims regarding Shaken Baby

[15] Pet'r's Amended Mot. for Relief at 34-39.

Syndrome are not new. Havard's experts have testified in cases, knew of, and / or wrote papers on Shaken Baby Syndrome long before trial in the case *sub judice*. Since Dr. Hayne testified at trial concerning Chloe Britt's injuries, Havard was afforded a fair opportunity to cross-examine Dr. Hayne on cause-of-death.[16] *Havard*, 988 So.2d at 345 (citing Miss. Code Ann. § 99-39-21(1)). Havard chose to cross-examine Dr. Hayne on the underlying felony of sexual battery.

Havard waived this challenge to Chloe Britt's cause-of-death. Havard could certainly have raised the issue on direct appeal, in his application for post-conviction relief or in his first successive petition. He did not. Havard's claims do not fall within any of the exceptions to the bar found in Miss. Code Ann. § 99-39-21(1). Therefore, his claims are precluded from further consideration by the procedural bar found in Miss. Code Ann. § 99-39-21(1).

Further, Havard's newly discovered evidence and fundamental rights violation claims challenge Chloe Britt's cause-of-death under a different legal theory—that Shaken Baby Syndrome has been debunked.[17] "The litigation of a factual issue at trial and on direct appeal of a specific state or federal legal theory or theories shall constitute a waiver of all other state or federal legal theories which could have been raised under said factual issue; and any relief sought under this article upon said facts but upon different state or federal legal theories shall be procedurally barred absent a showing of cause and actual prejudice." Miss. Code Ann. § 99-39-21(2).

The cause of Chloe Britt's death was raised and subsequently abandoned at the time of trial.

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[16] At the very least, Havard sought to pursue a different cause of death rather than one consistent with Shaken Baby Syndrome based on his request for medical records. Havard's motion requesting Chloe Britt's medical records and the related trial court order are attached hereto as Resp's Ex. "A" and "B".

[17] Pet'r's Amended Mot. for Relief at 34-39. Chloe Britt's cause-of-death, Shaken Baby Syndrome, has been raised, litigated and decided by the trial court and by this Court. CP at 92, 94.

When he abandoned that challenge, Havard waived any subsequent attempts to litigate cause-of-death. According to this Court, the trial court did not abuse its discretion when it refused to grant the funding necessary to secure an independent pathologist to provide "assistance in interpreting the autopsy reports."[18] *Havard*, 928 So.2d at 788-789 (finding "no abuse of discretion in the trial court's actions so as to deny Havard a fundamentally fair trial.").

Similarly, Havard has consistently attacked trial counsels' performance. This Court found his earlier challenges without merit. *Havard*, 988 So.2d at 330-333 (rejecting the assertion that rejected trial counsel were ineffective for failing to secure a pathologist for purposes of developing a defense); *Havard*, 86 So.3d at 908 (describing Havard's claim as nothing more than another "attempt to rehabilitate failed claims that already have been addressed by this Court."). On direct review in 2006, Havard argued trial counsel failed to obtain experts, including a pathologist, for the purpose of developing a defense. *Havard*, 928 So.2d at 788-789. In 2008, this Court rejected Havard's argument that trial counsel was ineffective for failing to secure a pathologist for purposes of developing a defense.[19] *Havard*, 988 So.2d at 330-331. Specifically, this Court found "trial counsel made the request based on the need for assistance in interpreting the autopsy reports." *Id.* at 330. In 2012, this Court rejected subsequent evidence in the form of deposition testimony given by Dr. Hayne as nothing more than a mere "attempt to show that his trial counsel were ineffective

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[18] *See* Resp's Ex. "A" and "B".

[19] The matter of sexual battery Havard committed upon Chloe Britt is barred from further consideration by the doctrine of *res judicata*. To the extent Havard's expert affiants opine as to Dr. Hayne's autopsy report and the testimonies of the treating physicians, medical staff and others, this issue has been decided by this Court on three separate occasions. *See Havard*, 86 So.3d at 910 (finding this issue procedurally barred and without merit); *Havard*, 988 So.2d at 333; *Havard*, 928 So.2d at 788-91.

in their failure to secure an independent pathologist." *Havard*, 86 So.3d at 910.

As he has several times before, Havard challenges Chloe Britt's cause-of-death on the basis of newly-discovered evidence rather than trial court error or ineffective assistance. "Rephrasing direct appeal issues for post-conviction purposes will not defeat the procedural bar of res judicata." *Havard*, 86 So.3d at 910; *see Havard*, 988 So. 2d at 333; *Havard*, 928 So.2d at 788-91 (ruling that Havard's theory of ineffective assistance of counsel "claim for failing to secure, or adequately prepar[ing] a motion to secure, a pathologist to investigate the case and defense strategy . . ." was barred) (citing Miss. Code Ann. § 99-39-21(3); *Wiley v. State*, 750 So.2d 1193, 1200 (Miss. 1999), *Foster v. State*, 687 So.2d 1124, 1129 (Miss. 1996); *Wiley v. State*, 517 So.2d 1373, 1377 (Miss. 1987)); *Loden*, 43 So.3d at 388.

The record also reflects that Havard did challenge cause-of-death under a theory that Chloe Britt died from injuries caused by a short, accidental fall. The following exchange occurred between trial counsel and Dr. Laurie Patterson on cross-examination:

> Defense: Dr. Patterson, when you were talking about the torn frenulum you talked about – I think you said a lot of times especially in children that a fall will cause that to happen?
>
> Patterson: Uh-hum. Yes.
>
> Defense: Well, even though this child wasn't walking, if this child had fallen from a height of, say, three feet onto a hard surface that could cause that frenulum to burst or to bleed; isn't that correct?
>
> Patterson: Yes. Anything that would cause – you know – something, a force type of effect, yes.
>
> Defense: Like a porcelain toilet top or something like that. Some solid object like that.
>
> Patterson: If she fell on to it with her mouth.

Tr. at 409.

The State submits that Havard is procedurally barred from challenging Chloe Britt's cause-of-death. Chloe Britt's cause of death has been litigated and reviewed several times by this Court. Therefore, Havard's claim Shaken Baby Syndrome is procedurally barred by Miss. Code Ann. § 99-39-21(2) and (3). *Havard*, 86 So.3d at 907-910 (stating that trial counsel were effective; and, the trial court had not erred in denying Havard funds to hire an independent pathologist for the purpose of assisting in interpreting the autopsy reports); *see Brown v. State*, 948 So.2d 405, 411 (Miss. 2006); *Howard v. State*, 945 So.2d 326, 361 (Miss. 2006) (citing *Grayson v. State*, 879 So.2d 1008, 1022 (Miss. 2004)).

As for the specific claims put forth by Havard in his second, successive post-conviction petition and overcoming the procedural bars and preclusive doctrines of waiver and res judicata, "an alleged error should be reviewed, in spite of any procedural bar, only where the claim is so novel that it has not previously been litigated, or, perhaps, where an appellate court has suddenly reversed itself on an issue previously thought settled. Havard carries the burden of demonstrating that his claim[s] [are] not procedurally barred." *Havard*, 988 So.2d at 333 (quoting *Lockett v. State*, 614 So.2d 888 (Miss. 1992) (internal citations and quotations omitted)). Havard has not carried his burden.

First, no "intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have adversely affected the outcome of [Havard's] conviction or sentence" exists. Miss. Code Ann. §§ 99-39-5(2)(a)(ii), -39-23(6), and -39-27(9). Havard cites to the Wisconsin intermediate Court of Appeals case of *State v. Edmunds*[20] for the proposition that Shaken Baby Syndrome has been debunked; and as, grounds for granting him relief. Pet'r's

[20] *But see State v. Cramer,* 351 Wis.2d 682 (Wis. Ct. App. 2013) (unpublished disposition entered on October 15, 2013, appearing in a reporter table). *State v. Cramer* is attached hereto as Resp's Ex. "C" at 3-11.

Amended Mot. for Relief at 36. Havard is mistaken. *Edmunds* does not stand for that proposition and his reliance on the case is misplaced.

To begin, the decision was rendered by Wisconsin's intermediate Court of Appeals. *See State v. Edmunds*, 746 N.W.2d 590 (Wis. Ct. App. 2008). The Wisconsin State Supreme Court never entered an opinion in *Edmunds*. Even if the Wisconsin State Supreme Court had decided *Edmunds*, the holding is not controlling authority. Havard's failure to support this unfounded assertion with relevant authority in and of itself obviates this Court's consideration. *See Walker v. State*, 913 So.2d 198, 222 (Miss. 2005) (barring further review of a challenge to the sufficiency of the evidence supporting the defendant's challenge where the defendant "failed to cite any relevant authority.").

As it concerns the evidence presented in this case and in *Edmunds*, the same Wisconsin intermediate court noted that in regards to Shaken Baby Syndrome as a valid cause-of-death:

> [t]here really is no controversy outside the courtroom. The American Academy of Pediatrics, pediatricians, neurosurgeons, it's well accepted that violently shaking a baby causes injury to that baby. *And outside a few limited number of physicians, most of whom appear as defense witnesses, there's really no controversy about it.*

See Resp's Ex. "C" (quoting *State v. Cramer,* 351 Wis.2d 682 (Wis. Ct. App. 2013) (emphasis added).

At any rate, *Edmunds* is not controlling. Thus, Havard's claims must fail as he does not and cannot cite to any relevant authority for the proposition that Shaken Baby Syndrome is junk science. *Walker*, 913 So.2d at 222. Mississippi courts have certainly not determined that to be the case. There is no intervening decision of this Court or the United States Supreme Court that would have an adverse affect on the outcome of Havard's trial.

Additionally, Havard's Shaken Baby Syndrome claim is not novel. The State would point to the case of *Middleton v. State* for support. *Middleton*, 980 So.2d 351, 356-357 (Miss. Ct. App. 2008); *see generally Kolberg v. State*, 829 So.2d 29, 70-71 (Miss. 2002). In *Middleton*, the appellant sought a new trial and challenged the evidence supporting his conviction for felonious child abuse. *Id.* at 353. Middleton's neighbor testified at trial that on October 24, 2005, he heard a baby crying for approximately one hour when suddenly he heard a thump followed by silence. *Id.* Immediately after, Middleton was seen leaving the apartment complex with an infant (only months old) in his arms. *Id.* Middleton found his aunt outside and together the three entered the aunt's apartment. *Id.* The infant was not breathing. *Id.* Emergency responders were called and Middleton administered CPR. *Id.*

At trial, the State introduced three experts who testified that the infant's injuries were permanent and consistent with Shaken Baby Syndrome. *Id.* The experts included: (1) an emergency room physician who treated the infant; (2) a pediatrician who treated the infant; and, (3) a radiologist, who specialized in pediatric care and who treated the child. *Id.* Middleton moved for directed verdict when the State rested its case-in-chief, but that motion was denied. *Id.* Following his conviction, Middleton moved for a new trial; or alternatively, a J.N.O.V. *Id.* Both were denied. *Id.* The trial court ordered Middleton to serve twenty-five years in the custody of the Mississippi Department of Corrections. *Id.* Middleton appealed. *Id.*

On appeal to the Mississippi Court of Appeals, Middleton raised three challenges to his conviction claiming the trial court erred in admitting the State's expert testimony. *Id.* As it relates in this case, Middleton took issue with the pediatrician who treated the infant's injuries. *Id.* at 355-56. "Middleton argued that Shaken Baby Syndrome is not a generally accepted theory in the medical

community . . . [and] the testimony regarding Shaken Baby Syndrome should . . . have been excluded because [the pediatrician] was not shown to be an expert in that field." *Id.* at 356. "The State argue[d] that [the pediatrician] exhibited sufficient knowledge, skill, and experience to qualify as an expert regarding pediatric trauma . . . [and that] "knowledge was of assistance to the jury . . . ." *Id.*

In finding the trial court had not erred in allowing the testimony, the Mississippi Court of Appeals noted the pediatrician "also testified that the theory of Shaken Baby Syndrome is a widely accepted theory, but he also admitted there are a few well-respected physicians who disagree regarding the theory." *Id.* at 356-357 (citing *Wells v. State*, 913 So.2d 1053, 1057-1058 (Miss. Ct. App. 2005), quoting *Chapman v. Carlson*, 240 So.2d 263, 268 (Miss. 1970)). The Court of Appeals went on to affirm Middleton's conviction after finding no error with admitting the pediatrician's testimony. *Id.* at 360.[21]

Beyond *Middleton* and *Kolberg*, the State would direct the Court's attention to *Cavazos v. Smith*, 132 S.Ct. 2, 4, 181 L.Ed.2d 311 (2011). In *Smith*, the United States Supreme Court affirmed the California State Supreme Court's refusal to set aside a jury verdict where the state's highest court found sufficient evidence supporting a grandmother's conviction for the death of her seven-week-old granddaughter. *Id.* at 3-4.

