M.E.

STATE OF MISSISSIPPI

KIRK FORDICE
GOVERNOR

DEPARTMENT OF PUBLIC SAFETY

JIM INGRAM
COMMISSIONER

July 2, 1992

Mr. Ronald Crowe
Executive Director
Mississippi Ethics Commission
Post Office Box 22746
Jackson, Mississippi 39225-2746

RE: State Medical Examiner

Dear Mr. Crowe:

As Commissioner of Public Safety, I am charged by statute with appointing the State Medical Examiner. In an attempt to fill this position and save the state money, I have had numerous, extensive discussions with Dr. Steven T. Hayne. He has expressed his interest and desire to be the Medical Examiner for the state. At his request, he will serve without salary or other benefits.

Dr. Hayne presently is serving as a State Designated Pathologist with no salary from the State. He has performed and is doing autopsies in all 82 counties upon request.

Autopsies are not normally ordered by the State Medical Examiner. They are usually ordered by the County Medical Examiners (Coroners) in each of the counties (Section 41-61-65). Each individual Coroner specifies their preference of the individual designated pathologist they want to conduct the autopsy from the list of Designated Pathologists on file in the Medical Examiners Office. Designated pathologists are located throughout the state. When at all possible, autopsies are scheduled by the coroners with a designated pathologist closest to the area requesting the services. This is done to cut down on expenses to the counties.

All autopsies are not performed by the State Medical Examiner. Neither are they all performed in the Jackson area. During the 1991 calendar year, the State Medical Examiner, Dr. Lloyd White, performed only 90 of the 1,263 autopsies ordered by coroners statewide. The majority of the 90 done by the Medical Examiner were of persons who died while being held in criminal institutions across the state; or were from the immediate Jackson area; or were cases that designated pathologists, for whatever reason, were unwilling to perform.

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Section 41-61-75 provides that pathologists performing autopsies are to receive a fee of $500 for each completed autopsy.

Dr. Hayne has been paid this amount for each autopsy he has performed as a designated pathologist. The fee is paid by the county for which he provides the service. Dr. Hayne is well established and so well respected in his profession and in the Medicolegal Death Investigation System that he was requested by the Coroners across the state to perform approximately 80% of all autopsies done in the State of Mississippi last year (excluding the 90 done by Dr. White). It would appear that, whether or not Dr. Hayne is appointed State Medical Examiner, he will continue to autopsy this volume even if some other person is appointed State Medical Examiner. With this in mind, it is very unlikely that any person appointed and paid the salary would be able to perform enough autopsies to recoup the salary expenses that he/she would receive from the state payroll system.

As indicated in the beginning of this letter, at his request Dr. Hayne, if appointed, would serve as Medical Examiner without salary, other normal benefits afforded state employees and without being provided a state-owned vehicle. He will receive no remuneration of any kind from the state for his performance of activities as State Medical Examiner. I am sure by now you are questioning "Why would anyone want to accept this position and not receive a salary, especially in light of the designated salary?" As indicated, Dr. Hayne is a State Designated District Pathologist. He receives $500 for each autopsy he performs by the individual counties for which he provides the service. He is willing to accept the position without salary because he currently does somewhere near 80% of all autopsies performed in the state. If appointed, it is my intention to allow Dr. Hayne to continue with this arrangement. However, this would be allowed only under the conditions set out in the next paragraph.

The Medical Examiner's Office day to day operations are being and have been maintained by Mrs. Deborah Dayton, Office Manager, since Dr. White left office. She will continue in that position. The facilities and staff of the Medical Examiner's office located at the Department of Public Safety Complex would perform only the clerical and administrative work of Dr. Hayne while in the performance of his official duties as Medical Examiner. Nothing connected with the facility, the equipment, state property, supplies or staff could be utilized by Dr. Hayne for any work he handles as a designated pathologist. When he performs any of the duties of the State Medical Examiner set out in Title 41 of the

Mississippi Code or any other functions directly related to his official capacity as Medical Examiner, he would receive no remuneration, reimbursement, or fees. Any monies generated or fees collected as Medical Examiner would be deposited into the state general fund as required by law.

It should also be noted that we will enter into an agreement wherein Dr. Hayne agrees that he waives his right to not be removed except for inefficiency or other good cause; that he waives written notice and a hearing as provided by Section 41-61-55 and recognizes and agrees that his appointment would be completely an at-will employment, terminal at the will and pleasure of the commissioner.

This exhaustive discussion has been presented to raise the following question. If appointed State Medical Examiner, receiving no salary, fringe benefits or any other remuneration from the state, could he continue as a designated pathologist and continue to be paid by the counties for which he provides autopsy services?

If you determine there are no ethical problems with this arrangement, the State of Mississippi stands to save approximately $125,000 per year. This translates into a savings in excess of $500,000.00 over the next four years. For your information, I have not received one application to date except Dr. Hayne for this position. Although I have traveled throughout the state talking to coroners, prosecutors, and medical doctors, the only one recommended to me has been Dr. Hayne.

I respectfully request the Mississippi Ethics Commission's advisory opinion as to whether or not Dr. Steven T. Hayne could be appointed State Medical Examiner under the conditions discussed.

Sincerely,

Jim Ingram
Commissioner

JOI:WHM:jjb

cc: File - (Adm.) (A) (C)

IN THE SUPREME COURT OF MISSISSIPPI

No. _____

JOSEPH EUGENE OSBORNE, Petitioner,

v.

STATE OF MISSISSIPPI, Respondent

PETITION FOR POST-CONVICTION RELIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

STATEMENT OF THE ISSUES

Petitioner raises the following issues in this Petition for Post Conviction Relief:

I. Whether evidence of Dr. Steven T. Hayne's serial forensic fraud, and the State of Mississippi's knowing role in aiding, abetting, and concealing it, constitutes newly discovered evidence that, had it been made available to petitioner at trial, would have produced a different result or verdict at his trial?

II. Whether the State of Mississippi violated Osborne's due process rights articulated in *Napue v. Illinois*, 360 U.S. 264 (1959), and its progeny, by presenting false evidence during his trial?

III. Whether the State violated Osborne's due process rights as articulated through *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny?

IV. Whether the State's use of Dr. Hayne as a witness without required disclosures, combined with Dr. Hayne's own misrepresentations, abrogated Osborne's rights secured by the Sixth Amendment's Confrontation clause, made enforceable against the State by the Due Process Clause of the Fourteenth Amendment?

V. Whether the admission of Dr. Hayne's testimony violated Osborne's substantive rights, including the right to a fundamentally fair trial, as incorporated by Mississippi Rule of Evidence 702?

SUMMARY OF THE ARGUMENT

Joseph Eugene Osborne, petitioner in this case, requests that this Court grant him leave to file for post-conviction relief. Newly discovered evidence – namely, documentary proof of a complicit arrangement between the State and Dr. Steven T. Hayne to circumvent Mississippi's public health laws, abundant testimonial evidence and supporting documentation of Dr. Hayne's pattern and practice of misrepresenting his professional credentials, as well as the providing of specious and contradictory trial testimony over time within areas of pseudo-forensic sub-specialties – exposes for the first time what some State[1] officials have long known, and what many others, including Osborne, have suspected but until now could not prove: that Dr. Hayne, Mississippi's *de facto* state pathologist for many years and the star witness at Osborne's criminal trial, is a serial purveyor of falsehoods, unreliable opinions, and fabricated forensic findings.

This new evidence was discovered in the late Spring of 2012 as a direct result of Dr. Hayne's suit against attorneys at the Innocence Project and Mississippi Innocence Project[2] that resulted in the disclosure of business

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[1] *See infra* notes 231-46 and accompanying text.

[2] Dr. Hayne sued Peter Neufeld and Vanessa Potkin, attorneys at the Innocence Project, and Tucker Carrington, an attorney at the Mississippi Innocence Project (and counsel for Osborne), for, among other things, libel, slander and defamation. *See Hayne. v. The Innocence Project*, No. 2008-247 (Rankin Cnty. Circuit Ct. Oct. 8, 2008). The case was ultimately dismissed. Dr. Hayne then brought a second suit in federal court in the Southern District. *Id*. Though the grounds were essentially the same, Carrington was not named as a defendant.

documents, trial transcripts, letters, depositions, and autopsy reports, among numerous other pieces of evidence, much of it centering around Dr. Hayne's deposition taken on April 26-27, 2012. In sum, the evidence proves that Dr. Hayne entered into an unethical agreement with the State and used the position to propagate falsehoods, unreliable opinions, and fabricated forensic findings to advance a twinned goal: satisfying the desires of his primary customer base – State law enforcement and prosecutorial personnel – and increasing his own monetary profit. Dr. Hayne has propagated these falsehoods, unreliable opinions, and fabricated forensic findings with the full support and knowledge of the State of Mississippi.

Although Dr. Hayne polluted the process of every trial in which he appeared, his testimony about manner and cause of death in many cases was not critical. On the other hand, in a limited number of other cases, like this one, Dr. Hayne's role was decisive. The combination of Dr. Hayne's misrepresentations about his abilities and certification to perform the work paved the way not only for the admissibility of his bogus, novel opinions, but also allowed for them to appear cloaked in the guise of accepted forensic pathology. In such cases, Dr. Hayne's false testimony provided the critical difference in a finding of criminal culpability. In Osborne's case, there can be little doubt that recently discovered evidence of the scope and breadth of forensic fraud would have changed the outcome of the trial, but also that, had that evidence been made known, certain rules of law and professional

responsibility applicable to attorneys and, more specifically, to prosecutors, would have prohibited Dr. Hayne from even presenting his testimony in the first place.[3]

Thus, in the light of the newly discovered evidence of the State's and Dr. Hayne's malfeasance, Osborne is entitled to relief based upon numerous grounds, including: the newly discovered evidence doctrine; the Fourteenth Amendment's prohibition against government attorneys knowingly introducing false evidence during a criminal trial;[4] the violation of due process rights pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny; violation of rights under the Sixth Amendment's Confrontation Clause; and violation of substantive rights, afforded every defendant, under the Mississippi Rules of Evidence.

This forensic fraud disaster was not a foregone conclusion.

The citizens of Mississippi, through their duly elected representatives, had pursued a course of action that advanced the cause of public health and secured criminal defendants' rights to a fair trial.[5] In the early 1970's, in order to ensure among other things the right to a fair trial through the introduction of greater accountability and professionalism in criminal prosecutions,[6] the Mississippi Legislature created the position of State

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[3] *See infra* notes 210-13 and accompanying text.
[4] *See Napue v. Illinois*, 360 U.S. 264, 269 (1959).
[5] MISS. CODE ANN. §§ 41-61-1 *et seq.* (1972); *see also* MISS. CODE ANN. §§ 41-61-51 *et seq.* (1986).
[6] Until 1974, Mississippi county coroners, who are elected, directed death investigations. JOINT LEGISLATIVE COMMITTEE ON PERFORMANCE EVALUATION AND

Medical Examiner (SME).[7] The position required a qualified expert in forensic death investigation to investigate sudden, violent, or suspicious deaths, and to conduct autopsies, when in the public interest. The enabling legislation also required the SME to be a physician and be board-certified in forensic pathology by the American Board of Pathology (ABP), the pathology field's pre-eminent governing body.

Despite these efforts, however, the medical examiner's office remained highly politicized, under-supported, and perennially underfunded. The office proved difficult to keep adequately staffed, so much so that the medical examiner post became – and then remained – vacant from 1995 until 2011. Beginning in the mid-1990's, instead of an SME overseeing autopsies, the Department of Public Safety kept a roll of so-called "State designated pathologists"[8] who performed them.[9] Of these "designated pathologists," Dr.

EXPENDITURE REVIEW, AN INVESTIGATION OF MISSISSIPPI'S MEDICOLEGAL DEATH INVESTIGATION PROCESS, 2008 Regular Sess., at 4 (2008), *available at* http://www.peer.state.ms.us/reports/rpt514.pdf. (attached as Appendix 1). Typically, the coroner would convene a "coroner's jury" to investigate any "violent, sudden, or causal death." *Id.* Lay and expert witnesses provided testimony to the jury on the cause and manner of death. *Id.* For years the system had been subject to political pressure, and during the Civil Rights era in particular, the system worked hand-in-hand with state segregationists to whitewash murders of blacks and civil rights activists. *See* SETH CAGIN & PHILIP DRAY, WE ARE NOT AFRAID: THE STORY OF GOODMAN, SCHWERNER, AND CHANEY AND THE CIVIL RIGHTS CAMPAIGN FOR MISSISSIPPI 135 (1988).

[7] *See* Mississippi Medical Examiners Act of 1974. MISS. CODE ANN. §§ 41-61-51 *et seq*. (1972).

[8] The Department of Public Safety determined who was qualified as a designated pathologist. *See* MISS. CODE ANN. §§ 41-61-1 *et seq*. (1972); *see also* MISS. CODE ANN. §§ 41-61-51 *et seq*. (1986).

[9] *See* JOINT LEGISLATIVE COMMITTEE ON PERFORMANCE EVALUATION AND EXPENDITURE REVIEW, AN INVESTIGATION OF MISSISSIPPI'S MEDICOLEGAL DEATH INVESTIGATION PROCESS, 2008 Regular Sess., at viii (2008) (attached as Appendix 1).

Hayne, according to his own admissions, performed the vast majority – over 1,700 autopsies annually – for an average of more than four autopsies a day, every day, seven days a week, without interruption, for nearly twenty years. In addition to this utterly unsustainable schedule, Dr. Hayne also provided testimony about his findings at trials, including this one.

Dr. Hayne did not achieve his position because he was well qualified; he was and always has been uncertified by the American Board of Pathology in forensic pathology, and his other certification claims are either specious or complete fictions.[10] Nor did he possess superior skills as a forensic pathologist; his work has been maligned for years – three individuals[11] thus far have been wrongfully convicted and later exonerated as a result of it. He and his prolific work have recently been the subject of an official inquiry by the College of American Pathologists.[12]

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[10] *See infra* notes 118-31 and accompanying text.

[11] *See infra* notes 149-150 and accompanying text.

[12] *See, e.g.,* Jerry Mitchell, *Doctor's Autopsy Abilities Targeted*, CLARION LEDGER, Apr. 27, 2008 (attached as Appendix 2); Radley Balko, *CSI: Mississippi*, WALL STREET JOURNAL, Oct. 7, 2007, *available at* http://online.wsj.com/article/SB119162544567850662.html. In May of 2008, the College of American Pathologists contacted Dr. Hayne to voice its concern about the number of autopsies that he had claimed to be performing annually. Letter from College of American Pathologists to Dr. Steven T. Hayne (May 22, 2008) (attached as Appendix 3).

After a hearing in July of 2008, the College found that, by his own admission, Dr. Hayne performed on average 1,669 autopsies per year from 1997 through 2007. Letter from College of Am. Pathologists to Jared Schwartz (Aug. 20, 2008) (attached as Appendix 4). At the hearing, Dr. Hayne testified that on weekdays, after he finishes preparing and delivering court testimony, he begins work at the morgue at 5 p.m. and works until 2 or 3 a.m. *Id.* On weekends he typically works the majority of both days. *Id.* He takes no vacations and works seven days a week throughout the year. *Id.* This number, the College found, substantially exceeds professional norms

In a series of agreements beginning in the mid-1990's and becoming more formal over time, the State of Mississippi and Dr. Hayne colluded to create a working arrangement that was mutually beneficial and outside the bounds of any recognized authority or law. The State saved hundreds of thousands of dollars in salary and other expenses by not hiring a medical examiner or staffing the medical examiner's office; Dr. Hayne gained a monopoly over what would become a multi-million dollar bulk autopsy business.[13] Operating in a State-created medicolegal oligarchy, Dr. Hayne combined serial misrepresentation and outright falsehoods, along with rank advertisements, to peddle his services in a market that was already rigged in his favor. The result was a tragedy for public health, victims of crime and their families, and, in this case, for the petitioner.

The State made this agreement with Dr. Hayne even though it knew or reasonably should have known that Dr. Hayne regularly propagated

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and that Dr. Hayne's claims of maintaining an appropriate standard of care should be viewed with skepticism. *Id.*

[13] Dr. Hayne performed over 80% of Mississippi's state autopsies – between 1,200-1,800 a year. Radley Balko, *The Coroners Revolt*, REASON MAGAZINE (Aug. 3, 2009, 12:30 PM), http://reason.com/archives/2009/08/03/the-coroners-revolt. At $500 per autopsy, his state autopsy practice generated $600,000-$900,000 in annual gross income. JOINT LEGISLATIVE COMMITTEE ON PERFORMANCE EVALUATION AND EXPENDITURE REVIEW, AN INVESTIGATION OF MISSISSIPPI'S MEDICOLEGAL DEATH INVESTIGATION PROCESS, 2008 Regular Sess., at x (2008) (attached as Appendix 1). In addition, Dr. Hayne testified between two to three times per week in criminal trials, approximately 130 criminal trials per year. He has testified that his hourly rate for criminal trials is $150, which includes time for consultation and travel. Though the average number of hours Dr. Hayne billed per criminal trial is unknown, he often testified to spending ten to twelve hours per civil trial, making his involvement in criminal trials worth well above $200,000 a year. By contrast, Mississippi allocates less than $200,000 per year for the State Medical Examiner salary. MISS. CODE ANN. §§ 41-61-51 *et seq.* (1986).

falsehoods, unreliable opinions, and fabricated forensic findings. At trials, his explanations for his lack of certification in forensic pathology by the American Board of Pathology, for example, were patent lies.[14] The business arrangement was also in direct violation of both the spirit and plain language of state ethics and public health laws. It exploited and circumvented, with the full knowledge of those who retained his services, well-established precepts about the use and value of forensic evidence in the courtroom. Among the collateral consequences: The sacrifice of certain individuals' – including Osborne's – fundamental civil rights, who were charged with, tried for, and wrongfully convicted of criminal offenses.

In cases like this one, where evidence culpability fell short of what would have been needed to secure a conviction, the State of Mississippi, in concert with Dr. Hayne, presented Dr. Hayne as an objective and highly-qualified forensic pathologist in order to provide critical, but unsound, testimony about petitioner's culpability. Without Dr. Hayne's testimony in this case, the prosecution's evidence would have rested in large part on the account of a three-year old child's recollection that was provided long after the incident for which Osborne was charged, a recollection that was inconsistent and contradicted by other witnesses and unsupported by the physical evidence. With Dr. Hayne, however, the State was able to use his findings to concoct a precise time and manner of death and make a case against Osborne, where otherwise there was none.

[14] See *infra*, notes 114-31.

Armed with this new evidence, Osborne now seeks redress because, as this Court has long recognized, "where fundamental and constitutional rights are ignored, due process does not exist, and a fair trial in contemplation of law cannot be had."[15] Newly discovered evidence of Dr. Hayne's malfeasance, combined with the acts of the State of Mississippi and the agents who prosecuted Osborne's case, deprived him of his liberty without due process of law by disregarding, among others, a fundamental constitutional right guaranteed to him by the United States and Mississippi Constitutions: a fair trial.[16]

STATEMENT OF THE CASE

A. Procedural History

On August 1, 2003, a Lauderdale County grand jury indicted Joseph Osborne for depraved heart murder.[17]

His trial commenced on April 5, 2004,[18] and on April 7, 2004, after six hours of deliberation, the jury found Osborne guilty of depraved heart murder, and the court subsequently sentenced him to life in prison.[19] The Mississippi Court of Appeals affirmed Osborne's conviction on February 21,

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[15] *Brooks v. State*, 46 So. 2d, 94, 97 (Miss. 1950).
[16] *See* MISS. CONST. art. III, §14.
[17] *Osborne v. State*, 942 So.2d 193, 196 (Miss. Ct. App. 2006).
[18] Transcript of Record at 143, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 5, 2004) (transcript attached as Appendix 5).
[19] Transcript of Record at 555, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 7, 2004) (attached as Appendix 5).

2006,[20] and following a denial of a motion for rehearing,[21] this Court denied his petition for *certiorari*.[22]

B. Statement of the Facts

In October of 2002, Osborne moved to Meridian, Mississippi, to find work.[23] While there, he lived with his girlfriend, Cindy Hopkins, and her two sons, five-year-old Charlie and three-year-old Sam.[24] Shortly thereafter, every member of the family contracted a stomach virus.[25] First, the boys got the stomach bug; then, on November 6, 2002, Cindy herself fell ill.[26] Because of the illness and medication she had taken, Cindy slept during the afternoon, while Osborne babysat.[27] Kimble Frazier, Osborne's friend who had visited Cindy's house a few times, came over and played with the children.[28]

Later that evening, Osborne fed the boys a large dinner of hotdogs, bathed them, and then readied them for bed.[29] As he was tucking them in, he put on a movie in their room while they went to sleep.[30]

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[20] *Osborne v. State*, 942 So.2d 193 (Miss. Ct. App. 2006).
[21] *Id.*
[22] *Osborne v. State*, 942 So.2d 164 (Miss. 2006).
[23] Transcript of Record at 210-11, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 5, 2004) (attached as Appendix 5).
[24] *Id.*
[25] *Id.* at 219.
[26] *Id.*
[27] *Id.* at 219-20.
[28] *Id.* at 221.
[29] Transcript of Record at 8-9, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Dec. 1, 2003) (attached as Appendix 5).
[30] Transcript of Record at 353, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 6, 2004) (attached as Appendix 5).

Cindy woke up about 10:30 p.m., checked on the boys, and brushed their teeth while they were sleeping.[31] At around 1:30 a.m., Cindy checked on them again.[32] Each time, she observed Charlie sleeping comfortably on his back.[33] Meanwhile, Frazier, who had decided to stay over,[34] also checked on the boys twice during the night – a little after 10:30 p.m. and again later.[35]

The next morning, Sam woke Cindy up around 8 a.m., and they prepared breakfast while Osborne slept.[36] Later that morning, around 10 a.m., Cindy went into the boys' room to get Charlie and discovered him face down on the bed.[37] Zyrtec pills were strewn across the floor and Charlie's bed.[38] Frazier woke Osborne, who called 911, and the fire department arrived shortly thereafter. [39]

Law enforcement investigators and Cindy's family initially believed that Charlie had died from a drug overdose.[40] However, Dr. Hayne performed the autopsy and determined that he had, in fact, died of suffocation.[41] Despite

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[31] *Id.* at 352-53.
[32] Transcript of Record at 225, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 5, 2004) (attached as Appendix 5).
[33] *Id.* at 264-65.
[34] Transcript of Record at 380-81, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 6, 2004) (attached as Appendix 5).
[35] *Id.* at 382-85.
[36] Transcript of Record at 206, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 5, 2004) (attached as Appendix 5).
[37] *Id.* at 228.
[38] *Id.* at 206, 228-29.
[39] Transcript of Record at 354, 385, *State v. Osborne*, No. 499-03 (Lauderdale Cnty Circuit Ct. Apr. 6, 2004) (attached as Appendix 5).
[40]Transcript of Record at 206, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 5, 2004) (attached as Appendix 5).
[41] Transcript of Record at 473, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 7, 2004) (attached as Appendix 5).

the fact that law enforcement interviewed Cindy, Osborne, Frazier, and Sam, police were unable to identify a suspect.[42]

In early December 2002, Sam was visiting his mother, grandmother, and aunt.[43] When Osborne told the boys to go to bed, Sam said, "Charlie wouldn't go to bed that night."[44] Concluding that the remark related to his brother's death, Cindy set up an interview for Sam with the Meridian Police Department.[45] The result was a forty-five minute interview during which Sam was unresponsive about the circumstances surrounding Charlie's death.[46] Five months after Charlie died (on April 9, 2003), the Attorney General's office retained Dr. Catherine Dixon, an employee of the Children's Advocacy Center, to interview Sam.[47] In an interview that lasted nine minutes, Sam told a strange tale about how Charlie died.[48] Among other things, it included references to Charlie being Spiderman, who climbed trees and scaled walls.[49] According to Sam's version, he secretly followed Osborne and Charlie as Osborne chased Charlie around the house and outside.[50] He

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[42] Transcript of Record at 351, 361-62, 365, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 6, 2004) (attached as Appendix 5).
[43] The Mississippi Department of Human Services had removed Sam from Cindy's home, and Sam moved in with Cindy's niece. Transcript of Record at 239-40, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 5, 2004) (attached as Appendix 5).
[44] Transcript of Record at 93,96,104, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Dec. 1, 2003) (attached as Appendix 5).
[45] *Id.* at 13-14.
[46] *Id.*
[47] Transcript of Record at 318, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 6, 2004) (attached as Appendix 5).
[48] *Id.* at 301-305.
[49] *Id.*
[50] *Id.* at 305-07.

said that Osborne spanked Charlie and then later, re-entered the boys' bedroom and "took his [Charlie's] breath away" while Sam watched with one eye open from his own bed.[51]

As a direct result of Sam's interview, Dr. Hayne had Charlie's body exhumed.[52] He requested the services of a forensic odontologist, who created a plaster cast – a "death mask," according to Dr. Hayne's terminology – of Sam's face. Dr. Hayne then marked on the mask the sites of injury that purportedly corresponded with his previous marks from his autopsy diagram in order to determine the approximate size of the hand that inflicted injuries.[53] The prosecution introduced the resulting "death mask" into evidence.[54]

At trial, Dr. Hayne testified Sam was suffocated and that his injuries were consistent with an adult person having covered the child's nose and mouth with a hand.[55] More specifically, Dr. Hayne testified that "[i]t would be consistent with a person placing their hand over the child's face, and the injuries located to the right side of the head would be consistent in part with

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[51] *Id.*
[52] Transcript of Record at 12-13, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Dec. 1, 2003) (attached as Appendix 5).
[53] Transcript of Record at 474, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 7, 2004) (attached as Appendix 5). Dr. Hayne testified that the injuries he saw on the child from the initial autopsy were still apparent but much less distinct and more difficult to visualize directly at the exhumation. *Id.* at 491. He explained he could not place markings on death mask at the time because it "takes time to cure the death mask before you pull the mold off." *Id.*
[54] *Id.* at 476.
[55] *Id.* at 473-74.

fingernail injuries to the child's right side of the face."[56] Dr. Hayne also testified that the "death mask" demonstrated that a "large hand," which would "favor a male's hand," caused the child's injuries.[57] The prosecution characterized this "opinion" as convincing evidence of Osborne's guilt.[58]

On August 1, 2003, a Lauderdale County grand jury indicted Osborne for depraved heart murder.[59] On December 1, 2003, a pre-trial hearing was held to determine whether three-year old Sam was competent to testify and whether the testimony of the three witnesses who had heard Sam's claims was admissible.[60] At the hearing, Sam was unable to remember many details, was unresponsive to questions, and looked to his mother for the answers to questions he was asked. The court, however, ruled that Sam was competent to testify and that Sam's out-of-court statements were admissible, as well.[61]

At that same hearing, the judge and attorneys discussed Dr. Hayne's "death mask."[62] The conversation was initiated when the court asked questions concerning the validity of the death mask and whether it was, in

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[56] *Id.*
[57] *Id.* at 477, 488-89. Dr. Hayne later testified on cross-examination that the injuries on the death mask were consistent with a male hand but could have been inflicted by a larger female hand. *Id.* at 488.
[58] In his closing argument the prosecutor stated: "The hand that was used, according to Dr. Hayne, was a large hand; it was a male hand." Transcript of Record at 532, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 7, 2004) (attached as Appendix 5).
[59] *Osborne v. State*, 942 So.2d 193, 196 (Miss. Ct. App. 2006).
[60] Transcript of Record at 136, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Dec. 1, 2003) (attached as Appendix 5).
[61] *Id.* at 31-59.
[62] *Id.* at 139.

essence, "super duper [novel] medical testimony."[63] The prosecutor assured the judge that Dr. Hayne was not another Dr. Michael West (a long-time colleague of Dr. Hayne's and forensic odontologist notorious for his fraudulent bite mark testimony), and that the mask was not akin to Dr. West's debunked and unreliable alternative light source imaging techniques.[64]

The trial commenced on April 5, 2004.[65] When Sam testified, he said he could not remember any significant details of Charlie's death.[66] Further, he detailed certain facts surrounding and following Charlie's death that cast serious doubt on his previous statement that inculpated Osborne. Specifically, he stated that he assumed any man coming into his room was Osborne because Osborne had been living with his mother, and that although he had overheard others saying Osborne was bad, Sam said he was not afraid of him when Osborne continued staying with him and his mom in the days following Charlie's death.[67]

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[63] *Id.* at 141.

[64] *Id.* at 142. Dr. West and Dr. Hayne colluded to tout their abilities to increase law enforcement organizations' conviction-rates with their novel and fraudulent alternative light source theories via advertisements in law enforcement trade journals. Michael H. West & Steven Hayne, *Alternative Light Sources for Trace Evidence Can Lead to Higher Conviction Rates*, 1 KODAK PUBLICATIONS 911 (1992) (attached as Appendix 6).

[65] Transcript of Record at 143, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 5, 2004) (attached as Appendix 5).

[66] Sam testified he could not remember the night Charlie died; he did not remember he and Charlie had been sick; he did not remember going to bed or taking a bath that night; he did not remember talking to either woman who interviewed him about Charlie's death; and he denied telling the interviewers that Charlie scaled the walls and climbed the trees like Spiderman. *Id.* at 278-94.

[67] *Id.* at 290-93.

Cindy and Frazier offered contradictory testimony as to the timeline of that night. Although Cindy testified that she stayed up with Osborne and Frazier until 1:30 a.m.,[68] Frazier testified that Osborne and Cindy went to bed around 10:30 p.m. – approximately fifteen to thirty minutes after the boys went to bed.[69] According to Frazier, who had also checked on the boys during the night, he neither heard nor noticed anyone else checking on them after he did.[70] In addition, Frazier testified that Osborne had never spanked Charlie that evening, as Sam had claimed.[71]

Dr. Hayne began his testimony by claiming that he was "an appointed state pathologist," who was directly affiliated with the State Medical Examiner's office.[72] According to him, Charlie died one to one-and-a-half hours after eating his dinner at 8 p.m., placing the time of death around 9:30.[73] Turning his attention to the "death mask," he referred to diagrams from his autopsy[74] and testified that it supported his conclusion that death by suffocation was "consistent with [being caused by] a larger hand rather than a smaller or medium sized hand."[75] When asked whether he could tell if the

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[68] Transcript of Record at 537, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 7, 2004) (attached as Appendix 5).
[69] Transcript of Record at 381-82, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 6, 2004) (attached as Appendix 5). Osborne's statement on November 14, 2002 supported Frazier's version of the events: that Osborne went to bed around 10:30 and Cindy came back to bed thirty minutes later. *Id.* at 351-52.
[70] *Id.* at 402.
[71] *Id.* at 401.
[72] Transcript of Record at 455, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 7, 2004) (attached as Appendix 5).
[73] *Id.* at 471-72.
[74] *Id.* at 480-87.
[75] *Id.* at 477.

marks were from a male or female hand, Dr. Hayne responded that he "would favor a male's hand."[76]

After six hours of deliberation, the jury returned a verdict of guilty for depraved heart murder.[77]

ARGUMENT

I. EVIDENCE OF DR. HAYNE'S SERIAL FORENSIC FRAUD, AND THE STATE OF MISSISSIPPI'S KNOWING ROLE IN AIDING, ABETTING, AND CONCEALING IT, CONSTITUTES NEWLY DISCOVERED EVIDENCE THAT, HAD IT BEEN MADE AVAILABLE, WOULD HAVE PRODUCED A DIFFERENT RESULT AT OSBORNE'S TRIAL.

A. Standard of Review

Under the Mississippi Uniform Post-Conviction Collateral Relief Act (UPCCRA), post-conviction review "provide[s] prisoners with a procedure, limited in nature, to review those objections, defenses, claims, questions, issues or errors which in practical reality could not be or should not have been raised at trial or on direct appeal."[78]

Presentation of a claim of newly discovered evidence for post-conviction review pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act, Mississippi Code § 99-39-5(2)(a)(i), requires that:

> (2) A motion for relief under this article . . . be made

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[76] *Id.* The prosecution explained that Dr. Hayne had the handprints of Cindy, Frazier, and Osborne, and that Osborne's hands were significantly bigger than the other two. Transcript of Record at 12-13, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Dec. 1, 2003) (attached as Appendix 5).
[77] *Id.* at 556.
[78] MISS. CODE ANN. §§ 99-39-1 *et. seq.* (1984).

> within three (3) years after the time in which the petitioner's direct appeal is ruled upon by the Supreme Court of Mississippi . . . Excepted from this three-year statute of limitations are those cases in which 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 had such been introduced at trial it would have caused a different result in the conviction or sentence . . .

Miss. Code §99-39-5 (2)(a)(i). Because Osborne's petition is based on claims of newly discovered evidence, and satisfies the related statutory requirements, it is not time barred.

The Mississippi Supreme Court reviews applications for leave to file post-conviction relief pursuant to Mississippi Code Annotated Section 99-39-27. Under this section, the court may exercise two options when reviewing a petitioner's application.[79] First, the court may rule on the petition, granting or denying the requested relief, if it plainly appears "from the face of the application, motion, exhibits and the prior record" that the claim is not barred under Section 99-39-21 of the Mississippi Code and that there is a substantial showing that the petitioner has been denied a state or federal right.[80] Second, the court may grant the petitioner's application to proceed in the trial court for "further proceedings under Sections 99-39-13 through 99-39-23" of the Mississippi Code.[81]

B. Legal Authority

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[79] *See Mitchell v. State*, 809 So.2d 672, 673 (Miss. 2002).
[80] *Mitchell*, 809 So.2d at 673.
[81] MISS. CODE ANN. § 99-39-27(7)(b) (Supp. 2006).

Osborne's dogged pursuit of the truth has uncovered a wealth of newly discovered evidence involving Dr. Hayne's prejudicial misconduct and forensic fraud during his criminal trial. This newly discovered evidence requires the court to reverse Osborne's conviction. According to settled law of this Court, a petitioner is entitled to a new trial based on newly discovered evidence when he or she can demonstrate: (1) that the new evidence was discovered since the trial; (2) that when using due diligence the evidence could not have discovered the new evidence prior to trial; (3) that the evidence is material to the issue and that it is not merely cumulative or impeaching; and (4) that the evidence will probably produce a different result or verdict in the new trial.[82]

Osborne's recent discovery of Dr. Hayne's malfeasance during Osborne's criminal trial and the complicity of the State of Mississippi in hiding this information meet all four of this Court's requirements for a new trial. His petition should be granted, and his conviction and sentence be vacated.

C. Newly Discovered Evidence

The newly discovered evidence, material to Osborne's case, is set forth fully in the sections, footnotes, and various appendices that follow, but in the main include the following: (1) that although he was grossly unqualified, Dr. Hayne entered into an unethical arrangement with the State under which he

[82] *See Ormond v. State*, 599 So.2d 951, 962 (Miss. 1992); *see also Sonnenburg v. State*, 830 So.2d 678, 681 (Miss. Ct. App. 2002).

was allowed to act as the State's primary forensic pathologist;[83] (2) that Dr. Hayne, with the State's knowledge, repeatedly misrepresented – under oath – his qualifications to testify as a forensic pathologist;[84] and (3) that Dr. Hayne engaged in extensive forensic fraud, which irreparably tainted his testimony as a forensic pathologist and his findings in this case, including his conclusions about the time of death and the "death mask."[85]

1. Dr. Hayne's Rise to Prominence and His Unethical Arrangement with the State

First, Dr. Hayne and the State repeatedly and systematically failed to disclose his illegal, unethical arrangement with the State which allowed him to act as the *de facto* State Medical Examiner, although he was unqualified to hold that office. This arrangement was significantly more influenced by his desire for personal enrichment than by his professional competence.

In the early 1990s, Mississippi state officials began to implement a plan that allow him to circumvent statutorily mandated public health and safety requirements. By first weakening and then dismantling the Office of State Medical Examiner, the plan was ostensibly designed to "save" the State money by privatizing its autopsy services. In practice, however, the arrangement, whose precise terms have until now remained undisclosed, enriched a single, favored pathologist: Dr. Hayne. This arrangement sacrificed medical and legal rigor, and ultimately, the rights of criminal

[83] *See infra* notes 86-112 and accompanying text.
[84] *See infra* notes 114-48 and accompanying text.
[85] *See infra* notes 150-98 and accompanying text.

defendants, like Osborne, who were wrongfully prosecuted and convicted of serious offenses.

Statutory provisions put into place in the late 1980s required that the state medical examiner be certified by the American Board of Pathology (ABP). Because Dr. Hayne failed his attempt at ABP certification, beginning in 1992, Mississippi Public Safety Commissioner Jim Ingram and Dr. Hayne began efforts to thwart any serious effort to hire a state medical examiner and staff that office, despite the statutory mandate.[86] Under Ingram's plan, which had Dr. Hayne's approval, the bulk of fee-based, autopsy work would be shifted to Dr. Hayne, who was operating in private practice. In order to aid Dr. Hayne, the agreement would ultimately allow him to refer to himself as the "State designated pathologist," even though he was not certified. According to Ingram, this arrangement would save the State approximately $120,000 annually and would permit Dr. Hayne to ramp up his private pathology business.[87] Individual counties – which, under the plan, paid $550 per autopsy[88] – would not have to pay any additional fees, and Dr. Hayne, by virtue of his unfettered ability to conduct six to seven times more autopsies

[86] In point of fact, the State medical examiner's office had been unsettled since the early 1980's. Dr. Faye Spruill had been appointed medical examiner in 1979, but by 1982, after significant controversy during her tenure, the Legislature had ceased allocating funds to the office. After Dr. Spruill left, funding was restored, though not to levels needed to fully fund the office so that it could meet its statutory mandate. John Butch, *Applicants for Medical Examiner Job Tough to Find,* CLARION-LEDGER, Mar. 22, 1999) (attached as Appendix 7); s*ee*, MISS. CODE ANN. §§ 41-61-55 *et seq*. (1986).

[87] Letter from Jim Ingram, Comm'r of Pub. Safety, to Ronald Crowe, Exec. Dir., Miss. Ethics Comm'n (July 2, 1992) (attached as Appendix 8).

[88] *See* MISS. CODE ANN. §41-61-75 (1986).

than any legitimate governing body authorized, would see a windfall: nearly $500,000 in personal income annually.[89]

There were two ethical problems with this arrangement. First, there should have been immediate concern over the astronomical number of autopsies that Dr. Hayne would be conducting each year. According to Ingram himself, Dr. Hayne performed well over 1,200 autopsies in 1991 alone. The guidelines of the National Association of Medical Examiners (NAME), the industry's primary professional organization, indicate that a medical examiner should perform a *maximum* of 250 autopsies a year—less if he's also tasked with administrative duties.[90] The NAME standards are not meant to penalize diligent and hard working pathologists; they are a function of the demonstrable practical certainty that, performing more than approximately 250 autopsies a year will result in a significant number of errors. In short, Dr. Hayne was participating in what the National Association of Medical Examiners (NAME) considers a gross deficiency and serious affront to the "minimum standards for an adequate medicolegal

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[89] *See* JOINT LEGISLATIVE COMMITTEE ON PERFORMANCE EVALUATION AND EXPENDITURE REVIEW, AN INVESTIGATION OF MISSISSIPPI'S MEDICOLEGAL DEATH INVESTIGATION PROCESS, 2008 Regular Sess., at x, 23 (2008), *available at* http://www.peer.state.ms.us/reports/rpt514.pdf (attached as Appendix 1).

[90] OFFICE OF THE MEDICAL EXAMINER, PERFORMANCE AUDIT 13 (Dec. 15, 2011), *available at* http://www.denvergov.org/Portals/741/documents/Audits2011/Medical%20Examiner%20Audit%20Report%2012-15-11.pdf; NAT'L ASS'N OF MED. EXAM'RS, FORENSIC AUTOPSY PERFORMANCE STANDARDS 10 (2011), *available at* http://thename.org/index2.php?option=com_docman&task=doc_view&gid=160&Itemid=26. (attached as Appendix 9).

system."[91] Ingram's request, in effect, was asking for the State's blessing on Dr. Hayne's gross violation of public health policy.

The second reason the State should have had significant concerns about this arrangement was identical to why the State would have to go to such great lengths in the first place to circumvent the requirements for holding the position of State Medical Examiner: Why, for example, could Mississippi not simply hire Dr. Hayne to be the State Medical Examiner? The obvious answer was that Dr. Hayne was categorically unqualified for the position because he was not certified in forensic pathology by the ABP.[92] Certification in forensic pathology from the ABP – the peer-governed association that provides the certification for the subspecialty recognized by the American Medical Association[93] – is a statutory requirement for Mississippi's medical examiner.[94] Dr. Hayne was not certified by the ABP in forensic pathology: he failed the exam, has never been certified by the ABP in

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[91] VINCENT J. DI MAIO & DOMINIC DI MAIO, FORENSIC PATHOLOGY 19 (2nd ed. 2001) (attached as Appendix 10); s*ee also*, NAT'L ASS'N OF MED. EXAM'RS, FORENSIC AUTOPSY PERFORMANCE STANDARDS 10 (2011), *available at* http://thename.org/index2.php?option=com_docman&task=doc_view&gid=160&Itemid=26 (attached as Appendix 9). Standard B4.5 states that "Autopsies shall be performed as follows: . . . the forensic pathologist shall not perform more than 325 autopsies in a year. Recommended maximum number of autopsies is 250 per year." *Id.*

[92] Dr. Hayne has claimed, both under oath on numerous occasions and in response to those who have questioned him about it, that he walked out of the forensic pathology certification exam because the questions insulted his intelligence. That explanation should have strained credulity. As it turns out, it was completely false. The truth was that he was failing every single section of the exam at the point he walked out. *See* Deposition of Dr. Steven Hayne at 255, *Hayne v. Innocence Project*, No. 3:09-CV-218-KS-LRA (S.D. Miss. Apr. 26, 2012) (attached as Appendix 11).

[93] THE AMERICAN BOARD OF PATHOLOGY, http://www.abpath.org/ (last visited June 19, 2012).

[94] *See* MISS. CODE ANN. § 41-61-55 (1986).

forensic pathology, and has repeatedly demonstrated that he lacks the knowledge, skills, and ethical sensibility necessary to be certified by the ABP in forensic pathology.[95]

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[95] In 2007, Mississippi Department of Corrections (MDOC) inmate Randy Cheney began exhibiting signs of sepsis. *See* Complaint at ¶17, *Cheney v. Collier*, No. 4:09CV00111 (N.D. Miss. Oct. 26, 2009). After a couple of weeks of deteriorating health, Cheney was finally transported to Parchman Hospital at the Mississippi State Penitentiary. *Id.* at ¶24. After his condition worsened he was taken to Greenwood Leflore Hospital. *Id.* at ¶26. The day after his arrival he died of septic shock. *Id.* at ¶28.

Dr. Hayne performed the autopsy and determined that Cheney's cause of death was hypertensive heart disease and coronary artery disease. *See* Steven T. Hayne, Final Report of Autopsy, AME# 8-Q5-07 (Aug. 30, 2007) (attached as Appendix 12). He ruled the manner of death to be natural. *Id.* Of critical import in determining cause and manner of death, of course, was Cheney's ongoing complaint about his infection, the length of time that it took him to receive medical care, and the possibility that the medical care he did receive – medication for a rapid heartbeat – was negligent and was a proximate cause of his death. *See* Complaint at ¶¶ 29-51, *Cheney v. Collier*, No. 4:09CV00111 (N.D. Miss. Oct. 26, 2009).

Among the issues central to arriving at an understanding of what led to his death was the condition of his spleen, an organ that is a key part of the immune system and which, if compromised, may increase risk of sepsis. Justin T. Denholm, Penelope A. Jones, Denis W. Spelman, Paul U. Cameron & Ian J Woolley, *Spleen Registry May Help Reduce the Incidence of Overwhelming Postsplenectomy Infection in Victoria*, MED. J. AUST. 192 (1): 49-50 (2010). Dr. Hayne indicated in the autopsy report that Cheney's spleen, "assume[d] its usual left upper quadrant abdominal location, and is noted to weigh 180 grams" – within range of normal for an adult human. Steven T. Hayne, Final Report of Autopsy, AME# 8-Q5-07 (Aug. 30, 2007) (attached as Appendix 12). After removing and examining it, Dr. Hayne noted that the spleen "capsule is intact and no subcapsular contusions are appreciated. The spleen is cross-sectioned and a moderate amount of serosanguineous fluid exudes from the cut surfaces. Examination of the cross-sectioned segments of the spleen reveals acute splenic congestion. The malpighian corpuscles are of normal size and number." *Id.* In short, Dr. Hayne's autopsy report concluded that Cheney's spleen presented with no abnormalities or signs that otherwise might have suggested the presence of or connection to massive sepsis.

The problem was that Cheney had no spleen. It had been surgically removed in its entirety in 2003 in a procedure commonly known as a splenectomy – a condition that Cheney had reported to MDOC medical staff upon his admittance to prison. *See*, N. Miss. Med. Ctr., Dep't of Pathology, Tissue Examination for Randy Cheney (Nov. 28, 2003) (attached as Appendix 13). At the time of surgical removal the spleen weighed 152 grams. *Id.* In the intervening period of time – at least according to Dr. Hayne's findings – it had not only regenerated, but had grown back bigger than before – by close to thirty grams. Dr. Hayne was recently asked in a

Thus, from its inception, the State was fully cognizant of the business arrangement's potential legal and ethical problems. Commissioner Ingram, in fact, sought advice from the Mississippi Ethics Commission. In a newly discovered letter to Ronald Crowe, Executive Director of the Ethics Commission, Commissioner Ingram focused on Dr. Hayne's work and the economic benefits that would flow to the State from the proposed arrangement.[96] "[Dr. Hayne] is willing to accept the position without salary

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deposition to explain his findings: "[W]ell, you know, an accessory spleen can grow in the size of the original spleen. So that would be my interpretation of what occurred." Deposition of Dr. Steven Hayne at 239, *Hayne v. Innocence Project*, No. 3:09-CV-218-KS-LRA (S.D. Miss. Apr. 26, 2012) (attached as Appendix 11). Dr. Hayne offered no additional medical support for his explanation. *Id.*

In a series of other cases, Dr. Hayne has performed autopsies reflecting similar intentional misrepresentations and gross negligence. In the case of an infant drowning in a pool at a Days Inn in the Mississippi Delta, Dr. Hayne removed and weighed two kidneys when the child, as a result of surgical intervention, possessed only one. *See* Affidavit of Tucker Carrington (Sept. 27, 2012) (attached as Appendix 14). In a 1999 case Dr. Hayne testified that the remains of an almost completely skeletonized female showed signs of strangulation—a conclusion other medical examiners say could not be reached unless there was muscle tissue to examine. Radley Balko, *CSI: Mississippi: A Case Study in Expert Testimony Gone Horribly Wrong*, REASON MAGAZINE, (Oct. 8, 2007 3:20 PM), http://reason.com/archives/2007/10/08/csi-mississippi/print. In 1998, Dr. Hayne concluded that a female had expired of natural causes, but, after the state medical examiner in Birmingham performed a second autopsy (the decedent was from Alabama), the examination discovered that Dr. Hayne had not even emptied the woman's pockets and that many of the internal organs that Dr. Hayne had claimed to have examined had not been touched (the woman had died from a blow to the head). *Id.* In 1997, years after he'd performed the autopsies, Dr. Hayne changed his diagnosis – without re-examining the bodies – in two infant deaths from sudden infant death syndrome (SIDS) to asphyxiation after plaintiffs' attorneys who desired his testimony contacted him about a suit they were planning to file against the manufacturer of an infant rocker. *Id.* Finally, in a murder case from southern Mississippi, Dr. Hayne claimed to have removed the ovaries and uterus of the victim and examined them. The problem: the victim was male. *See* Affidavit of Tucker Carrington (Sept. 27, 2012) (attached as Appendix 14).

[96] By then the office had become "a battleground between coroners and private pathologists and those who [saw] the office as a way to improve systemic quality" and overall public health. John Butch, *Applicants for Medical Examiner Job Tough*

because he currently does somewhere near 80% of all autopsies performed by the State," and "[h]e receives $500 for each autopsy he performs by the individual counties for which he provides the service."[97] Commissioner Ingram continued: "[t]he State of Mississippi stands to save approximately $125,000 per year. This translates into a savings in excess of $500,000 over the next four years."[98] Ingram did not disclose the fact that, should the request be approved, an uncertified, grossly unqualified pathologist would be performing an ethically unconscionable number of autopsies – almost every single autopsy in the state – in a market that he and the State had not only gamed in his favor, but also in one where there would be no objective, professional oversight of his work.[99]

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to Find, CLARION-LEDGER, Mar. 22, 1999 (attached as Appendix 7). Those who argued that the office ought to be staffed by a professional and licensed medical examiner pointed to state laws that mandated such a structure, and also to the public health policy supporting it. *See generally*, Associated Press, *Low Pay is Blamed for Vacant Jobs, Backlog at Miss. Crime Lab*, THE MEMPHIS COMMERCIAL APPEAL, July 20, 1998 (attached as Appendix 15); Butch, *supra* note 88.

[97] Letter from Jim Ingram, Comm'r of Pub. Safety, to Ronald Crowe, Exec. Dir., Miss. Ethics Comm'n (July 2, 1992) (attached as Appendix 8).

[98] *Id.*

[99] The two most organized and vocal proponents of the move to decentralize the medical examiner's office were the two who stood to gain the most from it: Dr. Hayne and his forensic odontologist colleague, Dr. Michael West. Each had a vested self-interest in the outcome. For his part, Dr. West was the Forrest County coroner. He was public, but not entirely candid, about his self-interest in the outcome of the medical examiner's office. Publically, Dr. West maintained that the medical examiner's office "needs to be an administrative position . . . . You would save money for the state and be able to regulate the coroners better." Butch, *supra* note 88. In order to expedite matters, Dr. West drafted a petition that enumerated four complaints about the then iteration of the medical examiner's office and its staff: (1) "Failure of the State Medical Examiner to support many of the county Coroners;" (2) "State Medical Examiner assisting defense counsel;" (3) "attempt of the State Medical Examiner to establish a political power base at the expense of the elected Coroners and other elected officials;" and (4) "failure of the State Medical Examiner

Notwithstanding Ingram's material omissions, the Ethics Commission quickly responded to his letter. Its first concern was "a degree of suspicion among the public" that would arise when "a designated pathologist who now conducts a large percentage of state and local autopsies is designated State Medical Examiner" without being properly hired or possessing the statutorily required certification.[100] The Ethics Commission was also concerned about the conflict of interest that would violate the State's Declaration of Public Policy.[101] The Ethics Commission wrote that it had "grave concern . . . as to the practicality and propriety in having a pathologist conducting such a large percentage of the state's autopsies also responsible for the rules and

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to cooperate with the Coroners as mandated by State Law." Petition from Dr. Michael West to Undersigned Coroners (undated) (attached as Appendix 16). Forty-two coroners lent their names to the petition. *Id.* Letter from Dr. Michael West to "Fellow Coroners" (Jan. 25, 1995) (attached as Appendix 17). What Dr. West did not disclose in public discussion was that he was well into the prime of his relationship with Dr. Hayne. The two had by that time collaborated on dozens of cases, many of them previously unsolved, and each stood to leverage their relationship into personal and professional advancement. *See*, Dr. Michael West, CV Abstract (listing "15 years Forensic Advisor Mississippi Mortuary Service / Dr Steve Hayne) (attached as Appendix 18). Dr. West wrote, in part:

> Up to this time [1993], I had been a frequent participant at the morgue, dental ID, bitemarks, Forensic Consultant, Deputy Coroner, Medical Examiner Investigator for Forrest Co MS. The pace quickened in 1994 when I became Coroner/Chief Medical Examiner Investigator. A position I held for the next six years.
>
> After leaving office I accepted a position with Dr Steven Hayne, a Designated State Pathologist. These positions offered me a tremendous opportunity in being able to record, document and photograph, the almost full spectrum of traumatic injuries and the human condition. I say almost, as I will think I've seen everything, then bam, I'm presented with something new.

Letter from Dr. Michael West to Am. Bd. of Forensic Odontology (June 15, 2006) (attached as Appendix 19).

[100] *See* Miss. Ethics Comm'n, Advisory Op. 92-132-E (July 10, 1992) (attached as Appendix 20).

[101] *See id.* (referring, *inter alia*, to MISS. CODE ANN. §§ 25-4-101 *et seq*. (1983)).

regulations under which he and his professional colleagues perform their public duty."[102] It also speculated that the person in the post – Dr. Hayne – would use the position for pecuniary gain in violation of state ethics and public policy, which, in its view, would compromise public health priorities.[103]

Moreover, by making an end-run around the statutory requirements regarding the hiring and staffing of a state medical examiner's office and instead opening the work to a hand-chosen private forensic pathologist, the arrangement flouted the Mississippi law's public health safeguards (which provide for oversight of private, state-designated pathologists and county coroners by a neutral, independent state medical examiner), proper professional oversight through the SME's power to remove coroners and pathologists when necessary, and proper training of county coroners.[104] In short, the arrangement abrogated the precise aims of State Medical Examiner Act and shifted critical financial and ethical incentives away from the state-mandated, structured oversight of the State Medical Examiner and toward a decentralized, unaccountable cabal of elected state coroners.

The State Public Safety Commission ultimately ignored the Ethics Commission's warnings and contracted with Dr. Hayne. In his new capacity

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[102] *Id.*

[103] Though the Commission found no *per se* violation of ethics laws as presented, the Commission reiterated that the person assuming the position could not use that position for pecuniary benefit. *Id.* Specifically, the Commission wrote that "the path he will be forced to follow . . . may be so narrow as to limit his effectiveness." *Id.*

[104] *See generally*, MISS. CODE ANN. §§ 41-61-55 *et seq.* (1972); JOINT LEGISLATIVE COMMITTEE ON PERFORMANCE EVALUATION AND EXPENDITURE REVIEW, AN INVESTIGATION OF MISSISSIPPI'S MEDICOLEGAL DEATH INVESTIGATION PROCESS, 2008 Regular Sess., at 6 (2008) (attached as Appendix 1).

he began doing precisely what the Ethics Commission feared: using his position as a "State designated pathologist" for pecuniary benefit. Notably, the State's arrangement with Dr. Hayne changed who made the choice to hire a pathologist; whereas the State Medical Examiner Act allowed the SME's office to make pathologist-hiring decisions, the arrangement with Dr. Hayne shifted this decision to the discretion of county coroners. Mississippi county coroners are elected officials, and many were friends with Dr. Hayne. Dr. Hayne began to do what any private businessperson would do: solicit and satisfy a customer base. Among other things, Dr. Hayne made political contributions to county coroners and others who could influence the number of dead bodies sent to him for autopsy.[105] In turn, business with the county coroners turned out to be quite lucrative. According to his own records, Dr.

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[105] Q. How about -- were there any donations to coroners around your office?
A.Uh-huh.
Q.Who were they?
A. I -- I can't remember. Jimmy Roberts, because he's local. But the rest of them, I don't even remember their names. I couldn't tell you their names today, of the current ones, because I don't deal with them.
. . .
Q.Did Dr. Hayne make any political donations through his pool that was left in the Investigative Research --
A. That's where it came from.

See Deposition of Cecil McCrory at 90, *Hayne v. Innocence Project*, No. 3:09-CV-218-KS-LRA (S.D. Miss. Apr. 24, 2012) (attached as Appendix 21).

Dr. Hayne donated to coroner campaigns (including Jimmy Roberts), district attorney campaigns (including Forrest Allgood), and other political offices (such as the attorney general). His greatest known contribution is in the amount of $35,000 to Rusty Fortenberry for attorney general. *See id*. In an election cycle, Dr. Hayne's business partner, Cecil McCrory, estimated political contributions in the amount of $40,000. *See id.* at 92.

