IN THE MISSISSIPPI SUPREME COURT

JEFFREY HAVARD *Petitioner–Appellant*

versus **No. 2018–CA–01709–SCT**

STATE OF MISSISSIPPI *Respondent–Appellee*

BRIEF of APPELLEE

ORAL ARGUMENT NOT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

Petitioner–Appellant Jeffrey Keith Havard appeals the judgment of the Circuit Court of Adams County, Mississippi, in this matter so that he may continue to litigate the issues of newly-discovered evidence in his third application for post-conviction relief.[1] He seeks oral argument to that end. The State, however, does not. It does not because the facts and legal arguments are adequately presented in the briefs and record, and the decisional process will not be significantly aided by oral argument. For that reason, the State respectfully requests that this matter be submitted without oral argument in accordance with Rule 34 of the Mississippi Rules of Appellate Procedure. MRAP 34(a)(3).

[1] Motion for Relief from Judgment or for Leave to File Successive Petition for Post-Conviction Relief at 30-38, *Jeffrey Keith Havard v. State of Mississippi*, No. 2013-DR-01995-SCT (Miss. filed Nov. 25, 2013).

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STATEMENT OF THE FACTS

On direct review, this Court summarized the facts of this case as follows:

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 Havard's version of the events of that night....

Havard v. State, 928 So.2d 771, 778-79 (Miss. 2006).

STATEMENT OF THE CASE

Petitioner Jeffrey Keith Havard was convicted and sentenced to death by an Adams County jury for the capital murder of six-month-old Chloe Britt in December of 2002. This Court affirmed the judgment of his conviction and sentence on direct appeal, and denied his first two post-conviction applications.[2] On November 25, 2013, Petitioner filed a third post-conviction application. His PCR application presented a single ground for relief—that newly discovered evidence in the form of recent advances in science and medicine proved he was actually innocent of capital murder.[3] He amended his PCR application on September 3, 2014 with two additional claims: (1) that the State suppressed favorable evidence in violation of *Brady v. Maryland*,[4] and (2) that trial counsel was ineffective for failing to interview Dr. Steven Hayne.[5]

In April of 2015, this Court granted Havard limited leave to proceed in the trial court with the

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[2] *See Havard v. State*, 928 So.2d 771 (Miss. 2006) (*Havard I*, direct appeal);*Havard v. State*, 988 So.2d 322 (Miss. 2008) (*Havard II*, initial PCR application); *Havard v. State*, 86 So.3d 896 (Miss. 2012) (*Havard III*, second PCR application).

[3] Motion for Relief from Judgment or for Leave to File Successive Petition for Post-Conviction Relief, *Jeffrey Keith Havard v. State of Mississippi*, No. 2013-DR-01995-SCT (Miss. Nov. 25, 2013) (*Havard IV*).

[4] *Brady v. Maryland*, 373 U.S. 83 (1963).

[5] Amended Motion for Relief from Judgment of for Leave to File Successive Petition for Post-Conviction relief*, Havard IV*, No. 2013-DR-01995-SCT (Miss. Sept. 3, 2014).

issues of newly-discovered evidence in his post-conviction application.[6] He filed his petition for post-conviction relief in the trial court on June 16, 2015. In addition to his newly discovered evidence issues, the petition contained allegations related to sexual battery despite the Court's remand Order. After the initial pleadings had been filed, the trial court held a status conference and entered an Agreed Scheduling Order on May 31, 2016. The Agreed Scheduling Order set deadlines for (1) designating expert witnesses and disclosing their written reports (Dec. 16, 2016), (2) completing discovery (March 28, 2017), (3) filing motions and having them heard (Jul. 7, 2017), and (4) conducting an evidentiary hearing on Petitioner's issues with newly-discovered evidence (Aug. 14-16, 2017).[7]

The parties designated experts and exchanged their reports on December 16, 2016. Havard named Michael Baden, M.D., Janice Ophoven, M.D., and Chris Van Ee, Ph.D. as expert witnesses. He also listed Dr. Hayne as a potential witness. The State designated Scott Benton, M.D., and provided Havard a copy of Dr. Benton's final written report and opinions. Havard provided the State with his experts' written reports and opinions. On March 9, 2017, Havard's counsel deposed Dr. Benton and obtained his case file.[8] Weeks later, he provided the State with supplemented and amended reports and opinions from Drs. Ophoven and Van Ee. These reports and opinions were nothing more than responses to Dr. Benton's written report and deposition testimony.

On July 7, 2017, the trial court held a motions hearing and heard Havard's Motion to Compel,

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[6] Order, *Jeffrey Keith Havard v. State of Mississippi*, No. 2013-DR-01995-SCT (Miss. Apr. 2, 2015).

[7] Agreed Scheduling Order, *Jeffrey Havard v. State of Mississippi*, No. 02-KR-0141-J (Miss. Cir. Ct. May 31, 2016).

[8] Dr. Van Ee attended Dr. Benton's deposition.

Motion for Summary Judgment, and his Motion to Exclude Opinions of Scott Benton, as well as the State's Motion for an Order that Restricts or Limits Evidence and Testimony, Motion for Partial Exclusion of Expert Testimony and Evidence, and Motion and for Summary Judgment. The trial court reserved ruling on the parties' *Daubert* motions. It denied Petitioner's Motion to Compel and the parties' summary judgment motions. As for the Motion for an Order that Restricts or Limits Evidence and Testimony, the trial court agreed with the State and ruled that its jurisdiction was limited by the remand Order to the issues of newly discovered evidence in the post-conviction application Havard filed in this Court in November of 2013. The evidentiary hearing began on August 14, and ended August 16, 2017. In those three days, the trial court admitted third-five exhibits into evidence and heard testimony from Dr. Hayne and expert testimony from Drs. Baden, Ophoven, Van Ee, and Benton.[9]

On September 14, 2018, the trial court issued a written Order, which granted Petitioner a new sentencing hearing.[10] The State announced that it would not to seek a sentence of death because it could not present a case in aggravation due to the passage of time. The parties agreed that the only sentence available was a term of life in the custody of the Mississippi Department of Corrections without the possibility of parole or probation. Based on those representations, the trial court sentenced Petitioner to serve a term of life without the possibility of parole or probation.

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[9] Drs. Baden, Ophoven, and Hayne are forensic pathologists. Dr. Baden was accepted as an expert in the fields of Anatomic Forensic and Clinical Pathology. (Evidentiary Hr'g Tr. 57). Dr. Ophoven was accepted as an expert in the field of Pediatric Forensic Pathology. (Evidentiary Hr'g Tr. 173-74; 184). Dr. Van Ee is a biomechanical engineer, who was accepted as an expert in the field of biomechanical engineering. (Evidentiary Hr'g Tr. 281-292). Dr. Benton is a physician, who is double-board certified in General Pediatrics and Child Abuse Pediatrics. (Evidentiary Hr'g Tr. 358). He was accepted as an expert in the field of Child Abuse Pediatrics. (Evidentiary Hr'g Tr. 364).

[10] Order, *Havard v. State*, No. 02-KR-0141-J (Miss. Cir. Ct. Sept. 14, 2018).

Petitioner now appeals the trial court's decision to deny his request for an entirely new trial with the following assignments of error. As demonstrated below, none of his assignments have merit and should be denied.

SUMMARY OF THE ARGUMENT

Havard was convicted of capital murder and sentenced to death after a full and fair trial at which he could have challenged the validity of SBS. He utterly failed to demonstrate his "newly-acquired" evidence was newly-discovered evidence that proves his innocence. Even so, the trial court vacated his death sentence, and ordered a new sentencing phase proceeding nearly 15 years after trial. Havard, emboldened by the trial court's act of grace, insists he is entitled to more. So he claims the trial court erred, and demands relief from this Court in the form of a new trial. But the trial court did not err. Havard simply failed to carry his burden to show his "newly-acquired evidence" was newly discovered evidence. What he presented through testimony of three witnesses at the evidentiary hearing was not newly discovered evidence that proves he is actually innocent of capital murder.

The opinions expressed by Petitioner's expert witnesses are not generally accepted in the medical community. The AHT and SBS diagnoses, on the other hand, are. Both are supported by The American Academy of Pediatrics, the American Academy of Ophthamology, the American College of Emergency Physicians, the Center for Disease Control and Prevention, and many other medical organizations in this country and others. Both diagnoses are supported by hundreds of peer-reviewed articles written by physicians around the globe. Both are based on decades of experience and real-world application. And both are taught in medical schools to future physicians, many of whom will treat and provide care to child abuse victims.

ARGUMENT

I. The trial court did not err in upholding Havard's conviction.

In his first assignment of error, Havard claims the trial court erred in upholding his conviction and asks the Court to reverse that decision. (Appellant's Br. at 25-63). He argues the trial court committed several legal errors in upholding his conviction. He also says the trial court made several factual errors and clearly erred in upholding his conviction. Havard is entirely mistaken. The Court should affirm the trial court's decision for the reasons given below.

A. Standard of review

The standard of review to be applied on appeal from a post-conviction evidentiary hearing is settled. "[W]hether a new trial should be granted is made by the trial judge on a case-by-case basis, taking into account all the relevant facts and circumstances."[11] This determination is one which is "left to the discretion of the trial court, and that decision will not be reversed absent an abuse of that discretion."[12] A trial court's fact-findings are reviewed for clear error. So on appeal, the reviewing court "'must examine the entire record and accept that evidence which supports or reasonably tends to support the findings of fact made below, together with all reasonable inferences which may be drawn therefrom and which favor the lower court's finding of fact.'"[13] The reviewing court must also give considerable deference "to the trial court as the 'sole authority for determining credibility of the

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[11] *Brown v. State*, 890 So.2d 901, 916 (¶ 53) (Miss. 2004) (citing *Moore v. State*, 508 So.2d 666, 668 (Miss. 1987)).

[12] *Brown*, 890 So.2d at 916-17 (¶ 53) (citing *Williams v. State*, 669 So.2d 44, 53 (Miss. 1996)).

[13] *Chase v. State*, 171 So.3d 463, 479 (¶ 51) (Miss. 2015) (internal punctuation omitted) (quoting *Goodin v. State*, 102 So.3d 1102, 1111 (Miss. 2012) (quoting *Doss v. State*, 19 So.3d 690, 694 (Miss. 2009))).

witnesses.'"[44] "Of course, questions of law are reviewed *de novo*."[45]

B. Newly discovered evidence

Havard's ground for relief was based on claims of newly discovered evidence. It was his burden to show his new evidence qualified as newly discovered evidence. To warrant relief, Havard's evidence had to satisfy four factors. *Brown*, 890 So.2d at 917 (citations omitted). He had to show the evidence was discovered after trial and could not have been discovered through the exercise of reasonable diligence at the time of trial or direct appeal. *Havard*, 86 So.3d at 901 (¶ 16). He had to show the nature of the evidence was such that, had it been presented, it is practically certain the evidence would have produced a different result or verdict at trial. *Crawford v. State*, 867 So.2d 196, 204 (¶ 9) (Miss. 2003). He had to show the evidence was material to the outcome of his conviction. *Williams*, 669 So.2d at 55. And he had to show the evidence was not cumulative or merely impeaching. *Id.*; *see Havard*, 86 So.3d at 910 (¶ 53) (finding Dr. Hayne's deposition testimony duplicative of another expert's opinions and not newly discovered evidence).

C. Reasons for denying Havard's first assignment of error.

The Court should affirm the trial court's decision and deny the requests for relief under Havard's first assignment of error for the following reasons:

1. Havard's claims of legal error are procedurally barred and without merit.

The State would begin by addressing Havard's claims that the trial court erred as a matter of law in upholding his conviction. (Appellant's Br. at 60-63). He says it was error for the trial court to provide little analysis of his evidence in its Order. He claims the trial court disregarded why and

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[44] *Chase*, 171 So.3d at 479 (¶ 51) (quoting *Goodin*, 102 So.3d at1111).

[45] *Id.* (citing *Goodin*, 102 So.3d at1111 (quoting *Doss*, 19 So.3d at 694)).

when the State presented the SBS evidence at trial in upholding his conviction. He argues the trial court did not consider the ways in which his evidence dramatically altered his case. And he argues the trial court erred as a matter of law by requiring him to prove his newly discovered issues beyond imposing a higher standard than the preponderance of the evidence standard. None of these claims entitle Havard to any relief.

a. Review is barred.

First things first, review of these claims is barred. Havard claims the trial court committed several legal errors but cites no authority to support them, with one exception. "The failure to cite relevant authority ... constitutes a procedural bar." *King v. State*, 857 So.2d 702, 725 (¶70) (Miss. 2003). This Court does not review unsupported assertions. *Wilcher v. State*, 227 So.3d 890, 895 (¶ 25) (Miss 2017) (quoting *Clark v. State*, 503 So.2d 277, 280 (Miss. 1987) (quoting *Johnson v. State*, 122 So. 529 (1929))).[46] "'It is the duty of counsel to make more than an assertion, they should state reasons for their propositions, and cite authorities in their support." *Id.* at 895 (¶ 25) (some internal punctuation omitted) (quoting *Clark*, 503 So.2d at 280 (quoting *Johnson*, 122 So. 529)). The lone exception is his claim that the trial court erred as a matter of law by disregarding evidence, which he says dramatically alters the jury issue. Havard cites *Hunt v. State*, 877 So.2d 503 (Miss. Ct. App. 2004) for the proposition that the trial court abused its discretion by refusing to grant a new trial where new evidence dramatically alters the jury issue. (Appellant's Br. at 63). But even this assertion

[46] *Jordan v. State*, 995 So.2d 94, 110 (¶ 51) (Miss. 2008) (quoting *Conley v. State*, 790 So.2d 773, 784 (Miss. 2001); MRAP 28(a)(6)); *Simmons v. State*, 805 So.2d 452, 487 (¶ 90) (Miss. 2001) (quoting *Hoops v. State*, 681 So.2d 521, 526 (Miss. 1996); *Hewlett v. State*, 607 So.2d 1097, 1106 (Miss. 1992)); *Williams v. State*, 708 So.2d 1358, 1360 (¶ 12) (Miss. 1998); *Weaver v. State*, 713 So.2d 860, 863 (Miss. 1997); *Hunter v. State*, 489 So.2d 1086, 1090 (Miss. 1986); *Kelly v. State*, 553 So.2d 517, 521 (Miss. 1989); *Kelly v. State*, 463 So.2d 1070, 1072 (Miss. 1985); *Redmond v. State*, 457 So.2d 1344, 1346 (Miss. 1984).

should not be considered. "The failure to ... make any connection between the authority cited and his case constitutes a procedural bar." *King*, 857 So.2d at 725 (¶70). Havard says his evidence warrants a new trial because it dramatically alters the jury question without making any connection to *Hunt*. In addition, most of Havard's assertions are not supported by citations to specific portions of the record. "[I]ssues cannot be decided based on assertions from the briefs alone. *The issues must be supported and proved by the record*.'" *Patton*, 109 So.3d at 75 n. 9 (emphasis added) (quoting *Pulphus v. State*, 782 So.2d 1220, 1224 (Miss. 2001)); *King*, 857 So.2d at 726 (¶ 77). Havard's claims of legal error are largely unsupported and should not be considered. Alternatively, Havard's claims of legal error are without merit.

b. The trial court did not err for failing to provide more analysis.

Havard claims the trial court erred as a matter of law in failing to provide more analysis of his newly discovered evidence issues and evidence in its final order. (Appellant's Br. at 60-61). He cites no authority in support of his contention. Section 99-39-23(5) states: "If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the conviction or sentence under attack.... The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." Miss. Code Ann. § 99-39-23(5). The trial court's final judgment order comports with Section 99-39-23(5).

c. The trial court did not err in upholding Havard's conviction.

One of his claims is that the trial court erred as a matter of law in vacating his sentence but not his conviction by disregarding pertinent facts as to why and when the State presented the SBS evidence at trial. (Appellant's Br. at 62). There are at least two problems with this claim. First, this claim is based on Havard's mistaken assumption that the trial court found his evidence qualified as

newly discovered evidence when it clearly did not. (Id. at 62). The trial court found that, "[a]s to the conviction, ..." Havard "failed to prove by a preponderance of the evidence that there exists new evidence, which would have caused a different result." (Evid. Hr'g CP at 1662.) It expressly stated that Havard's evidence was reasonably discoverable and capable of being presented at trial. *See Havard*, 86 So.3d at 906 (¶¶ 38-39) (ruling Dr. Hayne's deposition testimony was not newly discovered evidence because it was consistent with his trial testimony and Dr. Hayne was subjected to cross-examination at trial). The trial court also found Havard had not shown it was practically conclusive that, had it been presented at trial, his evidence would have produced a different result in his conviction. *See id.* at 910 (¶ 53) (finding Dr. Hayne's deposition testimony was impeaching, cumulative, and insufficient to warrant relief in light of all the evidence). It made these findings after reviewing all of the evidence from trial and the evidentiary hearing. (Evid. Hr'g CP at 1660-62.)

Havard's claim is also based on the assertion that the trial court ignored pertinent facts as to "why" and "when" the State introduced the SBS evidence at trial. (Appellant's Br. at 61-62). His assertion regarding "when" the SBS evidence was introduced is simply wrong. In his brief, Havard tells the Court that *all* of the SBS evidence was presented during the guilt phase of trial. (Id. at 61). It is crystal clear from the record of Havard's capital murder trial that the State began its case in aggravation by making a motion "to introduce the testimony, the evidence, and all exhibits that were previously introduced in the guilt phase ... into evidence in the sentencing phase in support of the aggravating circumstances that [the State] ... presented to the Court...." (Trial Tr. at 656.) The trial record also reflects the ruling on the State's unopposed motion, which was as follows:

> That is the law. That will be allowed. So let the record show that the Court is directing that all the evidence and testimony that was produced during the guilt or innocence phase of the trial will be admitted into evidence on the sentencing phase of the trial. Ladies and gentlemen, you're to consider the same evidence that was

brought forward in the previous aspect of this case now on the sentencing phase. (Id.) The trial record unquestionably proves all of the SBS evidence was before the jury at both phases of trial. If not, what evidence did this Court review on direct appeal? *See Havard*, 928 So.2d at 801-802 (¶ 61) (concluding that "sufficient evidence was presented at trial for a jury to find that under Miss. Code Ann. Section 99-19-101(5), aggravating circumstances existed"). The trial record and the Court's Majority Opinion entered on direct review completely undermine Havard's assertion. If anything, his assertion as to "when" the SBS evidence was introduced only shows he is unfamiliar with the significant events that took place during his trial and direct review proceedings.

Additionally, and as it relates to "why" the State introduced the SBS evidence, Havard is mistaken in asserting the trial court erred by vacating his sentence but not his conviction. He correctly notes that the trial court expressed "a cautious disturbance" in the confidence of his sentence. But he is incorrect in asserting the SBS evidence had the same effect on the question of guilt as it had on the question of punishment. (Appellant's Br. at 61). The problem with this assertion is that it ignores the fact that issues before the jury during the sentencing phase are different from those before it in the guilt phase.[47]

For that reason, Havard is incorrect in asserting any doubts raised by his new evidence were doubts in the confidence of both verdicts because his new evidence challenged the SBS evidence. As demonstrated above, the State introduced the SBS evidence during both phases of trial. But it did so for different reasons. The jury issue at the guilt phase was whether Havard was guilty of capital murder during the commission of a sexual battery of a child. (Id. at 99.) The State had to prove Havard actually killed Chloe with or without design to effect death while engaged in the commission

[47] The trial court explained these differences to Havard in 2002. (Trial Tr. at 651, 652.)

of the crime of sexual battery of a child. The State introduced the SBS evidence during the guilt phase to show Havard actually killed Chloe by causing her death, an element of his capital murder charge. (Id. at 103-104, 106.) There were two different jury issues at the sentencing phase. The jury had to first determine whether the death penalty could be imposed. *Dickerson v. State*, 175 So.3d 6, 32 (¶ 79) (Miss. 2015) (quoting *Evans v. State*, 725 So.2d 613, 683-84 (¶¶ 311-16) (Miss. 1997)).[48] If so, it then had to determine whether Havard should be sentenced to death because at least one aggravating circumstance warranted imposing the death penalty and outweighed the mitigating circumstances. The State re-introduced the SBS evidence to show the death penalty could be imposed because Havard actually killed Chloe, and established two aggravating circumstances—that the killing: (a) took place during the commission of a sexual battery, and/or (b) was especially heinous, atrocious, or cruel. (Trial Tr. at 199-200.) Havard is incorrect in asserting any doubts raised by his new evidence were doubts that undermined the confidence in both verdicts.

The trial court vacated Havard's sentence, finding that it was possible his evidence could have changed the sentencing verdict. It is important to note that Havard, in asserting his short fall theory, repeatedly argues his new evidence suggests it is possible that he accidentally dropped Chloe and never intended to cause her harm. Assuming *arguendo* that his argument is true and accurate, the State fails to appreciate how it supports his claim in the slightest. Havard is admitting that he actually killed Chloe, which is not only an element of the offense he was charged with committing but an element of an aggravating circumstance noticed by the State. He is also admitting that he is an individual who may be sentenced to death under *Enmund v. Florida*, 458 U.S. 782 (1982).

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[48] The jury was required to find at least one *Enmund* factor to impose the death penalty. *Enmund v. Florida*, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987).

Dickerson, 175 So.3d at 33 (¶ 79).