After the California State Supreme Court affirmed the conviction, Cavacos sought federal habeas relief. *Id.* at 2. The United States District Court for the Central District of California denied her petition. *Id.* Cavacos appealed to the United States Court of Appeals for the Ninth Circuit. *Id.* The Ninth Circuit reversed and remanded. *Id.* The state petitioned for a writ of certiorari to the state

[21] The Court of Appeals also noted that "several lay witnesses . . . testified to what they observed on the day [the infant] suffered his injuries." *Middleton*, 980 So.2d at 360.

supreme court and the United States Supreme Court. *Id.* The California State Supreme Court reinstated its opinion. The U.S. Supreme Court, in *Smith,* affirmed the state court's decision and reversed the Ninth Circuit. *Id.*

In doing so, the *Smith* Court expressly recognized the deference courts of appeal owe to juries, stating that "it is the responsibility of the jury–not the court–to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." *Id.* at 4. Importantly, the *Smith* Court recognized the jury's determination that the victim died as a result of injuries consistent with Shaken Baby Syndrome. *Id.* at 8.

ii. Havard's Brady and Alternative Ineffective Assistance of Trial Counsel Claims.

Likewise, Havard seeks to re-litigate the issue his underlying felony of sexual battery under different legal theories: a *Brady* violation, or alternatively a claim of ineffective assistance. Gus Sermos, Havard's trial counsel, recently executed an affidavit in which he states that he was aware that Dr. Hayne found evidence consistent with Chloe Britt having been sexually battered.[22] The issue of Havard's underlying felony, sexual battery, was litigated at trial, on direct appeal, in his post-conviction relief application, and his first, successive post-conviction relief petition. As a result, Havard has waived any subsequent challenge his underlying felony of sexual battery under a theory that the prosecution violated *Brady* or that trial counsels' investigative efforts related to Dr. Hayne's sexual battery findings were ineffective. *See Havard*, 86 So.3d at 901 (citing Miss. Code Ann. § 99-39-21(1)).

The purpose of the Mississippi Uniform Post-Conviction Collateral Relief Act "is to provide

[22] *See* Resp's Ex. "S" (Aff. of Gus Sermos, dated Sept. 16, 2014).

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*." *Loden v. State*, 43 So.3d 365, 392-93 (Miss. 2010) (emphasis in the original) (citing Miss. Code Ann. §§ 99-39-3(2), 99-39-21(1)). Havard is merely attempting to revive a claim decided at trial, on direct appeal, in his post-conviction relief application, and his in first, successive post-conviction relief petition. *Havard*, 928 So.2d at 788-89; *Havard*, 86 So.3d at 904-10. Havard has waived challenging the issue of his underlying felony of sexual battery under *Brady*, or alternatively that trial counsel was ineffective for not challenging prosecution's evidence. *See Foster v. State*, 687 So.2d 1124, 1134-37 (Miss. 1996) (citing Miss. Code Ann. § 99-39-21(2)); *Wiley v. State*, 517 So.2d 1373, 1377-78 (Miss. 1987).

Havard may overcome his waiver, but only by demonstrating both "cause" and "actual prejudice" as defined by the UPCCRA. *See Grayson v. State*, 118 So.3d 118, 133-34, 135 (Miss. 2013) (quoting Miss. Code Ann. § 99-39-21(2), (4)-(6)). He fails to do so. And in light of the evidence, the State submits Havard cannot show cause or actual prejudice.[23] In his September 15, 2014, affidavit, Gus Sermos states that he was aware of Dr. Hayne's findings from Chloe Britt's autopsy, including evidence consistent with Chloe Britt's rectum being penetrated by an object. Resp's Ex "R", "T" & "U". Havard's interpretation of Dr. Hayne's findings on sexual battery are consistent with his trial testimony and testimony throughout these proceedings. And, the jury heard trial counsel's cross-examination of Dr. Hayne, which was focused solely on his findings related to Chloe Britt's sexual battery. Tr. at 560-63. Havard's *Brady* claim is subject to the doctrine of

[23] *See* Resp's Ex "R" (Aff. of Gus Sermos, dated Sept. 15, 2014); Resp's Ex. "T" (Appendices to Havard's Direct Appeal Brief of Appellant, dated Oct. 4, 2004); and Resp's Ex. "U" (Exhibits to Havard's "Petition for Post-Conviction Relief", dated Apr. 26, 2007).

waiver and cannot be reviewed.

In addition, the doctrine of res judicata bars Havard's claim of ineffective assistance of trial counsel.[24] *See Foster*, 687 So.2d at 1134-37 (citing Miss. Code Ann. § 99-39-21(3)). Havard bears the burden of demonstrating the procedural bars do not apply to his claims. *See King v. State*, 23 So.3d 1067, 1071-72 (Miss. 2009) (citing Miss. Code Ann. § 99-39-21(3) & (6)). This Court has already decided the issue of Havard's trial counsels' effectiveness concerning "Dr. Hayne's statements regarding his pre-trial assessment of the underlying felony of sexual battery . . . ." Pet'r's Amended Mot. for Relief at 41; *see Havard*, 86 So.3d at 907-910. In 2012, this Court unanimously found Havard's contention that his trial counsel "were ineffective because . . . they failed to have any pretrial interaction with Dr. Hayne . . ." was without merit. *Havard*, 86 So.3d at 909, 910; *see also Havard*, 988 So.2d at 333 ("Rephrasing direct appeal issues for post-conviction purposes will not defeat the procedural bar of res judicata."). As a result, the doctrine of res judicata precludes further review of this issue. Miss. Code Ann. § 99-39-21(3); *see Foster*, 687 So.2d at 1134-37.

For these reasons, the State submits Havard's *Brady* and ineffective assistance of trial counsel claim are procedurally barred. Havard is entitled to no relief.

5. *The Claims Raised in Havard's Amended Motion for Relief from Judgement or Leave to File Successive Petition for Post-Conviction Relief are Not Exempt from the UPCCRA's Procedural Bars Under Fundamental Rights Exception.*

Next, the State submits that Shaken Baby Syndrome, *Brady*, and ineffective assistance of counsel claims raised in Havard's Amended Motion for Relief from Judgement or Leave to File Successive Petition for Post-Conviction Relief are not excepted from the UPCCRA's procedural bars under this Court's fundamental rights exception. *Rowland v. State*, 42 So.3d 503 (Miss. 2010). To

[24] *See* Pet'r's Amended Mot. for Relief from Judgment at 41.

be clear, the State does not dispute that the discretionary authority to "regulate procedural burdens [is] subject to proscription under those clauses of the State and Federal Constitutions if they offend[]some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Means v. State*, 43 So.3d 438, 442 (Miss. 2010) (internal quotations omitted) (quoting *Cooper v. Oklahoma*, 517 U.S. 348, 367, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996); *Patterson v. New York*, 432 U.S. 197, 201-202, 978 S.Ct. 2319, 53 L.Ed.2d 281 (1977)); *see Rowland*, 98 So.3d 1032, 1036 (Miss. 2012). "[This Court has held that] . . . an exception to the procedural bars exists for errors affecting certain constitutional rights." *Rowland*, 98 So.3d at 1036 (citing *Smith v. State*, 477 So.2d 191, 195 (Miss. 1985)). "[T]he State has neither the authority nor the right to subject a person to double jeopardy. . . illegal sentence . . . [or] den[y him] . . . due process at sentencing." *Id.* at 1036 (citations omitted).

That said, Havard contends that the Shaken Baby Syndrome, *Brady*, and ineffective assistance of counsel claims are excepted from the UPCCRA's procedural bars pursuant to *Rowland*, 42 So.3d 503.[25] His is mistaken. And, the State disagrees with Havard's interpretation of *Rowland* and his application of the fundamental rights exception. The *Rowland* Court did not carve out a new fundamental rights exception to the UPCCRA's procedural bars. Instead, this Court clarified confusion surrounding an exception to procedural bars for claims involving error affecting a prisoner's fundamental rights.

The facts in *Rowland* presented this Court with the opportunity to resolve conflicts and inconsistencies concerning this State's reviewing courts' authority to bar claims of error affecting

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[25] Pet'r's Amended Mot. for Relief from Judgement at 43-44 (citing and quoting *Rowland v. State*, 42 So.3d 503 (Miss. 2010)).

fundamental rights. Confusion surrounded the limits of those courts' authority to bar claims of fundamental rights violations. In earlier opinions, the Court extended the discretionary authority to bar claims of alleged error affecting fundamental rights. The *Rowland* Court found this grant of authority actually thwarted the purpose underlying the exception—to "be 'faithful stewards' in keeping with the spirit of *Brooks*." *Rowland*, 42 So.3d at 507 (quoting *Read v. State*, 430 So.2d 832, 836-837 (Miss. 1983)).

In keeping with the spirit of *Brooks*, claims of error affecting a prisoner's fundamental rights must be reviewed. *Id.* (quoting *Smith v. State*, 477 So.2d 191, 195 (Miss. 1985)). *Rowland* reaffirmed the role of reviewing courts to be faithful stewards ensuring that no person "be deprived of his liberty except by due process of law." *Id.* (quoting *Brooks v. State*, 46 So.2d 94, 97 (Miss. 1950)). "[W]here fundamental and constitutional rights are ignored, due process does not exists, and a fair trial in contemplation of law cannot be had . . . ." *Id.* (quoting *Brooks*, 46 So.2d at 97).

The statutory exceptions to the UPCCRA's procedural bars require the petitioning party to show his claim meets an exception to the UPCCRA's procedural bars or to show cause and actual prejudice. Errors affecting a party's fundamental or constitutional rights must be considered in order to ensure the guaranteed right to a fair trial. *Rowland*, 42 So.3d at 507; *see generally Brooks*, 46 So.2d 94. *Rowland* makes clear that a "procedural bar cannot be applied in the face of 'errors affecting fundamental rights,' because it would be 'too significant a deprivation of liberty to be subjected to a procedural bar.'" *Id.* (quoting *Smith*, 477 So.2d at 195).

That said, the State does not read *Rowland* as relieving Havard of his burden to show cause. "Merely asserting a constitutional violation is insufficient to overcome the [UPCCRA's] procedural bars." *Means*, 43 So.3d at 442; *see Chandler v. State*, 44 So.3d 442, 444 (Miss. Ct. App. 2010).

Under this Court's precedent, "[t]here must at least appear to be some basis for the truth of the claim ***before*** the procedural bar[s] will be waived." *Means*, 43 So.3d at 442 (emphasis added). Here, there is no apparent basis supporting Havard's claims.

Under Havard's interpretation of *Rowland*, error—or even the remote possibility of error—is unnecessary. Naked assertions mandate appellate review and consideration. Havard's application of *Rowland* elevates the constitutional right from a fair trial to an absolute right of appellate review of any claim which a petitioner deems to be a denial of a fundamental right, simply because he makes that argument. That cannot be the case. In keeping with the spirit of *Brooks*, Havard "'can be deprived of his liberty . . . by due process of law.'" *Rowland*, 42 So.3d at 507 (quoting *Brooks*, 46 So.2d at 97). A claim for relief based on a fundamental rights violation will be excepted from the UPCCRA's bars where it appears that "'due process does not exist, and a fair trial . . . cannot be had . . . .'" *Id.* (quoting *Brooks*, 46 So.2d at 97).