Hayne performed an average of 1,600 autopsies per year:[106] a significant financial windfall.[107]

Within a few years, Dr. Hayne had dubbed himself the "Chief State Pathologist" – "an honorific which Dr. Hayne insisted on adding" to his contract and that the State allowed.[108] With State approval of the business arrangement and no fear of anyone in an official capacity challenging his mass-autopsy business or the self-serving contract between him and the State, Dr. Hayne then turned the Ethics Commission's reservations – things that should have been viewed as disqualifying or illegal actions – on their head. In Dr. Hayne's hands, the Commission's ethical and professional concerns were transformed into anecdotal evidence of the credibility of his work – the astronomical and unprofessional number of autopsies he was performing, for example, becoming, instead, proof of his professionalism.[109]

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[106] Steven T. Hayne, Number of Autopsies (undated) (attached as Appendix 22).

[107] Over the span of Dr. Hayne's career, counties paid him between $400 to $550 per autopsy. *See* Deposition of Steven Hayne at 110, *Hayne v. Innocence Project*, No. 3:09-CV-218-KS-LRA (S.D. Miss. Apr. 26, 2012) (attached as Appendix 11).

[108] Letter from James W. Younger, Office of General Counsel, Miss. Dep't of Pub. Safety, to Merrida Coxwell, counsel for Steven Hayne (June 27, 2008) (attached as Appendix 23). Mr. Younger also notes that pursuant to the same contract, Dr. Hayne is an independent contractor who holds no state office. *Id.*

[109] The examples are innumerable, but his testimony in *State v. Brown* is representative of Dr. Hayne's general response to questions about his autopsy numbers. Transcript of Record at 761-63, *State v. Brown*, No. 05-428 (Pike Cnty. Circuit Ct. Mar. 26, 2006) (attached as Appendix 24). The prosecutor asks Dr. Hayne about the number of autopsies he has performed, the sole purpose of which is an attempt to establish his credibility in spite of professional norms to the contrary:

> Q. I don't know if you can answer this for the span of 30 years, but, to date, can you state approximately how many postmortem examinations you have conducted?
>
> A. I cannot give you an exact answer, Counselor, but approximately 30 to 35,000.

For example, when questioned by prosecutors about how many autopsies he performed or how he was getting so much work, Dr. Hayne never mentioned that the reason he performed such a high volume of autopsies stemmed from an undisclosed and ethically problematic agreement he had with the State. Nor did he reveal that the numbers themselves so exceeded what any governing agency would approve, or that the quality of his work should be viewed with extreme skepticism.[110] On the rare occasion that a defense attorney challenged Dr. Hayne, he typically claimed that he enjoyed no discrete benefits in his position and that he was similarly situated to other designated pathologists around the State.[111] His heavy workload, he testified, was simply a reflection of the quality of his work.[112]

> Q. Currently, could you give us an average of the number of autopsies you might perform in a given month?
> A. Approximately 150 autopsies, 140 autopsies a month.
> . . .
> Q. Dr. Hayne, have you ever qualified in the courts of Mississippi as an expert in the field of medicine, specializing in forensic pathology?
> A. Yes, Counselor.
> Q. Have you also so qualified in the fields of anatomic pathology and clinical pathology?
> A. Yes, ma'am.
> Q. And of the times that you have qualified, how many times have you actually testified?
> A. In the State of Mississippi, approximately 3,500 times.
> . . .
> Q. Your Honor, at this time . . . the State would tender Dr. Steven Hayne . . . .
> *Id.*

[110] *See supra* note 12 and accompanying text.

[111] In *State v Bennett* for example, Dr. Hayne was challenged concerning the number of autopsies he was performing and whether he would agree that performing in excess of 350 autopsies per year was ill-advised:

Significantly, there is not a single incidence of any State official, prosecutor or otherwise, upholding his or her legal and professional obligation to disclose to defense counsel the nature of Dr. Hayne's *quid pro quo* business relationship with the State.

2. Dr. Hayne's Extensive Fabrications Regarding his Professional Qualifications

Dr. Hayne's business arrangement with the State was not the only information he overtly lied about or concealed. State officials, by conspiring with him to circumvent both the need for a fully-functioning medical

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> I don't agree with that at all . . . I would point out to you several facts, counselor. One, there are some 30 designated pathologists, state pathologists, in the state of Mississippi. We don't solicit any of the work. When they are sent to us, we are mandated by the attorney general to do the work. The coroners and deputy coroners can send autopsies to whomever they choose. And we receive the overwhelming bulk of the work. I think we believe that we do a better job than other people. That's why it is a free and open market for the performance of post-mortem examinations.
>
> If I had been doing a poor quality of work [sic] such as alleged, then I would not be doing any autopsies. But the rule is in the state of Mississippi, if a designated pathologist receives a request from a coroner or deputy coroner, he must perform that autopsy.
>
> There are times I would much prefer not to do them. I also work long, long hours, much more than the average person. I commonly get two, three and four hours sleep a night. I do not require much sleep. I choose to work. That is my free will to do that.

Transcript of Record at 1283-86, *State v. Bennett*, No. 12699 (Rankin Cnty. Circuit Ct. Feb. 5, 2003) (attached as Appendix 25).

[112] Dr. Hayne's disingenuous claims misled more than just fact-finders. In upholding a trial court's decision to admit Dr. Hayne's testimony, this Court recently wrote in *Lima v. State*, 7 So.3d 903, 908 (Miss. 2009), that "Lima claims that Dr. Hayne's testimony was unreliable because he performs many more autopsies annually than the number recommended by the authors of *Forensic Pathology*. However, Dr. Hayne explained that he does not take vacations and works nearly every day of the year, for approximately sixteen hours a day. He explained that performing a large number of autopsies is viewed by some as necessary in order to remain competent in the field."

examiner's office and a statutorily qualified chief medical examiner, not only ignored what they knew or should have known regarding his lack of credentials, but also gave tacit permission to him to continue tarting them up. As a result, in a series of *curricula vitae* and trial testimony over a period of years, Dr. Hayne made a host of claims that amounted to material misrepresentations of his professional qualifications. State prosecutors elicited, and Dr. Hayne readily attested to, this false information in an effort to make his abilities appear superior to pathologists whose opinion might differ from his, or to any governing organization whose guidelines cast aspersion on the integrity of his work. In large measure, trial courts have admitted his testimony and reviewing courts have affirmed it.[113] He has thus defrauded the majority of trial judges and all of the appellate justices in the State of Mississippi.

After careful analysis of voluminous evidence, the conclusions are inescapable: Dr. Hayne's misrepresentations are serial and include matters of central concern to his status as a qualified and credible pathologist. These areas of dishonesty include: (a) false claims about the circumstances surrounding the fact that he failed the American Board of Pathology certification examination in forensic pathology; (b) false claims of board

[113] *See, e.g., Moffett v. State*, 49 So.3d 1073, 1110-11 (Miss. 2010) (holding that although "Dr. Hayne is not certified by a statutorily required board," the ABP, such certification does not apply "to every pathologist."). Relying on earlier decisions this Court confirmed Dr. Hayne's testimony because it had been based on requisite "knowledge, skill, experience, training, or education"); *Lima v. State*, 7 So.3d 903, 907 (Miss. 2009).

certification in forensic pathology; (c) other false claims that accreditation in forensic medicine is the equivalent of board certification; (d) false claims of professional and scholarly activity; and, (e) false claims of educational accomplishments, including in at least one instance under oath, an outright lie about his ABP exam performance and certification.

a. Licensure and Professional Certifications

Dr. Hayne's boldest and most critical falsehood involves his explanation about his lack of a certification in forensic pathology from the American Board of Pathology (ABP). As previously discussed, that certification from the ABP – the field's preeminent peer-governed association[114] – is a statutory requirement for Mississippi's medical examiner post.[115] Although Dr. Hayne has on numerous occasions dismissed the importance of board certification,[116] the ABP has defined the educational and training requirements for the field of forensic pathology and has provided specialty certification since 1959. Further, ABP licensure is a common requirement in most states employing medical examiners and in most hospitals employing forensic pathologists.[117]

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[114] THE AMERICAN BOARD OF PATHOLOGY, http://www.abpath.org/ (last visited June 19, 2012).
[115] *See* MISS. CODE ANN. § 41-61-55(2) (1986).
[116] Transcript of Record at 157, *State v Austin*, No. 2001-KA-0920 (Coahoma Cnty. Circuit Ct. May 22, 2001) (attached as Appendix 26); Transcript of Record at 438, *State v. Fuqua*, 03-0-256WSY (Hinds Cnty. Cir. Ct. 2005) (attached as Appendix 27).
[117] *See generally* W.G. Eckert, *The Forensic Pathology Specialty Certifications*, 9 AM. J. FORENSIC MED. AND PATHOLOGY 85-9 (1988).

Mainly because he lacks the skills or knowledge to pass the ABP forensic pathology examination, Dr. Hayne has long denigrated the State's statutory requirement for ABP certification, as well as the significance of the certification itself. His story – that he walked out of the exam because a question on it was so insulting to his intelligence that he refused to participate – strains credulity. Nevertheless, that was the story that Dr. Hayne proffered whenever anyone asked about his lack of an ABP certification in forensic pathology.[118] His most public rendition of the story (and the one that drew the attention of the ABP itself) occurred soon after his pathology work was exposed for the role it played in the Levon Brooks[119] and Kennedy Brewer[120] exonerations in Noxubee County in 2008. When confronted by the *Clarion Ledger* about his lack of forensic pathology certification from the ABP, Dr. Hayne once again explained that the exam was a useless exercise that insulted his intelligence. According to Dr. Hayne, the exam contained a supposedly offensive, culturally biased question asked about the colors associated with death. As he explained:

> In the Orient, white is associated with death. Green is a color of decomposition, certainly associated with death. Blood is

[118] *See* Deposition of Steven Hayne at 56-57, *Vessel v. Alleman,* No. 99-0307-CI (Warren Cnty. Circuit Ct. June 26, 2003) (attached as Appendix 28); Deposition of Steven Hayne at 48-49, *Bennett v. City of Canton Swimming Pool*, No. C1-96-0176 (Madison Cnty. Circuit Ct. June 2, 2001) (attached as Appendix 29); Transcript of Record at 19, *State v. Townsend*, No. 2000-127-CR (Montgomery Cnty. Circuit Ct. Mar. 20, 2001) (attached as Appendix 30); Transcript of Record at 367-68, *State v. Williams*, No. 2004-048 (Washington Cnty. Circuit Ct. Oct. 18, 2004) (attached as Appendix 31).

[119] *See http://www.innocenceproject.org/Content/Levon_Brooks.php.*

[120] *See http://www.innocenceproject.org/Content/Kennedy_Brewer.php.*

> obviously associated with death. To me, it was just the final absurd question. So I got up, handed my paper to the proctor and said, "I leave, I quit. I'm not going to answer this type of material."[121]

To be clear, Dr. Hayne is not of any ethnic background traditionally associated with, as he puts it, "the Orient."

After the *Clarion-Ledger* reported Dr. Hayne's story, ABP officials contacted the newspaper to refute it. "As the executive director of the American Board of Pathology I was surprised by Dr. Hayne's description of the 'stupid question' (related to colors associated with funerals) on his forensic pathology examination that caused him to walk out of the exam," wrote Dr. Betsy Bennett. "Dr. Hayne took the forensic pathology examination in 1989. I pulled the text of this examination from our files, and there was no question on that examination that was remotely similar to Dr. Hayne's description."[122]

After encountering skepticism over his story, Dr. Hayne contacted the ABP and requested the exam himself. He was told that it was not available.[123] Thereafter, evidently believing that his version could never be definitively disproven, Dr. Hayne continued to lie, characterizing Dr.

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[121] *See* Mitchell, *supra* note 12.
[122] *Id.*
[123] *See* Deposition of Steven Hayne at 246, *Hayne v. Innocence Project*, No. 3:09-CV-218-KS-LRA (S.D. Miss. Apr. 26, 2012) (attached as Appendix 11).

Bennett's rebuttal as "flat wrong"[124] and reiterating that she "doesn't know what she's talking about."[125]

Very recently, pursuant to court order, the ABP produced the oft-discussed test. Nowhere on the test was there any question remotely resembling the one Dr. Hayne swore was on it. When confronted with a copy of the test itself, he finally admitted that, in fact, no such question existed, and when asked, confessed that he could provide "no explanation for that."[126] The ABP's production also revealed an additional fact: At the time Dr. Hayne "walked out" of the ABP exam, he was failing it.[127] And, in at least one newly discovered incident, Dr. Hayne provided additional false testimony about his ABP examinations.

At a civil deposition in Alabama, Dr. Hayne was asked whether he passed the ABP exam the first time he took it and whether he'd ever failed any of his other boards. His answer to the first question was "yes", and "no"

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[124] Interestingly enough, although Dr. Hayne repeatedly insisted upon his version of the story, he was hardly consistent in telling it. Dr. Hayne's version often varied when it came to the colors that were involved in the question, an interesting development given that according to him it was the colors themselves and their cultural significance that held such import. *See* Deposition of Steven Hayne at 267-91, *Hayne v. Innocence Project*, No. 3:09-CV-218-KS-LRA (S.D. Miss. Apr. 26, 2012) (attached as Appendix 11).

[125] *See* Mitchell, *supra* note 12.

[126] *See* Deposition of Steven Hayne at 244-45, *Hayne v. Innocence Project*, No. 3:09-CV-218-KS-LRA (S.D. Miss. Apr. 26, 2012) (attached as Appendix 11).

[127] Dr. Hayne's reported score was 484; 750 was the minimal score required to pass the exam. *Id.* at 255-56. The test indicated that he had answered questions in every section. Dr. Hayne also failed the ABP examination in anatomical and clinical pathology the first time he took it. *Id.* at 305-06.

to the second; both answers are false.[128] When confronted with his false testimony during his deposition in his case against the Innocence Project, Dr. Hayne provided this explanation: He claimed not to have remembered making those false statements and that, when he discovered them – presumably in the deposition transcript – he wrote the judge a letter claiming that there had been a "mistake" by the court reporter.[129] Attorneys for the Innocence Project asked him to produce that letter, and Dr. Hayne said that he would because "he could get it from the judge."[130] To date, Dr. Hayne has not produced the letter; undersigned contacted both the judge (now in private practice) and the court where the matter had been litigated. Neither the judge nor the court had any record of such letter in the case file.[131]

Faced with his inability to meet the ABP's requirements, Dr. Hayne has claimed to be board certified in forensic pathology by a host of other organizations.[132] Most of these claims are likewise false. Dr Hayne has not been certified in forensic pathology by any organization since 1997. After failing the ABP exam in forensic pathology in 1989,[133] Dr. Hayne simply went

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[128] *See* Deposition of Steven Hayne at 84-5, *Hand v. Fabianke*, No. 03-234 (Franklin Cnty, AL, Circ. Ct., May 14, 2004) (attached as Appendix 32).
[129] Deposition of Steven Hayne at 303, *Hayne v. Innocence Project*, No. 3:09-CV-218-KS-LRA (S.D. Miss. Apr. 26, 2012) (attached as Appendix 11).
[130] *Id.* at 304.
[131] Affidavit of William M. McIntosh (Oct. 17, 2012) (attached as Appendix 33).
[132] It is a well-known and professionally accepted fact that legitimate medical board certification in the United States comes from the American Board of Medical Specialties (ABMS), which has 24 affiliate boards, including the ABP. When doctors claim to be "board certified" it is commonly understood that their claim refers to the ABMS's oversight. Mitchell, *supra* note 12.
[133] *See* Deposition of Steven Hayne at 253-54, *Hayne v. Innocence Project*, No. 3:09-CV-218-KS-LRA (S.D. Miss. Apr. 26, 2012) (attached as Appendix 10).

out and acquired bogus *bona fides* from organizations that sounded to laymen like legitimate bodies, but, in reality, often required nothing more for membership than an annual subscription cost.[134]

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[134] Among these was the is a now-defunct "specialty board" of the American Academy of Neurological Orthopedic Surgeons (AANOS); the American Board of Forensic Pathology ceased to exist in 1995. Letter from Nick Rebel, Executive Director of the Am. Academy of Neurological and Orthopedic Surgeons, to Jim Lappan (May 18, 2010) (attached as Appendix 34); Mitchell, *supra* note 12. Furthermore, the ABFP has never been recognized as a legitimate certifying organization, Letter from Barbara Schneidman, Associate Vice President of the American Board of Medical Specialties, to Emily W. Ward, Assistant Professor of Pathology (June 18, 1996) ("The American Board of Forensic Pathology is not recognized by the American Board of Medical Specialties (ABMS and is not authorized to provide certification.") (attached as Appendix 35); Mitchell, *supra* note 12; the only legitimate certifying organization for forensic Pathology is the American Board of Pathologists, an organization that Dr. Hayne is most decidedly not a member of. *See supra* notes 120-34 and accompanying text. Moreover, AANOS requires re-certification of its members every five years, and, according to its executive director, "re-certification [by AANOS has] . . . not [been] possible in Boards such as Forensic Pathology" since 1996. Mitchell, *supra* note 12; Letter from Nick Rebel, Executive Director of the Am. Academy of Neurological and Orthopedic Surgeons, to Jim Lappan (May 18, 2010) (attached as Appendix 34). Dr. Hayne joined the ABFP in 1992. Thus, because Dr. Hayne was certified on June 26, 1992 by an organization that requires re-certification every five years and that no longer supports the ABFP, the fact is that Dr. Hayne's APFB certification in forensic pathology, for whatever it was worth, expired on June 27, 1997; he has not been certified – in any way let alone by the ABFP – in forensic pathology for the past fifteen years. *See* Letter From Nick Rebel, Executive Director of the Am. Academy of Neurological and Orthopedic Surgeons, to Jim Lappan (Aug. 17, 2010) (attached as Appendix 36).

Dr. Hayne nevertheless still claims to be a board certified forensic pathologist. Dr. Hayne is fully aware of the misrepresentation. In a 2001 deposition, Dr. Hayne admitted that he knew that the AANOS no longer offered diplomas and certificates in forensic pathology, but he continued to list the qualification on his CV and to testify about it in criminal trials. *See* deposition of Steven Hayne at 24-25, *Lewis v. Brown*, No. 99-0476 (Sunflower Cnty. Circuit Ct. Aug. 23, 2001) (attached Appendix 37). He also frequently testified that he was certified by the ABFP – the clear import being that this organization (rather than the ABP) was the default governing body for forensic pathologists. The fact of the matter was that he was no longer certified in forensic pathology at all.

Dr. Hayne also represents that he is board certified by referring to memberships in professional organizations that issue certificates but that are not in fact "board certifying" organizations as that term is commonly understood. For example, Dr. Hayne has continually misrepresented his membership with the American College of Forensic Examiners International (ACFEI) as being the

b. Dr. Hayne's Curricula Vitae

In conjunction with his various falsehoods about his licensure and board certifications, Dr. Hayne hawked misinformation about other professional accomplishments contained in various *curricula vitae* that he has disseminated over time. Dr. Hayne's CV[135] has included scholarly publications in which he was not included in the publication as a listed author,[136] as well as presentations in which he did not, in fact, present the material.[137]

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equivalent of board certification in forensic medicine. In reality, Dr. Hayne is a member of the American Board of Forensic Medicine – an *advisory*, not certifying, board under the ACFEI. Leah Bartos, *No Forensic Background? No Problem*, FRONTLINE/PROPUBLICA (Apr. 17, 2012 11:30 AM), http://www.propublica.org/article/no-forensic-background-no-problem (attached as Appendix 38). Dr. Hayne was "grandfathered" into ACFEI's Fellow designation on September 15, 1997, based on his "diplomate" status: three years of ACFEI service combined with professional achievement. Am. College of Forensic Examiners Int'l, Fellow Application, *available* at http://www.acfei.com/diplomate_fellow/. Dr. Hayne cites his "fellow" designation as proof he was board certified in forensic medicine and frequently testifies he is board certified in forensic medicine by the ACFEI. *See,* Letter from Steven Hayne to Michael Lanford, Miss. Att'y Gen. (May 6, 2010) (attached as Appendix 39); *see also*, Transcript of Record at 760-63, *State v. Brown*, No. 05-428 (Pike Cnty. Circuit Ct. Mar. 26, 2006) (attached as Appendix 24). However, as the editor-in-chief of ACFEI's journal, *The Forensic Examiner*, has noted, the ACFEI Fellow designation is "different from being certified . . . One shows general professional accomplishment while the other shows that standards were met relating to specific knowledge in a certain field." Letter from John Lechliter, Editor in Chief of THE FORENSIC EXAMINER, to Radley Balko, (Mar. 17, 2008) (attached as Appendix 40). Because ACFEI fellow designation and certification communicate different aspects of a professional background, Dr. Hayne's claim that he is board certified in forensic medicine based on his ACFEI Fellow designation is also false.

[135] Steven T. Hayne, Curriculum Vitae (Mar. 13, 2001) (attached as Appendix 41).

[136] Dr. Hayne fraudulently included the following publications on his CV, omitting listed authors:

His claims about his presentations are particularly suspect given that many of them involved his mid-1990s collaboration with forensic odontologist Dr. Michael West. When confronted with his claims that he was a presenter at an American Academy of Forensic Science conference, for example, Dr. Hayne admitted that he had not actually been at the presentation but defended himself by testifying that "if you write the information, that's a presentation. It's not an article. So, therefore, you're entitled credit for it."[138]

In perhaps the most egregious example of trumping up his CV, Dr. Hayne simply plagiarized an entire series of presentations and publications

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1. R.E. Barsley, M.H. West, & J. Frair, *Forensic Photography. Ultraviolet Imaging of Wounds on Skin*, AM. J. FORENSIC MED. PATHOL. 11 (4):300-8 (1990).
2. M.H. West, R.E. Barsley, J. Frair , & M.D. Seal, *The Use of Human Skin in the Fabrication of a Bite Mark Template: Two Case Reports*, J FORENSIC SCI. 35 (6): 1477-85 (1990).
3. M.H. West & R.E. Barsley, *First Bite Mark Convictions in Mississippi*, MISS. DENT. ASSOC. J 46 (4):7 (1990). Steven T. Hayne, Curriculum Vitae (Mar. 13, 2001).
4. M. West, R.E. Barsley, J. Frair, W. Stewart, *Ultraviolet Radiation and Its Role in Wound Pattern Documentation*, J FORENSIC SCI. 37 (6): 1466-79 (1992).

Steven T. Hayne, Curriculum Vitae (Mar. 13, 2001) (attached as Appendix 41).

[137] Dr. Hayne included the following presentations on his CV, omitting listed presenters:

1. R.E. Barsley, Presentation at the 42nd Annual Meeting of the Am. Academy of Forensic Scientists: Short UV Photography: Skin as a Substrate for Bitemark Comparisons (Feb. 23, 1990).
2. M. Cimrmancic Presentation at the 43rd Annual Meeting Am. Academy of Forensic Scientists: Comparison of Monochromatic Illumination with Standard Photographic Filters for Enhancement of Bitemark Injuries. (Feb. 22, 1991).

Steven T. Hayne, Curriculum Vitae (Mar. 13, 2001) (attached as Appendix 41).

[138] *See* Deposition of Steven Hayne at 22, *Bennett v. City of Canton Swimming Pool*, No. C1-96-0176 (Madison Cnty. Circuit Ct. June 2, 2001).

that Dr. West presented and authored. A comparison of Dr. Hayne's and Dr. West's CVs indicates that beginning in 1988, when the two started working frequently together, Dr. Hayne simply copied large portions of Dr. West's CV *in toto.*[139] All of Dr. Hayne's purported "presentations" after 1988 are derived verbatim from Dr. West's CV; all of Dr. Hayne's "other publications" after 1989 are likewise derivative.[140]

Dr. Hayne also exaggerated his educational achievements in order to burnish his credibility and mislead fact-finders about his supposed preternatural abilities to assume such an incredible workload without compromising quality.[141] For example, in a recent Washington County

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[139] *Compare* Steven T. Hayne, Curriculum Vitae (Mar. 13, 2001) (attached as Appendix 41); *with* Michael West, Curriculum Vitae (Mar. 30, 2006) (attached as Appendix 42).

[140] *Compare* Steven T. Hayne, Curriculum Vitae (Mar. 13, 2001) (attached as Appendix 41); *with* Michael West, Curriculum Vitae (Mar. 30, 2006) (attached as Appendix 42). None other than Dr. West has risen to Dr. Hayne's defense in this matter. In a 2001 affidavit, Dr. West explained that Dr. Hayne's CV is "completely accurate," and that any omission of Dr. Hayne's name from the cited works or presentations is due to "a) a mistake on my [West's] part, b) a mistake on the publishing organization's part in failing to list all authors or participants, or c) that at the time of the particular article or presentation Dr. Hayne simply did not desire the recognition." Michael H. West Aff. at 1:3 (June 28, 2001) (attached as Appendix 43).

[141] Q. Let me ask you if you agree with this statement. "Excessive caseload is a problem in many medical legal offices. The recommended annual caseload for a forensic pathologist without administrative responsibilities is 250 autopsies. On a short-time basis, one can perform autopsies at an annual rate of 300, perhaps 325. By the time caseload exceeds 350 autopsies, mistakes are made and the quality of the autopsy is sacrificed." Would you agree or disagree with that statement?
A. I think it depends upon the individual, Counselor. I might point out that I require very little sleep. I normally sleep no more than two to three hours a day. I also work seven days a week, not five days a week. I don't take holidays. I don't take vacations.

prosecution, when a defense attorney challenged Dr. Hayne's ability to perform so many autopsies without making mistakes, Dr. Hayne responded, under oath, that:

> when I was an undergraduate, I carried up to 39 units at a time maintaining a straight A average. So I work at a much more efficient level and much harder than most people. I was blessed with that and cursed with that, but that's what I carry with me, and I do work very, very hard.[142]

Newly discovered evidence of Dr. Hayne's undergraduate record – evidence that was gained collaterally to formal federal discovery – completely and utterly discredits his claims, both about his former performance as a student and, consistent with his puffery, his purported abilities as a pathologist. He was hardly the 4.0 student he pretended to be, and his hours carried fell far short of the workload he bragged about.[143]

Dr. Hayne also frequently lied under oath about academic awards that he had received. The clear import of the questions and answers between Dr. Hayne and prosecutors when asked about them was to suggest that the awards were for his medical achievements. None were. No university records reflect that Dr. Hayne received any academic awards or honors during

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Transcript of Record at 375, *State v. Williams*, No. 2004-048 (Washington Cnty. Circuit. Ct. Oct. 18, 2004) (attached as Appendix 31).

[142] *Id.*

[143] *See* Appendix 44, which undersigned, out of an abundance of caution, and not because any rule of law or professional conduct requires it, have sought leave to file under seal. *See, e.g.*, 20 U.S.C. 1232g(a)(6); 34 C.F.R. § 99.3; *Norwood v. Slammons*, 788 F.Supp.2d 1020, 1026 (W.D. Ark. 1991); *Tarka v. Franklin*, 891 F.2d 102, 105 (5th Cir. 1989); *In re Kagan*, 351 F.3d 1157 (D.C. Ct. App. 2003).

medical school.[144] Although Dr. Hayne's *undergraduate* transcripts reflect that he was a member of *Phi Kappa Phi* and *Phi Eta Sigma* (an honorary fraternity for college freshmen) honor societies, this has no reflection on his abilities as a pathologist. Moreover, when prosecutors asked at trials about his academic honors and achievements – the clear thrust of which was to bolster his testimony as the State's forensic excerpt – Dr. Hayne sometimes mentioned his membership with Blue Key, which is merely an undergraduate organization honoring leadership,[145] and frequently mentioned other awards similarly unconnected to his medical training or education.[146]

Like his self-interested business with the State, neither Dr. Hayne nor any other State official ever disclosed the falsity of these claims. Worse, Dr. Hayne was able to make them with impunity because the State had knowingly abdicated its responsibility to abide by statutory requirements[147]

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[144] Letter from Suzanne M.W. Anderson, Univ. Registrar, Univ. of N.D., to K.C. Meckfessel, Staff Att'y for the Innocence Project (Feb. 13, 2012) (attached as Appendix 45).

[145] Blue Key Honor Society, Criteria for Membership in Blue Key, http://www.bluekey.org/member.html.

[146] Q. Have you received any honors or awards, Doctor?
A. Got an M.D. degree.
Q. That's the first honor. I count my high school diploma as one, too.
A. I was Phi Kappa Phi, Phi Eta Sigma, Blue Key.
Q. Are these honors assigned in any particular area of study? For instance, I'm particularly interested in the study of medicine.
A. These are all academic awards.
Deposition of Steven Hayne at 10-11, *Vessel v. Alleman*, No. 99-0307-CI (Warren Cnty. Circuit Ct. June 26, 2003) (attached as Appendix 28).

[147] Pursuant to the Mississippi Medical Examiner's Act, the State Medical Examiner's Office regulates the appointment and retention of designated state pathologists. Miss. Code Ann. § 41-61-65(1) (1972). A Designated Pathologist Review Committee, with the State Medical Examiner serving as chairman, is required to review selected examples of autopsies to "recommend selection, retention, probation,

that would have ensured competence and professionalism in its designated pathologists. Statutory mandate required the state medical examiner (had there been one) to perform due diligence by vetting any pathologist hired to perform autopsies on behalf of the State. Even minimal compliance with due diligence duty would have exposed Dr. Hayne as a fraud.[148] Instead, the State inexcusably settled into the widespread policy and practice of suppressing the nature of their agreement with Dr. Hayne. As a consequence, Dr. Hayne presented demonstrably false testimony regarding his qualifications, and introduced forensic fraud as evidence in criminal trials, both with the State's acquiescence and with impunity. There is little dispute; the State's knowing malfeasance was reprehensible, illegal, and entitles Osborne to post-conviction relief.

3. Forensic Fraud: Dr. Hayne's Creation of a Market for Pseudo-Scientific Fraudulent Testimony

Freed from worry about official oversight, Dr. Hayne also carved out various areas of pseudo-forensic sub-specialties, with which he supported the prosecution's theory. He would provide testimony in the form of medical terms of art that sounded like good, reliable forensic science, but, in reality,

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or dismissal of pathologists from the designated list." JOINT LEGISLATIVE COMMITTEE ON PERFORMANCE EVALUATION AND EXPENDITURE REVIEW, AN INVESTIGATION OF MISSISSIPPI'S MEDICOLEGAL DEATH INVESTIGATION PROCESS, 2008 Regular Sess., at vii (2008) (attached as Appendix 1). The review committee is required to maintain files on each designated pathologist, including audits of post-mortem examinations and other information. *Id.* at 5.

[148] In fact, it was not until May of 2008, after information about the *Brooks* and *Brewer* cases was available, as well as a complaint about Dr. Hayne to the Mississippi Board of Medical Licensure, that action was taken, though still not by any entity in the State. *See supra* note 12 and accompanying text.

had no bases or foundations in any recognized field. When the State's theory of guilt lacked solid evidentiary support, the State would turn to Dr. Hayne. He would oblige with opinions utterly foreign to any realm of forensic pathology. Although totally bogus, his brand of testimony appeared to be connected to areas about which forensic pathologists should have knowledge and expertise – blood-spatter or time of death determinations, for example – and was steeped in medicolegal lingo that helped keep up the appearance. As a result, trial and appellate courts admitted and affirmed his testimony.[149]

A close review of Dr. Hayne's testimony in these cases over time – an opportunity until now unavailable because of an inability to access information such as autopsy reports and other case-related materials that state officials refused to disclose – reveals something else: that in a series of cases, and on behalf of the party using him as a witness – almost always state prosecutors in criminal prosecutions – Dr. Hayne provided critical testimony that was decidedly unscientific, directly contrary to his testimony in previous cases in the same subject matter area, and diametrically opposed to the consensus amongst real forensic pathologists. The areas in which Dr. Hayne offered his services and fraudulently claimed specialized expertise

[149] The only reported instance of an appellate court reversing a conviction based on Dr. Hayne's improper testimony is this court's opinion in *Edmonds v. State*, 955 So.2d 787, 791-92 (Miss. 2007). Appellate courts have found Dr. Hayne's testimony unreliable and affirmed a trial court's decision to exclude his testimony as outside his field of expertise. *See Palmer v. Volkswagen of Am., Inc.*, 905 So.2d 564, 587-88 (Miss. Ct. App. 2003), *overruled in part on other grounds by*, *Palmer v. Volkswagen of Am., Inc.*, 904 So.2d 1077 (Miss. 2005).

include: (a) wound pattern analysis; (b) bite mark analysis;[150] (c) blood pattern analysis;[151] (d) time of death;[152] and (e) various ballistics sub-

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[150] Despite the alarming rate of wrongful convictions based on bite mark matching, and the wholesale lack of any scientific basis for the pseudo-science, Dr. Hayne and Dr. West together developed the most notorious use of the bogus field ever documented in any jurisdiction. Typically, Dr. Hayne would note markings on a decedent's body as "pattern injuries" – a trait suggestive of bite marks. *See, e.g.,* Transcript of Record at 682-708, *State v. Brooks*, No. 5937 (Noxubee Cnty. Circuit Ct. 1992) (attached as Appendix 46). He would then request the services of his colleague Dr. West, who would offer his bite mark matching expertise and astonishingly low error rate – "something less than my savior Jesus Christ." Radley Balko, "*Indeed, and Without a Doubt"*, REASON MAGAZINE (Aug. 2, 2007, 7:42 AM), *available at* http://reason.com/archives/2007/08/02/indeed-and-without-a-doubt. Hayne continued in this practice notwithstanding the fact that Dr. West had been very vocally removed from odontological professional organizations. *See* AMERICAN ASSOCIATION OF FORENSIC SCIENTISTS, ETHICS COMMITTEE, Case No. 143, ETHICS COMMITTEE REPORT (1994) (attached as Appendix 47); AMERICAN BOARD OF FORENSIC ODONTOLOGY, ETHICS COMMITTEE, Complaint No. 93-B, ETHICS COMMITTEE REPORT (1994) (attached as Appendix 48).

Dr. West and Dr. Hayne have now both come to the conclusion that bite mark evidence was not all that they had touted it to be. Each has, in fact, disavowed the field's usefulness as a forensic identification method. *See* Deposition of Dr. Steven Hayne at 172-74, *Hayne v. Innocence Project*, No 3:09-CV-218-KS-LRA (S.D. Miss. Apr. 26, 2012) (attached as Exhibit 11). In a February 11, 2012, deposition, Dr. West testified as follows about bite marks:

> A. I no longer believe in bite mark analysis. I don't think it should be used in court. I think you should use DNA, throw bite marks out.
>
> . . .
>
> Q. Are you withdrawing your testimony about the bite mark identification in this case?
>
> A. When I testified in this case [in 2001], I believed in the uniqueness of human bite marks. I no longer believe in that. And if I was asked to testify in this case again, I would say I don't believe it's a system that's reliable enough to be used in court.

Deposition of Michael West at 37, *Stubbs v. State*, No. 2011-387-LS-LT (Lincoln Cnty. Circuit Ct. Feb. 11, 2012) (attached as Exhibit 49).

When asked recently how long he had been aware of Dr. West's own lack of confidence in the area, Dr. Hayne answered, "Wow, several years ago," and added that it had not come as a surprise. *See* Deposition of Dr. Steven Hayne at 172-73, *Hayne v. Innocence Project*, No 3:09-CV-218-KS-LRA (S.D. Miss. Apr. 26, 2012) (attached as Appendix 11). After explaining why he had changed his mind, he mentioned the *Brooks* and *Brewer* cases, among other incidents. *Id.* at 173. Then, attorneys asked Dr. Hayne whether he was concerned about the outcome of cases that he and Dr. West had worked on together. *Id.* at 173-74. Dr. Hayne responded, "I think there is a concern, yes . . . I would be very reluctant to call in a forensic

odontologist to do a bite mark comparison study." *Id*.

Faced with an error that completely negated the foundations of their work in this area, Dr. Hayne and Dr. West had a choice: they could either revisit their prior findings, which had led to the convictions of dozens of individuals, or say nothing. Among other individuals, their decision would have affected Brewer, under a death sentence and whose life literally hung in the balance, and Brooks, who was then finishing his first decade in prison. Any legitimate doctor would have abided by the Hippocratic oath; any faithful scientist would have moved quickly to notify those affected by the error and then revisited the bases of his earlier findings; and any decent human being would have valued the lives of innocent men and women over his professional reputation. Tellingly, Dr. Hayne and Dr. West remained silent. They made no effort whatsoever to alert anyone to their change of opinion. They also never bothered to alert anyone to their errors. The fact that Kennedy Brewer and Eddie Lee Howard, who is currently on death row, were slated for execution based on the doctors' inculpatory bite mark testimony or that other wrongfully convicted defendants, like Levon Brooks, were serving life sentences, was evidently of no moment to them.

[151] As a recent National Academy of Science report stated:

> [I]nterpreting and integrating bloodstain patterns into a reconstruction requires, at a minimum: an appropriate scientific education; knowledge of the terminology employed (e.g., angle of impact, arterial spurting, back spatter, castoff pattern); an understanding of the limitations of the measurement tools used to make bloodstain pattern measurements (e.g., calculators, software, lasers, protractors); an understanding of applied mathematics and the use of significant figures; an understanding of the physics of fluid transfer.

COMMITTEE ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCES COMMUNITY, NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 177 (2009) (attached as Appendix 50). Dr. Hayne's numerous CVs list no training or expertise in the area whatsoever. *See generally*, Steven T. Hayne, Curriculum Vitae (Mar. 13, 2001) (attached as Appendix 41). Nonetheless, he testified in dozens of cases – providing critical evidence about bloodstain patterns that purported to support the State's prosecution theory. *See, e.g., Wooten v. State*, 811 So.2d 355 (Miss. Ct. App. 2001). Like the derelict treatment of the admissibility of bite mark testimony in Mississippi trial courts, Mississippi reviewing courts failed to subject Dr. Hayne's claims about his blood spatter opinions to any serious examination under prevailing law or rules of evidence, in part because it seemed to fall within the purview of what board certified and qualified – never mind that Hayne lacked both – forensic pathologists testified about. *See, e.g., id.*

[152] *See infra* Part *b*.

specialties.[153] An understanding of these cases makes clear the breadth and depth of Dr. Hayne's fraud and the State's reliance upon it in cases like this one. There is, of course, no record of any State official, including prosecutors in this or any other case, disclosing transcripts or other information pursuant to *Brady v. Maryland,* 373 U.S. 83 (1963), or any other legal, professional or ethical obligation, of Dr. Hayne's pattern and practice of perjuring himself and deceiving the courts in these areas.

Dr. Hayne engaged in this pattern and practice of forensic fraud in Osborne's case. At trial, Dr. Hayne provided testimony crucial to the State's theory of the case concerning wound pattern analysis and time of death.

a. Fraudulent Wound Pattern Analysis Testimony

In theory, wound-pattern analysis attempts "to identify a specific source of the impression" of a wound by identifying "class and individual characteristics" belonging to a piece of evidence and comparing it to an

[153] Firearm examination is often crucial to a criminal investigation involving gunshot wounds. In addition to the analysis of marks on cartridges and bullets, "firearms examination also includes the determination of the firing distance, the operability of a weapon, and sometimes the analysis of primer residue to determine whether someone recently handled a weapon." COMMITTEE ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCES COMMUNITY & THE NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 5-18 (2009) (attached as Appendix 50). Ballistics experts are trained personnel responsible for conducting firearm examinations and specializing in firearm ballistics – defined as "the science of the motion of projectiles." *Id.* Despite the fact that Dr. Hayne was not a ballistics expert, he offered ballistics expert-specific testimony in numerous trials on numerous sub-topics of the study of ballistics throughout the State. *See, e.g., State v. Brown*, 33 So.3d 1134 (Miss. Ct. App. 2009); Steven T. Hayne, Curriculum Vitae (Mar. 13, 2001) (attached as Appendix 41).

impression found on a person's body.[154] Although Dr. Hayne possesses no credentials reflecting even the most basic knowledge or training in this highly technical forensic field,[155] he nevertheless forged an active, successful, and high-profile boutique practice by testifying frequently about wound pattern analyses. No object, even ones that had never been identified with any precision as to class or model, seemed beyond his ability to match to the marks that he purportedly discovered during autopsies or other crime scene investigations.

Despite the lack of analytical data supporting the bases for the comparison of marks made by even mass-produced items (e.g., shoes or tires). Dr. Hayne has managed to match a variety of mass-produced objects to a multiplicity of wound types.[156] His findings and testimony about them implicated defendants by linking an object owned or otherwise connected to them to a respective victim's wounds.[157] In Mississippi criminal prosecutions, Dr. Hayne has dubiously determined that each of the following objects was

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[154] COMMITTEE ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCES COMMUNITY & THE NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 515 (2009) (citing Marrku Liukkonen, Heikki Majamaa, & JohannaVirtanen, *The Role and Duties of the Shoeprint/Toolmark Examiner in Forensic Laboratories*, 9 FORENSIC SCIENCE INT'L 82, 99-108 (1996)). (attached as Appendix 50).

[155] *See generally*, Steven T. Hayne, Curriculum Vitae (Mar. 13, 2001) (attached as Appendix 41).

[156] *See, e.g., Kelly v. State*, 735 So.2d 1071, 1079 (Miss. Ct. App. 1999) ("Dr. Hayne's expert pattern-injury testimony created a match between the pattern-injury marks found on both Tina's and Erica's faces and the patterns found on the face of an Iron Man watch believed to have been worn by Kelly at the time of Tina and Erica's death.").

[157] *See e.g., id.*

likely the source of wounds found on victims' bodies: a wristwatch,[158] bolt cutters,[159] an aluminum baseball bat,[160] a chunk of concrete,[161] a kaiser blade,[162] a hoe handle,[163] a broom handle,[164] and, in the instant case – the only of its kind ever documented[165] – a defendant's bare hand vis-à-vis a "death mask."

Osborne was tried and convicted of suffocating his girlfriend's five-year-old son, Charlie.[166] Although investigators initially believed that Charlie died from a drug overdose,[167] Dr. Hayne conducted the autopsy and determined the cause of death to be suffocation.[168] Law enforcement interviewed Osborne, along with his girlfriend, his friend, and the victim's three-year-old brother, but no suspect was identified.[169] Several months later – based on a seven-minute-long interview with a three-year-old – Dr. Hayne exhumed Charlie's body.[170] A forensic odontologist (apparently, not Dr. West) created a cast of the face in order for Dr. Hayne to determine the

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[158] *Id.*
[159] *Duplantis v. State*, 708 So.2d 1327 (Miss. 1998).
[160] *Cooper v. State*, 76 So.3d 749, 752 (Miss. Ct. App. 2011).
[161] *Walters v. State*, 720 So.2d 856, 860 (Miss. 1998).
[162] *Sanders v. State*, 801 So.2d 694 (Miss. 2001).
[163] *Id.*
[164] *Ware v. State*, 914 So.2d 751 (Miss. Ct. App. 2001).
[165] *See infra* note 243 and accompanying text.
[166] Transcript of Record at 556, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 7, 2004) (attached as Appendix 5).
[167] Transcript of Record at 206, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 5, 2004) (attached as Appendix 5).
[168] Transcript of Record at 473-74, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 7, 2004) (attached as Appendix 5).
[169] Transcript of Record at 351, 361-62, 365, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 6, 2004) (attached as Appendix 5).
[170] Transcript of Record at 12-13, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Dec. 1, 2003) (attached as Appendix 5).

approximate size of the hand that inflicted the injuries.[171] Dr. Hayne marked the sites of injury that corresponded with his previous marks from his autopsy diagram on the plaster cast.[172] The prosecution introduced the resulting "death mask" into evidence.[173]

At trial Dr. Hayne testified that the boy was suffocated and that his injuries were consistent with an adult person having covered the child's nose and mouth with a hand:[174] "It would be consistent with a person placing their hand over the child's face, and the injuries located to the right side of the head would be consistent in part with fingernail injuries to the child's right side of the face."[175] Dr. Hayne also testified that the "death mask" demonstrated that a "large hand," which would "favor a male's hand," caused the child's injuries.[176] The prosecution characterized this "opinion" as convincing evidence of Osborne's guilt.[177] It was an essential component of the State's theory, without which the State could not have won a conviction.

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[171] Transcript of Record at 474, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 7, 2004) (attached as Appendix 5).
[172] *Id.* Dr. Hayne testified that the injuries he saw on child from initial autopsy were still apparent but much less distinct and more difficult to visualize directly at the exhumation. *Id.* at 491. He explained he could not place markings on the death mask at the time—"[it] takes time to cure the death mask before you pull the mold off." *Id.*
[173] *Id.* at 476.
[174] *Id.* at 473-74.
[175] *Id.*
[176] *Id.* at 477, 488-89. Dr. Hayne later testified on cross-examination that the injuries on the death mask were consistent with a male hand but could have been inflicted by a larger female hand. *Id.* at 488.
[177] In his closing argument the prosecutor stated: "The hand that was used, according to Dr. Hayne, was a large hand; it was a male hand." Transcript of Record at 532, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 7, 2004) (attached as Appendix 5).

b. Dr. Hayne's Fraudulent and Contradictory Testimony Concerning the Time of Death

Determining time of death can be critically important in criminal cases, particularly when law enforcement is trying to assess suspects' alibis. It is also true, though, that "all methods now in use to determine time of death are to a degree unreliable and inaccurate."[178] In fact, the "longer the postmortem interval . . . the less precise the estimate," and all factors used in determining time of death have significant shortcomings.[179]

Dr. Hayne himself sometimes iterated these commonly accepted forensic truisms. For example, in *Baldwin*,[180] when asked about time of death, Dr. Hayne paraphrased the leading treatise in the field, testifying that any "attempt to determine the time of death is essentially a leap into darkness."[181] More specifically, Dr. Hayne continued, "[pathology] cannot do that . . . [O]ne cannot rely on a single test or even a compilation of tests to

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[178] DI MAIO & DI MAIO, *supra* note 91, at 21 (attached as Appendix 10).

[179] Examples of common methods used to determine time of death include: *livor mortis*, *rigor mortis*, body temperature, degree of decomposition, vitreous analysis, gastric examination, and others. *Id.*

[180] *See Baldwin v. State*, 784 So.2d 148 (Miss. 2001).

[181] Transcript of Record at 916, *State v. Baldwin*, No. 96-672-CR1 (Lowndes Cnty. Circuit Ct. March 24, 1999) (attached as Appendix 51). *Id.* at 921. In *Baldwin*, the defendant presented an alibi, but it "prove[d] to be of no help to him . . . [because w]hile certain witnesses did testify to Baldwin's whereabouts on the night in question, no one was able to account for him between approximately 12:45 a.m. and 5:00 a.m. All testimony presented in furtherance of the State's theory indicates that the murder occurred at some point within that time frame." *Baldwin*, 784 So.2d at 165.

give anything other than an estimate. One cannot give an exact time. If one does, one does not know the science."[182]

Likewise, in *Brooks*,[183] Dr. Hayne said that forensic television shows claiming that someone died at "x hour" were "almost laughable."[184] "Doctor," the prosecutor reiterated, "when the pathologist sits up in some show like *Murder She Wrote* and says that the victim dies at nine seventeen on the evening of – that is literally just TV garbage, is that correct?" Dr. Hayne agreed.[185]

On the other hand, there are cases like William Ray Hughes',[186] where Hughes's defense was an alibi, for which he had substantial evidence except for a small window of time where his employment time records did not account for his whereabouts.[187] According to the State, this was the window of time during which Hughes abducted and murdered the victim.[188] The State relied on Dr. Hayne to advance this proposition. According to Dr. Hayne's autopsy report, fixing a fairly precise time of death was possible because:

> well-developed *rigor mortis*[189] [was] present and noted to involve the jaw, neck, back, legs, arms, chest, and abdomen. Fixed

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[182] Transcript of Record at 921, *State v. Baldwin*, No. 96-672-CR1 (Lowndes Cnty., Circuit Ct. March 24, 1999) (attached as Appendix 51).
[183] *See Brooks v. State,* 748 So.2d 736 (Miss. 1999).
[184] Transcript of Record at 705, *State v. Brooks*, No. 5937 (Noxubee Cnty. Circuit Ct. Jan. 15, 1992) (attached as Appendix 46).
[185] *Id.* at 706.
[186] *See Hughes v. State*, 735 So.2d 238 (Miss. 1999).
[187] Transcript of Record at 677, *State v. Hughes*, No. CR96-68-C-T (Tate Cnty Circuit Ct. Nov. 12, 1996) (attached as Appendix 52).
[188] *Id.* at 679.
[189] *Rigor mortis* is the stiffening or hardening of limbs and other body parts after death. *See* DI MAIO & DI MAIO, *supra* note 91, at 26-28 (attached as Appendix 10).

> purple *livor mortis*[190] [was] present over the anterior and lateral surfaces of the body as well as the superior aspect of the back and the lateral surfaces of the abdomen plus the right and left thighs of the anterior surfaces.[191]

Dr. Hayne's reliance on particular variables – like *rigor* and *livor mortis* – is not only unreliable because they are merely rough indicators of time of death, but also because and Dr. Hayne and prosecutors routinely neglected to disclose his contradictory, previous testimony about the limited usefulness of these same factors. In *Young*,[192] for example, Dr. Hayne had also discussed time of death by using observations of *rigor* and *livor mortis*, commenting about the presence or absence such factors, that "[putting all the factors] together [is] still a difficult area, and one is best only giving an opinion as to the general time frame as opposed to very specific times."[193] "It is now more difficult to determine time of death," Dr. Hayne warned, "than it ever was before."[194]

In Osborne's case the State argued that Osborne suffocated Charlie around 9:30 p.m., after putting Charlie and his brother to bed – an hour following dinner and an hour before the victim's mother and another guest would have had the opportunity.[195] The State's purpose was to rule out other individuals present at the crime scene. The State relied on Dr. Hayne's

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[190] *Livor mortis* is the settling, or pooling, of blood in lower portions of the body after death. *Id.* at 121-25. (attached as Appendix 10).
[191] Steven Hayne, Autopsy Report, Feb. 7, 1996, at 2 (attached as Appendix 53).
[192] *Young v. State*, 731 So.2d 1145 (Miss. 1999).
[193] Transcript of Record at 111 *State v. Young,* No. 97-KP-0162 (Coahoma Cnty. Circuit Ct. Nov. 20, 1995) (attached as Appendix 54).
[194] *Id.* at 110-11.
[195] *Osborne v. State*, 942 So.2d 193 (Miss. Ct. App. 2006).

testimony that the victim died at approximately 9:30 p.m., a finding he claimed to have based on the victim's gastrointestinal contents, a variable that, like others about which Dr. Hayne had previously testified, is problematic and changeable.[196] Dr. Hayne testified that the victim died approximately one to one-and-a-half hours after finishing a relatively large meal, which he had reportedly eaten between 8 and 8:30 p.m.[197] He testified that normal physical activity would not make a significant change in digestion and that going to bed might slow down the digestive process slightly.[198]

Not only did Dr. Hayne fail to qualify his opinion, but he also deviated from widely accepted medical literature and standard forensic textbooks. Typically, the digestion of small meals ranges from half an hour to two hours, while digestion of large meals ranges from three to six hours.[199] Although Dr. Hayne appeared to consider scientifically sound variables, he misrepresented

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[196] "[T]he emptying of the stomach is a complex, multifactorial process, and its evaluation for determining time of death requires caution and careful review of all limiting factors." MEDICOLEGAL INVESTIGATIONS OF DEATH 107 (Werner U. Spitz & Daniel J. Spitz eds., 4th ed. 2002). "[T]he rate of emptying may only be approximated, because it changes depending on various factors, including the amount and type of food, drug, or medication intake, prior medical and emotional condition of the deceased and other individual variables." *Id.* at 105 (attached as Appendix 55).

[197] Transcript of Record at 472, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 7, 2004) (attached as Appendix 5).

[198] *Id.* at 479.

[199] *See* DI MAIO & DI MAIO, *supra* note 91, at 37 (attached as Appendix 10). In his definitive treatise, Dr. Di Maio discusses the conclusions of various experts regarding meal digestion: "Spitz and Fisher state that a small meal (a sandwich) is digested in 1 h and a large meal takes 3-5 h. Adelson says gastric emptying depends on the size and content of the meal, with a light meal taking 1/2-2 h to digest, a medium size meal 3-4 h, and a heavy meal 4-6 h." *Id.*

his ability to determine the time interval between eating and death, while, at the same time, falsifying his analysis under the guise of credible, reliable scientific conclusions.

D. This Evidence Was Discovered After Trial

The evidence of Dr. Hayne's unethical, self-serving agreement with the State, Dr. Hayne's numerous misrepresentations concerning his professional qualifications, and the breadth of his duplicitous forensic testimony was not discovered until after Osborne's trial, when Dr. Hayne, in an effort to salvage what was left of his reputation, sued the Innocence Project and two of its attorneys.[200] The Innocence Project lawyers, in the course of ordinary, federal discovery, issued subpoenas, took depositions, received disclosure of otherwise confidential autopsy reports, and obtained other case-related documents – which, in turn, made all of this new evidence available to Osborne.

E. Using Due Diligence, Osborne Could Not Discover This Evidence Before Trial

Not only did Osborne discover this information after trial, but he also could not have possibly discovered it before trial using due diligence.

The responsibility of due diligence has been summarized as the following:

> The showing of diligence required is that a reasonable effort was made. The applicant is not called upon to prove he sought evidence where he had no reason to apprehend any existed. He

[200] *See generally*, Deposition of Steven Hayne at 172-74, *Hayne v. Innocence Project, et al.*, No 3:09-CV-218-KS-LRA (S.D. Miss. Apr. 26, 2012) (attached as Appendix 11).

> must exhaust the probable sources of information concerning his case; he must use that of which he knows, and he must follow all clues which would fairly advise a diligent man that something bearing on his litigation might be discovered or developed. But he is not placed under the burden of interviewing persons or seeking in places where there is no indication of any helpful evidence.[201]

For more than a decade, Dr. Hayne fraudulently misrepresented his qualifications, his arrangement with the State under which he was able to testify as the State's expert, and the bases for his pseudo-science testimony. Osborne had no means by which to prove that these were lies or that Dr. Hayne's testimony in his case was forensic fraud. Although some of the incidents of Dr. Hayne's false testimony and use of pseudo-forensic practices have since been recognized, most of the cases lacked objective proof such as autopsy reports or Dr. Hayne's own explanations about the cases, which were unavailable until recently. The State had affirmative obligations to disclose this information,[202] and no evidence was disclosed pursuant to these requirements either. Finally, undersigned counsel made numerous requests outside of the litigation process for this information – through open records law requests, for example – none of which were honored.[203]

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[201] *Westergard v. Des Moines Ry.*, 52 N.W.2d 39, 44 (Iowa 1952); *accord Sullivan v. Heal*, 571 So.2d 278, 281 (Miss. 1990) ("A party asking for a new trial on the ground of newly discovered evidence must satisfy the [trial] court that the evidence has come to his knowledge since the trial and that it was not owing to a want of diligence on his part that it was not discovered sooner.").

[202] *See, e.g.*, MISS. UNIF. RULES OF CIRCUIT AND CNTY. CT. PRAC. § 9.04, *available at* courts.ms.gov/rules/msrulesofcourt/urccc.pdf; *Giglio v. United States*, 405 U.S. 150, 154 (1972) (holding that prosecutors must disclose impeachment evidence).