And assuming as Havard contends that any doubt that was raised from the SBS evidence was doubt in the confidence of both verdicts, his claim still fails. The SBS evidence was introduced at the sentencing phase to prove both aggravating circumstances. The jury found the State proved both aggravators. That said, the HAC aggravating circumstance is "a separate statutory aggravating circumstance" from the underlying felony aggravator. *Havard*, 928 So.2d at 802 (¶ 63). "'The fact that two aggravating circumstances rely on some of the same evidence does not render them duplicative. When they are not duplicative, ... the same evidence [may be used] to support different aggravators.'" *Id.* at 803 (¶ 64) (quoting *Patton v. Mullin*, 425 F.3d 788, 809 (10th Cir. 2005)). The jury was instructed on what constituted a heinous, atrocious, or cruel capital offense. *See id.* at 799-800 (¶ 58) ("heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others"). The jury found the SBS evidence established at least one of several factors that met the HAC aggravator's standard. *Id.* at 800 (¶ 58). The SBS evidence was introduced to show cause and manner of death in both phases. But unlike the guilt phase, the SBS evidence was also offered to show the offense was a heinous, atrocious, or cruel capital offense. Havard's new evidence could have had the opposite effect. And in that way, his evidence could raise doubt in the confidence of the sentencing verdict but not in the guilty verdict.

Havard fails to show the trial court erred as a matter of law by vacating his sentence but upholding his conviction. His claim is based on false assumptions and incorrect assertions of fact and law. The trial court did not disregard the fact that the SBS evidence was before the jury at sentencing. Havard did. The trial court did not disregard the fact that guilt phase jury issues are different from

sentencing phase jury issues. Havard did. And the trial court did not disregard the fact that,

> The jury could have found from the evidence presented at trial that Havard was engaged in the commission of sexual battery while committing the acts on Chloe which led to her death. Additionally, the jury could have found this crime to meet the HAC standard because of factors other than the sexual battery, such as the relationship between Havard and Chloe's mother or Chloe's age.

Id. at 802-803 (¶ 64). This claim is without merit and should be denied.

Even if the trial court did err, it is harmless. The trial court found Havard failed to show his evidence qualified as newly discovered evidence. And yet, it granted him relief by vacating his sentence pursuant to Miss. Code Ann. § 99-39-5(1)(e). (Evid. Hr'g CP at 1659.) That decision does not entitle Havard to any relief.

d. The trial court did not fail to consider Havard's evidence.

Next, Havard argues the trial court did not consider the ways in which his evidence dramatically altered his case. (Appellant's Br. at 62-63). Here, he cites *Hunt v. State*, 877 So.2d 503 (Miss. Ct. App. 2004), as authority that supports his claim because the Court of Appeals in that case found the trial court abused its discretion in refusing to grant a new trial where new evidence dramatically alters the jury issue. (Appellant's Br. at 63). In that case, the defendant (Hunt) was charged with one count of rape. At trial, the State introduced evidence that suggested he came to the victim's apartment early one morning, forced his way inside, and raped the victim. *Hunt*, 877 So.2d at 506 (¶ 7). The State also introduced evidence that connected Hunt with DNA material taken from the victim's apartment. *Id.* at 506 (¶ 8). Hunt testified that he met the victim at a bar and later drove to her apartment after she instructed him to do so. *Id.* He also testified that the had consensual intercourse inside his vehicle; that he had never been inside of her apartment, and had never seen the victim before or after their encounter. *Id.* The jury found him guilty. *Id.* at 506 (¶ 9). And he

appealed.

On direct appeal, Hunt raised four assignments of error, including a challenge to the weight of the evidence. *Id.* at 507 (¶ 11). The Court of Appeals reviewed his challenge and ruled the evidence was sufficient to support his conviction because the jury heard both version of events and accepted the victim's version. *Id.* at 507 (12). Years later, Hunt filed a post-conviction application in this Court, seeking leave to proceed in the trial court with an actual innocence claim based on newly discovered evidence in the form of sworn statements from a former friend of the victim. *Id.* at 507 (¶ 14). This Court granted him leave. He filed a PCR petition in the trial court and was granted an evidentiary hearing. *Id.* at 507-510 (¶¶ 15-33). The trial court heard testimony from the former friends and other testimony, but denied his petition. Hunt appealed that decision. *Id.* at 507-510 (¶¶ 15-33).

On appeal, the Court of Appeals focused largely on Hunt's statements, the victim's, and his newly discovered evidence—the statements and testimony from the former friend. *Id.* at 510-14 (¶¶ 34-61). The Court reviewed the former friend's testimony and found it qualified as newly discovered evidence. *Id.* at 510-13 (¶¶ 34-46; 51-56). The Court reversed trial court's decision, vacated his conviction, and remanded for a new trial. *Id.* at 514 (¶ 63). It did so because the new evidence raised too many questions about whether a mistake had been made. *Id*. at 514 (¶ 62). It "dramatically altered" the issue of Hunt's guilt, which had been a literal he-said, she-said battle. This new evidence was not discoverable at the time of trial or direct appeal. And while some portions were cumulative and impeaching, most of this evidence corroborated Hunt's version of events. *Id*. at 514 (¶¶ 60-61). In analyzing the materiality of the former friend's testimony, the *Hunt* Court found the former friend's testimony changed the nature of the case and the issue of guilt beyond a credibility determination to

into a case where the defendant's theory is supported by evidence, including direct evidence. *Id.* at 514 (¶ 60).

Hunt is factually and legally distinguishable from this case. Havard's new evidence is not new. Dr. Hayne—a witness at trial—was aware of and testifying about the same manufactured controversies with biomechanical sector, short falls, and shaking literally 2 months after trial in a manner wholly consistent with what Havard's experts. If this "science" was not reasonably discoverable, why was Dr. Hayne testifying to these controversial issues at the time of trial? said did not exist or were not widely known at the time of trial.

It is worth noting Havard's assertion: "Tthe State would be unable to argue Chloe's medical findings have no accidental explanation. The State based its case on fact and evidence. possibilities Havard says his new evidence is consistent with his statement to law enforcement and shows shaking alone could not have caused all of Chloe's injuries. (Id. at 62). He goes on to state that the "finding of shaking alone, as presented at trial, precluded a credible argument of accident. Now, the evidence presented at trial would be critically different, and the jury question would be dramatically altered." (Id.) How? He says that blunt force injuries greatly increases other possible causes of death, greatly. would no longer preclude him from presenting a credible short fall theory. That assertion is premised entirely on his limited view of the evidence. He believes the State's evidence showed shaking alone caused Chloe's injuries. That may fit his theory now, but it does not accurately reflect what was presented at trial. Chloe's injuries included blunt force injuries. The photos of her face established that fact. The bruises on head face and head are blunt force injuries. The torn frenum is a blunt force injury. Some of her intracranial injuries are blunt force injuries. The subdural hematoma is a blunt force injury. The evidence presented at trial did not show Chloe's injuries were the result of shaking

and nothing else.

It is possible that Havard's new evidence could be construed as consistent with what he told law enforcement but only in the most limited sense. When considered in light of the evidence presented at trial, as the trial court had to consider it, is more than a stretch to suggest this evidence dramatically alters this case. Havard seems to forget that his statements were presented to the jury. It heard him describe dropping Chloe. It heard him admit to shaking Chloe, possibly too hard, and hiding the fact that he had. The jury also considered his first statement, which was inconsistent with his second. The jury would have to consider the fact that no expert could identify any external injury as the site on Chloe's head that impacted the toilet. And the jury would have assume her head hit the toilet. This is only a portion of the evidence presented at trial. Havard's new evidence does not dramatically alter the case.

e. The trial court did not apply an erroneous legal standard.

Finally, Havard asks the Court to reverse the trial court decision to uphold his conviction, claiming it erred as a matter of law by imposing a higher standard upon him than the law requires, one higher than the "by a preponderance of the evidence" standard. (Appellant's Br. at 63). He supports his claim with a bare assertion, which is: the evidence that he presented at the evidentiary hearing far outweighed what the State presented. (Id.) Even if that were true (and it is not), Havard's assertion goes to the trial court's credibility determinations not the legal standard it applied.

In any event, it is clear from its order that the trial court applied the appropriate standard of review for determining whether a new trial is warranted . (Evid. Hr'g CP at 1659.) That is, whether Havard "'proved by a preponderance of the evidence that material facts existed which had not been previously heard and which required the vacation of his conviction or sentence.'" *Meeks v. State*, 781

So.2d 109, 113 (¶ 10) (Miss. 2001) (quoting *Turner v. State*, 673 So.2d 382, 384 (Miss. 1996)). In doing so, the trial court evaluated Havard's newly discovered evidence under the appropriate by a preponderance of the evidence standard. Miss. Code Ann. § 99-39-23(7). It found Havard failed to carry his burden "to prove by a preponderance of the evidence that there exists new evidence that would have caused a different result." (Evid. Hr'g CP at 1662.)

His issues with Dr. Hayne's are prime examples of Havard failing to carry his burden. Prior to the evidentiary hearing, Havard claimed that recent advances in science and medicine had caused Dr. Hayne to disavowed his 2002 opinions. He also claimed that Dr. Hayne based his opinions on a "triad" of findings without any consideration to alternative causes of death. Dr. Hayne's testimony proved otherwise. Dr. Hayne had not changed his 2002 opinions. (Evid. Hr'g Tr. at 35, 50, 52.) He also testified that he was aware of and considered alternative causes of death, including a short fall. (Id. at 44, 48-50.) He even pointed to the portion of his autopsy report where he listed other findings that did not relate to the lethal injuries. (Id. at 45.) In his words, what he "was saying there was that I didn't see any other disease entity based upon observation of the child, the medical history of the child, full body x-rays, and microscopic review of the tissue and the like." (Id. at 46.)

The trial court did not apply an erroneous legal standard. It applied the correct standard of review, and applied the appropriate standard in evaluating the evidence supporting his claims. This claim is without merit and should be denied.

The Court should deny Havard's claims of legal error for the reasons above.

2. Havard's claims of factual error are without merit.

In addition to his claims of legal error, Havard also claims the trial court erred by discounting and disregarding his new evidence. (Appellant's Br. at 47). He is mistaken. Looking to the trial

court's final judgment order, it made the following findings of fact:

- That Dr. Hayne's testimony was credible and reasonably consistent with his trial testimony;
- That Dr. Hayne did not change his opinions of cause and manner of death;
- That a legitimate debate regarding the validity of SBS existed at the time of trial and now;
- That Dr. Hayne testified to this legitimate debate with the validity of SBS in another capital murder prosecution approximately two months after trial in this case;
- That Dr. Benton's testimony was credible and persuasive; and
- That Havard failed to prove by a preponderance of the evidence that there exists new evidence that would have caused a different result.

(Evid. Hr'g Tr. at 1661-62.)

a. Chloe's bruises

First, Havard says the trial court disregarded facts and analysis that did not support the State's2002 SBS theory, and chose to focus reports of Chloe arriving at the hospital bruised. (Appellant's Br. at 48-49). He then cites portions of the record where either Drs. Baden and Ophoven stated opinions as to potential causes of Chloe's external injuries.

Dr. Baden and Dr. Ophoven believed that many of Chloe's injuries were consistent with resuscitation. (Id.) Dr. Baden testified that Chloe's frenum was torn by emergency room staff during one of several intubation attempts. (Evid. Hr'g Tr. 79). Dr. Baden initially testified that bruising around Chloe's frenum was typical of difficult resuscitation. (Id. at 80.) But on cross, Dr. Baden changed his position after being reminded that the frenum tear was present at the time Chloe arrived at the hospital. (Id. at 131, 149, 150.) But on cross, he admitted that he had only reviewed portions of the record, and conceded that the record showed health care providers discovered the torn frenum during a finger sweep of Chloe's mouth—a finger sweep that had been performed before any resuscitation attempt had been made. (Id. at 130, 143). After conceding the fact that Chloe's frenum

was not the result of resuscitation, Dr. Baden revised his opinion on the object caused Chloe's frenum to tear, stating that it was "something in the mouth or by the impact against the floor when she hit the floor or something[.]" (Id. at 152). Dr. Ophoven suggested that the torn frenum was the result of resuscitation efforts. (Id. at 259.) When confronted with the record support that showed Chloe's frenum was torn when she arrived at the hospital, Dr. Ophoven stated: "It certainly sounds like the frenum tear occurred before if indeed [Shelly Smith's] recall is accurate." (Id.).

The trial court did not discount or ignore the testimonies of Drs. Baden and Ophoven. [W]hether a new trial should be granted is made by the trial judge on a case-by-case basis, taking into account all the relevant facts and circumstances." *Brown*, 890 So.2d at 916 (¶ 53) (citing Moore, 508 So.2d at 668). That said, Drs. Baden and Ophoven testified that Chloe's injuries could have been caused by resuscitation efforts when the record demonstrated otherwise. Dr. Baden testified that the bruises around Chloe's head were consistent with falling on one's head under any circumstances. And both doctors' testified in possibilities. Court pays considerable deference "to the trial court as the 'sole authority for determining credibility of the witnesses.'" *Chase*, 171 So.3d at 479 (¶ 51) (quoting *Goodin*, 102 So.3d at1111).

b. Chloe's bruises

First, Havard says the trial court disregarded facts and analysis that did not support the State's2002 SBS theory, and chose to focus reports of Chloe arriving at the hospital bruised. (Appellant's Br. at 48). He then cites portions of the record

Dr. Benton disagreed. Dr. Benton had resuscitated infants hundreds of times. (Id. at 374.) And in all of those times, he had never resuscitated an infant who was restrained. (Id. at 375.) But he did not discount the possibility that resuscitation efforts could have caused some of Chloe's

superficial injuries. He found "bruises to the chest that [he] excluded because said, hum. Maybe that one is from CPR, but the other bruises around the head and the frenulum injury unequivocally are not from resuscitation injuries in my opinion." (Id. at 449). Chloe's external bruises presented "a classic presentation that a first year pediatric resident should recognize and probably most of [his] medical students." (Id. at 376). And Havard's statement and blood samples from the scene were the only sources of information which indicated Chloe was bleeding from a frenum laceration after an alleged fall. (Id. at 376-77).

c. Chloe is blue and not breathing

Next, Havard somehow suggests the trial court erred in mentioning the fact that she was blue and not breathing when she arrived at the hospital. (Appellant's Br. at 49). Instead, he says these facts are irrelevant and asymptomatic for abuse. (Id.) He goes on, stating, that the reasons Chloe may have stopped breathing are myriad. Unlike Havard, the trial court must determine the issue in light of *all* relevant facts and circumstances. *Brown*, 890 So.2d at 916 (¶ 53) (citing *Moore*, 508 So.2d at 668). Chloe was uninjured when Rebecca Britt left the home. Chloe was blue and not breathing when Rebecca returned. Havard had never bathed Chloe before. He injures her, places her in her crib, and leaves alone. These facts place Chloe in Havard's custody when Rebecca Britt left the home until she returned. When Rebecca returned, Havard "said that nothing unusual happened while the mother was gone and that he had bathed Chloe, gave her a dose of antibiotics and put her to bed just before her return." (Evid. Hr'g Tr. at 376-77).

d. Chloe is bleeding

Havard takes issue with the trial court's finding that Chloe was "bloodied" when she arrived at the hospital. (Appellant's Br. at 49). He states that the only record reference to bleeding was from

her torn frenum. He notes that Chloe's bleeding could have been caused by a short fall. (Id. at 49). In his February 23, 2002 statement, Havard notices blood on Chloe's face. Blood samples were taken from the home were the only sources of information that indicates Chloe was bleeding. (Evid-. Hr'g Tr. at 376-77.) Havard "said that nothing unusual happened while the mother was gone and that he had bathed Chloe, gave her a dose of antibiotics and put her to bed just before her return." (Appellant's Br. at 49). The reviewing court must also give considerable deference "to the trial court as the 'sole authority for determining credibility of the witnesses.'" *Chase*, 171 So.3d at 479 (¶ 51) (quoting *Goodin*, 102 So.3d at1111). -

e. Havard's statements

Summarizes statements he made prior to trial in response to the trial court's final judgment order, which references Havard's "changing and conflicting" statements. (Appellant's Br. at 50). He argues that there is no basis for denying him a new trial. (Id. at 52). The trial court's fact-findings are reviewed for clear error, and given considerable deference "as the 'sole authority for determining credibility of the witnesses.'" *Chase*, 171 So.3d at 479 (¶ 51) (quoting *Goodin*, 102 So.3d at 1111). Havard gave two statements, one on February 22, 2002 and another the next day.

On February 22, 2002, Havard gave law enforcement a verbal statement of his version of events that took place at his home on the previous evening. This version of events made no mention of dropping or shaking Chloe. In fact, Havard did not know what happened to Chloe. And he was confused about law enforcement's sudden interest in speaking with him. (Trial Tr. at 469-71.)

The next day, Havard gave law enforcement a second statement and version of events that took place at his home on February 21, 2002. He informed the deputies that he accidentally dropped Chloe while removing her from a bathroom tub. As he was lifting her, she slipped from his arms and

fell a short distance, feet-first. He caught her with one arm just as she impacted the toilet, which sat approximately one and a half feet from the tub. Havard was certain that one of Chloe's legs hit the toilet lid but uncertain that her head hit the toilet tank. He believed her upper body hit the porcelain tank. He also told law enforcement about shaking Chloe. He may have been too rough with her. Maybe he shook her too hard. According to Havard, he became upset, frantic after dropping Chloe. And he was shaking her. "I have shaken her too hard...." The State played the recording of his statement for the jury, and offered it and a copy of the certified transcript into evidence. (Trial Tr. 507-09).

f. Dr. Hayne's testimony

Havard faults the trial court for finding Dr. Hayne's trial testimony and his evidentiary hearing testimony, "reasonably consistent." (Appellant's Br. at 52). According to Havard, "there are huge differences between the two, despite Dr. Hayne's attempts to waffle on the stand at the 2017 hearing. (Id.) He then tells the Court what Dr. Hayne would say; how he would classify Chloe's death, and just about anything else that he believes will benefit him most. (Id.)

Havard has been making these claims for years. But when the opportunity presented itself at the evidentiary hearing to carry his burden and prove his claims, he passed. He never asked Dr. Hayne whether his opinions had changed. He knew the answer. So Havard questioned Dr. Hayne about studies referenced in his 2013 and 2014 affidavits and other immaterial questions. Dr. Hayne agreed that some studies, which had been published after trial, suggested that: (1) shaking alone cannot generate the amount of force needed produce traumatic injuries, and (2) short-distance falls may, in certain instances, generate significant amounts of force and produce injuries like Chloe's

traumatic brain injuries.[44] (Id. at 22-27.) But, Dr. Hayne also stated that those studies reflected the minority view. (Id. at 23-25, 26-27, 31-32.) He also said that the American Academy of Pediatrics (AAP) recognized SBS as a valid medical diagnosis, and cited the AAP Committee on Child Abuse and Neglect's 2009 policy statement, which recommended medical professionals use "abusive head trauma" (AHT) when diagnosing inflicted head injuries in infants and young children.[45] (Id. at 25-26.)

Dr. Hayne confirmed the fact that his 2002 opinions on cause and manner of death had not changed. The Evidentiary Hearing Transcript reads as follows:

> Q. Doctor Hayne, do you wish to change your testimony at this time as to any of the injuries that you noted on Chloe Britt?
>
> A. No, Counselor.
>
> ....
>
> Q. Is there doubt in the medical community as to the diagnosis to Shaken Baby Syndrome?
>
> A. No, sir.
>
> Q. Do you have any doubt as to the diagnosis of Shaken Baby Syndrome by itself?
>
> A. I don't like to use the term anymore, Counselor. There is debate in the literature, though the vast preponderance of experts still believe in it. I feel it's best not to avoid that diagnosis and use the current diagnosis of Abusive

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[44] Exhibit 4; Affidavit of Steven T. Hayne, dated Jul. 22, 2013; Exhibit 5, Affidavit of Dr. Steven T. Hayne, dated Jul. 14, 2014.

[45] The AAP has never discarded SBS as medical terminology for describing specific injuries. Its 2009 Policy Statement says: "[T]he commonality of a described shaking mechanism along with the infrequency of impact evidence supports shaking as an important mechanism of AHT." Exhibit 15; Cindy W. Christian, Robert Block, Policy Statement, *Abusive Head Trauma in Infants and Children*, 123:5 PEDIATRICS 1409, 1409-10 (2009). "**Shaken baby syndrome is a subset of AHT**. Injuries induced **by shaking** and those caused by blunt force trauma have the potential to result in death...." *Id.* at 1409-10 (emphasis added). The 2009 Policy Statement also states: "The goal of this policy statement is not to detract from shaking as a mechanism of AHT but to broaden the terminology to account for the multitude of primary and secondary injuries that result from AHT...." *Id.* at 1410.

Head Trauma.

(Evid. Hr'g Tr. at 35, 38-39.)

True to form, Havard puts his words into Dr. Hayne's mouth when he says: Dr. Hayne "would classify the cause of death of Chloe Britt as blunt force trauma, which includes many possible causes including an accidental fall." (Appellant's Br. at 52). The Evidentiary Hearing Transcript contains no such classification. It does read as follows:

> Q. We looked at the earlier article. Considering that article what would you now consider to be the **cause of death** in this case?
>
> A. **Abusive Head Trauma**.
>
> Q. And Abusive Head Trauma is the new nomenclature for Shaken Baby Syndrome, correct?
>
> A. It's inclusive in that.
>
> ....
>
> Q. Now, have you ever change your testimony, or do you wish to change it today that the manner of death in this case was homicide?
>
> A. No, sir.

(Evid. Hr'g Tr. at 52.)

