**IN THE SUPREME COURT OF MISSISSIPPI**

**NO. 2018-CA-01709-SCT**

***JEFFREY HAVARD a/k/a JEFFREY KEITH HAVARD***

***v.***

***STATE OF MISSISSIPPI***

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|---|---|
| DATE OF JUDGMENT: | 09/14/2018 |
| TRIAL JUDGE: | HON. FORREST A. JOHNSON, JR. |
| TRIAL COURT ATTORNEYS: | JASON L. DAVIS<br>BRAD A. SMITH<br>MARK D. JICKA<br>CAROLINE K. IVANOV<br>GRAHAM P. CARNER |
| COURT FROM WHICH APPEALED: | ADAMS COUNTY CIRCUIT COURT |
| ATTORNEYS FOR APPELLANT: | GRAHAM P. CARNER<br>MARK D. JICKA<br>CAROLINE K. IVANOV |
| ATTORNEYS FOR APPELLEE: | OFFICE OF THE ATTORNEY GENERAL<br>BY: BRAD A. SMITH<br>ASHLEY LAUREN SULSER |
| NATURE OF THE CASE: | CIVIL - POST-CONVICTION RELIEF |
| DISPOSITION: | AFFIRMED - 12/17/2020 |
| MOTION FOR REHEARING FILED: | |
| MANDATE ISSUED: | |

**EN BANC.**

**COLEMAN, JUSTICE, FOR THE COURT:**

¶1. An Adams County jury convicted Jeffery Keith Havard of capital murder and sentenced him to death. The Court granted Havard's third petition for post-conviction relief and allowed him to proceed in the trial court based on his claim that newly discovered

evidence pertaining to shaken-baby syndrome required a new trial and vacating his death sentence.

¶2. After an evidentiary hearing, the trial judge determined that Havard failed to prove by a preponderance of the evidence that new evidence existed that would have caused a different result as to his guilt or innocence. But the trial judge did vacate Havard's death sentence and resentenced him to life without parole. Now, Havard appeals the trial judge's denial of a new trial. We affirm.

## FACTUAL BACKGROUND

¶3. The following facts are taken from the Court's decision after considering Havard's second motion for post-conviction relief:

> Havard was living in Adams County with his girlfriend, Rebecca Britt, the mother of the victim, 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. On February 21, 2002, at approximately 8:00 p.m., Havard gave Britt some money and asked her to get supper from the grocery store. When Britt returned home, she found that Chloe had been bathed and was 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. Britt testified that, before that night, Havard had never bathed Chloe or changed her diaper.
>
> Britt testified that she checked on Chloe and she seemed fine. Havard then insisted that Britt go back out to the video store to rent some movies. Britt further testified that when she returned, Havard was in the bathroom with the door shut. She then went to check on Chloe and found the baby was blue and no longer breathing. Britt attempted to resuscitate Chloe by CPR before Britt and Havard drove Chloe to Natchez Community Hospital, where Britt's mother worked. The child was pronounced dead at the hospital later that night.
>
> The pathologist[, Dr. Steven Hayne,] prepared Chloe's autopsy report [and] testified that some of Chloe's injuries were consistent with penetration of the rectum with an object. Chloe's other injuries included abrasions and

> bruises inside her mouth. *The baby also had internal bleeding inside her skull that was consistent with shaken-baby syndrome*. . . .
>
> Havard was later charged with capital murder with sexual battery being the underlying felony. Two days after Chloe's death, Havard gave a videotaped statement, in which he denied committing sexual battery on Chloe. *He claimed that he accidentally dropped her against the commode after giving her a bath, shook her in a panic, and then rubbed her down with lavender lotion before putting her to bed*.

***Havard v. State***, 86 So. 3d 896, 898–99 (¶¶ 2–5) (Miss. 2012) (***Havard III***) (emphasis added).

## PROCEDURAL HISTORY

¶4. Havard has been on death row since he was found guilty of capital murder (killing during the commission of sexual battery) of six-month-old Chloe Britt in 2002. Our Court affirmed Havard's conviction and sentence on direct appeal. ***Havard v. State***, 928 So. 2d 771, 778 (¶ 1) (Miss. 2006) (***Havard I***). Our Court denied Havard's first two post-conviction applications. ***Havard v. State***, 988 So. 2d 322, 325 (¶ 1) (Miss. 2008) (***Havard II***); ***Havard III***, 86 So. 3d at 898 (¶ 1) (Miss. 2012).

¶5. On November 25, 2013, Havard filed his third petition for post-conviction relief in our Court. Havard presented one ground, and one ground only:

> **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, Petitioner'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. Petitioner is entitled to have this claim and the factual basis of the claim fully explored in proceedings in this 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.

¶6. Havard's petition continued, explaining that "[*n*]*ewly-discovered evidence demonstrates that the basis for the State's theory of murder–the mode and mechanism of death, Shaken Baby Syndrome–is flawed.*" And Havard asserted that new scientific evidence increases the probability that Chloe's actual cause and manner of death were blunt force trauma caused by an accidental drop rather than shaken-baby syndrome caused by violent shaking.

¶7. Havard's petition further alleged, quoting an affidavit from one of his medical experts, that since his "trial in 2002, 'the medical community has begun to accept a number of alternative explanations that can account for deaths that would have previously been attributed to shaken baby syndrome.'" And Havard's petition later explained that if the Court granted a new trial, the jury would hear that he actually caused Chloe's death by accidentally dropping her rather than shaking her. He argued that "Dr. Hayne's [trial] testimony [wa]s devoid of any analysis of the accidental dropping of Chloe as described by Havard."

¶8. On May 30, 2014, before our Court rendered a decision, Havard filed an amended application for leave that contained two additional claims. Havard claimed that the State suppressed favorable evidence in violation of ***Brady v. Maryland***[1] and that trial counsel had been ineffective for failing to interview Dr. Hayne before trial. Unlike his original petition, Havard's amended PCR application concerned evidence regarding Havard's underlying

[1] ***Brady v. Maryland***, 373 U.S. 83, 86 (1963).

felony of sexual battery. To support his claims, Havard cited a newspaper article that quoted Dr. Hayne as saying, "I didn't think there was a sexual assault, . . . I didn't see any evidence of sexual assault." Havard also argued that his trial counsel was ineffective for failing to interview Dr. Hayne and obtain the above-described information.

¶9. After reviewing Havard's initial and amended application for leave, the Court unanimously granted Havard "leave of this Court 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*." Order, ***Havard v. State***, No. 2013-DR-01995-SCT (Miss. Apr. 2, 2015) (emphasis added). Finding no merit in Havard's assertions contained within his amended PCR application, the Court's order expressly denied Havard "leave to proceed in the trial court on those two claims." ***Id.*** Havard filed his petition for post-conviction relief in the Circuit Court of Adams County. In addition to his newly discovered evidence issues, Havard's modified petition contained the same newspaper article he used as the basis to file his amended PCR application and other allegations related to sexual battery. The trial court set a date for an evidentiary hearing, and both parties designated experts and filed multiple motions. Havard designated Michael Baden, MD, Janice Ophoven, MD, and Chris Van Ee, PhD, as expert witnesses. He also listed Dr. Hayne as a witness. The State only designated one expert, Scott Benton, MD. The State did not contest the qualifications of any of Havard's experts.

¶10. Before the evidentiary hearing, the State filed, among other things, a motion for an order that restricted or limited evidence and testimony to the specific issues contained with

the Mississippi Supreme Court's order. The State argued that the Mississippi Supreme Court's order only allowed the trial court to address the issues of newly discovered evidence concerning shaken-baby syndrome and its relation to Chloe's cause and manner of death. Havard argued that the State intertwined the issue of sexual battery with the issue of shaken-baby syndrome so much that the trial judge should allow him to discuss both. Following a review of the order, the trial judge found that he only had jurisdiction to hear the issues of newly discovered evidence concerning shaken-baby syndrome and its relation to Chloe's cause and manner of death. Havard also filed a motion to exclude the opinions of the State's designated expert witness, Dr. Benton. But the trial judge deferred ruling on the challenges to Dr. Benton's qualifications and testimony until the evidentiary hearing. In August of 2017, the circuit court heard testimony from both the State's and Havard's experts.