[203] With the exception of the Commissioner of Public Safety, Stephen B. Simpson, who in August of 2008, "removed [Dr. Hayne] from the list of designated pathologists

and . . . no longer [allowed him to] conduct autopsies at the State Medical Examiner Facility," Letter from Stephen B. Simpson, Mississippi Comm'r of Public Safety, to Steven T. Hayne (August 4, 2008) (attached as Appendix 56), State officials have been resistant to take any similar action, or, in some cases, thwart the efforts of those who have. In the spring of 2008, for example, shortly after Brooks and Brewer were exonerated, attorneys at the Innocence Project and Mississippi Innocence Project in an effort to gather information about Dr. Hayne's work sent requests to district attorneys throughout the state. The requests were made pursuant to Mississippi Public Records Act, and were narrowly tailored so that information deemed private could be excised from the request. Miss. Code. Ann. §§ 25-61-1 *et seq.* (1983). By law the information is required to be made available. *Id.*; *see generally*, *See, e.g.*, Letter to Sam Howell from Peter Neufeld & Tucker Carrington, (Mar. 5, 2008) (attached as Appendix 57).

Every state district attorney refused to comply. *See* Appendix 58 (compiling the responses from every district attorney to the Mississippi Public Records Act request). The District Attorney for the Twelfth Judicial District, which includes Forrest and Perry Counties, wrote that "As district attorney, I am not aware of any wrongful convictions in my district." Letter from Jon Mark Weathers to Gabriel S. Oberfield (Mar. 20, 2008) (attached as Appendix 59). Two years later, Phillip Bivens and Bobby Ray Dixon were exonerated in Hattiesburg, the Forrest County seat, after spending thirty years in prison due to their wrongful convictions for murder. Campbell Robertson, *30 Years Later, Freedom in a Case With Tragedy for All Involved*, N.Y. TIMES, Sept. 16, 2010, at A12, *available at* http://www.nytimes.com/2010/09/17/us/17exonerate.html. Larry Ruffin, also convicted, was cleared too. Ruffin, however, died in prison in 2002. *Id.*

Coroners – many of whom were the beneficiaries of Dr. Hayne's campaign contribution largesse – also took action. Their effort was aimed at circumventing Commissioner Simpson's decision to remove Dr. Hayne from the designated State pathologist list. *See generally* Letter from James Y. Dale, Special Assistant Atty General, to Ricky Shivers, Cnty. Coroner (June 26, 2009) (attached as Appendix 60). As contemplated, their plan was to contract on their own with Dr. Hayne. There was some concern, however, about contracting with him – still uncertified and no longer working pursuant to a state contract – and so the coroners turned to the Mississippi Attorney General's office for legal advice. *Id.*

According to the Attorney General's opinion, there was nothing illegal about continuing to employ Dr. Hayne. *Id.* The opinion was silent as to whether such action was good public policy, and the opinion omitted any mention of the State Ethics Commission's conclusions about such an arrangement that had been sought years before. *Id.* When efforts were made during the next legislative session to require that counties who contracted separately with pathologists hire only those licensed by the ABP, as required by statute, the Attorney General's office made explicit what was implicit in its legal opinion of the previous year: protecting the *status quo*. In an e-mail to county coroners and others, Mississippi Attorney General Jim Hood wrote:

> Please be advised House Bill 1456 amends Section 41-61-65 and allows the Department of Public Safety to appoint a Pathologist

The fact that it took so long, faced such opposition, and was produced under these extraordinary circumstances, is probative on at least two fronts: it exemplifies just how resistant State officials were (and remain) to the disclosure of this information, and how critical this information is to Osborne's case.

F. This Newly Discovered Evidence is Not Merely Impeaching or Cumulative

Moreover, in this case, the newly discovered evidence is neither cumulative nor merely impeaching. Black's Law Dictionary defines "impeach" as "[t]o discredit the veracity of [a witness]."[204] The newly discovered evidence certainly calls into question Dr. Hayne's veracity on any witness stand, given that it reveals he told many lies throughout his career; however, the newly discovered evidence serves a purpose material to this case: it directly vitiates

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> which [sic] must be qualified to perform post-mortem examinations. Further, this bill requires the Pathologist be an M.D. or D.O. who is certified in Forensic Pathology by the American Board of Pathology. This is an Innocence Project bill which threatens cases which involved Dr. Hayne. This bill has passed the Senate and is headed to the House of Representatives. Please contact your House Member and encourage him or her to defeat this bill. Our office is working diligently to stop this potentially harmful legislation.

Radley Balko, Mississippi AG Hood Still Actively Supporting Steven Hayne, Reason.com(Mar. 20, 2012 1:16PM), http://reason.com/blog/2010/03/12/mississipip-ag-jim-hood-still.

Attorney General Hood was not the only one lobbying; a number of county coroners were also writing – to Governor Barbour – requesting that Dr. Hayne "be reinstated as our State Pathologist." Letter from Dexter "Skip" Howard, Holmes Cnty. Coroner, to Haley Barbour, Governor of Miss., (Aug. 19, 2008) (attached as Appendix 61); *see also* Letter from Clay McMorris, Lincoln Cnty. Coroner, to Haley Barbour, Governor of Mississippi, (Aug. 25, 2008) (attached as Appendix 62).

[204] BLACK'S LAW DICTIONARY, 755 (7th ed. 1999).

the only physical evidence linking Osborne to Charlie's death – the "death mask" and the time of death.[205] In other words, this evidence cannot be considered merely impeachment evidence because it is material to Osborne's conviction for depraved heart murder.[206]

Here, a forensic charlatan, under an express agreement with the State, provided false testimony as to his credentials, experience, and certification. Not satisfied to be merely under-qualified to offer pathology testimony in courtrooms throughout the State, Dr. Hayne began inventing areas of pseudo-science in order to aid prosecutions. Among these fraudulent subspecialties were time of death and wound pattern analysis testimony. Thus, Dr. Hayne used his lies about his credentials and his wrongfully obtained, *de facto* position of power to insert false, non-scientifically supported evidence – the "death mask" and the "time of death" – into Osborne's trial for the express purpose of getting a conviction.

Moreover, it is indisputable that Dr. Hayne's testimony, including his forensic fraud, was the *raison d'être* for Osborne's conviction. Without Dr. Hayne's fraudulent testimony, the State would not have been able to prove a

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[205] *See generally*, *Little v. State*, 736 So.2d 486, 489 (Miss. App. 1999); *In re Ward*, 89 So.3d 720, 727 (Ala. 2011).

[206] *See generally, United States v. Blackthorne*, 378 F.3d 449, 454 (5th Cir. 2004); *United States v. Holmes*, 406 F.3d 337 (5th Cir. 2005) (noting that the "newly discovered evidence" in the case did not entitle the appellant to a new trial, because the evidence did not have "any tendency to undermine the verdict"; *Register Propane Gas Co., Inc. v. Whitey,* 668 So.2d 225, 229 (Ala. 1996) ("[W]here the newly discovered evidence tends to destroy or obliterate the effect of the evidence upon which the verdict rested it is more than impeaching for its tendency would be to defeat the verdict returned.") (internal citations omitted).

time of death, which created a timeline for the prosecution in which Osborne was the only adult capable of killing Charlie. Even the cause of Charlie's death would remain unestablished without Dr. Hayne's testimony.

Dr. Hayne's testimony was not cumulative to the testimony of other witnesses. At trial, the jurors were presented with a hodgepodge of varying accounts and timelines. Dr. Hayne was the only witness to offer testimony concerning time of death, mode of death, and the "death mask." Without this spurious testimony, the State would have been forced to rely on the testimony of a three-year-old, whose testimony changed several times, even during trial.

G. This Newly Discovered Evidence Would Likely have Produced a Different Result at Trial

The newly discovered evidence in this case would likely have produced a different result at trial. According to this Court, "[e]ven if the petitioner is successful in proving his allegations regarding the newly discovered evidence, there still must be a determination concerning the 'probative effect of such evidence to produce a different result on a new trial' . . .[I]f newly discovered evidence . . . will probably produce a different result or induce a different verdict, it is sufficient and should require a new trial."[207]

Furthermore, there can be no serious argument against the fact that evidence of self-interested business dealings by the State's primary forensic witness, would, if disclosed to a judge and jury, likely produce a different result at trial. Similarly, when crucial evidence in support of the State's

[207] *Meeks v. State*, 781 So.2d 109, 112 (Miss. 2001) (quoting *Smith v State*, 492 So.2d 260, 263 (Miss. 1986).

theory of prosecution is presented by an expert whose record show him to be a fabulist of his own credentials, that evidence is almost worthless as a probative expert opinion, and inadmissible as a matter of law.[208]

Additional evidence of Dr. Hayne's willingness to provide testimony about areas of pseudo-forensic science and to ignore professional and ethical obligations to correct the harm that such findings and testimony produced[209] in this case would be dispositive of the witness's abject lack of professional competence and credibility.

This evidence would also bar the State, pursuant to professional rules of ethics and long standing case law, from even presenting Dr. Hayne's forensic fraud as evidence at trial. In 1935, the Supreme Court described the prosecutor as

> the representative . . . of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at

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[208] *See, e.g.*, *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); *Sherwin-Williams Co. v. Gainers*, 75 So.3d 41, 45-46 (Miss. 2011).

[209] *See, e.g.*, PETER D. BARNETT, ETHICS IN FORENSIC SCIENCE: PROFESSIONAL STANDARDS FOR THE PRACTICE OF CRIMINALISTICS 5 (2001), *available at* http://www.crcnetbase.com/doi/abs/10.1201/9781420041620.ax4; American Board of Criminalists, *Rules of Professional Conduct, available at* http://www.criminalistics.com/ethics.cfm; American Medical Association Council on Ethical and Judicial Affairs, Formal Op. 9.07 (2004), *available at* http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion907.page; GRAHAM M., HANZLICK R., FORENSIC PATHOLOGY IN CRIMINAL CASES 62 (3d ed. 2006) (noting that the College of American Pathologists's Professional Relations Manual requires medical experts to limit testimony to areas of competence).

> liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[210]

Prosecutors also have an ethical duty under ABA Model Rule 3.8(d) and this State's corollary rule to turn over "all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense,[211] a duty the ABA has recently interpreted to apply to all evidence "favorable to the defense," regardless of its potential materiality to the trial's outcome.[212] Even the guidelines put forth by the National District Attorneys Association state that "[t]he primary responsibility of prosecution is to see that justice is accomplished."[213]

Thus, in light of the newly discovered evidence in this case, neither Dr. Hayne nor Dr. Hayne's fraudulent pseudo-scientific findings could have been admitted against Joseph Osborne, without compromising the integrity of the judicial process, the sanctity of his right to a fair trial, or the reliability of the

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[210] *Berger v. United States*, 295 U.S. 78, 88 (1935); see also *Banks v. Dretke*, 540 U.S. 668, 696 (2004) ("We have several times underscored the 'special role played by the American prosecutor in the search for truth in criminal trials.'")(internal citations omitted).

[211] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2007) (outlining the special responsibilities of a prosecutor); MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3)(2007) (prohibiting an attorney from "offer[ing] evidence that the lawyer knows to be false"); MISS. RULES OF PROF'L CONDUCT R. 3.3(a)(2004), *available at* http://courts.ms.gov/rules/msrulesofcourt/rules_of_professional_conduct; MISS. RULES OF PROF'L CONDUCT R. 3.8(d)(2004), *available at* http://courts.ms.gov/rules/msrulesofcourt/rules_of_professional_conduct..pdf; . The ABA Standards for Criminal Justice also state that it is unprofessional conduct for a prosecutor to "knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses." ABA CRIMINAL JUSTICE STANDARDS § 3-5.6(a) (2003).

[212] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009), *available at* http://www.abanet.org/media/youraba/200909/opinion_09-454.pdf.

[213] NAT'L PROSECUTIONS STANDARDS § 1.1 (Nat'l Ass'n of Dist. Attorneys 1991).

guilty verdict. Moreover, without Dr. Hayne's self-interested and fraudulent opinions, the State would have lacked the requisite proof beyond a reasonable doubt for depraved-heart murder.

II. BY PRESENTING FALSE EVIDENCE DURING HIS CRIMINAL TRIAL THE STATE OF MISSISSIPPI VIOLATED OSBORNE'S DUE PROCESS RIGHTS ARTICULATED IN *NAPUE V. ILLINOIS*, 360 U.S. 264 (1959).

A. Standard of Review

Presentation of a claim of newly discovered evidence for post-conviction review pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act, Mississippi Code § 99-39-5 (2)(a)(i), requires that:

> (2) A motion for relief under this article . . . be made within three (3) years after the time in which the petitioner's direct appeal is ruled upon by the Supreme Court of Mississippi . . . Excepted from this three-year statute of limitations are those cases in which 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 had such been introduced at trial it would have caused a different result in the conviction or sentence . . .

Miss. Code §99-39-5 (2)(a)(i). Because Osborne's petition is based on claims of newly discovered evidence, and satisfies the related statutory requirements, his petition is not time barred. In addition, errors affecting a prisoner's fundamental constitutional rights raised on post-conviction relief, including *Napue*[214] violations, are exempted from all bars.[215] Thus, the court may either

[214] *Napue v. Illinois*, 360 U.S. 264 (1959).
[215] *Rowland v. State*, 42 So.3d 503, 507 (Miss. 2010).

rule upon the petition outright or grant the petitioner's application to proceed in the trial court for "further proceedings under Sections 99-39-13 through 99-39-23" of the Mississippi Code.[216]

B. Legal Standard

"[I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment . . . The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears."[217] Thus, a *Napue* violation occurs when the prosecuting attorney knows that a witness's testimony is false or "when *another government attorney* knows of the false testimony and does nothing to correct it."[218] False testimony "includes testimony that affects only the credibility of a witness."[219]

It is also well established that criminal defendants are entitled to a new trial based upon a *Napue* violation when (1) the statements in question are shown to be false; (2) a government attorney knew that they were false;

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[216] MISS. CODE ANN. § 99-39-27(7)(a)-(b).
[217] *Napue*, 360 U.S. at 269.
[218] *United States v. O'Keefe*, 128 F.3d 885, 893 (5th Cir. 1997) (emphasis added); *see also Giglio v. United States*, 405 U.S. 150, 153 (1972).
[219] *O'Keefe*, 128 F.3d at 893; *Napue*, 360 U.S. at 269-270; *see also Howell v. State*, 989 So.2d 372, 397 (Miss. 2008) (Diaz, J., dissenting) (stating that when the "reliability of a given witness may well be determinative of guilt or innocence, impeachment evidence affecting the credibility of that witness should not be concealed by the prosecution").

and (3) the statements were material.[220] Unlike other situations where the evidence must also meet some additional evidentiary hurdle for a duty to arise or relief to be granted, the presentation alone of false or misleading evidence more easily satisfies the obligation in full.[221]

C. The State Elicited Evidence About Dr. Hayne's Basic Qualifications That It Knew Was False

During Dr. Hayne's direct examination at Osborne's criminal trial, the prosecutor engaged in a series of questions and answers the sole purpose of which was to bolster Dr. Hayne's testimony with information implying that Dr. Hayne was an experienced pathologist working for the State and that his testimony was being given pursuant to the imprimatur of the State of Mississippi's statutorily established death investigation system:

> Q. And what is your occupation?
> A. I'm a physician practicing in the fields of anatomic, clinical, and forensic pathology, sir.
> . . .
> Q. And are you associated or affiliated in any way with the Mississippi Medical Examiner's Office?
> A. I am, sir.
> Q. And as an appointed state pathologist, have you testified as an expert in forensic pathology in basically all of the courts in the State of Mississippi as well as other states?
> A. Well, I have testified as an expert in forensic pathology in every court in the State of Mississippi.[222]

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[220] *O'Keefe*, 128 F.3d at 893; *United States v. Blackburn*, 9 F.3d 353, 357 (5th Cir. 1993); *see also United States v. MMR Corp.*, 954 F.2d 1040, 1047 (5th Cir. 1992) ("[I]f the government used false testimony and knew or should have known of its falsity, a new trial must be held if there was any reasonable likelihood that the false testimony affected the judgment of the jury.").
[221] *See Alcorta v. Texas*, 355 U.S. 28, 31 (1957).
[222] Transcript of Record at 454-55, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Cir. Ct. Apr. 7, 2004) (attached as Appendix 5).

The fact of the matter, of course, was that Dr. Hayne was nothing of the sort: he was not an employee of, or in any meaningful way "associated with" the State Medical Examiner's Office, because there was no SME or SME's office; nor did he have professional obligations requiring him to testify as an objective witness.

Both the State and Dr. Hayne were well aware that his answers were misrepresentations. By the time of his testimony they had been in an ongoing contractual relationship for years, the terms of which specifically exempted him from any official oversight, including oversight that would have prevented Dr. Hayne from falsifying his credentials.[223] The truth is that Dr. Hayne was working and testifying in a *quid pro quo* relationship. For its part, the State received cut-rate forensic pathology services without having to pay the salary of a medical examiner or staff. Dr. Hayne was operating a for-profit business whose customer base in criminal trials was prosecutors, law enforcement, and coroners – in other words, the very individuals and entities who determined how much business would flow to him.[224] Stated plainly, Dr. Hayne had a financial interest in the outcome of the verdict that was rendered in criminal trials.

D. The State and Dr. Hayne Misled the Jury by Characterizing Dr. Hayne's Forensic Experience as Evidence of Credibility, When, in Truth, It was Nothing More Than a Self-Serving

[223] *See supra* notes 86-107 and accompanying text.
[224] *Id.*

Term of His Contract and a Knowing Violation of Accepted Professional Standards

In the same initial colloquy during Dr. Hayne's direct examination, the State elicited the following information about his experience:

> Q. And as an appointed state pathologist, have you testified as an expert in forensic pathology in basically in all of the courts in the State of Mississippi as well as other states?
> A. Well, I have testified as an expert in forensic pathology in every court in the State of Mississippi and other states, as well as Federal Court and Military Courts operating under the Uniform Code of Military Justice.
> Q. Do you have any idea how many times you have testified as an expert in the field of forensic pathology?
> A. I don't keep an exact number, but approximately 3,000 times.[225]

The clear import of the testimony was to equate Dr. Hayne's experience as a forensic witness – represented by the thousands of times that he had testified as a forensic pathologist – to a corresponding level of professional expertise and experience. The answer, "approximately 3,000 times,"[226] was meant to convey that Dr. Hayne's services as a state-sponsored forensic pathologist were in great demand and beyond reproach.

The truth was something quite different. The bulk autopsy work was a term of the arrangement between Dr. Hayne and the State[227] and not the result of any specific professional skill-set that he possessed. Dr. Hayne wasn't required to do the work, but the economic advantages conferred by the State meant that he performed almost all of the state's autopsies for their

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[225] Transcript of Record at 455, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Cir. Ct. Apr. 7, 2004) (attached as Appendix 5).
[226] *See id.*
[227] *See supra* notes 86-107 and accompanying text.

own personal enrichment. Simply put, the more autopsies Dr. Hayne conducted, the more money he made. In addition, Dr. Hayne could conduct as many autopsies as he wanted – even a number far in excess of accepted standards of care – because he did not need to concern himself about oversight from professional peers or licensing organizations.[228]

E. Dr. Hayne Presented False and Often Self-Contradictory Testimony that Supported Critical Areas of the Prosecution's Theory

One of the critical components of the State's prosecution theory against Osborne was time of death. The State needed to show that Osborne had both been present and had been awake during the period of time that the child had been suffocated. Dr. Hayne provided the State with the time frame that it needed to implicate Osborne.

During direct examination, the prosecution elicited the following testimony from Dr. Hayne about certain specific findings made during the autopsy:

> Q. Did you find any pills of any sort there?
> A. I did not find any pill material. I did identify approximately a cup and a half of particular food matter including tan, soft, easily crushable material, and also pink meat. And a small amount of food matter had actually entered the first part of the small bowel, the duodena and (inaudible) of only approximately four inches, sir.
> Q. Just from your experience in your own life, was this pink meat that you saw, was it consistent with what we would all think of as a hot dog?
> A. A hot dog, it would fit with that.

[228] *Id.*

Q. And why is it significant as to where along in the digestive process this food was?
A. It may indicate or give one significant variable to the determination of the time of death.
Q. And how does it do that?
A. There are certain documented times in which food is passed through the gastrointestinal system after consumption of a large meal. The meal would stay in the stomach for a period of approximately an hour to hour and a half and then will start dumping into the small bowel. This had occurred for a distance of approximately four inches. The small bowel normally measures anywhere from to 30 to 35 to 40 feet in length. So one could see that it just started passing from the stomach into the small bowel.
Q. So what would that tell you as to when he died as reflected by when his digestive system stopped?
A. Using that criteria, it would indicate to me that the decedent had succumbed or died approximately an hour to hour and a half after finishing a relatively large meal for a child of that size.[229]

During cross-examination, Osborne's attorney attempted, without success, to discredit Hayne's findings.[230] Dr. Hayne later continued to testify concerning time of death:

Q. Dr. Hayne, you said that the digestive process would indicate that somewhere (*sic*) to an hour, hour and a half would have lapsed from the time the child had eaten until the death occurred; is that correct?
A. That's correct, Counselor.
Q. Now, would activity play into that?
A. Activity would not have a significant change in that. Disease would and severe emotional stress would have an impact on the dumping effect of the stomach into the small bowel.
Q. If the child was – so are you saying that being active, if he is up and moving about, would not speed up the process?

[229] Transcript of Record at 471-72, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Cir. Ct. Apr. 7, 2004) (attached as Appendix 5).
[230] *See id.* at 478-80 (attached as Appendix 5).

A. It would not have any significant change, normal physical activity.
Q. Would going to bed and being inactive, would that have an affect?
A. That may slow it down slightly, but again it would not be any significant amount. It would still be within the range of an hour to an hour and a half, sir.
Q. Could it result, say, in two hours?
A. I could not exclude two hours. I think that would be on the far outside limit, though.
Q. But it is possible?
A. I would not exclude it. It would be possible.[231]

The unanimous scientific consensus among leading authorities in forensic pathology is that "all methods now in use to determine time of death are to a degree unreliable and inaccurate."[232] In fact, the "longer the postmortem interval . . . the less precise the estimate of interval" and all traditional factors used in determining time of death have significant shortcomings.[233]

Dr. Hayne himself had testified consistently with this viewpoint on numerous previous occasions, when the prosecution theory necessitated a broader range of time of death. In *State v. Baldwin*,[234] for example, when asked about time of death, Dr. Hayne paraphrased a preeminent forensic pathology treatise, testifying that any "attempt to determine the time of death is essentially a leap into darkness."[235]

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[231] Transcript of Record at 478-79, *State v. Joseph Osborne*, No. 499-03 (Lauderdale Cnty., Miss., Apr. 7, 2004) (attached as Appendix 5).
[232] *See* DI MAIO & DI MAIO, *supra* note 91 at 21 (attached as Appendix 10).
[233] *Id.*
[234] *See* Transcript of Record at 916, *State v. Baldwin*, No. 96-672-CR1 (Lowndes Cnty. Circuit Ct. March 24, 1999) (attached as Appendix 51).
[235] *Id.*

More specifically, he continued, "[pathology] cannot do that . . . one cannot rely on a single test or even a compilation of tests to give anything other than an estimate. One cannot give an exact time. If one does, one does not know the science."[236] Likewise, in *State v. Brown*, Dr. Hayne testified that time of death is a determination that is "tenuous and difficult at best."[237]

F. The State Knew or Should Have Known That Dr. Hayne's So-called "Death Mask" Testimony Was Not Only Novel, But Also Unsupported, Untested, and Otherwise Inadmissible as a Matter of Law.

Three months after the decedent was buried, Dr. Hayne exhumed the body in order to create a "death mask."[238] At trial, after a preliminary discussion of the child decedent's facial injuries, the State laid the foundation for the introduction of the "death mask" and the findings that Dr. Hayne claimed flowed from that – that the victim had been suffocated by having an adult hand placed over his nose and mouth:

> Q. From your findings, from what you saw in your external and internal examinations and your opinions and conclusions, would the injuries and the death be consistent with a person having covered this child's nose and mouth with a hand, like an adult?
> A. It would be consistent with that. It would be consistent with a person placing their hand over the child's face, and the injuries located to the right side of the head would be

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[236] *Id.* at 921.
[237] Transcript of Record at 842, *State v. Brown*, No. CR 94-201-BD (De Soto Cnty. Circuit Ct. Mar. 23, 1995) (attached as Appendix 63).
[238] Transcript of Record at 12-13, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 7, 2004) (attached as Appendix 5).

consistent in part with fingernail injuries to the child's right side of the face.

Q. Now, after you have completed your autopsy, were you involved in a second view of this body?

A. I was, sir.

Q. How did that come about?

A. It was requested that an examination by made of the child's face to determine the approximate size of a hand that could inflict these injuries. Exhumation was performed. Moulage was performed by Lieutenant Commander VanDermark.

Q. I'm sorry. What was performed?

A. Moulage. That is a casting of the face.[239]

After explaining that the reason for the exhumation was to take a cast of the decedent's face, Dr. Hayne testified concerning his method of creating this "death mask":

A. And then I looked at the diagrams that I had made, the photographs, placed the injuries on the cast, death mask, of the child and tried to determine what was the most probable type of hand that would have inflicted; small medium, or large.

Q. Let me ask you now: When you say that you looked back at your notes, did you keep detailed notes as to the exact position of every one of the injuries that you found?

A. I tried to, sir. I marked them on the body diagram sheets, and I also took photographs of them.

Q. I mean, they are actually – on your diagram sheets they are actually measurements, right?

A. Yes, they are.

Q. So you know – in other words, when you looked at what we are calling a "death mask," you knew exactly where on the death mask to place these injuries; is that right?

A. I placed them based upon the documentation that I had derived during the autopsy.[240]

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[239] Transcript of Record at 473-74, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Dec. 1, 2003) (attached as Appendix 5).

[240] *Id.* at 474-75.

Based on markings he placed on the death mask, Dr. Hayne concluded the injuries were "consistent with a larger hand rather than a smaller or medium sized hand . . . I would favor a male's hand."[241]

Use of a "death mask" is not standard forensic practice; in fact, nationwide, Osborne's case is the only instance of a plaster cast of the decedent's face ever being admitted into evidence, or for that matter, of a "death mask" being made and used in this manner in a criminal investigation. Of note, "death mask" is a term-of-art referring to a decedent's face postmortem, not to any kind of physical mask fashioned by a pathologist for this purpose.[242] Thus, in cases that use the term "death mask," the relevant court has had to address whether the admission of photographs depicting the decedent's face postmortem is more probative than prejudicial; there is not a single case in any jurisdiction in the United States where a court has allowed a pathologist to exhume a body months after burial, make a plaster cast of the decedent's face for the purpose of determining the relative size of a hand that supposedly left a handprint on the decedent's face, and admit the resulting "death mask" into evidence.[243] In other words, Hayne's

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[241] *Id.* at 477.

[242] *See generally, Lee v. State*, 735 N.E.2d 1169, 1172 (Ind. 2008).

[243] *Compare Osborne v. State*, 942 So.2d 193 (Miss. Ct. App. 2006) (allowing Dr. Hayne's testimony about the size of a handprint left on a decedent's face based on a "death mask" he created out of Plaster of Paris months after the decedent was buried); *with Johnson v. State*, 175 S.E.2d 840, 842 (Ga. 1970) (holding that naked photographs of the decedent wearing a "death mask" – meaning the decedent's face post-mortem – were admissible "to show the condition of the body of the deceased and the nature and extent of his wounds"); *McMichael v. State*, 471 N.E.2d 726 (Ind.

"death mask" testimony is not standard practice, even by people who have the professional credentials to engage in wound pattern analysis. This is quintessential forensic fraud. Moreover, prosecutors encouraged this fraud, even though the falsity of the death mask was readily apparent.

G. The Presentation of This Baseless and False Evidence, Whether Considered Singly or Together, Constitutes a Violation of Osborne's Due Process Guarantees and Requires the Grant of a New Trial.

It is well-settled that when a prosecutor knowingly presents false testimony, a defendant's conviction must be reversed under the due process clause of the Fourteenth Amendment when the "false testimony used by the State in securing the conviction of petitioner may have had an effect on the outcome of the trial."[244] A new trial is required "if the false testimony could have . . . in any reasonable likelihood affected the judgment of the jury."[245]

In this case, the State elicited false and misleading testimony from Dr. Hayne concerning: (1) Dr. Hayne's relationship with the State, allowing him

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Ct. App. 1984) (allowing the admission of photographs of a decedent's face postmortem for identification purposes).

[244] *Napue v. Illinois*, 360 U.S. 264, 272 (1959); *see also Manning v. State,* 929 So.2d 885, 891 (Miss. 2006); *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. MMR Corp*., 954 F.2d 1040, 1047 (5th Cir. 1992) ("[I]f the government used false testimony and knew or should have known of its falsity, a new trial must be held if there was any reasonable likelihood that the false testimony affected the judgment of the jury.").

[245] *Manning v. State*, 929 So.2d 885, 890 (Miss. 2006) (quoting *Barrientes v. Johnson*, 221 F.3d 741, 756 (5th Cir. 2000)). In reversing the conviction in *Napue*, the United States Supreme Court unanimously held that it was not bound by a lower appellate court's determination that the petitioner would have been found guilty without the presentation of the false testimony. *Napue*, 360 U.S. at 272. Instead, the Court utilized a "reasonable likelihood" standard and concluded that a new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury." *Id.* at 271; *Barrientes*, 221 F.3d at 756.

to state, under oath, that he was affiliated with the State Medical Examiner's Office; (2) Dr. Hayne's experience as a pathologist, allowing him to represent the colossal number of autopsies that he conducted annually as evidence of his credibility, instead of gross medical malpractice; (3) Dr. Hayne's contradictory and accommodating testimony concerning the time of death; and (4) Dr. Hayne's unqualified, unprecedented, and unfounded testimony concerning the "death mask." There is certainly, at least, a "reasonable likelihood" that Dr. Hayne's perjury and forensic fraud "affected the judgment of the jury;"[246] Dr. Hayne's testimony was the only physical evidence linking Osborne to the crime scene. Without Dr. Hayne's testimony, the State would have had to rely on the testimony of a three-year-old, testimony that was given years after the incident and overtly contradicted by other witnesses.[247]

State actors knew or should have known that Dr. Hayne's role as a witness was not as a vetted, credentialed, and objective pathologist, but was, instead, a direct result of the State's *quid pro quo* business relationship with him – one that guaranteed him a lucrative business opportunity that he took full advantage of. Even prosecutors, like the ones in this case, who may claim some amount of plausible deniability based on an assumption, given his State-secured title, that Dr. Hayne was not a charlatan, do not escape legal

[246] *Manning*, 929 So.2d 885, 890 (quoting *Barrientes*, 221 F.3d at 756).
[247] *See generally*, *United States v. McCabe*, No. 10-154 (E.D. La. May 4, 2011) (granting a new trial when there was material, newly discovered evidence and all testimony supporting conviction was contradicted by other evidence and unreliable).

responsibility. As the United States Supreme Court noted in *Napue*, "[a] lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."[248]

Jurisdictions that have faced similar incidents of forensic fraud, and its state-supported introduction, have held that:

> the prosecutor should not be permitted to avoid responsibility for the false testimony of a government witness by failing to examine readily available information that would establish that the witness is lying. It would have been a simple procedure in this case for the State to have verified . . . [the expert's] qualifications before he testified at . . . [the defendant's] trial. As a direct result of its failure to do so, false testimony occurred at the trial, and a fraud was perpetrated on the court and on the defendant.[249]

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[248] *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959) (internal quotation omitted).

[249] *People v. Cornille*, 448N.E.2d857, 865 (Ill. 1983); *see also Napue*, 360 U.S. at 865–66. ("Moreover, it is obvious that every party, including the State, has an obligation to verify the credentials of its expert witnesses. It is only on the basis of these credentials that experts are permitted to offer their professional opinions concerning the factual issues disputed in the criminal proceeding. This type of purportedly objective opinion testimony may have considerable influence on the jury, and the rules for qualifying expert witnesses are designed to ensure that only genuine experts will offer it.").

The same principle is true for the content presented by an expert witness. In *Imbler v. Craven*,[250] the court held that reckless use of highly suspicious false testimony violates due process:

> Due process of law does not tolerate a prosecutor's selective inattention to such significant facts. . . . It imposes as well an affirmative duty to avoid even unintentional deception and misrepresentation, and in fulfilling that duty the prosecutor must undertake careful study of his case and exercise diligence in its preparation, particularly where he is confronted with facts tending to cast doubt upon his witness' testimony.[251]

In sum, fraudulent and misleading expert testimony does not, by definition, escape what *Napue* and a host of other Supreme Court cases prohibit: the presentation by the State of evidence that it knows or should know is false;[252] Osborne has met all criteria necessary for establishing a *Napue* violation. His petition should be granted, and his conviction and sentence vacated.

III. THE STATE VIOLATED OSBORNE'S DUE PROCESS RIGHTS AS ARTICULATED IN *BRADY V. MARYLAND*, 373 U.S. 83 (1963), AND ITS PROGENY.

A. Standard of Review

Presentation of a claim of newly discovered evidence for post-conviction

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[250] 298 F. Supp. 795, 807-09 (C.D. Cal. 1969), *aff'd per curiam*, 424 F.2d 631 (9th Cir. 1970).

[251] *See also*, *N. Mariana Islands v. Bowie*, 243 F.3d 1109, 1118 (9th Cir. 2001) ("[A prosecutor's due process duty] requires a prosecutor to act when put on notice of the real possibility of false testimony. This duty is not discharged by attempting to finesse the problem by pressing ahead without a diligent and a good faith attempt to resolve it. A prosecutor cannot avoid this obligation by refusing to search for the truth and remaining willfully ignorant of the facts.").

[252] *See Mooney v. Holohan*, 294 U.S. 103 (1935); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Curran v. Delaware*, 259 F.2d 707 (3rd Cir. 1958); *New York v. Wilson*, 318 U.S. 688 (1943); *White v. Ragen*, 324 U.S. 760 (1945).

review pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act, Mississippi Code § 99-39-5 (2)(a)(i), requires that:

> (2) A motion for relief under this article . . . be made within three (3) years after the time in which the petitioner's direct appeal is ruled upon by the Supreme Court of Mississippi . . . Excepted from this three-year statute of limitations are those cases in which the petitioner can demonstrate either:
> (a)(i) . . . that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence . . .

Miss. Code §99-39-5 (2)(a)(i). Because Osborne's petition is based on claims of newly discovered evidence, his petition satisfies these requirements and is not time barred. Additionally, errors affecting a prisoner's fundamental constitutional rights raised on post-conviction relief, including *Brady* violations, are exempted from all procedural bars.[253] Thus, the Supreme Court may either rule on the petition outright or grant the petitioner's application to proceed in the trial court for "further proceedings under Sections 99-39-13 through 99-39-23" of the Mississippi Code.[254]

B. Legal Standard

It is clear, based on both federal and Mississippi precedent, that prosecutors violate a defendant's due process right to a fair trial by withholding material evidence, regardless of whether the withholding was

[253] *Rowland v. State*, 42 So.3d 503, 507 (Miss. 2010).
[254] MISS. CODE ANN. § 99-39-27(7)(a)-(b).

intentional.[255] In *Brady*, the Supreme Court mandated that prosecutors must disclose material evidence in order to avoid "an unfair trial to the accused."[256] Furthermore, this Court has held that "[f]avorable evidence includes that which is either directly exculpatory or items which can be used for impeachment purposes."[257] When such evidence "within the knowledge of a governmental officer has been withheld from the defense, that knowledge is imputed to the prosecutor, regardless of the fact that the governmental officer with actual knowledge is from a different governmental agency."[258]

The responsibility for disclosure of exculpatory material in the State's possession rests with the State. It is well-established that "the constitutional duty [to disclose] is triggered by the potential impact of favorable but undisclosed evidence," rather than by the request or diligence of the defendant.[259] As an agent of the state, the prosecutor has an affirmative duty to comply with the imperatives of *Brady*, including "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[260]

In order to establish a *Brady* violation, the defendant must show:

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[255] *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding non-disclosure by the State, of evidence beneficial to the defense, is grounds for relief "irrespective of the good or bad faith of the prosecution").
[256] *Id.*
[257] *Manning v. State*, 929 So.2d 885, 891 (Miss. 2006).
[258] *State v. Blenden*, 748 So.2d 77, 86 (Miss. 1999) (*citing United States v. Antone*, 603 F.2d 566, 569 (5th Cir.1979); *see also Giglio v. United States,* 405 U.S. 150, 153-54 (1972).
[259] *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *see also Bagley v. United States*, 473 U.S. 667, 682-83 (1985).
[260] *Kyles*, 514 U.S. at 437.

> (1) that the government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.[261]

The State effectively possesses *Brady* material when any member of the prosecutorial team has knowledge of such.[262] Moreover, the State is said to be in possession of *Brady* material when that material is in the possession of, or otherwise known, to state agencies and their agents.[263] A prosecutor is held to a constructive knowledge standard and is therefore responsible for learning what other prosecutors, the police, or other investigative agencies know.[264] In sum, the State has a duty to disclose exculpatory material known to any member of the prosecutorial team.[265] In *Box v. State*, this Court found the prosecutorial team to consist of persons other than state prosecutors:

> The State, in the present context, is a team consisting of the attorney, the law enforcement officers of the jurisdiction in which the case is brought, all other cooperating law enforcement officials – municipal, county, state or federal, the prosecution witnesses, and any other persons cooperating in the investigation and prosecution of the case. What is known or available to any one or more is deemed known by or available to

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[261] *Howard v. State*, 945 So.2d 326, 337 (Miss. 2006) (internal citations omitted).
[262] *King v. State*, 656 So.2d 1168, 1174 (Miss. 1995).
[263] *United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979) (holding that knowledge possessed by state law enforcement agents is imputed to federal prosecutors based on principles of agency law).
[264] *Giglio v. United States*, 405 U.S. 150 (1972); *Antone*, 603 F.2d at 569 (5th Cir. 1979).
[265] *King*, 656 So.2d at 1174.

the State. All are collectively "the State" for present purposes.[266]

C. Business Relationship with the State

The State had a constitutional duty to disclose the business relationship between itself and Dr. Hayne. Dr. Hayne's pecuniary stake in maintaining a good relationship with law enforcement and prosecutors throughout Mississippi was impeachment material, demonstrating Dr. Hayne's bias and a personal interest in his findings, testimony, and the ultimate outcome of the trial. These agreements must be disclosed under *Brady*.[267] As discussed above, Dr. Hayne was working in a fee-for-hire arrangement that was totally at odds with the professional objectivity that a state-appointed medical examiner was duty-bound to bring to the State's medicolegal apparatus. Nonetheless, Dr. Hayne was able to operate in this market with a State-provided title. There is no better example of this perverted system than the fact that Dr. Hayne advertised his services to law enforcement to help increase their conviction rates.[268]

Additionally, this arrangement ran afoul of ethical and public policy considerations that the State Ethics Commission had specifically

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[266] *Box v. State*, 437 So.2d 19, 25 n. 4 (Miss. 1983).
[267] *See Banks v. Dretke*, 540 U.S. 668, 702–03 (2004) (holding that it was a *Brady* violation when government failed to disclose witness status as paid informant); *Giglio*, 405 U.S. at 153–55 (1972) (holding that it was a *Brady* violation when government failed to disclose a non-prosecution agreement with cooperating witness).
[268] *See supra* notes 64 and accompanying text.

articulated.[269] As Dr. Hayne's practice existed and grew over time, he wound up making manifest every concern identified by the Commission. At no point did any State official, prosecutor or otherwise, seek to disclose this information or correct the false impression that Dr. Hayne's presence as a witness on behalf of the State created in the minds of the fact-finder.

D. Licensure and Credentialing History

The State had a duty to disclose that Dr. Hayne, in spite of his false claims to the contrary, had not been certified in forensic pathology since June 27, 1997. Despite the fact that he has not been in any way certified in forensic pathology for the past fifteen years, Dr. Hayne continued to testify in trial after trial and continues to claim – in his CV, under oath, and elsewhere – that he is, in fact, a board certified forensic pathologist.

The State also had a duty to disclose the fact that Dr. Hayne's membership with the American College of Forensic Examiners (ACFEI) did not constitute board certification in forensic medicine. Dr. Hayne has continuously misrepresented his membership with the ACFEI as being the equivalent of board certification in forensic medicine. In reality, Dr. Hayne is a member of the American Board of Forensic Medicine – an advisory, not certifying, board under the ACFEI. Dr. Hayne cites his "Fellow" designation as proof he was board certified in forensic medicine. However, the ACFEI Fellow designation is different from being certified. Because ACFEI fellow designation and board certification communicate different aspects of a

[269] *See supra* notes 102-03 and accompanying text.

professional background, the State had a duty to disclose Dr. Hayne was not board certified in forensic medicine as he represented.

E. Widely-Accepted Forensic Pathology Principles Concerning Time of Death Determinations

The unanimous scientific consensus among leading authorities in forensic pathology, which Dr. Hayne continuously testified to have relied on, is that "all methods now in use to determine time of death are to a degree unreliable and inaccurate."[270] In fact, the "longer the postmortem interval . . . the less precise the estimate of interval" and all traditional factors used in determining time of death have significant shortcomings.[271]

As Dr. Hayne admittedly relied on accepted principles and authority in forensic pathology, the consensus that time of death determinations are inaccurate, unreliable, and fraught with danger was impeachment evidence subject to *Brady* disclosure.

F. Previous, Contradictory Testimony Concerning Time of Death Determinations

Dr. Hayne's previous testimony concerning the unreliability and inaccuracy of time of death determinations was clearly impeachment material, and thus subject to Brady disclosure.[272] As discussed above, Dr. Hayne's testimony concerning time of death had on occasion been consistent with accepted medical opinion in many instances; but, at other times, when it

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[270] *See* DI MAIO & DI MAIO, *supra* note 91 at 21 (attached as Appendix 10).
[271] *Id.*
[272] *Kyles v. Whitley*, 514 U.S. 419, 445 (1995) (holding that it was a *Brady* violation where prosecution failed to disclose multiple inconsistent statements by key witness).

was inconvenient to the theory of prosecution, his testimony was inconsistent with scientific fact.

Dr. Hayne's prior testimony was inconsistent with his narrow and specific time of death determination in this case. Here, Dr. Hayne concluded that the decedent died within a thirty-minute window, which was completely at odds with his former acknowledgement of accepted medical opinion. Because his prior testimony contradicted his time of death determination in this case, Dr. Hayne's conclusions that time of death determinations are inaccurate and unreliable were impeachment material subject to Brady disclosure requirements.

G. This Information Could Not Have Been Obtained with Due Diligence by the Defense.

The bulk of the evidence discussed above was revealed only after specific requests were made in discovery and in response to subpoenas in the civil action Dr. Hayne initiated against lawyers working with innocence projects. Other material – transcripts and autopsy reports – for example, would have been unknown to defense counsel or unavailable as a matter of privacy law.[273] They are also prohibitively expensive for counsel, most of whom, like counsel in Osborne's case, were appointed by the court to represent their indigent clients. Regardless, previous efforts to gain such material were thwarted by local county and State officials.[274]

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[273] *See* MISS. CODE ANN. §§ 25-61-1 *et seq*.
[274] *See supra* note 203.

H. A Reasonable Probability Exists That the Outcome of the Proceedings Would Have Been Different Had the Evidence of Dr. Hayne's Business Relationship with the State, His Misleading Credentials and Educational Background, and His Previous Contradictory Testimony Been Disclosed.

Dr. Hayne's testimony was critical for the State to prove Osborne's culpability. Without Dr. Hayne's testimony, the State was left with Cindy and Frazier's contradictory versions of events and the scattershot, inconsistent testimony of a traumatized three-year-old, who, at one time, described the murder victim as Spiderman. Thus, in order to secure the conviction, the prosecution presented Dr. Hayne as an objective, disinterested medical expert who ultimately provided critical testimonial evidence and improper, scientifically baseless opinions. The State's misleading presentation of Dr. Hayne and subsequent solicitation of false testimony assuredly influenced the jury's determination of Petitioner's criminal liability. The State's reliance on Dr. Hayne's testimony demonstrates the critical nature of his testimony.[275] The court should therefore grant Osborne's petition, vacate his sentence, and remand the case to the Lauderdale County Circuit Court for a new trial

[275] Transcript of Record at 526-28, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 7, 2004) (attached as Appendix 5).

IV. THE STATE'S USE OF DR. HAYNE AS A WITNESS WITHOUT PROPER DISCLOSURES, COMBINED WITH DR. HAYNE'S OWN MISREPRESENTATIONS, ABROGATED PETITIONER'S RIGHTS PURSUANT TO THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE.

A. Standard of Review

Presentation of a claim of newly discovered evidence for post-conviction review pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act, Mississippi Code § 99-39-5(2)(a)(i), requires that:

> (2) A motion for relief under this article . . . be made within three (3) years after the time in which the petitioner's direct appeal is ruled upon by the Supreme Court of Mississippi . . . Excepted from this three-year statute of limitations are those cases in which the petitioner can demonstrate either:
> (a)(i) . . . that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence . . .

Miss. Code §99-39-5(2)(a)(i). Because Osborne's petition is based on claims of newly discovered evidence, his petition satisfies these requirements and is not time barred. Additionally, errors affecting a prisoner's fundamental constitutional rights raised on post-conviction relief, including Confrontation Clause violations, are exempted from all relevant procedural bars.[276] Thus, the Supreme Court may either rule on the petition outright or grant the

[276] *Rowland v. State*, 42 So.3d 503, 507 (Miss. 2010).

petitioner's application to proceed in the trial court for "further proceedings under Sections 99-39-13 through 99-39-23" of the Mississippi Code.[277]

B. Legal Authority

The Sixth Amendment's "Confrontation Clause . . . is satisfied where defense counsel has been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness."[278]

The right to confrontation "means more than being allowed to confront the witness physically;"[279] it also means that "[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination."[280] "[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the fact-finder the reasons for giving scant weight to the witness' testimony."[281] Of particular relevance, "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."[282] Therefore, "a criminal defendant states a violation of the Confrontation Clause by showing that he was

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[277] MISS. CODE ANN. § 99-39-27(7)(a)-(b).
[278] *United States v. Restivo*, 8 F.3d 274, 278 (5th Cir. 1993) (internal quotations omitted); U.S. CONST. amend. VI.
[279] *Davis v. Alaska*, 415 U.S. 308, 315 (1974).
[280] *Id.* at 315-16 (internal quotations omitted).
[281] *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985).
[282] *Davis*, 415 U.S. at 316-317 (citing *Greene v. McElroy*, 360 U.S. 474, 496 (1959)).

prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness."[283]

The court employs a harmless error standard in determining whether such exclusion violated the Confrontation Clause.[284] Several factors inform whether the alleged Confrontation Clause violation was harmless, including "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case."[285]

Dr. Hayne was the most critical witness in the State's prosecution of Osborne. Had Osborne's trial counsel been privy to impeaching information about Dr. Hayne – almost all of which was required by law to be disclosed – confronting Dr. Hayne with this material during cross-examination would have provided a significantly different impression of Dr. Hayne's credibility than the one the State presented to the jury through its direct examination. Instead of the jury perceiving Dr. Hayne as an honest, if over-worked, State-sanctioned pathologist, whose objective opinion implicated Osborne, the jury would have been made aware that, in fact, Dr. Hayne had a pecuniary interest in his professional dealings with the State, that he had lied about the true nature of that relationship, as well as his qualifications – professional

[283] *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986).
[284] *Chapman v. California*, 386 U.S. 18, 23 (1967).
[285] *Van Arsdall*, 475 U.S. at 684.

and otherwise – and that he simply did not possess the requisite credibility or allegiance to truthfulness.

The Confrontation Clause violation was not harmless, as Dr. Hayne's testimony was the linchpin of Osborne's trial. Dr. Hayne's fraudulent testimony concerning the decedent's time of death framed Petitioner as the only individual in the home with the opportunity to commit the homicide. Further, Dr. Hayne's perjured observations concerning the "death mask" purported to identify Osborne's hand as the murder weapon – a large male hand. Dr. Hayne's testimony was not cumulative, because no other witnesses testified concerning the time of death or the instrument that inflicted the decedent's injuries. The only evidence presented that was arguably consistent with Dr. Hayne's bogus findings was the unreliable and suspect testimony of a five year-old concerning an event that occurred when he was three. The extent to which the defense was capable of cross-examining Dr. Hayne concerned his certainty of his time of death findings, the difference between contusions and abrasions, the accuracy of the diagramed injuries, the exhumation, and his conclusions relating to the death mask.

Defense counsel was incapable of cross-examining Dr. Hayne about his bias towards the State and personal interest in securing a conviction, his tarnished credentialing history and lack of credentials in forensic pathology, and his fraudulent practice, methods, and findings. Because the prosecution's case would have been non-existent without Dr. Hayne's testimony, the State

cannot prove that the Confrontation Clause violation was harmless beyond a reasonable doubt; Osborne is thus entitled to post-conviction relief.

V. THE ADMISSION OF DR. HAYNE'S TESTIMONY VIOLATED OSBORNE'S SUBSTANTIVE RIGHTS AS INCORPORATED BY MISSISSIPPI RULE OF EVIDENCE 702.

A. Standard of Review

Presentation of a claim of newly discovered evidence for post-conviction review pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act, Mississippi Code § 99-39-5(2)(a)(i), requires that:

> (2) A motion for relief under this article . . . be made within three (3) years after the time in which the petitioner's direct appeal is ruled upon by the Supreme Court of Mississippi . . . Excepted from this three-year statute of limitations are those cases in which the petitioner can demonstrate either:
> (a)(i) . . . that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence . . .

Miss. Code §99-39-5(2)(a)(i). Because Osborne's petition is based on claims of newly discovered evidence, his petition satisfies these requirements and is not time barred. Additionally, errors affecting a prisoner's fundamental constitutional rights raised on post-conviction relief, including gross violations of Rules of Evidence such that a criminal defendant's substantive rights are violated, are exempted from all procedural bars.[286] Thus, the Supreme Court may either rule upon the petition outright or grant the

[286] *Rowland v. State*, 42 So.3d 503, 507 (Miss. 2010).

petitioner's application to proceed in the trial court for "further proceedings under Sections 99-39-13 through 99-39-23" of the Mississippi Code. Miss. Code Ann. § 99-39-27(7)(a)-(b).

B. Legal Authority

Even if all forensic examiners operated under ideal "scientific" circumstances – that is, using proven techniques performed by qualified professionals, conducted in an accredited environment with meaningful supervision and controls – their findings would still be subject to the same dangers that prompted the adoption of the Due Process Clause in the first place. This is because the evidentiary worth of forensic evidence cannot be boiled down to a set of simple, infallible claims. Instead, the probative value of forensic evidence always depends on a variety of factors, including the training and skill of the forensic examiner, the validity and reliability of the technique, the precision of the recording methods, the existence of supervisory controls, and the absence of bias undermining the accuracy and objectivity of the forensic examiner in reporting the results.

These sorts of factors are, on a fundamental level, no different than problems that can affect the reliability of other types of testimony. All witnesses, including state forensic examiners, can make mistakes, shade their testimony in favor of the sponsoring party, and even fabricate things that never occurred. These dangers are at their greatest when evidence is prepared by the state with an eye toward a criminal trial, as forensic

examiners' reports inevitably are, and as the reports in this case in fact were.

When it is determined that a forensic witness violated some, or all, of these mechanisms that exist to ensure the validity of a particular claimed expertise and the reliability of the findings that flowed from it, the right to a fundamentally fair proceeding has been compromised.[287]

In the wake of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and this court's 2003 decision in *Mississippi Transportation Commission v. McLemore*, 863 So.2d 31 (Miss. 2003), as well as the amendment of Mississippi Rules of Evidence 701 and 702,[288] the fulcrum of admissibility for all non-lay testimony is reliability. Rule 702 mandates that the reliability determination has three components: (1) the expert must base his opinion upon sufficient facts or data; (2) the expert must ground the opinion in reliable principles and methods; (3) the expert must apply those principles and methods to the facts of the case in a reliable manner. Additionally, courts may also consider "[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 high

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[287] *See Payne v. Tennessee*, 501 U.S. 808, 825 (1991) ("In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.")

[288] Pursuant to *In Re Mississippi Rules of Evidence*, No. 89-R-99002-SCT (May 29, 2003), the Mississippi Supreme Court amended Mississippi Rules of Evidence 701 and 702. As a result of the amendments, the two rules are identical to the corresponding Federal Rules of Evidence. Thus, the amendments made the rights that flow from the state rules commensurate with Federal decisions interpreting the same language. *Williams v. State*, 667 So. 2d 15, 19 n.1 (Miss. 1996), *overruled on other grounds by*, *Smith v. State*, 986 So.2d 290 (Miss. 2006).

known or potential rate of error; and whether the theory or technique enjoys general acceptance within a relevant scientific community."[289]

The foregoing analysis and pretrial determination are required in order to comport with Osborne's substantive rights, including the right to a fundamentally fair trial.[290] Tragically, however, in numerous criminal cases, including wrongful conviction cases, Mississippi trial and appellate courts, have allowed and affirmed the admission of Dr. Hayne's testimony.[291] To be

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[289] *Anderson v. State*, 62 So.3d 927, 937 (Miss. 2011) (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593-94 (1993)); *Poole v. Avara*, 908 So.2d 716 (Miss. 2005) (listed *Daubert* factors are not exhaustive). More specifically, if Rule 702 is implicated, a court must consider the following questions: Whether the theory or technique in question has been, or can be, tested; Do standards and controls exist? If so, have they been maintained? *Bocanegra v. Vicmar Servs, Inc.,* 320 F.3d 581, 585 (5th Cir. 2003). Is the expert testimony is based on research the expert has conducted independent of the litigation? *Daubert v. Merrell Dow Pharms., Inc.,* 43 F.3d 1311, 1317 (9th Cir.), *cert. denied*, 516 U.S. 869 (1995). Are the findings or conclusions of the proffered testimony the result of valid extrapolations from accepted studies or techniques? *Bocanegra*, 320 F.3d at 586. Has the expert previously testified to his opinion in a proceeding that has no connection to the matter at bar? *Ambrosini v. Labarraque*, 101 F.3d 129, 139 (D.C. Cir. 1996), *cert. dismissed*, 520 U.S. 1205 (1997). Has the expert adequately accounted for obvious alternative explanations? *Michaels v. Avitech, Inc.*, 202 F.3d 746, 753 (5th Cir.), *cert. denied* 531 U.S. 126 (2000). Is there too great an analytical gap between the data and the opinion? *General Electric v. Joiner*, 522 U.S. 136 (1997).

[290] *Dawson v. Delaware*, 503 U.S. 159 (1992); *see generally, Romano v. Oklahoma*, 512 U.S. 1, 12-13 (1994); *Stewart v. State*, 662 So. 2d 552, 557 (Miss. 1995) (citing *Hicks v. Ohio*, 447 U.S. 343, 346 (1980*)); see also, Klimas v. Mabry*, 599 F.2d 842, 848 (8th Cir. 1979), *rev'd on other grounds*, 448 U.S. 444 (1980); *Daniels v. Williams*, 474 U.S. 327, 331-32 (1986). This Court has readily emeployed such judicial scrutiny in considering opinions proffered by forensic experts. Unfortunately, however, that scrutiny has almost exclusively been brought to bear in civil cases where, for example, the value of property is at issue, *See Gulf S. Pipeline Co. v. Pitre*, 35 So.3d 494, 498-500 (Miss. 2011); *Miss. Transp. Comm'n v. McLemore*, 863 So.2d 31, 41-42 (Miss. 2003), or in cases where there are medical negligence claims. *See Sherwin-Williams Co. v. Gaines, 75* So.3d 41, 45-46 (Miss. 2011)*; Hill v. Mills,* 26 So.3d 322, 329-33 (Miss. 2010)*; Bullock v. Lott*, 964 So.2d 1119, 1128-32 (Miss. 2007).