Rowland may relieve a petitioner from his burden to show actual prejudice in limited circumstances, but not his burden to establish cause. *See Means*, 43 So.3d at 442. As it stands, Havard received a fair trial. *See Havard*, 86 So.3d 896; *Havard*, 988 So.2d 322; *Havard*, 928 So.2d 771. And, Havard bears the burden of showing a violation of his fundamental rights occurred. He does not. The bases for Havard's fundamental rights violation is simply that he "could not previously present these claims, because [his Shaken Baby Syndrome claim is] based upon evidence that was not reasonably discoverable at the time of trial due to advances in the medical and scientific communities . . . [and] . . . because the grounds for [his *Brady*] claim were hidden by the State."[26] Both allegations are false and are addressed in the following section of this discussion.

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[26] Pet'r's Amended Mot. for Relief from Judgement at 42.

For present purposes, the State submits that the claims raised by Havard in his Amended Motion for Relief from Judgement or Leave to File Successive Petition for Post-Conviction Relief do not fall under the fundamental rights exception and are procedurally barred by the UPCCRA.

B. The Claims Raised in Havard's Amended Motion for Relief from Judgment or for Leave to File Successive Lack Merit.

Without waiving any of the procedural bars and without conceding to any of Havard's assertions, the State submits that all of the claims raised in Havard's Amended Motion for Relief from Judgment or for Leave to File Successive Petition for Post-Conviction Relief are without merit. As a result, Havard is entitled to no relief. Havard's Shaken Baby Syndrome, *Brady*, and ineffective assistance claims are discussed below**.**

1. *Havard's Shaken Baby Syndrome Claim*.

Havard avers recent advances in the medical and scientific communities as evidence exonerating him of any guilt. He argues that these recent advances have spurred a paradigm shift in both the nation's medical and scientific communities. According to him, a majority professionals in both of these communities now disavow Shaken Baby Syndrome as a legitimate medical diagnosis. Havard claims these recent advances prove he is innocent of capital murder. He seeks a new trial or at a minimum, an evidentiary hearing. Havard contends he will be denied due process if his requests are denied.

Havard's argument is based on newly-discovered evidence, which purportedly debunks Shaken Baby Syndrome as a recognized medical diagnosis. His argument was discussed earlier in the context of the newly-discovered exception to the UPCCRA's procedural bars. Here, the

substance of his claim is addressed under the same newly-discovered evidence standard. Newly-discovered evidence refers to evidence which "is of such nature that it would be practically conclusive that, if it had been introduced at trial, it would have caused a different result in the conviction or sentence." *Havard*, 86 So.3d at 901, 906, 908-910 (quoting Miss. Code Ann. § 99-39-27(9)). Havard's Shaken Baby Syndrome claim is not based on newly-discovered evidence

Havard's theory is that newly-discovered evidence proves that Chloe Britt died as a result of a short, accidental fall, which debunks Shaken Baby Syndrome. To do so, he "must show that [this] evidence . . . is material to the issue and that it is not merely cumulative or impeaching." *Williams*, 669 So.2d at 55; *see McCoy v. State*, 111 So.3d 673, 676 (Miss. Ct. App. 2013) (recognizing newly discovered evidence is evidence which is "outcome determinative . . . .") (citing to Miss. Code Ann. §§ 99-39-5(2) and 99-39-23(6)). Havard has not and cannot show this evidence creates a reasonable probability of a different result at trial, because the evidence supporting his theory does not prove Chloe Britt died from a short, accidental fall. The evidence supporting his theory is offered to impeach the evidence supporting his sexual battery conviction.

Havard's expert affiants reach conclusions that support his short, accidental fall theory. Looking to Dr. George R. Nichols' sworn statement, he believes Chloe died as a result of a short, accidental fall. He notes:

> that subdural hematomas and retinal hemorrhages are not necessarily indicative of abusive shaking; indeed, with only these two symptoms, the classic trial of Shaken Baby Syndrome is not fully established . . . [and] that Chloe's injuries [could not] have been caused by intentional force equivalent to the force of a motor vehicle accident or a fall from a significant height. 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. Falls are random events and it is now generally accepted that some long distance falls do not cause severe injury while other short distance falls may cause significant injury and death.

> It is further now understood that while most short distance falls do not lead to serious injuries, a subset of short distance falls result in skull fractures and lethal intracranial hemorrhage.

Pet'r's Ex. "D" at 2-3. Dr. Nichols does not reach any conclusion to a reasonable degree of medical certainty as to Chloe's death. *Id.* at 2. Instead, he chooses to focus on recent changes that have occurred in the fields of forensic pathology and biomechanical engineering since 2002. *Id.*

Dr. Michael M. Baden, like Dr. Nichols, believes Chloe died as a result of a short, accidental fall. Dr. Baden states that:

> Chloe's signs and symptoms did not establish the classic triad of Shaken Baby Syndrome - a condition which many forensic pathologists have concluded does not exist; and who now conclude that scientific evidence shows that shaking a baby cannot produce subdural hemorrhages or sufficient brain damage to cause a baby to die.

Pet'r's Ex. "B" at 2. Dr. Baden believes that:

> Chloe' s autopsy findings are consistent with having occurred as the result of a short accidental fall, as [petitioner] has consistently described, and are not consistent with the baby having been shaken to death . . . .

Id. at 2. Dr. Baden notes Chloe's injuries, including the bruises to her head, and attributes her death to one of many types of innocent head trauma, such as from short, accidental falls. *Id.* He also states that Chloe did not present the classic triad of injuries associated with Shaken Baby Syndrome. Dr. Baden, unlike Dr. Nichols concludes:

> to a reasonable degree of medical certainty, based on my education, training and fifty years' experience as a forensic pathologist and medical examiner, that Chloe's clinical, medical and autopsy findings, including her head bruises, are entirely consistent with having resulted from a short accidental fall and are not consistent with Shaken Baby Syndrome.

Id.

Dr. Janice Ophoven generally agrees with Drs. Baden and Nichols that "the child's collapse

was most likely triggered by the short fall described by Mr. Havard . . . ." Pet'r's Ex. "C" at 2. Her opinion is broader than Dr. Baden's. She feels "other predisposing factors may have contributed to . . ." Chloe's death. *Id.* at 2, 17-18. Dr. Ophoven does not end her analysis there. As it concerns Dr. Hayne's testimony and autopsy report, Dr. Ophoven lends her expertise to make a legal conclusion. According to Dr. Ophoven:

> Dr. Hayne did not conclude in his report or testimony that the death was "due to" shaking or that the manner of death was homicide but rather stated that the findings were "consistent with" shaken baby syndrome and homicide . . . . [I]n medicine most findings are "consistent with" a wide array of diagnoses, this wording indicates that he did not reach a clear or definitive diagnosis that would support a finding of shaking or homicide beyond a reasonable doubt or even by a preponderance of the evidence. Such distinctions are unlikely to be noted by a jury unless the defense attorney understands these nuances, most likely through consultation with a medical expert.

Id. at 17. Dr. Ophoven believes Chloe died from injuries sustained as a result of a short, accidental fall and certain predisposing health issues. She then critiques the treating physicians and medical staffs' testimonies.

It is obvious that the focus of Havard's experts is Dr. Hayne's Shaken Baby Syndrome conclusion. Their analyses do not make it practically certain that Havard's trial would have ended differently. While each believe Chloe's death was caused by a short, accidental fall, the experts reach that conclusion without considering all the evidence—a luxury which the jury was not afforded. The expert conclusions stand in stark contrast to all the evidence presented at trial. When viewed in light of all the evidence, the expert conclusions do not make it reasonably probable that there would have been a different outcome at trial.

The jury heard evidence which established that Chloe was fussy, but otherwise alive and well at 8:00 p.m. on February 21, 2002. Tr. at 325-27, 333-334, 345. By 10:00 p.m., Chloe was near

death. The evidence proved Chloe sustained: massive head injuries, retinal hemorrhaging, bruises to her head and thighs, a torn frenelum, a torn, bleeding rectal area; and, other abrasions. *See* Tr. at 403-404, 407-408, 418-420; *see also* Resp's Ex. "L".[27] Chloe was in Havard's exclusive custody for a large portion of that time. Pet'r's Ex. "F" at 4 (Transcribed, Video-Recorded Statement of Jeffrey Keith Havard, dated Feb. 23, 2002).

The evidence presented to the jury demonstrated Havard was ill-prepared for the responsibility of caring for Chloe. Havard had not bathed Chloe prior to and on February 21, 2002. *Id.* at 11. Chloe and Rebecca Britt moved into Havard's trailer home three weeks earlier. *Id.* at 8. Havard was unemployed. Tr. at 341; *see Havard*, 988 So.2d at 335-336 (noting that Havard's grandfather, William Havard, recalled that his grandson quit his job after William Havard purchased him a vehicle for the specific purpose of traveling to and from work; and that, Havard "would have people over using drugs . . . .").

On February 21, 2002, Havard pre-occupied himself with household chores and television in an effort to avoid caring for Chloe. Pet'r's Ex. "F" at 4. Though Havard conveniently ignores this point, the State thinks it pertinent to remind this Court that Havard told law enforcement officials that he was prone to fits of anger; and in fact, experienced a childhood flashback of being beaten in a bathtub at the time he was bathing Chloe. *Id.* at 19-20; *see also Havard*, 988 So.2d at 335-36 (noting Havard's grandfather recognized that Gordon Harrell, Havard's step-father, was abusive to Havard during his childhood; and additionally, that Havard was short-tempered and violent as evidenced by William Harrell's recollection of calling the police to calm Havard down on multiple occasions).

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[27] *See* Dr. Hayne's 2002 Final Report of Autopsy.

Additionally, the evidence demonstrated Havard's intentional efforts to disguise Chloe's injuries. Havard sent Rebecca to a nearby grocery store to fetch dinner. Pet'r's Ex. "F" at 19-20; Tr. at 341. After Rebecca left for the store, Chloe began crying and Havard did not know why. *Id.* He decided to change Chloe's diaper on the bed in the master bedroom, but her diaper was clean. *Id.* She "kind of spit up and her nose was running." *Id.* Even though Havard had never bathed Chloe before, he decided he would while Rebecca was away. *Id.* at 11, 16-17. Havard spread a towel on the bowl of the commode and planned on lay Chloe there to dry her off. But, as he was removing Chloe from the tub, she fell.