Havard claims that a new jury would hear Dr. Hayne's testimony relating to the diagnostic trial is "just bad science." (Appellant's Br. at 53.) Dr. Hayne clarified this point for Havard at the evidentiary hearing, when he testified:

> If you have subdural hemorrhage, subarachnoid hemorrhage and cephalopathy it leads you towards Shaken Baby Syndrome or Abusive Head Injury. It's not diagnostic of it, but if you don't have those findings, it would very difficult to entertain a diagnosis of Abusive Head Trauma and Shake Baby Syndrome.

(Evid. Hr'g Tr. at 42-43.) Dr. Hayne was aware of differential diagnoses to the SBS diagnosis. He confirmed this fact at the evidentiary hearing.

> Q. Were you aware of the science at that time that dealt with other

considerations for Shaken Baby Syndrome? Diagnosis?

A. Other causes?

Q. Yes.

A. Yes.

(Id. at 46.)

Dr. Hayne was testifying to the controversy with SBS, short falls, shaking alone at the time of Havard's capital murder trial. There is no denying it. And Havard does not. In fact, he quotes a portion from the *Bennett* trial record where Dr. Hayne was testifying in a manner wholly consistent with Drs. Baden, Ophoven, and Van Ee. (Appellant's Br. at 53). This is fact, albeit one Havard simply refuses to accept. Now, he places emphasis on Dr. Hayne's testimony in *Bennett* where he confirms the fact that there is debate in the field of biomechanics who hold the opinion that shaking alone cannot produce injuries like Chloe's. Havard, however, emphasizes that this position was "not universally accepted" at the time of his trial. He says, "This testimony was not given at the Havard trial. Dr. Hayne at no time during the Havard trial acknowledged debate about shaking vs. impact, not did he acknowledge this controversy." (Id.)

This testimony was not given because it was not elicited, not because it did not exist. There is no question it did. In 2002, Havard was unconcerned with SBS. Havard's "theory of defense was that no sexual battery occurred, thereby eliminating the underlying felony to the capital murder charge. If this defense had proved successful, Havard would have avoided the death penalty." *Havard*, 988 So.2d at 327 (¶ 8). This is the reason the trial court's findings include the legitimate debate and the short-fall theory. The evidence did exist. And it certainly was capable of being presented at trial. It is not newly discovered evidence because it was reasonably discoverable at his trial. *See Havard*, 86 So.3d at 906 (¶¶ 38-39).

Nevertheless, Havard continues to blame Dr. Hayne for not alerting attorneys or the Court. Why would he? If Dr. Hayne performed Chloe's autopsy, reviewed records and other documents, and believed his findings and her injuries all pointed to a diagnosis of SBS, why would he alert any one do a determination he did not make? His opinion on cause and manner of death is SBS and homicide. But the fact remains, Havard bears the burden of proving his newly discovered issues by a preponderance of the evidence. *Turner v. State*, 673 So.2d 384. He cannot do so.

g. The controversy

Havard's next attack on the trial court relates to his previous one. Even though Havard acknowledges the fact that Dr. Hayne was testifying two months after trial in this case about on-going debate with shaking, short falls, and biomechanics, he says the trial court's findings of a legitimate debate are erroneous. How? He says, the controversy was not so controversial in 2002, but it is now. (Appellant's Br. at 55). As the State appreciates his argument, Havard is conceding the fact that this "evidence" existed at the time of trial. And he seems to suggest that rather than try to introduce at trial, he chose to see if this controversy became sufficiently controversial. How is his wait-and-see approach not a waiver? And when did this controversy became sufficiently controversial? The fact-finder makes credibility determinations. And here, the trial court found a legitimate debate existed in 2002. Its finding is based on evidence and is not clearly erroneous.

g. Evidence

Havard argues the trial court erred in finding his evidence qualified as newly discovered evidence. (Appellant's Br. at 57-58). He is mistaken for the reasons above. Havard's evidence is not newly discovered evidence. He insists that Dr. Hayne's opinions have changed, when the Evidentiary Hearing Transcript clearly shows otherwise.

h. Dr. Benton's testimony

Next, Havard claims the trial court erred in finding Dr. Benton credible. The reviewing court must also give considerable deference "to the trial court as the 'sole authority for determining credibility of the witnesses.'" *Chase*, 171 So.3d at 479 (¶ 51) (quoting *Goodin*, 102 So.3d at1111). Havard argues that Dr. Benton was not qualified to render opinions in this case and his methodology is flaw. (Appellant's Br. at 58). Both issues are discussed in Section II, *infra*. Even so, he says many of Dr. Benton's support his position. Of course, he provides no legal or record citation for any of his assertions—save one. Dr. Benton. Dr. Benton also testified to multiple plane injuries, which is how he described Chloe's external bruises. The multiple plane injuries did not support Havard's short fall theory due to the number of impact sites. Dr. Benton stated that, in a worse case scenario, he would expect to see two injuries. (Evid. Hr'g Tr. At 375). Dr. Benton testified that shaking, on its own, can injure infants. (Id. at 378.) Dr. Benton, who is a full fellow of the AAP and a member of the Committee of Child Abuse and Neglect, spoke directly to the issue of whether the AAP had abandoned or changed its policy with respect to Shaken Baby Syndrome. (Id. at 392-93.) According to Dr. Benton, the AAP had not. (Id. at 392.)

I. Jury findings & new evidence

Havard also faults the trial court for not granting him a new trial and ignoring much of the evidence he presented. (Appellant's Br. at 59). He says the trial court clearly erred for not considering his new evidence. (Id.) The trial court's final judgment order "[i]n addition to all the medical evidence and expert testimony and opinions as to SBS and its evolution since the time of the trial...." (Evid. Hr'g Tr. at 1650.) The trial court did consider Havard's evidence.

4. Havard's evidence was reasonably discoverable at the time of trial.

The Court should affirm the trial court's decision because the evidence before it clearly showed Havard's evidence was reasonably discoverable at the time of trial. Havard presented affidavits executed by Doctors Hayne, Baden, Ophoven, and Van Ee along with their testimonies in an attempt to show recent developments in the field of biomechanics caused fierce debate about the efficacy of shaking as an injury mechanism of traumatic brain injury and paradigm shift in opinion on validity of the SBS diagnosis. Havard asserted that data from biomechanical tests and modeling, which did not exist in 2002, suggested a short distance fall was an injury mechanism for traumatic brain injury in infants and children but shaking was not. He said this data supported his claim that he dropped Chloe because it showed the amount of force generated by a short-distance head first fall could be exponentially greater than the amount of force generated by shaking alone.

Dr. Hayne's testimony proved Havard's contention, that the controversy regarding SBS was non-existent or insignificant at the time of trial, was false. On cross, Dr. Hayne confirmed the fact that there was clear controversy and heated debate with SBS, shaking, and short falls at the time of trial. He did so by citing to and reading from the record on appeal in *Devin A. Bennett v. State of Mississippi*, 933 So.2d 930 (Miss. 2006) (No. 2003-DP-00765-SCT)—a capital murder case tried just two months after Havard's capital murder trial. Dr. Hayne was an expert witness in the *Bennett* case, who testified to a ten-week-old infant's brain injuries that were similar to Chloe's. At trial, in *Bennett*, Dr. Hayne was asked whether forensic pathologists and pediatricians generally accepted the position that shaking alone was an injury mechanism capable of producing subdural hematomas and retinal hemorrhages. *Id.* at 937 (¶ 14). Dr. Hayne read his response to that question during the evidentiary hearing, which was as follows:

> "It's accepted although there was a debate in the literature the majority of views that shaking alone can produce these types of injuries, the subdural hemorrhage and retinal

> hemorrhages. Though there's debate apart from the biomechanical section says that you cannot produce enough force to produce these injuries. You have to have a contact of impact injury in addition to shaking of forces. That is not universally accepted, but individuals who do believe that."[46]

(Evid. Hr'g Tr. at 49.) Dr. Hayne also cited to the *Bennett* Record in confirming the existence of considerable debate and controversy related to short-distance falls as a differential diagnosis to SBS. (Id. at 45-47, 50-51.)[47]

Additionally, the Majority Opinion published in Devin Bennett's 2006 direct appeal belies Havard's contentions. The Court's recitation of facts in *Bennett* notes the defense's theory of the case was that Bennett's son, Brandon, the ten-week-old infant, died as a result of injuries from a short fall. *See Bennett*, 933 So.2d at 937 (¶ 14) (stating that "Dr. Hayne discredited the defense's theory that Brandon caused these injuries to himself...."). The recitation of facts also includes summaries of the trial testimonies and opinions of Doctors Hayne, Bonnie Woodall, an expert in pediatric emergency medicine, and Andrew Parent, an expert in pediatric neurosurgery. The Court noted that Dr. Hayne found two skull fractures, corresponding hemorrhages on both sides of Brandon's brain, and a subdural hematoma that were linked to blunt force trauma from a direct blow tp Brandon's head. *Id.* Dr. Hayne found areas of hemorrhages over the surface of Brandon's brain, and testified that a short fall would not produce the subdural hematoma or diffuse brain injury. *Id.* It was Dr. Hayne's opinion

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[46] Exhibit I-D at 1215; Trial Transcript at 1215, *Bennett*, 933 So.2d 930 (No. 2003-DP-00765-SCT). Bennett, like Havard, was convicted of capital murder and sentenced to death. Bennett's capital murder trial took place in February of 2003, approximately two months after Havard's trial.

[47] For example, the jury in *Bennett*, heard Dr. Hayne state:

> There has been discussion and debate, specifically over two articles in the literature, one by Puckett, one by Roote, discussing the minimum heights for infliction of lethal injury. That literature, which is open to considerable debate, the shortest height is approximately two feet in Puckett's article, but also involves a much older child.

(Ex. I-D; *Bennett* Trial Tr. at 1212.)

"that Brandon was the victim of shaken baby syndrome followed by some blunt force trauma impact." *Id.*

Dr. Woodall's testimony and opinions were consistent with Dr. Hayne's. *Id.* at 935 (¶ 6). She testified that Brandon had a subdural hematoma, brain swelling, intracranial hemorrhaging, and bilateral retinal hemorrhages. *Id.* at 936 (¶ 11). According to Dr. Woodall, Brandon's injuries were not consistent with a short fall. *Id.* She explained that a hematoma is a type of injury in children, which is often (**but not always**) caused by violent shaking. *Id.* She also stated that a **short fall** could produce Brandon's brain injuries if it generated a significant amount of force and had "some sort of angular rotational component to it...." *Id.* Like Dr. Hayne, Dr. Woodall opined that Brandon's injuries "were consistent with being shaken and thrown down on a hard surface." *Id.* at 937 (¶ 12).

The Court also summarized the testimony and findings of Dr. Parent. *Id.* at 937 (¶ 13). Dr. Parent found a bruise over Brandon's "frontal area" and "hemorrhages in both eyes." *Id.* He noted that Brandon's "pupils were fixed and dilated[,] ..." like Chloe's. *Id.* A CT scan of Brandon's head revealed a subdural hematoma, a subarachnoid hematoma, and a collection of blood beneath the tissue that separated the upper and lower portions of Brandon's brain. *Id.* He too found Brandon's brain injuries inconsistent with falling a short distance onto a hard surface. *Id.* Like Doctors Hayne and Woodall, Dr. Parent opined that Brandon's injuries "were consistent with being shaken and thrown down on a hard surface." *Id.*

Havard called Dr. Hayne as his first witness. He offered affidavits that Dr. Hayne executed in 2013 and 2014 as evidence and attempted to elicit testimony to show Dr. Hayne: (1) did not consider alternative causes of death (differentials) for SBS in performing Chloe's autopsy, and (2) disavowed his 2002 opinions on cause and manner of death due to recent developments in the field

of biomechanics after trial. (Evid. Hr'g Tr. at 15-33.) There was one problem: Dr. Hayne had never disavowed his 2002 opinions. And Havard completely avoided asking the obvious question—whether Dr. Hayne had disavowed his 2002 opinions. So on cross, the State

But on cross, Dr. Hayne directly responded to Havard's allegations that he had disavowed his 2002 opinions, and had not considered differentials for the SBS diagnosis. With respect to Havard's allegation that he had disavowed his 2002 opinions, Dr. Hayne reaffirmed his 2002 testimony related to Chloe's injuries (Id. at 35), his opinion on cause of death (Id. at 52), and his opinion on manner of death (Id.). Dr. Hayne also testified that he did consider differentials for the SBS diagnosis in 2002, including a short fall and underlying disease but failed to find evidence of any differential diagnosis. (Id. at 43-46).

II. The trial court did not abuse its discretion in allowing Dr. Benton to testify as an expert witness.

Havard takes issue with the trial court's decision to admit the expert testimony of Dr. Scott Benton under his second assignment of error. (Appellant's Br. at 63-72.) He claims the trial court erred when it allowed Dr. Benton to testify as an expert witness under MRE 702. He is wrong.

A. Standard of Review

The admissibility of expert testimony under MRE 702 is a trial court determination, which is reviewed for abuse of discretion. *Miss. Transp. Comm'n v. McLemore*, 863 So.2d 31, 34 (¶ 4) (Miss. 2003) (citing *Puckett v. State*, 737 So.2d 322, 342 (Miss. 1999)); *General Electric Co. v. Joiner*, 522 U.S. 136, 141 (1997). "'A trial judge's determination as to whether a witness is qualified to testify as an expert is given the widest possible discretion and that decision will only be disturbed when there has been a clear abuse of discretion.'" *Middleton v. State*, 980 So.2d 351, 353 (¶ 6) (Miss. Ct. App. 2008) (quoting *Smith v. State*, 925 So.2d 825, 834 (¶ 23) (Miss. 2006) (quoting *Logan v.*

State, 773 So.2d 338, 346-47 (¶ 31) (Miss. 2000))). An admissibility determination stands if it is not arbitrary and clearly erroneous. *McLemore*, 863 So.2d at 34 (¶ 4) (citing *Puckett*, 737 So.2d at 342).

B. Admissibility of expert testimony

MRE 702 provides the standard of admissibility for expert testimony. In applying that standard, the trial court must determine whether a witness is qualified as an expert. "[A] witness is qualified as an expert by knowledge, skill, experience, training, or education...." MRE 702. "Preliminary questions of witness qualifications, privileges and admissibility of evidence are resolved pursuant to Rule 104(a) and 104(b)." *McLemore*, 863 So.2d at 36 (¶ 11) (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993)). 509 U.S. at 592). As it concerns witness qualifications, Rule 104 states in pertinent part that:

> **(a) In General.** The court must decide any preliminary question about whether a witness is qualified.... In so deciding, the court is not bound by evidence rules....

MRE 104(a).

The trial court also has a "gatekeeping responsibility" to review scientific evidence and determine its admissibility under MRE 702. *McLemore*, 863 So.2d at 36 (¶ 11) (citing *Daubert*, 509 U.S. at 592). A qualified witness may testify "in the form of an opinion or otherwise if:"

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

MRE 702. And "there must be a 'valid scientific connection to the pertinent inquiry as a precondition to admissibility.'" *Id.* (quoting *Daubert*, 509 U.S. at 592).

So, the trial court must engage in a two-pronged inquiry to determine whether the expert's

testimony rests on a reliable foundation and whether it is relevant to the issue at hand. *Id.* (quoting *Daubert*, 509 U.S. at 589). Expert testimony must be reliable. A reliability determination is one part of Rule 702's two-pronged inquiry. *Poole ex rel. Wrongful Death Beneficiaries of Poole v. Avara*, 908 So.2d 716, 723 (¶ 15) (Miss. 2005). To be reliable, the expert testimony must be grounded in methods and procedures of science to be admissible. *Id.* (quoting *Daubert*, 509 U.S. at 590). It must be stated with "reasonable certainty, given the state of knowledge in the field in which the expert is qualified." *West v. State*, 553 So.2d 8, 20 (Miss. 1989); *Williams v. State*, 544 So.2d 782, 786 (Miss. 1987). "Scientific knowledge means something more than unsupported speculation or subjective belief that is grounded in methods and procedures of science." *Avara*, 908 So.2d at 723 (¶ 15) (citing *Daubert*, 509 U.S. at 590). It "must rise above mere speculation." *West*, 553 So.2d at 20; *Williams*, 544 So.2d at 786. Expert testimony that offers a "reasonable hypothesis" is insufficient. *Goforth v. City of Ridgeland*, 603 So.2d 323, 329 (Miss. 1992). And expert testimony that is "indefinite or ... expressed in terms of mere possibilities" is inadmissible. *West*, 553 So.2d at 20 (citing *Scott County Co-op v. Brown*, 187 So.2d 321, 325-26 (Miss. 1966); *General Benevolent Assoc. v. Fowler*, 50 So.2d 137, 142 (1951)). That said, "[t]he analysis of expert testimony's admissibility is a flexible one that must focus on the principles and methodology applied, not on the conclusions they generate." *Gillett v. State*, 56 So.3d 469, 495 (¶ 64) (Miss. 2010) (citing *McLemore*, 863 So.2d at 37; *Daubert*, 509 U.S. at 595).

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the United States Supreme Court "adopted a nonexhaustive, illustrative list of reliability factors for determining the admissibility of expert testimony." *Gillett*, 56 So.3d at 495 (¶ 64). Those factors include:

> [W]hether the theory or technique can be and has been tested; whether it has been subjected to peer review and publication; whether, in respect to a particular technique,

> there is a high known or potential rate of error; whether there are standards controlling the technique's operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community.

Id. (citing *McLemore*, 863 So.2d at 37 (citing *Daubert*, 509 U.S. at 592-94)). But the Court subsequently expanded the analysis in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

In *Kumho*, the Court considered whether the trial court's gatekeeping responsibility required it to consider the reliability of testimony that is based on technical or specialized knowledge. *Kumho Tire Co., Ltd.*, 526 U.S. at 147, 151. It held the trial court's responsibility included all expert testimony. *Id.* The Court reached this conclusion cognizant of situations that involve witnesses "whose expertise is based purely on experience ..." and testimony would have to be excluded because those experts' field of expertise lacked reliability. *Id.* at 151. But, these situation would be the exception, not the rule. The Court, to illustrate this point, cited astrology and necromancy as examples of unreliable fields. *Id.*

The Court also announced what is now known as the "intellectual rigor" test to be applied when the *Daubert* factors do not lend themselves to an admissibility determination because of the nature of the issue, the expertise in question, or subject of the proffered testimony. *Id.* at 150. The Court explained that in these situations, the trial court has the duty "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* at 152. The "intellectual rigor" test is employed by courts in this state. *See Gillett*, 56 So.3d at 495 (¶ 64) ("The applicability of these factors varies depending on the nature of the issue, the expert's particular expertise, and the subject of the testimony.") (citing *McLemore*, 863 So.2d at 37 (citing *Kumho Tire Co., Ltd.*, 526 U.S. at 151)).

Expert testimony also must be relevant. A relevance determination is the second part of Rule 702's two-pronged inquiry. Expert testimony is relevant if it will assist the trier of fact in understanding or determining a fact at issue. *Id.* at 526; *McLemore*, 863 So.2d at 38. That testimony must "assist the trier of facts evidence means the evidence must be relevant," as that word is defined by Mississippi Rule of Evidence 401.

C. Reasons for denying Havard's second assignment of error

In his second assignment of error, Havard claims the trial court abused its discretion in allowing Dr. Benton to testify as an expert witness. He supports this assignment with three attacks on Dr. Benton. First, he says that Dr. Benton's lacked the qualifications to render opinions on cause of death, manner of death, and biomechanics. (Appellant's Br. at 66-68). Second, he argues that Dr. Benton's methodology was unreliable because he did not consider relevant information, conduct an investigation, or request a biomechanical assessment. (Id. at 68-69). And third, Havard argues that Dr. Benton's opinions were tainted by personal bias. (Id. at 69-72).

1. Review is barred.

"'There is a presumption that the judgment of the trial court is correct, and the burden is on the Appellant to demonstrate some reversible error to this Court.'" *Clark v. State*, 503 So.2d 277, 280 (Miss. 1987) (quoting *Branch v. State*, 347 So.2d 957, 958 (Miss. 1977)). Havard—not the Court or the State—bears the burden of demonstrating legal error by citing relevant authority and proving factual assertions with record evidence. The issues under this assignment do not conform to MRAP 28(a)(1)(7). That rule "requires an Appellant to include in his argument 'the contentions of Appellant with respect to the issues presented, and the reasons for those contentions, with citations to the authorities, statutes, and parts of the record relied on.'" *Patton v. State*, 109 So.3d 66, 75 (¶ 22) (Miss.

2012) (quoting MRAP 28(a)(1)(6)).

Review of Havard's second assignment is barred for two reasons. First, Havard fails to cite relevant authority. "The failure to cite relevant authority, or to make any connection between the authority cited and his case constitutes a procedural bar." *King v. State*, 857 So.2d 702, 725 (¶70) (Miss. 2003). He recites the standards of MRE 702 and *Daubert*, but cites no authority to support the issues under his second assignment and offers no explanation of how it should be applied. *King*, 857 So.2d at 725 (¶ 37) (citing *Branch v. State*, 347 So.2d 957, 958 (Miss. 1977)). He has abandoned these issues. *Matter of Estate of Smith v. Boolos*, 204 So.3d 291, 313 (¶ 49) (Miss. 2016). The longstanding rule is that unsupported assignments of error will not be considered. *See Wilcher v. State*, 227 So.3d 890, 895 (¶ 25) (Miss. 2017) ("'It is the duty of counsel to make more than an assertion, they should state reasons for their propositions, and cite authorities in their support.'") (quoting *Clark v. State*, 503 So.2d 277, 280 (Miss. 1987) (quoting *Johnson v. State*, 154 Miss. 512, 122 So. 529 (1929))); *Jordan v. State*, 995 So.2d 94, 110 (¶ 51) (Miss. 2008) (quoting *Conley v. State*, 790 So.2d 773, 784 (Miss. 2001); MRAP 28(a)(6)); *Simmons v. State*, 805 So.2d 452, 487 (¶ 90) (Miss. 2001) (quoting *Hoops v. State*, 681 So.2d 521, 526 (Miss. 1996); *Hewlett v. State*, 607 So.2d 1097, 1106 (Miss. 1992)); *Williams v. State*, 708 So.2d 1358, 1360 (¶ 12) (Miss. 1998) ("'[I]t is the duty of an Appellant to provide authority and support for an assignment.'") (quoting *Hoops*, 681 So.2d at 526; *Kelly v. State*, 553 So.2d 517, 521 (Miss. 1989)); *Weaver v. State*, 713 So.2d 860, 863 (Miss. 1997).