[291] *See Banks, v. State*, 725 So.2d 711, 713 (Miss. 1997); *Brewer v. State*, 725 So.2d 106 (Miss.1998); *Brooks v. State,* 748 So.2d 736 (Miss. 1999); *Edmonds v. State,* 955

fair, courts allowed Dr. Hayne to testify and denigrate the fairness of the judicial institution, because he and the State actively concealed the truth about his agreement with the State, his lack of credentials, and his forensic fraud. Dr. Hayne and the State's malfeasance is as much an affront to the integrity of Mississippi's judiciary as it was to the constitutional right to a fair trial.

C. The Admission of Dr. Hayne's "Death Mask" Testimony Violated Mississippi Rule of Evidence 702.

Although the trial court expressed some concern over Dr. Hayne's "death mask" findings,[292] it nevertheless allowed its introduction and Dr. Hayne's conclusion that a large male hand inflicted the facial injuries. The trial court admitted this evidence without any *Daubert* inquiry as to the scientific bases in support.

During direct examination, Dr. Hayne testified about his methods in creating the "death mask." He testified that the body was exhumed months after the initial autopsy; that at that time the facial wounds were "much less distinct, much more difficult to visualize directly;"[293] that, during the second examination, an odontologist made a casting of the decedent's face; that the body was reburied before the cast had set; and that he marked the mask

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So.2d 787, (Miss. 2007); *Howard v. State*, 701 So.2d 274, (Miss. 1997); *Jones v. State*, 962 So.2d 1263 (Miss. 2007).

[292] Transcript of Record at 141-42, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Dec. 1, 2003) (attached as Appendix 5).

[293] Transcript of Record at 491, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 7, 2004) (attached as Appendix 5).

based on his diagrams from the initial autopsy.[294] Dr. Hayne further testified to the reliability and accuracy of his "death mask," claiming the markings could only have varied by an eighth of an inch.[295]

The State presented the "death mask" evidence to support its claim that Osborne, based on the size of his hands as compared to the other two suspects, was the true perpetrator.[296] During closing argument, the prosecution reminded the jury that the hand "according to Dr. Hayne, was a large hand; it was a male hand."[297]

A trial court's decision regarding admissibility of expert testimony will generally be affirmed unless a reviewing court finds that the trial court's decision "was arbitrary and clearly erroneous, amounting to an abuse of discretion."[298] The trial court's consideration of Dr. Hayne's testimony in Osborne's case meets this requirement.

As this Court has noted, qualified expert witnesses may possess the expertise to testify within certain areas, but that does not mean they possess the expertise to testify about areas beyond their field of expertise or in areas not supported by valid science.[299]

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[294] *Id.* at 475-91.
[295] *Id.* at 487.
[296] Transcript of Record at 12-13, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Dec. 1, 2003) (attached as Appendix 5).
[297] Transcript of Record at 532, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 7, 2004) (attached as Appendix 5).
[298] *Bishop v. State*, 982 So.2d 371, 380 (Miss. 2008).
[299] *See, e.g., Edmonds v. State*, 955 So.2d 787, 792 (Miss. 2007) ("While Dr. Hayne is qualified to proffer expert opinions in forensic pathology, a court should not give such an expert carte blanche to proffer any opinion he chooses."); *Stubbs v. State*,

A review of the *Daubert/McLemore* factors shows that Dr. Hayne's "death mask" and subsequent conclusions do not survive a Rule 702 inquiry. The State offered no evidence showing that Dr. Hayne had conducted any tests assessing the reliability of his conclusion that a large male hand inflicted the facial injuries or that demonstrated that observation of the body and the wound could demonstrate the accuracy of the "death mask." Dr. Hayne admitted he did not directly compare the mask with the body.[300] There was no showing that Dr. Hayne's methods had been subject to peer review, and there was nothing to show what the rate of error would be if the theory that adequate comparisons between a body to diagrams to a "death mask" could actually be tested. There was no evidence of standards that control such testing, and there was no evidence that this method is generally accepted within a relevant scientific community. Finally, there were no articles, publications, or authorities cited that in any way discuss the ability of a forensic pathologist to base scientific conclusions on the creation of a death mask.

Although "forensic pathologists may render an expert opinion at trial as to whether a particular instrument or weapon in evidence was consistent

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845 So.2d 656, 670 (Miss. 2003) ("This does not mean that Dr. West can indiscriminately offer so-called expert testimony in other areas in which he not even remotely meets the Miss. R. Evid. 702 criteria. We caution prosecutors and defense attorneys, as well as our learned trial judges, to take care that Dr. West's testimony as an expert is confined to the area of his expertise under Miss. R. Evid. 702.")

[300] Transcript of Record at 491, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 7, 2004) (attached as Appendix 5).

with particular injuries to a victim,"[301] Dr. Hayne's testimony sought to match Osborne's hands to a plaster casting – a novel technique, absent from the jurisprudence of every single jurisdiction in the United States.

The State's effort to establish a verifiable basis for Dr. Hayne's opinion consisted of the following discussion:

> BY THE COURT: Explain to an ignorant judge what a death mask means, what that is, and what kind of conclusions are sought to be drawn from preparing a death mask.
> BY Ms. HOWELL: The body was exhumed . . .
> THE COURT: How many months after interment?
> BY Ms. HOWELL: Three months.
> BY THE COURT: Three months. Okay.
> . . .
>
> BY Ms. HOWELL: They use some kind of clay that is used in odontology is my understanding and they put it over the face. That was done and it was shipped to Dr. Hayne's office.
> BY THE COURT: The purpose of doing that is what?
> BY Ms. HOWELL: To get the exact proportions of the child's face. And then Dr. Hayne was supposed to with his – the autopsy report and measurements of the bruising on the face to put those bruises on the face to determine, if they could, how big the hand would have to be to make those types of bruises on the face.
> BY THE COURT: Okay. So this purported death mask is primarily done for the purpose of getting accurate dimensions of the facial bones and structure of the child, and I assume Dr. Hayne has got photos of whatever during the autopsy showing visibly some indication of bruising and he uses the death mask measurements and all to try to get an opinion as to the size of the – if it was a human hand, the size of the hand used on the face of the child.
> BY Ms. HOWELL: I think all of this was done at the urging of Dr. Hayne when he saw the body and heard it was supposed to be an overdose. . . . And I think it was him talking to someone at the AG's Office and said, you know, it would really be a good idea to get the mask done, I can put the bruises on there, and we can see for ourselves how large of a hand we're dealing with.

[301] *McGowen v. State*, 859 So.2d 320, 334 (Miss. 2003).

. . .
BY THE COURT: Well, I gather from what I'm hearing from all of this is that there is no kind of, for lack of a better phrase, super duper medical testimony here from a pathologist that is in some new field or some type of new procedure or new testing done, nothing scientifically novel. We've got a forensic pathologist, Dr. Hayne, the state medical examiner[302], who I assume is going to testify that the bruising is consistent with a hand of the size of the defendant's placed on the face of this child.
BY Ms. HOWELL: A large male hand is what he puts in there. . . . I don't know how he could say for sure it was Joey Osborne without fingerprints or something like that, he's just saying it is a large male hand.
BY THE COURT: I don't need another Dr. West in the courtroom –
BY Ms. HOWELL: No.
BY THE COURT: -- With his alternative light source imaging techniques. We don't have that.[303]

That colloquy comprised the entirety of what passed for a *Daubert* hearing. As such, the judgment must be reversed and the case remanded for a new trial.

D. The Trial Court's Admission of Dr. Hayne's Forensic Testimony Violated Rule 702 and Daubert and Was Both Arbitrary and Clearly Erroneous.

During direct examination, the prosecution asked about Dr. Hayne about his expert opinion regarding time of death:

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[302] The trial judge, apparently, assumed that Dr. Hayne was "the state medical examiner," which was incorrect, as discussed above, but an impression that Dr. Hayne did his best to disseminate, and made no effort to correct. *See also* Transcript of Record at 139-42, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 6, 2004) (stating, in front of the impaneled jury, that "it is my understanding that Dr. Hayne, who is the state medical examiner, was subpoenaed by two different courts at the same time to be in two different places.") (attached as Appendix 5).
[303] Transcript of Record at 455, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Dec. 1, 2003) (attached as Appendix 5).

> Q. And why is it significant as to where along in the digestive process this food was?
> A. It may indicate or give one significant variable to the determination of the time of death.
> Q. And how does it do that?
> A. There are certain documented times in which food is passed through the gastrointestinal system after consumption of a large meal. The meal would stay in the stomach for a period of approximately an hour to an hour and a half and then will start dumping into the small bowel. . . .
> Q. So what would that tell you as to when he died as reflected by when his digestive system stopped?
> A. Using that criteria, it would indicate to me that the decedent had succumbed or died approximately an hour to hour an a half after finishing a relatively large meal for a child of that size.[304]

The prosecution relied on Dr. Hayne's testimony to argue in its closing argument that Osborne was the only individual present in the home with the opportunity to commit the murder:

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[304] Defense counsel later questioned Dr. Hayne on this area as well:

> Q. Dr. Hayne, you said that the digestive process would indicate that somewhere to an hour, hour and a half would have elapsed from the time the child had eaten until the death occurred; is that correct?
> A. That's correct, Counselor.
> Q. Now, would activity play into that?
> A. Activity would not have a significant change in that. Disease would and severe emotional stress would have an impact on the dumping effect of the stomach into the small bowel.
> Q. If the child was – so you are saying that being active, if he is up and moving about, would not speed up the process?
> A. It would not have any significant change, normal physical activity.
> Q. Would going to bed and being inactive, would that have an affect?
> A. That may slow it down slightly, but again it would not be any significant amount. It would still be within the range of an hour to an hour and a half, sir.
> Q. Could it result, say, in two hours?
> A. I could not exclude two hours. I think that would be on the far outside limit, though.
> Q. But it is possible?
> A. I would not exclude it. It would be possible.

Id. at 472, 478-79.

> Well, let's look at what we honestly know. We know that this child, from Dr. Hayne's testimony, from medical testimony, this child died within an hour to an hour and a half of his last meal. . . . From that, ladies and gentlemen, Joey Osborne is the only one who had the opportunity to kill the child.[305]

Like the death mask testimony, the State offered no evidence to show that Dr. Hayne had conducted any tests assessing the reliability of his conclusion that the child died one to one-and-a-half hours after finishing his dinner or that Dr. Hayne had complied with any accepted, reliable methods in determining the time of death.[306]

A review of the *Daubert* and *McLemore* factors shows that Dr. Hayne's time of death methodologies and opinion do not survive Rule 702. There was no showing that Dr. Hayne's conclusions had been subject to peer review; there was nothing to show what the rate of error would be with regard to the theory that the time of death of a child could be narrowed down to a thirty-minute window; there was no evidence of any standards that could be applied to such a theory; there was no evidence that this method is generally accepted within a relevant scientific community; there were no articles or publications or authorities cited that discuss the ability of a forensic pathologist to determine a victim's time of death to this degree of temporal accuracy.

Not only did Dr. Hayne's opinion concerning time of death fail to satisfy any of the *Daubert* factors, his determinations offended the accepted

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[305] *Id.* at 526-28.
[306] *Id.* at 472.

scientific opinion that such determinations are fundamentally inaccurate and unreliable. More specifically, studies of gastric emptying and digestion are illustrative of the fallacy that gastric emptying follows an anticipated timeline and course.[307] Instead, the rate of gastric emptying is inconsistent and influenced by a variety of factors.[308]

The State had the burden of establishing the basis for Dr. Hayne's opinion: "The party offering the expert's testimony must show that the expert has based his testimony on the methods and procedures of science, not merely his subjective beliefs or unsupported speculation."[309] Moreover, "the trial court must determine whether the proffered testimony is reliable."[310]

Both the State and the trial court abdicated their responsibilities under *Daubert* and Rule 702. Dr. Hayne took full advantage of the opportunity presented to him. When patently inadmissible evidence is

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[307] "A perusal of standard forensic textbooks gives a number of estimations of how long it takes to digest a meal. Spitz and Fisher state that a small meal (a sandwich) is digested in 1 h and a large meal takes 3-5 h. Adelson says gastric emptying depends on the size and content of the meal, with a light meal taking 1/2-2 h to digest, a medium sized meal 3-4 h, and a heavy meal 4-6 h." *See* DI MAIO & DI MAIO, *supra* note 91, at 37 (attached as Appendix 10).

[308] *Id.* at 37-39 (attached as Appendix 10).

[309] *Miss. Transp. Comm'n v. McLemore*, 863 So.2d 31, 36 (Miss. 2003); *see also, Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 276 (5th Cir. 1998) (en banc) ("[T]he party seeking to have the district court admit expert testimony must demonstrate that the expert's findings and conclusions are based on the scientific method, and, therefore, are reliable.").

[310] *McLemore*, 863 So.2d at 38; *see also, Allen v. Penn. Engineering Corp.*, 102 F.3d 194, 196 (5th Cir. 1996) ("[A] trial court has a duty to screen expert testimony for both its relevance and reliability."); *Sherwin-Williams Co. v. Gaines*, 75 So.3d 41, 46 (Miss. 2011) ("Our trial judges work exceedingly hard and have discretion in how they discharge their gatekeeping duty, but we take this opportunity to reiterate that such duty includes making sure that the opinions themselves are based on sufficient facts or data and are the product of reliable principles and methods.").

admitted that prejudices a defendant's due process rights, or when a trial judge fails to perform his or her duty pursuant to *Daubert* and admits expert opinion without a sufficient showing, a new trial is the appropriate remedy.[311]

CONCLUSION

Ultimately, the failure of justice in this case is threefold. First, there is the knowing and intentional violation of Osborne's constitutional rights. Every criminal defendant is guaranteed the fundamental right to a fair criminal trial through multiple constitutional provisions and doctrines: the Fourteenth Amendment, *Brady*, *Napue*, and the Sixth Amendment's Confrontation Clause, among them. Yet, State officials and Dr. Hayne together ignored these guarantees – and for many reasons: pride, avarice, and the ease of obtaining a conviction with fraudulent, fabricated evidence – thereby depriving Osborne of a fair trial, seemingly without hesitation or professional conscience. The lengths the State went to assure that Osborne could not have a fair trial cannot be overstated. For years the State routinely, knowingly, and systematically made it a practice to conceal the nature of its working relationship with Dr. Hayne, which allowed Dr. Hayne, an uncertified forensic pathologist, to act as the *de facto* State Medical

[311] *See generally*, *United States v. Velarde*, 214 F.3d 1204 (10th Cir. 2000)(reversing and remanding a case for a new trial where trial judge failed to make reliability determinations before admitting testimony of two expert physicians testifying for the prosecution); *Goebel v. Denver & Rio Grande W. R.R.*, 215 F.3d 1083 (10th Cir. 2000) (trial judge's admission of expert opinion without conducting reliability analysis required by *Daubert* is an abuse of discretion requiring a new trial).

Examiner. As a direct consequence, the State tacitly condoned Dr. Hayne's perjurious claims about his qualifications and educational accomplishments in countless criminal trials throughout Mississippi. Then, the State retained Dr. Hayne to produce forensic fraud – through the "death mask" and his determination of time of death – during Osborne's trial. Fortunately, there is a remedy: to provide Osborne, through post-conviction relief, the fair trial that the State and Dr. Hayne deprived him of in the first place.

The second tragedy in this case is Dr. Hayne's and the State's decades-long assault upon the integrity of Mississippi courts. This Court imposes a duty upon lawyers not to knowingly introduce false or fabricated evidence before Mississippi's courts.[312] This duty was of no moment to the State; prosecutors charged ahead, using Dr. Hayne's perjured, fraudulent testimony at almost every available opportunity. Very recently, in *Sherwin-Williams Co. v. Gainers,* this Court issued its most comprehensive rejection of pseudo-science's place in Mississippi courts. The Court strongly reprimanded a lower court for allowing such testimony to be introduced, chastening courts with the admonition that they are charged with a gatekeeping duty to ensure "that the [expert] opinions themselves are based on sufficient facts or data and are the product of reliable principles and methods."[313] The concurrence, in turn, concluded that "[i]t is well settled in this jurisdiction that a verdict may

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[312] MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2007) (prohibiting an attorney from "offer[ing] evidence that the lawyer knows to be false"); MISS. RULES OF PROF'L CONDUCT R. 3.3(a)(2004), *available at* http://courts.ms.gov/rules/msrulesofcourt/rules_of_professional_conduct.pdf.

[313] *Sherwin-Williams Co. v. Gainers*, 75 So.3d 41, 46 (Miss. 2011).

not be based upon surmise or conjecture."[314] Regardless of whether the Court considers the ethical duties demanded of attorneys (and in this context of prosecutors especially) or the requirements of Rule 702,[315] one universal truth is clear: Dr. Hayne should have never been admitted as an expert in Mississippi courts. Every single time the State colluded to introduce Dr. Hayne's pseudo-scientific perjury into evidence, it sullied the reputation of Mississippi's judiciary.

The final outrage of this case is what Dr. Hayne is doing today: despite statutory provisions prohibiting State coroners from hiring him,[316] Dr. Hayne continues to market his special brand of forensic fraud.[317] In other words, the

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[314] *Id.* at 48 (Kitchens, J., concurring) (quoting *John Morrell & Co. v. Shultz*, 208 So. 2d 906, 907 (Miss. 1968)).

[315] MISS. R. EVID. 702.

[316] MISS. CODE ANN. § 41-61-57 (Supp. 2010).

[317] Dr. Hayne recently sent a personal solicitation to a new customer base: criminal defense attorneys. The letter read, in part, "We are pleased to announce that Steven Hayne, M.D. will be available immediately to assist criminal defense attorneys in the State of Mississippi. . . . Dr. Hayne is available to give testimony as an expert witness in all criminal cases involving violent crimes and death of unknown origin." Letter from Pathology Consultants, Inc., Dr. Steven T Hayne M.D (undated) (attached as Appendix 64).

Attorneys have taken him up on the offer. Last fall, defense counsel retained Dr. Hayne in and Oktibbeha County criminal case. *See* Transcript of Record at 51, *State v. Sharp* (No. 2010-158-CRH) (Oktibbeha Cnty. Circuit Court, Sept. 26, 2011) (attached as Appendix 65). The defendant, accused of murder for the shooting death of her paramour, claimed self-defense. *See* David Miller, *Leslie Sharp Found Not Guilty*, THE DISPATCH (Sept. 30, 2011 10:33 PM), http://www.cdispatch.com/news/article.asp?aid=13309. The defendant, however, had shot the victim seven times – including several shots in the back which, arguably, were proof of the defendant being the aggressor, not the victim. *Id.* Evidence about which shots were fired first would be critical. Eyewitness accounts were not helpful. Both sides turned to forensic evidence.

The State's pathologist, Dr. Adele Lewis, testified that there was no way to determine which shot was fired first because of the multiple variables involved – including, among other things, the position of the shooter and the decedent, and the angle of the weapon at the time it was fired. "There's an infinite number of scenarios

era of Dr. Hayne's incursion upon the fairness of criminal trials and the integrity of the judiciary has not passed; this regrettable epoch in the history of Mississippi abides.

Respectfully submitted, this _____day of _____, 2012.

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in which you can pose the shooter," Dr. Lewis testified. Transcript of Record at 48, *State v. Sharp* (No. 2010-158-CRH) (Oktibbeha Cnty. Circuit Court, Sept. 26, 2011) (attached as Appendix 65). "[A]n honest and competent pathologist would not be able to tell you which order the shots were fired and the position of the person. It's not scientifically possible." *Id.* at 51 (attached as Appendix 65).

But the defense had not retained an honest and competent pathologist. The defense had retained Dr. Hayne. According to Dr. Hayne, the first bullets fired hit the decedent in the front of his body; the gunshot wounds to his back were among the last to occur. Transcript of Record at 27, *State v. Sharp* (No. 2010-158-CRH) (Oktibbeha Cnty. Circuit Court, Sept. 26, 2011) (attached as Appendix 65).

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CERTIFICATE OF SERVICE

I, W. Tucker Carrington, attorney for Defendant/Petitioner, do hereby certify that I have this day served, via hand-delivery and/or first-class U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing document to the following:

Jim Hood, Esq.
Attorney General
Office of the Attorney General
P.O. Box 220
Jackson, MS 39205-0220

This the _____ day of November, 2012.

_____

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IN THE SUPREME COURT OF MISSISSIPPI

No. _____

TAVARES FLAGGS, Petitioner,

v.

STATE OF MISSISSIPPI, Respondent

PETITION FOR POST-CONVICTION RELIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

STATEMENT OF THE ISSUES

Petitioner raises the following issues in this Petition for Post Conviction Relief:

I. Whether evidence of Dr. Steven T. Hayne's serial forensic fraud, and the State of Mississippi's knowing role in aiding, abetting, and concealing it, constitutes newly discovered evidence that, had it been made available to petitioner at trial, would have produced a different result or verdict at his trial?

II. Whether the State of Mississippi violated Flaggs' due process rights articulated in *Napue v. Illinois*, 360 U.S. 264 (1959), and its progeny, by presenting false evidence during his trial?

III. Whether the State violated Flaggs' due process rights as articulated through *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny?

IV. Whether the State's use of Dr. Hayne as a witness without required disclosures, combined with Dr. Hayne's own misrepresentations, abrogated Flaggs' rights secured by the Sixth Amendment's Confrontation clause, made enforceable against the State by the Due Process Clause of the Fourteenth Amendment?

V. Whether the admission of Dr. Hayne's testimony violated Flaggs' substantive rights, including the right to a fair trial, secured by Mississippi Rule of Evidence 702?

VI. Whether Flaggs' trial counsel was constitutionally ineffective as a matter of law, causing his defense to be prejudiced?

SUMMARY OF THE ARGUMENT

Tavares Flaggs, petitioner in this case, requests that the Supreme Court grant him leave to file for post-conviction relief. Newly discovered evidence – namely, documentary proof of a complicit arrangement between the State and Dr. Steven T. Hayne to circumvent Mississippi's public health laws, abundant testimonial evidence and supporting documentation of Dr. Hayne's pattern and practice of misrepresenting his professional credentials, as well as the providing of specious and contradictory trial testimony over time within areas of pseudo-forensic sub-specialties – exposes for the first time what some State[1] officials have long known, and what many others, including Flaggs, have suspected but until now could not prove: that Dr. Hayne, Mississippi's *de facto* state pathologist for many years and the star witness at Flaggs' criminal trial, is a serial purveyor of falsehoods, unreliable opinions, and fabricated forensic findings.

This new evidence was discovered in the late Spring of 2012 as a direct result of Dr. Hayne's suit against attorneys at the Innocence Project and Mississippi Innocence Project[2] that resulted in the disclosure of business documents, trial transcripts, letters, depositions, and autopsy reports, among

[1] *See infra* notes 232-39 and accompanying text.

[2] Dr. Hayne sued Peter Neufeld and Vanessa Potkin, attorneys at the Innocence Project, and Tucker Carrington, an attorney at the Mississippi Innocence Project (and counsel for Flaggs), for, among other things, libel, slander and defamation. *See Hayne v. The Innocence Project*, No. 2008-247 (Rankin Cnty. Circuit Ct. Oct. 8, 2008). The case was ultimately dismissed. Dr. Hayne then brought a second suit in federal court in the Southern District. *Id*. Though the grounds were essentially the same, Carrington was not named as a defendant.

numerous other pieces of evidence, much of it centering around Dr. Hayne's deposition taken on April 26-27, 2012. In sum, the evidence proves that Dr. Hayne entered into an unethical agreement with the State and used the position to propagate falsehoods, unreliable opinions, and fabricated forensic findings to advance a twinned goal: satisfying the desires of his primary customer base – State law enforcement and prosecutorial personnel – and increasing his own monetary profit. Dr. Hayne has propagated these falsehoods, unreliable opinions, and fabricated forensic findings with the full support and knowledge of the State of Mississippi.

Although Dr. Hayne polluted the process of many of the trials in which he appeared, his testimony about manner and cause of death in many cases was not critical. On the other hand, in a limited number of other cases, like this one, Dr. Hayne's role was decisive. The combination of Dr. Hayne's misrepresentations about his abilities and certification to perform the work paved the way not only for the admissibility of his falsehoods, unreliable opinions, and fabricated forensic findings, but also allowed for them to appear cloaked in the guise of accepted forensic pathology. In such cases, Dr. Hayne's false testimony provided the critical difference in a finding of criminal culpability**.** In Flaggs' case, there can be little doubt that recently discovered evidence of the scope and breadth of Dr. Hayne's forensic fraud would have changed the outcome of the trial, but also that, had that evidence been made known, certain rules of law and professional responsibility applicable to

attorneys would have prohibited Dr. Hayne from even presenting his testimony in the first place.[3]

Thus, in the light of the newly discovered evidence of the State's and Dr. Hayne's malfeasance, Flaggs is entitled to relief based upon numerous grounds, including: the newly discovered evidence doctrine; the Fourteenth Amendment's prohibition against government attorneys knowingly introducing false evidence during a criminal trial;[4] the violation of due process rights pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny; violation of rights under the Sixth Amendment's Confrontation Clause; and violation of substantive rights, afforded every defendant, under the Mississippi Rules of Evidence.

This forensic fraud disaster was not a foregone conclusion.

Through their duly elected representatives, the citizens of Mississippi had pursued a course of action that advanced the cause of public health and secured criminal defendants' rights to a fair trial.[5] In the early 1970s, in order to advance public health and safety and to protect the right to a fair trial through the introduction of greater accountability and professionalism in criminal prosecutions,[6] the Mississippi Legislature created the position of

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[3] *See infra* notes 183-86 and accompanying text.
[4] *See Napue v. Illinois*, 360 U.S. 264, 269 (1959).
[5] MISS. CODE ANN. §§ 41-61-1 *et seq.* (1972); *see also* MISS. CODE ANN. §§ 41-61-51 *et seq.* (1986).
[6] Until 1974, Mississippi county coroners, who are elected, directed death investigations. JOINT LEGISLATIVE COMMITTEE ON PERFORMANCE EVALUATION AND EXPENDITURE REVIEW, AN INVESTIGATION OF MISSISSIPPI'S MEDICOLEGAL DEATH INVESTIGATION PROCESS, 2008 Regular Sess., at 4 (2008), *available at*

State Medical Examiner (SME).[7] The position required a qualified expert in forensic death investigation to investigate sudden, violent, or suspicious deaths, and to conduct autopsies, when in the public interest. The enabling legislation also required the SME to be a physician and be board certified in forensic pathology by the American Board of Pathology (ABP), the pathology field's pre-eminent governing body.

Despite these efforts, however, the medical examiner's office remained highly politicized, under-supported, and perennially underfunded. The office proved difficult to keep adequately staffed, so much so that the medical examiner post became – and then remained – vacant from 1995 until 2011. Beginning in the mid-1990's, instead of an SME overseeing autopsies, the Department of Public Safety kept a roll of so-called "State designated pathologists"[8] who performed them.[9] Of these "designated pathologists," Dr. Hayne, according to his own admissions, performed the vast majority – over

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http://www.peer.state.ms.us/reports/rpt514.pdf. (attached as Appendix 1). Typically, the coroner would convene a "coroner's jury" to investigate any "violent, sudden, or causal death." *Id.* Lay and expert witnesses provided testimony to the jury on the cause and manner of death. *Id.* For years the system had been subject to political pressure, and during the Civil Rights era in particular, the system worked hand-in-hand with state segregationists to whitewash murders of blacks and civil rights activists. *See* SETH CAGIN & PHILIP DRAY, WE ARE NOT AFRAID: THE STORY OF GOODMAN, SCHWERNER, AND CHANEY AND THE CIVIL RIGHTS CAMPAIGN FOR MISSISSIPPI 135 (1988).

[7] *See* Mississippi Medical Examiners Act of 1974. MISS. CODE ANN. §§ 41-61-51 *et seq*. (1972).

[8] The Department of Public Safety determined who was qualified as a designated pathologist. *See* MISS. CODE ANN. §§ 41-61-1 *et seq*. (1972); *see also* MISS. CODE ANN. §§ 41-61-51 *et seq*. (1986).

[9] *See* JOINT LEGISLATIVE COMMITTEE ON PERFORMANCE EVALUATION AND EXPENDITURE REVIEW, AN INVESTIGATION OF MISSISSIPPI'S MEDICOLEGAL DEATH INVESTIGATION PROCESS, 2008 Regular Sess., at viii (2008) (attached as Appendix 1).

1,700 autopsies annually – for an average of more than four autopsies a day, every day, seven days a week, without interruption, for nearly twenty years. In addition to this utterly unsustainable schedule, Dr. Hayne also provided testimony about his findings at trials, including this one.

Dr. Hayne did not achieve his position because he was highly qualified; he was and always has been uncertified by the American Board of Pathology in forensic pathology, and his other certification claims are either specious or complete fictions.[10] Nor did he possess superior skills as a forensic pathologist; his work has been maligned for years – three individuals[11] thus far have been wrongfully convicted and later exonerated as a result of it. He and his prolific work have recently been the subject of an official inquiry by the College of American Pathologists.[12]

In a series of agreements beginning in the mid-1990s and becoming

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[10] *See infra* notes 116-133 and accompanying text.

[11] *See infra* notes 121-22, 288 and accompanying text.

[12] *See, e.g.,* Jerry Mitchell, *Doctor's Autopsy Abilities Targeted*, CLARION LEDGER, Apr. 27, 2008 (attached as Appendix 2); Radley Balko, *CSI: Mississippi*, WALL STREET JOURNAL, Oct. 7, 2007, *available at* http://online.wsj.com/article/SB119162544567850662.html. In May of 2008, the College of American Pathologists contacted Dr. Hayne to voice its concern about the number of autopsies that he had claimed to be performing annually. Letter from College of Am. Pathologists to Steven T. Hayne (May 22, 2008) (attached as Appendix 3).

After a hearing in July of 2008, the College found that, by his own admission, Dr. Hayne performed on average 1,669 autopsies per year from 1997 through 2007. Letter from College of Am. Pathologists to Jared Schwartz (Aug. 20, 2008) (attached as Appendix 4). At the hearing, Dr. Hayne testified that on weekdays, after he finished preparing and delivering court testimony, he began work at the morgue at 5 p.m. and worked until 2 or 3 a.m. *Id.* On weekends he typically worked the majority of both days. *Id.* He took no vacations and worked seven days a week throughout the year. *Id.* This number, the College found, substantially exceeds professional norms and that Dr. Hayne's claims of maintaining an appropriate standard of care should be viewed with skepticism. *Id.*

more formal over time, the State of Mississippi and Dr. Hayne created and entered a working arrangement that was mutually beneficial and outside the bounds of any recognized authority or law. The State saved hundreds of thousands of dollars in salary and other expenses by not hiring a medical examiner or staffing the medical examiner's office; Dr. Hayne gained a monopoly over what would become a multi-million dollar bulk autopsy business.[13] Operating in a State-created medicolegal oligarchy, Dr. Hayne combined serial misrepresentations and falsehoods, along with rank advertisements, to peddle his services in a market that was already rigged in his favor. The result was a tragedy for public health, victims of crime and their families, and, in this case, for Tavares Flaggs.

The State made this agreement with Dr. Hayne even though it knew that Dr. Hayne regularly injected falsehoods, unreliable opinions, and fabricated forensic findings into criminal proceedings. At trials, his explanations for his lack of certification in forensic pathology by the

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[13] Dr. Hayne performed over 80% of Mississippi's state autopsies – between 1,200-1,800 a year. Radley Balko, *The Coroners Revolt*, REASON MAGAZINE (Aug. 3, 2009, 12:30 PM), http://reason.com/archives/2009/08/03/the-coroners-revolt. At $500 per autopsy, his state autopsy practice generated $600,000-$900,000 in annual gross income. JOINT LEGISLATIVE COMMITTEE ON PERFORMANCE EVALUATION AND EXPENDITURE REVIEW, AN INVESTIGATION OF MISSISSIPPI'S MEDICOLEGAL DEATH INVESTIGATION PROCESS, 2008 Regular Sess., at x (2008) (attached as Appendix 1). In addition, Dr. Hayne testified between two to three times per week in criminal trials, approximately 130 criminal trials per year. He has testified that his hourly rate for criminal trials is $150, which includes time for consultation and travel. Though the amount of hours Dr. Hayne billed per criminal trial are unknown, he often testified to spending ten to twelve hours per civil trial, making his involvement in criminal trials well above $200,000 a year. By contrast, Mississippi allocates less than $200,000 per annum for the State Medical Examiner salary. MISS. CODE ANN. §§ 41-61-51 *et seq*. (1986).

American Board of Pathology, for example, were patent lies.[14] The business arrangement was also in direct violation of both the spirit and plain language of state ethics and public health laws. It exploited and circumvented, with the full knowledge of those who retained his services, well-established precepts about the use and value of forensic evidence in the courtroom. Among the collateral consequences: The sacrifice of certain individuals' fundamental civil rights – including Flaggs' – who were charged with, tried for, and wrongfully convicted of criminal offenses.

In cases like this one, where evidence of culpability fell far short of what would have been needed to secure a conviction, the State of Mississippi, in concert with Dr. Hayne, presented Dr. Hayne as an objective and highly qualified forensic pathologist in order to provide critical, but unsound, testimony about Flaggs' culpability. Without Dr. Hayne's testimony in this case, the State had very little, if any, evidence to charge Flaggs with any offense at all. Moreover, most of the evidence, physical and testimonial, supported Flaggs' version of events, namely self-defense. In short, there would have been no basis whatsoever for a murder conviction.

Armed with this new evidence, Flaggs now seeks redress because, as this Court has long recognized, "where fundamental and constitutional rights are ignored, due process does not exist, and a fair trial in contemplation of law cannot be had."[15] Newly discovered evidence of Dr. Hayne's malfeasance,

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[14] See *infra*, notes 116-133.
[15] *Brooks v. State*, 46 So. 2d, 94, 97 (Miss. 1950).

combined with the acts of the State of Mississippi and the agents who prosecuted Flaggs' case, deprived him of his liberty without due process of law by disregarding, among others, a fundamental constitutional right guaranteed to him by the United States and Mississippi Constitutions: a fair trial.[16]

STATEMENT OF THE CASE

A. Procedural History

On October 12, 2005, a Hinds County grand jury returned an indictment, pursuant to Section 97-3-19 of the Mississippi Code, against Tavares Flaggs, the petitioner, for murder.[17] Flaggs pleaded not guilty to the charge against him.[18] Flaggs' criminal trial began on July 24, 2006.[19] On July 26, 2006, petitioner was found guilty of murder and sentenced to life imprisonment.[20]

The Mississippi Court of Appeals affirmed the conviction and sentence.[21] Flaggs then filed a motion for rehearing, which was denied by the court on October 14, 2008,[22] and on January 22, 2009, the Mississippi Supreme Court denied Flaggs' petition for *certiorari*.[23] On November 16,

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[16] *See* MISS. CONST. art. III, §14.
[17] *Flaggs v. State*, 999 So.2d 393, 395 (Miss. Ct. App. 2008).
[18] *Id.*
[19] *Id.*
[20] Transcript of Record at 433, *State v. Flaggs*, No. 05-0-933 (Hinds Cnty. Circuit Ct. July 26, 2006) (attached as Appendix 5).
[21] *Flaggs v. State*, 999 So.2d 393 (Miss. Ct. App. 2008).
[22] *Id.*
[23] *Flaggs v. State*, 999 So.2d 852 (Miss. 2009).

2010, he filed an application for leave to file a motion for post-conviction relief in this Court; the Court denied this motion on December 15, 2010.[24] Thereafter, Flaggs, acting *pro se*, filed a petition for a writ of *habeas corpus* in the United States District Court for the Southern District of Mississippi; the District Court denied the petition on August 29, 2012.[25]

B. Statement of Facts[26]

On April, 25, 2005, Tavares Flaggs went to his friend Derrick Wright's, apartment to smoke crack cocaine.[27] Flaggs and Wright were well-acquainted, in part because they had smoked crack together on numerous occasions.[28] On that particular day, however, Wright had a violent reaction to the drug.[29] Wright began acting erratically, running around his apartment, looking out of the apartment's windows, peeking around corners, putting his ear up to the front door, and accusing his friend, Flaggs, of trying to harm him.[30] While Wright worked himself into a state of drug-addled paranoia, Flaggs remained in the apartment's bedroom.[31] Wright's behavior turned

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[24] Referenced in *Flaggs v. Epps*, No. 3:11–cv–608; *Flaggs v. Epps,* 2012 WL 3776697, at *1 (S.D. Miss. Aug. 29, 2012).
[25] *Flaggs v. Epps*, No. 3:11–cv–608; *Flaggs v. Epps,* 2012 WL 3763645, at *1 (S.D. Miss. Aug. 29, 2012).
[26] The information in the Statement of Facts is taken from both the trial transcript and the taped statement (transcribed by undersigned) Flaggs gave to the police upon his arrest, which was admitted into evidence and played for the jury at trial (attached as addition to Appendix 5). Transcript of Record at 382, *State v. Flaggs*, No. 05-0-933 (Hinds Cnty. Circuit Ct. Miss., July 26, 2006) (attached as Appendix 5).
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*

violent, and, brandishing a screwdriver, he approached Flaggs and accused Flaggs of "trying to do something" to him.[32]

Flaggs attempted to defuse the situation.[33] Despite his attempts, however, Wright attacked him with the screwdriver.[34] As Flaggs struggled to protect himself, the two men wrestled from the bedroom into the hallway.[35] Flaggs fell to the ground during the struggle, but was able to wrest the screwdriver from Wright.[36] Wright then ran into the apartment's kitchen.[37] Flaggs, concerned that Wright might grab another weapon, followed him.[38]

Wright did, indeed, grab a butcher knife from the kitchen counter.[39] In response, Flaggs reached for a small, flimsy steak knife from a table in the

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[32] *Id.*
[33] *Id.* Petitioner responded to Wright's accusations, stating: "Man, me and you sit here and smoke crack plenty of times. You know I ain't never tried to do nothing to you." *Id.*
[34] *Id.* The State produced evidence at trial that Wright had recently undergone shoulder surgery and wore a sling as a result. Transcript of Record at 191-95, *State v. Flaggs*, No. 05-0-933 (Hinds Cnty. Circuit Ct. July 25, 2006). However, Wright was not wearing the sling when he was later discovered, *Id.* at 226, 417, and the autopsy, conducted by Dr. Hayne, revealed no sign of recent surgeries. Transcript of Record at 340, *State v. Flaggs*, No. 05-0-933 (Hinds Cnty. Circuit Ct. July 26, 2006). Further, the sling was not recovered by the police from Wright's apartment during the investigation, Transcript of Record at 178, *State v. Flaggs*, No. 05-0-933 (Hinds Cnty. Circuit Ct. July 25, 2006), nor was any blood found on the sling when it was later produced by Wright's brother. Transcript of Record at 417, *State v. Flaggs*, No. 05-0-933 (Hinds Cnty. Circuit Ct. July 26, 2006). Wright was also seen moving boxes shortly before his death. *Id.* at 389.
[35] Taped Statement of Tavares Flaggs, *State v. Flaggs*, No. 05-0-933 (Hinds Cnty. Circuit Ct. July 26, 2006); *see also* Transcript of Record at 382, *State v. Flaggs*, No. 05-0-933 (Hinds Cnty. Circuit Ct. July 26, 2006).
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] Taped Statement of Tavares Flaggs, *State v. Flaggs*, No. 05-0-933 (Hinds Cnty. Circuit Ct. July 26, 2006); *see also* Transcript of Record at 382, *State v. Flaggs*, No. 05-0-933 (Hinds Cnty. Circuit Ct. July 26, 2006).

corner of the kitchen.[40] Wright, brandishing the butcher knife, approached Flaggs. [41] Flaggs tried to flee by running from the kitchen into the hallway.[42] Wright pursued him.[43] Wright caught up with Flaggs in the hallway, and Flaggs tried to defend himself with the steak knife, but it was too small to deter Wright's attack.[44] Flaggs dropped his knife to the ground and used both hands to defend himself.[45] As the two men struggled, Wright slashed Flaggs across the forearm and bit him on the chest, near his left armpit.[46] Wright also bit Flaggs' fourth finger on his left hand, sinking his teeth nearly to the bone.[47] Flaggs bled profusely from his wounds – particularly the wound on his hand – as they struggled in the hall near the bathroom.[48] Flaggs was eventually able to wrench his finger free from Wright's mouth.[49] Wright had sustained no injuries and was not bleeding during the portion of the struggle occurring in the hallway.[50]

As the fight continued, Flaggs gained control of Wright's knife.[51] Wright was undeterred.[52] As Wright tried to take the knife back, Flaggs

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[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*

stabbed him.[53] Of the blows inflicted, only one proved to be lethal.[54] Panicked, Flaggs dropped the knife, changed his shirt, and left the apartment, thinking, as he later told the police, "Oh my God . . . what have I done?!"[55]

Flaggs was arrested four months later when investigators discovered his fingerprint on a knife blade found at the apartment.[56] Flaggs cooperated with law enforcement and voluntarily gave a tape-recorded statement in which he described Wright's attack and his own actions in self-defense.[57] At no point during Flaggs' arrest or his subsequent interview did he ever deny stabbing Wright or causing his death. Other than Flaggs and Wright, there were no eyewitnesses to the events that led to Wright's death.

At trial, the prosecution relied upon Dr. Steven Hayne as its chief witness; the State presented no evidence of his qualifications as a forensic

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[53] *Id.*

[54] Transcript of Record at 317-18, *State v. Flaggs*, No. 05-0-933 (Hinds Cnty. Circuit Ct. July 26, 2006). The total number of wounds was not conclusively established at trial, and it is difficult to ascertain this number from the trial transcript. Dr. Steven Hayne performed the autopsy and testified concerning the number of wounds at trial. *Id.* at 317-19. Dr. Hayne described fifteen stab wounds, one chop wound, and three slash wounds, but never definitively stated the total number of wounds. *Id.* at 317-18. Determining the wound total is made even more difficult by Dr. Hayne's multiple and different descriptions of certain wounds. For example, Dr. Hayne testified that there was one wound located on Wright's right forearm, but described it at separate times as both a "slash wound," *id.* at 318, and as a "chop wound." *Id.* at 322. In addition, Dr. Hayne's characterization of Wright's wounds again changed when he stated he identified three chop wounds, not one, as he had previously testified. *Id.* at 319. Whether multiple characterizations of the same wound led to double counting of that wound is unknown.

[55] Taped Statement of Tavares Flaggs, *State v. Flaggs*, No. 05-0-933 (Hinds Cnty. Circuit Ct. July 26, 2006); *see also* Transcript of Record at 382, *State v. Flaggs*, No. 05-0-933 (Hinds Cnty. Circuit Ct. July 26, 2006).

[56] Transcript of Record at 373, *State v. Flaggs*, No. 05-0-933 (Hinds Cnty. Circuit Ct. July 26, 2006).

[57] *Id.* at 377-78.

pathologist.[58] Dr. Hayne did not personally examine the crime scene,[59] nor is there any indication in the record that Dr. Hayne was aware at any point of Flaggs' description of the events in the apartment and his attempts to defend himself. Additionally, there is no indication in the record that Dr. Hayne examined Flaggs' wounds.[60]

Nonetheless, the State asked for, and Dr. Hayne provided, explicit information about the context and characterization of the struggle between the men and the nature of Wright's wounds. Contrary to Flaggs' statement that Wright repeatedly attacked him, Dr. Hayne testified that three of Wright's nonlethal wounds indicated "defensive posturing,"[61] that is, according to Dr. Hayne, "an injury in an attempt of somebody to ward off injury to the face, to the neck and to the upper chest with their fingers, their hands or their forearms."[62] Dr. Hayne based this conclusion solely upon the location of these three nonlethal wounds,[63] one on the back of Wright's left hand,[64] one on Wright's right forearm and wrist,[65] and one on the fourth finger of Wright's left hand.[66] Dr. Hayne was not asked, and did not provide an opinion, about the nature of the additional nonlethal wounds.

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[58] *Id.* at 313-14.
[59] *Id.* at 340.
[60] *Id.*
[61] *Id.* at 318-19, 324.
[62] *Id.* at 318.
[63] *Id.* at 319, 332-33.
[64] *Id.* at 318, 333.
[65] *Id.* at 318-19, 334.
[66] *Id.* at 319, 334-35.

After the following exchange, the trial court allowed Dr. Hayne to also testify as a "blood spatter" expert:

> Q . . . How much spatter would you expect to come from the body during . . .
> BY MR. LABARRE: Your honor, I'm going to object. I don't think he's been qualified as a blood spatter expert.
> BY THE COURT: Overruled.[67]

Dr. Hayne provided testimony concerning the discolorations on the hallway walls that were presumed to be – but without any evidentiary support – blood spatter.[68] Dr. Hayne was not offered by the prosecution or received by the court as a blood spatter expert at any point during the trial.[69] In addition, the "blood spatter" was never tested in order to determine whether it was in fact blood; nor, it follows, was there any determination about whose blood it was.

Nevertheless, despite his lack of personal knowledge concerning the apartment, the fight, Flaggs' wounds, his lack of expertise in blood spatter, and the lack of verification that the discoloration on the hallway walls was in fact blood, Dr. Hayne determined with a "reasonable degree of medical certainty"[70] that the "blood" had in fact come from Wright's wounds on his right arm and that it was a further indicator of "defensive posturing."[71] Dr. Hayne also testified, in direct contradiction with Flaggs' statement to the police, that the "blood spatter" showed that Wright had been "moving in a

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[67] *Id.* at 338-39.
[68] *Id.* at 337-39.
[69] *Id.* at 338-39.
[70] *Id.* at 340-41.
[71] *Id.* at 339.

backward position *away from* the indicated area where the blood spatter was located."[72]

Other than Dr. Hayne's testimony, the State produced no other witness or physical evidence that contradicted Flaggs' claim of self-defense. Flaggs was convicted of murder, of attacking Wright with the deliberate design to effectuate his death.[73]

ARGUMENT

I. EVIDENCE OF DR. HAYNE'S SERIAL FORENSIC FRAUD, AND THE STATE OF MISSISSIPPI'S KNOWING ROLE IN AIDING, ABETTING, AND CONCEALING IT, CONSTITUTES NEWLY DISCOVERED EVIDENCE THAT, HAD IT BEEN MADE AVAILABLE, WOULD HAVE PRODUCED A DIFFERENT RESULT AT FLAGGS' TRIAL.

A. Standard of Review

Under the Mississippi Uniform Post-Conviction Collateral Relief Act (UPCCRA), post-conviction review "provide[s] prisoners with a procedure, limited in nature, to review those objections, defenses, claims, questions,

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[72] *Id.* at 338 (emphasis added). At trial, the State introduced into evidence three photographs of the "blood spatter": Exhibits 12, 13 and 14. *Id.* at 234-35, 237-38. These photographs were identified by and introduced through Charles Taylor, a crime scene investigator for the Jackson Police Department. *Id.* at 227. There is no indication in the record that Dr. Hayne examined these photographs at anytime before or during Flaggs' criminal trial when formulating his opinion that the "blood spatter" showed that Wright was attempting to defend himself. According to the record, Exhibit 15, a diagram of Wright's apartment, was the only exhibit Dr. Hayne examined at trial in formulating his conclusions concerning the "blood spatter." *Id.* at 237.

[73] *Id.* at 433.

issues or errors which in practical reality could not be or should not have been raised at trial or on direct appeal."[74]

The Mississippi Supreme Court reviews applications for leave to file post-conviction relief pursuant to Mississippi Code Annotated Section 99-39-27. Under this section, the court may exercise two options when reviewing a petitioner's application.[75] First, the court may rule on the petition, granting or denying the requested relief, if it plainly appears "from the face of the application, motion, exhibits and the prior record" that the claim is not barred under Section 99-39-21 of the Mississippi Code and that there is a substantial showing that the petitioner has been denied a state or federal right.[76] Second, the court may grant the petitioner's application to proceed in the trial court for "further proceedings under Sections 99-39-13 through 99-39-23" of the Mississippi Code.[77]

Furthermore, although successive writs are generally barred from post-conviction review,[78] Flaggs' request for leave to file for post-conviction relief is not barred because it asserts a claim based on newly discovered evidence, and otherwise meets the related requirements in § 99-39-27(9) of the UPCCRA.[79]

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[74] MISS. CODE ANN. §§ 99-39-1 *et. seq*. (1984).
[75] *See Mitchell v. State*, 809 So.2d 672, 673 (Miss. 2002).
[76] *Mitchell*, 809 So.2d at 673.
[77] MISS. CODE ANN. § 99-39-27(7)(b) (Supp. 2006).
[78] *See* MISS. CODE ANN. §§ 99-39-1 *et. seq*. (1984).
[79] See MISS. CODE ANN. § 99-39-27(9) ("[E]xcepted from this prohibition [against successive writs for post-conviction relief] are those cases in which the prisoner can demonstrate . . . that he has evidence not reasonably discoverable at the time of

The law of the case doctrine posits that "[w]hatever is once established as the controlling legal rule of decision, between the same parties in the same case, continues to be the law of the case, so long as there is a similarity of facts."[80] Thus, ordinarily, an issue of fact or law decided on appeal will not be reexamined either by an appellate court on a subsequent appeal.[81] The law of the case doctrine, however, is an exercise of judicial discretion which "merely expresses the practice of courts generally to refuse to reopen what has been decided," not a limit on judicial power.[82] The doctrine, therefore, is not inviolate and "it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice."[83] Insofar as the court's previous holding about the materiality of Dr. Hayne's blood spatter testimony implicitly affects this petition for post-conviction relief, the court should not apply the law of the case doctrine in this case, because reaffirming the forensic fraud of an uncertified, unqualified expert witness would result in "manifest injustice" and would compromise the stringent demands of public policy.[84] Furthermore, even if the court were to

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trial, that is of such nature that it would be practically conclusive that, if it had been introduced at trial, it would have caused a different result in the conviction or sentence.").

[80] *Miss. College v. May*, 128 So.2d 557, 558 (Miss. 1961).

[81] *See id.*

[82] *Messinger v. Anderson*, 225 U.S. 436, 444 (1912); *accord Continental Turpentine and Rosin Co. v. Gulf Naval Stores Co.*, 142 So.2d 200, 206–207 (Miss. 1962).

[83] *Simpson v. State Farm Fire & Cas. Co.*, 564 So. 2d 1374,1380 (Miss. 1990) (quoting *Arizona v. California*, 460 U.S. 605, 618 n. 8 (1983), *overruled on other grounds*, *Upchurch Plumbing, Inc. v. Greenwood Utils. Comm'n*, 964 So.2d 1100 (Miss. 2007).

[84] *Flaggs v. State*, 999 So.2d 393, 403 (Miss. Ct. App. 2008).

apply the law of the case doctrine, the doctrine would have very limited effect on the disposition of this petition, because this petition for post-conviction relief challenges the admission of Dr. Hayne's testimony in its entirety – including his defensive posturing testimony – and not just his blood spatter testimony.

B. Legal Authority

Flaggs' dogged pursuit of the truth has uncovered a wealth of newly discovered evidence involving Dr. Hayne's prejudicial misconduct and forensic fraud during Flaggs' criminal trial. This newly discovered evidence requires the court to reverse Flaggs' wrongful conviction.

According to the Mississippi Supreme Court, a petitioner is entitled to a new trial based on newly discovered evidence when he or she can demonstrate: (1) that the new evidence was discovered since the trial, (2) that due diligence could not have discovered the new evidence prior to trial, (3) that the evidence is material to the issue and that it is not merely cumulative or impeaching, and (4) that the evidence will probably produce a different result or verdict in the new trial.[85]

Flaggs' recent discovery of Dr. Hayne's malfeasance during Flaggs' trial and the complicity of the State of Mississippi in failing to disclose this information meet all four of this court's requirements for a new trial. His

[85] *See Ormond v. State*, 599 So.2d 951, 962 (Miss. 1992); *see also Sonnenburg v. State*, 830 So.2d 678, 681 (Miss. Ct. App. 2002).

petition should be granted, and his conviction and sentence should be vacated.

C. Newly Discovered Evidence

The newly discovered evidence, material to Flaggs' case, is set forth fully in the sections, footnotes, and various appendices that follow, but is proof of the following: (1) that although he was grossly unqualified, Dr. Hayne entered into an unethical arrangement with the State under which he was allowed to act as the State's primary forensic pathologist;[86] (2) that Dr. Hayne, with the State's knowledge, repeatedly misrepresented – under oath – his qualifications to testify as a forensic pathologist;[87] and (3) that Dr. Hayne engaged in extensive forensic fraud, which irreparably tainted his testimony as a forensic pathologist and his findings in this case, including his conclusions about the blood spatter in the hallway.[88]

1. **Dr. Hayne's Rise to Prominence and His Unethical Arrangement with the State**

First, Dr. Hayne and the State repeatedly and systematically failed to disclose his illegal, unethical arrangement with the State which allowed him to act as the *de facto* State Medical Examiner, although he was unqualified to hold that office. This arrangement was significantly more influenced by his desire for personal enrichment than by his professional competence.

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[86] *See infra* notes 88-114 and accompanying text.
[87] *See infra* notes 116-48 and accompanying text.
[88] *See infra* notes 152-72 and accompanying text.

In the early 1990s, Mississippi state officials began to implement a plan that allowed Dr. Hayne to circumvent statutorily mandated public health and safety requirements. By first weakening, and then dismantling, the Office of State Medical Examiner, the plan was ostensibly designed to "save" the State money by privatizing its autopsy services. In practice, however, the arrangement, whose precise terms have until now remained undisclosed, enriched a single, favored pathologist: Dr. Hayne. This arrangement sacrificed medical and legal rigor, and ultimately, the rights of criminal defendants, like Flaggs, who were wrongfully prosecuted and convicted of serious offenses.

Statutory provisions put into place in the late 1980's required that the State Medical Examiner be certified by the American Board of Pathology (ABP). Because Dr. Hayne failed his attempt at ABP certification, beginning in 1992, Mississippi Public Safety Commissioner Jim Ingram and Dr. Hayne began efforts to thwart any serious effort to hire a state medical examiner and staff that office, despite the statutory mandate.[89] Under Ingram's plan, which had Dr. Hayne's approval, the bulk of fee-based autopsy work would be shifted to Dr. Hayne, who was operating in private practice. In order to aid

[89] In point of fact, the State medical examiner's office had been unsettled since the early 1980's. Dr. Faye Spruill had been appointed medical examiner in 1979, but by 1982, after significant controversy during her tenure, the Legislature had ceased allocating funds to the office. After Dr. Spruill left, funding was restored, though not to levels needed to fully fund the office so that it could meet its statutory mandate. John Butch, *Applicants for Medical Examiner Job Tough to Find,* CLARION-LEDGER, Mar. 22, 1999) (attached as Appendix 6); s*ee*, MISS. CODE ANN. §§ 41-61-55 *et seq*. (1986).