While these events were unfolding, Havard had "a flashback of [his] childhood . . . when [he] was in the tub and [he] got beat up." *Id.* at 19-20. Though he could not be certain, Havard believed Chloe's "head hit the tank . . . [or her] upper body hit the tank . . . ." *Id.* at 16-17. He was certain that Chloe's "leg for sure hit the bowl, hit the lid." *Id.* at 5, 12. Havard caught Chloe and shook her several times until she cried. *Id.* at 5-6, 12-13. Though uncertain, Havard *admitted* that he "may have shaken her too hard." *Id.* at 19, 20. He was relieved to hear Chloe cry. *Id.* at 6. But, he knew Rebecca would be home soon, so he quickly wiped blood from Chloe's face, rubbed her with lotion, diapered her, and dressed her. *Id.*

Once Havard placed Chloe in her crib, he began cleaning the mess, but was interrupted. *Id.* at 23. He heard Rebecca drive up, so Havard stopped cleaning, began watching television and acted as though nothing happened. *Id.* Havard attempted to keep Rebecca from Chloe by warning Rebecca not to go into Chloe's room, because she was asleep. *Id.* at 23. But, Rebecca "went in there anyway . . . ." *Id.* Havard watched as Rebecca approached Chloe's crib. *Id.* When Rebecca left the room content, he "guess[ed] that [Chloe] was fine . . ." and did not think telling Rebecca about the

fall was all too important. *Id.*[28] He "figured, well, there's nothing wrong . . . I didn't hurt her." *Id.*

At that point, Havard sent Rebecca back to rent movies. *Id.* at 4, 7; Tr. at 347-48. Rebecca left, again, and Havard stripped the sheets from the bed in the master bedroom. *Id.* at 7.[29] Then, he gathered the sheets and clothes off the bed and bundled them together with the comforter from the master bedroom. Tr. at 457-459; 472-473. Havard was barricaded inside the restroom when Rebecca returned. Pet'r's Ex. "F" at 7. Rebecca knocked on the door, but it was not clear what he was doing. *Id*; Tr. at 348-349. So, Rebecca walked into Chloe's room and found her daughter blue and not breathing. Tr. at 349. Rebecca called out to Havard for help and began CPR on Chloe. *Id.* Havard and Rebecca decided to rush Chloe to the nearest emergency room. *Id.* at 350. Rebecca and Chloe waited outside in the car while Havard dressed himself. *Id.* He started to drive in the opposite direction, away from the closest hospital. *Id.* Rebecca demanded he drive her to Natchez Community Hospital, so he turned around. *Id.*

At the emergency room, health care providers asked about Chloe's injuries. Havard said nothing, pretending as if he had no idea what happened. *Id.* at 470-71. He was "scared they were going to say she had been shaken . . . ." Pet'r's Ex. "F" at 21. And, Havard knew he was "the one that shook her." *Id.* Havard knew Chloe "was like she [wa]s . . . [n]ot breathing." *Id.* at 20. Law enforcement officials wanted to interview Havard about his contact with Chloe earlier that night. Tr. at 470. Havard reluctantly agreed, but seemed preoccupied. *Id.* at 437-38. He repeatedly asked

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[28] Ironically, Havard told law enforcement officials he was "the one that shook her." Pet'r's Ex. "F" at 21. Havard knew Chloe "was like she [wa]s . . . [n]ot breathing." *Id.* at 20.

[29] DNA analysis confirmed both Havard's DNA and Chloe's DNA and blood were contained within one spot on the bed sheets Havard attempted to wash. Chloe lived in Havard's home for approximately 21 days. It was entirely reasonable for the jury to infer that Havard took measures to deceive Rebecca Britt by making Chloe's injuries appear accidental.

if he could return to the trailer. *Id*. He wanted to shower. *Id.*

Law enforcement officials searched Havard's trailer in the early hours of February 22, 2002. Law enforcement found evidence, which tended to show that Havard was in the process of destroying evidence. Officers found the trailer unlocked, indicating the three left in a hurry. Officers recovered the bed sheets, a bed comforter, a towel and clothes. Tr. at 457-59; 472-73. They found these items wrapped together on the kitchen floor mere feet from a washing machine and dryer. *Id.* Officers also searched the bathroom where Havard purportedly bathed Chloe, but found no indication that the trailer's bath tub had been used. *Id.* at 492. Instead, officers found Chloe's baby tub leaning against a wall of the trailer's bathroom. *Id.*

The jury also heard Dr. Hayne testimonies concerning his autopsy observations and conclusions. He described Chloe's injuries, which included "the presence of a subdural hemorrhage; and . . . the presence of retinal hemorrhage . . . ." *Id*. at 556. Dr. Hayne testified that he observed no "other potentially lethal causes of death." *Id.* He explained that his findings were "inclusionary and exclusionary" and they led him to conclusion that Chloe's cause of death "was consistent with the shaken baby syndrome . . . ." *Id.* at 556; *see Kolberg*, 829 So. 2d at 70-71 (recognizing diagnoses of abuse in fact-specific context).

Dr. Hayne did not testify to any specific amount of force as Dr. Nichols faults. Pet'r's Ex. "D". Instead, Dr. Hayne relied on his experience and observations in having conducted approximately twenty-five thousand autopsies, at that time, when describing the extent of Chloe's injuries to the jury. Tr. at 541. The injuries Dr. Hayne observed "parallel[ed] . . . [those] in motor vehicle crashes, [or] falls from significant heights . . . ." *Id.* at 557. He did not equate Chloe's injuries to those of a car wreck or falls from significant heights. Rather, Dr. Hayne likened the extent

of Chloe's injuries to those he had seen in victims of car wrecks and falls, (*i.e.*, extremely violent and catastrophic). His observations led him to conclude that Chloe's death "was consistent with homicide . . . ." *Id.* Dr. Hayne reached that conclusion based on her injuries and age. He believed Chloe was incapable of inflicting the injuries she suffered, herself. Chloe, a six-month-old infant probably had minimal ability to move, much less walk and thus accidentally fall. Dr. Hayne noted in his report and testified before that jury that Chloe's frenulum was torn; and, her head and legs were bruised in multiple places. Given her age and injuries, Dr. Hayne concluded that Chloe's death was consistent with shaken baby syndrome with closed head injuries.

Recently, Dr. Hayne executed a sworn affidavit in which he clearly states "with a reasonable degree of medical certainty" that Chloe's cause of death would be classified "as **shaken baby syndrome** with impact or blunt force trauma." Pet'r's Ex. "A" at 2 (Aff. of Dr. Steven T. Hayne, dated July 22, 2013). The statements sworn to in that affidavit do not change his 2002 autopsy report or testimony. In 2002, Dr. Hayne expressly attributed Chloe's death to "[c]hanges consistent with shaken baby syndrome ***and*** closed head injuries." Resp's Ex. "L" at 486 (emphasis added).

Dr. Ophoven takes issue with Dr. Hayne's conclusion. She expressly states that "Dr. Hayne did not conclude in his report or testimony that the death was 'due to' shaking or that the manner of death was homicide but rather stated that the findings were 'consistent with' shaken baby syndrome and homicide . . . ." Pet'r's Ex. "E" at 17. Dr. Ophoven then explains that "in medicine most findings are 'consistent with' a wide array of diagnoses, this wording indicates that he did not reach a clear or definitive diagnosis . . . ." *Id.*

What Drs. Ophoven, Baden and Nichols fail to include in their analyses is that, in addition to Dr. Hayne's testimony and report findings, the jury heard Havard confess in his video-recorded

statement that after dropping Chloe, he shook her, probably too hard–until she cried. The jury heard Havard tell police officers that he left Chloe alone and told no one. He left her and began destroying evidence which would link him to Chloe's injuries. Considering all the evidence—not just Dr. Hayne's 2002 testimony and autopsy report—Havard's short, accidental fall theory fails when considering the evidence as a whole. Because, his theory merely provides an alternative theory which challenges Dr. Hayne's findings in isolation.

The opinions of Havard's experts do not exonerate Havard. And, the State submits that they are not offered for the purpose of doing so. Havard offers these opinions solely for the purpose of re-litigating the issue of his guilt. Stated differently, Havard offers this evidence "to accuse; to charge a liability upon . . . [t]o dispute, disparage, deny, or contradict . . . " BLACK'S LAW DICTIONARY 678 (5th ed. 1979). He does so under the guise of newly-discovered evidence. Newly-discovered evidence is "evidence . . . [that] is material . . . [and] not merely . . . impeaching." *Williams*, 669 So.2d at 55; *see Havard*, 86 So.3d at 901, 906, 908-910 ; *Gray*, 887 So.2d at 162 (Miss. 2004); *Ormond v. State*, 599 So.2d 951, 961-962 (Miss. 1992).

Looking to Havard's biomechanical expert, Dr. Chris Van Ee rules out the possibility that Chloe's injuries could have been caused by shaking alone. His position is that data from scientific testing shows abusive shaking (shaking by an adult), at best, produces, angular accelerations associated with falls of only 1 foot. Pet'r's Ex. "E" at 6. Dr. Van Ee believes that "[t]o attribute the injuries of this child to shaking and dismissing the reported history of the accidental fall is not supported by current science." *Id.* at 9. It is worth noting that Dr. Van Ee is not, and has never been, a licensed physician and has not attended medical school. *Id.* His opinion is based on his engineering education which is distinguishable from the practice of medical, which relies on

deductive reasoning. Dr. Van Ee has never seen, treated, diagnosed, at least legally, any living patient. Lacking that education, experience and background, Dr. Van Ee reaches a conclusion based almost entirely on a hypothetical application of theoretical testing published in "biomechanical literature" and "current data on short distance falls" to exclude Shaken Baby Syndrome as a cause of Chloe Britt's death. Pet'r's Mot. 27-28; Pet'r's' Ex. "E" 1-3, 6 (citing case studies published by Dr. John Plunckett, forensic pathologist).[30]

"Rather than respond in like, with unsupported generalizations . . . [the State would point to] the various international and domestic medical organizations that have publically acknowledged the validity of [Shaken Baby Syndrome] as a medical diagnosis . . . ":

1) The World Health Organization;
2) The Royal College of Pediatrics and Child Health;
3) The Royal College of Radiologists;
4) The Royal College of Ophthalmologists;
5) The Canadian Pediatric Society;
6) The American Academy of Pediatrics;
7) The American Academy of Ophthalmology;
8) The American Association for Pediatric Ophthalmology and Strabismus;
9) The American College of Radiology;
10) The American Academy of Family Physicians;
11) The American College of Surgeons;
12) The American Association of Neurologic Surgeons;
13) The Pediatric Orthopaedic Society of North America;
14) The American College of Emergency Physicians;
15) The American Academy of Neurology.

Sandeep Narang, M.D., J.D., *A Daubert Analysis of Abusive Head Trauma / Shaken Baby Syndrome*,

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[30] In 2004, Dr. Van Ee was tendered as an expert by a Virginia defendant, Carlos Estrella-Perez, during the proceedings of *Commonwealth of Virginia v. Estrella-Perez*, No. 3051857-00 (Newport News Cir. Ct. June 11, 2004). Dr. Van Ee explained that he did "not treat patients." Resp's Ex. "G" at 201 (Tr. Excerpt of Dr. Van Ee's Testimony, *Estrella-Perez*, No. 3051857-00 (dated Jun. 11, 2004)). The Circuit Court of Newport News reluctantly ruled that Dr. Van Ee qualified as an expert in the field of biomechanical engineering after expressing its reservations with Dr. Van Ee's expertise and anticipated testimony. *See id*. at 205.

11 Hous. J. Health L. & Pol'y at 574-575.[31] The Centers for Disease Control and Prevention also acknowledges the validity of Shaken Baby Syndrome.[32] In addition, the diagnosis has been widely studied and tested across a broad spectrum of medical and non-medical disciplines. *Id.* at 578.[33] Aside from being internationally recognized:

> there exist at least **700 peer-reviewed**, clinical medical articles, comprising thousands of pages of medical literature, published by over 1000 different medical authors, from at least twenty-eight different countries. **Additionally, AHT has been peer-reviewed and published in the following disciplines: biomechanical engineering, general pediatrics, neonatology, neurology, neurosurgery, nursing, obstetrics, ophthalmology, orthopedics, pathology (forensic pathology), radiology, and rehabilitative medicine**. In fact, given its association with significant medical injuries and child fatalities, AHT is the **most peer-reviewed** and **well-published topic** in **child abuse pediatrics**. Thus, it is difficult for one to assert or argue that the diagnosis of AHT has not been subjected to the rigors of scientific falsifiability, stringently peer reviewed, or well published.

Id. (emphasis added).[34]

Shaken Baby Syndrome is internationally recognized as a serious form of injury, most often related to abuse. This Court recognizes "diagnoses of abuse in context of specific facts." *Kolberg*, 829 So.2d at 70-71 (recognizing "child abuse . . . a generally medically accepted diagnosis.") (citing

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[31] Resp's Ex. "E" at 42-43.

[32] *See* http://www.cdc.gov/ViolencePrevention/pdf/PedHeadTrauma-a.pdf (last visited Dec. 23, 2013) (citing Parks SE, *et al*., *Pediatric Abusive Head Trauma: Recommended Definitions for Public Health Surveillance and Research*., Atlanta (GA): Centers for Disease Control and Prevention, (2012)); *see* Joëlle Anne Moreno and Brian Holmgren, *Dissent Into Confusion: The Supreme Court, Denialism, and the False "Scientific" Controversy Over Shaken Baby Syndrome*, 2013 Utah L. Rev. 153, 155 (2013), attached as Resp's Ex. "Q".