*Evidentiary Hearing Testimony*

¶11. The crux of Havard's new-evidence argument is that the triad of injuries used to diagnose shaken-baby syndrome is no longer valid, and it is now accepted that the recent advances in biomechanics demonstrate that the same injuries can be caused by short, accidental falls.

**Dr. Steven Hayne**

¶12. Pathologist Dr. Steven Hayne conducted Chloe's autopsy and testified at Havard's trial. Dr. Hayne acknowledged that during Havard's trial he told the jury that Chloe's cause of death was "consistent with Shaken Baby Syndrome." He also read what he told the jury when asked to explain shaken-baby syndrome. He explained: "It would be consistent with

a person violently shaking a small child. Not an incidental movement of a child, but a violent shaking of a child back and forth to produce the types of injuries that are described as Shaken Baby Syndrome." Dr. Hayne explained that he reached his diagnosis by using the "classic triad for Shaken Baby Syndrome." He stated his version of the triad is "subdural hemorrhage; presence of retinal hemorrhage; and the absence of other potential lethal causes of death."

¶13. Throughout Dr. Hayne's evidentiary hearing, Havard's counsel focused on the fact that Dr. Hayne testified that "shaking alone was the cause of death." Turning to an affidavit Dr. Hayne signed on July 22, 2013, Havard's counsel pointed out that Dr. Hayne stated:

> At trial, I testified that the cause of death of Chloe Britt was consistent with Shaken Baby Syndrome. Recent advances in the field of biomechanics demonstrate that shaking alone could not produce enough force to produce the injuries that caused the death of Chloe Britt. The current state of the art would classify those injuries as *Shaken Baby Syndrome with impact or blunt force trauma*.

Dr. Hayne acknowledged that in 2009, the American Academy of Pediatrics recommended that the term shaken-baby syndrome be discarded and replaced with "Abusive Head Trauma." He did, however, note that the academy's final conclusion to move away from the term shaken-baby syndrome did not come until 2016.

¶14. On cross-examination, the State asked Dr. Hayne to explain the evolution of shaken-baby syndrome and abusive head trauma. Dr. Hayne noted that the academy moved away from shaken-baby syndrome's nomenclature but not its validity as a diagnosis. He explained:

> [S]ixty years ago, it [Shaken-baby syndrome] was called Whiplash Shaken Baby Syndrome. They introduced a second concept of impact or thrown, Shaken Baby Thrown, Shaken Baby Impact which is really an addition to

> Shaken Baby. There's been ongoing dispute over it, and I actually gave another statement to opposite side counsel. I said that I would have called it -- several years ago I would have called it, closed head injury secondary to blunt force trauma (consistent of baby shaking syndrome), which, I think, is leading toward the College of Pediatrics came out with last year in their definitive statement of Abusive Head Injury. At the present time that is what I would call it, Abusive Head Injury.

Dr. Hayne testified that the medical community does not doubt the validity of shaken-baby syndrome as a diagnosis, but he now prefers to use the term "Abusive Head Trauma."

¶15. When asked why he did not use abusive head trauma on his autopsy report for Chloe, Dr. Hayne explained that the phrase did not exist at the time. Dr. Hayne explained that the name change is due to debates in the literature that recommend to avoid using the term shaken-baby syndrome and to use abusive head trauma. Even with the recommendation, Dr. Hayne explained that in 2016, the Journal of Pediatrics surveyed more than six hundred physicians frequently involved in the evaluation of injured children, and of those respondents, 96.7 percent characterized shaken-baby syndrome or abusive head trauma as a valid diagnosis and 88.1 percent of respondents characterized shaken-baby syndrome as a valid diagnosis.

¶16. Despite the different terminology, Dr. Hayne averred that Chloe's case is not a "Purely Shaken Baby Case" because of the "many injuries to the head on multiple surfaces." To that end, the State asked Dr. Hayne what he put as the cause of death on his 2002 autopsy report. Dr. Hayne, reading from his autopsy report, stated, "shaken baby syndrome and closed head injuries." Dr. Hayne explained that, as part of his triad, he reviewed and considered all of Chloe's injuries when determining Chloe's cause and manner of death. Moreover, Dr. Hayne

explained that despite the new nomenclature, shaken-baby syndrome is inclusive in abusive head trauma.

¶17. Turning to the discussion of shaken-baby syndrome and whether new evidence is now available that was not during Havard's trial, the State asked Dr. Hayne about another case he testified in just two months after Havard's. In ***Bennett v. State***, 933 So. 2d 930, 935 (¶¶ 5–8) (Miss. 2006), a two-month-old sustained injuries similar to Chloe. There, like here, Dr. Hayne conducted the autopsy and testified at trial. ***Id.*** During Havard's recent hearing, Dr. Hayne referenced his testimony in ***Bennett*** and responded to the question of whether it is a commonly held view in forensics and the pediatric community that shaking alone can cause the described injuries:

> 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 that 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 [there are] individuals who do believe that.

And Dr. Hayne responded no when the State asked if he wished to change his testimony concerning the manner of death in Chloe's case. Dr. Hayne stated that he stood by his determination concerning Chloe's cause and manner of death despite the fact that he would use a different nomenclature for shaken-baby syndrome.

**Dr. Scott Benton**

¶18. At the evidentiary hearing, the State tendered, and the trial judge accepted, Dr. Scott Benton as an expert in the field of child-battery pediatrics. When explaining his decision,

the trial judge specifically noted that Dr. Benton was not a pathologist or a biomechanical engineer. The trial judge also granted Havard a continuing objection as to Dr. Benton's testimony and opinions. For the purposes of the instant appeal, we will address the portions of Dr. Benton's testimony with which Havard takes issue.

¶19. The State asked Dr. Benton what his purpose was in the case. He responded, "I was asked to review material sent to me with an eye 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." Dr. Benton testified that neither he nor any other board-certified pediatrician that he was aware of believed in the triad of injuries that Dr. Hayne used to determine Chloe's cause and manner of death. Moreover, Dr. Benton explained that the term "triad" is not something he uses. Despite disagreeing with Dr. Hayne's usage, Dr. Benton testified that he *agreed* with Dr. Hayne's ultimate conclusion as to Chloe's cause and manner of death.

¶20. On cross-examination, Dr. Benton averred that he believed that Chloe died from a brain injury with elements of shaking and impact. Dr. Benton qualified his statement, explaining that he could not "sort the contributions to each, but the impacts to the head independently are not lethal." Dr. Benton also testified that he did not use any mathematical formulas, like biomechanical engineers do, to arrive at his opinion concerning Chloe's cause and manner of death.

**Havard's Experts**

¶21. Havard called three experts to testify. Most of their testimony, however, is duplicative. Moreover, as explained below, regardless of what scientific evidence or testimony Havard put forth, a new trial need not be granted. Throughout the evidentiary hearing, Havard's experts explained that shaken-baby syndrome is an archaic diagnosis and that the medical community now accepts that using the classic "triad of injuries" to make such a diagnosis is attributable to short falls, not shaking. In other words, all three of Havard's experts opined that evolutions in science now prove that short falls, not violent shaking, produced the injuries that Chloe sustained.