And second, Havard fails to cite specific portions of the record that support and prove the issues under his second assignment. "'Our law is clear that an Appellant must present to us a record sufficient to show the occurrence of the error he asserts....'" *King*, 857 So.2d at 714 (¶ 12) (quoting

Acker v. State, 797 So.2d 966, 972 (Miss. 2001) (quoting *Lambert v. State*, 574 So.2d 573, 577 (Miss. 1990))); *Alexander v. State*, 759 So.2d 411, 418 (Miss. 2000) (citing *Pate v. State*, 419 So.2d 1324, 1325-26 (Miss. 1982)). The issues under Havard's second assignment are based on factual assertions. There are several instances where a factual assertion is completely unsupported. In others, an assertion is accompanied by a record citation that does not support and prove Havard's position. "[I]ssues cannot be decided based on assertions from the briefs alone. *The issues must be supported and proved by the record*.'" *Patton*, 109 So.3d at 75 n. 9 (emphasis added) (quoting *Pulphus v. State*, 782 So.2d 1220, 1224 (Miss. 2001)); *King*, 857 So.2d at 726 (¶ 77). Havard fails to point out record evidence that supports and proves the issues under his second assignment. Review of these issues is barred. *Cowart v. State*, 178 So.3d 651, 665-66 (¶ 39) (Miss. 2015).

2. Havard does not claim, and cannot show resulting prejudice.

In addition to their procedural deficiencies, the issues under Havard's second assignment cannot be the basis for granting him relief. He does not identify any right that has been affected by the trial court's admissibility determination in his second assignment of error. "It is the duty of the Appellant, not only to demonstrate error in the introduction of the evidence, but also to show the prejudice to the defense that arose from that erroneous ruling." *King*, 857 So.2d at 720 (¶ 42) (citations omitted). "[E]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right is affected by the ruling." *Simmons*, 805 So.2d at 488 (¶ 92) (citing MRE 103(a)). "This Court cannot reverse unless a substantial right has been affected." *Johnson v. State*, 908 So.2d 758, 764-65 (¶ 24) (Miss. 2005) (citing *Simmons*, 805 So.2d at 488 (¶ 92)). And there is no error where, as here, the Appellant fails to show what right was affected by an admissibility determination. *Id.* at 764-65 (¶ 24) (quoting *Simmons*, 805 So.2d at 488). Havard does not, and

cannot show resulting prejudice. He may not obtain relief for his second assignment or error.

3. Dr. Benton was qualified under MRE 702.

Havard's first issue is that the trial court erred when it allowed Dr. Benton to express opinions on cause and manner of death when he was not qualified to express those opinions. Havard tells the Court that this case was "focused on Shaken Baby Syndrome as it relates to *cause and manner of death*." (Id. at 66) (emphasis in the original). Based on that characterization of the proceedings, he argues that Dr. Benton was not qualified to render opinions on injury mechanisms such as, SBS or short falls, "in this context." (Id.) Why? As the State appreciates it, Havard's position is that because Chloe's brain injuries caused her death, the only experts who were qualified to express any opinion related to those injuries were forensic pathologists.[48] (Id.) He is mistaken.

The Court should refuse to review this issue. Havard cites absolutely no legal authority to support it. His failure is a bar on review of this issue. *Williams*, 708 So.2d at 1361 (¶ 12) (quoting *Weaver v. State*, 713 So.2d 860, 863 (Miss. 1997)); *Simmons*, 805 So.2d at 487 (¶ 90). And Havard cites no portion of the record where Dr. Benton expressed an opinion on cause of death, manner of death, or biomechanics. That failure bars review of this issue. *See Cowart*, 178 So.3d at 665-66 (¶ 39) (barring review of an issue with an admissibility determination of a confession that was not supported by citation to record evidence); *Jordan v. State*, 995 So.2d 94, 110 (¶ 51) (Miss. 2008) (quoting *Conley v. State*, 790 So.2d 773, 784 (Miss. 2001).

In addition, this issue cannot be the basis for granting Havard relief. He does not identify any

[48] Interestingly, Havard does not dispute the fact that Dr. Benton is a pediatric expert. (Appellant's Br. at 66). And he seems to suggest that had Chloe's brain injuries not produced her death, the trial court would not have erred in allowing Dr. Benton to render opinions on the nature of her injuries or mechanisms that caused them. (Id.)

right that has been affected by the trial court's admissibility determination. "This Court cannot reverse unless a substantial right has been affected." *Johnson*, 908 So.2d at 764-65 (¶ 24) (citing *Simmons*, 805 So.2d at 488 (¶ 92)). "[E]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right is affected by the ruling." *Simmons*, 805 So.2d at 488 (¶ 92) (citing MRE 103(a)).

Havard's assertions regarding Dr. Benton's qualifications omit facts in the record and misrepresent the proceedings below. (Appellant's Br. at 64, 66-68). For example, Havard asserts that this case is "focused on Shaken Baby Syndrome as it relates to *cause and manner of death*." (Id. at 66) (emphasis in the original). Recall that the Court granted Havard leave to seek post-conviction relief on the "issues of newly discovered evidence presented in his application for leave."[49] He filed his PCR Petition in the trial court on June 16, 2015. (CP at 3.) The issues of newly available evidence in that PCR Petition were (1) that newly available scientific and medical evidence related to short falls and shaking had debunked SBS, and caused Dr. Hayne to disavow his 2002 opinion on cause of death (closed head injuries and changes consistent with SBS); and (2) that collateral review was available under the newly discovered evidence and fundamental rights exceptions to the UPCCRA's bars. (Id. at 34-41; 42-45.) Havard did not present evidence that proved his issues. He did not show the scientific evidence supporting SBS was junk, that Dr. Hayne disavowed his 2002 opinion, or that he could not have presented a short-fall theory at trial.

Havard also omits a significant part of the Evidentiary Hearing Transcript in asserting Dr. Benton rendered opinions on cause of death, manner of death, and biomechanics. What Havard represents to this Court is that after being accepted as an expert in the field of child abuse pediatrics,

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[49] Order, *Havard v. State*, No. 2013-DR-01995-SCT (Miss. Apr. 2, 2015).

"Dr. Benton proceeded to testify as to opinions and theories that should have been excluded under Mississippi Rule of Evidence 702. Specifically, he testified that he was to render opinions regarding 'the cause and manner of death of Chloe Britt.' (R. Vol. 15, P. 373)." (Appellant's Br. at 64). The portion of Evidentiary Hearing Transcript that Havard has cited—R. Vol. 15, P. 373—reflects the following exchange between the State and Dr. Benton:

> Q. Doctor Benton, what were you asked to do in this case?
>
> A. I was asked to review the materials that you sent me with an eye to looking to see if the science has evolved since the trial of Jeffrey Havard that altered the opinion as to the cause and manner of death of Chloe Britt.

(Evid. Hr'g Tr. at 373.) The passage above does not support Havard's assertion. What it shows is that Havard has misrepresented the record.

The State would also direct the Court's attention to the Transcript[50] of the Motions Hearing that took place in the trial court on July 7, 2017. On July 7, 2017, the trial court held a motions hearing and heard argument on several motions, including Havard's motion to exclude Dr. Benton's testimony. (Mot. Hr'g Tr. at 24-28.) Havard sought to exclude Dr. Benton's testimony "as it relates to the cause and manner of death because he lacks qualifications and the use of proper methodology and Mississippi Rules of Evidence 702 and the Daubert standard...." (Id. at 28.) He also informed the trial court of his intent to tender two forensic pathologists as expert witnesses who would testify on two separate issues. Specifically, Havard stated that one of the forensic pathologist's testimony would focus on "pediatrics" and the other pathologist's testimony would focus on "the changes in Shaken Baby Syndrome over the years." (Id. at 25-26). The State explained that Dr. Benton was a child abuse pediatrician who would testify "to changes in the science regarding Shaken Baby

[50] The Motions Hearing Transcript appears in Supplemental Volume 1 of the Record.

Syndrome[,] ..." not cause and manner of death. (Id. at 28, 29.) The trial court reserved its ruling on the motion until the August 2017 evidentiary hearing.

At the evidentiary hearing, the trial court heard Dr. Benton state:

- that he was a full professor of pediatrics at UMMC, the Chief of the Division of Forensic Medicine at UMMC, and the Medical Director of the Children's Safe Center at UMMC;
- that prior to his UMMC employment, he was employed by and practiced medicine at the LSU Children's Hospital from 1994 through 2008;
- that he was not a pathologist, but relied on pathology reports as child abuse pediatrician and relying on pathology reports and other sources of information was usual and customary practice in this field;
- that he obtained his medical degree from LSU's School of Medicine and completed a pediatrics residency through LSU's Department of Pediatrics Children's Hospital, University Hospital, and Charity Hospital of New Orleans;
- that he completed a clerkship of pediatric forensic medicine as a second year resident, and as a result, accepted the invitation to further his education in forensic medicine by seeing child abuse patients as a third year resident;
- that he was offered and accepted a professorship after his residency to continue his work and education in child abuse that included, beginning in 1994 at least 2 national conferences and more recently 3 national conferences per year;
- that he has an unrestricted medical license in Mississippi and Louisiana;
- that he is double-board certified in general pediatrics and child abuse pediatrics, has maintained his both certificates by taking three full examinations and obtaining the necessary continuing medical education requirements specific to the fields of general pediatrics and child abuse pediatrics, and completing and submitting quality assurance and improvement projects to the American Board of Pediatrics;
- that, as of August of 2017, he had 23 years of experience practicing child abuse pediatrics;
- that his practice entails providing clinical services to children who are suspected of being abuse victims, the surveillance of all children who are preverbal / nonverbal trauma patients admitted to UMMC (Jackson, Biloxi, Grenada, Hattiesburg, and Tupelo), the surveillance and review of incoming complaints of child abuse from the Mississippi Department of Child Protective Services for case triage and recommendations concerning the sufficiency of medical examinations performed and the need for additional examinations, administrative duties that included teaching child abuse to all third year medical students and residents (in pediatrics, family medicine, psychiatry, child psychiatry), and educating health personnel on the current state of child abuse science as well as child abuse recognition and response;

- that he lectures at both of Mississippi's law schools, social worker agencies, daycares, and churches on issues related to child abuse;
- that he advises authorities of his opinion as to whether a particular child has been abused, including children with head injuries;
- that he consults on numerous cases each year;
- that, on average, he concludes between 50 to 60 children in the UMMC system have abusive head trauma each year;
- that most of his head injury consults do not include abuse and are consistent with the proffered scenario;
- that, in some cases, he is not able to reach a conclusion;
- that he has testified as an expert in numerous cases in Mississippi, Louisiana, Alabama, Colorado, South Dakota, Maine, Virginia, in different areas, including Abusive Head Trauma, Shaken Baby Syndrome, burns of children, torture of children, sexual abuse of children, and delayed disclosure in abused children;
- that he consults on cases involving children who are living and deceased;
- that he does not conduct autopsies but frequently attends them;
- that he has testified as an expert in a Shaken Baby Syndrome case involving the death of a child;

(Id. at 357-65; 367-68.) The trial court also heard Dr. Baden testify that, beginning in the 1970s, "ophthalmologists and pediatricians ... became very much involved with Shaken Baby Syndrome" in homicide cases. (Id. at 97.) Based on what it heard, the trial court accepted Dr. Benton as an expert in the field of child abuse pediatrics with expertise in injuries resulting from SBS and from falls.[51]

The trial court did not abuse its discretion in allowing Dr. Benton to testify as an expert in the field of child abuse pediatrics. Dr. Benton was the only physician, who was double-board certified

[51] Havard renewed his motion to exclude Dr. Benton's testimony, arguing that the Court "sent the case back for the determination on cause and manner of death as it related to the advancements in pathology and biomechanics." (Evid. Hr'g Tr. at 366.) Havard's characterization of the remand order drew an objection from the State, who clarified that leave had been granted leave on "newly discovered issues related to Shaken Baby Syndrome." (Id.)

in general pediatrics and child abuse pediatrics. He was the only physician whose board certification required to him to be well-versed in the most recent peer-reviewed literature on child abuse, AHT, and SBS. He was the only physician who taught child abuse pediatrics to medical students and residents. He was the only physician in clinical practice at the time his report was made. He was the only physician whose clinical practice was mostly, if not entirely, devoted to evaluating and providing care to children suspected of abuse in all of its forms, and supervising preverbal and nonverbal child trauma patients. He was the only physician whose medical practice involved diagnosing and treating injuries resulting from SBS and short falls. And Dr. Benton had been qualified as a medical expert in other cases in Mississippi and other states.[52]

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[52] *See Portis v. State*, 245 So.3d 457, 462 (¶ 6) (Miss. 2018) (stating that Dr. Benton "is an expert in child abuse pediatrics, formerly known as pediatric forensic medicine"); *Gray v. State*, 202 So.3d 243, 258 (¶ 53) (Miss. Ct. App. 2015) (affirming the determination that Dr. Benton was an expert in pediatric forensic medicine, which was based, in part, on the fact that he "had testified in numerous cases as an expert in pediatric forensic medicine"); *Harris v. State*, 123 So.3d 925, 931-32 (¶ 18) (Miss. Ct. App. 2013) (stating that Dr. Benton was a pediatric forensic medicine expert, and noting he had performed a differential diagnosis (his methodology), ruled out other potential causes, and concluded that the nine-month-old victim's injuries were the result of child abuse); *White v. State*, 107 So.3d 999, 1001 (¶ 8) (Miss. Ct. App. 2012) (stating that Dr. Benton, based on his clinical examination of a three-month-old infant, concluded the infant's traumatic brain injuries were the result of abuse rather than reasons that were proffered by caregivers, including a fall from a bed); *Cooley v. State*, 76 So.3d 210, 214 (¶ 13) (Miss. Ct. App. 2011) (noting that Dr. Benton was "an expert in pediatric forensics," who examined the body of a young child suspected of abuse, identified injuries on the child's body that "consisted of a repetitious pattern of discrete circular marks," and opined that those injuries were the result of abuse and caused by "'an object that contacted the body'"); *State v. Otkins-Victor*, 193 So.3d 479, 493-94 (stating that Dr. Benton was an expert in pediatrics and child abuse pediatrics, who had reviewed documentation and medical records of a child who died from brain injuries resulting from child abuse); *State v. Imbraguglio*, 987 So.2d 257, 262-63 (La. Ct. App. 2008) (finding Dr. Benton qualified as an expert in pediatric forensic medicine, who opined that linear forces commonly observed in children who have suffered head injuries as a result of a fall were inconsistent with the head injuries observed in this case, which were high-velocity force injuries that were commonly observed in child abuse cases); *State v. Galliano*, 945 So.2d 701, 707, 709, 719-721 (La. Ct. App. 2006) (stating that Dr. Benton was a pediatric expert, who had reviewed the medical records of a two-year-old child with traumatic brain injuries, and concluded the injuries "were indicative of being shaken with his head being thrown back and forth[, and] caused by acceleration/deceleration forces" rather than injuries resulting from a SUV door being shut on the child's head), *remanded by State v. Galliano*, 839 So.2d 932 (La. 2003); *State v. Miller*, 940 So.2d 864, 867 (La. Ct. App. 2006) (stating that Dr. Benton is an pediatric forensic medicine expert, whose opinion was that a four-year-old's lethal brain injuries were indicative of SBS, which was

This case is similar to *Middleton v. State*, 980 So.2d 351 (Miss. Ct. App. 2008). In *Middleton*, the Appellant (Middleton) was charged with and convicted of felonious child abuse of a child. The victim in *Middleton* was an infant who had sustained diffuse brain injuries that included hemorrhaging on the surface and between both hemispheres of the brain, a subdural hematoma, and hemorrhaging in the left retina. 980 So.2d at 352-53; 355, 356, 358 (¶¶ 2-4; 15, 19, 28). At trial, the State tendered and the trial court determined that a pediatric radiologist, a critical care pediatrician, and a child abuse pediatrician were experts whose opinions concerning the nature and cause of the victim's injuries were reliable and relevant. *Id.* at 353 (¶¶ 4-5). The jury, in turn, heard all three physicians state that the victim's head injuries "were sustained most likely as a result of Shaken Baby Syndrome." *Id.* at 353 (¶ 4). Middleton was convicted of felonious child abuse. And he appealed.

On direct review, Middleton claimed the trial court had abused its discretion in determining the physicians were not qualified to render opinions on the nature and cause of the infant's brain injuries. *Id.* at 353-59 (¶¶ 6-32). The Court of Appeals rejected his claim and affirmed the trial court's admissibility determination. In reaching this decision, the Court of Appeals found the

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consistent with opinions held by a forensic pathologist, an emergency medicine physician, a neurosurgeon, a pediatric ophthalmologist, and a pediatric radiologist); *State v. Glenn*, 900 So.2d 26, 31, 35 (La. Ct. App. 2005) (noting that Dr. Benton was accepted as an expert in pediatric forensic medicine and opined, consistent with a forensic pathologist, that a two-month-old infant's brain injuries were indicative of SBS and resulting from acceleration/deceleration forces rather than forces from a short fall); *State v. Nolan*, 882 So.2d 1246, 1250-51 (La. Ct. App. 2004) (noting that Dr. Benton was an expert in pediatric forensic medicine who opined, consistent with a pediatric critical care expert, that an infant's head injuries were consistent with SBS and acceleration/deceleration (centripetal) forces rather than linear impact force injuries commonly observed in short fall events); *State v. Smith*, 877 So.2d 1123, 1128-29, 1133-34 (La. Ct. App. 2004) (noting that Dr. Benton was a pediatric forensic medicine expert whose review of medical records, an autopsy report, a pediatric neuropathology report, and other documentation led him to conclude, consistent with a pediatric neuropathologist, that a seven-month-old infant's lethal brain injuries were indicative of SBS and caused by acceleration/deceleration forces from shaking); *State v. Richthofen*, 803 So.2d 171, 178, 179-180, 184-87 (La. Ct. App. 2001) (noting that Dr. Benton was an expert in pediatric forensic medicine, who, consistent with a pediatric intensive care expert and a neurosurgery expert, opined that even though a sixteen-month-old child had been diagnosed with Adams Oliver Syndrome, her fatal brain injuries were indicative of SBS).

physicians' board certifications, medical practice affiliations, knowledge, training, experience, clinical practice, and history of testifying as medical experts in other cases were factors that supported the trial court's determinations. *Id.* at 355-59 (¶¶ 13-32). In affirming the trial court, the Court of Appeals held that each physician was qualified as a medical expert and their opinions "regarding the nature and possible causes of [the infant]'s injuries ..." were reliable and relevant, and admissible under MRE 702. *Id.* at 355-59 (¶¶ 13-32).

Just as the physicians in *Middleton*, Dr. Benton was qualified as an expert by his scientific knowledge, experience, training, and skill. The trial court did not abuse its discretion in determining Dr. Benton was an expert in child abuse pediatrics with particular expertise regarding injuries resulting from SBS and falls. Havard argues that Dr. Benton was not qualified to express an opinion on the cause of Chloe's brain injuries because those injuries produced death. This argument is not only flawed; it is illogical.

Determining the cause of an injury, disease, or disability is a fundamental part of practicing medicine. Some physicians have expressly stated,

> The physician in AHT/SBS cases employs no different methodology than the ER physician who assesses life or death scenarios in the emergency room, or than the neurosurgeon who assesses the cause and treatment of intracranial bleeds, or than **the forensic pathologist who assesses the cause and manner of death** in a variety of cases. All employ the "differential diagnosis" methodology, a methodology rooted in the scientific method.[]

Sandeep K. 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*, 13 HOUS. J. HEALTH L. & POL'Y 203, 285-86 (2013) (emphasis added).

The opinions that Dr. Benton expressed related to (1) Chloe's brain injuries, and (2) the evolution of the SBS diagnosis and were within the scope of his expertise. The Court of Appeals has

rejected similar claims. *Middleton v. State*, 980 So.2d 351, 356-57 (¶¶ 21-23) (Miss. Ct. App. 2008) (citing *Wells v. State*, 913 So.2d 1053, (Miss. Ct. App. 2005)). And this Court has already rejected arguments similar to those Havard makes concerning the scope of Dr. Benton's expertise as it relates to short falls and Chloe's injuries. *Kolberg v. State*, 829 So.2d 29, 71 (¶¶ 116-17) (Miss. 2002), *overruled on other grounds by Harrell v. State*, 134 So.3d 266 (Miss. 2014), *Rowsey v. State*, 188 So.3d 486 (Miss. 2015); *Hall v. State*, 611 So.2d 915, 920 (Miss. 1992) (finding that two physicians were qualified to render opinion testimony as experts in child abuse); *see also Moore v. State*, 773 So.2d 984, 987 (¶ 9) (Miss. Ct. App. 2000) (noting that, "in *Hiengpho–Thichack v. State*, 603 So.2d 363, 364 (Miss. 1992), the court recognized the characterization of [family practice physician's] expertise [in child abuse] as a 'sub-specialty'" (alterations in the original)). But even if that were not true, this Court has held that "'[a] physician who is sufficiently familiar with the standards of a medical specialty may testify as an expert, even though he does not practice the specialty himself.'" *Greenwood Leflore Hospital v. Bennett*, 276 So.3d 1174, 1179 (¶ 15) (Miss. 2018) (some alterations omitted) (quoting *Sacks v. Necaise*, 991 So.2d 615, 622 (¶ 23) (Miss. Ct. App. 2007)). With respect to AHT cases, "a multidisciplinary child protection team approach has become the standard of care in many jurisdictions." Narang, *A Daubert Analysis of Abusive Head Trauma/Shaken Baby Syndrome*, 11 HOUS. J. HEALTH L. & POL'Y at 573 n. 467 (citing Antonia Chiesa & Ann-Christine Duhaime, *Abusive Head Trauma*, 56 PEDIATRIC CLINICS N. AM. 317, 319 (2009)).