[33] Resp's Ex. "E" at 44.

[34] The amount of peer-reviewed articles related to Shaken Baby Syndrome–some 700 peer-reviewed, clinical medical articles by Dr. Narang's estimation—stands in stark contrast with Havard's biomechanical engineering expert, Chris Van Ee, who is the "co-author of **the only peer-reviewed** publication . . . ." Pet'r's Mot. at 27.

Crawford v. State, 754 So.2d 1211 (Miss. 2000) (overruled on other grounds). "[W]hile this Court has not recognized abuse syndromes, we have recognized diagnoses of abuse in the context of specific facts." *Kolberg*, 829 So.2d at 71 (internal quotations omitted).

Havard's Shaken Baby Syndrome claim is not based on newly-discovered. Havard's Shaken Baby Syndrome claim is based on evidence, available at the time of his trial. The evidence is represented as newly-discovered in an attempt to re-litigate his guilt. This evidence does not prove his theory, rather it impeaches Dr. Hayne's findings and conclusion. But when this evidence is considered in light of all the evidence, Havard's short, accidental fall does not create a reasonable probability of a different outcome at trial. For the those reasons, the State submits Havard's Shaken Baby Syndrome claim has lacks merit. He is entitled to no relief.

2. *Havard's Brady and Ineffective Assistance of Trial Counsel Claims are Entirely Without Merit.*

The *Clarion Ledger* published an article, *The Death of Chloe Britt: Capital Murder or Accidental Fall?*, on January, 19, 2014, which Havard claims contains newly-discovered evidence. *See* Pet'r's Ex. "I".[35] Havard, approximately five months later, moved this Court seeking to amend his second, successive post-conviction petition with two additional claims for collateral relief: a *Brady* claim and an alternative ineffective assistance of trial counsel claim. On September 2, 2014, this Court entered an order allowing Havard to amend his second, successive post-conviction petition and giving the State an opportunity to file an amended response. Havard's *Brady* and ineffective assistance of trial counsel claims are addressed below, in turn.

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[35] Jerry Mitchell, *The Death of Chloe Britt: Capital Murder or Accidental Fall?*, CLARION LEDGER, Jan. 20, 2014).

i. Havard's Brady Claim.

Looking to his Amended Motion, Havard argues that the prosecution suppressed evidence prior to trial in violation of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and its progeny. *See* Pet'r's Amended Mot. for Relief from Judgment at 30. Havard's *Brady* claim is based almost entirely on "new facts" appearing in a January 19, 2014, *Clarion Ledger* article, recently revealed to him.[36] *Id.* at 30. He argues these new facts support his *Brady* claim. *Id.* at 30-33, 40. Havard places a great deal of weight on one statement attributed to Dr. Hayne, where he is quoted as having "informed prosecutors prior to trial that he could not say a sexual assault took place." *Id.* at 32.

To begin, Havard has fails to state a *Brady* claim. He bears the burden to do so. *Thorson v. State*, 994 So.2d 707, 720 (Miss. 2007) (internal citations omitted). This Court applies a four-part test to determine whether or not a petitioner has carried his burden. *See id*. at 720. To carry his burden, Havard had to provide facts sufficient to show,

a. that the State possessed evidence favorable to the defendant (including impeachment evidence);
b. that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence;
c. that the prosecution suppressed the favorable evidence; and
d. that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Id. at 720 (internal citations omitted); *Howard v. State*, 945 So.2d 326 ,337 (Miss. 2006); *see also Havard*, 86 So.3d at 900.

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[36] Havard obtained an affidavit executed by Dr. Steven Hayne on July 21, 2014. Havard also cites portions of the record concerning pre-trial discovery matters. *See* Pet'r's Amended Mot. for Relief from Judgment or for Leave to File Successive Pet. for Post-Conviction Relief at 32-33.

Looking to the first prong of this Court's test, Havard relies on statements which in no way show that the State possessed favorable or impeachment evidence. Favorable "evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Simon v. State*, 857 So.2d 668, 699 (Miss.2003) (quoting *Kyles v. Whitley*, 514 U.S. 419, 433 (1995)); and *U.S. v. Bagley*, 473 U.S. 667, 682). Dr. Hayne's statement is not favorable to Havard. Assuming Dr. Hayne informed the prosecution, prior to trial, that he "could not support a finding of sexual abuse in this case"[37] that statement is not favorable to Havard. Dr. Hayne's testimony was that he found evidence consistent with the penetration of Chloe Britt's rectum by an object.

Dr. Hayne found evidence consistent with sexual battery. But as he has explained time and again, Dr. Hayne could not reach a definitive conclusion that Chloe Britt was the victim of a sexual battery. The evidence Dr. Hayne found also prevented him from excluding the possibility that Chloe Britt had been sexually battered. Below are several examples of statements given by Dr. Hayne which emphasize this point. Havard's *Brady* claim in no way alters Dr. Hayne's trial testimony, Final Report of Autopsy, 2010 Deposition, and various affidavits Dr. Hayne has executed on Havard's behalf.

Beginning with his trial testimony, Dr. Hayne was briefly questioned by the prosecution concerning the rectal injuries Chloe Britt sustained.

> Mr. Harper: I would hand you what's been marked as State's Exhibit 5 and ask if you'll look at that photography and tell me whether or not you can identify what's in that photograph.

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[37] Pet'r's Ex. "1" at 2 (Aff. of Dr. Steven T. Hayne, dated July 21, 2014).

Dr. Hayne: Identify what is in - -

Mr. Harper: Yes, sir.

Dr. Hayne: What it depicts, sir?

Mr. Harper: Yes, sir.

Dr. Hayne: It depicts the bruise located to the rectum of the decedent, sir. That photograph was taken by me during the course of the post mortem examination.

Mr. Harper: Okay, sir. I'll ask you, Dr. Hayne. What would that be indicative of, the injuries that you saw to the rectal area, if you can answer that question.

Dr. Hayne: *It would be consistent with penetration of the rectum with an object, sir . . . .*

Tr. at 551 (emphasis added). In 2010, during a deposition conducted by Havard's present counsel, Dr. Hayne made clear that:

> [A]ll I 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 ore significant evaluation and conclusion.

Resp's Ex. "N" at 28 (Depo of Dr. Steven T. Hayne, dated Nov. 23, 2010) (emphasis added). Dr. Hayne executed an affidavit at the requestof Havard's present counsel in 2013. Dr. Hayne stated that he "found no *definitive* evidence of sexual abuse based upon my findings. A finding of sexual assault was not *conclusively* demonstrated." Pet'r's Ex. "A" at 2 (Aff. of Dr. Steven T. Hayne, dated July 22, 2013) (emphasis added). The January 19, 2014, *Clarion Ledger* article quotes Dr. Hayne's trial testimony relating to his findings on sexual battery. The article states that Dr. Hayne found evidence "consistent with penetration of the rectum with an object." Jerry Mitchell, *The Death of Chloe Britt: Capital Murder or Accidental Fall?*, CLARION LEDGER at 6; *see* Pet'r's Ex. "H" at 2 (Jerry Mitchell, *Defense Lawyers Want Review of Cases Involving Pathologist Dr. Steven Hayne*, ClarionLedger.com, Jun. 16, 2013) (same)).

The State submits Havard has not and cannot prove that the prosecution possessed favorable or impeachment evidence. The sole statement Havard relies upon in support of his *Brady* claim is unfavorable to Havard's claim. In his most recent affidavit, Dr. Hayne's states that he informed prosecutors prior to trial that he was unable to find enough evidence that would allow him to conclude to a reasonable degree of medical certainty that Chloe Britt had been sexually assaulted. Dr. Hayne found evidence consistent with penetration of Chloe Britt's rectum by an object. And as he has explained, he could not conclude definitively that a sexual assault occurred or had not occurred. Dr. Hayne's July 14, 2014, affidavit does not contradict his trial testimony, his Final Report of Autopsy, his testimony given in 2010 during a deposition, and the various affidavits he has executed on Havard's behalf. Importantly, his statements are not favorable to Havard, particularly when considered with all of the evidence presented at trial. For example, Havard's admitted digital penetration Chloe's rectum.

Next, Havard makes no attempt to show that he did not possess this evidence and was unable to obtain it by exercising reasonable diligence. He cannot. After all, Dr. Hayne executed an affidavit on Havard's behalf one a year earlier. Pet'r's Ex. "A". Havard's present counsel deposed Dr. Hayne in November of 2010. Resp's Ex. "N" at 450-502. The following exchange occurred during that 2010 deposition:

Mr. Jicka:	And you were not asked, actually, about sexual battery during that trial, were you, sir?
Dr. Hayne:	Not specifically, no.
Mr. Jicka:	But you were aware, from even from the coroner's permit, that that was an issue in the case, correct?
Dr. Hayne:	Oh, yes, and I knew before I even stepped on the witness stand that was going to be an issue.

> Mr. Jicka: Okay. And prior to the trial, you discussed this with the district attorney whether you could say to a reasonable degree of medical certainty or even to a probability that sexual abuse occurred, correct?
>
> Dr. Hayne: That's correct. But all I 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.
>
> Mr. Jicka: Okay. You - - if you had been asked the same questions we - - that I've been asking you today in court sexual abuse, would you have answered them in the same manner, sir?
>
> Dr. Hayne: Exact way. I think I at least touched on some of those, and I have not changed my opinion, and it would make no difference whether defense or prosecution was asking me, the answer would be the same.
>
> . . . .

Id. at 477-78.

Dr. Hayne was available for questioning prior to trial and Havard possessed a copy of Dr. Hayne's autopsy report, prior to trial. The record reflects that on September 25, 2002— nearly three months before trial—the trial court entered an order, expressly recognizing that:

> the report of Dr. Hayne, and any supplements, are in the possession of the defendant, and that Dr. Hayne is available to answer any questions that defense counsel may have of him.

CP at 94; And, the appendices to Havard's direct appeal brief and exhibits submitted with his application for post-conviction relief clearly indicate trial counsel had Dr. Hayne's autopsy report listed as inventory in their case file.[38] *See Davis v. State*, 43 So.3d 1116, 1125 (Miss. 2010) (finding prosecution's disclosure of witness and summary of testimony contained in a police report was sufficient information for Davis to contact and interview witness concerning details of her statement); *Manning v. State*, 929 So.2d 885, 892-93 (Miss. 2006); *Howard v. State*, 945 So.2d 326, 337-39 (Miss. 2006).

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[38] Resp's Ex. "T" & "U".

In addition, trial counsel's cross-examination of Dr. Hayne clearly demonstrates a high level of familiarity with contents of the autopsy report. Trial counsel's cross of Dr. Hayne gives rise to the reasonable inference that trial counsel was aware that Dr. Hayne could not conclude nor exclude the possibility that Chloe Britt was sexually battered.[39] Looking to the trial transcript, trial counsel's cross of Dr. Hayne began:

> Mr. Sermos: Dr. Hayne, as far as your examination and I don't want to even try to put words in your mouth, but, essentially, the shaken baby syndrome here and the cause of death and then the manner of death, those two things, especially the shaken baby syndrome, that is a totally separate item from any allegations or indications of rectal or sexual abuse; is that correct?
>
> Dr. Hayne: The cause of - - yes. The cause of death that I addressed was the shaken baby syndrome. The manner of death, of course, is a product of the cause of death. The other findings were separate, sir. They did not constitute lethal injuries that would place death in and of themselves, sir.
>
> Mr. Sermos: And then the next question is ***when you use the word in your report*** "contusion" - - excuse me one moment, please, and I'll get right to. You had used the word in the rectum there would have been a contusion. In your definition from a medical expert standpoint, is a contusion and a tear the same thing?
>
> Dr. Hayne: No, sir.
>
> Mr. Sermos: Okay. Would you please tell the jury what the difference would be?
>
> Dr. Hayne: A tear is a laceration most commonly whether it's a complete, full thickness disruption of the - - in this case, the mucosal surface as opposed to a skin surface. A contusion is a collection of blood underneath the mucosal surface.
>
> Mr. Sermos: Okay.
>
> Dr. Hayne: It's a produce of tearing of vessels underneath the skin or mucosal surface and bleeding at that site with the subsequent collection of blood.
>
> Mr. Sermos: So that could be caused by something different than would cause a

[39] *See* Resp's Ex. "S" (Aff. of Gus Sermos, dated Sept. 16, 2014).

tear; is that correct?