**Dr. Michael Baden**

¶22. Havard tendered, and the trial court accepted, Dr. Michael Baden as an expert in the fields of anatomic forensics and clinical pathology. When asked about Chloe's cause and manner of death, Dr. Baden testified that the "issue is did Chloe die from the trauma Doctor Hayne found at autopsy, which I think she did die from, and was that trauma caused by an accidental short fall, or was it caused by Shaken Baby Syndrome, or by an intentional short fall?" Addressing Dr. Hayne's determination for Chloe's cause of death, Dr. Baden explained that he did not agree with Dr. Hayne's conclusion that Chloe's cause of death was consistent with shaken-baby syndrome.

¶23. Dr. Baden further posited that "Chloe died from an impact, a blunt force impact to the head . . . [and that] the shaking of the baby is irrelevant." When asked if any evidence supported an allegation that Chloe sustained a violent and abusive shaking, Dr. Baden

responded that "[t]he introduction of shaking into the diagnosis is entirely speculative. I can't rule shaking in or out because there's nothing that the shaking would have done."

¶24. Turning to the evolution of shaken-baby syndrome and scientific advances concerning the triad of injuries, Dr. Baden agreed that shaken-baby syndrome has been known for forty-five years, but he disagreed that any violent shaking can cause a subdural hemorrhage without an impact. Dr. Baden explained that Dr. John Caffey, a pediatric radiologist, enunciated what is known as the "classic triad" in 1972. Dr. Baden stated that the classic triad required subdural hemorrhage, retinal hemorrhages, and swelling of the brain. Dr. Baden explained that after the classic triad's introduction, the scientific community generally accepted that only violent shaking could cause subdural hemorrhages.

¶25. Turning to the current understanding of the triad of injuries, Dr. Baden opined that it is understood that subdural hemorrhages occur from impacts such as falling down stairs, taking a baseball to the head, or tackling in football, but not shaking. He averred that "there are lots and lots of ways you get subdural hemorrhage, retinal hemorrhage, and brain swelling." Dr. Baden explained that it is just now understood that "in a short fall with a sudden deceleration of the brain will cause rupture in some of those capillaries. It's probably one of the most common causes of serious head injury are subdural hemorrhages."

**Dr. Janice Ophaven**

¶26. The trial court accept Dr. Janice Ophaven as an expert in the field of pediatric forensic pathology. She averred that "the manner of death is consistent with an accident." Like Dr. Baden, Dr. Ophaven testified that Chloe's death was the result of "complications of blunt

force resulting in an acute subdural subcoracoid bleeding that's consistent with blunt force impact in a shortfall as described by . . . Havard."

¶27. Addressing the evolution of shaken-baby syndrome science since 2002, Dr. Ophaven testified that in 2001, the National Association of Medical Examiners (the Association) published articles on "fatal abusive head injuries in infants and young children . . . [that] address[ed] Shaken-baby syndrome as the rotational movement of brain damage from a violent shaking type injury." She opined that the article was in force at the time of Havard's trial but had not been renewed by the Association in 2006. Further, she averred that the Association backed away from shaken-baby syndrome because of the scientific community's lack of belief in it. And she acknowledged that shaken-baby syndrome had a long history "but that as of [2017] there is no longer any controversy that this was and is a controversial diagnosis." She explained that "numerous internationally recognized forums . . . question the [classic triad] in association with a diagnosis of shaking and that the link is absent." Now, she says, the diagnosis of shaken-baby syndrome and terms that have been used in lieu of shaken-baby syndrome are known as "Rotational Acceleration/Decelerations, Abusive Head Trauma, Shaking Impact . . . ."

**Dr. Chris Van Ee**

¶28. The trial court accepted Dr. Chris Van Ee as an expert in biomechanical engineering. Dr. Van Ee obtained his PhD in orthopedic biomechanics, which is the study of the body's response to an impact. Dr. Van Ee testified that he focuses on how force is transmitted through components of the body, the injuries that the body sustains, and the relationship

between the injuries and the exposure in terms of forces or acceleration that a person experiences.

¶29. Dr. Van Ee testified that he has read articles and studies that compare head acceleration levels from shaking and falls. He opined that such studies are a critical distinction in determining whether the injury is due to acceleration of the head because of a fall or abrupt change of velocity of the head due to shaking. He explained that the "community wouldn't [have] know[n] about [such a study], until it was published in 2003," after Havard's trial. Dr. Van Ee noted multiple studies that occurred after Havard's trial that prove that the same triad of injuries appear when no shaking is involved.

¶30. In one matter, Dr. Van Ee referenced a case study of a seven-month-old child that suffered the same injuries as Chloe as a result of an accidental fall down a flight of stairs. Dr. Van Ee testified that when strictly looking at head acceleration and spinning, a one foot fall on the carpet is worse than a shake, explaining that a three-to-five-foot fall onto concrete is worse than a fall from the same height onto carpet. In the end, Dr. Van Ee concluded that Chloe's injuries were consistent with Havard's story of accidently dropping her and that there was no scientific basis to rule out an accidental fall.

*Circuit Court's Ruling*

¶31. After the evidentiary hearing, the circuit court upheld Havard's conviction but vacated his death sentence. Upholding Havard's conviction, the trial judge explained:

> As to the conviction, the [c]ourt finds that Havard failed to prove by a preponderance of the evidence that there exists new evidence that would have caused a different result. [Havard] simply makes a better argument, not a new one, based on the evolution of the Shaken-baby syndrome science. This Court

> can say with confidence the Petitioner's evidence is not sufficient to undermine the confidence in the conviction.
>
> . . . .
>
> This is not a case where a jury was asked to accept a bare-bones assertion, with medical evidence only, that the defendant must have violently shaken a baby, causing fatal injuries. There was damning evidence against the Petitioner by way of his being the only one with Chloe at the time of the event, his behavior in ignoring and denying knowledge of her grave condition to the mother and medical personnel, and the changing and conflicting statements out of his own mouth. The jury considered it all, including the reasonable inferences therefrom, weighed the evidence and credibility of the witnesses, and found him guilty of the crime. The Petitioner has failed to prove that he is entitled to relief from the conviction.

But when considering Havard's death sentence, the trial judge explained:

> The sentence by the jury was death. The finality and severity of that sentence render it qualitatively and fundamentally different from other punishments. The Supreme Court of Mississippi and the United States Supreme Court have rightfully applied extraordinary scrutiny where a death sentence is involved. This Court takes no lesser approach.
>
> While the evidence presented by the Petitioner is not sufficient to undermine this Court's confidence in the conviction, there is a cautious disturbance in confidence of the sentence of death, even if slight. Matters and arguments that would not reasonably have changed a juror's vote on the question of guilt, could have, even if slight, as to the decision on the sentence of death.

*Havard's Appeal of the Circuit Court's Ruling*

¶32. Havard appealed. Havard is currently seeking habeas relief in the United States District Court for the Southern District of Mississippi; however, the district court stayed the case pending the outcome of Havard's appeal. Havard raises three issues on appeal. He argues that the trial judge erred: (1) by failing to grant him a new trial when the newly discovered evidence had bearing on his guilt or innocence and would dramatically alter the

jury question if the case were tried again using the new evidence; (2) by admitting the expert opinions of Dr. Scott Benton; and (3) by excluding evidence concerning the underlying felony of sexual battery.

¶33. Following a review of the record, Havard's first and third issues are dispositive and are without merit. Havard's second assignment of error is moot, and even if the trial judge erred by admitting Dr. Benton's testimony, such error is at most harmless. Therefore, we affirm.

## STANDARD OF REVIEW

¶34. "The determination of whether 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 v. State***, 890 So. 2d 901, 916 (¶ 53) (Miss. 2004) (citing ***Moore v. State***, 508 So. 2d 666, 668 (Miss. 1987)). "On appeal, the appropriate standard of review for denial of post-conviction relief after an evidentiary hearing is the clearly erroneous standard." ***Johns v. State***, 926 So. 2d 188, 194 (¶ 29) (Miss. 2006) (citing ***Reynolds v. State***, 521 So. 2d 914, 918 (Miss. 1988)).