Dr. Hayne, the agreement would ultimately allow him to refer to himself as the "State designated pathologist," even though he was not certified. According to Ingram, this arrangement would save the State approximately $120,000 annually and would permit Dr. Hayne to ramp up his private pathology business.[90] Individual counties – which, under the plan, paid $550 per autopsy[91] – would not have to pay any additional fees, and Dr. Hayne, by virtue of his unfettered ability to conduct six to seven times more autopsies than any legitimate, governing body authorized, would see a windfall: nearly $500,000 in personal income annually.[92]

There were two ethical problems with this arrangement. First, there should have been immediate concern over the astronomical number of autopsies that Dr. Hayne would be conducting each year. According to Ingram himself, Dr. Hayne performed well over 1,200 autopsies in 1991 alone. The guidelines of the National Association of Medical Examiners (NAME), the industry's primary professional organization, indicate that a medical examiner should perform a *maximum* of 250 autopsies a year—less if he is also tasked with administrative duties.[93] The NAME standards are not

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[90] Letter from Jim Ingram, Comm'r of Pub. Safety, to Ronald Crowe, Exec. Dir., Miss. Ethics Comm'n (July 2, 1992) (attached as Appendix 7).
[91] *See* MISS. CODE ANN. §41-61-75 (1986).
[92] *See* JOINT LEGISLATIVE COMMITTEE ON PERFORMANCE EVALUATION AND EXPENDITURE REVIEW, AN INVESTIGATION OF MISSISSIPPI'S MEDICOLEGAL DEATH INVESTIGATION PROCESS, 2008 Regular Sess., at x, 23 (2008), *available at* http://www.peer.state.ms.us/reports/rpt514.pdf (attached as Appendix 1).
[93] OFFICE OF THE MEDICAL EXAMINER, PERFORMANCE AUDIT 13 (Dec. 15, 2011), *available at* http://www.denvergov.org/Portals/741/documents/Audits2011/Medical%20Examiner

meant to penalize diligent and hard-working pathologists. They are a function of the practical certainty that performing more than approximately 250 autopsies a year will result in a significant number of errors. This is not a case of a pathologist performing 260 or 275 autopsies a year, arguably within the margin of error inherent in the 250 maximum. In other words, Dr. Hayne was participating in what the National Association of Medical Examiners (NAME) considers a gross deficiency and serious affront to the "minimum standards for an adequate medicolegal system."[94] Ingram's request, in effect, was asking for the State's blessing on Dr. Hayne's gross violation of public health policy.

The second reason the State should have had significant concerns about this arrangement was identical to why the State would have to go to such great lengths to bypass the requirements of the medical examiner's office. Why, for example, could Mississippi not simply hire Dr. Hayne to be the State Medical Examiner? The obvious answer was that Dr. Hayne was categorically unqualified for the position because he was not certified in

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%20Audit%20Report%2012-15-11.pdf; NAT'L ASS'N OF MED. EXAM'RS, FORENSIC AUTOPSY PERFORMANCE STANDARDS 10 (2011), *available at* http://thename.org/index2.php?option=com_docman&task=doc_view&gid=160&Itemid=26 (attached as Appendix 8).

[94] VINCENT J. DI MAIO & DOMINIC DI MAIO, FORENSIC PATHOLOGY 19 (2nd ed. 2001) (attached as Appendix 9); s*ee also*, NAT'L ASS'N OF MED. EXAM'RS, FORENSIC AUTOPSY PERFORMANCE STANDARDS 10 (2011), *available at* http://thename.org/index2.php?option=com_docman&task=doc_view&gid=160&Itemid=26 (attached as Appendix 8). Standard B4.5 states that "Autopsies shall be performed as follows: . . . the forensic pathologist shall not perform more than 325 autopsies in a year. Recommended maximum number of autopsies is 250 per year." *Id.*

forensic pathology by the ABP.[95] Certification in forensic pathology from the ABP – the peer-governed association that provides certification for the subspecialty recognized by the American Medical Association[96] – is a statutory requirement for Mississippi's medical examiner.[97] Dr. Hayne was not certified by the ABP in forensic pathology – he failed the exam, has never been certified by the ABP in forensic pathology, and has repeatedly demonstrated that he lacks the knowledge, skills, and ethical sensibility necessary to be certified by the ABP in forensic pathology.[98]

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[95] Dr. Hayne has claimed, both under oath on numerous occasions and in response to those who have questioned him about it, that he walked out of the forensic pathology certification exam because the questions insulted his intelligence. That explanation should have strained credulity. As it turns out, it was completely false. The truth was that he was failing every single section of the exam at the point he walked out. *See* Deposition of Dr. Steven Hayne at 255, *Hayne v. Innocence Project*, No. 3:09-CV-218-KS-LRA (S.D. Miss. Apr. 26, 2012) (attached as Appendix 10).

[96] THE AMERICAN BOARD OF PATHOLOGY, http://www.abpath.org/ (last visited June 19, 2012).

[97] *See* MISS. CODE ANN. § 41-61-55 (1986).

[98] In 2007, Mississippi Department of Corrections (MDOC) inmate Randy Cheney began exhibiting signs of sepsis. *See* Complaint at ¶17, *Cheney v. Collier*, No. 4:09CV00111 (N.D. Miss. Oct. 26, 2009). After a couple of weeks of deteriorating health, Cheney was finally transported to Parchman Hospital at the Mississippi State Penitentiary. *Id.* at ¶24. After his condition worsened he was taken to Greenwood Leflore Hospital. *Id.* at ¶26. The day after his arrival he died of septic shock. *Id.* at ¶28.

Dr. Hayne performed the autopsy and determined that Cheney's cause of death was hypertensive heart disease and coronary artery disease. *See* Steven T. Hayne, Final Report of Autopsy, AME# 8-Q5-07 (Aug. 30, 2007) (attached as appendix 11). He ruled the manner of death to be natural. *Id.* Of critical import in determining cause and manner of death, of course, was Cheney's ongoing complaint about his infection, the length of time that it took him to receive medical care, and the possibility that the medical care he did receive – medication for a rapid heartbeat – was negligent and was a proximate cause of his death. *See* Complaint at ¶¶ 29-51, *Cheney v. Collier*, No. 4:09CV00111 (N.D. Miss. Oct. 26, 2009).

Among the issues central to arriving at an understanding of what led to his death was the condition of his spleen, an organ that is a key part of the immune system and which, if compromised, may increase risk of sepsis. Justin T. Denholm, Penelope A. Jones, Denis W. Spelman, Paul U. Cameron & Ian J Woolley, *Spleen*

Registry May Help Reduce the Incidence of Overwhelming Postsplenectomy Infection in Victoria, MED. J. AUST. 192 (1): 49-50 (2010). Dr. Hayne indicated in the autopsy report that Cheney's spleen, "assume[d] its usual left upper quadrant abdominal location, and is noted to weigh 180 grams" – within range of normal for an adult human. Steven T. Hayne, Final Report of Autopsy, AME# 8-Q5-07 (Aug. 30, 2007) (attached as Appendix 11). After removing and examining it, Dr. Hayne noted that the spleen "capsule is intact and no subcapsular contusions are appreciated. The spleen is cross-sectioned and a moderate amount of serosanguineous fluid exudes from the cut surfaces. Examination of the cross-sectioned segments of the spleen reveals acute splenic congestion. The malpighian corpuscles are of normal size and number." *Id.* In short, Dr. Hayne's autopsy report concluded that Cheney's spleen presented with no abnormalities or signs that otherwise might have suggested the presence of or connection to massive sepsis.

The problem was that Cheney had no spleen. It had been surgically removed in its entirety in 2003 in a procedure commonly known as a splenectomy – a condition that Cheney had reported to MDOC medical staff upon his admittance to prison. *See*, N. Miss. Med. Ctr., Dep't of Pathology, Tissue Examination for Randy Cheney (Nov. 28, 2003) (attached as Appendix 12). At the time of surgical removal the spleen weighed 152 grams. *Id.* In the intervening period of time – at least according to Dr. Hayne's findings – it had not only regenerated, but had grown back bigger than before – by close to thirty grams. Dr. Hayne was recently asked in a deposition to explain his findings: "[W]ell, you know, an accessory spleen can grow in the size of the original spleen. So that would be my interpretation of what occurred." Deposition of Dr. Steven Hayne at 239, *Hayne v. Innocence Project*, No. 3:09-CV-218-KS-LRA (S.D. Miss. Apr. 26, 2012) (attached as Appendix 10). Dr. Hayne offered no additional medical support for his explanation. *Id.*

In a series of other cases, Dr. Hayne has performed autopsies reflecting similar intentional misrepresentations and gross negligence. In the case of an infant drowning in a pool at a Days Inn in the Mississippi Delta, Dr. Hayne removed and weighed two kidneys when the child, as a result of surgical intervention, possessed only one. *See* Affidavit of Tucker Carrington (Sept. 27, 2012) (attached as Appendix 13). In a 1999 case Dr. Hayne testified that the remains of an almost completely skeletonized female showed signs of strangulation—a conclusion other medical examiners say could not be reached unless there was muscle tissue to examine. Radley Balko, *CSI: Mississippi: A Case Study in Expert Testimony Gone Horribly Wrong*, REASON MAGAZINE, (Oct. 8, 2007 3:20 PM), http://reason.com/archives/2007/10/08/csi-mississippi/print. In 1998, Dr. Hayne concluded that a female had expired of natural causes, but, after the state medical examiner in Birmingham performed a second autopsy (the decedent was from Alabama), the examination discovered that Dr. Hayne had not even emptied the woman's pockets and that many of the internal organs that Dr. Hayne had claimed to have examined had not been touched (the woman had died from a blow to the head). *Id.* In 1997, years after he had performed the autopsies, Dr. Hayne changed his diagnosis – without re-examining the bodies – in two infant deaths from sudden infant death syndrome (SIDS) to asphyxiation after plaintiffs' attorneys who desired his testimony contacted him about a suit they were planning to file against the manufacturer of an infant rocker. *Id.* Finally, in a murder case from southern

Thus, from its inception, the State was fully cognizant of the business arrangement's potential legal and ethical problems. Commissioner Ingram, in fact, sought advice from the Mississippi Ethics Commission. In a newly discovered letter to Ronald Crowe, Executive Director of the Ethics Commission, Commissioner Ingram focused on Dr. Hayne's work and the economic benefits that would flow to the State from the proposed arrangement.[99] "[Dr. Hayne] is willing to accept the position without salary because he currently does somewhere near 80% of all autopsies performed by the State," and "[h]e receives $500 for each autopsy he performs by the individual counties for which he provides the service."[100] Commissioner Ingram continued: "[t]he State of Mississippi stands to save approximately $125,000 per year. This translates into a savings in excess of $500,000 over the next four years."[101]

Ingram did not disclose the fact that, should the request be approved, an uncertified, wholly unqualified pathologist would be performing an

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Mississippi, Dr. Hayne claimed to have removed the ovaries and uterus of the victim and examined them. The problem: the victim was male. *See* Affidavit of Tucker Carrington (Sept. 27, 2012) (attached as Appendix 13).

[99] By then the office had become "a battleground between coroners and private pathologists and those who [saw] the office as a way to improve systemic quality" and overall public health. John Butch, *Applicants for Medical Examiner Job Tough to Find*, CLARION-LEDGER, Mar. 22, 1999 (attached as Appendix 6). Those who argued that the office ought to be staffed by a professional and licensed medical examiner pointed to state laws that mandated such a structure, and also to the public health policy supporting it. *See generally*, Associated Press, *Low Pay is Blamed for Vacant Jobs, Backlog at Miss. Crime Lab*, THE MEMPHIS COMMERCIAL APPEAL, July 20, 1998 (attached as Appendix 14); Butch, *supra* note 88 (attached as Appendix 6).

[100] Letter from Jim Ingram, Comm'r of Pub. Safety, to Ronald Crowe, Exec. Dir., Miss. Ethics Comm'n (July 2, 1992) (attached as Appendix 7).

[101] *Id.*

ethically unconscionable number of autopsies – almost every single autopsy in the state – in a market that he and the State had not only gamed in his favor, but also in one where there would be no objective, professional oversight of his work.[102]

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[102] The two most organized and vocal proponents of the move to decentralize the medical examiner's office were the two who stood to gain the most from it: Dr. Hayne and his forensic odontologist colleague, Dr. Michael West. Each had a vested self-interest in the outcome. For his part, Dr. West was the Forrest County coroner. He was public, but not entirely candid, about his self-interest in the outcome of the medical examiner's office. Publically, Dr. West maintained that the medical examiner's office "needs to be an administrative position . . . . You would save money for the state and be able to regulate the coroners better." Butch, *supra* note 88 (attached as Appendix 6). In order to expedite matters, Dr. West drafted a petition that enumerated four complaints about the medical examiner's office and its staff: (1) "Failure of the State Medical Examiner to support many of the county Coroners;" (2) "State Medical Examiner assisting defense counsel;" (3) "attempt of the State Medical Examiner to establish a political power base at the expense of the elected Coroners and other elected officials;" and (4) "failure of the State Medical Examiner to cooperate with the Coroners as mandated by State Law." Petition from Dr. Michael West to Undersigned Coroners (undated) (attached as Appendix 15). Forty-two coroners lent their names to the petition. *Id.* Letter from Dr. Michael West to "Fellow Coroners" (Jan. 25, 1995) (attached as Appendix 16).

What Dr. West did not disclose in public discussion was that he was well into the prime of his relationship with Dr. Hayne. The two had by that time collaborated on dozens of cases, many of them previously unsolved, and each stood to leverage their relationship into personal and professional advancement. *See*, Dr. Michael West, CV Abstract (listing "15 years Forensic Advisor Mississippi Mortuary Service / Dr Steve Hayne) (attached as Appendix 17). Dr. West wrote, in part:

> Up to this time [1993], I had been a frequent participant at the morgue, dental ID, bitemarks, Forensic Consultant, Deputy Coroner, Medical Examiner Investigator for Forrest Co MS. The pace quickened in 1994 when I became Coroner/Chief Medical Examiner Investigator. A position I held for the next six years.
>
> After leaving office I accepted a position with Dr Steven Hayne, a Designated State Pathologist. These positions offered me a tremendous opportunity in being able to record, document and photograph, the almost full spectrum of traumatic injuries and the human condition. I say almost, as I will think I've seen everything, then bam, I'm presented with something new.

Letter from Dr. Michael West to Am. Bd. of Forensic Odontology (June 15, 2006) (attached as Appendix 18).

Notwithstanding Ingram's material omissions, the Ethics Commission quickly responded to his letter. Its first concern was "a degree of suspicion among the public" that would arise when "a designated pathologist who now conducts a large percentage of state and local autopsies is designated State Medical Examiner" without being properly hired or possessing the statutorily required certification.[103] The Ethics Commission was also concerned about the conflict of interest that would violate the State's Declaration of Public Policy.[104] The Ethics Commission wrote that it had "grave concern . . . as to the practicality and propriety in having a pathologist conducting such a large percentage of the state's autopsies also responsible for the rules and regulations under which he and his professional colleagues perform their public duty."[105] It also speculated that the person in the post – Dr. Hayne – would use the position for pecuniary gain in violation of state ethics and public policy, which, in its view, would compromise public health priorities.[106]

Moreover, by making an end-run around the statutory requirements regarding the hiring and staffing of a state medical examiner's office, and instead opening the work to a handpicked private forensic pathologist, the arrangement flouted the Mississippi law's public health safeguards (which

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[103] *See* Miss. Ethics Comm'n, Advisory Op. 92-132-E (July 10, 1992) (attached as Appendix 19).
[104] *See id.* (referring, *inter alia*, to MISS. CODE ANN. §§ 25-4-101 *et seq*. (1983)).
[105] *Id.*
[106] Though the Commission found no *per se* violation of ethics laws as presented, the Commission reiterated that the person assuming the position could not use that position for pecuniary benefit. *Id.* Specifically, the Commission wrote that "the path he will be forced to follow . . . may be so narrow as to limit his effectiveness." *Id.*

provide for oversight of private, state-designated pathologists and county coroners by a neutral, independent state medical examiner), proper professional oversight through the SME's power to remove coroners and pathologists when necessary, and proper training of county coroners.[107] In short, the arrangement abrogated the precise aims of State Medical Examiner Act and shifted critical financial and ethical incentives away from the state-mandated, structured oversight of the State Medical Examiner and toward a decentralized, unaccountable cabal of elected state coroners.

The State Public Safety Commission ignored the Ethics Commission's warnings and contracted with Dr. Hayne. In his new capacity, he began doing precisely what the Ethics Commission feared: using his position as a "State designated pathologist" for pecuniary benefit. Notably, the State's arrangement with Dr. Hayne changed who made the choice to hire a pathologist; whereas the State Medical Examiner Act allowed the SME's office to make pathologist-hiring decisions, the arrangement with Dr. Hayne shifted this decision to the discretion of county coroners. Mississippi county coroners are elected officials, and many were friends with Dr. Hayne. Dr. Hayne began to do what any private businessperson would do: solicit and satisfy a customer base. Among other things, Dr. Hayne made political contributions to county coroners and others who could influence the number

[107] *See generally*, MISS. CODE ANN. §§ 41-61-55 *et seq.* (1972); JOINT LEGISLATIVE COMMITTEE ON PERFORMANCE EVALUATION AND EXPENDITURE REVIEW, AN INVESTIGATION OF MISSISSIPPI'S MEDICOLEGAL DEATH INVESTIGATION PROCESS, 2008 Regular Sess., at 6 (2008) (attached as Appendix 1).

of dead bodies sent to him for autopsy.[108] In turn, business with the county coroners turned out to be quite lucrative. According to his own records, Dr. Hayne performed an average of 1,600 autopsies per year:[109] a significant financial windfall.[110]

Within a few years, Dr. Hayne had dubbed himself the "Chief State Pathologist" – "an honorific which Dr. Hayne insisted on adding" to his contract and that the State allowed.[111] With State approval of the business arrangement and no fear of anyone in an official capacity challenging his mass-autopsy business or the self-serving contract between him and the

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[108] Q. How about -- were there any donations to coroners around your office?
A.Uh-huh.
Q.Who were they?
A. I -- I can't remember. Jimmy Roberts, because he's local. But the rest of them, I don't even remember their names. I couldn't tell you their names today, of the current ones, because I don't deal with them.
. . .
Q.Did Dr. Hayne make any political donations through his pool that was left in the Investigative Research --
A. That's where it came from.

See Deposition of Cecil McCrory at 90, *Hayne v. Innocence Project*, No. 3:09-CV-218-KS-LRA (S.D. Miss. Apr. 24, 2012) (attached as Appendix 20).

Dr. Hayne donated to coroner campaigns (including Jimmy Roberts), district attorney campaigns (including Forrest Allgood), and other political offices (such as the attorney general). His largest known contribution is in the amount of $35,000 to Rusty Fortenberry for attorney general. *See id*. In an election cycle, Dr. Hayne's business partner, Cecil McCrory, estimated political contributions in the amount of $40,000. *See id.* at 92.

[109] Steven T. Hayne, Number of Autopsies (undated) (attached as Appendix 21).

[110] Over the span of Dr. Hayne's career, counties paid him between $400 to $550 per autopsy. *See* Deposition of Steven Hayne at 110, *Hayne v. Innocence Project*, No. 3:09-CV-218-KS-LRA (S.D. Miss. Apr. 26, 2012) (attached as Appendix 10).

[111] Letter from James W. Younger, Office of General Counsel, Miss. Dep't of Pub. Safety, to Merrida Coxwell, counsel for Steven Hayne (June 27, 2008) (attached as Appendix 22). Mr. Younger also notes that pursuant to the same contract, Dr. Hayne is an independent contractor who holds no state office. *Id.*

State, Dr. Hayne then turned the Ethics Commission's reservations – things that should have been viewed as disqualifying or illegal actions – on their head. In Dr. Hayne's hands, the Commission's ethical and professional concerns were transformed into anecdotal evidence of the credibility of his work – the unprofessional and enormous number of autopsies he was performing, for example, becoming instead proof of his professionalism.[112] For example, when questioned by prosecutors about how many autopsies he performed or how he was getting so much work, Dr. Hayne never mentioned that the reason he performed such a high volume of autopsies stemmed from

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[112] The examples are abundant, but his testimony in *State v. Brown* is representative of Dr. Hayne's general response to questions about his autopsy numbers. Transcript of Record at 761-63, *State v. Brown*, No. 05-428 (Pike Cnty. Circuit Ct. Mar. 26, 2006) (attached as Appendix 23). The prosecutor asked Dr. Hayne about the number of autopsies he had performed, the sole purpose of which was an attempt to establish his credibility in spite of professional norms to the contrary:

> Q. I don't know if you can answer this for the span of 30 years, but, to date, can you state approximately how many postmortem examinations you have conducted?
> A. I cannot give you an exact answer, Counselor, but approximately 30 to 35,000.
> Q. Currently, could you give us an average of the number of autopsies you might perform in a given month?
> A. Approximately 150 autopsies, 140 autopsies a month.
> . . .
> Q. Dr. Hayne, have you ever qualified in the courts of Mississippi as an expert in the field of medicine, specializing in forensic pathology?
> A. Yes, Counselor.
> Q. Have you also so qualified in the fields of anatomic pathology and clinical pathology?
> A. Yes, ma'am.
> Q. And of the times that you have qualified, how many times have you actually testified?
> A. In the State of Mississippi, approximately 3,500 times.
> . . .
> Q. Your Honor, at this time . . . the State would tender Dr. Steven Hayne . . .
> *Id.*

an undisclosed and ethically problematic agreement he had with the State. Nor did he reveal that the numbers themselves vastly exceeded what any governing agency would approve, or that the quality of his work should be viewed with extreme skepticism.[113] On the rare occasion that a defense attorney challenged Dr. Hayne, he typically claimed that he enjoyed no discrete benefits in his position and that he was similarly situated to other designated pathologists around the state. His heavy workload, he testified, was simply a reflection of the quality of his work.[114]

Significantly, there is not a single incidence of any State official, prosecutor or otherwise, upholding his or her legal and professional obligation to disclose to defense counsel the nature of Dr. Hayne's *quid pro quo* business relationship with the State.[115]

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[113] *See supra* note 12 and accompanying text.

[114] Dr. Hayne's disingenuous claims misled more than just fact-finders. In upholding a trial court's decision to admit Dr. Hayne's testimony, this Court recently wrote in *Lima v. State*, 7 So.3d 903, 908 (Miss. 2009), that "Lima claims that Dr. Hayne's testimony was unreliable because he performs many more autopsies annually than the number recommended by the authors of *Forensic Pathology*. However, Dr. Hayne explained that he does not take vacations and works nearly every day of the year, for approximately sixteen hours a day. He explained that performing a large number of autopsies is viewed by some as necessary in order to remain competent in the field."

[115] In *State v Bennett* for example, Dr. Hayne was challenged concerning the number of autopsies he was performing and whether he would agree that performing in excess of 350 autopsies per year was ill-advised:

> I don't agree with that at all . . . I would point out to you several facts, counselor. One, there are some 30 designated pathologists, state pathologists, in the state of Mississippi. We don't solicit any of the work. When they are sent to us, we are mandated by the attorney general to do the work. The coroners and deputy coroners can send autopsies to whomever they choose. And we receive the overwhelming bulk of the work. I think we believe that we do a better job than other people. That's why it is a free and open market for the performance of post-mortem examinations.

2. Dr. Hayne's Extensive Fabrications Regarding his Professional Qualifications

Dr. Hayne's business arrangement with the State was not the only information he overtly lied about or concealed. State officials, by conspiring with him to circumvent both the need for a fully-functioning medical examiner's office and a statutorily qualified chief medical examiner, not only ignored what they knew or should have known regarding his lack of credentials, but also gave tacit permission to him to continue tarting them up. As a result, in a series of *curricula vitae* and trial testimony over a period of years, Dr. Hayne made a host of claims that amounted to material misrepresentations of his professional qualifications. State prosecutors elicited, and Dr. Hayne readily attested to, this false information in an effort to make his abilities appear superior to pathologists whose opinion might differ from his, or to any governing organization whose guidelines cast aspersion on the integrity of his work. In large measure, trial courts have admitted his testimony and reviewing courts have affirmed it.[116] He has thus

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> If I had been doing a poor quality of work such as alleged, then I would not be doing any autopsies. But the rule is in the state of Mississippi, if a designated pathologist receives a request from a coroner or deputy coroner, he must perform that autopsy.
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> There are times I would much prefer not to do them. I also work long, long hours, much more than the average person. I commonly get two, three and four hours sleep a night. I do not require much sleep. I choose to work. That is my free will to do that.

Transcript of Record at 1283-86, *State v. Bennett*, No. 12699 (Rankin Cnty. Circuit Ct. Feb. 5, 2003) (attached as Appendix 24).

[116] *See, e.g., Moffett v. State*, 49 So.3d 1073, 1110-11 (Miss. 2010) (holding that although "Dr. Hayne is not certified by a statutorily required board," the ABP, such certification does not apply "to every pathologist."). Relying on earlier decisions this

defrauded the majority of trial judges and all of the appellate justices in the State of Mississippi.

After careful analysis of an abundance of evidence, the conclusions are inescapable: Dr. Hayne's misrepresentations are serial and include matters of central concern to his status as a qualified and credible pathologist. These areas of dishonesty include: (a) false claims about the circumstances surrounding the fact that he failed the American Board of Pathology certification examination in forensic pathology; (b) false claims of board certification in forensic pathology; (c) other false claims that accreditation in forensic medicine is the equivalent of board certification; (d) false claims of professional and scholarly activity; and, (e) false claims of educational accomplishments, including in at least one instance under oath, an outright lie about his ABP exam performance and certification.

a. Licensure and Professional Certifications

Dr. Hayne's boldest and most critical falsehood involves his explanation about his lack of a certification in forensic pathology from the American Board of Pathology (ABP). As previously discussed, certification from the ABP – the field's preeminent peer-governed association[117] – is a

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Court confirmed Dr. Hayne's testimony because it had been based on requisite "knowledge, skill, experience, training, or education"); *Lima v. State*, 7 So.3d 903, 907 (Miss. 2009).

[117] THE AMERICAN BOARD OF PATHOLOGY, http://www.abpath.org/ (last visited June 19, 2012).

statutory requirement for Mississippi's medical examiner post.[118] Although Dr. Hayne has on numerous occasions dismissed the importance of board certification,[119] the ABP has defined the educational and training requirements for the field of forensic pathology and has provided specialty certification since 1959. Further, ABP licensure is a common requirement in most states employing medical examiners and in most hospitals employing forensic pathologists.[120]

Mainly because he lacks the skills or knowledge to pass the ABP forensic pathology examination, Dr. Hayne has long denigrated the State's statutory requirement for ABP certification, as well as the significance of the certification itself. His story – that he walked out of the exam because a question on it was so insulting to his intelligence that he refused to participate – strains credulity. Nevertheless, that was the story that Dr. Hayne proffered whenever anyone asked about his lack of an ABP certification in forensic pathology.[121] His most public rendition of the story (and the one that drew the attention of the ABP itself) occurred soon after his

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[118] *See* MISS. CODE ANN. § 41-61-55(2) (1986).

[119] Transcript of Record at 157, *State v Austin*, No. 2001-KA-0920 (Coahoma Cnty. Circuit Ct. May 22, 2001) (attached as Appendix 25); Transcript of Record at 438, *State v. Fuqua*, 03-0-256WSY (Hinds Cnty. Cir. Ct. 2005) (attached as Appendix 26).

[120] *See generally* W.G. Eckert, *The Forensic Pathology Specialty Certifications*, 9 AM. J. FORENSIC MED. AND PATHOLOGY 85-9 (1988).

[121] *See* deposition of Steven Hayne at 56-57, *Vessel v. Alleman,* No. 99-0307-CI (Warren Cnty. Circuit Ct. June 26, 2003) (attached as Appendix 27); Deposition of Steven Hayne at 48-49, *Bennett v. City of Canton Swimming Pool*, No. C1-96-0176 (Madison Cnty. Circuit Ct. June 2, 2001) (attached as Appendix 28); Transcript of Record at 19, *State v. Townsend*, No. 2000-127-CR (Montgomery Cnty. Circuit Ct. Mar. 20, 2001) (attached as Appendix 29); Transcript of Record at 367-68, *State v. Williams*, No. 2004-048 (Washington Cnty. Circuit Ct. Oct. 18, 2004) (attached as Appendix 30).

pathology work was exposed for the role it played in the Levon Brooks[122] and Kennedy Brewer[123] exonerations in Noxubee County in 2008. When confronted by the *Clarion Ledger* about his lack of forensic pathology certification from the ABP, Dr. Hayne once again explained that the exam was a useless exercise that insulted his intelligence. According to Dr. Hayne, the exam contained a supposedly offensive, culturally biased question asked about the colors associated with death. As he explained:

> In the Orient, white is associated with death. Green is a color of decomposition, certainly associated with death. Blood is obviously associated with death. To me, it was just the final absurd question. So I got up, handed my paper to the proctor and said, "I leave, I quit. I'm not going to answer this type of material."[124]

To be clear, Dr. Hayne is not of any ethnic background traditionally associated with, as he puts it, "the Orient."

After the *Clarion-Ledger* reported Dr. Hayne's story, ABP officials contacted the newspaper to refute it. "As the executive director of the American Board of Pathology I was surprised by Dr. Hayne's description of the 'stupid question' (related to colors associated with funerals) on his forensic pathology examination that caused him to walk out of the exam," wrote Dr. Betsy Bennett. "Dr. Hayne took the forensic pathology examination in 1989. I pulled the text of this examination from our files, and there was no

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[122] *See http://www.innocenceproject.org/Content/Levon_Brooks.php.*
[123] *See http://www.innocenceproject.org/Content/Kennedy_Brewer.php.*
[124] *See* Mitchell, *supra* note 12.

question on that examination that was remotely similar to Dr. Hayne's description."[125]

After encountering skepticism about his story, Dr. Hayne contacted the ABP and requested the exam himself. He was told that it was not available.[126] Thereafter, evidently believing that his version could never be definitively disproven, Dr. Hayne continued to lie, characterizing Dr. Bennett's rebuttal as "flat wrong"[127] and reiterating that she "doesn't know what she's talking about."[128]

Very recently, pursuant to court order, the ABP produced the oft-discussed test. Nowhere on the test was there any question remotely resembling the one Dr. Hayne swore was on it. When confronted with a copy of the test itself, he finally admitted that, in fact, no such question existed, and when asked, confessed that he could provide "no explanation for that."[129] The ABP's production also revealed an additional fact: At the time Dr. Hayne "walked out" of the ABP exam, he was failing it.[130] And, in at least one newly

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[125] *Id.*

[126] *See* Deposition of Steven Hayne at 246, *Hayne v. Innocence Project*, No. 3:09-CV-218-KS-LRA (S.D. Miss. Apr. 26, 2012) (attached as Appendix 10).

[127] Interestingly enough, although Dr. Hayne repeatedly insisted upon his version of the story, he was hardly consistent in telling it. Dr. Hayne's version often varied when it came to the colors that were involved in the question, an interesting development given that according to him it was the colors themselves and their cultural significance that held such import. *See* Deposition of Steven Hayne at 267-91, *Hayne v. Innocence Project*, No. 3:09-CV-218-KS-LRA (S.D. Miss. Apr. 26, 2012) (attached as Appendix 10).

[128] *See* Mitchell, *supra* note 12.

[129] *See* Deposition of Steven Hayne at 244-45, *Hayne v. Innocence Project*, No. 3:09-CV-218-KS-LRA (S.D. Miss. Apr. 26, 2012) (attached as Appendix 10).

[130] Dr. Hayne's reported score was 484; 750 was the minimal score required to pass the exam. *Id.* at 255-56. The test indicated that he had answered questions in every

discovered incident, Dr. Hayne provided additional false testimony about his ABP examinations.

At a civil deposition in Alabama, Dr. Hayne was asked whether he passed the ABP exam the first time he took it and whether he'd ever failed any of his other boards. His answer to the first question was "yes", and "no" to the second; both answers are false.[131] When confronted with this false testimony during his deposition in his case against the Innocence Project, Dr. Hayne provided this explanation: He claimed not to have remembered making those false statements and that, when he discovered them – presumably in the deposition transcript – he wrote the judge a letter claiming that there had been a "mistake" by the court reporter.[132] Attorneys for the Innocence Project asked him to produce that letter, and Dr. Hayne said that he would because "he could get it from the judge."[133] To date, Dr. Hayne has not produced the letter; undersigned contacted the court where the matter had been litigated, and the court had no record of any such letter in the case file.[134]

Faced with his inability to meet the ABP's requirements, Dr. Hayne has claimed to be board certified in forensic pathology by a host of other

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section. Dr. Hayne also failed the ABP examination in anatomical and clinical pathology the first time he took it. *Id.* at 305-06.

[131] *See* Deposition of Steven Hayne at 84-5, *Hand v. Fabianke*, No. 03-234 (Franklin Cnty, AL, Circ. Ct., May 14, 2004) (attached as Appendix 31).

[132] Deposition of Steven Hayne at 303, *Hayne v. Innocence Project*, No. 3:09-CV-218-KS-LRA (S.D. Miss. Apr. 26, 2012) (attached as Appendix 10).

[133] *Id.* at 304.

[134] Affidavit of William M. McIntosh, (Oct. 17, 2012) (attached as Appendix 32).

organizations.[135] Most of these claims are likewise false. Dr Hayne has not been certified in forensic pathology by any organization since 1997. After failing the ABP exam in forensic pathology in 1989,[136] Dr. Hayne simply went out and acquired bogus *bona fides* from organizations that sounded to laymen like legitimate bodies, but which, in reality, often required nothing more for membership than an annual subscription cost.[137]

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[135] It is a well-known and professionally accepted fact that legitimate medical board certification in the United States comes from the American Board of Medical Specialties (ABMS), which has 24 affiliate boards, including the ABP. When doctors claim to be "board certified" it is commonly understood that their claim refers to the ABMS's oversight. Mitchell, *supra* note 12.

[136] *See* deposition of Steven Hayne at 253-54, *Hayne v. Innocence Project*, No. 3:09-CV-218-KS-LRA (S.D. Miss. Apr. 26, 2012) (attached as Appendix 10).

[137] Among these was the is a now-defunct "specialty board" of the American Academy of Neurological Orthopedic Surgeons (AANOS); the American Board of Forensic Pathology ceased to exist in 1995. Letter from Nick Rebel, Executive Director of the Am. Academy of Neurological and Orthopedic Surgeons, to Jim Lappan (May 18, 2010) (attached as Appendix 33); Mitchell, *supra* note 12. Furthermore, the ABFP has never been recognized as a legitimate certifying organization, Letter from Barbara Schneidman, Associate Vice President of the American Board of Medical Specialties, to Emily W. Ward, Assistant Professor of Pathology (June 18, 1996) ("The American Board of Forensic Pathology is not recognized by the American Board of Medical Specialties (ABMS and is not authorized to provide certification.") (attached as Appendix 34); Mitchell, *supra* note 12; the only legitimate certifying organization for forensic Pathology is the American Board of Pathologists, an organization that Dr. Hayne is most decidedly not a member of. *See supra* notes 120-29 and accompanying text. Moreover, AANOS requires re-certification of its members every five years, and, according to its executive director, "re-certification [by AANOS has] . . . not [been] possible in Boards such as Forensic Pathology" since 1996. Mitchell, *supra* note 12; Letter from Nick Rebel, Executive Director of the Am. Academy of Neurological and Orthopedic Surgeons, to Jim Lappan (May 18, 2010) (attached as Appendix 33). Dr. Hayne joined the ABFP in 1992. Thus, because Dr. Hayne was certified on June 26, 1992 by an organization that requires re-certification every five years and that no longer supports the ABFP, the fact is that Dr. Hayne's APFB certification in forensic pathology, for whatever it was worth, expired on June 27, 1997; he has not been certified – in any way let alone by the ABFP – in forensic pathology for the past fifteen years. *See* Letter From Nick Rebel, Executive Director of the Am. Academy of Neurological and Orthopedic Surgeons, to Jim Lappan (Aug. 17, 2010) (attached as Appendix 35).

b. Dr. Hayne's Curricula Vitae

In conjunction with his various falsehoods about his licensure and board certifications, Dr. Hayne hawked misinformation about other professional accomplishments contained in various *curricula vitae* that he

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Dr. Hayne nevertheless still claims to be a board certified forensic pathologist. Dr. Hayne is fully aware of the misrepresentation. In a 2001 deposition, Dr. Hayne admitted that he knew that the AANOS no longer offered diplomas and certificates in forensic pathology, but he continued to list the qualification on his CV and to testify about it in criminal trials. *See* deposition of Steven Hayne at 24-25, *Lewis v. Brown*, No. 99-0476 (Sunflower Cnty. Circuit Ct. Aug. 23, 2001) (attached Appendix 36). He also frequently testified that he was certified by the ABFP – the clear import being that this organization (rather than the ABP) was the default governing body for forensic pathologists. The fact of the matter was that he was no longer certified in forensic pathology at all.

Dr. Hayne also represents that he is board certified by referring to memberships in professional organizations that issue certificates but that are not in fact "board certifying" organizations as that term is commonly understood. For example, Dr. Hayne has continually misrepresented his membership with the American College of Forensic Examiners International (ACFEI) as being the equivalent of board certification in forensic medicine. In reality, Dr. Hayne is a member of the American Board of Forensic Medicine – an *advisory*, not certifying, board under the ACFEI. Leah Bartos, *No Forensic Background? No Problem*, FRONTLINE/PROPUBLICA (Apr. 17, 2012 11:30 AM), http://www.propublica.org/article/no-forensic-background-no-problem (attached as Appendix 37). Dr. Hayne was "grandfathered" into ACFEI's Fellow designation on September 15, 1997, based on his "diplomate" status: three years of ACFEI service combined with professional achievement. Am. College of Forensic Examiners Int'l, Fellow Application, *available* at http://www.acfei.com/diplomate_fellow/. Dr. Hayne cites his "fellow" designation as proof he was board certified in forensic medicine and frequently testifies he is board certified in forensic medicine by the ACFEI. *See,* Letter from Steven Hayne to Michael Lanford, Miss. Att'y Gen. (May 6, 2010) (attached as Appendix 38); *see also*, Transcript of Record at 760-63, *State v. Brown*, No. 05-428 (Pike Cnty. Circuit Ct. Mar. 26, 2006) (attached as Appendix 23). However, as the editor-in-chief of ACFEI's journal, *The Forensic Examiner*, has noted, the ACFEI Fellow designation is "different from being certified . . . One shows general professional accomplishment while the other shows that standards were met relating to specific knowledge in a certain field." Letter from John Lechliter, Editor in Chief of THE FORENSIC EXAMINER, to Radley Balko, (Mar. 17, 2008) (attached as Appendix 39). Because ACFEI fellow designation and certification communicate different aspects of a professional background, Dr. Hayne's claim that he is board certified in forensic medicine based on his ACFEI Fellow designation is also false.

has disseminated over time. Dr. Hayne's CV[138] has included scholarly publications in which he was not included in the publication as a listed author,[139] as well as presentations in which he did not actually present the material.[140]

His claims about his presentations are particularly suspect given that many of them involved his mid-1990s collaboration with forensic odontologist Dr. Michael West. When confronted with his claims that he had been a presenter at an American Academy of Forensic Science conference, for example, Dr. Hayne admitted that he had not actually been at the

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[138] Steven T. Hayne, Curriculum Vitae (Mar. 13, 2001) (attached as Appendix 40).

[139] Dr. Hayne fraudulently included the following publications on his CV, omitting listed authors:

> 1. R.E. Barsley, M.H. West, & J. Frair, *Forensic Photography. Ultraviolet Imaging of Wounds on Skin*, AM. J. FORENSIC MED. PATHOL. 11 (4):300-8 (1990).
> 2. M.H. West, R.E. Barsley, J. Frair , & M.D. Seal, *The Use of Human Skin in the Fabrication of a Bite Mark Template: Two Case Reports*, J FORENSIC SCI. 35 (6): 1477-85 (1990).
> 3. M.H. West & R.E. Barsley, *First Bite Mark Convictions in Mississippi*, MISS. DENT. ASSOC. J 46 (4):7 (1990). Steven T. Hayne, Curriculum Vitae (Mar. 13, 2001).
> 4. M. West, R.E. Barsley, J. Frair, W. Stewart, *Ultraviolet Radiation and Its Role in Wound Pattern Documentation*, J FORENSIC SCI. 37 (6): 1466-79 (1992).

Steven T. Hayne, Curriculum Vitae (Mar. 13, 2001) (attached as Appendix 40).

[140] Dr. Hayne included the following presentations on his CV, omitting listed presenters:

> 1. R.E. Barsley, Presentation at the 42nd Annual Meeting of the Am. Academy of Forensic Scientists: Short UV Photography: Skin as a Substrate for Bitemark Comparisons (Feb. 23, 1990).
> 2. M. Cimrmancic Presentation at the 43rd Annual Meeting Am. Academy of Forensic Scientists: Comparison of Monochromatic Illumination with Standard Photographic Filters for Enhancement of Bitemark Injuries. (Feb. 22, 1991).

Steven T. Hayne, Curriculum Vitae (Mar. 13, 2001) (attached as Appendix 40).

presentation but defended himself by testifying that "if you write the information, that's a presentation. It's not an article. So, therefore, you're entitled credit for it."[141]

In perhaps the most egregious example of trumping up his CV, Dr. Hayne simply plagiarized an entire series of presentations and publications that Dr. West presented and authored. A comparison of Dr. Hayne's and Dr. West's CVs indicates that beginning in 1988, when the two started working frequently together, Dr. Hayne simply copied large portions of Dr. West's CV *in toto.*[142] All of Dr. Hayne's purported "presentations" after 1988 are derived verbatim from Dr. West's CV; all of Dr. Hayne's "other publications" after 1989 are likewise derivative.[143]

Dr. Hayne also exaggerated his educational achievements in order to burnish his credibility and mislead fact-finders about his supposed preternatural abilities to assume such an incredible workload without

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[141] *See* Deposition of Steven Hayne at 22, *Bennett v. City of Canton Swimming Pool*, No. C1-96-0176 (Madison Cnty. Circuit Ct. June 2, 2001) (attached as Appendix 28).
[142] *Compare* Steven T. Hayne, Curriculum Vitae (Mar. 13, 2001) (attached as Appendix 40); *with* Michael West, Curriculum Vitae (Mar. 30, 2006) (attached as Appendix 41).
[143] *Compare* Steven T. Hayne, Curriculum Vitae (Mar. 13, 2001) (attached as Appendix 40); *with* Michael West, Curriculum Vitae (Mar. 30, 2006) (attached as Appendix 41). None other than Dr. West has risen to Dr. Hayne's defense in this matter. In a 2001 affidavit, Dr. West explained that Dr. Hayne's CV is "completely accurate," and that any omission of Dr. Hayne's name from the cited works or presentations is due to "a) a mistake on my [West's] part, b) a mistake on the publishing organization's part in failing to list all authors or participants, or c) that at the time of the particular article or presentation Dr. Hayne simply did not desire the recognition." Michael H. West Aff. at 1:3 (June 28, 2001) (attached as Appendix 42).

compromising quality.[144] For example, in a recent Washington County prosecution, when a defense attorney challenged Dr. Hayne's ability to perform so many autopsies without making mistakes, Dr. Hayne responded, under oath, that:

> when I was an undergraduate, I carried up to 39 units at a time maintaining a straight A average. So I work at a much more efficient level and much harder than most people. I was blessed with that and cursed with that, but that's what I carry with me, and I do work very, very hard.[145]

Newly discovered evidence of Dr. Hayne's undergraduate record, gained collaterally to formal federal discovery, completely and utterly discredits his claims, both about his former performance as a student and, consistent with his puffery, his purported abilities as a pathologist. He was hardly the 4.0 student he pretended to be; his hours carried fell far short of the workload he bragged to have managed.[146]

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[144] Q. Let me ask you if you agree with this statement. "Excessive caseload is a problem in many medical legal offices. The recommended annual caseload for a forensic pathologist without administrative responsibilities is 250 autopsies. On a short-time basis, one can perform autopsies at an annual rate of 300, perhaps 325. By the time caseload exceeds 350 autopsies, mistakes are made and the quality of the autopsy is sacrificed." Would you agree or disagree with that statement?
A. I think it depends upon the individual, Counselor. I might point out that I require very little sleep. I normally sleep no more than two to three hours a day. I also work seven days a week, not five days a week. I don't take holidays. I don't take vacations . . .

Transcript of Record at 375, *State v. Williams*, No. 2004-048 (Washington Cnty. Circuit. Ct. Oct. 18, 2004) (attached as Appendix 30).

[145] *Id.*

[146] *See* Appendix 43, which undersigned, out of an abundance of caution, and not because any rule of law or professional conduct require it, have sought leave to file under seal. *See, e.g.*, 20 U.S.C. 1232g(a)(6); 34 C.F.R. § 99.3; *Norwood v. Slammons*,

Dr. Hayne also frequently lied under oath about academic awards that he had received. The clear import of the questions and answers between Dr. Hayne and prosecutors when asked about them was to suggest that the awards were for his medical achievements. None were. No university records reflect that Dr. Hayne received any academic awards or honors during medical school.[147] Although Dr. Hayne's *undergraduate* transcripts reflect that he was a member of *Phi Kappa Phi* and *Phi Eta Sigma* (an honorary fraternity for college freshmen) honor societies, this has no reflection on his abilities as a pathologist. Moreover, when prosecutors asked at trials about his academic honors and achievements – the clear thrust of which was to bolster his testimony as the State's forensic excerpt – Dr. Hayne sometimes mentioned his membership with Blue Key, which is merely an undergraduate organization honoring leadership,[148] and frequently mentioned other awards similarly unconnected to his medical training or education.[149]

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788 F.Supp.2d 1020, 1026 (W.D. Ark. 1991); *Tarka v. Franklin*, 891 F.2d 102, 105 (5th Cir. 1989); *In re Kagan*, 351 F.3d 1157 (D.C. Ct. App. 2003).

[147] Letter from Suzanne M.W. Anderson, Univ. Registrar, Univ. of N.D., to K.C. Meckfessel, Staff Att'y for the Innocence Project (Feb. 13, 2012) (attached as Appendix 44).

[148] Blue Key Honor Society, Criteria for Membership in Blue Key, http://www.bluekey.org/member.html.

[149] Q. Have you received any honors or awards, Doctor?
A. Got an M.D. degree.
Q. That's the first honor. I count my high school diploma as one, too.
A. I was Phi Kappa Phi, Phi Eta Sigma, Blue Key.
Q. Are these honors assigned in any particular area of study? For instance, I'm particularly interested in the study of medicine.
A. These are all academic awards.
Deposition of Steven Hayne at 10-11, *Vessel v. Alleman*, No. 99-0307-CI (Warren Cnty. Circuit Ct. June 26, 2003) (attached as Appendix 27).

Like his self-interested business with the State, neither Dr. Hayne nor any other State official ever disclosed the falsity of these claims. Worse, Dr. Hayne was able to make them with impunity because the State had knowingly ignored its responsibility to abide by statutory requirements[150] that would have ensured competence and professionalism in its designated pathologists. Statutory mandate required the state medical examiner (had there been one) to thoroughly vet any pathologist hired to perform autopsies on behalf of the State. Even minimal compliance with their due diligence duty would have exposed Dr. Hayne as a fraud.[151] Instead, the State inexcusably settled into the widespread policy and practice of suppressing the nature of their agreement with Dr. Hayne. As a consequence, Dr. Hayne presented demonstrably false testimony regarding his qualifications, and introduced forensic fraud as evidence in criminal trials, both with the State's acquiescence and with impunity. There is little dispute; the State's knowing

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[150] Pursuant to the Mississippi Medical Examiner's Act, the State Medical Examiner's Office regulates the appointment and retention of designated state pathologists. MISS. CODE ANN. § 41-61-65(1) (1972). A Designated Pathologist Review Committee, with the State Medical Examiner serving as chairman, is required to review selected examples of autopsies to "recommend selection, retention, probation, or dismissal of pathologists from the designated list." JOINT LEGISLATIVE COMMITTEE ON PERFORMANCE EVALUATION AND EXPENDITURE REVIEW, AN INVESTIGATION OF MISSISSIPPI'S MEDICOLEGAL DEATH INVESTIGATION PROCESS, 2008 Regular Sess., at vii (2008). The review committee is required to maintain files on each designated pathologist, including audits of post-mortem examinations and other information. *Id.* at 5 (attached as Appendix 1).

[151] In fact, no action was taken until May of 2008 (though still not by any entity in the State), after information about the *Brooks* and *Brewer* cases was available, as well as a complaint about Dr. Hayne to the Mississippi Board of Medical Licensure. *See supra* note 12.

malfeasance was reprehensible, illegal, and entitles Flaggs to post-conviction relief.

3. Forensic Fraud: Dr. Hayne's Creation of a Market for Pseudo-Scientific Fraudulent Testimony

Freed from worry about official oversight, Dr. Hayne also carved out various areas of pseudo-forensic sub-specialties, which he often used to support the prosecution's theory. He would provide testimony in the form of medical jargon that sounded like good, reliable forensic science, but, in reality, had no foundation in any recognized field. When the State's theory of guilt lacked solid evidentiary support, the State would turn to Dr. Hayne. He would oblige with opinions utterly foreign to any realm of forensic pathology. Although totally bogus, his brand of testimony appeared to be connected to areas about which forensic pathologists should have knowledge and expertise – blood-spatter or time of death determinations, for example – and was steeped in medico-legal rhetoric that helped keep up the appearance. As a result, trial and appellate courts repeatedly admitted and affirmed his testimony.[152]

[152] The only reported instance of an appellate court reversing a conviction based on Dr. Hayne's improper testimony is this Court's opinion in *Edmonds v. State*, 955 So.2d 787, 791-92 (Miss. 2007). Appellate courts have found Dr. Hayne's testimony unreliable and affirmed a trial court's decision to exclude his testimony as outside his field of expertise. *See Palmer v. Volkswagen of Am., Inc.*, 905 So.2d 564, 587-88 (Miss. Ct. App. 2003), *overruled in part on other grounds by*, *Palmer v. Volkswagen of Am., Inc.*, 904 So.2d 1077 (Miss. 2005).

A close review of Dr. Hayne's testimony in these cases over time – an opportunity until now unavailable because of an inability to access information such as autopsy reports and other case-related materials that state officials refused to disclose – reveals something else: that in a series of cases, and on behalf of the party using him as a witness (almost always state prosecutors in criminal prosecutions), Dr. Hayne provided critical testimony that was decidedly unscientific, directly contrary to his testimony in previous cases in the same subject matter area, and diametrically opposed to the consensus amongst real forensic pathologists. The areas in which Dr. Hayne offered his services and fraudulently claimed specialized expertise include: (a) wound pattern analysis;[153] (b) bite mark analysis;[154] (c) blood pattern analysis; (d) time of death;[155] and (e) various ballistics sub-specialties.[156]

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[153] In theory, wound-pattern analysis attempts "to identify a specific source of the impression" of a wound by identifying "class and individual characteristics" belonging to a piece of evidence and comparing it to an impression found on a person's body. COMMITTEE ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCES COMMUNITY, *et al.*, THE NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 515 (2009) (attached as Appendix 43)(citing Marrku Liukkonen, Heikki Majamaa, & Johanna Virtanen, *The Role and Duties of the Shoeprint/Toolmark Examiner in Forensic Laboratories*, 9 FORENSIC SCIENCE INT'L 82, 99-108 (1996)). Although Dr. Hayne possesses no credentials reflecting even the most basic knowledge or training in this highly technical forensic field, he nevertheless forged an active, successful, and high-profile boutique practice by testifying frequently about wound pattern analyses. *See generally*, Steven T. Hayne, Curriculum Vitae (Mar. 13, 2001) (attached as Appendix 40). No object, even ones that had never been identified with any precision as to class or model, seemed beyond his ability to match to the marks that he purportedly discovered during autopsies or other crime scene investigations. *See, e.g., Kelly v. State*, 735 So.2d 1071, 1079 (Miss. Ct. App. 1999) ("Dr. Hayne's expert pattern-injury testimony created a match between the pattern-injury marks found on both Tina's and Erica's faces and the patterns found on the face of an Iron Man watch believed to have been worn by Kelly at the time of Tina and Erica's death.").

[154] Despite the alarming rate of wrongful convictions based on bite mark matching, and the wholesale lack of any scientific basis for the pseudo-science, Dr. Hayne and Dr. West together developed the most notorious use of the bogus field ever documented in any jurisdiction. Typically, Dr. Hayne would note markings on a decedent's body as "pattern injuries" – a trait suggestive of bite marks. *See, e.g.,* Transcript of Record at 682-708, *State v. Brooks*, No. 5937 (Noxubee Cnty. Circuit Ct. 1992) (attached as Appendix 44). He would then request the services of his colleague Dr. West, who would offer his bite mark matching expertise and astonishingly low error rate – "something less than my savior Jesus Christ." Radley Balko, "*Indeed, and Without a Doubt"*, REASON MAGAZINE (Aug. 2, 2007, 7:42 AM), *available at* http://reason.com/archives/2007/08/02/indeed-and-without-a-doubt. Hayne continued in this practice notwithstanding the fact that Dr. West had been very publically removed from every single odontological professional organization, *see* AMERICAN ASSOCIATION OF FORENSIC SCIENTISTS, ETHICS COMMITTEE, Case No. 143, ETHICS COMMITTEE REPORT (1994) (attached as Appendix 45); AMERICAN BOARD OF FORENSIC ODONTOLOGY, ETHICS COMMITTEE, Complaint No. 93-B, ETHICS COMMITTEE REPORT (1994) (attached as Appendix 46); the Hayne-West tag-team testified to bite mark evidence in notorious cases resulting in wrongful convictions. *See*, *e.g.,* Transcript of Record at 731-32, *State v. Brooks*, No. 5937 (Noxubee Cnty. Circuit Ct. 1992) (attached as Appendix 44).

Dr. West and Dr. Hayne have now both come to the conclusion that bite mark evidence was not all that they had touted it to be. Each has, in fact, disavowed the field's usefulness as a forensic identification method. *See* deposition of Dr. Steven Hayne at 172-74, *Hayne v. Innocence Project*, No 3:09-CV-218-KS-LRA (S.D. Miss. Apr. 26, 2012) (attached as Exhibit 10). In a deposition taken on February 11, 2012, Dr. West testified about bite marks:

> A. I no longer believe in bite mark analysis. I don't think it should be used in court. I think you should use DNA, throw bite marks out.
>
> . . .
>
> Q. Are you withdrawing your testimony about the bite mark identification in this case?
>
> A. When I testified in this case [in 2001], I believed in the uniqueness of human bite marks. I no longer believe in that. And if I was asked to testify in this case again, I would say I don't believe it's a system that's reliable enough to be used in court.

Deposition of Michael West at 37, *Stubbs v. State*, No. 2011-387-LS-LT (Lincoln Cnty. Circuit Ct. Feb. 11, 2012) (attached as Exhibit 47).

When asked recently how long he had been aware of Dr. West's own lack of confidence in the area, Dr. Hayne answered, "Wow, several years ago," and added that it had not come as a surprise. *See* Deposition of Dr. Steven Hayne at 172-73, *Hayne v. Innocence Project*, No 3:09-CV-218-KS-LRA (S.D. Miss. Apr. 26, 2012) (attached as Appendix 10). After explaining why he had changed his mind, he mentioned the *Brooks* and *Brewer* cases, among other incidents. *Id.* at 173. Then, attorneys asked Dr. Hayne whether he was concerned about the outcome of cases that he and Dr. West had worked on together. *Id.* at 173-74. Dr. Hayne responded, "I think there is a concern, yes . . . I would be very reluctant to call in a forensic odontologist to do a bite mark comparison study." *Id.*

An understanding of these cases makes clear the breadth and depth of Dr. Hayne's fraud and the State's reliance upon it in cases like this one. There is, of course, no record of any State official, including prosecutors in this or any other case, disclosing transcripts or other information pursuant to

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Faced with an error that completely negated the foundations of their work in this area, Dr. Hayne and Dr. West had a choice: they could either revisit their prior findings, which had led to the convictions of dozens of individuals, or say nothing. Among other individuals, their decision would have affected Brewer, under a death sentence, and Brooks, who was then finishing his first decade in prison. Any legitimate doctor would have abided by the Hippocratic oath; any faithful scientist would have moved quickly to notify those affected by the error and then revisited the bases of his earlier findings; and any decent human being would have valued the lives of innocent men and women over his professional reputation. Dr. Hayne and Dr. West remained silent. They made no effort whatsoever to alert anyone to their change of opinion. They also never bothered to alert anyone to their errors. The fact that Kennedy Brewer and Eddie Lee Howard (who is currently on death row), were slated for execution based on the doctors' inculpatory bite mark testimony, or that other wrongfully convicted defendants, like Levon Brooks, were serving life sentences, was evidently of no moment to them.