Dr. Hayne: Could be, or it could be the same object.

Mr. Sermos: If there were any tears down there ***in your report*** when you put a ***contusion of the anus is noted***, I presume you would have also written tears were noticed also; is that correct?

Dr. Hayne: If I had seen them, I would have put down laceration. I did not see it in this case, and I did not exclude it, but I just didn't see it.

Mr. Sermos: The next part of that is you mention ***in your report*** on - - actually it's page two after your cover sheet. You put well-formed stool is present within the luminal space of the large bowel.

Dr. Hayne: Yes, sir.

Mr. Sermos: Is the large bowel by what you're referring to here, the descending colon?

Dr. Hayne: It would include the descending colon, yes.

Mr. Sermos: Okay. So where the next question comes from is this. At the time the baby was deceased, was in the hospital, the other witness [sic] have testified that there was feces coming out of the baby's anus and rectal area, and that it was basically diarrhea type. Now, is there a difference in diarrhea and well-formed stool?

Dr. Hayne: Yes, sir.

Mr. Sermos: Okay. My next question would then be what would cause - - if these witnesses testified to this that there was diarrhea, loose bowels, and basically this was at the time of death. When would the well-formed stool form? Was it already there?

Dr. Hayne: I think the well-formed stool is already present, and that would include the ascending as well as transverse colon. Now, if there was injury to a lower part of the colon that could be a transfer of fluid in that site, and you can get a semi-liquid stool while you have solid stool in the first part of the colon.

Mr. Sermos: Okay. And then that would go to the next part of what you probably have done - - ***it's not in your report*** anywhere, and I don't presume it existed, but had there been some damage into or of the descending colon, you would have noticed that; is that correct?

Dr. Hayne: I would have, sir.

Mr. Sermos: And when you stated that around the rectum or the anular ring, the sphincter. That there was that contusion there, and that could be

caused - - ***I believe you said by an object***?

Dr. Hayne: Yes.

Mr. Sermos: If an object had - - when you state that, the object merely has to come into contact with the anus and it doesn't necessarily imply any massive insertion, does it?

Dr. Hayne: No. It implies force.

Mr. Sermos: Right.

Dr. Hayne: It implies injury to the mucosal surface subsequently tearing the small vessels underneath the mucosal surface.

Mr. Sermos: Okay. And then, shall we say, and I'll ask you for your expert opinion on this also. If some object were to have been inserted in that child's anus and even gone into the descending colon or the rectal area and that object were found, then that object should have either some form of tissue, matter, blood, or feces on it. Wouldn't you expect that?

Dr. Hayne: I would expect to at least to see fecal matter on it, sir. Maybe other items.

Mr. Sermos: Okay . . . .

Tr. at 560-63 (emphasis added).

Trial counsel's cross of Dr. Hayne focused solely on his findings concerning sexual battery to emphasize the lack of supporting evidence. (*e.g.*, no indication of massive insertion of an object, no fecal matter on objects submitted to forensic analysis, well-formed stool versus loose stool others witnessed, distinguishing laceration from contusion, and the absence of any finding pertaining to lacerations listed in Dr. Hayne's report). Trial counsel's cross does not support Havard's assertion that evidence was suppressed. The jury heard Dr. Hayne testify that his findings related to sexual battery were, inconclusive. *See Havard*, 86 So.3d at 909-10. The jury heard this testimony due to trial counsels' familiarity with Dr. Hayne's report. The State submits this evidence was discoverable prior to trial and in Havard's possession.

Finally, the State submits that the evidence supporting Havard's *Brady* claim does not show a reasonable probability of a different outcome at trial. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *King v. State*, 656 So.2d 1168, 1177 (Miss. 1995) (internal quotation marks omitted) (quoting *U.S. v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985)).[40] In 2012, this Court unanimously denied Havard post-conviction review and collateral relief. *Havard*, 86 So.3d at 910. This Court was presented essentially the same issue and ruled that "[t]here [wa]s no merit to Havard's claim that newly discovered evidence exists that supports his innocence." *Id.* at 904-907. In reaching that conclusion, the Court explained that:

> Dr. Hayne testified at Havard's trial, and he was subjected to cross-examination. In his recent deposition testimony, Dr. Hayne testified that his deposition testimony was consistent with his trial testimony. Although Dr. Hayne's trial testimony was limited regarding sexual battery, nothing in his deposition testimony was inconsistent with his trial testimony. Additionally, at his deposition, Dr. Hayne testified that he had seen no new facts that would cause him to change his testimony at trial.

Id. at 906.

The State submits Havard's *Brady* claim is without merit. Havard's *Brady* claim does not satisfy the UPCCRA's pleading requirements. As a result, he fails to state a claim for relief. Based on the facts in his amended motion, Havard cannot prove a *Brady* violation occurred. His *Brady* claim is based on facts not within his knowledge. His claim does not indicate how he will prove those facts and the purpose for proving them. Therefore, Havard is entitled to no relief and his *Brady* claim should be dismissed.

Additionally, the State submits there was no discovery rule violation in this case. Havard does not expressly argue a discovery violation. Instead, he references portions of the record where

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[40] *See also Keller v. State*, 138 So.3d 817, 840 (Miss. 2014) (citing *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)).

trial counsel sought discovery pursuant to Rule 9.04 of the *Uniform Rules County and Circuit Court.* Nevertheless, the State submits there was no discovery violation. Trial counsel obligated the prosecution to disclose the contents of any witness's statement, written, recorded or otherwise preserved, including any oral statements. *See* URCCC R. 9.04. The record clearly reflects that Dr. Hayne's Final Report of Autopsy was disclosed. Dr. Hayne was made available to both sides. CP at 94; *see McGowen v. State*, 859 So.2d 320, 338 (Miss. 2003) (finding discovery violation claim was without merit, in part, where defendant was given the opportunity to interview one of the prosecution's witnesses). Additionally, Gus Sermos's affidavit states "I was aware that . . . Dr. Steven T. Hayne, found evidence consistent with [Chloe Britt] having been sexually battered." Resp's Ex. "S". Gus. Sermors's affidavit shows he was aware of Dr. Hayne's findings, including those related to sexual battery. The State submits there was no violation of Rule 9.04.

ii. Havard's Ineffective Assistance of Counsel Claim.

Alternatively, Havard claims trial counsel were ineffective in their investigative efforts concerning Dr. Hayne's autopsy findings. Pet'r's Amended Mot. for Relief from Judgment or for Leave to File Successive Pet. for Post-Conviction Relief at 41 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). This Court applies the two-pronged test of *Strickland* and its progeny. *See Havard*, 988 So.2d at 331. "Havard must show that counsels' performance was deficient . . .[and] that defense counsels' deficient performance was prejudicial to Havard's defense." *Id.* (citing *Strickland*, 466 U.S. at 687); *see Ford v. State*, 708 So. 2d 73, 75 (Miss. 1998) (quoting *Smith v. State*, 434 So.2d 212, 219 (Miss. 1983); citing Miss. Code Ann. § 99-39-9(1)(c)).

Havard's fails to state a *prima facie* ineffective assistance of counsel claim for relief. In turn, his ineffective assistance of counsel claim should be dismissed. *Billiot v. State*, 515 So.2d

1234, 1237 (Miss. 1987) (quoting Miss. Code Ann. § 99-39-11(2)). Havard fails to provide affidavits to support his ineffective assistance of counsel claim. *See Ford*, 708 So.2d at 75 (citing Miss. Code Ann. § 99-39-9); *Brooks v. State*, 573 So.2d 1350, 1354 (Miss. 1990) (citing *Smith v. State*, 490 So.2d 860 (Miss. 1986) (holding a movant's alleged ineffective assistance of counsel claim was without merit where the claim failed to satisfy the UPCCRA's pleading requirements) (citing Miss. Code Ann. § 99-39-9(e)). The affidavit requirement applies when a post-conviction petition relies on facts that will be offered and proven by witnesses' called to testify. *See Ford*, 708 So.2d at 75. The affidavit requirement does not preclude Havard from stating a *prima facie* claim for relief. *Id.*.

However, the absence of any supporting facts significantly limits Havard's ability to state a claim for relief. Havard must state a *prima facie* claim of ineffective assistance of counsel which is based exclusively on facts which are within his knowledge, because he must be able to attest to the facts which he intends to prove in his Amended Motion. *Lewis v. State*, 776 So.2d 679, 682 (Miss. 2000) (quoting *Ford*, 708 So.2d at 75). This is problematic for Havard.

The facts appearing in Havard's Amended Motion concerning trial counsels' investigative performance do not state a claim which would entitle Havard to any relief. Havard's ineffective assistance of counsel claim is set out in one sentence. "Dr. Hayne's statements regarding his pre-trial assessment of the underlying felony of sexual battery demonstrates that Petitioner's trial counsel were ineffective in their efforts to investigate the case, including by failing to speak with Dr. Hayne prior to trial." Pet'r's Amended Mot. for Relief from Judgment at 41. His claim lacks the "specificity and detail" required to establish a *prima facie* claim of ineffective assistance. *Ford*, 708 So.2d at 75 (citing Miss. Code Ann. § 99-39-11(2)). He fails to provide facts which "show specific

acts or omissions that he alleges are the result of unreasonable legal assistance." *Brawner v. State*, 947 So.2d 254, 260-61 (Miss. 2006); *see generally Moffett v. State*, 137 So.3d 247, 260-62 (¶¶ 14-30) (Miss. 2014) (ruling that the post-conviction movant failed to meet both prongs of *Strickland* where affidavits were presented in support of PCR claim of ineffective assistance of trial counsel's pre-trial investigative efforts). Havard's ineffective assistance claim does not satisfy the UPCCRA's pleadings requirements.

The State submits Havard fails to state a claim or ineffective assistance of trial counsel and is not entitled any relief. The facts appearing in Havard's Amended Motion do not demonstrate a "claim procedurally alive substantially showing denial of a state or federal right . . . ." *Young v. State*, 731 So.2d 1120, 1122 (Miss. 1999) (citations and internal quotation marks omitted). This Court presumes trial counsels' performance was effective. *Id.* at 1123. The facts appearing in Havard's Amended Motion do not show Havard's trial counsels' performance was deficient. *Id.* Likewise, Havard's Amended Motion provides no facts that show trial counsels' performance caused him to suffer actual prejudice. *Id.*

Havard's assertions of trial counsels' performance is merely an attempt to re-litigate the issue of Chloe Britt's sexual battery. "Havard is trying to revitalize his previously raised ineffective assistance of counsel claim by asserting that, if he had known this new information, he would have prevailed on his original post-conviction-relief proceedings." *Havard*, 86 So.3d at 909-10. This Court disposed of an essentially identical claim in Havard's first, successive post-conviction petition. The portion of the Court's 2012 decision unanimously denying Havard's first, successive post-conviction petition appears below.

On direct appeal, Havard claimed that his trial counsel were ineffective for failing to

secure a pathologist to investigate the case and develop a defense strategy. *Havard*, 928 So.2d at 788. Havard's counsel did request an independent review of the autopsy report, but the trial court denied the motion, because no basis for need was shown when Dr. Hayne was available. Havard argued that it was his attorneys' failure to present the trial court with a basis for the request that constituted ineffective assistance. *Id*. To support this claim, Havard relied on the affidavit of Dr. Lauridson and a medical journal article in an attempt to show the substantial need that he claimed his attorneys failed to show. *Id*. at 789. The Court refused to consider the documentation on direct appeal, because it was outside of the record. *Id*. Ultimately, the Court found that Havard's counsels' actions were not deficient and the trial court exercised sound discretion when denying Havard's motion for an independent evaluation. *Id*.