¶35. Further, "[a] finding of fact is 'clearly erroneous' when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been made." ***Id.*** (citing ***Bryan v. Holzer***, 589 So. 2d 648, 659 (Miss. 1991)). "Th[e] 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

findings of fact." ***Id.*** (internal quotation marks omitted) (quoting ***Mullins v. Ratcliff***, 515 So. 2d 1183, 1189 (Miss. 1987)).

## DISCUSSION

### I. Did the circuit court err by not granting Havard a new trial based on the evidence presented?

¶36. "To succeed on a motion for a new trial based on newly discovered evidence, the petitioner must prove that new evidence has been discovered since the close of trial and that it could not have been discovered through due diligence before the trial began." ***Crawford v. State***, 867 So. 2d 196, 203–04 (¶ 9) (Miss. 2003) (citing ***Meeks v. State***, 781 So. 2d 109, 112 (¶ 8) (Miss. 2001). "In addition, the petitioner must show that the newly discovered evidence will probably produce a different result or induce a different verdict, if a new trial is granted." ***Id.*** at 204 (citing ***Meeks***, 781 So. 2d at 112 (¶ 8)).

¶37. Havard argues that the trial judge erred when he determined the evidence presented would not produce a different result and when he determined the evidence was not new. Havard further posits that the State convicted him of capital murder based on the theory that he shook Chloe to death. He explains that "[i]f even one juror questioned Shaken-baby syndrome at the end of the trial, [he] would not have been *convicted* . . . ." (Emphasis added.) Throughout his evidentiary hearing and brief to the Court, Havard says that the evidence he presented "ha[s] bearing on [his] guilt/innocence and would dramatically alter the jury question if the case was tried again." Havard explains that "[t]he jury never heard experts say that Chloe's *death* could have been an *accident*." (Emphasis added.)

¶38. But as explained below, even assuming, *arguendo*, that Havard presented new evidence, it could not and would not "produce a different result or induce a different verdict," even if the Court granted a new trial. ***Crawford***, 867 So. 2d at 203–04 (¶ 9) (citing ***Meeks***, 781 So. 2d at 112 (¶ 8)). Accordingly, the evolution of shaken-baby syndrome versus impact and its relation to Chloe's cause and manner of death *have no bearing* on Havard's guilt or innocence.

¶39. In 2002, "a jury found Jeffrey Havard guilty of capital murder (killing during the commission of sexual battery) of six-month old Chloe Britt . . . ." ***Havard I***, 928 So. 2d at 778 (¶ 1). Mississippi Code Section 97-3-19(2)(e) defines capital murder:

> (2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:
>
> . . . .
>
> (e) *When done with or without any design to effect death*, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson, robbery, *sexual battery*, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or in any attempt to commit such felonies;
>
> . . . .

Miss. Code Ann. § 97-3-19(2)(e) (Rev. 2014) (emphasis added).

¶40. Havard repeatedly argues that "[t]his case is focused on Shaken Baby Syndrome as it relates to *cause and manner of death*." (Emphasis added.) He is correct. Havard explains that if the Court granted him a new trial, his new "defense theory [would be] that Chloe died after being accidentally dropped." In other words, Havard's defense theory is that he did not intend to kill Chloe or effect her death. But no matter how Havard explains Chloe's cause

and manner of death, one fact is undisputed: Havard effected Chloe's death. How Havard effected Chloe's death, in the context of determining guilt or innocence in a capital-murder trial, is irrelevant.

¶41. "When faced with the charge of capital murder, a defendant is *not entitled* to raise the defense of accident as to that charge." ***Nelson v. State***, 995 So. 2d 799, 808 (¶ 29) (Miss. Ct. App. 2008) (holding that "[t]here is nothing about [Mississippi Code Section 97-3-19(2)(e)] which requires any intent to kill when a person is slain during the course of a [sexual battery]. It is no legal defense to claim accident, or that it was done without malice" (emphasis added) (citing ***Griffin v. State***, 557 So. 2d 542, 549 (Miss. 1990)).

¶42. Even assuming *arguendo* that Havard's evidence *is* newly discovered, the ruling in ***Nelson***, which derived authority from ***Griffin v. State***, 557 So. 2d 542, 549 (Miss. 1990), and Section 97-3-19(2)(e) provide no route for Havard to prevail in a new trial. And Havard would not be entitled to raise his new defense theory that he accidentally killed Chloe. ***Nelson***, 995 So. 2d at 808 (¶ 29). That said, Havard argues that his evidence would alter the jury question were the case tried again. We disagree.

¶43. We must reiterate the redundant nature of the evidence at hand. In the event of a new trial, the following jury question would remain: Did Havard effect Chloe's death while engaged in the commission of the crime of sexual battery? And no matter the jury's understanding—whether bolstered by newly discovered evidence or not—if the undisputed fact that Havard effected Chloe's death, while committing the underlying felony of sexual

battery, he remains guilty of capital murder. ***Havard I***, 928 So. 2d at 778 (¶ 1). Accordingly, we affirm.

## II. Did the trial judge err by admitting the opinions of the State's new expert, Dr. Benton?

¶44. "[T]he admission of expert testimony is within the sound discretion of the trial judge." ***Miss. Transp. Comm'n v. McLemore***, 863 So. 2d 31, 34 (¶ 4) (Miss. 2003) (citing ***Puckett v. State***, 737 So. 2d 322, 342 (¶ 57) (Miss. 1999)). "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) (internal quotation marks omitted) (quoting ***Smith v. State***, 925 So. 2d 825, 834 (¶ 23) (Miss. 2006)). "Therefore, the decision of a trial judge will stand 'unless we conclude that the discretion was arbitrary and clearly erroneous, amounting to an abuse of discretion.'" ***McLemore***, 863 So. 2d at 34 (¶ 4) (quoting ***Puckett***, 737 So. 2d at 342 (¶ 57)).

¶45. "It is also well settled that error may not be predicated upon a ruling which admits or excludes evidence unless a *substantial right* is affected by the ruling." ***Simmons v. State***, 805 So. 2d 452, 488 (¶ 92) (Miss. 2001) (emphasis added) (citing Miss. R. Evid. 103(a)). "If the defendant fails to show what right, if any, was affected by such ruling, no reversible error lies." ***Johnson v. State***, 908 So. 2d 758, 765 (¶ 24) (Miss. 2005) (citing ***Simmons***, 805 So. 2d at 488 (¶ 92)). "[Our] Court cannot reverse unless a substantial right has been affected." ***Id.*** (citing ***Simmons***, 805 So. 2d at 488 (¶ 92)).

¶46. Addressing Havard's second assignment of error, the State argues that "[Havard failed to] identify any right that has been affected by the trial court's admissibility determination." The Court agrees. Although Havard's initial brief lacks any specific mention of a substantial right that the trial judge's ruling affected, Havard's reply brief explains:

> It is reasonable to conclude that if the State's only designated expert was disqualified by the Court due to his lack of relevant experience and unreliable opinions that there would have been a different outcome at the trial court level. Indeed, the Circuit Court specifically found Dr. Benton's testimony to be "credible and persuasive." Thus, the trial court's error in admitting Dr. Benton's opinions was prejudicial to Havard.

¶47. Havard's argument that "Dr. Benton's opinions [were] prejudicial" is without merit. Indeed, Havard contradicts himself when he admits that "much of Dr. Benton's testimony actually supported Havard's request for post-conviction belief [sic] . . . ." Dr. Benton's testimony, if anything, ensured that the trial judge vacated Havard's death sentence.