[155] Determining time of death can be critically important in criminal cases, particularly when law enforcement is trying to assess suspects' alibis. It is also true, though, that "all methods now in use to determine time of death are to a degree unreliable and inaccurate." DI MAIO & DI MAIO, *supra* note 93, at 21 (attached as Appendix 9). In fact, the "longer the postmortem interval . . . the less precise the estimate," and all factors used in determining time of death have significant shortcomings. *Id.* Despite these obvious limitations upon determining time of death with precision, Dr. Hayne provided precise times of death, at times within an hour, in courts throughout Mississippi.

[156] Firearm examination is often crucial to a criminal investigation involving gunshot wounds. In addition to the analysis of marks on cartridges and bullets, "firearms examination also includes the determination of the firing distance, the operability of a weapon, and sometimes the analysis of primer residue to determine whether someone recently handled a weapon." COMMITTEE ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCES COMMUNITY & THE NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 5-18 (2009) (attached as Appendix 43). Ballistics experts are trained personnel responsible for conducting firearm examinations and specializing in firearm ballistics – defined as "the science of the motion of projectiles." *Id.* Despite the fact that Dr. Hayne was not a ballistics expert, he offered ballistics expert-specific testimony in numerous trials on numerous sub-topics of the study of ballistics throughout the State. *See, e.g., State v. Brown*, 33 So.3d 1134 (Miss. Ct. App. 2009); Steven T. Hayne, Curriculum Vitae (Mar. 13, 2001) (attached as Appendix 40).

Brady v. Maryland, 373 U.S. 83 (1963) about Dr. Hayne's pattern and practice of perjuring himself and deceiving the courts in these areas.

Dr. Hayne engaged in this pattern and practice of forensic fraud in Flaggs' case. At trial, Dr. Hayne provided testimony crucial to the State's theory of the case concerning bloodstain pattern analysis.

a. Fraudulent Bloodstain Pattern Testimony

"The uncertainties associated with bloodstain pattern analysis are enormous."[157] Thus, experts in this highly complex field of forensic science must possess advanced knowledge, excellent training, and the ability to conduct sophisticated, scientific experiments.[158] According to a National Academy of Science recent report on forensic science in American courts:

> interpreting and integrating bloodstain patterns into a reconstruction requires, at a minimum: an appropriate scientific education; knowledge of the terminology employed (e.g., angle of impact, arterial spurting, back spatter, castoff pattern); an understanding of the limitations of the measurement tools used to make bloodstain pattern measurements (e.g., calculators, software, lasers, protractors); an understanding of applied mathematics and the use of significant figures; an understanding of the physics of fluid transfer, [among others]."[159]

Although "[s]cientific studies support some aspects of bloodstain pattern analysis,"[160] it is indisputable that experts often "extrapolate far

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[157] COMMITTEE ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCES COMMUNITY *et al.*, NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 179 (2009) (attached as Appendix 43).
[158] *Id.* at 177-79.
[159] *Id.* at 177.
[160] *Id.* at 178.

beyond what can be supported" by science.[161] Analyzing bloodstain patterns is not a simple practice, because "[a]lthough the trajectories of bullets are linear, the damage that [bullets] cause in soft tissue and the complex patterns that fluids make when exiting wounds are highly variable."[162] In order to properly conduct a bloodstain pattern analysis, experts must perform many experiments, accounting for the actions allegedly performed during the crime, the resulting blood spatter pattern, and the causal connection between the person's actions and the blood spatter.[163]

Because of the complicated nature of bloodstain pattern analysis, "extra care must be given to the way in which the analyses are presented in court."[164] Consequently, the International Association for Identification and the Scientific Working Group on Bloodstain Pattern Analysis recommend that, in order to be admitted in courts as blood spatter experts, experts must have at least 240 hours of relevant course instruction.[165]

Dr. Hayne's CV lists no training or expertise whatsoever in the field of blood pattern analysis.[166] In short, he lacks the skills, knowledge, and qualifications necessary to testify about blood spatter patterns. Nevertheless, he presented his fraudulent "blood spatter analysis" in dozens of cases –

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[161] *Id.*
[162] *Id.*
[163] *Id.* at 179.
[164] *Id.*
[165] *See* Int'l Ass'n for Indentification, Bloodstain Pattern Examiner Certification Requirements, theiai.org/certifications/bloodstain/requirements.php.
[166] *See* Steven T. Hayne, Curriculum Vitae (Mar. 13, 2001) (attached as Appendix 40).

including Flaggs' case – providing critical evidence about bloodstain patterns that supported the State's prosecution theory.[167] Trial courts routinely admitted this forensic fraud without requisite inquiry. Mississippi courts failed to subject Dr. Hayne's blood spatter opinions to any serious scrutiny under prevailing law or the Mississippi Rules of Evidence, in part, because according to their reasoning, such opinions seemed to fall within the purview of what qualified, board certified forensic pathologists typically testified about.[168]

Notwithstanding the fact that Dr. Hayne was uncertified in forensic pathology; was patently unqualified to testify about blood spatter analysis; did not visit the crime scene in Flaggs' case; did not verify that the substance on the walls of Wright's apartment was blood; did not test the substance on the walls to determine, if it was in fact blood, who the blood belonged to; did not conduct any experiments taking into consideration the blood spatter relative to the movements of the perpetrator and the victim; and, ostensibly,

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[167] For example, in one of the earliest reported cases, *Wooten v. State*, 811 So.2d 355 (Miss. Ct. App. 2001), Dr. Hayne testified about the presence of moderate-velocity blood spatter on the living room wall. *Id.* at 365. His opinions about its significance appeared nowhere in his autopsy report or other notes about his findings, and defense counsel objected. *Id.* at 364-65. The Court of Appeals denied relief on the issue, basing its opinion not on the validity of Hayne's opinion but on Wooten's attorney's failure to properly raise the issue. *Id.* at 366.

[168] After *Wooten*, Dr. Hayne testified frequently about blood spatter, and appellate courts cited to *Wooten* – a case where there had been no trial record of any inquiry into the bases of his opinion and no discussion as to his opinion's validity on appeal, either – as authority for its admissibility. *See, e.g.*, *Hudson v. State*, 754 So.2d 582 (Miss. App. 2000); *Flaggs v. State*, 999 So.2d 393 (Miss. 2008) (holding that the admission of Dr. Hayne's blood-spatter testimony was not erroneous because "Dr. Hayne has been accepted in other cases as an expert in the analysis of blood spatter").

did not rely upon the State's pictures of the crime scene, the trial court still allowed Dr. Hayne to testify about blood spatter patterns at Flaggs' trial.[169] Although the State never sought to qualify Dr. Hayne as an expert in blood spatter analysis, the State elicited testimony from Dr. Hayne that he was able to determine with a "reasonable degree of medical certainty"[170] that the "blood" on the apartment walls had, in fact, come from Wright's wounds and that it was an indicator of "defensive posturing."[171]

Furthermore, at trial, the State introduced three photographs of the "blood spatter" into evidence.[172] There is no indication in the record that Dr. Hayne examined these photographs at anytime before or during Flaggs' trial when formulating his opinion that the "blood spatter" showed Wright's attempts to defend himself. Neither is there any sign that Dr. Hayne conducted the experiments necessary to make this determination. According to the record, a diagram of Wright's apartment was the only evidence Dr. Hayne examined in formulating his conclusions concerning the "blood spatter."[173] There is no doubt that Dr. Hayne's "blood pattern analysis" in this case is pseudo-science and not a true forensic-based finding.

Other than Dr. Hayne's manifest forensic fraud, the State produced no other witness or physical evidence contradicting Flaggs' self-defense claim.

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[169] *See supra* notes 57-71 and accompanying text.
[170] Transcript of Record at 340-41, *State v. Flaggs*, No. 05-0-933 (Hinds Cnty. Circuit Ct. July 26, 2006) (attached as Appendix 5).
[171] *Id.* at 339.
[172] *Id.* at 234-37.
[173] *Id.* at 227.

D. This Evidence Was Discovered After Trial

The evidence of Dr. Hayne's unethical, self-serving agreement with the State, Dr. Hayne's numerous misrepresentations concerning his professional qualifications, and the breadth of his duplicitous forensic testimony was not discovered until after Flaggs' trial, when Dr. Hayne, in an effort to salvage what was left of his reputation, sued the Innocence Project and two of its attorneys.[174] The Innocence Project lawyers, in the course of ordinary, federal discovery, issued subpoenas, took depositions, received disclosure of otherwise confidential autopsy reports, and obtained other case related documents – which, in turn, made all of this new evidence available to Flaggs.

E. Using Due Diligence, Flaggs Could Not Discover This Evidence Before Trial

Not only did Flaggs discover this information after trial, but he also could not have possibly discovered it before trial using due diligence.

The responsibility of due diligence has been summarized as the following:

> The showing of diligence required is that a reasonable effort was made. The applicant is not called upon to prove he sought evidence where he had no reason to apprehend any existed. He must exhaust the probable sources of information concerning his case; he must use that of which he knows, and he must follow all clues which would fairly advise a diligent man that something bearing on his litigation might be discovered or developed. But he is not placed under the burden of interviewing persons or

[174] *See generally*, Deposition of Steven Hayne at 172-74, *Hayne v. Innocence Project, et al.*, No 3:09-CV-218-KS-LRA (S.D. Miss. Apr. 26, 2012) (attached as Appendix 10).

> seeking in places where there is no indication of any helpful evidence.[175]

For more than a decade, Dr. Hayne fraudulently misrepresented his qualifications, his arrangement with the State through which he was able to testify as the State's expert, and the bases for his pseudo-science testimony. Flaggs had no means by which to prove that these were lies or that Dr. Hayne's testimony in his case was forensic fraud. Although some of the incidents of Dr. Hayne's false testimony and use of pseudo-forensic practices have since been recognized, most of the cases lacked objective proof like autopsy reports or Dr. Hayne's own explanations about the cases, which were unavailable until recently. The State had affirmative obligations to disclose this information,[176] and no evidence was disclosed pursuant to these requirements either. Finally, undersigned counsel made numerous requests outside of the litigation process for this information – through open records law requests, for example – none of which were honored.[177]

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[175] *Westergard v. Des Moines Ry.*, 52 N.W.2d 39, 44 (Iowa 1952); *accord Sullivan v. Heal*, 571 So.2d 278, 281 (Miss. 1990) ("A party asking for a new trial on the ground of newly discovered evidence must satisfy the [trial] court that the evidence has come to his knowledge since the trial and that it was not owing to a want of diligence on his part that it was not discovered sooner.").

[176] *See, e.g.*, MISS. UNIF. RULES OF CIRCUIT AND CNTY. CT. PRAC. § 9.04, *available at* courts.ms.gov/rules/msrulesofcourt/urccc.pdf; *Giglio v. United States*, 405 U.S. 150, 154 (1972)(holding that prosecutors must disclose impeachment evidence).

[177] With the exception of the Commissioner of Public Safety, Stephen B. Simpson, who in August of 2008, "removed [Dr. Hayne] from the list of designated pathologists and . . . no longer [allowed him to] conduct autopsies at the State Medical Examiner Facility," Letter from Stephen B. Simpson, Mississippi Comm'r of Public Safety, to Steven T. Hayne (August 4, 2008) (attached as Appendix 48), State officials have been resistant to take any similar action, or, in some cases, thwart the efforts of those who have. In the spring of 2008, for example, shortly after Brooks and Brewer were exonerated, attorneys at the Innocence Project and Mississippi Innocence

Project, in an effort to gather information about Dr. Hayne's work, sent requests to district attorneys throughout the state. The requests were made pursuant to Mississippi Public Records Act, and were narrowly tailored so that information deemed private could be excised from the request. Miss. Code. Ann. §§ 25-61-1 *et seq.* (1983). By law the information is required to be made available. *Id.*; *see, e.g.*, Letter to Sam Howell from Peter Neufeld & Tucker Carrington, (Mar. 5, 2008) (attached as Appendix 49).

Every state district attorney refused to comply. *See* Appendix 50 (compiling the responses from every district attorney to the Mississippi Public Records Act request). The District Attorney for the Twelfth Judicial District, which includes Forrest and Perry Counties, wrote that "As district attorney, I am not aware of any wrongful convictions in my district." Letter from Jon Mark to Gabriel S. Oberfield (Mar. 20, 2008) (attached as Appendix 51). Two years later, Phillip Bivens and Bobby Ray Dixon were exonerated in Hattiesburg, the Forrest County seat, after spending thirty years in prison due to their wrongful convictions for murder. Campbell Robertson, *30 Years Later, Freedom in a Case With Tragedy for All Involved*, N.Y. TIMES, Sept. 16, 2010, at A12, *available at* http://www.nytimes.com/2010/09/17/us/17exonerate.html. Larry Ruffin, also convicted, was cleared too. Ruffin, however, died in prison in 2002. *Id.*

Coroners – many of whom were the beneficiaries of Dr. Hayne's campaign contribution largesse – also took action. Their effort was aimed at circumventing Commissioner Simpson's decision to remove Dr. Hayne from the designated State pathologist list. *See generally* Letter from James Y. Dale, Special Assistant Atty. General, to Ricky Shivers, Cnty. Coroner (June 26, 2009) (attached as Appendix 52). As contemplated, their plan was to contract on their own with Dr. Hayne. There was some concern, however, about contracting with him – he was still uncertified and no longer working pursuant to a state contract – and so the coroners turned to the Mississippi Attorney General's office for legal advice. *Id.*

According to the Attorney General's opinion, there was nothing illegal about continuing to employ Dr. Hayne. *Id.* The opinion was silent as to whether such action was good public policy, and the opinion omitted any mention of the State Ethics Commission's conclusions about such an arrangement that had been sought years before. *Id.* When efforts were made during the next legislative session to require that counties who contracted separately with pathologists hire only those licensed by the ABP, as required by statute, the Attorney General's office made explicit what was implicit in its legal opinion of the previous year: protecting the *status quo* at all costs. In an e-mail to county coroners and others, Mississippi Attorney General Jim Hood wrote:

> Please be advised House Bill 1456 amends Section 41-61-65 and allows the Department of Public Safety to appoint a Pathologist which must be qualified to perform post-mortem examinations. Further, this bill requires the Pathologist be an M.D. or D.O. who is certified in Forensic Pathology by the American Board of Pathology. This is an Innocence Project bill which threatens cases which involved Dr. Hayne. This bill has passed the Senate and is headed to the House of Representatives. Please contact

The fact that getting this information took so long, faced such opposition, and was produced under such extraordinary circumstances, is probative on at least two fronts: it exemplifies just how resistant State officials were (and remain) to the disclosure of this information, and how critical this information is to Flaggs' case.

F. This Newly Discovered Evidence is Not Merely Impeaching or Cumulative

Moreover, in this case, the newly discovered evidence is neither cumulative nor merely impeaching. Black's Law Dictionary defines "impeach" as "[t]o discredit the veracity of [a witness]."[178] The newly discovered evidence certainly calls into question Dr. Hayne's veracity on any witness stand, given that it reveals he told many lies throughout his career; however, the newly discovered evidence serves a purpose material to this case: it directly vitiates the only physical evidence inculpating Flaggs of murder, instead of self-

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> your House Member and encourage him or her to defeat this bill. Our office is working diligently to stop this potentially harmful legislation.

Radley Balko, Mississippi AG Hood Still Actively Supporting Steven Hayne, Reason.com(Mar. 20, 2012 1:16PM), http://reason.com/blog/2010/03/12/mississipip-ag-jim-hood-still.

Attorney General Hood was not the only one lobbying: a number of county coroners were also writing – to Governor Barbour – requesting that Dr. Hayne "be reinstated as our State Pathologist." Letter from Dexter "Skip" Howard, Holmes Cnty. Coroner, to Haley Barbour, Governor of Miss., (Aug. 19, 2008) (attached as Appendix 53); *see also* Letter from Clay McMorris, Lincoln Cnty. Coroner, to Haley Barbour, Governor of Mississippi, (Aug. 25, 2008) (attached as Appendix 54).

[178] BLACK'S LAW DICTIONARY, 755 (7th ed. 1999).

defense.[179] In other words, this evidence cannot be considered merely impeachment evidence because it is material to Flaggs' conviction for murder.[180]

Here, a forensic charlatan, under an express agreement with the State, provided false testimony about his credentials, experience, and certification. Not satisfied to be merely under-qualified to offer pathology testimony in courtrooms throughout the State, Dr. Hayne began inventing areas of pseudo-science in order to aid prosecutions. Among these fraudulent subspecialties was bloodstain pattern testimony. Thus, Dr. Hayne used his lies about his credentials and his wrongfully obtained, *de facto* position of power to insert false, non-scientifically supported evidence – the bloodstain pattern analysis– into Flaggs' trial for the express purpose of getting a conviction.

Moreover, it is indisputable that Dr. Hayne's testimony, including his forensic fraud, was the *raison d'être* for Flaggs' conviction. Without Dr. Hayne's fraudulent testimony, the State would not have been able to prove that Flaggs murdered Wright. Instead, all evidence presented at trial would

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[179] *See generally*, *Little v. State*, 736 So.2d 486, 489 (Miss. App. 1999); *In re Ward*, 89 So.3d 720, 727 (Ala. 2011).

[180] *See generally, United States v. Blackthorne*, 378 F.3d 449, 454 (5th Cir. 2004); *United States v. Holmes*, 406 F.3d 337 (5th Cir. 2005) (noting that the "newly discovered evidence" in the case did not entitle the appellant to a new trial, because the evidence did not have "any tendency to undermine the verdict"; *Register Propane Gas Co., Inc. v. Whitey,* 668 So.2d 225, 229 (Ala. 1996) ("[W]here the newly discovered evidence tends to destroy or obliterate the effect of the evidence upon which the verdict rested it is more than impeaching for its tendency would be to defeat the verdict returned.") (internal citations omitted).

have supported Flaggs' explanation of events: he was acting in self-defense by fending off an attack from a drug-crazed crack addict.

Dr. Hayne's testimony was not cumulative to the testimony of other witnesses. At trial, no other witness presented evidence concerning bloodstain pattern analysis.

G. This Newly Discovered Evidence Would Likely Have Produced a Different Result at Trial

The newly discovered evidence in this case would likely have produced a different result at trial. According to this Court, "[e]ven if the petitioner is successful in proving his allegations regarding the newly discovered evidence, there still must be a determination concerning the 'probative effect of such evidence to produce a different result on a new trial.' Of course, if newly discovered evidence . . . will probably produce a different result or induce a different verdict, it is sufficient and should require a new trial."[181]

Furthermore, there can be no serious argument against the fact that evidence of self-interested business dealings by the State's primary forensic witness, would, if disclosed to a judge and jury, likely produce a different result at trial. Similarly, when crucial evidence in support of the State's theory of prosecution is presented by an expert whose record shows him to be

[181] *Meeks v. State*, 781 So.2d 109, 112 (Miss. 2001) (quoting *Smith v State*, 492 So.2d 260, 263 (Miss. 1986).

a fabulist of his own credentials, that evidence is near worthless as a reliable expert opinion, and inadmissible as a matter of law.[182]

Additional evidence of Dr. Hayne's willingness to provide testimony about areas of pseudo-forensic science and to ignore professional and ethical obligations to correct the harm that such findings and testimony produced[183] in this case and others would be dispositive of Dr. Hayne's abject lack of professional competence and credibility.

This evidence would also bar the State, pursuant to professional rules of ethics and long standing case law, from even presenting Dr. Hayne's forensic fraud as evidence at trial. In 1935, the Supreme Court described the prosecutor as

> the representative . . . of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from

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[182] *See, e.g.*, *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); *Sherwin-Williams Co. v. Gainers*, 75 So.3d 41, 45-46 (Miss. 2011).

[183] *See, e.g.*, PETER D. BARNETT, ETHICS IN FORENSIC SCIENCE: PROFESSIONAL STANDARDS FOR THE PRACTICE OF CRIMINALISTICS 5 (2001), *available at* http://www.crcnetbase.com/doi/abs/10.1201/9781420041620.ax4; American Board of Criminalists, *Rules of Professional Conduct, available at* http://www.criminalistics.com/ethics.cfm; American Medical Association Council on Ethical and Judicial Affairs, Formal Op. 9.07 (2004), *available at* http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion907.page; GRAHAM M., HANZLICK R., FORENSIC PATHOLOGY IN CRIMINAL CASES 62 (3d ed. 2006) (noting that the College of American Pathologists's Professional Relations Manual requires medical experts to limit testimony to areas of competence).

> improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[184]

Prosecutors also have an ethical duty under ABA Model Rule 3.8(d) and this State's analogous rule to turn over "all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense,[185] a duty the ABA has recently interpreted to apply to all evidence "favorable to the defense," regardless of its potential materiality to the trial's outcome.[186] Even the guidelines put forth by the National District Attorneys Association state that "[t]he primary responsibility of prosecution is to see that justice is accomplished."[187]

Thus, in light of the newly discovered evidence in this case, neither Dr. Hayne nor Dr. Hayne's fraudulent pseudo-scientific findings could have been admitted against Tavares Flaggs, without compromising the integrity of the judicial process, the sanctity of his right to a fair trial, or the reliability of the

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[184] *Berger v. United States*, 295 U.S. 78, 88 (1935); see also *Banks v. Dretke*, 540 U.S. 668, 696 (2004) ("We have several times underscored the 'special role played by the American prosecutor in the search for truth in criminal trials.'") (internal citations omitted).

[185] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2007) (outlining the special responsibilities of a prosecutor); MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3)(2007) (prohibiting an attorney from "offer[ing] evidence that the lawyer knows to be false"); MISS. RULES OF PROF'L CONDUCT R. 3.3(a)(2004), *available at* http://courts.ms.gov/rules/msrulesofcourt/rules_of_professional_conduct; MISS. RULES OF PROF'L CONDUCT R. 3.8(d)(2004), *available at* http://courts.ms.gov/rules/msrulesofcourt/rules_of_professional_conduct.pdf. The ABA Standards for Criminal Justice also state that it is unprofessional conduct for a prosecutor to "knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses." ABA CRIMINAL JUSTICE STANDARDS § 3-5.6(a) (2003).

[186] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009), *available at* http://www.abanet.org/media/youraba/200909/opinion_09-454.pdf.

[187] NAT'L PROSECUTION STANDARDS § 1.1 (Nat'l Ass'n of Dist. Attorneys 1991).

guilty verdict. Moreover, without Dr. Hayne's self-interested and fraudulent opinions, the State would have lacked the requisite proof beyond a reasonable doubt for murder.

II. BY PRESENTING FALSE EVIDENCE DURING HIS CRIMINAL TRIAL, THE STATE OF MISSISSIPPI VIOLATED FLAGGS' DUE PROCESS RIGHTS AS ARTICULATED IN *NAPUE V. ILLINOIS*, 360 U.S. 264 (1959).

A. Standard of Review

Although successive writs are ordinarily barred from post-conviction review, errors affecting a prisoner's fundamental constitutional rights raised on post-conviction relief, including *Napue*[188] violations, are exempted from all bars.[189] Thus, the Supreme Court may either rule upon the petition outright or grant the petitioner's application to proceed in the trial court for "further proceedings under Sections 99-39-13 through 99-39-23" of the Mississippi Code.[190]

Presentation of a claim of newly discovered evidence for post-conviction review pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act, Mississippi Code § 99-39-5(2)(a)(i), requires that:

> (2) A motion for relief under this article . . . be made within three (3) years after the time in which the petitioner's direct appeal is ruled upon by the Supreme Court of Mississippi . . . Excepted from this three-year statute of limitations are those cases in

[188] *Napue v. Illinois*, 360 U.S. 264 (1959).
[189] *Rowland v. State*, 42 So.3d 503, 507 (Miss. 2010).
[190] MISS. CODE ANN. § 99-39-27(7)(a)-(b).

> which the petitioner can demonstrate either:
> (a)(i) . . . that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence . . .

Miss. Code §99-39-5(2)(a)(i). Because Flaggs' successive petition is based on claims of newly discovered evidence, otherwise meets the related requirements in § 99-39-27(9) of the UPCCRA, and is based on claims regarding his fundamental constitutional rights, his petition is not time barred.

The law of the case doctrine posits that "[w]hatever is once established as the controlling legal rule of decision, between the same parties in the same case, continues to be the law of the case, so long as there is a similarity of facts."[191] Thus, ordinarily, an issue of fact or law decided on appeal will not be reexamined either by an appellate court on a subsequent appeal.[192] The law of the case doctrine, however, is an exercise of judicial discretion which "merely expresses the practice of courts generally to refuse to reopen what has been decided," not a limit on judicial power.[193] The doctrine, therefore, is not inviolate and "it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest

[191] *Miss. College v. May*, 128 So.2d 557, 558 (Miss. 1961).
[192] *See id.*
[193] *Messinger v. Anderson*, 225 U.S. 436, 444 (1912); *accord Continental Turpentine and Rosin Co. v. Gulf Naval Stores Co.*, 142 So.2d 200, 206–207 (Miss. 1962).

injustice."[194] This doctrine is not applicable with regard to Flaggs' *Napue*[195] claim because Flaggs argues that Dr. Hayne's blood spatter testimony and his defensive wound analysis were completely false, not just that he was unqualified to render it. Furthermore, the court considers *Napue* claims under a heightened standard of care, where even impeachment evidence gives rise to a constitutional violation "if the false testimony could have . . . in any reasonable likelihood affected the judgment of the jury."[196]

B. Legal Standard

"[I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment . . . The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears."[197] Thus, a *Napue* violation occurs when the prosecuting attorney knows that a witness's testimony is false or "when *another government*

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[194] *Simpson v. State Farm Fire & Cas. Co.*, 564 So. 2d 1374,1380 (Miss. 1990) (quoting *Arizona v. California*, 460 U.S. 605, 618 n. 8 (1983), *overruled on other grounds*, *Upchurch Plumbing, Inc. v. Greenwood Utils. Comm'n*, 964 So.2d 1100 (Miss. 2007).

[195] *Napue v. Illinois*, 360 U.S. 264 (1959).

[196] *Manning v. State*, 929 So.2d 885, 890 (Miss. 2006) (quoting *Barrientes v. Johnson*, 221 F.3d 741, 756 (5th Cir. 2000)). In reversing the conviction in *Napue*, the United States Supreme Court unanimously held that it was not bound by a lower appellate court's determination that the petitioner would have been found guilty without the presentation of the false testimony. *Napue*, 360 U.S. at 272. Instead, the Court utilized a "reasonable likelihood" standard and concluded that a new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury." *Id.* at 271; *Barrientes*, 221 F.3d at 756.

[197] *Napue*, 360 U.S. at 269.

attorney knows of the false testimony and does nothing to correct it."[198] False testimony "includes testimony that affects only the credibility of a witness."[199]

It is also well established that criminal defendants are entitled to a new trial based upon a *Napue* violation when (1) the statements in question are shown to be false; (2) a government attorney knew that they were false; and (3) the statements were material.[200] Unlike other situations where the evidence must also meet some additional evidentiary hurdle for a duty to arise or relief to be granted, the presentation alone of false or misleading evidence more easily satisfies the obligation in full.[201]

C. The State Elicited False Bloodstain Pattern Testimony from Dr. Hayne Which Prosecutors Knew Dr. Hayne Was Patently Unqualified to Render and Was Without Basis in Science or the Facts of the Case.

Interpreting bloodstain patterns is complex and requires a unique set of scientific skills and knowledge. The prosecution made no effort under Mississippi Rule of Evidence 702 to proffer Dr. Hayne as a blood spatter

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[198] *United States v. O'Keefe*, 128 F.3d 885, 893 (5th Cir. 1997) (emphasis added); *see also Giglio v. United States*, 405 U.S. 150, 153 (1972).
[199] *O'Keefe*, 128 F.3d at 893; *Napue*, 360 U.S. at 269-270; *see also Howell v. State*, 989 So.2d 372, 397 (Miss. 2008) (Diaz, J., dissenting) (stating that when the "reliability of a given witness may well be determinative of guilt or innocence, impeachment evidence affecting the credibility of that witness should not be concealed by the prosecution").
[200] *O'Keefe*, 128 F.3d at 893; *United States v. Blackburn*, 9 F.3d 353, 357 (5th Cir. 1993); *see also United States v. MMR Corp.*, 954 F.2d 1040, 1047 (5th Cir. 1992) ("[I]f the government used false testimony and knew or should have known of its falsity, a new trial must be held if there was any reasonable likelihood that the false testimony affected the judgment of the jury.").
[201] *See Alcorta v. Texas*, 355 U.S. 28, 31 (1957).

expert.[202] Moreover, when defense counsel objected that Dr. Hayne had not been qualified as a blood spatter expert, the court overruled the objection without comment and without requiring the State to lay any foundation whatsoever for Dr. Hayne's expertise in bloodstain analysis.[203]

The State capitalized on the court's error and Dr. Hayne's willingness to testify consistent with the prosecution's theory even though he possessed none of the requisite knowledge of or training about blood spatter science, terminology, or the instruments used in evaluating such patterns. Dr. Hayne's opinion – baseless conjecture, under the circumstances – was that the lightly stippled discoloration found on the hallway wall was blood spatter and that the alleged blood had come from Wright's wounds.[204] However, both Dr. Hayne and the State failed to have the discolorations tested in order to determine whether it was indeed blood and, if it was, to whom it belonged. Thus, both the State and Dr. Hayne knew that Dr. Hayne's opinion concerning the blood's origin was purely speculative, as it had no basis in science or the facts of the case. Additionally, both the State and Dr. Hayne knew that Dr. Hayne lacked a rational basis for stating that the blood had come from Wright because Flaggs had told police that Wright had bitten and cut him during the struggle in the hallway.

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[202] Transcript of Record at 338-39, *State v. Flaggs*, No. 05-0-933 (Hinds Cnty. Circuit Ct. July 26, 2006) (attached as Appendix 5).
[203] *Id.* at 339.
[204] *Id.*

Furthermore, not only did Dr. Hayne determine without blood tests that the substance on the hallway wall was in fact blood and that the substance was Wright's blood, Dr. Hayne also testified that the blood spatter came from the wounds on Wright's right forearm and hand.[205] In other words, Dr. Hayne concluded that Wright had sustained these two particular wounds before or during the time Flaggs and Wright were struggling in the hall. In contradiction to this conclusion, however, Dr. Hayne testified earlier in the trial that he could not ascertain the chronological order in which Wright's wounds were inflicted.[206] Ultimately, Dr. Hayne's conclusion is without rational basis and is contradicted by his previous testimony.

In addition, although the State introduced three photographs of the "blood spatter" into evidence – Exhibits 12,[207] 13,[208] and 14[209] – there is no indication in the record that Dr. Hayne examined these photographs at any time when formulating his opinion that the "blood spatter" showed Wright was attempting to defend himself. According to the record, Exhibit 15, a diagram of Wright's apartment, was the only exhibit Dr. Hayne examined at trial in formulating his conclusions concerning the "blood spatter."[210]

In sum, Dr. Hayne's testimony about bloodstain analysis was forensic fraud piled upon more forensic fraud. Not only was the State aware that Dr.

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[205] *Id.*
[206] *Id.* at 336-39.
[207] *Id.* at 234-35.
[208] *Id.* at 237.
[209] *Id.* at 237-38.
[210] *Id.* at 237.

Hayne was patently unqualified to perform bloodstain pattern analysis, the State knew that he did not even bother to pretend to participate in any of the generally accepted tests or analyses in rendering his blood spatter opinion. He neglected to look at pictures of the spatter itself or certify that the substance was in fact blood. The basis for this forensic fraud was simple: it is what the State needed Dr. Hayne to testify in order to obtain a conviction against Flaggs. The State encouraged him to present these lies as evidence, even though prosecutors knew that this opinion was both false and baseless.

D. The State Elicited False Testimony Concerning Wright's "Defensive Wounds" from Dr. Hayne That Prosecutors Knew Was Without Basis in Science or the Facts of the Case

Dr. Hayne bolstered another equally important aspect of the State's case with other testimony as false as his blood spatter testimony. Dr. Hayne testified that the wounds located on Wright's left hand, right forearm and wrist, and fourth finger of the left hand all indicated defensive posturing and that Wright allegedly sustained these wounds while attempting to defend himself from Flaggs.[211] Dr. Hayne's conclusion was based solely upon the location of these wounds.

Although the location of wounds on the upper extremities may inform whether the injured party assumed a defensive posture,[212] the characterization of a wound as defensive requires an understanding of the context and series of events leading up to the injury. This understanding

[211] *Id.* at 324.
[212] VINCENT J. DI MAIO & DOMINIC DI MAIO, FORENSIC PATHOLOGY 208, 215-16 (2nd ed. 2001) (attached as Appendix 9).

would come from discussion with witnesses, the injured party or parties, and the physical evidence from the crime scene. In stark contrast, however, Dr. Hayne did not speak with Flaggs, listen to his statement to police, examine Flaggs' wounds, acknowledge that he was aware that Flaggs had wounds resulting from the altercation, visit the crime scene, or examine other physical evidence from the scene. Thus, Dr. Hayne's assertion that some of Wright's wounds indicated defensive posturing was not arrived at through a procedure that even remotely resembled any generally accepted practice in forensic pathology.

In addition, his conclusion also directly contradicted Flaggs' statement to police. Flaggs stated that he sustained bite wounds to his finger and chest and a knife wound to his forearm while attempting to defend himself from Wright.[213] As Dr. Hayne completely disregarded the fact that Flaggs himself sustained wounds during the fight, Dr. Hayne's conclusion concerning Wright's supposed defensive wounds was based on a distorted, unilateral, and prosecution-minded version of the facts.

E. The Presentation of This Baseless and False Evidence, Whether Considered Singly or Together, Constitutes a Violation of Flaggs' Due Process Guarantees and Requires the Grant of a New Trial.

It is well-settled that when a prosecutor knowingly presents false testimony, a defendant's conviction must be reversed under the due process

[213] Taped Statement of Tavares Flaggs, *State v. Flaggs*, No. 05-0-933 (Hinds Cnty. Circuit Ct. July 26, 2006); *see also* Transcript of Record at 382, *State v. Flaggs*, No. 05-0-933 (Hinds Cnty. Circuit Ct. July 26, 2006) (attached as Appendix 5).

clause of the Fourteenth Amendment when the "false testimony used by the State in securing the conviction of petitioner may have had an effect on the outcome of the trial."[214] A new trial is required "if the false testimony could have . . . in any reasonable likelihood affected the judgment of the jury."[215]

In this case, the State elicited false and misleading testimony from Dr. Hayne concerning: (1) the blood spatter pattern on the hallway wall and (2) the "defensive posturing" of Wright's wounds. Prosecutors, as well as other State attorneys, knew that this evidence was false and introduced it anyway, because they needed Dr. Hayne's testimony and accompanying forensic fraud to obtain a guilty verdict. There is certainly, at least, a "reasonable likelihood" that Dr. Hayne's perjury and forensic fraud "affected the judgment of the jury;"[216] Dr. Hayne's testimony was the only evidence at trial negating Flaggs' self-defense theory and suggesting that Flaggs committed murder.

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[214] *Napue v. Illinois*, 360 U.S. 264, 272 (1959); *see also Manning v. State,* 929 So.2d 885, 891 (Miss. 2006); *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. MMR Corp.*, 954 F.2d 1040, 1047 (5th Cir. 1992) ("[I]f the government used false testimony and knew or should have known of its falsity, a new trial must be held if there was any reasonable likelihood that the false testimony affected the judgment of the jury.").

[215] *Manning v. State*, 929 So.2d 885, 890 (Miss. 2006) (quoting *Barrientes v. Johnson*, 221 F.3d 741, 756 (5th Cir. 2000)). In reversing the conviction in *Napue*, the United States Supreme Court unanimously held that it was not bound by a lower appellate court's determination that the petitioner would have been found guilty without the presentation of the false testimony. *Napue*, 360 U.S. at 272. Instead, the Court utilized a "reasonable likelihood" standard and concluded that a new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury." *Id.* at 271; *Barrientes*, 221 F.3d at 756.

[216] *Manning*, 929 So.2d 885, 890 (quoting *Barrientes*, 221 F.3d at 756).

State actors knew or should have known that Dr. Hayne's role as a witness was not as a vetted, credentialed, and objective pathologist, but was, instead, as a direct result of the State's *quid pro quo* business relationship with him – one that guaranteed him a lucrative business opportunity that he took full advantage of. Even prosecutors who may claim some degree of plausible deniability (based on an assumption, given his State-secured title, that Dr. Hayne was not a charlatan) do not escape legal responsibility. As the United States Supreme Court noted in *Napue*, "[a] lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."[217]

Jurisdictions that have faced similar incidents of forensic fraud, and its state-supported introduction, have held that:

> the prosecutor should not be permitted to avoid responsibility for the false testimony of a government witness by failing to examine readily available information that would establish that the witness is lying. It would have been a simple procedure in this case for the State to have verified . . . [the expert's] qualifications before he testified at . . . [the defendant's] trial. As a direct result of its failure to do so, false testimony occurred at the trial, and a fraud was perpetrated on the court and on the defendant.[218]

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[217] *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959) (internal quotation omitted).
[218] *People v. Cornille*, 448N.E.2d857, 865 (Ill. 1983); *see also Napue*, 360 U.S. at 865–66. ("Moreover, it is obvious that every party, including the State, has an obligation to verify the credentials of its expert witnesses. It is only on the basis of these credentials that experts are permitted to offer their professional opinions concerning

The same principle is true for the content presented by an expert witness. In *Imbler v. Craven*,[219] the court held that reckless use of highly suspicious false testimony violates due process:

> Due process of law does not tolerate a prosecutor's selective inattention to such significant facts . . . It imposes as well an affirmative duty to avoid even unintentional deception and misrepresentation, and in fulfilling that duty the prosecutor must undertake careful study of his case and exercise diligence in its preparation, particularly where he is confronted with facts tending to cast doubt upon his witness' testimony.[220]

In sum, fraudulent and misleading expert testimony does not, by definition, escape what *Napue* and a host of other Supreme Court cases prohibit: the presentation by the State of evidence that it knows or should know is false.[221] Flaggs has met all criteria necessary for establishing a *Napue* violation. His petition should be granted, and his conviction and sentence should be vacated.

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the factual issues disputed in the criminal proceeding. This type of purportedly objective opinion testimony may have considerable influence on the jury, and the rules for qualifying expert witnesses are designed to ensure that only genuine experts will offer it.").

[219] 298 F. Supp. 795, 807-09 (C.D. Cal. 1969), *aff'd per curiam*, 424 F.2d 631 (9th Cir. 1970).

[220] *See also*, *N. Mariana Islands v. Bowie*, 243 F.3d 1109, 1118 (9th Cir. 2001) ("[A prosecutor's due process duty] requires a prosecutor to act when put on notice of the real possibility of false testimony. This duty is not discharged by attempting to finesse the problem by pressing ahead without a diligent and a good faith attempt to resolve it. A prosecutor cannot avoid this obligation by refusing to search for the truth and remaining willfully ignorant of the facts.").

[221] *See Mooney v. Holohan*, 294 U.S. 103 (1935); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Curran v. Delaware*, 259 F.2d 707 (3rd Cir. 1958); *New York v. Wilson*, 318 U.S. 688 (1943); *White v. Ragen*, 324 U.S. 760 (1945).

III. THE STATE'S FAILURE TO DISCLOSE THE TRUE NATURE AND EXTENT OF ITS RELATIONSHIP WITH DR. HAYNE AMOUNTED TO A VIOLATION OF FLAGGS' DUE PROCESS RIGHTS AS INCORPORATED THROUGH *BRADY V. MARYLAND*, 373 U.S. 83 (1963), AND ITS PROGENY.

A. Standard of Review

Although successive writs are ordinarily barred from post-conviction review, errors affecting a prisoner's fundamental constitutional rights raised on post-conviction relief, including *Brady* violations, are exempted from all procedural bars.[222] Thus, the Supreme Court may either rule on the petition outright or grant the petitioner's application to proceed in the trial court for "further proceedings under Sections 99-39-13 through 99-39-23" of the Mississippi Code.[223]

Presentation of a claim of newly discovered evidence for post-conviction review pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act, Mississippi Code § 99-39-5(2)(a)(i), requires that:

> (2) A motion for relief under this article . . . be made within three (3) years after the time in which the petitioner's direct appeal is ruled upon by the Supreme Court of Mississippi . . . Excepted from this three-year statute of limitations are those cases in which the petitioner can demonstrate either:
> (a)(i) . . . that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence . . .

[222] *Rowland v. State*, 42 So.3d 503, 507 (Miss. 2010).
[223] MISS. CODE ANN. § 99-39-27(7)(a)-(b).

Miss. Code §99-39-5 (2)(a)(i). Because Flaggs' successive petition is based on claims of newly discovered evidence, otherwise meets the related requirements in § 99-39-27(9) of the UPCCRA, and is based on claims regarding his fundamental constitutional rights, his petition is not time barred.

The law of the case doctrine posits that "[w]hatever is once established as the controlling legal rule of decision, between the same parties in the same case, continues to be the law of the case, so long as there is a similarity of facts."[224] Thus, ordinarily, an issue of fact or law decided on appeal will not be reexamined either by an appellate court on a subsequent appeal.[225] The law of the case doctrine, however, is an exercise of judicial discretion which "merely expresses the practice of courts generally to refuse to reopen what has been decided," not a limit on judicial power.[226] The doctrine, therefore, is not inviolate and "it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice."[227]

Insofar as the court's previous holding about the materiality of Dr. Hayne's blood spatter testimony implicitly affects this petition for post-

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[224] *Miss. College v. May*, 128 So.2d 557, 558 (Miss. 1961).
[225] *See id.*
[226] *Messinger v. Anderson*, 225 U.S. 436, 444 (1912); *accord Continental Turpentine and Rosin Co. v. Gulf Naval Stores Co.*, 142 So.2d 200, 206–207 (Miss. 1962).
[227] *Simpson v. State Farm Fire & Cas. Co.*, 564 So. 2d 1374,1380 (Miss. 1990) (quoting *Arizona v. California*, 460 U.S. 605, 618 n. 8 (1983), *overruled on other grounds*, *Upchurch Plumbing, Inc. v. Greenwood Utils. Comm'n*, 964 So.2d 1100 (Miss. 2007).

conviction relief, the Court should not apply the law of the case doctrine in this case, because reaffirming the forensic fraud of an uncertified, unqualified expert witness would result in "manifest injustice" and would compromise the stringent demands of public policy.[228] Furthermore, even if the court were to apply the law of the case doctrine, the doctrine would have very limited affect on the disposition of this petition, because this petition for post-conviction relief challenges the admission of Dr. Hayne's testimony in its entirety, including his defensive posturing testimony, not just his blood spatter testimony.

B. Legal Standard

It is clear, based on both federal and Mississippi precedent, that prosecutors violate a defendant's due process right to a fair trial by withholding material evidence, regardless of whether the withholding was intentional.[229] In *Brady*, the United States Supreme Court mandated that prosecutors must disclose material evidence in order to avoid "an unfair trial to the accused."[230] Furthermore, this Court has held that "[f]avorable evidence includes that which is either directly exculpatory or items which can be used for impeachment purposes."[231] When such evidence "within the knowledge of a governmental officer has been withheld from the defense, that

[228] *Flaggs v. State*, 999 So.2d 393, 403 (Miss. Ct. App. 2008).
[229] *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding non-disclosure by the State, of evidence beneficial to the defense, is grounds for relief "irrespective of the good or bad faith of the prosecution").
[230] *Id.*
[231] *Manning v. State*, 929 So.2d 885, 891 (Miss. 2006).

knowledge is imputed to the prosecutor, regardless of the fact that the governmental officer with actual knowledge is from a different governmental agency."[232]

The responsibility for disclosure of exculpatory material in the State's possession rests with the State. It is well established that "the constitutional duty [to disclose] is triggered by the potential impact of favorable but undisclosed evidence," rather than by the request or diligence of the defendant.[233] As an agent of the state, the prosecutor has an affirmative duty to comply with the imperatives of *Brady*, including "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[234]

In order to establish a *Brady* violation, the defendant must show:

> (1) that the government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.[235]

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[232] *State v. Blenden*, 748 So.2d 77, 86 (Miss. 1999) (*citing United States v. Antone*, 603 F.2d 566, 569 (5th Cir.1979); *see also Giglio v. United States,* 405 U.S. 150, 153-54 (1972).
[233] *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *see also Bagley v. United States*, 473 U.S. 667, 682-83 (1985).
[234] *Kyles*, 514 U.S. at 437.
[235] *Howard v. State*, 945 So.2d 326, 337 (Miss. 2006) (internal citations omitted).

The State effectively possesses *Brady* material when any member of the prosecutorial team has knowledge of such.[236] Moreover, the State is said to be in possession of *Brady* material when that material is in the possession of, or otherwise known to, to state agencies and their agents.[237] A prosecutor is held to a constructive knowledge standard and is therefore responsible for learning what other prosecutors, the police, or other investigative agencies know.[238] In sum, the State has a duty to disclose exculpatory material known to any member of the prosecutorial team.[239] In *Box v. State*, this Court found the prosecutorial team to consist of persons other than state prosecutors:

> The State, in the present context, is a team consisting of the attorney, the law enforcement officers of the jurisdiction in which the case is brought, all other cooperating law enforcement officials – municipal, county, state or federal, the prosecution witnesses, and any other persons cooperating in the investigation and prosecution of the case. What is known or available to any one or more is deemed known by or available to the State. All are collectively "the State" for present purposes.[240]

C. Business Relationship with the State

The State had a constitutional duty to disclose the business relationship between itself and Dr. Hayne. Dr. Hayne's pecuniary stake in maintaining a good relationship with law enforcement and prosecutors

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[236] *King v. State*, 656 So.2d 1168, 1174 (Miss. 1995).
[237] *United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979) (holding that knowledge possessed by state law enforcement agents is imputed to federal prosecutors based on principles of agency law).
[238] *Giglio v. United States*, 405 U.S. 150 (1972); *Antone*, 603 F.2d at 569 (5th Cir. 1979).
[239] *King*, 656 So.2d at 1174.
[240] *Box v. State*, 437 So.2d 19, 25 n. 4 (Miss. 1983).

throughout Mississippi was impeachment material, demonstrating Dr. Hayne's bias, and a personal interest in his findings, testimony, and the ultimate outcome of the trial. These agreements must be disclosed under *Brady*.[241]

As discussed above, Dr. Hayne was working in a fee-for-hire arrangement that was totally at odds with the professional objectivity that a legitimate state-appointed medical examiner would have been duty-bound to bring to the State's medico-legal apparatus.[242] Nonetheless, Dr. Hayne was able to operate in this market under the aegis of a State-provided title. There is no better example of this perverted system than the fact that Dr. Hayne advertised his services to law enforcement to help increase their conviction rates.[243]

Additionally, this arrangement ran afoul of ethical and public policy considerations that the State Ethics Commission had specifically articulated.[244] As Dr. Hayne's practice grew over time, he wound up making manifest every concern identified by the Commission. At no point did any

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[241] *See Banks v. Dretke*, 540 U.S. 668, 702–03 (2004) (holding that it was a *Brady* violation when government failed to disclose witness status as paid informant); *Giglio*, 405 U.S. at 153–55 (1972) (holding that it was a *Brady* violation when government failed to disclose a non-prosecution agreement with cooperating witness).

[242] *See supra* notes 88-114 and accompanying text.

[243] Dr. West and Dr. Hayne colluded in touting their abilities to increase law enforcement organizations' conviction-rates with their novel and fraudulent alternative light source theories via advertisements in law enforcement trade journals. Michael H. West & Steven Hayne, *Alternative Light Sources for Trace Evidence Can Lead to Higher Conviction Rates*, 1 KODAK PUBLICATIONS 911 (1992) (attached as Appendix 55).

[244] *See supra* notes 102-06 and accompanying text.

State official, prosecutor or otherwise, seek to disclose this information or correct the false impression that Dr. Hayne's presence as a witness on behalf of the State created in the minds of the fact-finder.

D. Licensure and Credentialing History

The State had a duty to disclose that Dr. Hayne, in spite of his false claims to the contrary, had not been certified in forensic pathology since June 27, 1997.[245] Despite the fact that he has not been in any way certified in forensic pathology for the past fifteen years, Dr. Hayne continued to testify in trial after trial (and continues to claim) – in his CV, under oath, and elsewhere – that he is, in fact, a board certified forensic pathologist.

The State also had a duty to disclose the fact that Dr. Hayne's membership with the American College of Forensic Examiners (ACFEI) did not constitute board certification in forensic medicine.[246] Dr. Hayne has continuously misrepresented his membership with the ACFEI as being the equivalent of board certification in forensic medicine. In reality, Dr. Hayne is a member of the American Board of Forensic Medicine – an advisory, not certifying, board under the ACFEI.[247] Dr. Hayne cites his "Fellow" designation as proof he was board certified in forensic medicine. However, the ACFEI Fellow designation is different from being certified. Because ACFEI fellow designation and board certification communicate different aspects of a

[245] *See supra* notes 118-36 and accompanying text.
[246] *Id.*
[247] *Id.*

professional background, the State had a duty to disclose Dr. Hayne was not board certified in forensic medicine as he represented.

E. Widely-Accepted Forensic Pathology Principles Concerning Bloodstain Pattern Analysis

It is commonly accepted that "[t]he uncertainties associated with bloodstain pattern analysis are enormous;"[248] thus, experts in this highly complex field of forensic science must possess advanced knowledge, excellent training, and the ability to conduct sophisticated, scientific experiments.[249] According to a National Academy of Sciences (NAS) recent report on forensic science in American courts:

> interpreting and integrating bloodstain patterns into a reconstruction requires, at a minimum: an appropriate scientific education; knowledge of the terminology employed (e.g., angle of impact, arterial spurting, back spatter, castoff pattern); an understanding of the limitations of the measurement tools used to make bloodstain pattern measurements (e.g., calculators, software, lasers, protractors); an understanding of applied mathematics and the use of significant figures; an understanding of the physics of fluid transfer, [among others]." among others.[250]

Although "[s]cientific studies support some aspects of bloodstain pattern analysis,"[251] it is indisputable that experts often "extrapolate far beyond what can be supported" by science.[252] Analyzing bloodstain patterns is not a simple practice, because "[a]lthough the trajectories of bullets are

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[248] COMMITTEE ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCES COMMUNITY *et al.*, NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 179 (2009) (attached as Appendix 43).
[249] *Id.* at 177-79.
[250] *Id.* at 177.
[251] *Id.* at 178.
[252] *Id.*

linear, the damage that [bullets] cause in soft tissue and the complex patterns that fluids make when exiting wounds are highly variable."[253] In order to properly conduct a bloodstain pattern analysis, experts must perform many experiments, accounting for the actions carried out during the crime, the resulting blood spatter pattern, and the causal connection between the person's actions and the blood spatter.[254]

Dr. Hayne's CV lists no training or expertise whatsoever in the field of blood pattern analysis whatsoever.[255] In short, he lacks the skills, knowledge, and qualifications necessary to testify about blood spatter patterns; yet, the State did not disclose that it was presenting a patently unqualified expert. Moreover, it is quite clear that Dr. Hayne did not engage in any of the accepted methods for performing his bloodstain pattern analysis: he did not visit the crime scene; he did not perform any experiments; and he did not verify that the substance on the walls was blood. In fact, it is unclear from the record whether he even glanced at pictures of the purported bloodstain pattern. In sum, Dr. Hayne's egregious deviation from accepted bloodstain pattern methodology, as well as his being wholly unqualified to present the information in the first place, constitute *Brady* material, which the prosecution was required to disclose to Flaggs' prior to trial.

F. This Information Could Not Have Been Obtained with Due Diligence by the Defense.

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[253] *Id.*
[254] *Id.* at 179.
[255] *See* Steven T. Hayne, Curriculum Vitae (Mar. 13, 2001) (attached as Appendix 40).

The bulk of the evidence discussed above was revealed only after specific requests were made in discovery and in response to subpoenas in the civil action Dr. Hayne initiated against lawyers working with innocence projects. Other material – transcripts and autopsy reports – for example, would have been unknown to defense counsel or unavailable as a matter of privacy law.[256] They are also prohibitively expensive for counsel, most of whom, like counsel in Flaggs' case, were appointed by the court to represent their indigent clients. Regardless, previous efforts to gain such material were thwarted by local county and State officials.[257]

G. A Reasonable Probability Exists That the Outcome of the Proceedings Would Have Been Different Had the Evidence of Dr. Hayne's Business Relationship with the State, His Misleading Credentials and Educational Background, and His Previous Contradictory Testimony Been Disclosed.

Dr. Hayne's testimony was critical for the State to prove Flaggs' culpability. Without Dr. Hayne's testimony, the bulk of the State's evidence corroborated Flaggs' self-defense claim. Accordingly, in order to secure the conviction, the prosecution presented Dr. Hayne as an objective, disinterested medical expert who ultimately provided critical testimonial evidence and improper, scientifically baseless opinions. The State's misleading presentation of Dr. Hayne and subsequent solicitation of false testimony assuredly influenced the jury's determination of Flaggs' criminal liability. The State's reliance on Dr. Hayne's testimony demonstrates the critical

[256] *See* MISS. CODE ANN. §§ 25-61-1 *et seq*.
[257] *See supra* note 176.

nature of his testimony. The court should therefore grant Flaggs' petition, vacate his sentence, and remand the case to the Hinds County Circuit Court for a new trial

IV. THE STATE'S USE OF DR. HAYNE AS A WITNESS WITHOUT PROPER DISCLOSURES, COMBINED WITH DR. HAYNE'S OWN MISREPRESENTATIONS, ABROGATED PETITIONER'S RIGHTS PURSUANT TO THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE.

A. Standard of Review

Although successive writs are ordinarily barred from post-conviction review, errors affecting a prisoner's fundamental constitutional rights raised in a request for post-conviction relief, including Confrontation Clause violations, are exempted from all relevant procedural bars.[258] Thus, the Supreme Court may either rule on the petition outright or grant the petitioner's application to proceed in the trial court for "further proceedings under Sections 99-39-13 through 99-39-23" of the Mississippi Code.[259]

Presentation of a claim of newly discovered evidence for post-conviction review pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act, Mississippi Code § 99-39-5(2)(a)(i), requires that:

> (2) A motion for relief under this article . . . be made within three (3) years after the time in which the petitioner's direct appeal is ruled upon by the Supreme Court of Mississippi . . . Excepted from this three-year statute of limitations are those cases in

[258] *Rowland v. State*, 42 So.3d 503, 507 (Miss. 2010).
[259] MISS. CODE ANN. § 99-39-27(7)(a)-(b).

> which the petitioner can demonstrate either:
> (a)(i) . . . that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence . . .

Miss. Code §99-39-5 (2)(a)(i). Because Flaggs' successive petition is based on claims of newly discovered evidence, otherwise meets the related requirements in § 99-39-27(9) of the UPCCRA, and is based on claims regarding his fundamental constitutional rights, his petition is not time barred.