Subsequently, in his original post-conviction-relief motion, Havard again raised the issue that his counsel were ineffective in failing to secure an expert witness to aid in research and the development of a defense strategy. The Court reconsidered the issue, in light of Dr. Lauridson's affidavit. Havard also submitted the affidavit of an attorney unrelated to Havard's case, who opined Havard's trial counsel were ineffective.

The Court considered, for the sake of argument, that even if Havard's counsel performed deficiently, meeting the first prong under Strickland, Havard could not show prejudice. *Havard*, 988 So.2d at 331. Although the Court's reasoning is more fully explained in that opinion, suffice it to state here that this Court found Dr. Lauridson's affidavit and reports did not contain evidence that would create a reasonable probability that the outcome of Havard's trial would have been different.

Id. at 333. . . .

Havard now asserts that his attorneys were ineffective because, after failing to secure an independent pathologist, *they failed to have any pretrial interaction with Dr. Hayne*. He relies on Dr. Hayne's deposition testimony that follows:

> Q: Did you ever meet with Gus Sermos or Robert Clark, Mr. Havard's attorneys about this case?
>
> A: I don't remember that, Counselor, but I–
>
> [Objection made by the State]
>
> Q: If requested by them, would you have met with the attorneys for Mr. Havard in this case?
>
> A: I always honored those requests, either prosecution or defense.
>
> Q: And would you have answered their questions in a meeting the same same way you have today, if asked?

A: If they were asking the same questions, I would respond the same way.

> This new line of questioning is not "newly discovered evidence" within the meaning of Mississippi Code Section 99-39-27(9). The newly discovered evidence must be "practically conclusive that, if it had been introduced at trial, it would have caused a different result in the conviction or sentence." Havard is trying to revitalize his previously raised ineffective-assistance-of-counsel claim by asserting that, if he had known this new information, he would have prevailed on his original post-conviction-relief proceedings.
>
> Havard now offers the deposition testimony of Dr. Hayne to show: a) that Dr. Hayne has an opinion in line with Dr. Lauridson's and b) *that Havard's trial attorneys never interviewed Dr. Hayne prior to trial to learn of his opinion*. In the original post-conviction-relief proceedings, Havard presented Dr. Lauridson's report and documentation in an attempt to show that his trial counsel were ineffective in their failure to secure an independent pathologist. This Court considered Dr. Lauridson's report and what it had to offer had it been introduced at trial. Havard's ineffective-assistance-of-counsel claim did not pass the standard set forth in *Strickland*. *Havard*, 988 So.2d at 333. Dr. Hayne's deposition testimony is that he does not remember meeting with Havard's trial counsel. However, even assuming that Dr. Hayne was not interviewed by Havard's trial counsel, the remainder of his deposition testimony that Havard seeks to have this Court consider is duplicative of Dr. Lauridson's report, which was considered and rejected in the original post-conviction proceeding. Furthermore, Havard offers no explanation as to why this information could not have been discovered prior to filing his original motion for post-conviction relief. This issue is procedurally barred. Notwithstanding the procedural bars, the issue is without merit.

Havard, 86 So.3d at 908-10 (emphasis added).

Havard's ineffective assistance of counsel claim should be dismissed. His claim does not satisfy the pleading requirements of the UPCCRA and does not state a claim for relief. Even if he had stated a claim for relief, Havard's ineffective assistance claim is no different from the claim this Court dismissed in 2012. *Id.* at 908-10. "Havard is trying to revitalize his previously raised ineffective-assistance-of-counsel claim by asserting that, if he had known this new information, he would have prevailed on his original post-conviction relief proceedings." The State submits his claim of ineffective assistance of counsel is without merit. Havard is entitled to no relief.

C. Havard is Entitled to No Relief from Judgment; and is Not Entitled to Proceed in the Trial Court.

Alternatively, Havard seeks relief from judgment under Rule 60(b) of the Mississippi Rules of Civil Procedure. Pet'r's Amended Mot. for Relief from Judgment at 44-47. He claims justice requires this Court exercise Its equitable authority to vacate his conviction and sentence. But if not, Havard seeks leave to file a successive petition for post-conviction relief in the trial court. *Id.* at 45-46. Havard's claim for relief from judgment and requested leave to proceed in the trial court should be denied.

Havard is not entitled to Rule 60(b)'s extraordinary relief. Rule 60(b)'s extraordinary relief is reserved for extremely rare and compelling circumstances. And, the UPCCRA provides the legal channel for obtaining leave to proceed in the trial court, not Rule 60(b). Havard fails to cite any authority which would allow the Court to vacate a conviction and sentence or to ignore the UPCCRA's procedure for obtaining collateral relief under Rule 60(b). As a result, his motions for relief from judgment or leave to proceed are not properly before the Court. *See generally Byrom v. State*, 863 So.2d 836, 863 (Miss. 2003) (quoting *Simmons v. State*, 805 So.2d 452, 487 (Miss. 2001)).

Without conceding the procedural default, Rule 60(b) states:

> [o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> 1. fraud, misrepresentation, or other misconduct of an adverse party;
> 2. accident or mistake;
> 3. newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
> 4. the judgment is void;
> 5. the judgment has been satisfied, released, or discharged, or a prior judgment upon

> which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;
>
> 6. any other reason justifying relief from the judgment.
>
> The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. Leave to make the motion need not be obtained from the appellate court unless the record has been transmitted to the appellate court and the action remains pending therein. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action and not otherwise.

Miss. R. Civ. P. 60(b).

Rule 60(b) motions indict the integrity of a judgment, order, proceeding with a charge of error. *Id.* Where exceptional or compelling circumstances warrant, Rule 60(b) "provides for extraordinary relief granted only upon an adequate showing . . . ." *Campbell v. State*, 126 So.3d 61, 2013 WL 1883342, *3 (Miss. Ct. App. 2013) (quoting *Perkins v. Perkins*, 787 So.2d 1256, 1261 (Miss. 2001) (citing *King v. King*, 556 So. 2d 716, 722 (Miss. 1990)). The "Rule . . . is a corrective device . . . [which] allows for the setting aside of a judgment for a number of reasons, [if] the motion is made within a reasonable time and . . . 'is not simply an opportunity to litigate that which is already settled.'" *Montgomery v. Montgomery*, 759 So. 2d 1238, 1240 (Miss. 2000) (quoting *Askew v. Askew*, 699 So.2d 515, 516, 520 (Miss. 1997)). Havard's "gross negligence, ignorance of the rules, or ignorance of the law is not enough." *Id.* (quoting *Perkins*, 787 So.2d at 1261). It is clear under this Court's precedent that Havard motions for extraordinary relief are improper. He must justify his failure to avoid mistake or inadvertence with exceptional or compelling circumstances.

Id. He does not.

To begin, Havard has failed to file this motion within a reasonable time. This motion comes nearly seven (7) years after this Court entered final judgment. "[W]hether a Rule 60(b)(6) motion has been made within a reasonable time is considered on a case-by-case basis." *Carpenter*, 58 So. 3d at 1162 (internal citations omitted); *see Briney v. United States Fid. & Guar. Co.*, 714 So.2d 962, 966-967 (Miss. 1998); *see generally Liljeberg*, 486 U.S. 863, n. 11; *Klapprott*, 335 U.S. at 613. Any prejudice suffered by the opposing party and the absence of good reasons for delay are relevant to a determination on the time a Rule 60(b)(6) motion is made. *Tyler v. Auto. Fin. Co., Inc*., 113 So. 3d 1236, 1241 (Miss. 2013) (citing *Briney*, 714 So.2d at 967); *see Indymac Bank, F.S.B. v. Young*, 966 So.2d 1286, 1290 (Miss. Ct. App. 2007) (citing *Briney*, 714 So.2d at 967).

Havard's newly-discovered evidence argument is an excuse, not an explanation. "This [hindsight] principle is no less applicable in situations where the merits have not been adjudicated." *In re Pettle*, 410 F.3d 189, 193 (5th Cir. 2005). Havard would have this Court believe that this paradigm-shift surrounding Shaken Baby Syndrome was undiscoverable prior to 2013. He gives no explanation, other than it was not widely-accepted. Adopting a wait-and-see approach to the development of evidence is no basis for granting him extraordinary relief. *Montgomery*, 759 So. 2d at 1240 (stating that gross negligence is no basis for relief) (quoting *Perkins*, 787 So.2d at 1261). Havard, through the exercise of reasonable diligence, could have discovered this evidence. The third-parties employed by the *Clarion Ledger* have managed to uncover essentially every evidentiary basis supporting his claims for relief. The State cannot reconcile Havard's assertion that this evidence was not reasonably discoverable given Havard's considerable access to experts and in light of the purported international recognition of science debunking Shaken Baby Syndrome across two

global professional communities.

Rule 60(b)(3) of the Mississippi Rules of Civil Procedure is the appropriate provision for claims supported by newly-discovered evidence. *See Mitchell v. Nelson*, 830 So.2d 635, 638 (Miss. 2007). Havard's motion is untimely under the plain language of the Rule's newly discovered evidence provision. *Id.* at 639 (providing no more than six months following "judgment, order, or proceeding was entered or taken."); *see also Ray v. Ray*, 963 So.2d 20, 23-24 (Miss. 2007) (refusing to grant extraordinary relief). "It is a well-settled principle that a state may attach reasonable time limitations to the assertion of federal constitutional rights." *Hester v. State*, 749 So.2d 1221, 1222 (Miss. Ct. App. 1999) (citing *Cole v. State*, 608 So.2d 1313, 1319 (Miss. 1992)).

Havard cannot satisfy the newly-discovered evidence provision. Final judgment came on March 10, 2006 after this Court affirmed Havard's conviction and sentence and denied his motion for rehearing. *Havard*, 928 So.2d 771. Havard's Amended Motion was accepted by the Court for filing on September 3, 2014, well-beyond the time period. His untimeliness leaves this Court without discretion to grant relief under Rule 60(b)(3). *See Carpenter*, 58 So.3d at 1162; *Mitchell*, 830 So.2d at 638. Havard must proceed under Rule 60(b)(6), the catch-all provision. In doing so, Havard improperly moves this Court seeking exoneration or an opportunity to re-litigate his underlying felony of sexual battery.

The plain language of Rule 60(b)(6) and controlling precedent requires Havard to justify relief on reasons **other than** newly discovered evidence. *Mitchell*, 830 So.3d 639 (explaining that relief under the catch-all provision "must be based on some reason other than the first five enumerated clauses of the rule.") (citing *Briney,* 714 So.2d at 966); *Montgomery*, 759 So.2d 1240-1241 (following the U.S. Supreme Court in, *Klapprott*, 335 U.S. at 614-515, in finding the phrase

"other reasons" as reference to reasons justifying relief other than those "five particularly specified . . . .") (citing *Askew*, 699 So.2d at 516); *see Carpenter*, 58 So.3d at 1162 (finding enumerated provisions mutually exclusive and courts lack discretion to grant relief under Rule 60(b)(6) for reasons specifically enumerated under parts (1)-(5)); *Hartford Underwriters Ins. Co. v. Williams*, 936 So.2d 888, 893-894 (Miss. 2006) (agreeing with the Fifth Circuit's application of Rule 60(b)(6) to "cases of extreme hardship not covered under any of the other subsections.") (quoting *Burkett v. Burkett*, 537 So.2d 443, 445 (Miss. 1989); *Smith v. Jackson Tool & Die, Inc.*, 426 F.2d 5 (5th Cir. 1970)). He does not.