¶48. Moreover, Havard's assignment of error is predicated upon a ruling that admitted expert testimony as evidence. "It is well settled that [an] error may not be predicated upon a ruling which admits . . . evidence unless a *substantial right* is affected by the ruling." ***Simmons***, 805 So. 2d at 488 (¶ 92) (emphasis added) (citing Miss. R. Evid. 103(a)). As discussed above, no matter what argument, evidence, or theory of defense Havard presented at the evidentiary hearing concerning Chloe's cause and manner of death, Havard would not be entitled to a new trial.

¶49. Havard did not prove that Dr. Benton's testimony affected any substantial right. Therefore, Havard's second assignment of error is without merit. And even assuming that the trial judge did err by admitting Dr. Benton's testimony, the error is harmless.

## III. Did the circuit court err by excluding evidence of the underlying felony of sexual assault?

¶50. On March 27, 2015, our Court granted Havard leave to file a petition for post-conviction relief in the trial court on the issues of "newly discovered evidence presented in his application for leave." Order, ***Havard v. State***, No. 2013-DR-01995-SCT (Miss. Apr. 2, 2015). Before the evidentiary hearing, the State filed a motion to restrict the testimony at the evidentiary hearing to just the issues on remand, specifically the evolution of shaken-baby syndrome and its relation to Chloe's cause and manner of death. Havard disagreed and argued that the Court's order encompassed the issue of sexual battery and the issue of shaken-baby syndrome because the State intertwined and connected both the issues so much at the trial-court level, and beyond that, the trial judge could not then adjudicate them separately.

¶51. At the motion hearing, the trial judge considered the arguments of both parties. Interpreting the Court's order to determine his jurisdiction, the trial judge explained:

> Let me say -- would you like to respond to anything further about that? I understand what [the State's] 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*.

(Emphasis added.) Responding to the trial judge's interpretation of the order, Havard's counsel asked if he "could just point something out about the sexual battery being intertwined[.]" The trial judge replied:

> 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 battery. The State did not proceed on the child battery. 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/petitioner'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.
>
> . . . .
>
> [*T*]*he issue of whether or not there was sexual battery is not before this Court. That's not one of the issues*, but I understand there may be some testimony [regarding sexual battery], but because we're operating without a jury at this point in the procedure, the [c]ourt can handle this by way of objection. To the extent of if that's what you're asking in the motion, that is the Court's ruling, because I don't have the jurisdiction. That's not the issue before the Court.

(Emphasis added.)

¶52. On appeal, Havard argues that the trial judge abused his discretion by ruling that the circuit court lacked jurisdiction to hear the issue of sexual battery. Havard explains:

> This Court's order remanding this matter in no way restricted the scope of the proceedings in the way the trial court ordered. This Court's April 2, 2015 Order remanded the case to this court for proceedings "on the **issues** of newly discovered evidence presented in his application for leave" filed with the Supreme Court. This Court's Order did restrict Petitioner's ability to proceed

> on claims related to allegations of a ***Brady*** violation and ineffective assistance of counsel. But no such restriction is found with respect to the issue of sexual battery.
>
> While Havard's application for leave filed with this Court unquestionably was focused on Shaken-baby syndrome, it also contained multiple mentions of the issue of sexual battery. The application quoted from experts Dr. Steven Hayne, Dr. Janice Ophoven, and Dr. Michael Baden regarding questions about the sexual battery allegation present in this case.

¶53. "Th[e] Court has held on several occasions that the only issues properly considered are those issues for which the case was initially remanded." ***Burns v. State***, 879 So. 2d 1000, 1003 (¶ 9) (Miss. 2004) (citing ***Culberson v. State***, 456 So. 2d 697, 698 (Miss. 1984); *see also* ***Neal v. State***, 687 So. 2d 1180, 1182 (Miss. 1996) ("This is an appeal from an evidentiary hearing [on the denial of the right to testify]; therefore, this issue [of jury instructions] is not properly before th[e] Court and will not be discussed."). "Th[e] 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 findings of fact." ***Johns v. State***, 926 So. 2d 188, 194 (¶ 29) (Miss. 2006) (internal quotation marks omitted) (quoting ***Mullins v. Ratcliff***, 515 So. 2d 1183, 1189 (Miss. 1987)).

¶54. Havard argues that his application for leave is "replete with references to issues concerning sexual battery and their connection to the shaken-baby syndrome . . . ." He explains that "under the plain terms of the [o]rder, issues of sexual battery were relevant to the proceedings in the Circuit Court . . . ." Havard contends that he simply "*sought to introduce evidence* that there was no sexual battery *in support of the claims* that were

remanded." (Emphasis added.) And Havard further posits that the issue on appeal is an evidentiary matter not a jurisdictional one.

¶55. The State argues that Havard's claim is procedurally barred and without merit. The State argues that "Havard fail[ed] to cite authority that gives the trial courts the discretion to consider issues on remand, which are not specifically identified by th[e] Court." We agree. "The [appellant's f]ailure to cite relevant authority obviates the appellate court's obligation to review such issues." ***Eubanks v. State***, 291 So. 3d 309, 322 (¶ 48) (Miss. 2020) (alteration in original) (internal quotation marks omitted) (quoting ***Batiste v. State***, 121 So. 3d 808, 861 (¶ 134) (Miss. 2013)). "Failure to cite legal authority in support of an issue is a procedural bar on appeal." ***Id.*** (internal quotation marks omitted) (quoting ***Carter v. Miss. Dep't of Corr.***, 860 So. 2d 1187, 1193 (¶ 17) (Miss. 2003)).

¶56. "Notwithstanding the procedural bar, [Havard's] claim is without merit." ***Id.*** Turning to Havard's substantive argument, the State explains that the trial judge's refusal to allow any testimony regarding sexual battery at the hearing is not an evidentiary issue but a jurisdictional one. The State claims under Mississippi case law that the trial judge had no jurisdiction to consider the issue of sexual battery because it was outside the scope of the order. We agree.

¶57. Unraveling Havard's intertwined argument, the trial judge properly found that the Court's order concerned only the issues of the newly discovered shaken-baby syndrome evidence and its relation to the cause and manner of Chloe's death. Havard's argument that "he sought to introduce evidence that there was no sexual battery *in support of the claims* that

[the Court] remanded" is telling. (Emphasis added.) The statement all but admits that the issue of sexual battery is separate and distinct from the claims the Court remanded. Indeed, Havard's post-conviction relief application explicitly states that his claim for relief is based on "**newly-discovered evidence demonstrat[ing] that the cause and manner of death of Chloe Britt was not Shaken Baby Syndrome, as was testified to at Havard's Trial**."

¶58. A review of the Court's orders makes clear that the issue addressed in the order specifically pertained to Havard's claim of newly discovered evidence concerning Chloe's cause and manner of death and shaken-baby syndrome. And on that basis, the circuit court stayed within the jurisdiction granted by the order. Accordingly, we affirm the circuit court's decision.

## CONCLUSION

¶59. Because Havard is not entitled to raise the defense of accident as to the charge of capital murder, the trial court did not err by denying him a new trial. The admittance of Dr. Benton's opinions did not affect Havard's substantial right. And even so, any such error was, at best, harmless. Lastly, the trial court did not err by limiting its jurisdiction solely to shaken-baby syndrome evidence; the Court's order granted Havard leave for matters that only concerned newly discovered shaken-baby syndrome evidence and its relation to Chloe's cause and manner of death. Accordingly, we affirm.

¶60. **AFFIRMED.**

**RANDOLPH, C.J., MAXWELL, BEAM, CHAMBERLIN AND GRIFFIS, JJ., CONCUR. KING, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KITCHENS, P.J., AND ISHEE, J.**

**KING, PRESIDING JUSTICE, DISSENTING:**

¶61. Because I would find that Jeffrey Keith Havard submitted sufficient evidence showing that the change in science surrounding shaken-baby syndrome (SBS) entitled him to a new trial, I dissent. I also disagree with the majority's finding that the trial court correctly excluded testimony disproving the underlying felony of sexual assault.