Further, Havard argues that Dr. Benton was not qualified to express "opinions regarding the science of movement, mechanism of injury, the physics behind forces, etc. as they relate to SBS in

general and the death of Chloe Britt in particular." (Appellant's Br. at 67).[53] Dr. Benton did not express biomechanical opinions. But Dr. Benton did say that his practice entails treating a social illness[, child abuse,] by recognizing it by using science." (Evid. Hr'g Tr. at 362.) This science includes the science of biomechanics. In fact, many of the studies and reports that Dr. Van Ee cited, mentioned, and/or discussed were studies and reports authored and/or co-authored by physicians, including Dr. "Duhaime, ... who is a child abuse pediatrician[]..." and "a neurosurgeon[,] ..." and Dr. David Chadwick, who is a pediatrician.[54] (Id. at 384, 420.)

The State would briefly address one final assertion in Havard's brief—that Dr. Benton "acknowledges that biomechanics is a reliable scientific field that contributes to SBS scholarship and understanding. (*See* R. at V. 15, P. 469-470)." (Appellant's Br. at 67). The following exchange took place during Dr. Benton's cross examination:

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[53] It was noted earlier that Havard fails to cite any portion of the record where Dr. Benton rendered such an opinion. To reiterate, his failure to cite record evidence also serves as a bar to review of this issue. MRAP 28(7); *see Jordan*, 995 So.2d at 110 (¶ 51) ("'[T]his issue is not properly before the Court pursuant to M.R.A.P. 28(a)(6) which states that an argument in the appellate's brief "shall contain the contentions of Appellant with respect to each issues presented, and the reasons for those contentions, with citations to the authorities, statutes, and parts of the record relied upon."'") (quoting *Conley*, 790 So.2d at 784; MRAP 28(a)(6)) (some citations omitted).

[54] *See e.g.,* J. W. Finnie, et al., *Neuropatholigical Changes in a Lamb Model of Non-Accidential Head Injury (the Shaken Baby Syndrome)*, 19 J. CLINICAL NEUROSURG. 1159, 1159-1164 (2012); Bart Depreitere, M.D., et al., *Mechanics of Acute Subdural Hematomas Resulting from Bridging Vein Rupture*, 104 J. NEUROSURG. 950, 950-56 (2006); Horace B. Gardner, M.D., Case Report: *A Witnessed Short Fall Mimicking Presumed Shaken Baby Syndrome (Inflicted Childhood Neurotrauma*), 43 PEDIATR. NEUROSURG. 433, 433-435 (2007); Michael T. Prange, Ph.D., et al., *Anthropomorphic Simulations of Falls, Shakes, and Inflicted Impacts in Infants*, 99 J. NEUROSURG. 143, 143-150 (2003); John Plunkett, M.D., *Fatal Pediatric Head Injuries Caused by Short-Distance Falls*, 22(1) AM. J. FORENSIC MED. 1-12 (2001); Ann-Christine Duhaime, M.D., et al, *Nonaccidental Head Injury in Infants — The "Shaken Baby Syndrome"*, 338 NEW ENG. J. MED. 1822, 1822-29 (1998); John R. Hall, M.D., et al., *The Mortality of Childhood Falls*, 29 J. TRAUMA 1273, 1273-1275 (1989); Ann-Christine Duhaime, M.D., et al, *The Shaken Baby Syndrome a Clinical, Pathological, and Biomechanical Study*, 66 J. NEUROSURG. 409, 409-415 (1987); Nobuhiko Aoki, M.D., & Hideaki Masuzawa, M.D., *Infantile Acute Subdural Hematoma, Clinical Analysis of 26 Cases*, 61 J. NEUROSURG. 273, 273-280 (1984); E. S. Gurdjian, M.D., *Impact Head Injury, Mechanistic, Clinical and Preventive Correlations* 113-138 (Charles C. Thomas 1975).

Q. You do not think that biomechanics is an unreliable science to be used in a case like this, correct?

A. I do.

Q. You think it's reliable, right?

A. No. I said it's unreliable --

Q. All -- .

A. -- and I can give you all the reasons again why I don't think you can apply it to a criminal process. I mean, it's informative to our practice, but not on an individual case basis. I mean, if you look at this case specifically, there is no data that has been presented so far that takes into account the specifics and some of the vagaries of Mr. Havard's statements such as the fall first, possibly to the lid. It doesn't appear to be clear, defined head impact although we do have head impact clinically. Those discrepancies leave a lot of wiggle room to be taking any math into this.

Q. Turn to page 109.

A. Yes, sir.

Q. And if you'll look down at line 9 I asked you under oath do you think that biomechanics is an unreliable science, in the interpretation of this case. You don't mind. I know it's a long answer, but do you mind reading that whole answer into the record, please.

A. Yes, sir. I said, "Loaded question there with Dr. Van Ee in the room." I said, "No. I think it has challenges I think there is a future for biomechanical analysis. Our big problem is the one that plagues us in general. I can't go shake a living kid. I can't go hit a living kid and see what happens and do it with enough reliability and exactness in terms of forces. So when we look at our biomechanical literature now we're roughly stuck in the same thing that I'm critical about certain case reports with the history of people. You as an attorney know histories from people are frequently either inexact or unreliable or misinterpreted or flat out lies. In some way all of that is mixed into our basis in which we've come up with our rules and measurements. So I think we're getting better at our approximations. I think that the use of mathematical modeling is still limited in what we're not sure what thresholds exist. If we have current models that say that a child was going to die one in every hundred times they have a short fall, it doesn't reflect real world validity and that's the problem. So I'm not dismissive. We use it. I mean, and I encourage it, and he's done great work in the past that we've looked at, but I do apply that to a specific -- or do I apply that to a specific case. I think that's where you're going to start to get errors much like if we start to use specific case reports like the five month old who dies from a sitting position falling backwards."

Q. You did not examine the subdural blood in this case correct?

....

(Evid. Hr'g Tr. at 466-68.) As the passage above shows, Dr. Benton agrees that biomechanical data has value but in a broad sense and believes that biomechanical analysis has a future. But how Havard interprets Dr. Benton's testimony to even suggest that he somehow endorses biomechanics as a reliable scientific field is difficult to understand.

In any event, this Court should affirm the trial court's determination that Dr. Benton was qualified as an expert in child abuse pediatrics and possessed particular expertise with SBS and short falls. "'A trial judge's determination as to whether a witness is qualified to testify as an expert is given the widest possible discretion and that decision will only be disturbed when there has been a clear abuse of discretion.'" *Middleton*, 980 So.2d at 353 (¶ 6) (quoting *Smith*, 925 So.2d at 834 (¶ 23) (quoting *Logan*, 773 So.2d at 346-47 (¶ 31))). Havard does not cite, or even identify, evidence or testimony in the record that suggests the trial court's admissibility determination was arbitrary and clearly erroneous. The trial court did not abuse its discretion in allowing Dr. Benton to testify as an expert in the field of child abuse pediatrics, who was qualified to give opinion testimony related to injuries associated with and/or resulting from SBS and short falls. And Havard fails to show otherwise.[55] Accordingly, the trial court's admissibility determination regarding Dr. Benton must be affirmed.

4. Dr. Benton's methodology was reliable.

[55] Havard's issue with Dr. Benton's qualifications is disingenuous given that he, after announcing as much in open court, called two forensic pathologists for the primary purpose of eliciting expert testimony on "pediatrics" and "the evolution of Shaken Baby Syndrome." The better question is: How was Dr. Benton not qualified to give opinion testimony on (a) pediatrics, and (b) AHT/SBS—medical diagnoses and forms of child abuse?

Havard's second issue with the trial court's admissibility determination concerns Dr. Benton's methodology. (Appellant's Br. at 68-70). He says that Dr. Benton's opinions were the product of unreliable methodology because "Dr. Benton has not reviewed all relevant and important case materials and has not undertaken any analysis involving measurements or mathematical data...." (Id. at 69). This simply is not true.

To begin, review of this issue is barred. Havard cites no legal authority to support it. "Failure to cite relevant authority obviates the appellate court's obligation to review such issues." *Simmons*, 805 So.2d at 487 (¶ 90) (citing *Williams*, 708 So.2d at 1360-61 (¶¶ 12-13)). "'[I]t is the duty of an Appellant to provide authority and support of an assignment.'" *Williams*, 708 So.2d at 1361 (¶ 12) (quoting *Hoops*, 681 So.2d at 526; *Kelly*, 553 So.2d at 521).

Even if this issue could be considered, Havard cannot obtain relief for it. He has identified no right that was affected by the trial court's admissibility determination. "[E]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right is affected by the ruling." *Simmons*, 805 So.2d at 488 (¶ 92) (citing MRE 103(a)). Havard does not claim, and cannot show resulting prejudice.

Additionally, Havard's assertion that, "Dr. Benton has not reviewed all relevant and important case materials and has not undertaken any analysis involving measurements or mathematical data[,]" is not true. For example, Havard claims that Dr. Benton did not review his February 23, 2002 statement to local law enforcement at the time he gave his written report or deposition. (Id. at 68). Dr. Benton did review that statement. During the evidentiary hearing, Dr. Benton stated: "What [I] reviewed is what is listed on the front page of my report, which includes ... Havard's statement to the sheriff...." (Evid. Hr'g Tr. at 373.)

Doctor Benton's written report was admitted into evidence during the evidentiary hearing. (Evid. Hr'g Ex. 30.)[56] A list of digital files appears on the first page of Dr. Benton's written report under the heading "DOCUMENTS REVIEWED". (Id. at p. 1 of 12.) One of the digital files listed in Dr. Benton's report is "Exhibit_F_Havard_2.23.02_Statement_to_Sheriff.pdf".[57] (Id.) That file contains an electronic image of the entire Transcript of a Video Taped Statement of Jeffrey Havard Taken at the Adams County, Mississippi, Jail on the 23rd Day of February 2002 in *State of Mississippi v. Jeffrey Havard*, Cause No. 02-KR-0141.[58] It and the other digital files listed in Dr. Benton's written report were produced to Havard's counsel at Dr. Benton's March 9, 2017 deposition. Havard's counsel collectively offered these digital files as Exhibit 4 to Dr. Benton's deposition. (CP at 1047-48.)[59]

Havard also suggests that Dr. Benton did not review Chloe's medical records in asserting "the file materials that Dr. Benton produced do not contain any of her Chloe Britt's medical records." (Appellant's Br. at 68). He is mistaken. "Hayne.Autopsy.Rep_Hospital.Notes.Misc.pdf" is another digital file listed under "DOCUMENTS REVIEWED" of Dr. Benton's written report. (Evid. Hr'g Ex. 30 at p. 1 of 12.) This file contains many documents, including Chloe's medical records. Havard

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[56] Pediatric Forensic Medicine Consultation Report, dated Dec. 15, 2016.

[57] PDF is a digital file format, which provides an electronic image of a document layout that encapsulates the format and content of the originating document. *See* Theodore Z. Wyman, J.D., *Construction and Application of Fed. R. Civ. P. 34(b)(2)(E), Governing Production of Electronically Stored Information (ESI)*, 14 A.L.R. Fed. 3d Art. 1 § 3 (2016) ("Portable Document Format (PDF): A file format, developed by Adobe Systems, to facilitate the exchange of documents between platforms, regardless of originating application[,] by preserving the format and content. Because of the utility resulting from its neutrality, PDF is a very common format for ESI[,] [Electronically Stored Information].").

[58] This transcript was attached as Exhibit F to the PCR Petition that Havard filed in the trial court on June 16, 2015. (CP at 153-178.)

[59] Deposition of Scott A. Benton, M.D., at pp. 9-10.

has possessed these records since Dr. Benton's March 9, 2017 deposition. The Transcript of Dr. Benton's Deposition reads, in part, as follows:

> Q. So take me through, if you don't mind, the analysis that you did in the Jeffrey Havard case as it's related to your report.
>
> ....
>
> A. So again, the request was to identify if there was any new science that would affect the original determination of the cause and manner of death of Chloe Madison Britt, who is the victim in this case. To write the report I reviewed the materials that were sent by the Attorney General's office focusing in on all the medical records. I did not -- I skimmed through anything that was of legal nature.
>
> And so pages 2, 3, 4, 5, 6, and 7 is a synopsis of my interpretation of what I saw in those records. Actually, I went one too far; so pages 2 through 5. Beginning at the bottom of page 5 is where I summarize my interpretation or assessment
> of the record. So I did that first.
>
> I then went back and looked at the different affidavits that I guess you guys had supplied and took notes and tried to group what the concerns were, and then I tried to group and reply what my thoughts are on that. And that comprises pages 6 through 10. And that's pretty typical of how I do these.
>
> Q. When you go through your analysis, do you first identify the injuries and then the timing of those injuries and then look at the history? Or just kind of take me through how you do your analysis.
>
> A. Well, you start with what's the evidence in the case. So, I mean, I go through that and literally, much like y'all do, I take notes of everything, who said what, when, where, what exams were done, who did what, and I summarize all of that and what can I say from that. And that's the first part of this.
>
> Q. Do you start with the trial testimony first or a history first? How --
>
> A. I actually start with the medical records. So the trial testimony would be second. In fact, I put that less than all the other stuff. So I look at all the medical record. I look at the autopsy. I'm trying to think of everything that was available in this case. Any recorded transcripts or statements pretrial. That all comes first.
>
> ....
>
> Q. What were the medical records that were available specifically in the Chloe Britt case?
>
> A. I don't have independent recall, but it's the things that are on that jump drive and everything that was provided by the Attorney General's office.

(Evid. Hr'g CP at 1052.)[60] And the following exchange took place during Dr. Benton's evidentiary hearing voir dire examination:

> Q. You haven't reviewed any medical records at the time you gave your report. Is that correct?
>
> A. I reviewed all of the medical [records] -- it's hard for me to answer what I don't know. It's easier for me to tell you what I did review, which I previously told you at the deposition and is certainly listed in the front of my report.

(Evid. Hr'g Tr. at 370.)

Havard also reasserts his earlier contention "that Dr. Benton recognizes the scientific validity of biomechanics and the important role that this discipline can play in evaluating an SBS case such as this one." (Appellant's Br. at 68-69). This is false. The State has already quoted portions of the record where Dr. Benton stated his opinion, that biomechanics is unreliable, and the reasons that led him to reach that conclusion. Dr. Benton does "not see that this field is ripe to say that you cannot shake and injure a child in part, because it's based on animal models, adult primates...." (Evid. Hr'g Tr. at 388.) Scientists are "not even sure that the comparison between shaking and linear acceleration data is reliable[,] ..." given the continued progression in the biofidelity of anthropomorphic test devices (test dummies).

Dr. Benton's opinion—that biomechanics is unreliable—was also based on the biofidelic progression of AHTs. He testified at length about this progression in AHT biofidelity. Greater biofidelity in AHTs has produced biomechanical data that is much more consistent with (1) the data and results from other studies, including epidemiology studies, and (2) what is generally accepted in the medical field—that shaking alone can generate the type and amount of force needed to produce

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[60] Tr. of Benton Dep. at pp. 26-28. The "jump drive" that Dr. Benton referenced during his deposition was offered by Havard's counsel as Exhibit 4 to his deposition. That USB drive contained several digital files, including one titled: "Hayne.Autopsy.Rep_Hospital.Notes.Misc.pdf".

injuries like Chloe's lethal injuries. Dr. Benton said,

> I think biomechanical models are great. Okay? I think they are a way of getting around the fact that we cannot injure humans and get statistical data on what forces etc. needed, but the biomechanical data is based off of animal models, cadaver data, other inputs to create a then artificial structure made out of various materials and plastics, and there are various meters that are put on them, some on the top, some on the middle.
>
> There's lots of arguments about different things. Some of this data is based on the animal studies I mentioned. Some of this data is pure guess work, such as particularly the neck structures. We have very little data about infant neck structures. Yet, we have to model it, because our neck is an integral part of acceleration/deceleration, rotational injuries in infants. So, there's guesswork that goes into that. Let me explain.
>
> In terms of the major landmark articles, we first know about Duhaime's study in 1987. We heard everybody here talk about it. Duhaime, who is a colleague of mine, who is a child abuse pediatrician, if the studies by Caffey and Guthkelch could be upheld. Doctor Duhaime being a neurosurgeon felt like impact was a requirement and set up these studies to see if that was so. So, in the Duhaime study she used three different models of the necks. They couple together. They're anthropomorphic test devices if you will. The best that they knew how at the time readily saying that we're not sure this replicates a real human. They said that. That's their full disclosure about it. They were somewhat shocked at the results that they got because the shaking, if I'm not mistaken, was done by a Penn State football player, did not show forces shaking alone as opposed to just impact injuries. They did show however that shaking plus impact significantly elevated the forces to what they believed was a head injury criteria. We're not sure if that head injury criteria is correct. Doctor Van Ee even said that. It's kind of a point that it's okay. We can move it up or down. It's for further study, and that's what they said.
>
> Well, that was 1987. As pediatricians we went ahead and started saying, "Okay, this seems to be where it's headed. Maybe, it's shaking plus impact." We started modifying -- at least when I was around our lecture started -- we started using "shaking impact." You heard some of the other pathologists use other terms. "Shaking and thrown" I've really never heard. It may be in the northeast or the midwest, but it does fit the descriptions that Doctor Duhaime and her colleagues mentioned in that 1987 article.
>
> We didn't have the Prange article, which Doctor Van Ee cited and it was another landmark article. The concern that Prange tried to address was the problems of neck in the Duhaime article. What was interesting in the Prange article is that they have different numbers. We're not surprised and we shouldn't be surprised, because it's a different anthropomorphic test device. He somewhat replicated what Duhaime said and got some of the similar data, but the numbers were fairly statistically different

from the Duhaime study.

Doctor Van Ee stops short of with that and introduces his study, which uses a less biofidelic model than some of those, and then skips -- and perhaps because that was his PhD thesis and didn't have the ability to create his own test dummy, but Coats and her colleagues in 2008 recognized the deficiencies in the models in the previous including the neck areas where there were pretty much restricting the motion of the neck. In 2008 she created the first neck that could move in all three. Secondly, she realized by using a solid skull changes the biomechanics completely, because infants don't have solid skulls. For those of you that have had babies they have a soft spot and their bones you can push on them a bit. It kind of freaks some people out, but it's designed that way to allow the head to grow, but in between each of those boney plates is a connective tissue that's a little bit elastic. We now know from other biomechanic models that it provides a shock absorber. So, it was important to Coats and her colleagues to change the neck, change the head so that it had mimickers of sutures. When they did their studies they found even different data. The point being biomechanics is in its infancy if you ask me. It's great stuff. I think we need to continue to pursue it, refine it. I think it may have advantages in product design, you know, if it's better for your head, better for impact in a car, that's okay. If it's lesser, you're still better off than having no seatbelt or no helmet or no airbag. So, seeing it improve in that field makes sense. Now, we move all the way to the present.

We have Carole Jenny. Carole Jenny is a good friend of mine. I've known her work. She has studied for the past decade or two decades the biomechanics of infant head injury along with several international class biomechanical engineers. In her 2017 paper, which was presented earlier the important part that came across in that is that they too said that there were some problems with the existing anthropomorphic test devices, and we need to change it. We need to scale the head better. We need to figure out the mass. We need to include -- to figure out how the arms are involved and all of these types of things. We need to have an even better neck that more mimics an infant. There are other considerations. Again, I am not a biomechanical engineer, so I won't get into the details. But the conclusion of that paper was if you read it, and had Doctor Van Ee read parts of it, was critical of the previous, being critical not them doing a bad job, but the data keeps changing. In this article we now start to see with a greater biofidelity that shaking alone starts to produce forces that meets our head injury criteria by other studies. Is that the end? Absolutely not, but it does to begin to advance our biomechanical knowledge to fit our epidemic logic and our animal models that previously sent these although we were kind of disturbed that the biomechanics didn't quite fit.

(Evid. Hr'g Tr. at 384-88.)

Next, Havard asserts that Dr. Benton's methodology was unreliable because he "did not request a biomechanical analysis even though he has been involved in cases where he has done that

and acknowledges that such an analysis could have been done here." (Appellant's Br. at 69).[61] It is true that Dr. Benton did not request a biomechanical analysis in this case. But Havard relies on that fact as evidence that proves he chose not to consider relevant information related to Chloe's injuries and alternative causes for them, specifically short-distance falls. (Appellant's Br. at 69-70). He is wrong.