Rule 60(b)'s exceptional and compelling circumstances standard is a measure designed to balance an individual's interests with the interest of finality. Several factors must be considered when determining whether exceptional and compelling circumstances require relief from judgment. This Court must recognize:

> (1) that final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) [whether] the motion was made within a reasonable time; (5) [relevant only to default judgments]; (6) [whether] judgment was rendered after a trial on the merits-the movant had a fair opportunity to present his claim or defense; (7) intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack.

Carpenter v. Berry, 58 So.3d 1158, 1162 (Miss. 2011) (quoting *M.A.S. v. Miss. Dep't of Human Servs.*, 842 So.2d 527, 530 (Miss. 2003)). In addition, this Court must be mindful of the potential for a party's injustice; the same potential in others; and, reaffirming the public's confidence in the judicial process. *Montgomery*, 759 So.2d at 1240-1241 (citing *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863, 108 S.Ct. 2194, 2204, 100 L.Ed.2d 855 (1988)). Havard's interest in

obtaining an opportunity to be heard must be weighed against the interest of finality. *Mitchell*, 830 So 2d at 639; *see Seven Elves, Inc. v Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981).

That said, Havard *is* asking this Court to lightly set aside a final judgment even though he was afforded the opportunity to present this evidence at trial, on direct review and when applying for post-conviction relief. *See Carpenter,* 58 So.3d at 1162. Havard's conviction and sentence have been reviewed, in depth, by a jury and by this Court, multiple times. Given that Havard has had ample opportunity to raise this accidental fall theory–on multiple occasions –the State submits there are no facts indicating the presence of any injustice. *See Briney* 714 So.2d at 968; *Noble House, Inc. v. W & W Plumbing & Heating Inc.*, 881 So.2d 377, 383 (Miss. Ct. App. 2004).

Rule 60(b)(6) "should be liberally construed in order to achieve substantial justice . . . ." *Carpenter,* 58 So.3d at 1162. That said, substantial justice will not be achieved by granting Havard extraordinary relief to re-litigate his conviction. "[E]vidence should not be admitted to reverse the lower court's decision." *Mitchell*, 830 So.2d at 639 (citing *Lose*, 584 So.2d at 1286); *Montgomery*, 759 So. 2d at 1240. The "Rule . . . is a corrective device . . . ." *Montgomery*, 759 So. 2d at 1240.

Havard received a fair trial as well as consideration since that time. Havard is not asking for correction. Havard is entitled to relief to correct an injustice. Havard is not entitled to relief so that he may challenge his conviction. And, Havard has not shown relief is necessary. *See Montgomery*, 759 So.2d at 1240-1241 (citing *Liljeberg*, 486 U.S. at 863). This is evident given that Havard seeks Rule 60(b) relief as an alternative to the UPCCRA. The extraordinary relief reserved under Rule 60(b)(6) is unique and separate from the UPCCRA. *See Montgomery*, 759 So. 2d at 1240 (explaining the rule is "a corrective device . . . ."). Granting relief under Rule 60(b) where relief is denied by the UPCCRA creates a significant risk of undermining the UPCCRA.

In *Gonzalez v. Crosby*, the United States Supreme Court recognized this distinction in the context of federal *habeas corpus* petitions. 545 U.S. 524, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005); *see Wilcher v. Epps*, 203 F. App'x 559, 562-63 (5th Cir. 2006). The Court recognized, that:

> [i]n some instances, a Rule 60(b) motion will contain one or more claims. For example, it might straightforwardly assert that owing to "excusable neglect," Fed. Rule Civ. Proc. 60(b)(1), the movant's habeas petition had omitted a claim of constitutional error, and seek leave to present that claim. *Cf. Harris v. United States*, 367 F.3d 74, 80-81 (C.A.2 2004) (petitioner's Rule 60(b) motion sought relief from judgment because habeas counsel had failed to raise a Sixth Amendment claim). Similarly, a motion might seek leave to present "newly discovered evidence." Fed. Rule Civ. Proc. 60(b)(2), in support of a claim previously denied. *E.g., Rodwell v. Pepe*, 324 F.3d 66, 69 (C.A.1 2003). Or a motion might contend that a subsequent change in substantive law is a "reason justifying relief," Fed. Rule Civ. Proc. 60(b)(6), from the previous denial of a claim. *E.g., Dunlap v. Litscher*, 301 F.3d 873, 876 (C.A.7 2002). **Virtually every Court of Appeals to consider the question has held that such a pleading, although labeled a Rule 60(b) motion, is in substance a successive habeas petition and should be treated accordingly**. *E.g., Rodwell*, *supra*, at 71-72; *Dunlap*, *supra*, at 876.
>
> We think those holdings are correct. A habeas petitioner's filing that seeks vindication of such a claim is, if not in substance a "habeas corpus application," at least similar enough that failing to subject it to the same requirements would be "inconsistent with" the statute. 28 U.S.C. § 2254 Rule 11. Using Rule 60(b) to present new claims for relief from a state court's judgment of conviction-even claims couched in the language of a true Rule 60(b) motion-circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts. § 2244(b)(2). The same is true of a Rule 60(b)(2) motion presenting new evidence in support of a claim already litigated: Even assuming that reliance on a new factual predicate causes that motion to escape § 2244(b)(1)'s prohibition of claims "presented in a prior application,"§ 2244(b)(2)(B) requires a more convincing factual showing than does Rule 60(b). Likewise, a Rule 60(b) motion based on a purported change in the substantive law governing the claim could be used to circumvent § 2244(b)(2)(A)'s dictate that the only new law on which a successive petition may rely is "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." In addition to the substantive conflict with AEDPA standards, in each of these three examples use of Rule 60(b) would impermissibly circumvent the requirement that a successive habeas petition be precertified by the court of appeals as falling within an exception to the successive-petition bar. § 2244(b)(3).

Gonzalez, 545 U.S. at 530-532 (emphasis added).

Justice Scalia then pointed to several characteristics which serve to prevent undermining the purpose of the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA). For example,

> [t]he Rule is often used to relieve parties from the effect of a default judgment mistakenly entered against them, *e.g., Klapprott*, 335 U.S., at 615, 69 S.Ct. 384 (opinion of Black, J.), a function as legitimate in habeas cases as in run-of-the-mine civil cases. The Rule also preserves parties' opportunity to obtain vacatur of a judgment that is void for lack of subject-matter jurisdiction-a consideration just as valid in habeas cases as in any other, since absence of jurisdiction altogether deprives a federal court of the power to adjudicate the rights of the parties. *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 94, 101, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). In some instances, we may note, it is the State, not the habeas petitioner, that seeks to use Rule 60(b), to reopen a habeas judgment granting the writ. *See, e.g., Ritter v. Smith*, 811 F.2d 1398, 1400 (C.A.11 1987).
>
> Moreover, several characteristics of a Rule 60(b) motion limit the friction between the Rule and the successive-petition prohibitions of AEDPA, ensuring that our harmonization of the two will not expose federal courts to an avalanche of frivolous postjudgment motions. First, Rule 60(b) contains its own limitations, such as the requirement that the motion "be made within a reasonable time" and the more specific 1-year deadline for asserting three of the most open-ended grounds of relief (excusable neglect, newly discovered evidence, and fraud). Second, our cases have required a movant seeking relief under Rule 60(b)(6) to show "extraordinary circumstances" justifying the reopening of a final judgment. *Ackermann v. United States*, 340 U.S. 193, 199, 71 S.Ct. 209, 95 L.Ed. 207 (1950); accord, *id.*, at 202, 71 S.Ct. 209*; Liljeberg*, 486 U.S., at 864, 108 S.Ct. 2194; *id.*, at 873, 108 S.Ct. 2194 (REHNQUIST, C. J., dissenting) ("his very strict interpretation of Rule 60(b) is essential if the finality of judgments is to be preserved"). Such circumstances will rarely occur in the habeas context. Third, Rule 60(b) proceedings are subject to only limited and deferential appellate review. *Browder v. Director, Dept. of Corrections* of *Ill.*, 434 U.S. 257, 263, n. 7, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978). Many Courts of Appeals have construed 28 U.S.C. § 2253 to impose an additional limitation on appellate review by requiring a habeas petitioner to obtain a COA as a prerequisite to appealing the denial of a Rule 60(b) motion.

Id. at 534-535.

For present purposes, *Gonzalez* identifies characteristics distinguishing Rule 60 challenges from collateral attacks and provides significant policy guidance in balancing Havard's interests with

interest of finality. This Court "will routinely look to interpretation from the same federal rule." *Montgomery*, 759 So.2d at 1240-1241 (quoting *Stringfellow v. Stringfellow*, 451 So.2d 219, 221 (Miss. 1984)). Havard moves this Court under Rule 60(b) motion in form only. Substantively, the claims raised in this petition amounts to a successive collateral attack disguised as a Rule 60 motion. In doing so, Havard has placed this Court in a precarious position.

Havard recognizes the collateral relief claims he raises are procedurally barred under the UPCCRA. A motion seeking relief from judgment, which actually "seek[s] vindication of a claim is, if not in substance a [post-conviction] application, at least similar enough that failing to subject it to the same requirements would be inconsistent with the [UPCCRA]." *Gonzalez*, 545 U.S. at 531-532 (internal quotations omitted). By presenting new evidence in support of a claim already litigated and procedurally defective, Havard moves this Court in a manner inconsistent with the UPCCRA.

As Justice Scalia identified, "a motion might seek leave to present newly discovered evidence . . . in support of a claim previously denied." *Id.* at 531 (internal quotations omitted) (citing Fed. Rule Civ. Proc. 60(b)(2); *Rodwell*, 324 F.3d at 69). Similarly, a motion that presents new evidence in support of a claim already litigated: "[e]ven assuming that **reliance on a new factual predicate** causes [Havard's] . . . motion to escape [the UPCCRA's] prohibition of claims presented in a prior application . . . ." *Id.* at 531-532 (emphasis added) (internal quotations omitted). By couching the same claims in the form of a Rule 60(b) motion, he encourages this Court to tap Rule 60(b)(6)'s equitable power to vacate his conviction and sentence in a manner entirely inconsistent with legislative intent underlying the UPCCRA.

To allow Havard an opportunity to re-litigate his guilt under Rule 60(b)(6) defeats justice in this case, promotes injustice in others and perpetuates endless litigation. The procedural bars of the

UPCCRA, like the requirements of Rule 60(b), are designed to balance the parties' interests. They do so in a variety of ways, many of which are similar to Rule 60(b)'s. However, the UPCCRA and Rule 60(b) are not counterparts. Rule 60(b)(6) is inherently deferential, specifically reserved for exceptional circumstances requiring extraordinary relief. It would be inconsistent with the UPCCRA to allow Havard to escape the "prohibition of claims presented in a prior application . . . ." *Gonzalez*, 545 U.S. at 531-32 (internal quotations omitted). This point is underscored by the fact that Havard has not and cannot justify the granting of extraordinary relief.

All meritorious claims are encouraged to be raised at trial and on appeal. Those that cannot reasonably be raised at trial or on direct appeal may be litigated as provided by the UPCCRA. The incentive to vigorously litigate issues at trial and on direct appeal is dampened by an alternate path to relief. Removing the incentive undermines the public's confidence in the judicial process by promoting endless litigation and injustice. Havard offers no legal or factual basis which would give the slightest indication this Court should overturn a jury's verdict and this Court's careful consideration. He is not entitled to extraordinary relief. And so, the State respectfully requests that his motions for relief be denied.

CONCLUSION

For the reasons stated above, the State submits Havard is entitled to no relief. Therefore, the State respectfully requests the Court dismiss Havard's Amended Motion for Relief from Judgement or Leave to File Successive Petition for Post-Conviction Relief and all claims raised therein.

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CERTIFICATE OF SERVICE

This is to certify that I, Brad A. Smith, Special Assistant Attorney General for the State of Mississippi, have electronically filed this Amended Response in Opposition to Petitioner's Amended Motion for Relief from Judgement or Leave to File Successive Petition for Post-Conviction Relief with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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This, the 26th day of September, 2014.

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