¶62. Mississippi Code Section 99-39-23(6) provides an avenue for post-conviction relief if the petitioner can demonstrate that "he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that, if it had been introduced at trial, it would have caused a different result in the conviction or sentence." Miss. Code Ann. § 99-39-23(6) (Rev. 2015). "On appeal, the appropriate standard of review for denial of post-conviction relief after an evidentiary hearing is the clearly erroneous standard." ***Johns v. State***, 926 So. 2d 188, 194 (Miss. 2006) (citing ***Reynolds v. State***, 521 So. 2d 914, 918 (Miss. 1998)). "A finding of fact is 'clearly erroneous' when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been made." ***Id.*** (quoting ***Bryan v. Holzer***, 589 So. 2d 648, 659 (Miss. 1991)). This Court reviews questions of law de novo. ***Doss v. State***, 19 So. 3d 690, 694 (Miss. 2009).

¶63. "The burden of proof at an evidentiary hearing on a PCR case is on the petitioner to show 'by a preponderance of the evidence' that he is entitled to relief." ***Id.*** (quoting Miss. Code Ann. § 99-39-23(7) (Rev. 2007)). "To succeed on a motion for a new trial based on newly discovered evidence, the petitioner must prove that new evidence has been discovered

since the close of trial and that it could not have been discovered through due diligence before the trial began." ***Crawford v. State***, 867 So. 2d 196, 203-04 (Miss. 2003) (citing ***Meeks v. State***, 781 So. 2d 109, 112 (Miss. 2001)). "Evidence is material only if there is a *reasonable probability* (i.e., 'probability sufficient enough to undermine confidence in the outcome') that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." ***Howard v. State***, 300 So. 3d 1011, 1016 (Miss. 2020) (internal quotation marks omitted) (quoting ***Crawford***, 867 So. 2d at 203).

¶64. The majority concluded that "the evolution of shaken-baby syndrome versus impact and its relation to Chloe's cause and manner of death *have no bearing* on Havard's guilt or innocence." Maj. Op. ¶ 38. It came to this conclusion after agreeing with the trial judge's finding that he could only consider evidence relating to SBS and that sexual battery was outside the scope of remand order. I disagree with the majority's conclusion and would find that the trial judge erred by ruling that the court lacked jurisdiction to hear the evidence regarding the underlying conviction of sexual battery.

¶65. This Court's April 2, 2015 order stated that "Havard should be granted leave of this Court 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." Order, ***Havard v. State***, No. 2013-DP-01995-SCT (Miss. Apr. 2, 2015). Havard repeatedly and thoroughly discussed the issue of sexual battery in relation to SBS in his application for leave. The application stated,

> Patterson, Darr, Godbold, and Murphy also testified about the abnormal appearance of the baby's anus, which was observed to be dilated following intubation. With the exception of Dr. Darr (who also noted the dilation), the three other ER witnesses said that Chloe's anus looked dilated to 'size of a

> quarter.' All four of these witnesses added that they had seen injuries to the anal area itself. The two doctors and Nurse Murphy testified that the condition of the child's anus indicated sexual trauma, and was consistent with a large object being inserted into the rectum. None of these medical providers were tendered by the State or qualified by the Court to provide expert testimony at trial.

The application continued, stating:

> *[T]he evidence debunking the sexual battery in this case is compelling and only continues to mount.* With respect to Shaken Baby Syndrome, which was presented at trial as the manner and mechanism of death, new evidence demonstrates that this finding is also ill-founded and should not serve as the basis for any conviction, much less a conviction by which the State intends to take a man's life. This new evidence warrants a new trial.

(Emphasis added.)

¶66. In connection with SBS, Havard's application for leave continuously referred to the interrelated charge of sexual battery. Havard attached an affidavit executed by Dr. Hayne on July 22, 2013, that stated he had "found no definitive evidence of sexual abuse based upon [his] findings." Havard presented the testimony of Dr. Michael G. Baden, an expert in the fields of anatomic, clinical, and forensic pathology. Dr. Baden also took issue with the sexual battery aspects of Havard's case. The application specifically stated that, in Dr. Baden's opinion,

> [A]nal dilation, which was observed in the emergency room when Chloe was brought in for treatment, can be accounted for by her other injuries and is not indicative of sexual battery. Dr. Baden opines: "the sphincter muscles around the anus—and around the urinary bladder—normally relax when a baby loses consciousness and becomes comatose, and when death occurs. Relaxation of the sphincter muscles causes dilation of the anus which is common and entirely normal . . . ." Ultimately, Dr. Baden concludes, "to a reasonable degree of medical certainty, based on my education, training and fifty years' experience as a forensic pathologist and medical examiner, that Chloe Britt's clinical, medical and autopsy findings, including her head bruises, are entirely

> consistent with having resulted from a short accidental fall are not consistent with Shaken Baby Syndrome." Dr. Baden also opines "that there is absolutely no evidence—no circumstantial, medical, forensic, or autopsy evidence—that Chloe was sexually abused."

¶67. Havard also included in his application the opinion of Dr. Janice Ophoven, a pediatric forensic pathologist, who opined that "the anal findings are particularly important since the misdiagnosis of anal abuse at the hospital distorted the entire investigation and trial." Dr. Ophoven stated that she found no evidence of sexual abuse in Havard's case and that the anal findings had been "misinterpreted by hospital personnel who did not have experience or expertise in post-mortem changes in infants." The application stated that Dr. Ophoven concluded: "Chloe's 'collapse was most likely triggered by the short fall described by Mr. Havard; however, other predisposing factors may have contributed to the outcome'" and that "Havard's conviction was virtually guaranteed because he was not provided access to expert assistance to help his attorneys understand the significant medical and forensic issues in the case; and . . . a thorough review of this case is necessary to ensure that justice is done." Havard's application discussed in detail Dr. Ophoven's opinions regarding the sexual battery issue, including her conclusions that no evidence of sexual battery existed and that the "misdiagnosis and incorrect testimony by the treating providers infected the trial with a prejudice that was impossible to overcome."

¶68. Again, this Court's order stated that "Havard should be granted leave of this Court 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." Order, ***Havard v. State***, No. 2013-DP-01995-SCT (Miss. Apr. 2, 2015). The order also barred Havard from proceeding on his

***Brady***[2] claim and on his assertion that his counsel was ineffective for failing to interview Dr. Steven Hayne prior to trial. Id. However, the order did not exclude evidence pertaining to sexual abuse that Havard's application for PCR thoroughly discussed. As Havard argued, the issue of SBS does not exist in a vacuum. Havard presented exculpatory evidence regarding the underlying felony of sexual assault along with his evidence showing a change in thinking as to SBS. Thus, I would find that the trial court erred by excluding evidence relating to sexual assault.

¶69. Because Havard was accused of capital murder, the allegation of sexual battery goes hand in hand with the accusation of SBS. As Dr. Ophoven testified, a misdiagnosis of sexual battery would have distorted the entire investigation and trial. Therefore, I agree with Havard's assertion that an analysis of his SBS claim must also include a look into evidence pertaining to sexual battery.

¶70. A look into the history of Havard's trial further demonstrates that error. Before Havard's 2002 trial, Havard's trial counsel requested "an independent evaluation of the autopsy report based on counsel's lack of medical training and need to develop a defense." ***Havard v. State***, 928 So. 2d 771, 788 (Miss. 2006). Although this was a capital murder case, the trial court denied Havard's motion, stating that counsel had not shown a basis for need "when Dr. Steven Hayne, the pathologist who prepared the report, was available." ***Id.*** Dr. Hayne, the state pathologist with the Department of Public Safety at the time, was the only expert witness on medical issues to testify at Havard's trial.