The law of the case doctrine posits that "[w]hatever is once established as the controlling legal rule of decision, between the same parties in the same case, continues to be the law of the case, so long as there is a similarity of facts."[260] Thus, ordinarily, an issue of fact or law decided on appeal will not be reexamined either by an appellate court on a subsequent appeal.[261] The law of the case doctrine, however, is an exercise of judicial discretion which "merely expresses the practice of courts generally to refuse to reopen what has been decided," not a limit on judicial power.[262] The doctrine, therefore, is not inviolate and "it is not improper for a court to depart from a prior holding

[260] *Miss. College v. May*, 128 So.2d 557, 558 (Miss. 1961).
[261] *See id.*
[262] *Messinger v. Anderson*, 225 U.S. 436, 444 (1912); *accord Continental Turpentine and Rosin Co. v. Gulf Naval Stores Co.*, 142 So.2d 200, 206–207 (Miss. 1962).

if convinced that it is clearly erroneous and would work a manifest injustice."[263]

Insofar as the court's previous holding about the materiality of Dr. Hayne's blood spatter testimony implicitly affects this petition for post-conviction relief, the court should not apply the law of the case doctrine in this case, because reaffirming the forensic fraud of an uncertified, unqualified expert witness would result in "manifest injustice" and would compromise the stringent demands of public policy.[264] Furthermore, even if the court were to apply the law of the case doctrine, the doctrine would have very limited affect on the disposition of this petition, because this petition for post-conviction relief challenges the admission of Dr. Hayne's testimony in its entirety, including his defensive posturing testimony, not just his blood spatter testimony.

B. Legal Authority

The Sixth Amendment's "Confrontation Clause . . . is satisfied where defense counsel has been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness."[265]

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[263] *Simpson v. State Farm Fire & Cas. Co.*, 564 So. 2d 1374,1380 (Miss. 1990) (quoting *Arizona v. California*, 460 U.S. 605, 618 n. 8 (1983), *overruled on other grounds*, *Upchurch Plumbing, Inc. v. Greenwood Utils. Comm'n*, 964 So.2d 1100 (Miss. 2007).
[264] *Flaggs v. State*, 999 So.2d 393, 403 (Miss. Ct. App. 2008).
[265] *United States v. Restivo*, 8 F.3d 274, 278 (5th Cir. 1993) (internal quotations omitted); U.S. CONST. amend. VI.

The right to confrontation "means more than being allowed to confront the witness physically;"[266] it also means that "[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination."[267] "[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the fact-finder the reasons for giving scant weight to the witness' testimony."[268] Of particular relevance to this case is the fact that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."[269] Therefore, "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness."[270]

The court employs a harmless error standard in determining whether such exclusion violated the Confrontation Clause.[271] Several factors inform whether the alleged Confrontation Clause violation was harmless, including "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence

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[266] *Davis v. Alaska*, 415 U.S. 308, 315 (1974).
[267] *Id.* at 315-16 (internal quotations omitted).
[268] *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985).
[269] *Davis*, 415 U.S. at 316-317 (citing *Greene v. McElroy*, 360 U.S. 474, 496 (1959)).
[270] *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986).
[271] *Chapman v. California*, 386 U.S. 18, 23 (1967).

corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case."[272]

Dr. Hayne was the most critical witness in the State's prosecution of Flaggs. Had Flaggs' trial counsel been privy to impeaching information about Dr. Hayne – almost all of which was required by law to be disclosed – confronting Dr. Hayne with this material during cross-examination would have provided a significantly different impression of Dr. Hayne's credibility than the one the State presented to the jury through its direct examination. Instead of the jury perceiving Dr. Hayne as an honest, if overworked, State-sanctioned pathologist, whose objective opinion implicated Flaggs, the jury would have been made aware that, in fact, Dr. Hayne had a pecuniary interest in his professional dealings with the State, that he had lied about the true nature of that relationship, as well as his qualifications – professional and otherwise – and that he simply did not possess the requisite credibility or allegiance to truthfulness expected of a witness, especially an expert sponsored by the State.

Here, the most revealing aspect of Dr. Hayne's testimony regarding his qualifications and credentials is that he was admitted as an expert forensic pathologist, without having to provide any qualifications at all, because, as evidenced by defense counsel's lack of challenge, his credentials appeared to

[272] *Van Arsdall*, 475 U.S. at 684.

be, and precedent supported it, legitimate and immune to challenge.[273] For testimony as critical as Dr. Hayne's in this case – where the credibility of his opinions and his professional qualifications to render them were so central to a finding of culpability – the fact that Dr. Hayne was presented and, worse, accepted, without the requisite disclosures and without what should have been a robust cross examination, is a critical failing.

It is hard to imagine a more effective evisceration of a criminal defendant's Sixth Amendment right to cross-examination. The truth is that, had the State been honest about Dr. Hayne's lack of certification, his business relationship with the state, and abundant forensic fraud, there would have been ample evidence to prevent Dr. Hayne from being admitted as an expert during *voir dire* or to impugn Dr. Hayne's testimony before the jury. The fact is that Flaggs was robbed of his right to meaningful cross-examination, because the State never disclosed any impeaching evidence about Dr. Hayne.

The Confrontation Clause violation was not harmless because Dr. Hayne's testimony was the linchpin of the State's case against Flaggs. Dr. Hayne's fraudulent testimony concerning the bloodstain analysis and Wright's "defensive wounds" depicted Flaggs as a cold-blooded killer, instead of a man who had to fight for his life against a drug-addled, aggressive addict. Dr. Hayne's testimony was not cumulative, because no other

[273] Transcript of Record at 314, *State v. Flaggs*, No. 05-0-933 (Hinds Cnty. Circuit Ct. July 26, 2006) (attached as Appendix 5).

witnesses testified concerning the bloodstain pattern analysis, that the blood belonged to Wright, and that Wright had "defensive wounds."

Ultimately, defense counsel was incapable of cross-examining Dr. Hayne about his bias towards the State and personal interest in securing a conviction, his tarnished credentialing history and lack of credentials in forensic pathology, and his fraudulent practice, methods, and findings. Because the prosecution's case would have been non-existent without Dr. Hayne's testimony, the State cannot prove that the Confrontation Clause violation was harmless beyond a reasonable doubt; Flaggs is thus entitled to post-conviction relief.

V. THE ADMISSION OF DR. HAYNE'S TESTIMONY VIOLATED FLAGGS' SUBSTANTIVE RIGHTS AS INCORPORATED BY MISSISSIPPI RULE OF EVIDENCE 702.

A. Standard of Review

Although successive writs are ordinarily barred from post-conviction review, errors affecting a prisoner's fundamental constitutional rights raised on post-conviction relief, including gross violations of Rules of Evidence such that a criminal defendant's due process rights are violated, are exempted from all procedural bars.[274] Thus, the Supreme Court may either rule upon the petition outright or grant the petitioner's application to proceed in the trial court for "further proceedings under Sections 99-39-13 through 99-39-23" of the Mississippi Code. Miss. Code Ann. § 99-39-27(7)(a)-(b).

[274] *Rowland v. State*, 42 So.3d 503, 507 (Miss. 2010).

Presentation of a claim of newly discovered evidence for post-conviction review pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act, Mississippi Code § 99-39-5(2)(a)(i), requires that:

> (2) A motion for relief under this article . . . be made within three (3) years after the time in which the petitioner's direct appeal is ruled upon by the Supreme Court of Mississippi . . . Excepted from this three-year statute of limitations are those cases in which the petitioner can demonstrate either:
> (a)(i) . . . that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence . . .

Miss. Code §99-39-5 (2)(a)(i). Because Flaggs' successive petition is based on claims of newly discovered evidence, otherwise meets the related requirements in § 99-39-27(9) of the UPCCRA, and is based on claims regarding his fundamental constitutional rights, his petition is not time barred.

The law of the case doctrine posits that "[w]hatever is once established as the controlling legal rule of decision, between the same parties in the same case, continues to be the law of the case, so long as there is a similarity of facts."[275] Thus, ordinarily, an issue of fact or law decided on appeal will not be reexamined either by an appellate court on a subsequent appeal.[276] The law of the case doctrine, however, is an exercise of judicial discretion which "merely expresses the practice of courts generally to refuse to reopen what

[275] *Miss. College v. May*, 128 So.2d 557, 558 (Miss. 1961).
[276] *See id.*

has been decided," not a limit on judicial power.[277] The doctrine, therefore, is not inviolate and "it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice."[278] Insofar as the court's previous holding about the materiality of Dr. Hayne's blood spatter testimony implicitly affects this petition for post-conviction relief, the court should not apply the law of the case doctrine in this case, because reaffirming the forensic fraud of an uncertified, unqualified expert witness would result in "manifest injustice" and would compromise the stringent demands of public policy.[279] Furthermore, even if the court were to apply the law of the case doctrine, the doctrine would have very limited affect on the disposition of this petition, because this petition for post-conviction relief challenges the admission of Dr. Hayne's testimony in its entirety, including his defensive posturing testimony, not just his blood spatter testimony.

B. Legal Authority

Even if all forensic examiners operated under ideal "scientific" circumstances – that is, proven techniques performed by qualified professionals, conducted in an accredited environments with meaningful supervision and controls – their findings would still be subject to intense

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[277] *Messinger v. Anderson*, 225 U.S. 436, 444 (1912); *accord Continental Turpentine and Rosin Co. v. Gulf Naval Stores Co.*, 142 So.2d 200, 206–207 (Miss. 1962).
[278] *Simpson v. State Farm Fire & Cas. Co.*, 564 So. 2d 1374,1380 (Miss. 1990) (quoting *Arizona v. California*, 460 U.S. 605, 618 n. 8 (1983), *overruled on other grounds*, *Upchurch Plumbing, Inc. v. Greenwood Utils. Comm'n*, 964 So.2d 1100 (Miss. 2007).
[279] *Flaggs v. State*, 999 So.2d 393, 403 (Miss. Ct. App. 2008).

scrutiny given the substantive rights of a defendant that are at stake. This is because the evidentiary worth of forensic evidence cannot be boiled down to a set of simple, infallible claims. Instead, the probative value of forensic evidence always depends on a variety of factors, including the training and skill of the forensic examiner, the validity and reliability of the technique, the precision of the recording methods, the existence of supervisory controls, and the absence of context and confirmation bias undermining the accuracy and objectivity of the forensic examiner in reporting the results.

These sorts of factors are, on a fundamental level, no different than problems that can affect the reliability of other types of testimony. All witnesses, including state forensic examiners, can make mistakes, shade their testimony in favor of the sponsoring party, and even fabricate things that never occurred. These dangers are at their greatest when evidence is prepared by the state with an eye toward a criminal trial, as forensic examiner reports inevitably are, and as the reports in this case in fact were. When it is determined that a former forensic witness violated some, or all, of these mechanisms that exist to ensure the validity of a particular claimed expertise and the reliability of the findings that flowed from it, the right to a fundamentally fair proceeding.[280]

[280] *See Payne v. Tennessee*, 501 U.S. 808, 825 (1991) ("In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.").

The requirement of fundamental fairness and protection of substantive rights encompasses several basic obligations, among them a prohibition against the introduction of inaccurate or misleading evidence.[281] The forensic evidence introduced here – particularly the evidence about the existence of blood spatter, much less the conclusions that could be drawn from it, as well as the defensive posturing testimony – is of the type that implicates Flaggs' substantive trial rights and fails to meet the threshold of reliability for the admission of competent expert testimony and opinion.

In the wake of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and this court's 2003 decision in *Mississippi Transportation Commission v. McLemore*, 863 So.2d 31 (Miss. 2003), as well as the amendment of Mississippi Rules of Evidence 701 and 702,[282] the fulcrum of admissibility for all non-lay testimony is reliability. Rule 702 mandates that the reliability determination has three components: (1) the expert must base his opinion upon sufficient facts or data; (2) the expert must ground the opinion in reliable principles and methods; (3) the expert must apply those principles and methods to the facts of the case in a reliable manner. Courts

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[281] *See United States v. Scheffer*, 523 U.S. 303, 309 (1998) ("State and Federal Governments unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial. Indeed, the exclusion of unreliable evidence is a principal objective of many evidentiary rules.").

[282] Pursuant to *In Re Mississippi Rules of Evidence*, No. 89-R-99002-SCT (May 29, 2003), the Mississippi Supreme Court amended Mississippi Rules of Evidence 701 and 702. As a result of the amendments, the two rules are identical to the corresponding Federal Rules of Evidence. Thus, the amendments made the rights that flow from the state rules commensurate with Federal decisions interpreting the same language. *Williams v. State*, 667 So. 2d 15, 19 n.1 (Miss. 1996), *overruled on other grounds by*, *Smith v. State*, 986 So.2d 290 (Miss. 2006).

may also consider "[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 high known or potential rate of error; and whether the theory or technique enjoys general acceptance within a relevant scientific community."[283]

The foregoing analyses and pretrial determinations are required in order to comport with Flagg's substantive rights, including the right to a fundamentally fair trial.[284] Tragically, however, in numerous criminal cases,

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[283] *Anderson v. State*, 62 So.3d 927, 937 (Miss. 2011) (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593-94 (1993)); *Poole v. Avara*, 908 So.2d 716 (Miss. 2005) (*Daubert* factors were not exhaustive).

More specifically, if Rule 702 is implicated, a court must consider the following questions: Whether the theory or technique in question has been, or can be, tested; Do standards and controls exist? If so, have they been maintained? *Bocanegra v. Vicmar Servs, Inc.,* 320 F.3d 581, 585 (5th Cir. 2003). Is the expert testimony is based on research the expert has conducted independent of the litigation? *Daubert v. Merrell Dow Pharms., Inc.,* 43 F.3d 1311, 1317 (9th Cir.), *cert. denied*, 516 U.S. 869 (1995). Are the findings or conclusions of the proffered testimony the result of valid extrapolations from accepted studies or techniques? *Bocanegra*, 320 F.3d at 586. Has the expert previously testified to his opinion in a proceeding that has no connection to the matter at bar? *Ambrosini v. Labarraque*, 101 F.3d 129, 139 (D.C. Cir. 1996), *cert. dismissed*, 520 U.S. 1205 (1997). Has the expert adequately accounted for obvious alternative explanations? *Michaels v. Avitech, Inc.*, 202 sF.3d 746, 753 (5th Cir.), *cert. denied* 531 U.S. 126 (2000). Is there too great an analytical gap between the data and the opinion? *General Electric v. Joiner*, 522 U.S. 136 (1997).

[284] *Dawson v. Delaware*, 503 U.S. 159 (1992); *see generally, Romano v. Oklahoma*, 512 U.S. 1, 12-13 (1994); *Stewart v. State*, 662 So. 2d 552, 557 (Miss. 1995) (citing *Hicks v. Ohio*, 447 U.S. 343, 346 (1980*)); see also, Klimas v. Mabry*, 599 F.2d 842, 848 (8th Cir. 1979), *rev'd on other grounds*, 448 U.S. 444 (1980); *Daniels v. Williams*, 474 U.S. 327, 331-32 (1986). This Court has readily employed such judicial scrutiny when considering opinions proffered by forensic experts. Unfortunately, however, that scrutiny has almost exclusively been brought to bear in civil cases where, for example, the value of property is at issue, *See Gulf S. Pipeline Co. v. Pitre*, 35 So.3d 494, 498-500 (Miss. 2011); *Miss. Transp. Comm'n v. McLemore*, 863 So.2d 31, 41-42 (Miss. 2003), or in cases where there are medical negligence claims. *See Sherwin-Williams Co. v. Gaines, 75* So.3d 41, 45-46 (Miss. 2011)*; Hill v. Mills,* 26 So.3d 322, 329-33 (Miss. 2010)*; Bullock v. Lott*, 964 So.2d 1119, 1128-32 (Miss. 2007).

including wrongful conviction cases, Mississippi trial and appellate courts have allowed and affirmed the admission of Dr. Hayne's testimony.[285] To be fair, courts allowed Dr. Hayne to testify and denigrate the fairness of the judicial institution, because he and the State actively concealed the truth about his agreement with the State, his lack of credentials, and his forensic fraud. Dr. Hayne and the State's malfeasance is as much an affront to the integrity of Mississippi's judiciary as it was to Flaggs' constitutional right to a fair trial.

C. The Trial Court's Admission of Dr. Hayne's Forensic Testimony Violated Rule 702 and Daubert and Was Both Arbitrary and Clearly Erroneous.

The State had the burden of establishing the basis for Dr. Hayne's opinions, as "[t]he party offering the expert's testimony must show that the expert has based his testimony on the methods and procedures of science, not merely his subjective beliefs or unsupported speculation."[286] Moreover, "the trial court must determine whether the proffered testimony is reliable."[287]

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[285] *See Banks, v. State*, 725 So.2d 711, 713 (Miss. 1997); *Brewer v. State*, 725 So.2d 106 (Miss.1998); *Brooks v. State,* 748 So.2d 736 (Miss. 1999); *Edmonds v. State,* 955 So.2d 787, (Miss. 2007); *Howard v. State*, 701 So.2d 274, (Miss. 1997); *Jones v. State*, 962 So.2d 1263 (Miss. 2007).

[286] *McLemore*, 863 So.2d at 36. *See also Moore v. Ashland Chemical, Inc.,* 151 F.3d 269, 276 (5th Cir. 1998) (en banc).

> [T]he party seeking to have the district court admit expert testimony must demonstrate that the expert's findings and conclusions are based on the scientific method, and, therefore, are reliable. This required some objective, independent validation of the expert's methodology. The expert's assurances that he had utilized generally accepted scientific methodology is insufficient.

[287] *McLemore*, 863 So.2d at 38; *see also, Allen v. Penn. Engineering Corp.*, 102 F.3d 194, 196 (5th Cir. 1996) ("[A] trial court has a duty to screen expert testimony for both its relevance and reliability."); *Sherwin-Williams Co. v. Gaines*, 75 So.3d 41, 46

Dr. Hayne's opinions were not grounded in any criteria recognized as being within Rule 702(2). Generally, a trial court's decision regarding admissibility of expert testimony will be affirmed unless a reviewing court finds that the trial court's decision "was arbitrary and clearly erroneous, amounting to an abuse of discretion."[288] The trial court's consideration of Dr. Hayne's testimony in Flaggs' case meets this arbitrary and capricious requirement, because, as this Court has noted, a qualified expert witnesses may possess the expertise to testify within certain areas, but that does not mean they possess the expertise to testify about areas beyond their field of expertise or in areas not supported by valid science.[289]

A review of the *Daubert/McLemore* factors shows that Dr. Hayne's bloodstain pattern analysis and subsequent conclusions do not survive a Rule 702 inquiry. Dr. Hayne had no personal knowledge concerning the apartment, the fight, or Flaggs' wounds. He did not verify that the discoloration on the hallway walls was, in fact, blood, and, even assuming *arguendo*, that the substance on the walls was blood, did not have any basis

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(Miss. 2011) ("Our trial judges work exceedingly hard and have discretion in how they discharge their gatekeeping duty, but we take this opportunity to reiterate that such duty includes making sure that the opinions themselves are based on sufficient facts or data and are the product of reliable principles and methods.").

[288] *Bishop v. State*, 982 So.2d 371, 380 (Miss. 2008).

[289] *See, e.g., Edmonds v. State*, 955 So.2d 787, 792 (Miss. 2007) ("While Dr. Hayne is qualified to proffer expert opinions in forensic pathology, a court should not give such an expert carte blanche to proffer any opinion he chooses."); *Stubbs v. State*, 845 So.2d 656, 670 (Miss. 2003) ("This does not mean that Dr. West can indiscriminately offer so-called expert testimony in other areas in which he not even remotely meets the Miss. R. Evid. 702 criteria. We caution prosecutors and defense attorneys, as well as our learned trial judges, to take care that Dr. West's testimony as an expert is confined to the area of his expertise under Miss. R. Evid. 702.").

whatsoever for determining that the blood was Wright's blood.[290] Furthermore, the State offered no evidence showing that Dr. Hayne relied upon the facts or pictures from the crime scene in reaching his conclusion; that Dr. Hayne had conducted any tests assessing the reliability of his conclusion; that Dr. Hayne's methods had been subject to peer review; that Dr. Hayne's analysis was subject to a quantifiable rate of error; that Dr. Hayne's analysis was subjected to standards that control such testing; that Dr. Hayne's method is generally accepted within a relevant scientific community; or that Dr. Hayne's bloodstain pattern method was supported by any peer-reviewed material or treatises. In fact, there is no testimony in the record suggesting that Dr. Hayne even performed any scientific tests or analyses to reach his bloodstain pattern opinion.

The court's effort to establish a verifiable basis for Dr. Hayne's opinion consisted of the following discussion:

> Q. . . . How much spatter would you expect to come from the body during . . .
> BY MR. LABARRE: Your honor, I'm going to object. I don't think he's been qualified as a blood spatter expert.
> BY THE COURT: Overruled.[291]

This is clearly insufficient to qualify Dr. Hayne as a witness in blood spatter analysis and to establish, in any meaningful way, that Dr. Hayne's opinion is based on sound science.

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[290] *See supra* notes 67-71 and accompanying text.
[291] Transcript of Record at 338-39, *State v. Flaggs*, No. 05-0-933 (Hinds Cnty. Circuit Ct. July 26, 2006).

Had a finding been made in the trial court that Dr. Hayne was not qualified to testify as an expert at all, much less one on blood spatter, or if one is made here through the relief requested, it would be consistent with the sea change in recent public policy in this area. In 2011 the Legislature amended Section 41-61-55 of the Mississippi Code, the statutory provision governing the Office of State Medical Examiner. There is no mistaking the broader signals that, with the Governor's approval, the Legislature was sending in Senate Bill 2435: there is widespread concern about the legitimacy of pathology practice and opinions presented in our criminal courts.[292] Regardless, when patently inadmissible evidence (including, of course, purported expert testimony) is admitted that prejudices a defendant's substantive rights, a new trial is the appropriate remedy.[293]

VI. FLAGGS' TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE AS A MATTER OF LAW, CAUSING FLAGGS' DEFENSE TO BE PREJUDICED.

A. Standard of Review

Although successive writs are ordinarily barred from post-conviction review, errors affecting a prisoner's fundamental constitutional rights raised

[292] Among other provisions, the bill provides that "[t]he State Medical Examiner shall be appointed by the Commissioner of Public Safety subject to the approval of a majority of a panel composed of the following: (a) the Dean of the University of Mississippi Medical Center School of Medicine; (b) the Dean of the University of Mississippi School of Law; and (c) the State Health Officer. The State Medical Examiner may be discharged only for good cause, upon the recommendation of the Commissioner of Public Safety, and by a majority of the same panel." Miss. Code § 41-61-55(1).

[293] *Edmonds v. State*, 955 So.2d 787, 791-92 (Miss. 2007)(holding that "[a] ruling on evidence is not error unless a substantial right of the party is affected"; *see also Green v. State,* 614 So.2d 926, 935 (Miss.1992).

on post-conviction relief, including violations of a criminal defendant's Sixth Amendment right to effective assistance of counsel, are exempted from all procedural bars.[294] Thus, the Supreme Court may either rule upon the petition outright or grant the petitioner's application to proceed in the trial court for "further proceedings under Sections 99-39-13 through 99-39-23" of the Mississippi Code. Miss. Code Ann. § 99-39-27(7)(a)-(b).

Presentation of a claim of newly discovered evidence for post-conviction review pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act, Mississippi Code § 99-39-5(2)(a)(i), requires that:

> (2) A motion for relief under this article . . . be made within three (3) years after the time in which the petitioner's direct appeal is ruled upon by the Supreme Court of Mississippi . . . Excepted from this three-year statute of limitations are those cases in which the petitioner can demonstrate either:
> (a)(i) . . . that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence . . .

Miss. Code §99-39-5 (2)(a)(i). Because Flaggs' successive petition is based on claims of newly discovered evidence, otherwise meets the related requirements in § 99-39-27(9) of the UPCCRA, and is based on claims regarding his fundamental constitutional rights, his petition is not time barred.

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[294] *Rowland v. State*, 42 So.3d 503, 507 (Miss. 2010).

The law of the case doctrine posits that "[w]hatever is once established as the controlling legal rule of decision, between the same parties in the same case, continues to be the law of the case, so long as there is a similarity of facts."[295] Thus, ordinarily, an issue of fact or law decided on appeal will not be reexamined either by an appellate court on a subsequent appeal.[296] The law of the case doctrine, however, is an exercise of judicial discretion which "merely expresses the practice of courts generally to refuse to reopen what has been decided," not a limit on judicial power.[297] The doctrine, therefore, is not inviolate and "it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice."[298] Insofar as the court's previous holding about the materiality of Dr. Hayne's blood spatter testimony implicitly affects this petition for post-conviction relief, the court should not apply the law of the case doctrine in this case, because reaffirming the forensic fraud of an uncertified, unqualified expert witness would result in "manifest injustice" and would compromise the stringent demands of public policy.[299] Furthermore, even if the court were to apply the law of the case doctrine, the doctrine would have very limited affect on the disposition of this petition, because this petition for post-conviction relief challenges the admission of Dr. Hayne's testimony in its entirety, including his defensive posturing testimony, not just his blood spatter testimony.

B. Legal Authority

[295] *Miss. College v. May*, 128 So.2d 557, 558 (Miss. 1961).
[296] *See id.*
[297] *Messinger v. Anderson*, 225 U.S. 436, 444 (1912); *accord Continental Turpentine and Rosin Co. v. Gulf Naval Stores Co.*, 142 So.2d 200, 206–207 (Miss. 1962).
[298] *Simpson v. State Farm Fire & Cas. Co.*, 564 So. 2d 1374,1380 (Miss. 1990) (quoting *Arizona v. California*, 460 U.S. 605, 618 n. 8 (1983), *overruled on other grounds*, *Upchurch Plumbing, Inc. v. Greenwood Utils. Comm'n*, 964 So.2d 1100 (Miss. 2007).
[299] *Flaggs v. State*, 999 So.2d 393, 403 (Miss. Ct. App. 2008).

A defendant in a criminal case is entitled, under both the United States and Mississippi Constitutions, to effective assistance of counsel.[300] The United States Supreme Court articulated the lodestar for considering a constitutional claim of ineffective assistance of counsel in *Strickland v. Washington.*[301] According to the familiar *Strickland* test, first, the court must determine whether the defendant received reasonably effective assistance of counsel.[302] When making this determination, the court should avoid judging the attorney's performance in hindsight, and must consider any strategic reason advanced by the attorney to determine whether his performance was reasonable.[303] Reasonable tactical decisions should be given great deference.[304] However, the word "strategy" is not an incantation that frees a decision of counsel from further scrutiny. Rather, the decisions of counsel must be considered to determine whether the strategy was reasonable.[305]

Second, if the court determines that the defendant did not receive reasonably effective assistance of counsel, the court must determine whether this insufficiency had a "reasonable probability" of affecting the outcome of the case.[306] A "reasonable probability" does not mean a certainty that the verdict would have been different, but means that the confidence of the court

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[300] U.S. CONST. Amend. VI; U.S. CONST. Amend. XIV; Miss. Const. Art. 3, § 26; *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).
[301] *Strickland*, 466 U.S. at 687-88.
[302] *Id.* at 689-91.
[303] *See id.*
[304] *Id.*
[305] *Richards v. Quarterman*, 566 F.3d 553, 566 (5th Cir. 2009).
[306] *Strickland*, 466 U.S. at 695.

in the outcome is undermined.[307] A finding of prejudice need not be based on a single instance of ineffective assistance of counsel. Rather, the court determines whether the cumulative effect of counsel's improper acts and omissions requires the conclusion that there is a reasonable probability of a different result.[308] "Complaints concerning counsel's failure to file certain motions, call certain witnesses, ask certain questions, and make certain objections fall within the ambit of trial strategy."[309]

Although courts usually refrain from second-guessing counsel's trial strategy, the court does not afford the same deference to counsel's "strategic" decisions that are not based on a reasonable, complete investigation of the case. Such decisions are not entitled to deference. For example, in *Wiggins v. Smith*, 539 U.S. 510 (2003), the Court emphasized the duty of trial counsel to make a proper investigation of the facts of the case, and reversed because counsel made "strategic" decisions on the basis of inadequate investigation.[310]

C. Flaggs' Trial Counsel Was Ineffective

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[307] *See id.*
[308] *Ross v. State*, 954 So.2d 968, 1018 (Miss. 2007).
[309] *Cole v. State*, 666 So.2d 767, 777 (Miss. 1995); *see also Murray v. Maggio*, 736 F.2d 279 (5th Cir. 1984).
[310] The Court, however, should not create strategic reasons which are not advanced by counsel. *Moore v. Johnson,* 194 F.3d 586, 604 (5th Cir. 1999) ("Court is . . . not required to condone unreasonable decisions parading under the umbrella of strategy, or to fabricate tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all."); *Griffin v. Warden*, 970 F.2d 1355, 1358-1359 (4th Cir. 1992) (holding the Court may not "conjure up tactical decisions an attorney could have made, but plainly did not . . . Tolerance of tactical miscalculations is one thing, fabrication of tactical excuses is quite another.").

Flaggs' trial counsel was constitutionally ineffective because his counsel failed to seek a continuance and, if necessary, leave of the court to obtain an expert on Flagg's behalf, once Dr. Hayne testified that certain wounds on Wright's body and the alleged "blood spatter" on the hallway walls was, respectively, the decedent's blood and indicative of the decedent's defensive posturing.[311] It is now common knowledge that the Due Process Clause of the Fourteenth Amendment entitles a defendant to expert testimony when the State's case hinges upon expert testimony.[312] Indeed, the United States Supreme Court has long recognized that a criminal defendant is constitutionally entitled to his own expert in a case where the state's case rests, in substantial part, upon expert opinion.[313]

Furthermore, premised upon the precedents established in *Ake* and *Richardson*, it is now widely accepted that a lawyer, in order to provide effective representation, must seek to obtain an expert witness where the State's case rests upon expert testimony.[314] The Mississippi Supreme Court

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[311] *See supra* note 60.

[312] *Richardson v. State*, 767 So.2d 195 (Miss. 2000) (holding that when the State's case rests upon DNA evidence, defendant is entitled to a DNA expert of his own).

[313] *Ake v. Oklahoma*, 470 U.S. 68 (1985).

[314] *United States v. Fessel*, 531 F.2d 1275, 1279 (5th Cir. 1976) (holding that when the only issue at trial was sanity of the defendant, failure of defense counsel to request psychiatric expert was *per se* ineffective counsel); *see also Knott v. Mabry*, 671 F.2d 1208, 1212-13 (8th Cir. 1982) (holding that counsel may be found ineffective for failing to consult an expert "[w]here there is substantial contradiction in a given area of expertise,..."); *Pavel v. Hollins*, 261 F.3d 210, 223-24 (2nd Cir. 2001) (holding that failure to consult with or call a medical expert was deficient representation in a case where the prosecution depended upon "testimony of a physician" about the source of injuries to the victim); *Lindstandt v. Keane*, 239 F.3d 191, 202 (2nd Cir. 2001) (holding that defense counsel's failure to consult an expert, in conjunction with other substantial deficiencies by trial counsel, rendered defense

has readily embraced this principle and held that, when the majority of inculpatory evidence comes from expert witnesses, it is ineffective assistance of counsel for trial counsel to fail to seek to obtain an expert in defense. For example, in *Howard v. State*, 945 So.2d 326 (Miss. 2006), the Mississippi Supreme Court held that defense counsel was ineffective because he failed to obtain an expert witness on bite mark evidence.

Similar to *Howard* and other cases where courts have found that counsel was ineffective for failing to retain an expert, Flaggs' trial counsel failed to hire an expert to refute Dr. Hayne's dubious expert testimony. There

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counsel ineffective); *Proffitt v. United States*, 582 F.2d 854, 859 (4th Cir. 1978) (holding that court-appointed counsel's conditioning hiring of expert as to plaintiff's psychiatric condition on payment of lawyers fee and payment of expert fee was not constitutionally-adequate representation); *United States v. Edwards*, 488 F.2d 1154, 1164-65 (5th Cir. 1974) (holding that failure to pursue request for psychiatric assistance in case where court had adjudicated defendant was entitled to psychiatric expert was ineffective assistance of counsel); *Owsley v. Peyton*, 368 F.2d 1002, 1003 (4th Cir. 1966) (holding that when defense counsel has doubt as to defendant's mental condition, failure to introduce evidence concerning mental condition was *per se* ineffective assistance); *United States v. Taylor*, 437 F.2d 371, 378-79 (4th Cir. 1971) (holding that a criminal conviction should be remanded to determine whether examination by expert psychiatrist would have assisted the defendant in his defense); *Rogers v. Israel*, 746 F.2d 1288, 1295 (7th Cir. 1984) (holding that when the crucial issue during a first degree murder trial was whether the victim had been immediately incapacitated so as to keep him from engaging in struggle with defendant, failure of defense counsel to consult a qualified expert physician was constitutionally-inadequate representation); *Davis v. Alabama*, 596 F.2d 1214, 1221 (5th Cir. 1979), *vacated as moot*, 446 U.S. 903 (1980) (holding that when a defendant has a history of mental problems and insanity was the only possible defense, failing to investigate to determine whether an expert opinion could be introduced was ineffective representation); *Williams v. Martin*, 618 F.2d 1021, 1027 (4th Cir. 1980) (in murder case, where cause of death was at issue, effective representation required expert forensic pathologist); *Sommers v. Commonwealth*, 843 S.W.2d 879, 882-85 (Ky. 1992) (failure to appoint expert pathologist by defendant violates due process where cause of death is at issue); *Troedel v. Wainwright*, 667 F. Supp. 1456, 1461 (S.D. Fla. 1986), *aff'd*, 828 F.2d 670 (11th Cir. 1967) (defense counsel was constitutionally ineffective when gunshot residue testimony was "critical" but defense lawyer had not consulted with any other expert in the field).

were no eyewitnesses to the incident, and the only evidence suggesting Flaggs committed murder was provided by the State's expert witness. Dr. Hayne's testimony was the only testimony rebutting Flaggs' defense that this was anything other than an act of self-defense.[315]

Perhaps there is no case more analogous to Flaggs' case than *Draughon v. Dretke*, 427 F.3d 286 (5th Cir. 2005). In *Draughon*, the State presented two witnesses that offered testimony suggesting that there was a very short distance between shooter and victim, discrediting the defendant's version of events: that the fatal shot was actually ricochet wound.[316] The defense did not call an expert witness to rebut this testimony.[317] The Fifth Circuit held that defense counsel was ineffective in not getting an expert witness to corroborate defendant's testimony by testifying about the characteristics of the fatal bullet.[318] According to the court,

> the failure to investigate the forensics of the fatal bullet deprived [defendant] of a substantial argument, and set up an unchallenged factual predicate for the State's main argument that [defendant] intended to kill. It left little with which to persuade the jury that [the expert's] statement of distance was faulty.[319]

Just as in Flaggs' case, the defendant in *Draughon* was the sole source of evidence contradicting the prosecution's theory.[320]

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[315] *See supra* note 35-37.
[316] *Id.*
[317] *Id.*
[318] *Id.* at 291.
[319] *Id.* at 296.
[320] *Id.*

D. Flaggs' Defense Was Prejudiced as a Result of His Trial Counsel's Ineffectiveness

In order to prove that his counsel's deficiency prejudiced his defense, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[321]

Evidence either of Dr. Hayne's non-existent bases for his opinions, or, in the alternative, a sound opinion based in forensic science that it was Flaggs whose wounds may have been the source of the alleged blood in the hallway would have substantially undercut the State's theory, namely its ability to argue to the jury that Wright "was surprised by [Flaggs] and was killed in the most malicious way you can think of."[322] In the end, Flaggs' defense amounted to nothing more than one distorted tape-recording offered by the State during its case-in-chief. When given the opportunity to call witnesses and defend his client, Flaggs' counsel called none and rested.[323]

CONCLUSION

Ultimately, the failure of justice in this case is threefold. First, there was the knowing and intentional violation of Flaggs' constitutional rights. Every criminal defendant is guaranteed the fundamental right to a fair

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[321] *Strickland*, 466 U.S. at 694; *see also Mohr v. State*, 584 So.2d 426, 430 (Miss. 1991).
[322] Transcript of Record at 422-23, *State v. Flaggs*, No. 05-0-933 (Hinds Cnty. Circuit Ct. July 26, 2006) (attached as Apendix 5).
[323] *Id.* at 406.

criminal trial through multiple constitutional provisions and doctrines: here, the Fourteenth Amendment's Due Process Clause, *Brady*, *Napue*, and the Sixth Amendment's Confrontation Clause. Yet, State officials and Dr. Hayne together ignored these guarantees – and for many reasons: pride, avarice, and the ease of obtaining a conviction with fraudulent, fabricated evidence – thereby depriving Flaggs of a fair trial, seemingly without hesitation or professional conscience.

The lengths the State went to assure that Flaggs could not have a fair trial cannot be overstated. For years the State routinely, knowingly, and systematically made it a practice to conceal the nature of its working relationship with Dr. Hayne, which allowed Dr. Hayne, an uncertified forensic pathologist, to act as the *de facto* State Medical Examiner. As a direct consequence, the State tacitly condoned Dr. Hayne's perjurious claims about his qualifications and educational accomplishments in countless criminal trials throughout Mississippi. Then, the State retained Dr. Hayne to produce forensic fraud – vis-à-vis the blood spatter and "defensive posturing" testimony – during Flaggs' trial. Fortunately, there is a remedy: to provide Flaggs, through post-conviction relief, the fair trial that the State and Dr. Hayne deprived him of in the first place.

The second tragedy in this case is Dr. Hayne and the State's decades-long assault upon the integrity of Mississippi courts. This Court imposes a duty upon lawyers not to knowingly introduce false or fabricated evidence

before Mississippi's courts.[324] This duty was of no moment to the State; prosecutors charged ahead, using Dr. Hayne's perjured, fraudulent testimony at almost every available opportunity. Very recently, in *Sherwin-Williams Co. v. Gainers,* this Court issued its most comprehensive rejection of pseudo-science's place in Mississippi courts. The Court strongly reprimanded a lower court for allowing such testimony to be introduced, chastening courts with the admonition that they are charged with a gatekeeping duty to ensure "that the [expert] opinions themselves are based on sufficient facts or data and are the product of reliable principles and methods."[325] The concurrence, in turn, concluded that " '[i]t is well settled in this jurisdiction that a verdict may not be based upon surmise or conjecture.' "[326]

Regardless of whether the Court considers the ethical duties demanded of attorneys (and in this context of prosecutors especially) or the requirements of Rule 702,[327] one universal truth is clear: Dr. Hayne should have never been admitted as an expert in Mississippi courts. Every single time the State colluded with Dr. Hayne to introduce his pseudo-scientific perjury into evidence, it sullied the reputation of Mississippi's judiciary.

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[324] MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2007) (prohibiting an attorney from "offer[ing] evidence that the lawyer knows to be false"); MISS. RULES OF PROF'L CONDUCT R. 3.3(a)(2004), *available at* http://courts.ms.gov/rules/msrulesofcourt/rules_of_professional_conduct.pdf.
[325] *Sherwin-Williams Co. v. Gainers*, 75 So.3d 41, 46 (Miss. 2011).
[326] *Id.* at 48 (Kitchens, J., concurring) (quoting *John Morrell & Co. v. Shultz*, 208 So. 2d 906, 907 (Miss. 1968)).
[327] MISS. R. EVID. 702.

The final outrage of this case is what Dr. Hayne is doing today: despite statutory provisions prohibiting State coroners from hiring him,[328] Dr. Hayne continues his forensic grift.[329] In other words, the era of Dr. Hayne's incursion upon the fairness of criminal trials and the integrity of the judiciary has not passed; this regrettable epoch in the history of Mississippi abides.

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[328] MISS. CODE ANN. § 41-61-57 (Supp. 2010).

[329] Dr. Hayne recently sent a personal solicitation to a new customer base: criminal defense attorneys. The letter read, in part, "We are pleased to announce that Steven Hayne, M.D. will be available immediately to assist criminal defense attorneys in the State of Mississippi. . . . Dr. Hayne is available to give testimony as an expert witness in all criminal cases involving violent crimes and death of unknown origin." Letter from Pathology Consultants, Inc., Dr. Steven T Hayne M.D (undated) (attached as Appendix 56).

Attorneys have taken him up on the offer. Last fall, a defense attorney retained Dr. Hayne in and Oktibbeha County criminal case. *See* Transcript of Record at 51, *State v. Sharp* (No. 2010-158-CRH) (Oktibbeha Cnty. Circuit Court, Sept. 26, 2011). (attached as Appendix 57). The defendant, accused of murder for the shooting death of her paramour, claimed self-defense. *See* David Miller, *Leslie Sharp Found Not Guilty*, THE DISPATCH (Sept. 30, 2011 10:33 PM), http://www.cdispatch.com/news/article.asp?aid=13309. The defendant, however, had shot the victim seven times – including several shots in the back, which, arguably, were proof of the defendant being the aggressor, not the victim. *Id.* Evidence about which shots were fired first would be critical. Eyewitness accounts were not helpful. Both sides turned to forensic evidence.

The State's pathologist, Dr. Adele Lewis, testified that there was no way to determine which shot was fired first because of the multiple variables involved – including, among other things, the position of the shooter and the decedent, and the angle of the weapon at the time it was fired. "There's an infinite number of scenarios in which you can pose the shooter," Dr. Lewis testified. Transcript of Record at 48, *State v. Sharp* (No. 2010-158-CRH) (Oktibbeha Cnty. Circuit Court, Sept. 26, 2011). "[A]n honest and competent pathologist would not be able to tell you which order the shots were fired and the position of the person. It's not scientifically possible." *Id.* at 51 (attached as Appendix 57).

But the defense had not retained an honest and competent pathologist. The defense had retained Dr. Hayne. According to Dr. Hayne, the first bullets fired hit the decedent in the front of his body; the gunshot wounds to his back were among the last to occur. Transcript of Record at 27, *State v. Sharp* (No. 2010-158-CRH) (Oktibbeha Cnty. Circuit Court, Sept. 26, 2011) (attached as Appendix 57).

Respectfully submitted, this _____day of _____, 2012.

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NO. 2011-KA-01471-SCT

DAVID W. PARVIN
Plaintiff-Appellant

VERSUS

STATE OF MISSISSIPPI
Defendant-Appellee

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SUPREME COURT OF MISSISSIPPI

NO. 2011-KA-01471-SCT

DAVID W. PARVIN
Plaintiff-Appellant

VERSUS

STATE OF MISSISSIPPI
Defendant-Appellee

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. David W. Parvin, Appellant
2. Jim Waide, Esq., Attorney for Appellant
3. Rachel M. Pierce, Esq., Attorney for Appellant
4. Waide & Associates, P.A., Attorneys for Appellant
5. James L. Robertson, Esq., Attorney for Appellant
6. Wise Carter Child & Caraway, P.A., Attorneys for Appellant
7. Timothy Edward Ervin, Esq., Attorney for Appellant
8. State of Mississippi, Appellee
9. Jeff Klingfuss, Esq., Assistant District Attorney, Attorney for Appellee
10. Paul C. Gault, Esq., Assistant District Attorney, Attorney for Appellee

11. Michael Paul Mills, Jr., Esq., Assistant District Attorney, Attorney for Appellee

12. Steven T. Hayne, M.D.

13. Grant Dale Graham, retired crime scene reconstructionist

This the 12th day of March, 2012.

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JAMES L. ROBERTSON

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

CASES:

STATUTES:

RULES:

OTHER AUTHORITIES:

STATEMENT OF THE ISSUES

1. The Circuit Court erred when it failed to grant Defendant's Motion for Judgment of Acquittal Notwithstanding the Verdict of the Jury, and, prior thereto, when it failed to direct a verdict of acquittal after the State had rested.

2. The Circuit Court erred when, contrary to Miss. R. Ev. 702, it refused to exclude --- from the jury's consideration or its own consideration --- the graphic depiction and other speculative opinions of Grant D. Graham regarding the manner in which the fatal accident occurred.

3. The Circuit Court erred when, contrary to Miss. R. Ev. 702, it refused to exclude --- from the jury's consideration or its own consideration --- the speculative opinion of Dr. Steven T. Hayne regarding the distance from the end of the gun barrel to the entrance wound.

4. The Circuit Court erred when failed and refused to grant a cautionary instruction to the jury regarding Dr. Steven Hayne's last minute revision of his autopsy report in an important particular so that it would be more consistent with his distance determination speculation.

5. The Circuit Court erred when failed and refused to grant Instruction P-2, a cautionary instruction to the jury regarding the graphic depiction and other speculative opinions of Grant D. Graham.

6. The Circuit Court erred when it failed and refused to grant Defendant's Motion for a New Trial.

STATEMENT OF THE CASE

I. Nature and Purpose of Appeal

> The best explanation of events when you put all of the data together comes to this particular scenario, considering that also with the victim sitting in the seat with a seven degree angle leaning over to the right, it puts everything showing that this is **a possible scenario of happening or occurring** within this room.

Event Reconstructionist Grant D. Graham, TT. 30, lines 11-16. [Emphasis added] Yet this "possible scenario of happening or occurring" became gospel in June 17, 2011, when the jury found David W. Parvin guilty of murdering his wife.

This is a *Weathersby* case with a *Daubert* twist. David W. Parvin is the sole eyewitness to the tragic accident in which he fatally shot his wife. He describes what happened reasonably. Parvin's articulation of the events of the morning of October 15, 2007, is not "substantially contradicted in material particulars by a credible witness or witnesses for the state . . . ." *Weathersby v. State*, 165 Miss. 207, 209, 147 So. 481, 481 (1933). The State counters with supposed "expert" speculations by two witnesses --- event reconstructionist Graham, whose "best explanation of events" is a "possible scenario of happening or occurring." Graham builds upon data known only to himself*, viz*., the critical "victim sitting . . . with a seven degree angle leaning over to the right." He then turns to and relies on distance speculations by forensic pathologist, Dr. Steven T. Hayne --- ostensibly to show "physical facts" to contradict Parvin's statement of the facts. In critical particulars, the speculations of Dr. Hayne and Mr. Graham fall far short of the (1), (2), (3) step mark set by Miss. R. Ev. 702, commonly known as the *Daubert* rule. Once those impermissible speculations are removed, David Parvin becomes entitled to acquittal under *Weathersby* and progeny like *Johnson v. State*, 987 So.2d 420, 424-27 (¶¶10-15) (Miss. 2008) and *Dew v. State*, 309 So.2d 857, 859 (Miss. 1975), or, at the very least, to a new

trial.

To be sure, a jury might well dislike Parvin. He admittedly engaged in an affair with a woman not his wife and appeared to have little remorse for having done so. See TT. 443-445. His testimony at trial suggests an attitude of arrogance.[1] But neither an unsavory affair, nor a poor trial demeanor, are legally permissible bases for Parvin's imprisonment for life for murder.

II. Proceedings in Circuit Court

On October 15, 2007, Joyce Parvin was fatally wounded by an accidental blast from a shotgun held by her husband, David W. Parvin, as he tripped and fell in the couple's home on the Tennessee Tombigbee Waterway in Monroe County.

On August 14, 2009, a Monroe County Grand Jury returned an Indictment, charging Parvin with murder in violation of Miss. Code § 97-3-19. R. 14.[2]

On September 20, 2010, the State gave notice of its intent to call Dr. Steven T. Hayne "as an expert witness in the field of forensic pathology." R. 39. No notice was given that Dr. Hayne may be tendered as an expert in any other field. On September 21, 2010, the Defendant Parvin moved to exclude "all evidence based on an autopsy done by Steven Hayne, M.D., . . . , along with all evidence based on any findings made by Dr. Hayne who is not a qualified expert under the laws of the State of Mississippi." R. 42-43.

On September 20, 2010, the State also gave notice of its intent to call Grant D. Graham, Sr., "as an expert in the fields of crime scene reconstruction and crime scene analysis." R. 39. On September 21, 2010, the Defendant Parvin filed a motion to exclude "evidence obtained through the use of computerized program called Poser 7." R. 42. Graham proposed to use Poser

[1] For example, TT. 392, whereby Parvin refers to the "damn indictment"; TT. 382-383, where he directs his attorney as to what questions to ask; and TT. 407-412, where he attempts to qualify himself as an expert.

7 and 3D Eyewitness computer programs at trial, TT. 326-328, to show that Parvin "purposefully shot and killed his wife, Joyce Parvin." R. 42.

On November 12, 2010, the Circuit denied Defendant Parvin's motions to exclude. TT. 55-57.

On May 4, 2011, the Defendant followed up his September 21, 2010, motions to exclude by filing a Motion To Preclude Prosecution From Ignoring Known Facts Which Disprove Opinions Critical To The Indictment. R. 73-115. This motion was also denied.

On June 13, 2011, the case was called for trial in the Circuit Court of the First Judicial District of Monroe County, the Honorable Paul S. Funderburk, Circuit Judge, presiding. TT. 60.

After the State had rested its case, the Defendant renewed all his prior motions and asked for a mistrial. The Circuit Court denied the motion to renew. TT. 423. The Defendant also moved the Court "to direct the jury to return a verdict of not guilty in favor of the defendant." TT. 423, lines 7-12. The Circuit Court denied the motion. TT. 423, lines 15-17.

On June 17, 2011, the jury returned a verdict that David Parvin was guilty of murder. R. 161-62. The Circuit Court sentenced Parvin to life imprisonment. R. 163.

On June 24, 2011, Defendant Parvin filed a Motion for Judgment for Acquittal Notwithstanding the Verdict (JNOV) or, in the Alternative, Motion for a New Trial. R. 170-72. Beginning immediately thereafter, the Defendant Parvin amended and elaborated his June 24 Motion with a number of hand written *pro se* letters, which the clerk filed on July 22, 2011. R. 196-221. On August 31, 2011, and September 1, 2011, the Defendant Parvin further amended and elaborated his June 24 Motion with additional *pro se* submissions. R. 223-37. On September 13, 2011, through new counsel, the Defendant Parvin filed his Motion to Amend

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[2] Citations to the Record are reported as follows: [R.Page Number]. Citations to the Trial Transcript are reported as follows: [TT.Page Number].

Motion For New Trial, R. 242-44, which Motion To Amend was granted. R. 262-63. The Defendant Parvin followed with additional *pro se* submissions. R. 245-61.

On September 19, 2011, the Circuit Court entered its Order denying Defendant's post-trial motions in each of their three iterations described above. R. 262-63.

On September 30, 2011, the Defendant Parvin timely filed Notice Of Appeal. R. 284.

III. Statement of the Facts

On October 15, 2007, at approximately 9:00 a.m., Defendant/Appellant Dr. David W. Parvin (hereinafter "Parvin")[3] called 911, reporting that he had accidently shot his wife in their home. TT. 377, 379. Approximately nine minutes later, Parvin called 911 back, concerned with the delay in an ambulance arriving. TT. 377, 379. When they finally arrived, medics and law enforcement officers found Mrs. Joyce B. Parvin dead, the victim of a fatal shotgun wound into her side. TT. 95.

Later that day, Parvin met Mississippi Highway Patrol Investigator Kenneth Bailey, TT. 136-49, at the Monroe County Sheriff's Department and was questioned about the accident. Bailey first did an off-the-record interview with Parvin and then an on-record tape-recorded interview. *Id.* According to Bailey, both the unrecorded interview and the taped interview contained the same version of events. TT. 136-48, 154. Specifically, Parvin stated in the interviews and swore at trial, see TT. 377-378, that he accidentally shot his wife when he tripped as he hurried down the hallway in their home, located on the Tennessee Tombigbee Waterway in Monroe County, on his way out the front door to shoot a beaver or some similar pest. TT. 377-78. Parvin and his wife frequently shot these troublesome pests near their home. TT. 374. Monroe County Sheriff's Chief Investigator Curtis Knight confirmed there was no county animal

[3] Parvin has a Ph.D. in economics from the University of Florida. He is a retired

control officer. TT. 110. Knight agreed that "people take care of the problem themselves by shooting the beavers." T. 110.

On this occasion, Parvin saw the animal outside. To avoid being detected, he took the long way around, out the front door, headed down the hallway. He was trying not to alert the pest to his presence and to sneak up on it in order to get in a position to shoot it. TT. 375-376. As Parvin entered the hall of their home, he tripped and fell and the gun accidentally discharged. TT. 377-78, 390. Parvin was uncertain what caused him to trip. He thinks he may have tripped over the rug, TT. 378, 388-90, but may also have tripped over their dog or both. TT. 378. According to Parvin's testimony:

> Q. And what happened as you entered the hall carrying the gun?
>
> A. I entered the hall, carrying the gun, and I tripped.
>
> Q. How did you trip?
>
> A. Well, the notes from the interviews[4] that day says I tripped over the rug or the dog or something, I didn't know, and, you know, on that day of the accident they are taking these interviews – I really don't know what I tripped over that day, but a few days later I knew that I tripped over the dog, and probably as I tripped over the dog, I may have tripped over the rug somewhat. The rug is not a true rug. It's a runner. It's got a big backing under it so it doesn't slip too much, the possibility of catching your foot on the side.

TT. 378, 391. On that morning the dog was on the runner as he walked over it headed for the front door. TT. 389-90.

> I come out of the closet with the gun. I go through the bedroom, out the bedroom door, immediately into the hallway door, and I am rushing. I shot a lot of these critters, beavers we are going to call them. I got to rush from where my gun is to where I expect to shoot them, which is kind of a point where they have to go around, and I get them in shotgun range. So I am rushing, and I tripped, and I

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professor of agricultural economics at Mississippi State University. He is 72 years old. TT. 372.

[4] Parvin is referring to the deputy's notes of the interviews with him on the day of the shooting.

> don't – I told them I really don't know whether I fell and hit the floor, or my knee may have hit the floor, but my instinct when I trip with a gun is to hold that gun and try to get the barrel in safe direction.

TT. 390.

Later Parvin reiterated what happened:

> On the date of the accident, I, as been stated, I had a loaded gun in my hand, and I was rushing outside behind my wife, who was seated, as has been stated. I tripped, and the gun went off, and my wife was fatally shot. That's what happened.

TT. 394. Parvin was never sure of the angle of fire. "I felt like that the shot was parallel to the floor or slightly elevated relative to the floor." TT. 394.

At the time of the shooting, Parvin's left hand was up on the fore grip and his right hand around the trigger guard, around the triggers. TT. 399. When he tripped, the right barrel, operated by the front trigger, discharged. *Id.* The back trigger, or full choke barrel, the more powerful shot, never discharged. TT. 400.

The State's case centers upon the opinion testimony of a retired Mississippi Crime Laboratory employee (Grant D. Graham), that the "best explanation of events" is that Parvin shot his wife while holding the shotgun in a general butt to shoulder configuration. TT. 343-45. In a pre-trial hearing, Graham calls this at best "a possible scenario of happening or occurring within this room." TT. 30, lines 11-16. Graham derived this "possible scenario" by utilizing fact memories of the deputies who investigated the accident, a 25° to 30° downward angle of fire, TT. 200; also State Ex. 16, at page 6, and distance estimate made by a forensic pathologist with no articulated or otherwise known expertise in calculating such distances, much less a Miss. R. Ev. 702 sufficient distance determination opinion tailored to this case. Nothing in the record shows what allows him to place "the victim sitting in the seat with a seven degree angle leaning

over to the right." TT 30, lines 11-16. Graham took this unscientific, undocumented and otherwise imprecise information and imputed it, using computer programs called "3D Eyewitness," TT. 326, and "Poser 7." TT. 326-328. Nothing in the record shows more than hearsay hints that these programs have been validated and proved reliable. There is no Rule 702 showing of their level of reliability *vel non*. Applying these two computer programs to the information he had from the Parvin home, Graham conjured his "best approximation" of how the shotgun was held when it was fired, TT. 358-59, again only "a possible scenario of happening or occurring within this room." TT. 30, lines 15-16.