First, Havard misstates Dr. Benton's testimony. Dr. Benton never said that he had requested biomechanical analyses in other cases. When asked whether he had done so in other cases, Dr. Benton answered: "I requested it? I mean, it has been requested in other cases. I'm not sure that I was the person that -- I don't have the money to buy these things." (Evid. Hr'g Tr. at 464.) Havard also misrepresents the record in asserting Dr. Benton admitted his opinions were "not based on any objective, scientific data at all." He supports his assertion by quoting the following exchange between Havard's counsel and Dr. Benton:

> Q. And your opinion is not based on physics or biomechanics, correct?
>
> A. I think its informed by both, but its certainly not a biomechanical assessment.
>
> Q. You're not using mathematical formulas to arrive at any of your opinions, correct?
>
> A. No, sir.

(Appellant's Br. at 69). The passage above contains two admissions, just not one that remotely resembles the admission that Havard asserts. Here too, Havard misrepresents the record.

The fact that Dr. Benton did not request a biomechanical analysis did not render his methodology unreliable. Dr. Benton's methodology was the differential diagnosis. In fact, he used

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[61] Here, Havard cites parts of the Evidentiary Hearing Transcript at pp. 464-66.

the differential diagnosis when he began practicing medicine. (Benton Report, Evid. Hr'g Ex. 30 at p. 6.) He even listed the differentials (*i.e.*, possible causes of an injury) that he considered in his written report. They were: (1) trauma—inflicted/abusive and accidental; (2) metabolic diseases; (3) hemophagocytic lymphohistiocytosis; (4) nutritional deficiencies; (5) genetic syndromes; (6) coagulopathies; (7) tumors; (8) lymphoblastic leukemia; (9) neuroblastoma; and (10) infections. (Id. at pp. 6-7.) And he gave the reason(s) that led him to rule out each one (*e.g.*, the absence of evidence). (Id. at pp. 6-7.)

Dr. Benton also discussed some of these differentials during the evidentiary hearing. One was trauma.[62] Dr. Benton was asked about finding acute subarachnoid hemorrhaging and ruling out traumatic injury from the birthing process based on that finding. The following exchange took place on cross-examination:

> Q. In your report you had criticized Dr. Ophoven's -some of her findings; is that correct?
>
> A. A lot of her findings, but yes.
>
> Q. You -- the one that you deny -- that you criticized and denied on face value is that there were no chronic subdurals and there were acute subarachnoid hemorrhaging profusely in this case. Do you remember that?
>
> A. Those are the findings in this case.
>
> Q. You were here when she testified, correct?
>
> A. I was.
>
> Q. Now, she didn't say that at the time of this incident that Chloe had this chronic condition, correct?
>
> A. You know, she waffled so much on that issue. She clearly in her deposition or affidavit -- affidavit, excuse me -- asserted that this child because of the birth

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[62] "[S]everal studies indicate that trauma is the most common cause" of Subdural Hemorrhages. Narang, *A Daubert Analysis of Abusive Head Trauma/Shaken Baby Syndrome*, 11 HOUS. J. HEALTH L. & POL'Y at 541-42 (citing Chris Hobbs et al., *Subdural Haematoma and Effusion in Infancy: An Epidemiological Study*, 90 ARCHIVES DISEASE CHILDHOOD 952, 954 (2005)).

cephalohematomas suffered a traumatic birth which I think is a stretch and a baby that went home with no complications, et cetera, and then asserted that possibly there was a chronic subdural that possibly re-bled that led to the conditions of this child that we are now discussing, and I take issue with those logical -- or illogical

Q. And so vou --

A. And then she misstates the Rooks article in support of that.

Q. So your criticism is that she overstates information in her report?

A. The issues here are so grave that it bothers me greatly that someone would misrepresent the literature that would assert a finding that the pathologist I'll go even better than that. I bet you even a first year pathologist would know the difference between a chronic subdural and acute subdural when they got the head open right in front of them.

Q. So --

A. Now, I'm going to defer on that because I am not a pathologist, but I have been to many autopsies, I've been to surgery, and I've seen the differences between chronic subdurals and acute subdurals, and they're different.

Q. How do you determine chronic subdurals, Dr. Benton?

A. Well, one you can look at them. The classic description to look is they look like crank case oil. They don't look like fresh blood.

Q. Do you agree there was no radiology done in this case, correct?

A. Correct.

Q. And you agree that no sections of dura are available so no one actually looked at Chloe's dura under a microscope, correct?

A. That is correct.

Q. Are you aware to diagnose chronic subdural hematoma and this may be beyond your paygrade, requires at least be the radiology, pictures of it, or histology, actually examining that. Did you know that?

A. Okay --

Q. To actually say it. But you said there were no --

A. Hang on a second because I'm going to parse your words, and it is part of my paygrade. What you were saying is wrong. You may need a piece of that dura to say it's a subdural that has a membrane or that has some advanced organizing feature, but you don't need that to diagnose an acute subdural. It is fresh blood that you see.

Q. We are talking about chronic subdurals, right?

A. Again -- okay. Go ahead. I'll listen to the question.

Q. Well, you didn't examine either of then -- any film on the dura or any tissue slides because they weren't taken, right?

A. I agree to that to you, yes. That's what I understand from the record.

Q. You wrote there were no chronic subdurals in your report.

A. That was Dr. Hayne's autopsy report. He described bilateral hemispheric acute subdural hematomas. Those are no[t] chronic subdural hematomas.

Q. Did he say anything about no chronic subdurals?

A. Did he say anything about no fractures. I mean, you can discuss with him why he doesn't note non entities, but that's not a common practice.

(Evid. Hr'g Tr. at 447-49.)

Dr. Benton considered and ruled out the possibility that Chloe had a chronic subdural hematoma, which rebled and caused her lethal injuries. Dr. Benton, the only pediatrician to testify, reviewed the relevant information and relied his knowledge, training, and experience in ruling out this differential. Dr. Benton did not find evidence of a traumatic delivery in Chloe's records. He even noted the fact that, after her birth, Chloe was discharged from the hospital with no complications. He did not find evidence of delivery complications that could have caused Chloe's lethal injuries.[63]

[63] Dr. Ophoven discussed several hypotheses and gave multiple opinions on cause of death in her report and supplemental report. After Dr. Benton disclosed his report and gave deposition testimony, Dr. Ophoven decided that her ultimate opinion on cause of death would be a short fall, which caused a chronic subdural hematoma to rebleed. She explained that this subdural hematoma (a) *could have* developed into a chronic subdural hematoma, and (b) *could have* rebled subsequent to a fall like the fall Havard described. She also testified that, if these things actually occurred, then Chloe's chronic subdural hematoma *could have* caused her death. Expert testimony that offers a "reasonable hypothesis" is insufficient. *Goforth*, 603 So.2d at 329. Expert testimony that is "indefinite or ... expressed in terms of mere possibilities" is inadmissible. *West*, 553 So.2d at 20. According to Dr Ophoven, no one will ever know. Why? Even though "there's medical evidence that would give you that information[,]" Dr. Ophoven blamed Dr. Hayne for not taking sections of dura —the missing puzzle piece of the puzzle. And to stoke the flames, she cited a study that, in her words, "identified that there was bleeding in the head in nearly 50% of children...." (Evid. Hr'g Tr. at 272.) She claimed her experience in "hav[ing] many, many, many cases of babies who are sytagmatic from birth who go onto to have complications of chronic subdural[,] ..." without specifying when, how, or why she, in her capacity as a pathologist, develop such an extensive clinical practice. (Id. at 271.) In any event,

Similarly, Dr. Benton found no evidence of a chronic subdural hematoma in Dr. Hayne's autopsy report. He said that chronic subdural hematomas was not an entity that Dr. Hayne found at autopsy. He also stated that it was not common practice to note entities in an autopsy report that were not found at autopsy.

Dr. Benton disagreed with her opinion because the evidence and cited study did not support it. He stated that Dr. Ophoven had misrepresented the study. The conclusion of the study she relied upon reads, *verbatim*: "Hemorrhages seen in, asymptomatic neonates are limited in size and location. SDH after one month of age is unlikely to be birth related." V.J. Rooks, M.D., et al, *Prevalence and Evolution of Intracranial Hemorrhage in Asymptomatic Term Infants*, 29 AM. J. NEUROLOGY 1082, 1084, 1088 (2008). That conclusion was based on reported findings in 46 cases of asymptomatic neonates with subdural hemorrhages that were confirmed 72 hours postbirth with Ultrasound or MRI and who were subjected to a second round of imaging at a later time (4 weeks). The study reported: (1) that most of the birth subdural hematomas completely resolved by 1 month, (2) that **all** of the subdural hematomas resolved by 3 months, (3) that **none** of the subdural hematomas became chronic, and (4) that "[**n**]**o** neonate had MRI **evidence** of **subarachnoid** ... **hemorrhage**." *Id.* at 1084, 1086 (emphasis added). Chloe was six months old at the time of her death. According to Rooks's study—the study Dr. Ophoven cited, any birth subdural hematoma Chloe sustained would have completely resolved months earlier. Further, Chloe's injuries included (1) diffuse acute subarachnoid hemorrhages (recent and dispersed bleeding under the surface layer of the brain), and (2) bilateral hemispheric acute subdural hematomas (accumulations of fresh blood on the surface of both sides of her brain). The Rooks study expressly reported finding no evidence of subarachnoid hemorrhages in any of the neonates. The Rooks study stated that the subdural hematomas identified were relatively small, and **all** but one was located in the posterior cranium. *Id.* at 1087. And in the exception case, the subdural hematoma was located in the anterior cranium, consistent with a spontaneous subdural hematoma (possible abuse), not trauma or complications during delivery. *Id.* Chloe's subdural hematomas were found on the sides of her brain, not the front. And unlike all of the neonates in the Rooks study, Chloe had subarachnoid hemorrhaging in multiple sections of her brain. It is an understatement to say Dr. Ophoven misrepresented the Rooks study in asserting in nearly half of all births, the child sustains a subdural hematoma, and when arguing these subdural hematomas become chronic injuries "in many, many, many cases...." (Id. at 271.) And how was Dr. Ophoven able to determine the children in those "many, many, many cases ..." suffered chronic subdural hematomas is entirely unclear? Was she referring to autopsies that she performed and sections of dura she examined? If that's the case, that testimony is consistent with the history she gave. Dr. Ophoven said she performed autopsies at the Hennepin County Medical Examiner's Office from 1989 to 1992, but what number she performed on children is unknown. (Id. at 179.) From 1992 to 2009, Dr. Ophoven performed approximately 13 autopsies on children under 10 years old. (Id. at 178-79.) She performed autopsies of children during her time at Children's Hospital, but most did not involve brain trauma. (Id. at 178.) And she stopped performing autopsies altogether in 2010. (Id. at 180.) She would have had to seen these children and identified their chronic subdurals, beginning in the '80s until '92—a time when she was not seeing brain trauma like chronic subdural hemorrhages. Or did Dr. Ophoven see and treat these pediatric patients? If she did, when? Dr. Ophoven has not practiced pediatric medicine, or even seen a pediatric patient since the 1970s. (Id. at 176.) All that to say, Dr. Ophoven's chronic subdural hematoma rebleed theory is, at best, just that—a theory. And that theory is completely unreliable given the evidence, her misrepresentations, and her shaky testimony.

Dr. Benton also testified about his deductive reasoning for ruling out possible trauma resulting from resuscitation efforts. Regarding this differential, the following exchanges took place during direct and cross examination:

Q. Have you ever had to resuscitate an infant?

A. Yes.

Q. How many times?

A. In the course of residency hundreds of times.

Q. And how many times of those was the infant restrained?

A. None.

Q. Did Chloe have any overt seizures?

A. No.

Q. Did you see where Ophaven opined that the anterior thigh bruises was caused by having to hold Chloe down during resuscitation?

A. Yes.

Q. And do you agree with her opinion?

A. I do not. I mean, that's truly a person who either hasn't experience those encounters or is being disingenuous.

....

Q. You had mentioned earlier about resuscitation efforts at it relates to Chloe Britt, correct?

A. Yes. sir.

Q. And I believe you stated that you don't believe there could be any bruises or any artifacts left on her body from resuscitation. Is that your opinion in this case?

A. I hope I didn't say that because I'm fully aware of the literature on resuscitative injuries, and there can be some minor abrasions and bruises. In fact, in this particular case, there were bruises to the chest that I excluded because said, hum. Maybe that one is from CPR, but the other bruises around the head and the frenulum injury unequivocally are not from resuscitation injuries in my opinion.

Q. You cited the Sugar paper --

A. Yes.

Q. -- is that correct?

A. Yes.

...

Q. I've handed you Bruises in Infants and Toddlers, Those Who Don't Cruise Rarely Bruise. I believe that's the article you testified about in direct; is that right?

A. Correct.

Q. This article doesn't talk about any resuscitation at all, does it?

A. No, it does not.

Q. In fact, it includes children assessed at well child visits and even some of them that are not even walking yet die have bruises in this study, correct?

A. Yes.

Q. So some bruise even if they don't cruise, right?

A. Yes. That's from a third party.

Q. Was it reported that any of the children in the study had falls, for example, caregiver arms, none of them there weren't any reports like that, correct?

A. That was not part of how that study was conducted. It simply looked at whether bruises were present in children less than the developmental stage of cruising and those above the developmental stage of cruising. It's a comparative study of the two developmental issues, and they purported a significant finding that those pre-cruising are -- yes. Pre-cruising didn't have bruises -- well, didn't have significant bruises the way the others did, and if they did, they'd have an explanation.

(Id. at 449-51.) Dr. Benton considered the possibility of trauma from emergency room resuscitation efforts as a differential for Chloe's head injuries but ruled it out based on his review of Chloe's medical records, the autopsy report, the trial record, medical literature on resuscitation injury, as well as his knowledge, training, and experience.

But trauma was not the only differential that Dr. Benton discussed.[64] On cross, counsel asked:

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[64] In his article, *A Daubert Analysis of Abusive Head Trauma/Shaken Baby Syndrome*, Dr. Narang discusses differentials for retinal hemorrhages (RHs) and explains that:

> While several studies demonstrate an association of RHs with birth, several factors distinguish birth-related RHs from the RHs commonly seen in AHT.[312] First, the vast majority of birth-related retinal hemorrhages are intraretinal.[313] Multi-layered RHs, as commonly seen in AHT, have not been

Q. There are other causes for triad symptoms other than blunt trauma to the head --

A. Yes.

Q. -- is that correct? And you say in your report that you excluded all of them, but there are others that you hadn't excluded. Would you agree with that?

A. Enlighten me. I don't know what you're referring to.

Q. I'll try. For example, there are conditions that mimic the same types of injuries we see in triad, correct? For example, superior sagittal sinus thrombosis.

A. Been disproved. Multiple studies.

Q. How about the blood clotting disfunction, like hypercoagulation ability?

A. Yes.

Q. Now, there weren't any blood tests done for that in this case, correct?

A. Well, the CBC is the only one that we had, and the child had a normal thrombo -- excused me. Normal platelets which precludes thrombocytopenia which is known cause of bleeding.

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reported in the medical literature in association with birth.[314] Second, study of the natural history of birth-related RHs reveals that the vast majority of these RHs resolve by two to four weeks of life.[315] This led one author to conclude that RHs "in infants older than 1 month ... [are] not likely related to birth".[316] Finally, retinoschisis (splitting of the retina) has never been reported in association with birth injury.[317]

n. 312 See M. Vaughn Emerson et al., *Incidence and Rate of Disappearance of Retinal Hemorrhage in Newborns*, 108 OPHTHALMOLOGY 36, 36 (2001); Lindsey A. Hughes et al., *Incidence, Distribution, and Duration of Birth-Related Retinal Hemorrhages: A Prospective Study*, 10 J. AM. ASS'N FOR PEDIATRIC OPHTHALMOLOGY & STRABISMUS 102, 102 (2006) (sources also referenced in Appendix A, "Ophthalmology" literature, prospective articles #6 & #13).

n. 313 See Emerson et al., supra note 312, at 36.

n. 314 Id. at 37.

n. 315 Id. at 38. There are rare cases of birth-related RHs lasting until six to eight weeks of life. See id. There has been no documentation of birth related RHs outside of eight weeks (two months) of life. See id.; Hughes et al., supra note 312, at 106.

n. 316 Id. at 39.

n. 317 See [Alex V.] Levin, ... [*Retinal Hemorrhages: Advances in Understanding*, 56 PEDIATRIC CLINICS N. AM. 333, 334 box 1 (2009)].

11 HOUS. J. HEALTH L. & POL'Y at 550-51.

Q. You write in your report that there was no evidence of infection that might cause symptoms like this, correct?

A. That is my assessment of the available medical evidence that was provided to me, yes.

Q. But Chloe Britt actually did have an infection.

A. Not that caused this.

Q. She had a high white cell count.

A. Which Dr. Ophoven and I both agree is a stress reaction to dying, and it wasn't that high --

....

Q. And she had enlarged lymph nodes, correct?

A. Correct. I agree with that too. That's called being a child.

Q. Is it your testimony that you cannot get subdural hematoma and retinal hemorrhages from a short fall?

A. I didn't say that.

Q. Would you agree that you can?

A. I think it's possible. Certainly if the fall is high enough it's documented to do so. I'd be little more suspect on short falls, but like I said I'm aware of all the -- I think I'm aware of all -- most, if not all of the falls that Dr. Van Ee presented. I mean these are discussed. I mean, we're not ignoring the possibility of short falls having a devastating injury, but in some of those cases there are explanations. For example, even in the Plunkett study, some of those kids had pathic disorders. So the differential diagnosis that I ran down here on Chloe Britt should be done in every case. It hasn't always been. So there is some valid criticism that erroneous diagnosis have been arrived in some cases I give it to you.

(Id. at 451-53.)

The fact that Dr. Benton considered and ruled out possible alternative causes is important. As a practicing clinical and forensic child abuse pediatrician, this is his methodology. "In assessing the methodology in AHT, it is important to remember that arriving at the diagnosis of AHT employs no different methodology than arriving at any other clinical diagnosis. At its core, clinical medical decision-making is grounded in the roots of the scientific method." Narang, *A Daubert Analysis of*

Abusive Head Trauma/Shaken Baby Syndrome, 11 HOUS. J. HEALTH L. & POL'Y at 584. "Many courts have held that the '**differential diagnosis**' **methodology is** a **reliable** method of ascertaining medical causation." *Id.* at 585 (emphasis added) (citing *Best v. Lowe's Home Ctrs. Inc.*, 563 F.3d 171, 179, 183-84 (6th Cir. 2009); *Hyman & Armstrong, P.S.C. v. Gunderson*, 279 S.W.3d 93, 107, 109 (Ky. 2008); *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 263 (4th Cir. 1999)). "Courts have stated that the '**differential diagnosis** is a **well-recognized** and **widely-used technique** in the medical community to **identify** and isolate **causes of disease** and **death**.'" *Id.* (quoting *Gunderson*, 279 S.W.3d at 107 (citing *Globetti v. Sandoz Pharms. Corp.*, 111 F.Supp.2d 1174 (N.D.Ala. 2000))); *see U. S. v. Vallo*, 238 F.3d 1242, 1245 (10th Cir. 2001) (holding the differential diagnosis methodology underlying AHT is a reliable technique); *People v. Dunaway*, 88 P.3d 619, 633-34 (Colo. 2004) (same); *People v. Martinez*, 74 P.3d 316, 323, 324-25 (Colo. 2003) (same); *State v. Leibhart*, 662 N.W.2d 618, 627-28 (Neb. 2003) (same); *Glenn*, 900 So.2d at 34-35 (same); Order Denying Motion to Exclude Testimony on AHT/SBS at 5-6, *State v. Mendoza*, No. 071908696 (Utah Dist. Ct., Jun. 5, 2009)).

Equally important is the fact that Havard's biomechanical expert did absolutely no testing whatsoever in this case. When asked if he could form an opinion as to whether or not Chloe's lethal injuries resulted from a short-distance, feet-first fall as Havard described without conducting any case-specific testing, Dr. Van Ee answered: "That's correct.... There's no reason to do new testing. We have enough information to determine that now." (Id. at 339.) The information supporting his opinion was: (1) "literature," (2) "Newton Laws under gravity," (3) "givens,"[65] and (4) the injuries

[65] The "givens" that Dr. Van Ee specifically identified were: (1) the distance Chloe purportedly fell according to Havard, and (2) the general dimensions of the toilet. It is entirely unclear how Dr. Van Ee, or any one for that matter, managed to extrapolate and scale the toilet's dimensions with any degree of accuracy.

found by Doctors Hayne, Baden, and Ophoven.[66] (Id. at 339, 348.) When pressed about not conducting any testing, Dr. Van Ee admitted:

> I'm just saying an impact in the back of the head that can leave this bruise, the way [Havard] described in catching [Chloe's] arm, I think **could** give you the angular acceleration sufficient to give intercranial injury that we see.

(Id. at 349.) It is worth nothing that "could" is not the standard for newly discovered evidence. The standard is probably change, not just possibly change the outcome.

Dr. Van Ee's opinion was based on subjective beliefs, not case-specific testing or scientific evidence. "Scientific knowledge means something more than ... subjective belief that is grounded in methods and procedures of science." *Avara*, 908 So.2d at 723 (¶ 15) (citing *Daubert*, 509 U.S. at 590). Dr. Van Ee chose not rely on biomechanical data from studies or experiments, involving feet-first falls—the type of fall Havard described. When asked whether he had, Dr. Van Ee admitted: "If you look at Bartocci's article, she has talked about **feet first falls**, and **you typically don't get head injury in that**." (Id. at 348 (emphasis added.)) He considered the Bartocci article *but* decided it would not "help [him] analyze this particular case in terms of if that head hit that porcelain toilet,

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Dr. Van Ee possessed two photographs, which depicted portions of the trailer floor between the bathtub and toilet. Neither photograph depicted the entire toilet, just portions of the left side—primarily the bottom where the toilet was fastened to the floor. A foot-long ruler appears in both photographs as a point of reference. Each photograph depicts a measurement of space. One shows the distance between a wall and a water line, which rose from the floor and extended vertically into the bottom of the toilet's reservoir (just under 4" of space between wall and pipe). The other shows the distance between the bathtub and the toilet's left side (approximately 12" of space between tub and toilet). The State is unaware of any other photo that depicts a scaling reference in any other bathroom photo. And unless the State is mistaken, Dr. Van Ee did not know the type of camera, power of its lens, camera angle, or distance between it and the toilet for any photo he reviewed. Was the camera mounted or hand-held when the photos were taken? None of this information was known. How, then, did Dr. Van Ee scale the toilet's dimensions without it?