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[2]*See* ***Brady v. Maryland***, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

¶71. During Havard's trial, the prosecutor relied heavily on Dr. Hayne's testimony regarding both SBS and sexual abuse. In the prosecutor's opening statement, he said to the jury:

> Dr. Stephen Hayne will come and testify for you about his findings and how he confirmed the nurses' and doctors' worst fears this child had been abused and the child had been penetrated and the child had died what he refers to as shaken baby syndrome or trauma to the head. He'll explain that for you today. This child was sexually abused, and during the course of that sexual abuse or shortly thereafter, was killed by Jeffrey Keith Havard, and that, ladies and gentlemen, is Chloe Madison Britt's last day with us.

Dr. Hayne then proceeded to testify that Chloe's cause of death was consistent with SBS. Dr. Hayne also testified that Chloe's rectum had a contusion measuring one inch and a bruise. Dr. Hayne stated that those injuries would be consistent with penetration of the rectum with an object. It is important to note that Dr. Hayne's autopsy report listed a contusion measuring one centimeter, not one inch, in size. Taken in context, there is a vast difference between an anal contusion measuring one inch and one measuring one centimeter. It is not hard to imagine that, had Havard been given the opportunity to present a plausible medical explanation to rebut Dr. Hayne's assertions, a dramatically different result would have occurred. However, Havard was denied his request to have an independent medical expert examine the autopsy report.

¶72. This Court previously has found, in another shaken-baby case involving Dr. Hayne, that the denial of the defendant's request for an independent expert denied him "'the raw materials integral to the building of an effective defense,' as he had absolutely no way to counter the State's sole evidence of the cause of death, or even to determine the proper

questions to ask to challenge Dr. Hayne on cross." ***Isham v. State***, 161 So. 3d 1076, 1083 (Miss. 2015) (internal quotation marks omitted) (quoting ***Brown v. State***, 152 So. 3d 1146, 1166 (Miss. 2014)). Similarly, here, the denial of Havard's request for an independent medical expert effectively denied Havard's chance to rebut Dr. Hayne's testimony. Instead, the following occurred: 1) the trial court denied Havard's request for an independent medical expert and stated that Dr. Steven Hayne, the pathologist who prepared the autospy report, was available to the defense; 2) this Court affirmed that denial; 3) Dr. Hayne testified, incorrectly, that Chloe's anus had a one-inch contusion that was consistent with penetration by an object; and 4) Dr. Hayne testified that Chloe's death could not have been an accident but instead occurred as the result of a violent, intentional shaking. Because Havard did not have an expert witness, the jury did not hear any testimony to contradict Dr. Hayne's assertions.

¶73. The State chose to present a case against Havard that intertwined the issues of sexual abuse and SBS. Those allegations of sexual abuse, as well as testimony that Chloe could only have died from intentional and violent shaking, served to skew the entire investigation and to inflame the jury. With the evidence presented at trial, Havard's conviction was virtually guaranteed. In his application for leave, Havard presented evidence showing that the allegations of sexual abuse were not supported along with evidence showing that Chloe's death could have been caused by an accidental drop. This new evidence as a whole would present a completely different case to a jury today and would cause the jury to question both the manner and cause of Chloe's death as well as the issue of sexual assault. Contrary to the

majority's assertions, Havard does not raise newly discovered evidence regarding sexual battery as an additional ground for relief. Havard raised the issue of sexual battery as a part of his claims about SBS. Evidence pertaining to the issue of sexual battery is part of Havard's overall claim and is not a separate ground for relief. Therefore, I would find that trial court's exclusion of evidence pertaining to the issue of sexual assault was an abuse of discretion.

¶74. In addition, I would find that Havard's presentation of newly discovered evidence regarding the sexual assault and SBS charges, along with the denial of Havard's request for an independent medical expert, was more than sufficient to show that he should be granted a new trial. At the 2017 evidentiary hearing, Havard presented evidence from Dr. Hayne himself, as well as from other experts, showing that Dr. Hayne's 2002 testimony regarding both sexual abuse and SBS was incorrect. Havard attached as an exhibit a 2009 declaration executed by Dr. Hayne that stated "[t]he Final Report of Autopsy documents the presence of a one centimeter contusion on the anus of Chloe Britt." The declaration additionally stated that the contusion "could have a variety of causes, and is not sufficient in and of itself to determine that a sexual assault occurred." Dr. Hayne continued, "[d]ilated anal sphincters may be seen on persons who have died, as well as on a person prior to death without significant brain function. My experience as well as the medical literature recognize that a dilated anal sphincter is not, on its own, evidence of anal sexual abuse, but must be supported by other evidence."

¶75. Havard included as evidence testimony from Dr. Hayne at a hearing in 2010 at which he again stated that he found a one centimeter, not one inch, contusion on Chloe's anus. Dr.

Hayne had stated that, "[p]rior to trial and before taking the witness stand at trial, I informed the prosecutor, Ronnie Harper, and members of his office that I could not support a finding of sexual abuse in this case." Havard attached as evidence a 2014 *Clarion Ledger* article regarding Havard's case. The article quoted Dr. Hayne: "'I didn't think there was a sexual assault,' Hayne said of his 2002 autopsy of Chloe. 'I didn't see any evidence of sexual assault.'" Dr. Hayne stated that the medical personnel at the hospital the night Chloe was brought in might have been looking at folds of Chloe's anus and thought the folds were tears. He claimed that he had been "very careful" and that he had taken sections. Afterward, Dr. Hayne executed an affidavit stating that he stood by his statements and quotations contained in the 2014 *Clarion Ledger* article and that the statements and quotations were accurate.

¶76. In addition to the evidence casting doubt on Havard's sexual battery conviction, Havard presented newly discovered evidence regarding the change in science surrounding SBS. At Havard's 2002 trial, Doctor Laurie Patterson, the ER physician on duty that night, stated that Chloe died from retinal hemorrhaging. She opined that "[r]etinal hemorrhaging is indicative in that age group of something like a shaken baby type thing where you actually caused so much force that you're able to tear those vessels there that you see those plaques or pools of blood deep in the eyes. That's the majority of the time that you see retinal hemorrhaging in a baby." Dr. Ayesha Dar, Chloe's pediatrician, testified that the hemorrhages in Chloe's retina were "so very specific of this kind of injury." Counsel asked, "[w]hat kind of injury is that?" Dr. Dar replied, "Being a shaken baby. Retinal hemorrhages. *Nothing else causes that*, and I said, oh, my God." (Emphasis added.)

¶77. And Dr. Hayne, the only medical expert to testify at Havard's trial, testified that Chloe had died of SBS. He stated,

> It would be consistent with a person violently shaking a small child. *Not an incidental movement of a child*, but violently shaking the child back and forth to produce the types of injuries that are described as shaken baby syndrome, which is a syndrome known for at least forty-five years now. Coined by a Dr. Coffee who analyzed several of these in Denver, Colorado, and the classic triad for shaken baby syndrome is one, the presence of a subdural hemorrhage; and two, the presence of retinal hemorrhage; and, three, *the absence of other potentially lethal causes of death*. Other etiologies or causes of death. So it's inclusionary and exclusionary. Both inclusionary findings were present. The subdural hemorrhage, the retinal hemorrhage, and also there was an exclusionary competent [sic]. *I did not find any other cause of death, sir.*

(Emphasis added.) He testified that the shaking would have been "very violent" and consistent with motor vehicle crashes. The jury at Havard's trial heard only that Chloe's death occurred as a result of a violent and intentional shaking that could not have been accidental.