[66] Doctors Hayne, Baden, and Ophoven did not identify any external injury found on Chloe's head and face as the site where her head impacted the toilet, the sentinel injury, or any of her external injury that was capable of producing the intracranial injuries.

what's going to happen." (Id.)

And Dr. Van Ee's opinion was based on unsupported speculation. "Scientific knowledge means something more than unsupported speculation...." *Avara*, 908 So.2d at 723 (¶ 15) (citing *Daubert*, 509 U.S. at 590). He reviewed the record where Major John Manley and Deputy Buddy Franks testified that Havard gave them a statement shortly after he was detained on February 21, 2002, and said nothing about a fall or hurting Chloe. (Trial Tr. at 454-56; 469-70.) Dr. Van Ee also reviewed Havard's February 23, 2002 statement but relied on specific portions of that statement and unsupported inferences he drew from themt. Dr. Van Ee assumed those portions of Havard's February 23rd statement were true and accurate, and identified the bruise on the back of Chloe's head as the site of impact. This was pure speculation. Doctors Hayne, Baden, and Ophoven agreed the bruise on the back of Chloe's head was an injury that played no part in her death. Second, Havard did not know whether Chloe's head actually hit the toilet and never said the back of her head hit the toilet.

Dr. Van Ee's opinion was nothing more than a mere possibility. Expert testimony that offers a "reasonable hypothesis" is insufficient. *Goforth*, 603 So.2d at 329. If the bruise on the back of Chloe's head was caused by the fall Havard described, then Dr. Van Ee *believes* it is *possible* that the force generated by her head impacting the toilet *could* produce injuries like her intracranial injuries.

Yet, Havard argues that Dr. Benton's methodologies are unreliable because he did not request a biomechanical analysis. How? Havard offers no explanation. Dr. Benton never said he completely disregards biomechanical data. In fact, Dr. Benton's testimony was that he reviews biomechanical data, research, and models. (Evid. Hr'g Tr. at 378.) He also testified that biomechanical information

may, depending on the case, inform physicians' decisions and opinions. (Id. at 379-81.) Dr. Benton reviewed Dr. Van Ee's reports, heard his testimony, and disagreed with his opinions because they were inconsistent with his medical knowledge, training, and experience, which are informed by biomechanical data. These facts only validate the trial court's admissibility determination. *Middleton*, 980 So.2d at 357-58 (¶¶ 27-29) (quoting MRE 703)).

The Court should affirm the trial court's admissibility determination that Dr. Benton was an expert in child abuse pediatrics and possessed particular expertise with SBS and short falls. Havard's issue with Dr. Benton's methodology is legally unsupported and barred. Alternatively, it is without merit. Dr. Benton's methodology—the differential diagnosis—was relevant and reliable. The trial court's admissibility determination must be affirmed."'A trial judge's determination as to whether a witness is qualified to testify as an expert is given the widest possible discretion and that decision will only be disturbed when there has been a clear abuse of discretion.'" *Middleton*, 980 So.2d at 353 (¶ 6) (quoting *Smith*, 925 So.2d at 834 (¶ 23) (quoting *Logan*, 773 So.2d at 346-47 (¶ 31))).

5. *Dr. Benton's opinions were reliable.*

Havard's third and final issue with the trial court's admissibility determination concerns the reliability of Dr. Benton's opinions. (Appellant's Br. at 70-72). He says the trial court should have excluded all of Dr. Benton's opinions because they were tainted by bias and failed "to account for non-abusive possibilities...." (Id. at 71, 72). These assertions are also false.

Like the two before it, review of this issue is barred. Havard fails to cite legal authority to support his issue with the reliability of Dr. Benton's opinions. "Failure to cite relevant authority obviates the appellate court's obligation to review such issues." *Simmons*, 805 So.2d at 487 (¶ 90) (citing *Williams*, 708 So.2d at 1360-61 (¶¶ 12-13)). "'[I]t is the duty of an Appellant to provide

authority and support of an assignment.'" *Williams*, 708 So.2d at 1361 (¶ 12) (quoting *Hoops*, 681 So.2d at 526; *Kelly*, 553 So.2d at 521).

Additionally, this issue does not meet the requirements of MRAP 28(a)(1)(7). Havard baldly asserts that Dr. Benton's opinions were unreliable. (Appellant's Br. at 72). "'There is a presumption that the judgment of the trial court is correct, and the burden is on the Appellant to demonstrate some reversible error to this Court.'" *Clark v. State*, 503 So.2d 277, 280 (Miss. 1987) (quoting *Branch v. State*, 347 So.2d 957, 958 (Miss. 1977)). He says that "[a]cknowledging several strong possibilities that Chloe Britt was not intentionally abused but then discarding them without explanation is not a reliable opinion from an expert: it is conclusory speculation on behalf of an advocate." (Id.). But, he provides no citation to the record where Dr. Benton acknowledged a differential but refused to consider it without explanation. "[I]ssues cannot be decided based on assertions from the briefs alone.'" *Patton*, 109 So.3d at 75 n. 9 (quoting *Pulphus*, 782 So.2d at 1224). It is Havard's burden to support and prove his argument with citations to the record, not the Court's and certainly not the State's. *Alexander v. State*, 759 So.2d 411, 418 (Miss. 2000) (citing *Pate v. State*, 419 So.2d 1324, 1325-26 (Miss. 1982)).

Even if review of this issue was not barred, Havard cannot obtain relief. "[E]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right is affected by the ruling." *Simmons*, 805 So.2d at 488 (¶ 92) (citing MRE 103(a)). Havard does not identify, much less show any right that has been affected by the trial court's admissibility determination. This necessarily means that Havard cannot show resulting prejudice. *Johnson*, 908 So.2d at 764-65 (¶ 24) (quoting *Simmons*, 805 So.2d at 488).

Additionally, the third issue under Havard's second assignment is without merit. Havard

insists that Dr. Benton's opinions were unreliable because Dr. Benton was biased against him. (Appellant's Br. at 70-72). To support this position, Havard cites portions of Dr. Benton's testimony and a thread of emailed messages between Dr. Benton and a local journalist. Havard also maintains his earlier assertion, that Dr. Benton failed to consider alternative causes of death, in particular that Chloe's injuries were caused by a short fall. (Id. at 71-72).

Havard argues that Dr. Benton's testimony proves he held a personal bias against him and testified as an advocate for the State rather than a "disinterested scientist." (Id. at 70). He cites page 363 of the Evidentiary Hearing Transcript in support. (Id. at 70). That part of the transcript contains a portion of Dr. Benton's testimony related to his qualifications as an expert in the field of child abuse pediatrics. Havard selectively cites this part of the transcript in asserting, "Dr. Benton admitted he is ... not merely a disinterested scientist, [and] considers himself to be a child advocate and a family advocate." (Id.) Page 363 of the Evidentiary Hearing Transcript contains the following two questions and answers in a series of three:

Q. Do you consider yourself to be a child advocate?
A. Yes.
Q. Do you consider yourself to be a family advocate?
A. Yes.

(Evid. Hr'g Tr. at 363.) The third question and answer in this line of questioning was:

Q. Do you consider yourself to be an advocate for the truth?
A. Yes.

(Id. at 364.) The passage above does not support Havard's contention. Dr. Benton *is* a disinterested objective third-party. He testified that evidence of abusive injuries is completely absent in the vast majority of the head injuries cases he consults. (Id. at 363.) If zeal and personal bias predisposed Dr.

Benton to finding evidence of abuse, why would he swear that he fails to find any evidence of abuse in the vast majority of his cases? The fact that Dr. Benton rarely finds evidence of abuse contradicts Havard's assertion.

Havard also asserts that the manner in which Dr. Benton became involved in this case further illustrates a lack of objectivity. (Appellant's Br. at 70). He begins by quoting a portion from Dr. Benton's cross-examination where he admitted to reading a newspaper article about Havard's potential innocence and contacting the author for the purpose of offering his assistance. (Id.) The record reflects that Havard attempted to impeach Dr. Benton first by showing Dr. Benton was motivated by the possibility of securing funding for Children's Safe Center. (Evidentiary Hr'g Tr. at 398.) The record also reflects that Dr. Benton's testimony rebuffed Havard's impeachment attempt on this basis, as demonstrated by the following exchange between Havard's counel and Dr. Benton:

> Q. And in order to get more money for the Children's Safe Center you felt like it may be important for you to get your name out there, correct? Out into the public domain?
>
> A. That was not the intent to reaching out to Jerry Mitchell. I will unabashedly say that part of my administration of the Children's Safe Center was the title Medical Director is I do have to be concerned about funding, but that was not the vehicle that we were seeking funding. So, the original was the legislature fund from the World Com settlement that was used to finance my salary and the operation of the clinic. Two years into this I realize -- well, actually, my Chair told me that the money was out. I was like, I thought there was a decade's worth of money. So, basically, I had to go looking for money, but we went looking to the State for funding. I can describe exactly how we went through that. It wasn't pandering to the community at large. I did not seek Jerry Mitchell so my name would be in the paper. I actually prefer that it not be. I actually prefer my on anonymity, but like you, but that's not always possible.

(Id. at 398-99.)

Havard also says that Dr. Benton's lack of objectivity is established by the fact that he emailed a message to the author of the newspaper article and stated that, based on his review of the newspaper

article and the Majority Opinion in *Havard III*, it was his belief that the facts supported a homicide. (Appellant's Br. at 71). Here too, Havard presents Dr. Benton's testimony out of context in an attempt to support his position. Later on cross, Dr. Benton explained that when he emailed the message to the author of the newspaper article, he was offering to *help* Havard and requesting information for that purpose. (Evidentiary Hr'g Tr. at 423.) Dr. Benton also stated that the email he sent was not a medical document, and that the statements in it were not medical opinions. (Id.)

The messages emailed to and by Dr. Benton support his testimony but not Havard's assertion that Dr. Benton was biased against him. For example, in a message dated January 15, 2014, Dr. Benton wrote:

> [W]hat *evidence* is there that prior diagnoses were erroneously made? Moreover, note that pathological diagnoses are but one part of the ultimate criminal charging. To answer you, I would support a *scientific review* in the face of known or suspected misuse of science that lead to a criminal conviction.
>
> ....
>
> I sense that you have adopted the position that innocents are in jail and suspect you are using *minority opinions published in non-scientific publications* like *law review articles and non-peer reviewed articles.*
>
> I welcome still a meeting and I am happy to guide you in the science as I know it or to those who know more than me. I can also provide insight into data you already possess.
>
> As I tell everyone, my two fears are that if I error that it might lead to the accusation or conviction of innocents OR to the return of an innocent child to an abusive environment.

(Jan. 15, 2014 Benton Email, Ex. 31 at p. 13 (emphasis added).)

Finally, Havard argues that Dr. Benton's opinions are unreliable because he acknowledged other non-abusive possibilities for Chloe's death but failed to account for them. (Appellant's Br. at 71-72). The State listed the "non-abusive possibilities" that Dr. Benton noted and considered in his written report when addressing the second issue under Havard's second assignment of error, above.

The non-abusive possibilities, or differentials, identified in Dr. Benton's written report were: (1) trauma—inflicted/abusive and accidental; (2) metabolic diseases; (3) hemophagocytic lymphohistiocytosis; (4) nutritional deficiencies; (5) genetic syndromes; (6) coagulopathies; (7) tumors; (8) lymphoblastic leukemia; (9) neuroblastoma; and (10) infections. (Benton Report, Evid. Hr'g Ex. 30 at pp. 6-7.)

Earlier, the State referenced the differentials that Dr. Benton discussed during the evidentiary hearing. The State incorporates that discussion and the quoted passages above here as evidence which shows Havard's assertion, that "Dr. Benton's analysis does not account for other possibilities[,]" is wholly contradicted by the Record. The passages quoted in the section above clearly show Dr. Benton *did* account for and consider other differentials in performing his differential diagnosis to AHT/SBS. The same is true of Dr. Benton's written report. (Ex. 30.) His testimony and written report establish the fact that Dr. Benton reviewed the evidence in this case and ruled out several other differentials in forming his opinion that Chloe's brain injuries were consistent with injuries caused by AHT/SBS.

The same cannot be said of Doctors Baden and Ophoven. They do not believe that AHT/SBS is a valid medical diagnosis. Neither considered shaking as an injury mechanism capable of producing injuries like Chloe's brain injuries. Dr. Baden did not account for shaking as a possible injury mechanism in this case. Dr. Baden testified that he has never accepted shaking, no matter how violent, to be an injury mechanism for subdural hemorrhages. (Evid. Hr'g Tr. at 82.) He also stated that, "If there's no impact, the brain and the head don't get damaged.... If [a child] falls down on his head gets ... a cephalohematoma, which means a big hemorrhage underneath the scalp that's the area of impact, but it's always an impact. If there's no impact, the brain and the head don't get damaged.

" (Id. at 88.) According to Dr. Baden, the problem with SBS is—and has been—"impact alone does it." (Id. at 107.) "You don't need shaking to get these injuries with impact." (Id.)

Likewise, Dr. Ophoven did not account for shaking as a possible injury mechanism. She testified that professionals in the field of forensic pathology have completely set aside SBS as a medical diagnosis. Dr. Ophoven stated, "In a case where the diagnosis of shaking is made forensic pathologist[s] will not support that mechanism, because the science is not there." (Id. at 204.) "[T]he diagnosis of Shaken Baby and terms that has been used in lieu of Shaken Baby, also known [as] Rotational Acceleration/Deceleration, Abusive Head Trauma, Shaking Impact, and Whiplash Shaken Infant is no longer considered a diagnosis that can be made on the basis of the presence of retinal hemorrhage, subdural and brain swelling." (Id. at 204-05.) "Amongst my peers the determination that violent shaking has not been verified as a proven mechanism of fatal brain injury...." (Id. at 207.) Dr. Ophoven also testified that one cannot rule out a diagnosis unless one considers that diagnosis. (Id. at 208.)

The Court should refuse to grant Havard relief for the third issue under his second assignment of error. His third issue is procedurally barred. Alternatively, this issue is without merit. Havard fails to identify any right that has been effected by the trial court's admissibility determination. And the assertions Havard offers in support of his third issue are contradicted by the Record. The Record clearly reflects that Dr. Benton did consider other possible non-abusive causes of Chloe's lethal brain injuries, including the short fall that Havard described.

III. Did the trial court err in denying Havard's attempt to expand the scope of the remand proceedings?

In his third assignment of error, Havard argues the trial court abused its discretion and denied him the opportunity to prove his claim of actual innocence when it refused to expand the scope of the

remand proceedings and consider the issue of sexual battery. He claims the trial court's ruling—that the only issues to be considered were Havard's issues of newly discovered evidence related to SBS—entitles him to relief. He asks that the Court consider the sexual battery issue in the first instance on appeal, find he has demonstrated actual innocence, and reverse his capital murder conviction. Havard's third assignment of error and his requests for relief should be denied for the reasons discussed below.

A. Facts

Since trial, Havard has directly and indirectly challenged the evidence supporting the underlying felony of his capital murder conviction. This is clear from the Majority Opinions that issued on direct review, *Havard v. State*, 928 So.2d 771, 787-791 (¶¶ 21-32) (Miss. 2006) (*Havard I*), during his initial post-conviction proceedings, *Havard v. State*, 988 So.2d 322, 327-333 (¶¶ 7-34) (Miss. 2008) (*Havard II*), and, in particular, during his first successive post-conviction proceedings in *Havard v. State*, 86 So.3d 896, 904-910 (¶¶ 29-53) (Miss. 2012) (*Havard III*). In *Havard III*, Havard claimed that newly discovered evidence would prove he was actually innocent of sexual battery. The newly discovered evidence supporting this claim, included: a 2009 Declaration of Dr. Hayne, the Transcript of Dr. Hayne's 2010 Deposition,[67] and Dr. James Lauridson's affidavit and written reports. The Court disagreed. It found the information supporting the claim was not newly discovered evidence, and ruled it time-barred, successive writ-barred, and without merit. *Havard III*, 86 So.3d at 904-07 (¶¶ 29-43).

Havard initiated these proceedings on November 23, 2013, by filing a third Motion for Relief

[67] Havard obtained Dr. Hayne's Declaration and took his deposition during the federal habeas corpus proceedings in *Jeffrey Havard v. Christopher Epps, et al*, No. 5:08-cv-00275-KS (S.D.Miss. docketed Sept. 5, 2008).

from Judgment or for Leave to File Successive Petition for Post-Conviction Relief (PCR Application) in this Court . In it, he requested the Court either vacate his capital murder conviction and sentence of death, or grant him leave to proceed in the trial court with his newly discovered evidence claim. The first page of his PCR application provided the following summary:

> **(1) Newly-discovered evidence demonstrates that the cause and manner of death of Chloe Britt was not Shaken Baby Syndrome, as was testified to at Havard's trial.** Newly-discovered evidence of advances in the scientific and medical fields since Havard's trial demonstrates that the testimony presented at trial concerning Shaken Baby Syndrome is ill-founded and no longer supported by the scientific and medical communities. In light of these circumstances, Havard's conviction and death sentence violate due process and constitute a manifest injustice that this Court is empowered to correct by way of post-conviction relief. At the very least, Havard is entitled to have this claim and the factual basis of the claim fully explored in proceedings in the trial court. This ground for relief has not previously been raised in Mississippi's state courts, because the factual grounds for the claim were not discovered until recently and could not have been discovered with reasonable diligence. This claim also involves a fundamental right.

(PCR Application at 1) (emphasis in the original).[68] The PCR Application also stated that:

> **3.** ... Newly-discovered evidence demonstrates that the basis for the State's theory of murder—the mode and mechanism of death, Shaken Baby Syndrome—is flawed. This newly-discovered evidence demonstrates Havard's actual innocence on the charge of capital murder. At the very least, it entitles Havard to a new trial so that a jury can hear all of the evidence, including the newly-discovered scientific evidence, and make a decision based upon all of the facts.

(Id. at 2-3). Havard set out his newly discovered evidence issue, beginning on page 30 of his PCR application under the heading, "CLAIM FOR RELIEF." (Id. at 30-35). The PCR Application contained two additional issues: (1) that the newly discovered evidence claim involved was not procedurally barred because it involved a fundamental right, and (2) that Havard was entitled to relief

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[68] *Jeffrey Keith Havard v. State of Mississippi*, No. 2013-DR-01995-SCT (Miss. docketed Nov. 25, 2013).

or leave to proceed in the trial court under MRE 60(b)(b). (Id. at 35-42). To reiterate Havard's PCR Application stated: "This ground for relief has not previously been raised in Mississippi's state courts, because the factual grounds for the claim were not discovered until recently and could not have been discovered with reasonable diligence." (Id. at 1). Sexual battery was not an issue raised in the PCR Application—much less a newly discovered evidence issue. In fact, sexual battery was not discussed under Havard's newly discovered evidence claim. The State filed its response on February 5, 2014. Havard filed his rebuttal on April 24, 2014.

Then on May 30, 2014, Havard filed an Amended Motion for Relief from Judgment or for Leave to File Successive Petition for Post-Conviction Relief (Amended PCR Application).[69] His Amended PCR Application contained a second newly discovered evidence claim, which strictly limited to Dr. Hayne's findings and testimony about sexual battery. Havard summarized his second claim as follows:

> **(2) Newly-discovered evidence demonstrates that Havard's rights under *Brady v. Maryland* were violated.** Prior to trial, the State's expert witness, Dr. Steven Hayne, told the prosecutor that he could not state that a sexual battery had occurred. Sexual battery was the underlying felony in this capital murder case. Dr. Hayne's findings and report to the prosecutor were clearly exculpatory but were not turned over to Havard or his trial counsel despite the fact that such exculpatory information had been explicitly requested. In the alternative, Hayne's findings and report demonstrate that trial counsel were ineffective for failing to interview Hayne and uncover these findings.

(Amended PCR Application at 2) (emphasis in the original). The Amended PCR Application continued,

> **3.** ... Newly-discovered evidence also reveals that the State violated Havard's rights under *Brady v. Maryland* by failing to disclose exculpatory findings reported by Dr. Steven Hayne to the prosecutor.

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[69] *Havard v. State*, No. 2013-DR-01995-SCT (Miss. filed May 30, 2014).