¶78. But at Havard's 2017 evidentiary hearing, Havard presented new evidence showing that Chloe had not died from a violent and intentional shaking but instead from blunt force trauma. Blunt-force trauma comports with Havard's theory of an accidental fall. A jury today would hear evidence that supported Havard's description of a three-foot accidental drop onto a hard surface. Therefore, a jury hearing the new evidence would hear a dramatically different case. Accordingly, I disagree with the majority's contention that the evolution of SBS and its relation to Chloe's death have no bearing on Havard's guilt or innocence.

¶79. At his 2017 evidentiary hearing, Havard presented evidence showing that SBS is no longer a valid diagnosis. Dr. Hayne admitted that "[r]ecent advances in the field of

biomechanics demonstrate that shaking alone could not produce enough force to produce the injuries that caused the death of Chloe Britt." Instead, Dr. Hayne testified that an impact or blunt force trauma must have occurred. That testimony was dramatically different from his testimony at Havard's 2002 trial that Chloe could *only* have died from a violent and intentional shaking.

¶80. Havard called Dr. Michael Baden, an expert in the fields of anatomic forensics and clinical pathology who had been actively involved in investigation of cases of possible child abuse for approximately fifty years. Dr. Baden stated that "years after 2002," the medical community realized that shaking alone could not cause the injuries in question. Dr. Baden testified that, in his opinion, Chloe had not died from a violent and intentional shaking but had died from a blunt force impact to the head. He stated that shaking had nothing to do with Chloe's death and that "[a]ll the injuries are entirely consistent with a blunt force impact and consistent with the manner in which Mr. Havard on day one said that the baby had fallen." Dr. Baden stated that he was "experienced as a forensic pathologist in investigating these types of cases when allegations of violence are made early in the investigation . . . ."

¶81. The trial court prevented Dr. Baden from testifying about the potential bias that could occur when inflammatory allegations of sexual abuse are made early in a case. Havard's attorney was allowed to make a proffer in which he stated,

> Doctor Baden would testify that allegations of sexual violence in regard particularly to a child are particularly inflammatory. They do color the rest of the investigation including by medical experts in his training and experience. He reviewed the conclusions that some have made in this case that Chloe Britt was a victim of sexual abuse. In his opinion the sexual battery aspect of the

> case is tied to other medical issues in the case such as Shaken Baby Syndrome for the reasons I've already stated.

¶82. Dr. Ophoven testified that in 2002, SBS was in its "heyday so to speak." She testified that diagnoses of SBS were being made frequently. Dr. Ophoven testified that the "American Pediatric Academy had published a position paper basically citing Shaken Baby Syndrome as a common if not most common cause of fatal head injury in children. . . . It was not debatable to the majority of specialists dealing with children with serious head injuries." However, Dr. Ophoven testified that the science had "totally" changed since 2002. She testified that "the theory of violent shaking as a cause of brain damage is no longer a reliable conclusion." Further, "as of today there is no longer any controversy that this was and is a controversial diagnosis. It is amongst my peers in forensic pathology that it's been set aside." Dr. Ophoven strongly disagreed with Dr. Hayne's 2002 testimony that Chloe's death was consistent with SBS.

¶83. Dr. Chris Van Ee, a biomedical engineer who specialized in the area of impact biomechanics, stated that short-distance falls, similar to the distance Havard described he had accidentally dropped Chloe, can result in serious and fatal head injuries. Dr. Van Ee testified that the first study to come out with a direct comparison of head-acceleration levels from shaking to falls was in 2003, a year after Havard's trial. That study showed that "angular acceleration from an impact is always much greater than that that occurs during a shaking." Dr. Van Ee testified that numerous studies since 2002 had been published that demonstrate that short falls can cause the same injuries previously attributed to SBS. He stated that it was possible that Chloe's injuries were caused by a fall if Chloe had fallen and hit her head on

a porcelain toilet. Dr. Van Ee concluded that no scientific basis existed "to reject the history of the accidental fall and conclude that Mr. Havard abused Chloe by shaking her."

¶84. The State's sole witness, Dr. Scott Benton, a professor of pediatrics at the University of Mississippi Medical Center, also concluded that Chloe's injuries required an impact.

¶85. Courts from outside jurisdictions have recognized the shift in science surrounding SBS that has occurred after Havard's trial. The Wisconsin Court of Appeals recognized that

> a significant and legitimate debate in the medical community has developed in the past ten years over whether infants can be fatally injured through shaking alone, whether an infant may suffer head trauma and yet experience a significant lucid interval prior to death, and whether other causes may mimic the symptoms traditionally viewed as indicating shaken baby or shaken impact syndrome.

***State v. Edmunds***, 746 N.W.2d 590, 596 (Wis. Ct. App. 2008). It reasoned that a new trial was required in the defendant's case, stating that in the defendant's original trial "the State was able to easily overcome [the defendant's] argument that she did not cause [the victim's] injuries by pointing out that the jury would have to disbelieve the medical experts in order to have a reasonable doubt as to [the defendant's] guilt." ***Id.*** at 599. But a jury at that time would have been presented with competing credible medical opinions. ***Id.***

¶86. In a Texas Court of Criminal Appeals case, the medical examiner at the defendant's trial had testified that the theory that the victim's injuries resulted from an accidental fall was "false and impossible." ***Ex parte Henderson***, 384 S.W.3d 833, 833 (Tex. Crim. App. 2012). Yet, at the evidentiary hearing, the medical examiner testified that "there is no way to determine with a reasonable degree of medical certainty whether [the victim's] injuries resulted from an intentional act of abuse or an accidental fall." ***Id.*** at 833-34. The appeals

court upheld the trial court's conclusion that the defendant had presented material exculpatory facts and remanded the case for a new trial. ***Id.*** at 834.

¶87. Similarly, the jury in Havard's trial would have had to disbelieve Dr. Hayne's testimony, the only expert testimony presented at trial, in order to have doubts as to Havard's guilt. It would be hard to imagine a jury's not convicting Havard after hearing extremely inflammatory allegations regarding injuries to a six month old. However, a jury today would hear competing and credible evidence relating to the allegation of sexual abuse and to the allegation of SBS. These changes in science and testimonies create material exculpatory facts. Thus, I would find that a new trial is required.

¶88. Although Havard has presented evidence showing that neither a sexual battery nor a purposeful shaking had occurred, the majority states that "[i]n the event of a new trial, the following jury question would remain: Did Havard effect Chloe's death while engaged in the commission of the crime of sexual battery." Maj. Op. ¶ 43. I disagree with the majority's decision to ignore exculpatory evidence relating to sexual battery and to again deny Havard an opportunity for a fair trial. The jury at Havard's trial heard expert testimony that Chloe could have died only from a violent and intentional shaking. Havard has now presented overwhelming evidence showing that Chloe did not die from shaking but from an impact. Because Havard's theory of defense, an accidental fall, is now consistent with Chloe's manner of death and because Havard presented new, exculpatory evidence regarding sexual assault, I would vacate Havard's conviction and remand this case for a new trial on the merits.

## CONCLUSION

¶89. At Havard's 2002 trial, his theory of defense was that he had accidentally dropped Chloe Britt. But that theory was vitiated by expert and lay testimonies that Chloe could only have died by purposeful, violent shaking. At Havard's 2017 evidentiary hearing, he presented compelling evidence not discoverable at his 2002 trial showing that Chloe's injuries could have been caused by an accidental dropping from a short distance. Havard additionally presented evidence showing that the testimony at trial regarding sexual assault was incorrect and unsupported. Because that evidence probably would have caused a different conviction or sentence, I respectfully dissent from the majority's conclusion that the evolution of SBS would have had no bearing on Havard's guilt or innocence and from its affirmance of the trial court's decision to exclude evidence disproving the sexual-assault allegations. I would reverse Havard's conviction and remand this case for a new trial.

**KITCHENS, P.J., AND ISHEE, J., JOIN THIS OPINION.**