(Id. at 2-3). Havard claimed the State failed to disclose the fact that Dr. Hayne could not state that Chloe Britt had been sexually battered. (See id. at 39-41). The only evidence Havard offered to support this claim was an article, which had been published online at clarionledger.com on January 19, 2014—more than four months—earlier after the State had filed its response and Havard had filed his rebuttal. On April 2, 2015, the Court entered an Order, which expressly limited the leave it granted Havard. Order, *Havard v. State*, No. 2013-DR-01995-SCT (Miss. filed Apr. 2, 2015). The Court granted Havard leave "to file his petition for post-conviction relief in the trial court on the issues of newly discovered evidence presented in his application for leave." *Id.* The Court expressly denied Havard's request for leave to proceed on the claims presented in his amended application for post-conviction relief. *Id.*

On June 16, 2015, Havard filed a modified version of the Petition for Post-Conviction Relief that was originally attached to his Amended Post-Conviction Relief Application, not the Petition for Post-Conviction Relief that was originally attached to his Initial Post-Conviction Relief Application. (CP at 3-46.) He also attached Exhibit I (the article that had been published online at clarionledger.com on January 19, 2014) to his modified Petition for Post-Conviction Relief. (Id. at 193-96.) This article was not attached as an exhibit to Havard's initial Post-Conviction Petition because it did not exist at the time Havard filed his Initial Post-Conviction Application on November 25, 2013. The article that Havard attached as Exhibit I was published nearly three months after he filed his initial Post-Conviction Application and Petition for Post-Conviction Relief in this Court.

Prior to the August 14, 2017 evidentiary hearing, the State moved the trial court for an order that would prevent Havard from expanding the scope of the remand. (CP at 1228-1230.) So Havard claimed his newly-discovered issues were "intertwined" with sexual battery issues. He made this

argument despite the fact that his initial PCR Petition contained no claim or issue of sexual battery, much an issue that was intertwined with his newly-discovered evidence issues. During a July 7, 2017 motions hearing, the trial court agreed with the State. It stated as follows:

> I understand what his motion is dealing with at this point. I've looked very carefully. I went back over it and reviewed. The Supreme Court order said that the sole jurisdiction of this Court is to allow a filing of a post-conviction relief motion on issues of newly-discovered evidence presented in his application for leave. That is the Shaken Baby Syndrome situation. Science is always advancing, but the allegations here are, and they've presented some very strong arguments in support of this, is that the scientific evidence and advancement on this issue is so different now. It's not a question of what they could have done or obtained back in 2002, but just that the science has changed, and that cast a cloud over this. As I said, under this newly-discovered evidence part it's a question of whether or not this requires a vacation of the conviction or the sentence in the interest of justice under the statute. To that extent I do grant the State's motion in that it will be limited to that narrow inquiry. As I understand, the issues about the sexual matters, that's not presented. I know there's argument made that's it's kind of like it's all intertwined, and it's impossible sometimes to say, "Well, you can't say one thing," but understand that that's not an issue here. What the issue is the science of Shaken Baby Syndrome, and whether or not there's been such a change in advancement in it that it causes to grant a new trial.
>
> ....
>
> Let me say this: As I understand it when I was going back through this, first there were allegations of the underlying felonies being sexual battery and child abuse. The State did not proceed on the child abuse. It was solely on the sexual battery. Again, that's not one of the issues before this Court, the issue of was it a sexual battery. It's this issue about the Shaken Baby Syndrome being the cause of death. Also, in particular in light of the defendant/Havard's statements that he gave, so -- I am going to restrict it. I'll grant the State's motion to the extent that I am going to restrict to precisely to what the Supreme Court is allowing inquiry into at this time.

(July 7, 2017 Motions Hearing Transcript at 31-33.)

Now on appeal, Havard claims the trial court erred in refusing to consider the issue of sexual battery. (Appellant's Br. at 72-80).

B. Reasons for denying Havard's third assignment of error.

The Court should deny Havard's third assignment of error for the following reasons:

1. *Review is barred.*

Review of Havard's third assignment of error is barred as *res judicata*, as a successive writ, and as untimely. This assignment is based on a claim of actual innocence and sexual battery. Havard claims the trial court abused its discretion and denied him of the opportunity to prove he is innocent of sexual battery by refusing to consider his sexual battery issue. His sexual battery issue is barred as *res judicata*, as a successive writ, and by time. *Neal v. State*, 687 So.2d 1180, 1186 (Miss. 1996) *see Burns v. State*, 879 So.2d 1000, 1004 (¶ 13) (Miss. 2004) (finding issue the denial of a request for expert assistance was *res judicata* where the issue had been reviewed on two prior occasions).

This Court has considered the issue of sexual battery on several occasions. *See e.g., Havard I*, 928 So.2d at 787-88, 789-90 (¶¶ 21-24, 28-32); *Havard II*, 988 So.2d at 327-333 (¶¶ 7-31); *Havard III*, 86 So.3d at 904-910 (¶¶ 29-53). Most recently, Havard claimed newly discovered evidence would show he was innocent of sexual battery. *Havard III*, 86 So.3d at 904-07 (¶¶ 29-43). The Court found his claim had "no merit" and was "procedurally barred by time and as a successive writ." *Id.* at 907 (¶ 43). Review of Havard's sexual battery issue is barred as *res judicata*.

Review of his third assignment is barred for another reason. Havard provides no authority to support his third assignment of error. "'[I]t is the duty of an appellant to provide authority and support of an assignment.'" *Williams*, 708 So.2d at 1361 (¶ 12) (quoting *Hoops*, 681 So.2d at 526; *Kelly*, 553 So.2d at 521). The failure to cite authority in support of an issue is a bar to review on appeal. *Simmons*, 805 So.2d at 487 (¶ 90) (citing *Williams*, 708 So.2d at 1360-61 (¶¶ 12-13)). Havard argues the trial court abused its discretion when it refused to consider his sexual battery issue because that issue was "intertwined" with his newly discovered evidence issues. (Appellant's Br. at 75). Havard fails to cite authority that gives trial courts the discretion to consider issues on remand,

which are not specifically identified by this Court. His failure to provide authority bars review of his third assignment.

2. *The trial court's ruling does not entitle Havard to any relief.*

Alternatively, Havard's third assignment of error is without merit. Havard claims the trial court abused its discretion in ruling it had no jurisdiction to consider Havard's sexual battery issue. He asks this Court to consider his sexual battery issue for the first time on appeal, find him innocent of sexual battery, and reverse his capital murder conviction. The trial court's ruling does not entitle Havard to any relief.

The State raised the issue of jurisdiction to the trial court in a motion, which was filed before the evidentiary hearing. In that motion, the State argued that there were two issues of newly discovered evidence in Havard's application for leave and that both related to SBS. (CP at 1103-04.) After reviewing the matter and hearing from the parties, the trial court found it had limited jurisdiction to consider the Havard's issues of newly discovered evidence but not his sexual battery issue. (July 7, 2017 Mot. Hr'g Tr. at 32-33.) And based on that finding, it ruled the only issues that it had jurisdiction to consider were Havard's issues of newly discovered evidence and that those issues were related to SBS. (Id. at 33.)

The trial court had no jurisdiction to consider the issue of sexual battery. When this Court granted Havard leave to proceed in the trial court, It limited the scope of the remand proceedings and the trial court's jurisdiction to the issues of newly discovered evidence in his application for leave. *Howell v. State*, 163 So.3d 240, 262-63 (¶¶ 62-63) (Miss. 2014) (citing *Davis v. State*, 897 So.2d 960, 970-71 (Miss. 2004)); *see Burns*, 879 So.2d at 1003 (¶ 9) (reaffirming the rule that "the only issues properly considered are those issues for which the case was initially remanded") (citing *Culberson*

v. State, 456 So.2d 697, 698 (Miss. 1984)); *Neal v. State*, 687 So.2d 1180, 1182 (Miss. 1996) (barring review of an issue with jury instructions in "an appeal from an evidentiary hearing on the denial of the right to testify"); *Billiot v. State*, 655 So.2d 1, 18 (Miss. 1995) (barring review of an issue with the constitutionality of Miss. Code Ann. § 99-19-57(2)(a) on appeal in a case, which had been "remanded for the limited reason of determining present insanity").

Havard's third assignment of error challenges the trial court's ruling on jurisdiction. But Havard does not address the trial court's jurisdiction in his brief, even though he admits the fact that jurisdiction was the basis of the trial court's ruling. (Appellant's Br. at 75). He does not because he realizes the trial court had no jurisdiction to consider his sexual battery issue and did not err in refusing to consider that issue. So, he recasts the trial court's ruling as a ruling on the admissibility of evidence in an attempt to create an issue. He says the trial court's ruling amounts to an abuse of discretion because it prevented him from proving his claim for relief by excluding evidence relevant to his sexual battery issue. (Id. at 76). But in citing to "multiple mentions" of sexual battery and arguing his sexual battery issue was intertwined with issues of newly discovered evidence, Havard is all but expressly admitting two facts. One, Havard's reference to "multiple mentions" is an admission that there was no sexual battery issue in his application for leave. And two, Havard's argument that his sexual battery issue was intertwined with his newly discovered issues is an admission that there was no newly discovered evidence issue related to sexual battery in his application for leave.

The trial court correctly found its jurisdiction was limited by this Court to the issues of newly discovered evidence in Havard's application for leave. There was one ground for post-conviction relief in Havard's application for leave. (CP at 31-41.) Havard summarized that ground:

> This ground for relief[—that Newly-discovered evidence demonstrates that the cause and manner of death of Chloe Britt was not Shaken Baby Syndrome, as was testified to at Havard's trial—]**has not previously been raised** in Mississippi's state courts, because **the factual grounds** for the claim **were not discovered until recently and could not have been discovered with reasonable diligence**.

(PCR Application at 1) (emphasis and brackets added). That claim was based on two issues of newly discovered evidence. One of those issues concerned Dr. Hayne's opinions on SBS. Havard claimed he could prove that Dr. Hayne had disavowed his 2002 opinions on cause and manner of death since trial. His other issue pertained to scientific developments that had taken place since 2002 and related to the SBS diagnosis. Havard insisted these "newly-available" developments would vindicate him by showing Chloe died from injuries caused by a short fall. The only issues the trial court had jurisdiction to consider were two issues with SBS.

The trial court did not err in ruling that it had no jurisdiction to consider the issue of sexual battery. There was no issue of newly discovered evidence related to sexual battery in Havard's application for leave. And the trial court had no discretion to expand the scope of remand. *Howell*, 163 So.3d at 262-63 (¶¶ 62-63) (citing *Davis*, 897 So.2d at 970-71); *Burns*, 879 So.2d at 1003 (¶ 9) (citing *Culberson*, 456 So.2d at 698); *Neal*, 687 So.2d at 1182; *Billiot*, 655 So.2d at 18. It could not abuse discretion that it did not have. Instead, the trial court correctly denied a request to expand its jurisdiction and consider allegations related to sexual battery—allegations which, according to Havard, were only mentioned in his application and not based on newly discovered evidence.

An additional point must be noted. That is, Havard has waived the opportunity to take issue with jurisdiction. *See Bishop v. State*, 882 So.2d 135, 154-55 (¶¶ 50-51) (Miss. 2004) (reaffirming and applying the rule that issues raised for the first time in a reply brief will not be considered). He does not address the trial court's jurisdiction in his brief. His decision to pass on the issue constitutes

a waiver. So in the event that Havard raises the issue of jurisdiction in his rebuttal brief, the Court should refuse to consider it.

Havard also makes several baseless assertions, hoping to divert the Court's attention from the issue of jurisdiction. For example, he says the State "cannot complain that new evidence regarding sexual battery is relevant to these proceedings" because it presented evidence of sexual battery and SBS at trial. (Appellant's Br. at 75). Havard's assertion has absolutely no bearing on whether the trial court abused its discretion. It in no way alters the fact that this Court conferred limited jurisdiction on the trial court after reviewing his application for leave, his amended application, the record, and other papers and documents that Miss. Code Ann. § 99-39-27 required. The State simply requested the trial court comply with the Court's directives.

Havard's assertion is based on a mischaracterization of the information, which he attempted to present to the trial court. He says this information is "new evidence regarding sexual battery." Not so. The State would simply point to the portion of Majority Opinion in *Havard III* where the Court found the information supporting his claim of actual innocence was not newly discovered evidence. *See e.g., id.* at 906, 907 (¶¶ 39, 43) (finding "no indication that the deposition testimony provided by Dr. Hayne was undiscoverable at the time of trial"). In this case, Havard presented the trial court with *the same information* this Court said was not newly discovered evidence. The information that Havard characterizes as "new evidence regarding sexual battery" in this case is no different from the information the Court considered in *Havard III*. It is not "new," and certainly not newly discovered evidence.

Havard's assertion ignores the UPCCRA's procedure, this Court's precedent, and the decision in *Havard III*. He argues that the trial court should have considered his sexual battery issue because

that issue is intertwined with his newly discovered evidence issues by virtue of the fact that the State presented evidence of SBS and sexual battery at trial. His argument is flawed because it ignores what the UPCCRA and precedent require—that he show his sexual battery issue is "procedurally alive and substantially show[s] the denial of a state or federal right." *Corrothers v. State*, 255 So.3d 99, 103 (¶ 2) (Miss. 2017) (citing Miss. Code Ann. § 99-39-27(5)); *Knox v. State*, 75 So.3d 1030, 1036 (¶ 15) (Miss. 2011). Havard must follow the UPCCRA's procedure to obtain post-conviction review and relief. *See Knox*, 255 So.3d at 1035 (¶ 12) ("A pleading cognizable under the UPCCRA will be treated as a motion for post-conviction relief that is subject to the procedural rules promulgated therein...."). And the UPCCRA requires him to show his issues are properly before the Court on post-conviction review and have some merit. Havard cannot, and did not make this showing given that this Court found his sexual battery issue was without merit and procedurally barred in *Havard III*. *Id.* at 907 (¶ 43); *see also id.* at 910 (¶ 53). His intertwined issues argument amounts to a request for permission to relitigate an issue, which was denied by this Court in an earlier attempt to obtain post-conviction relief and not set out in his most recent successive application for leave.

Havard's sexual battery issue is without merit, barred as *res judicata*, time-barred, and successive writ-barred. *Id.* at 907 (¶ 43), 910 (¶ 53). Under the UPCCRA's procedure and this Court's precedent, Havard "'carries the burden of demonstrating that his claim is not procedurally barred.'" *Jordan v. State*, 213 So.3d 40, 42 (¶ 8) (Miss. 2016) (quoting *Howard v. State*, 945 So.2d 326, 353 (Miss. 2006)). Havard made no attempt to carry his burden. Havard's sexual battery issue is time-barred and successive writ-barred. The time bar applies to issues raised in a PCR petition that is filed more than one year after the Mandate on direct review issues, unless the Havard demonstrates an applicable exception. *Jordan*, 213 So.3d at 42 (¶ 7) (citing Miss. Code Ann. § 99-39-5(2)(b);

Havard III, 86 So.3d at 899). The successive writ bar applies to a claim, which is presented in an application for leave and was considered by this Court in an earlier post-conviction proceeding, unless the Havard shows the claim is excepted. *Id.* (citing Miss. Code Ann. § 99-39-27(9)); *Woodward v. State*, 843 So.2d 1, 6 (¶ 13) (Miss. 2003). His sexual battery issue is not an issue of newly discovered evidence. *Havard III*, 86 So.3d at 907 (¶ 43), 910 (¶ 53). He fails to show his sexual battery issue is procedurally alive in arguing his sexual battery issue is intertwined with his newly discovered evidence issues. And his sexual battery issue is barred as *res judicata*. The doctrine of *res judicata* bars review of a claim, which has been considered and rejected by this Court, unless the Havard shows his "'claim is so novel that it has not previously been litigated' or that 'an appellate court[] has suddenly reversed itself on an issue previously thought settled.'" *Crawford v. State*, 867 So.2d 196, 202 (¶ 7) (Miss. 2003) (footnote omitted) (quoting *Lockett v. State*, 614 So.2d 888, 893 (Miss. 1992) (quoting *Irving v. State*, 498 So.2d 305, 311 (Miss. 1986))). The decision in *Havard III*, to deny Havard's first successive application for leave, is based, in part, on the Court's determination of two claims. The Court found Havard's claims, that he is actually innocent of sexual battery and trial counsel was ineffectiveness in challenging the underlying felony, were without merit and procedurally barred.

Havard also asserts that the trial court abused its discretion for failing to apply the doctrine of judicial estoppel and preventing the State from arguing that SBS and sexual battery are unconnected issues when "the State fought to introduce SBS evidence even though the underlying felony of child abuse was dropped." (Appellant's Br. at 78). He cites *Clark v. Neese*, 131 So.3d 556, 560 (Miss. 2013) as authority, which supports his assertion in holding "[a] party will be judicially estopped from a subsequent position if (1) the position is inconsistent with the one previously taken

during litigation, (2) a court accepted the previous position, and (3) the party did not inadvertently take the inconsistent position." *Clark*, 131 So.3d at 569 (¶ 16). This assertion, like the one before it, is nothing more than an attempt to divert attention away from the fact that this Court conferred limited jurisdiction upon the trial court.

Even so, Havard utterly fails to demonstrate any of the three elements listed above, which are required for the application of judicial estoppel. First, the State did not assert a position on the scope of the trial court's remand jurisdiction at trial. Second, the trial court did not accept a position regarding the scope of its remand jurisdiction at trial. And third, the State could not assert a position on the scope of the trial court's remand until this Court remanded the case. The State has never asserted a contrary position on what the capital murder statute required it to prove. Nor has the State asserted a contrary position on the trial court's remand jurisdiction. The trial court did not have jurisdiction on remand to consider an issue that was not raised in Havard's third application for leave or based on newly discovered evidence, and was previously denied by this Court for lack of merit and as procedurally barred.

Nevertheless, Havard segues into an argument about the possible negative impact that the allegations of sexual battery had on the investigation of this case. He supports that argument by citing a portion of Dr. Baden's testimony, which he says was unopposed. He discusses the portion of Dr. Baden's testimony where he speculated about the pressure and influence that law enforcement officers apply on medical examiners to support their suspicions with science by reaching a particular conclusion on cause and manner of death. (Appellant's Br. at 78-79). He goes on to tell the Court how Dr. Baden would have testified had he been allowed to continue. And he asks the Court to review all of the proffered testimony in yet another attempt to litigate his sexual battery issue and

information that has been presented to and rejected by this Court. (Id. at 78-80).

The Court should refuse Havard's requests to consider his sexual battery issue and review the proffers he made during the evidentiary hearing. To be clear, the State made two objections to this portion of Dr. Baden's testimony. After being asked factors that might compromise a death investigation, Dr. Baden speculated about pressure that law enforcement officers applied on medical examiners to reach a specific conclusion as to the cause and manner of death.[70] (Evidentiary Hr'g Tr. at 90.) The State immediately objected on the basis that Dr. Baden was "going beyond the field of pathology and speculating about what law enforcement believes"—preceded the portion of Dr. Baden's testimony that Havard quotes in his brief. (Id. at 91.) The trial court sustained the State's objection "to any other questions along that line." (Id.) Nevertheless, Havard pressed on, continuing with the same line of questioning. (Id.) Dr. Baden responded with more speculation about law enforcement influences and pressure applied on pathologists and medical examiners. (Id.) So the State lodged a second objection on the same grounds after the portion of Dr. Baden's testimony that appears on pages 78 and 79 of Havard's brief. (Id. at 92.) That objection, like the one before it, was sustained. (Id.) The State objected a third time when Havard attempted to elicit testimony from Dr. Baden about sexual battery. (Id.) The trial court sustained that objection. (Id.) The following exchange took place between Havard's counsel and the trial court:

MR. CARNER: But that was my question here. I'm going to get deeper into that in

[70] Interestingly, Dr. Baden later contradicted himself when he testified about his tenure during as Deputy Chief Medical Examiner in New York City. He stated that the examiners in that office were not pressured by law enforcement officers. According to Dr. Baden, medical examiners in his office would give a Battered Child Syndrome diagnosis when there was sufficient evidence to support that diagnosis. (Evid. Hr'g Tr. at 97.) But when there was insufficient evidence to support that diagnosis, the medical examiners in his office relied on law enforcement's investigation. "The police investigation would then determine whether the subdural hemorrhage and the brain injury was caused by abuse or by accident. If it was by abuse, we would call it a Battered Child Homicide." (Id.)

the particulars of this case. Your Honor, we believe that this is relevant because --

THE COURT: I know you believe it's relevant, but still -- this is a court of law, and I have to go by just like you have to go by the law. All of this was presented to the Supreme Court, numerous filings, and the issue of sexual battery is a closed issue. That is not before this Court. I have no jurisdiction to go there. It's really intellectually wrong to try to go there when we're here on something else. Now, I'm going to let you make a proffer, but I understand his point that sometimes things can influence people, well, that's -- I understand that.

(Id. at 92-93.) As the passage above makes clear, the trial court refused to consider Havard's issue with sexual battery because it had no jurisdiction to do so. The trial court did not err. And Havard did not, and has not, addressed the issue of jurisdiction. He may not do so now. *See Bishop*, 882 So.2d at 154-55 (¶¶ 50-51).

The Court should deny Havard's third assignment of error. Havard attempted to expand the scope of remand with an issue he says was intertwined with his issues of newly discovered evidence fully aware of the fact that this court denied the same issue in *Havard III* because it had no merit and was procedurally barred. As demonstrated above, the trial court's ruling does not entitle Havard to any relief. Whether Havard says his sexual battery issue is intertwined with his SBS claims does not change the fact that this Court has ruled his sexual battery issue has no merit or the fact that this Court granted him leave to proceed in the trial court with only his issues of newly discovered evidence. His intertwined issues argument does not change the fact that his sexual battery issue is time and successive writ-barred. His argument does not change the fact that his sexual battery issue is barred as *res judicata*. And his argument does not change the UPCCRA's requirement Havards to demonstrate the claims and issues in their applications for leave to be procedurally alive and substantially show the denial of a state or federal right as a prerequisite to obtaining leave of this Court.

CONCLUSION

For the reasons above, the Circuit Court of Adams County, Mississippi should be affirmed.

Respectfully submitted,

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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, electronically filed the foregoing Brief of Appellee with the Clerk of the Court for filing, using the MEC system which sent notification to:

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