A concise summary of the input information available to Graham is as follows:

Curtis Knight

Curtis Knight testified that he came to the Parvin home immediately after the shooting. Upon Knight's arrival, Parvin told him that he had been headed out the door to shoot a beaver when he tripped and the gun went off. TT. 93-109. Parvin was not sure what he tripped on. He first stated he tripped over a rug, but he could have tripped over the dog or maybe even over his own feet, and was not sure what caused him to trip. TT. 97.

In testimony disregarded by Crime Scene Reconstructionist Graham, Knight testified this was a "contact wound," because the material on the back of Mrs. Parvin's shirt was black and there were no "fliers" visible around the wound. TT. 101.[5] According to Knight, it was a "very close shot." TT. 102.

[5] A "flier" is a pellet that separates itself from the other shots. For there to be fliers, the shotgun wound must have been inflicted at some distance. See Knight testimony, TT. 101; Hathcock testimony, TT. 183.

Arthur Chancellor

Arthur Chancellor is a crime scene analyst employed by the Mississippi Bureau of Investigation Cold Case Unit. TT. 118. Chancellor came to the Parvin home at approximately 1:15 p.m. TT. 119. He found no evidence of any smudge or contact on the walls or "gouge marks on the hardwood floor." TT. 121. He, therefore, speculated that he was "unable to see a trip and fall." TT. 122. Never explaining the basis of his speculation, much less Rule 702 sufficient bases, Chancellor testified that, when one trips and falls while one is carrying a gun, "if you are falling to the side, your hands naturally go out." TT. 127. Chancellor said he did not see anything at the home to prove that Parvin's hands had gone out, TT. 133, but he offered nothing suggesting that or why there would necessarily be such evidence. With this non-scientific foundation, Chancellor became "suspicious" whether Parvin had tripped. TT. 133.

Like Knight before him, Chancellor did not see any "fliers" which would have existed had the muzzle of the shotgun been an appreciable distance from Mrs. Parvin's body. TT. 127, 128,131.

Kenneth Bailey

Mississippi Highway Patrol Investigator Kenneth Bailey, the same officer who had taken Parvin's statements, TT. 141, testified that he made various measurements at the Parvin home, including measuring the height of the computer desk where Mrs. Parvin was sitting, the width of the door entrance, the width of the hallways and the measurements of the floor plan of the home. TT. 148. Bailey also obtained Parvin's driver's license, which listed his height at six feet. TT. 146-47.

Starks Hathcock

Starks Hathcock, a forensic scientist specializing in firearms and ballistics, was called by

the prosecution. Hathcock was employed by the Mississippi Crime Lab, TT. 165, has a B.S. degree in criminal justice and a certificate from the Association of Firearm and Toolmark Examiners. TT. 166. The Circuit Court found Hathcock qualified as an expert in the "field of forensic science, particularly in firearm and toolmark determination and also qualified in the subfield of distance determination, . . ." TT. 252. Hathcock then testified that his test-firing showed that "fliers were produced at four feet" in various tests he ran with the firearm, TT. 256, but he could not make a determination of the actual shot distance in this case. TT. 255. "Not a conclusive distance, no." TT. 255, line 29. On cross, Hathcock admitted again that he "couldn't determine . . ." a "conclusive distance" from the muzzle of the gun to the entry point. TT. 262, lines 14-17. He was of the opinion that this was not a contact shooting since there was not a heavy, sooty deposit around the entry wound. TT. 258.

Dr. Steven T. Hayne

Dr. Steven T. Hayne has been a forensic pathologist for over thirty-five years, TT. 194, and was accepted by the court as an expert in forensic pathology. TT. 197. Dr. Hayne was not, however, tendered or accepted as an expert in firearms, ballistics or distance determination.

On October 16, 2007, Dr. Hayne performed the autopsy on Joyce B. Parvin at the Mississippi State Crime Lab. *Id.* Dr. Hayne testified that the trajectory of the pellets as they entered the Mrs. Parvin's body was twenty-five to thirty degrees downward. TT. 200. Disagreeing with on-the-scene investigator, Curtis Knight, TT. 101-02, Dr. Hayne said this was not a contact wound, because there was no powder residue in the wound itself. TT. 200. In further contrast, Dr. Hayne's original written autopsy report had said the opposite, that there was powder residue or flame injury in the wound. Neither of two autopsy associates questioned that finding in the autopsy report. TT. 205, lines 12-13. At trial --- three years, eight months later ---

Dr. Hayne testified this was a typographical error. At trial, Dr. Hayne in June of 2011 said that back in the Fall of 2007 he meant to say that there was "no" powder residue or flame injury. TT. 204-06. Dr. Hayne did not re-examine the body to determine which was right.

Dr. Hayne identified "tattooing" or "unburnt fragments of powder" found on Mrs. Parvin's face and left armpit. TT. 200.

Dr. Hayne "estimate[ed]" that the distance from the entrance of the gunshot wound to the end of the muzzle on the shotgun "was closer to four feet than three feet." TT 206, 217, 234-35; see also TT. 201, 206-07, 228. The record contains scant evidence as to how Dr. Hayne came up with this opinion, no evidence of his expertise in distance determination, and, most important, no Rule 702 sufficient bases for his opinion.[6]

Dr. Hayne added that there were pellet strikes that were "clearly demonstrable right on the verge of separating from the primary wound tract."[7] TT. 206. No expertise in ballistics was offered as a foundation for this opinion, nor did Dr. Hayne provide Rule 702 sufficient bases for his opinion. Dr. Hayne never explained how he could or did determine that pellets that struck the body without having separated were "on the verge of separating." Dr. Hayne never explained how the non-separated pellet strikes might have differed from or been the same as pellet strikes at three feet or two feet or one foot. Dr. Hayne appears to have relied on the finding of distance determination expert Starks Hathcock that "fliers were produced at four feet." TT. 255-56. Dr. Hayne never explained how that finding was reliable, but not Hathock's finding

[6] In fairness, the Defendant Parvin has far greater professional education and experience in these related fields, TT. 408-10, than has Dr. Steven Hayne. The trial judge refused to allow Dr. Parvin to testify about these matters which were well within his professional education and experience. TT. 411-12, 414, 415. Yet, Dr. Hayne had the run of the courtroom.

[7] It is first week of class, Physics 101, that the pellets were interacting and beginning to separate, at least to some extent, from the moment the shotgun was fired.

that **this was not enough** for him (Hathcock) to find a "conclusive distance" from the muzzle of the gun to the entry point. TT. 262.

Grant D. Graham

The State's case that the fatal shotgun wound was intentional, and not accidental, rested fundamentally on the opinion testimony of Grant D. Graham. Using a combination of selected (but not all) facts and measurements obtained from others (selected law enforcement officers and Dr. Hayne), Mr. Graham utilized two software programs and concluded that the shotgun was fired from Parvin's shoulder. TT. 343-345.

Graham described his qualifications as follows: he worked as a military policeman for twenty-one years, TT. 312, worked in the Air Force as a death investigator and was the manager of the Forensic Anthropology and Trace Material Analysis Laboratories while in the military. *Id.* After leaving the Air Force, he was a senior crime analyst for the Mississippi Crime Lab and transferred to the Mississippi Bureau of Investigations where he was involved in investigating crime scenes. TT. 312-13. He is now retired and living in Arizona. TT. 313.

Graham testified that "crime scene reconstruction is an integral part of blood stain pattern analysis," TT. 314. He has "taken a course in shooting incident reconstruction," which has as its goal to "try to reconstruct events that happened in a shooting incident." *Id.* The court accepted Graham as an "expert in the field of crime scene reconstruction, shooting incident reconstruction, and crime scene analysis." TT. 318. Graham testified that the factual predicates for his opinions consisted of Dr. Hayne's autopsy report, State Ex. 16 (particularly page 6), TT. 320, Parvin's height as stated on his driver's license, State Ex. 11, TT. 320, the various measurements Chancellor took at the Parvin home, TT. 320-21, and his measurements of the shotgun. TT. 322.

Graham never explained how he could convert Dr. Hayne's "closer to four feet than three

feet," estimate, TT 206, 217, 234-35, into a precise four feet. More fundamentally, Graham did not use any of the data from Crime Scene Analyst Hathcock, TT. 339, nor did he explain why not. Hathcock, the only qualified distance determination expert before the court, had testified that, based on the shooting tests he conducted, the distance from the shooter to the entry wound could not be determined. TT. 262. Graham also ignored the testimony of Deputy Sheriff Curtis Knight and MBI's Arthur Chancellor, neither of whom saw any "fliers" which would have existed had the muzzle of the shotgun been an appreciable distance from Mrs. Parvin's body. TT. 101-102, 131-34.

Graham never explained how he could convert Dr. Hayne's "angle[] of trajectory . . . right to left, superior to inferior at approximately 25 – 30 degrees," estimate, State Ex. 16, page 6, into a precise 25 degrees. He never explained how he knew "victim/Parvin was leaning to the right approximately 7 degrees while seated in a chair." Why not five degrees to the right, or 15 degrees?

Using the selected testimony just outlined and two software programs, Graham testified he posed a "hypothesis or an idea as to how maybe the incident happened." TT. 323. Exactly what Graham did is impossible to determine from the record. At the end of it all, Graham offered only a "best explanation" TT 343 or "best approximation" of what happened. TT 359. Neither the Court nor the jury were ever told whether "best" implied a 60% probability of producing reliable results, or a 30% probability, or some other level of probability.

The following excerpts from Graham's expert opinion testimony place his opinions in the best light they may be given:

> After we classify and organize the data, we test the hypothesis. In this case I tested the possible scenarios using a three-dimensional computer program call Poser 7, in which I was able to reconstruct, three dimensionally and digitally, the crime scale to scale. And then being able to use that to scale reconstruction, I was

able to test the various hypothesis, and then from there we derive a conclusion.

TT. 323-24.

The first step is to take the measurements of the room itself. The room, the desk and the chair, and to make those measurements and input those measurements into a software program that will give me a two-dimensional, or a floor plan view to scale sketch of the crime scene...

TT. 325.

Q. And what computer program did you use for that?

A. It's a program called 3D Eyewitness. It's a program that the Mississippi Bureau of Investigation Crime Scene Unit uses to complete all of their crime scene diagrams.

TT. 326.

Q. Thank you. Now once you achieve the floor plan to scale, what next did you do to incorporate the data that you received into the reconstruction?

A. Well, using the same scale on the same exact diagram, the computer program itself, you can click your mouse, give a point to start, and as you drag the mouse, the computer itself gives you the distance that the mouse has traveling. ... you can do everything to scale...
So I created the diagram to scale to scale of the floor plan itself, then I have to be able at the same scale incorporate the data measurements of the height of the shooter, the height of the victim, how high the desk is off the floor, the height of the seat of the chair, the length of the shotgun, **the length of the shooting distance**, the position of the shot on the victim. All those things are created at the same scale that the floor plan is on. So everything now is at the same scale of the same diagram, and I create those distances by basically creating a bar. If someone is six feet tall, then I create a bar that is on the scale on the diagram that is six feet long.

TT. 326-27. [Emphasis supplied]

A. ... So once I have all of those various different data measurements that I need to scale on the diagram, I take that diagram and I import it into the Poser 7 program.

Q. And briefly, not to interrupt, but Poser 7 is a software for the... 3D–

A. Yes.

Q. –images?

A. Yes. That is the three-dimensional program. That is the program that creates the 3D reconstructed crime scene.

Q. And you have covered this previously, but is that program itself generally accepted within the field of shooting incident reconstruction and crime scene reconstruction?

A. Yes, it is. For creating three-dimensional models.

Q. Which are to scale?

A. Yes, to scale.

TT. 327. Mr. Graham never explained the Rule 702 sufficient bases of any such "general[] accept[ance]." Graham mentioned studies that may have been done. He never explains, however, any details, particularly under what scientific controls these studies were done. He offered nothing that confirms the reliability *vel non* of the Poser 7 software program, much less did he give the margin of error. He never explained his qualifications to operate the program so as to produce reliable results.

Graham told the jury that the "best explanation of events," TT. 343, or "best approximation" of what happened, TT 359, is that the shooter was in an "approximate standing position with the shotgun held in a general butt to shoulder configuration..." TT. 345. Again, no level of probability or reliability is given. In a pre-trial hearing, Graham insisted "there is no rate of error regarding the reconstruction itself and the computer program." TT. 57, line 9-10. The State never satisfied its "burden of going forward," TT. 2, line 14, by showing that the computer programs Graham used produce reliable results. Not a word about margin of error, not in "the reconstruction itself," or in the Poser 7 and 3D Eyewitness software programs. Nothing satisfying subsections (1), (2) or (3) of Rule 702. Notwithstanding, Graham further testified:

Q. Mr. Graham, finally, did you have the opportunity to receive the

defendant's statement in this case?

A. Yes, I did.

Q. Is his version of what happened consistent with the data that you received and reviewed and used for your reconstruction?

A. No, it is not.

TT. 345.

Motion to Strike

Following this testimony, defense counsel updated and renewed his prior motions, and moved to strike the testimony Mr. Graham had just given:

> Comes now the defendant and moves the Court to strike the comments of the witness, declare a mistrial due to the fact that the witness has given his opinion, that without going into the substance of his opinion being based on the statement of the defendant, that it is – his statement is not consistent with the evidence that he has presented as a possible scenario. At all times his testimony has been a possible scenario, and I move to strike all that evidence and declare a mistrial.

TT. 346.

The court denied the motion. TT. 347.

Jury Instructions

The jury was instructed only on murder. TT. 480-489. No instruction was requested or given on manslaughter by culpable negligence. The jury retired on June 17, 2011, at 11:38 a.m., and on June 17, 2011 at 3:04 p.m., returned a verdict of guilty. TT. 519-520.

Defendant moved for a new trial, R. 170, which was denied. R. 262. This appeal was timely filed. R. 284.

SUMMARY OF THE ARGUMENT

David W. Parvin is the sole eyewitness to the tragic accident in which he fatally shot his wife. He describes what happened reasonably, without substantial contradictions "in material

particulars by a credible witness or witnesses for the state." *Weathersby v. State*, 165 Miss. 207, 209, 147 So. 481, 481 (1933). The State counters with supposed "expert" speculations by two witnesses --- event reconstructionist Graham, whose "best explanation of events" is a "possible scenario of happening or occurring." Graham builds upon data known only to himself*, viz*., the critical "victim sitting . . . with a seven degree angle leaning over to the right." He then turns to and relies on distance speculations by forensic pathologist, Dr. Steven T. Hayne --- ostensibly to show "physical facts" to contradict Parvin's statement of the facts.

Mr. Graham has taken **selected** items of testimony and measurements and ignored other equally probative testimony. The expert then took Dr. Hayne's Rule 702 deficient approximate distance determinations and angles of fire and converted those to absolutes. Next, he then added that the victim was seated in a chair leaning to the right approximately 7 [degrees], a fact we are supposed to accept though heaven only knows where it came from. It's certainly not in the record. This hodgepodge of credible, not so credible, and ephemeral evidence is what Mr. Graham used. But what he did not use is equally as important, as Graham ignored at least four pieces of credible evidence that contradicted the result he wanted to reach. Graham then fed this carefully selected and largely unvalidated evidence into a computer, used never validated computer software, never explained his competence to do so, and then concluded, by some unexplained calculation, that the weapon was fired from Parvin's shoulder.

Not so long ago an FBI Visual Information Specialist Examiner warned the courts of this state that

> because of current technologies in computer animation, it was possible to create an animation **showing literally anything as "real,"** where it was not based on any facts. Any computer animation which was not based on actual, physical measurements from the crime scene was mere speculation.

Cox v. State, 849 So.2d 1257, 1273-74 (¶57) (Miss. 2003). [Emphasis supplied] A computer generated graphic depiction is just as speculative and dangerous where, as here, several key measurements are not credibly available, this, before we ever get to the other deficiencies in Mr. Graham's tour de force.

In critical particulars, the speculations of Dr. Hayne and Mr. Graham fall far short of the (1), (2), (3) step mark set by Miss. R. Ev. 702, commonly known as the *Daubert* rule. Once those impermissible speculations are removed, David Parvin becomes entitled to acquittal under *Weathersby* and progeny like *Johnson v. State*, 987 So.2d 420, 424-27 (¶¶10-15) (Miss. 2008) and *Dew v. State*, 309 So.2d 857, 859 (Miss. 1975), or, at the very least, to a new trial.

ARGUMENT

I. Scope of Review

The standards that apply on review of the issues tendered are particularly important in this appeal.

A. The General Rule

First, in the present context, the Court traditionally accepts that conflicts in the credible evidence in the record are deemed resolved against the appealing party. On appeal of this jury verdict, the State is entitled to the benefit of reasonable inferences that may be drawn from the credible evidence. The operative concepts here are "credible evidence" and "reasonable inferences." Not all testimony in the trial record is credited, only that which satisfies a minimum threshold of credibility. Not everything a jury says goes.

B. The State's Beyond a Reasonable Doubt Evidentiary Obligation Enhances the State's Burden of Persuasion on Appeal

Second, the substantive evidentiary standard of proof at trial informs this Court's level of

scrutiny on this appeal. At trial, the State had to prove Parvin guilty of murder "beyond a reasonable doubt." As this was so, it is settled as a matter of law that Parvin's burden of persuasion on this appeal is considerably less than the burden shouldered by a losing party in the ordinary civil case. This is so because only a "preponderance of the evidence" was required for the jury to find for the plaintiff. Law and logic impose on the State today a burden of persuasion substantially greater than that shouldered in the ordinary civil appeal by a prevailing party at trial. The importance of the distinction here being drawn will be made clear below.

The lesser burden of persuasion that Parvin bears on this appeal is a function of legal principles accepted and applied by this Court in *Strantz v. Pinion*, 652 So.2d 738, 741 (Miss. 1955). The *Strantz* Court drew heavily on a U. S. Supreme Court decision widely accepted and cited in this state, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56 (1986). *Anderson* holds and *Strantz* accepts on principle that the substantive evidentiary standard the law imposes on a party is factored into and controls the quantum and credibility of proof that must be found (a) to take a case from a jury and, (b) by unavoidable implication, to avoid reversal on appeal. The greater the burden at trial, the greater the burden of persuading the Court to affirm on appeal.

Because these premises are not commonly briefed on appeal, an explanation is in order. *Anderson* arose in the context of a "clear and convincing evidence burden of proof."[8] The Court held that "the ruling on a motion for . . . . directed verdict necessarily implicates the substantive

[8] "[T]he determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. . . . [W]here the factual dispute concerns actual malice . . . , the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not."
Anderson, 477 U. S. at 255-56.

evidentiary standard of proof that would apply at the trial on the merits." 477 U.S. at 252. This Court accepted this premise in *Strantz*, 652 So.2d at 741.

The *Anderson* Court made clear that it was reasoning on principle, and that its holding was not limited to "clear and convincing evidence" civil cases. "[T]his is no different from . . . in a criminal case, where the . . . trial judge asks whether a reasonable jury could find guilt beyond a reasonable doubt." *Id*. at 252. *A fortiori*, these premises apply on appeal. This is nothing new in Mississippi law. *See, e.g., Glidden v. State*, 74 So.3d 342, 349 (¶22) (Miss. 2011) (citing and quoting cases); *Blanks v. State*, 542 So.2d 222, 226 (Miss. 1989) (citing and quoting cases). *Anderson* and *Strantz* make clear that the State's argument for affirmance "necessarily implicates" the same substantive evidentiary burden, the familiar "beyond a reasonable doubt" standard.[9] As in *Anderson*, 477 U. S. at 252, and *Strantz* , 652 So.2d at 741, David Parvin's burden of persuasion on appeal is orders of magnitude lesser than if he were appealing an adverse civil verdict. Conversely, the State's burden of persuasion is enhanced at all stages, including appeal.

With respect, this Court may affirm only if it finds the credible evidence in the record such that a reasonable jury could have found beyond a reasonable doubt that Parvin was guilty of murder. There are many reasons why the evidence in the present record does not meet this minimum threshold for affirmance. This is implicit in the evidentiary summary in the Statement of Facts above, and is explained more fully below.

C. The Power and At Times the Duty to Direct a Verdict or Grant a New Trial is Imbedded in the Tissue of the *Daubert* Rule

[9] The Circuit Court accepted and correctly instructed the jury regarding the "beyond a reasonable doubt" substantive evidentiary standard that the prosecution was required to satisfy before Parvin could be found guilty. R. 148-149.

Third, that evidence may have been admitted at trial **does not** mean --- without more --- that it is sufficient to sustain a verdict. This view follows from a principled reading of Miss. R. Ev. 702, clarifying what is colloquially called the *Daubert* rule. Just because an adverse party's expert's opinion is admitted at the trial of a civil case does not mean --- without more --- that a jury finding for that party is unassailable on appeal. On principle, *Anderson* and *Strantz* mandate an even stricter scrutiny of Rule 702 permissible opinion testimony on this homicide appeal, than in the ordinary civil case.

We will explain below that at least two of the prosecution proffered expert opinions, and their predicates, do not pass muster under Rule 702's clarification of *Daubert* and this Court's decisions in *Mississippi Transportation Comm'n v. McLemore*, 863 So.2d 31 (Miss. 2003); *Edmonds v. State*, 955 So.2d 787 (Miss. 2007), and their progeny. Within the very tissue of Rule 702/*Daubert*/*McLemore*/*Edmonds*, there is embedded the judicial duty to use the weapons of a directed verdict and/or a new trial to ameliorate the prejudicial effects of technically admitted but ultimately unreliable expert opinion testimony.

Put another way, the mere fact that an expert's testimony is admitted does not --- without more --- make the evidence strong enough to survive a motion for a directed verdict. *Gillett v. State*, 56 So.3d 469, 495 (¶65) (Miss. 2010), citing and quoting *Daubert, e.g.,* "the court remains free to direct a judgment," 509 U.S. at 596. "[S]cientific evidence that provided foundation for expert testimony, viewed in the light most favorable to plaintiffs [here, the State]," is not necessarily sufficient to avoid a directed verdict, or reversal on appeal. *Daubert*, 509 U.S. at 596, citing with approval *Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349 (6th Cir. 1992), and *Brock v. Merrell Dow Pharms., Inc.*, 874 F.2d 307 (5th Cir. 1989).

D. All Issues Tendered are Properly Before the Court

The State will no doubt argue that defense counsel failed to make a timely and appropriate objection to this expert testimony. There are several answers, foremost, those set out in Points B and C above. Moreover, defense counsel made timely and sufficient objections regarding the points presented on this appeal. That he may not have done so repetitiously is of no consequence. Once the Court has ruled, a party and his counsel must respect that ruling. They waive nothing by failing to object again and again. *See, e.g., Vines v. Windham*, 606 So.2d 128, 130 (Miss. 1992); *Lenard v. State*, 552 So.2d 93, 97 (Miss. 1989).

Where objection was untimely and nonspecific, and what is at issue is the right to a fundamental fair trial, this Court has authority to notice "plain errors." This is particularly so in criminal cases. L. Munford, Mississippi Appellate Practice § 3.7, fn. 86 at page 3-28 (2010) (citing cases). Plain error should be held when an expert testifies to a baseless conclusion which results in a murder conviction and life in prison.

II. There is No Substantial Evidence Refuting Parvin's Testimony that He Accidentally Shot His Wife. Accordingly, the Court Should Enter a Judgment of Not Guilty

A. This Court Should Reverse and Direct a Verdict of Acquittal

The familiar *Weathersby* Rule informs the Court's task on David Parvin's appeal. Almost eighty years ago, the Court declared that

> **[**W]here the defendant or the defendant's witnesses are the only eyewitnesses to the homicide, their version, if reasonable, must be accepted as true, unless substantially contradicted in material particulars by a credible witness or witnesses for the state, or by the physical facts or by the facts of common knowledge.

Weathersby v. State, 165 Miss. 207, 209, 147 So. 481, 481 (1933).

Weathersby is often misunderstood and more often miscited. Properly understood, it is not a rule to be given as a jury instruction as so much as it is "a guide for the circuit judge in

determining whether a defendant is entitled to a directed verdict." *Turner v. State*, 796 So.2d 998, 1002 (¶14) (Miss. 2001) (citing and quoting cases). *See, e.g., Heidel v. State*, 587 So.2d 835, 839 (Miss. 1991). So understood, the *Weathersby* Rule is alive and well in this state, and sufficient to require discharge of the defendant in cases like today's. *See, e.g., Johnson v. State*, 987 So.2d 420, 424-27 (¶¶10-15) (Miss. 2008); *Dew v. State*, 309 So.2d 857, 859 (Miss. 1975).

Parvin's version of the facts is "reasonable" and it "is not substantially contradicted in material particulars." *Johnson*, 987 So.2d at 426 (¶13).

The fact is that there is no substantial credible evidence that Parvin is a murderer and no substantial credible evidence to support the State's claim that he *intentionally* shot his wife while holding the shotgun at his shoulder. This is particularly so, given the scope of review premises articulated above.

The State's only evidence to contradict Parvin's version of events comes from witness Grant Graham, a purported expert in reconstruction of the shooting. Graham stated, in painful, difficult to understand **and fatally incomplete** detail, that he combined various measurements with software computer programs, and reached the conclusion that the shotgun was fired from shoulder height.

There is not one word in the record explaining how these computer *programs* operate, that Graham was competent to operate them, what formulas are utilized to reach the result, any scientific testing demonstrating these formulas are valid or any explanation whatsoever as to how the conclusion was reached that the shotgun was shot from the shoulder. Independently adequate to undermine Mr. Graham's analysis are the fatal flaws in his reliance materials. The critical distance determination between gun muzzle and victim, and as well, the hypothesized angle of fire, cannot withstand fair minded scrutiny. And these are before the Court assesses the fact that

Mr. Graham selectively relied on all evidence he thought supported his fancy but fictional modeling, and ignored the testimony from at least four sources that contradict or otherwise undermine the credibility of Graham's purported reliance materials. There is not a credible word of scientific evidence to discredit Parvin's testimony that what happened on the morning of October 15, 2007 was a tragic accident.

Fundamentally, Mr. Graham construed Dr. Steven Hayne's speculation that the distance was approximately four feet, converted it to an absolute four feet, but never explained why he rejected distance determination expert Starks Hathock's opinion that he could **not** find a "conclusive distance from the muzzle of the gun to the entry point." TT. 262. Mr. Graham never produced a model assuming a one, two or three foot estimated distance from shotgun muzzle to Mrs. Parvin's body, though the evidence provided by Monroe County Sheriff's Chief Investigator Curtis Knight, TT. 101-02, and MBI's Arthur Chancellor, TT. 131-34, credibly supported such hypotheses. Perhaps less globally but still important, Mr. Graham never explained how a variance in distance of several inches --- "closer to four feet than three feet," TT 206, 217, 234-35, would affect the reliability of his opinion. He never explained how the opinions he offered satisfied **any** --- much less **all** --- of the three step criteria required by Miss. R. Ev. 702(1), (2) and (3).[10]

III. The Circuit Court Erred When, Contrary to Miss. R. Ev. 702, It Refused to Exclude --- From the Jury's Consideration or Its Own Consideration --- the Graphic Depiction and Other Speculative Opinions of Grant D. Graham Regarding the Manner in Which the Fatal Accident Occurred

A. Miss. R. Ev. 702 Controlling Standards Elaborated

[10] Rule 702 requires that reliability that is prerequisite to admissibility satisfied only where "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." This an expert witness variant of the familiar three step process

Ten years before formal promulgation of the three step analysis required by *Miss*. R. Ev. 702(1), (2) and (3),[11] *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), made a sea change in the law, stating:

> [I]n order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation— *i.e.,* "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.

Daubert, 509 U.S. at 590. As further explained:

> This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

Daubert, 509 U.S. at 592-93 (footnotes omitted).

Daubert's fundamental teaching is that there must be some demonstration of *scientific* reliability **in each particular case** before an expert's opinion testimony may be received and treated as credible evidence. That revised Rule 702 has become the familiar law of this state in both criminal and civil cases does not mean it may be deemed satisfied by sweeping generalities such as those accepted by Mr. Graham in response to leading questions by the prosecution. TT. 327.

In *Edmonds v. State*, 955 So.2d 787 (Miss. 2007), the same pathologist who testified in this case (Dr. Steven T. Hayne), gave his opinion that it was probable that a weapon *had* been fired by two persons pulling the trigger. The Supreme Court reversed, in part, because the record contained no scientific basis for Dr. Hayne's opinion:

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of adjudication. *See Boardman v. USAA*, 470 So.2d 1024, 1029-30 (Miss. 1985)

[11] See Order, 841-46 So.2d (Miss. Cases), at xxxviii-xl. On December 1, 2000, Fed. R. Ev. 702 refined and clarified the law, as inadequacies and impracticabilities in the original 1993 *Daubert* formulation had become too obvious to ignore. On May 29, 2003, this Court amended Miss. R. Ev. 702 to make it identical with the post-*Daubert* version of Fed. R. Ev. 702, as it then

> While Dr. Hayne is qualified to proffer expert opinions in forensic pathology, a court should not give such an expert carte blanche to proffer any opinion he chooses. There was no showing that Dr. Hayne's testimony was based, not on opinion or speculation, but rather on scientific methods and procedures. *See, e.g., Moss v. Batesville Casket Co.,* 935 So.2d 393, 404 (Miss. 2006). The State made no proffer of any scientific testing performed to support Dr. Hayne's two-shooter theory. Therefore, the testimony pertaining to the two-shooter theory should not have been admitted under our standards.

Edmonds, 955 So.2d at 792 (¶8).

This case is like *Edmonds*, only more so. Here, it is not just that Graham's modeling fails fully under Rule 702. The predicate distance determination proffered by Dr. Hayne --- a forensic pathologist, not a ballistics expert --- fails fully under Rule 702. Moreover, Graham *takes* Dr. Hayne's hypothesized "approximately" 25° to 30° downward angle of fire, State Ex. 16, page 6, and makes it a precise 25°. Graham relied on a location of the entrance wound that is off by seven or eight inches. It is not unfair to quote here a colloquialism that has become familiar in our computer age: "Garbage in, garbage out."

There is no denying the legislative fact that "juries tend to place great weight on the testimony of experts and can be misled by unreliable opinions." *Sherwin-Williams Co. v. Gaines ex rel. Pollard*, 75 So.3d 41, 45 (¶13) (Miss. 2011). This is particularly likely in the context of the 3 D modeling that Graham presented, the psychological impact of which is hard to resist even by ordinarily skeptical lawyers and judges.[12] Add the high stakes in a homicide prosecution. More so than in any other case, courts "mak[e] sure that the [expert] opinions themselves are based on sufficient facts or data and are the product of reliable principles and methods." *Sherwin-Williams*, 75 So.3d at 46 (¶15).

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read.

[12] One of the errors below is the Circuit Court's refusal to grant a cautionary instruction, P-2, regarding the modeling depiction presented by Mr. Graham. R. 157; TT. 534, 536-37.

In *Edmonds*, only speculation *supported* the expert's inference that a trigger was pulled by two persons. In *Sherwin-Williams*, "only circumstantial supporting evidence" supported the expert's speculations regarding the dose and duration components of a lead poisoning causation analysis. 75 So.3d at 46 (¶14). Here, the problem begins with Dr. Hayne's speculation regarding the distance from the shotgun to the entrance wound, and Mr. Graham compounds the felony many-fold. He provides no Rule 702 sufficient showing of the reliability of his 3 D modeling software, nor does he provide Rule 702 sufficient evidence of his competence to use that software to produce reliable results. Past these, Graham never justifies his reliance on Dr. Hayne's speculation, nor reasons why he excludes other credible evidence contrary to Dr. Hayne's speculations.

B. Graham's Deficiencies Elaborated

Graham derived from his reconstruction that David Parvin was "in an approximate standing position, with the shotgun held in a general butt to shoulder configuration, . . . " Graham's Report, pp. 5-6. In any attempt to verify or disprove this result, one is immediately faced with the lack of available data in either Graham's report or his testimony. The deficiency is fatal under Miss. R. Ev. 702(1).

Graham's says he took Parvin's height and the victim's height and, within the Poser 7 program, fit scale 3-D models of human figures to those heights. TT 22, lines 5-20. Graham then placed the 3D model of the victim in a seated position in a chair of the appropriate dimensions, TT 22, lines 24-26. He next placed a representation of the muzzle to target distance, derived from Hayne's autopsy report, using the angles derived from Hayne's autopsy report, and with one end placed at the location of the gun-shot wound on the 3D model of the victim, also determined from Hayne's autopsy report. TT. 22, line 26-TT. 23, line 5. He then placed a 3D

model of the shotgun in line with the Hayne target to muzzle distance, and from this determined the location and orientation of the shotgun at the time it was fired. TT 23, lines 6-17.

The problem is that one does not have access to the relative proportions of the 3D models within the Poser 7 program. They are not in the record. Hayne's autopsy report determines that the gunshot wound was 38 cm or 14.96" below the top of the victim's head. Nothing in Graham's report indicates where the top of the victim's head was located. We are told that the victim was 5'7" tall and was seated in a chair whose seat was 1'5" above the floor. However, the actual top of the victim's head was determined by the relative proportions of the 3D model within the Poser 7 program, and the particulars of how Graham placed that 3D model on the model of the chair.

Taking Graham's statement that he used an angle of twenty-five degrees for the trajectory of fire, TT. 47, lines 24-29, TT. 48, 1-11, simple trigonometry determines that the butt of the shotgun was 39.9" higher from the floor than the gunshot wound. However, there is no way from Graham's report or testimony to determine the height of the gunshot wound.

Upon closer inspection of Graham's report, a more troubling difficulty arises. Recall that the twenty-five to thirty degree angle in Dr. Hayne's autopsy report was a measurement of the angle of the wound tract relative to the victim's body. This is not necessarily the same as the angle of trajectory of the shot relative to horizontal. Graham's report states that his "best approximation also included Victim/Parvin leaning to the right approximately 7 [degrees] while seated in the chair." Report at 5. Once again, ordinary plane geometry indicates that if the angle of the wound tract relative to the victim's body was twenty-five degrees, and the angle of the victim's body relative to vertical was seven degrees, then the actual angle of trajectory could have been only eighteen degrees. In that case, the butt of the shotgun would have been only

29.2" higher from the floor than the gunshot wound. Nothing in Graham's report indicates the source of this assumed seven degree angle.

Graham mentions this seven degree angle only once in his testimony. He never explains the source of this critical fact.

"The **best explanation** of events when you put all of the data together comes to this particular scenario, considering that also with the victim sitting in the seat with a seven degree angle leaning over to the right, it puts everything showing that this is **a possible scenario of happening or occurring** within this room." TT. 30, lines 11-16. [Emphasis supplied]

C. Mr. Graham Ignored Four Witnesses/Documents Inconsistent With His 3 D Model

First, Graham ignored evidence that Joyce Parvin suffered a contact wound or a near contact wound. Chief Deputy Curtis Knight testified this was a "contact wound," because the material on the back of Mrs. Parvin's shirt was black and there were no "fliers" visible around the wound. TT. 101. According to Knight, it was a "very close shot." TT. 102.

Second, Graham ignored the testimony of MBI's Arthur Chancellor that he did not see any "fliers" which would have existed had the muzzle of the shotgun been an appreciable distance from Mrs. Parvin's body. TT. 131-34.

Third, Dr. Steven Hayne's original written autopsy report said the same thing, that there was powder residue or flame injury in the wound. Two autopsy associates did not question Dr. Hayne's initial finding. TT. 205, lines 12-13. In another case, the same Dr. Hayne testified that "flaming, tattooing or smudging" would be found where "the shotgun was fired at her within a distance of three feet." *Turner v. State*, 796 So.2d 998, 1000 (¶7) (Miss. 2001). We will assume *arguendo* that Dr. Hayne's 180 degrees changed view at trial goes to credibility and weight, not

admissibility. This does not excuse Graham from explaining --- with Rule 702 sufficiency --- why he chose to rely on Dr. Hayne's trial testimony. The point gets its punch from several factors.

For one thing, the same Dr. Hayne not so long ago testified that a lack of any gunshot residue indicated a "distant gunshot wound from at least two feet away," *Simpson v. State*, 993 So.2d 400, 405 (¶13) (Miss. App. 2008). In *Speagle v. State*, 956 So.2d 237, 240 (¶7) (Miss. 2006), it was "over two and one-half feet," *viz*., "the lack of gunpowder residue in or around the gunshot wound, . . . , led him to the conclusion that the shot that killed Walker had to have been fired from a distance of over two and one-half feet." *Id*. Dr. Hayne's four foot estimate here has no reliability, Rule 702 variety or as a matter of simple common sense.

Then, of course, there is the fact that **all** other testimony on the point --- Knight, Chancellor, Hayne's contemporary autopsy report, the fact that his two associates never question the autopsy report --- was squarely against the view that Graham chose to accept.

Fourth, the eviscerating effect of the points just outlined is enhanced when we factor in the testimony of Starks Hathcock, the real distance determination expert in the case. The prosecution elicited from Hathcock a Rule 702 credible opinion that, based on the shooting tests he conducted, the distance from the shooter to the entry wound could not be determined! TT. 255, line 29; 262, lines 14-17. This is followed by a truly absurd colloquy between prosecuting counsel and distance determination expert Hathcock.

> Q. Now, that's [Hathcock's opinion that "a conclusive distance" could not be determined] based on the firearms training [Hathcock had].
> Is it at times possible that you could not determine one, but by the same token, a pathology expert could?

A. It's possible, yes.[13]

The pathology expert referred to, of course, was Dr. Steven Hayne, whose estimated distance opinion is far less reliable under Rule 702 than Hathcock's candid admission that, after extensive firearms training and testing, TT. 256-59, "a conclusive distance" could not be determined. TT. 255, line 29.

D. The Circuit Court's Errors Elaborated

With respect, the Circuit Court gave conclusory lip service to Rules 702 and 703. The Court ruled that Graham "had every right to rely on measurements and data gathered by . . . Dr. Hayne in the autopsy report." TT. 56, lines 7-10. No explanation is ever given why Dr. Hayne's estimated four foot distance determination has enough reliability that "any question about the validity or accuracy of that evidence . . . goes to the weight and credibility, not its admissibility." TT. 56, lines 11-15. The Court loosely recited Rule 702. TT. 56, lines 16-25. With respect, what is "obvious," TT. 56, line 22, is that Mr. Graham did **not** have sufficient facts and data regarding distance, nor were his principles and methods fully known, much less reliable, nor "that he has applied these principles and methods reliably to the evidence in this case." TT. 56, lines 22-25.

The Circuit Court credited Graham's testimony "that his reconstruction could be retested," TT. 57, lines 6-7, but missed the more fundamental question whether and with what margin of error such human produced raw data fed into the computer software programs Graham used are capable of producing reliable results at all. The Circuit Court parrots Graham that

[13] We assume Hathcock's "It's possible, yes," is a function of his good faith unawareness that distance determination is not within the competence of the ordinary "pathology expert," or that in *Dudley v. State*, 719 So.2d 180, 183 (Miss. 1998), Dr. Hayne admitted that he was "not a firearms expert."

"there is no error rate as far as the reconstruction itself and the computer program," TT. 57, lines 9-10, but again misses the big picture question. This is followed by a conclusory "general acceptance" finding that is similarly lacking in specifics. TT. 56, lines 18-22.

The record is devoid of any Rule 702(1), (2), (3) step bases whereby Graham could take measurements from the scene and utilize a particular computer software to conclude a weapon was fired from David Parvin's shoulder instead of by his tripping accidentally. The prosecution talked about these programs in generalities, but never proved their reliability in or out of court. What was elicited before the jury is Graham's opinion that, when one inserts various measurements into a computer and applies certain computer software to analyze it, one reaches the conclusion that the weapon was fired from the shoulder. Aside from the many reasons we never reach that point, the available data properly understood yields a significantly different result from that Graham presented to the jury. Given the record, Graham has produced a finding "which is violative of physical laws," among which are the laws of mathematics. *See Sherwin-Williams*, 75 So.3d at 47 (¶18), quoting *Elsworth v. Glindmeyer*, 234 So.2d 312, 321 (Miss. 1970).

In various contexts, similarly baseless conclusory expert testimony has been held insufficient to support a jury verdict, even in a civil case. *See, e.g., Sherwin-Williams*, 75 So.3d at 45-47 (no epidemiological or other empirical studies supporting expert's opinion); *Denham v. Holmes ex rel. Holmes*, 60 So.3d 773, 788 (¶53) (Miss. 2011), quoting *Watts v. Radiator Specialty Co.*, 990 So.2d 143, 149 (¶17) (Miss. 2008). This Court has repeatedly made clear that our Rule 702 enjoins a trial court that it should **not** "admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert, as self-proclaimed accuracy by an expert [is] an insufficient measure of reliability." *McKee v. Bowers Window & Door Co*., 64 So.3d 926, 933

(¶18) (Miss. 2011); *see also Dedeaux Utility Co. v. City of Gulfport*, 63 So.3d 514, 522 (¶16) (Miss. 2011); *Mississippi Transportation Comm'n v. McLemore*, 863 So.2d 31, 37 (¶13) (Miss. 2003). When asked about peer review, Mr. Graham talked of nothing but what he had done in the way of "lectures at these forensic conferences." TT. 43, line 16. He proceeds from the *ipse dixit* of expert Graham. TT. 43, lines 3-20. Neither Mr. Graham's nor Dr. Hayne's (in firearms and ballistics) self-proclaimed expertise gets him to first base.

* * * * *

A pause for context. Given the above, no reasonable jury could have found beyond a reasonable doubt that Parvin was guilty of murder. This so **before** the Court views the evidence through the lens provide in *Anderson*, 477 U. S. at 252, and *Strantz* , 652 So.2d at 741, see above, through which Parvin's burden of persuasion on appeal is orders of magnitude lesser, and the State's burden of persuasion enhanced, on this appeal. It matters not how or why the Rule 702 deficient expert opinion evidence may have been admitted. The judicial duty has shifted to this Court to use the weapons of a reverse-and-render and/or a new trial to ameliorate the prejudicial effects of technically admitted but ultimately unreliable expert opinion testimony. See *Gillett*, 56 So.3d at 495 (¶65), and *Daubert*, 509 U.S. at 596, see above.

After all, a jury is ill-equipped to recognize unreliability in testimony by an apparently experienced crime scene investigator as Mr. Graham appeared to be. Given the prosecution's failure to offer anything that might enable a competent, objective third person to assess the reliability of Mr. Graham's opinion, what the jury had before it was very close to Graham taking "carte blanche to proffer any opinion he cho[se]." *Gulf South Pipeline Co., LP v. Pitre*, 35 So.3d at 494, 499 (¶8) (Miss. 2010).

Edmonds, 955 So.2d at 791, also held that the trial court properly excluded testimony of

an expert witness on false confessions because the witness' testimony did not meet Rule 702's requirements. In this connection, *Edmonds* held:

> Rule 702 of the Mississippi Rules of Evidence is the standard for the admission of expert testimony in Mississippi. When determining admissibility of expert testimony, courts must consider whether the expert opinion is based on scientific knowledge (reliability) and whether the expert opinion will assist the trier of fact to understand or determine a fact in issue (relevance). *Miss. Transp. Comm'n v. McLemore,* 863 So.2d 31, 38 (Miss. 2003).

Edmonds, 955 So.2d at 791 (¶5). Within the three step pattern of analysis mandated by Rule 702, the Court made clear that it considers relevant

> factors mentioned in *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 587, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993): (1) whether the theory can be, and has been, tested; (2) whether the theory has been published or subjected to peer review; (3) any known rate of error; and (4) the general acceptance that the theory has garnered in the relevant expert community. *Id.,* at 593–94, 113 S.Ct. 2786. We find that the circuit court did not err in excluding the testimony of Allison D. Redlich, Ph.D., concerning involuntariness of confessions because, during the extensive *Daubert* hearing held by the circuit court, Dr. Redlich herself admitted that her theories could not be empirically tested.

Edmonds, 955 So.2d at 791 (¶¶5-6). Mr. Graham may not have admitted that his analyses could not be tested, but he certainly failed to explain to the court below or anyone else how this might be done.

Importantly, this is not a case where the expert witness has taken evidence which appeared in the record and utilized computer software to reenact a crime. There is much debate in the legal literature about whether such computer reenactment-type evidence is admissible. See, for example, David B. Hennes, Manufacturing *Evidence for Trial: the Prejudicial Implications of Videotaped Crime Scene Reenactments*, 142 U. Pa. L. Rev. 2125 (June 1994); and see Paul C. Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: the Need for Independent Crime Laboratories*, 4 Va. J. Soc. Pol'y & L. 439 (Winter, 1997).

An FBI Visual Information Specialist Examiner [has] testified that,

> because of current technologies in computer animation, **it was possible to create an animation showing literally anything as "real,"** when it was not based on any facts. Any computer animation which was not based on actual, physical measurements from the crime scene was mere speculation.

Cox v. State, 849 So.2d 1257, 1273-74 (¶57) (Miss. 2003). [Emphasis supplied] A computer generated graphic depiction is just as speculative and dangerous where, as here, several key measurements are not credibly available.

This is a case where the expert has taken **selected** items of testimony and measurements and ignored other equally probative testimony. The expert then took approximate distance determinations and angles of fire and converted those to absolutes. He then added an angle at which the victim was leaning which has no foundation in the record. This hodgepodge of credible, not so credible, and ephemeral evidence, Mr. Graham then fed into a computer, used never validated computer software, never explained his competence to do so, and then concluded, by some unexplained calculation, that the weapon was fired from Parvin's shoulder. The jury was told nothing of the margin for error in such a process. If ever there were a case of baseless, prejudicial evidence, this is it.

That Mr. Graham may have gotten away with using this computer software in prior cases is of no import. Each time he is called to testify, and each time he offer's an opinion with Rule 702, he must jump through the one, two three step hoops the rule imposes. *Gause v. State*, 65 So.3d 295, 306-07 (¶¶ 35-36) (Miss. 2011) (Kitchens, J., concurring).

Grant Graham relied on facts and data supplied by others. At the ten thousand foot level, Graham was proceeding under Miss. R. Ev. 703. At ground level, Graham chose to rely on evidence that supported the view he wished to present to the jury --- that David Parvin murdered his wife --- and ignored much credible evidence to the contrary.

Crucially, Graham never explains the basis for his patently indefensible selectivity.

III. The Circuit Court Erred When, Contrary to Miss. R. Ev. 702, It Refused to Exclude --- From the Jury's Consideration or Its Own Consideration --- the Speculative Opinion of Dr. Steven T. Hayne Regarding the Distance From the End of the Gun Barrel to the Entrance Wound

To begin with, nothing in the present record shows that Dr. Hayne has a Rule 702 sufficient level expertise in matters of ballistics and distance determination. That he may at times have opined regarding firearms in the past does not change the law that his qualifications, if any, must be given anew in each case. *Gause,* 65 So.3d at 306-07 (¶¶ 35-36). In *Dudley v. State*, 719 So.2d 180 (Miss. 1998), Dr. Hayne was allowed to give a much more elementary opinion that a projectile "was consistent with a .22 caliber projectile." *Dudley*, 719 So.2d at 183 (¶14). In affirming, the Court added this important caveat:

"The State should be cautioned that it cannot in the future rely solely on the testimony of forensic experts to establish ballistic matters. But for the eyewitness testimony in this case as to the gunman's identity, the State's case would be sorely lacking." *Dudley*, 719 So.2d at 183 (¶14). In the case at bar, where the issue was and remains "accident vs. homicide," there is no independent eye witness testimony.

We are well over a decade since the *Dudley* admonition, and the official appellate reports are replete with cases where Dr. Hayne gave opinion testimony in the fields of ballistics and distance determination, with no *record* that he came close to providing a Rule 702 sufficient predicate therefor. *See, e.g., Ferrell v. State*, 733 So.2d 788, 790 (¶7) (Miss. 1999) ("shot from a distance of at least twelve inches away," with no Rule 702 predicate for that opinion); *Turner,* 796 So.2d at 1000 (¶7) ("the shotgun was fired at a distance of approximately four feet away," with no Rule 702 predicate for that opinion); *Rogers v. State*, 796 So.2d 1022, 1030 (¶29) (Miss.

2001) ("the weapon was fired at a distance of greater than approximately two feet from the end of the muzzle to the entrance of the gunshot wound," with no Rule 702 predicate for that opinion); *Hodges v. State*, 912 So.2d 730, 745 (¶10) (Miss. 2005) (Dr. Hayne testified that the distance was 1½ to 2 feet, with no Rule 702 predicate for that opinion); *Herron v. State*, 941 So.2d 834, 836 (¶10) (Miss. App. 2006) ("the muzzle of the murder weapon was at least two feet away from the victim's head and hands," with no Rule 702 predicate for that opinion); *Simpson v. State*, 993 So.2d 400, 405 (¶13) (Miss. App. 2008) ("gunshot wound from at least two feet away, indicative of a homicide," with no Rule 702 predicate for that opinion, particularly the gratuitous legal opinion at the end).

With respect, the Court needs to re-send the *Dudley* message. The cases just noted are but the tip of the iceberg that is Dr. Hayne's quantum of in court opinions on matters of firearms and distance determination, with no Rule 702 sufficient predicates therefor. It is within the Court's judicial knowledge that expertise in firearms, ballistics and distance determination are not within the normal expertise of a forensic pathologist, however experienced. Dr. Hayne said as much in *Dudley*, 719 So.2d at 183 (admitting that he was "not a firearms expert"). No one seriously questions that Dr. Hayne is a Rule 702 sufficient expert in forensic pathology who in many cases has given expert testimony that it quite unexceptionable.

The present point is, no one seriously questions that Dr. Hayne has a penchant for going outside the legitimate realm of forensic pathology and providing opinions with nothing resembling a Rule 702 sufficient predicate. His major roles in sending innocent men to life imprisonment,[14] and in one known instance sent to death row,[15] are well documented. This gives

[14] *See Brooks v. State*, 748 So.2d 736 (Miss. 1999), declared exonerated by Circuit Court of Noxubee County and released May 13, 2008; *Edmonds v. State*, 955 So.2d 787, 791-93 ¶¶ 5-11 (Miss. 2007).

a central urgency to this Court's recent admonition that, notwithstanding the good and the bad of Dr. Hayne's past, his qualifications and Rule 702 steps (1), (2) and (3) predicates must not only be given anew in each case, but these must be tailored to the facts of each new case. *Gause*, 65 So.3d at 306-07 (¶¶ 35-36). All of this is particularly so in cases like this where Dr. Hayne wanders outside forensic pathology and off into firearms, ballistics and distance determination. Today's is the case to take this Court's experience in *Dudley* and *Edmonds* and *Gause*, and so many others, and, with respect, say "we really mean it." After all, this is a case where eye witness testimony to the central facts of the case for the prosecution is "sorely lacking," *Dudley*, 719 So.2d at 183 (¶14), and where the light of day shows gross and fatal deficiencies in the work of would be event reconstructionist Grant Graham.

There is a further complication regarding the angle of fire issue. This is an issue within the core of the field of mathematics. It lies in the subfield of geometry. With respect, the trial judge never understood this, *viz*., "the issues in this case don't involve mathematics," TT. 411, lines 20-21, and "If this were a case involving mathematics and economics, I would certainly allow him to express his expert opinion." TT. 415, lines 15-17.

IV. The Circuit Court Erred When It Failed and Refused to Grant a Cautionary Instruction to the Jury Regarding Dr. Steven Hayne's Last Minute Revision of His Autopsy Report in an Important Particular so that It Would be More Consistent with His Distance Determination Speculation

The Circuit Court erred in refusing the Defendant Parvin's request that the jury be instructed regarding the law of recently fabricated evidence, as applied to Dr. Hayne's substantive change in his trial testimony given June 15, 2011.

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[15] *See Brewer v. State*, 725 So.2d 106 (Miss. 1998) and 819 So.2d 1169 (Miss. 2002), declared exonerated by Circuit Court of Noxubee County and released February 15, 2008.

On December 13, 2007, Dr. Hayne prepared a report of his autopsy examination conducted on October 16, 2007. In the section GUNSHOT WOUND, the first sentence of the third paragraph prominently begins "Powder residue and flame injury is identified in the wound tract . . . ." State Ex. 16, at page 6. On June 9, 2011, Dr. Hayne addressed a letter to Assistant District Attorney Gault, advising that the word "no" should be added, so that the sentence "should read '**no** power residue or flame injuries'." State Ex. 17. Dr. Hayne made this eleventh hour "correction," though two autopsy assistants had not questioned the original report. TT. 205, lines 12-13.

We are not talking about the normal typographical error that we all make from time to time. The missing word "no" is not in the middle of a paragraph or sentence where it may easily be overlooked by a careful proofreader. Look at the first sentence of a free standing paragraph, which begins: "Powder residue and flame injury is identified . . . ." State Ex. 16, at page 6. The absence of "No" should have been apparent to even a less than careful proofreader, if, of course, there were in fact no "power residue or flame injury." Dr. Hayne's last minute correction is suspicious on its face, because of his failure to capitalize the N in "No." Dr. Hayne's wording, State Ex. 17, is "the wording should read "no powder residue or flame injuries," masking the fact that the newly added word becomes the first word in the first sentence of a free standing paragraph.

At trial, Dr. Hayne tried to pass this off as an inadvertent typographical error. Dr. Hayne testified that he meant to say that there was "no" powder residue or flame injury. TT. 204-06. He referred to other parts of his autopsy report to justify his "correction." Dr. Hayne did not re-examine the body to determine which part of his original autopsy report was right and which was wrong.

Adding the word "no" changes the meaning of the sentence altogether. More important, it suddenly puts Dr. Hayne's finding at odds with two other prosecution witnesses. Until the eve of trial, the Defendant had every reason to believe that Dr. Hayne's finding on this score was consistent with the testimony of Deputy Sheriff Curtis Knight and MBI's Arthur Chancellor, neither of whom saw any "fliers" which would have existed had the muzzle of the shotgun been an appreciable distance from Mrs. Parvin's body. TT. 101-102, 131-34.

The Circuit Court's error is a function of it finding an important fact issue that the jury should have been allowed to consider under proper instructions. The Court found that Dr. Hayne was doing "no more than curing an error." TT. 531. After a colloquy, the Court concluded "There is no . . . reason to think that's any sort of fabrication." TT. 532, lines 16-17. The Court erred by so deciding this fact issue instead of submitting it to the jury on proper instructions.

The Defendant timely brought this matter to the attention of the trial judge, and requested that the jury be instructed properly. Given the conflicting evidence before the jury, and the conflicting inferences that might reasonably be drawn therefrom, the trial judge was obliged to grant the instruction. *Weathersby v. Gore*, 556 F.2d 1247 (5th Cir. 1977), *viz.*,

> Though Gore's request that the instruction be submitted was oral and never reduced to writing . . . , such deficiency does not bar review of a requested instruction since the Court was clearly advised of the point involved.

Weathersby, 556 F.2d at 1255-56. This view is consistent with state law under which the trial court has

> the duty to make reasonable modifications of the requested instruction or, at the very least, to point out to [the defendant] wherein it may have been deficient and allow reasonable opportunity for correction.

Miller v. State, 733 So.2d 846, 849 (¶9) (Miss. App. 1999), citing and quoting *Anderson v. State*, 571 So.2d 961, 964 (Miss. 1990).

V. The Court Erred in Refusing to Instruct the Jury to View With Caution Mr. Graham's Graphic Depiction

We have noted above the psychological impact of the 3 D modeling that Graham presented, and the very real potential for prejudice therefrom. The Defendant requested and the Circuit Court refused to grant a cautionary instruction regarding Mr. Graham's modeling depiction. R. 157; TT. 534, 536-37.

Defendant requested Instruction P-2 which read:

> The animation presented to the jury represents only a recreation of the proponent's version of the event; it should in no way be viewed as the absolute truth; and, like all evidence, it may be accepted or rejected in whole or in part.

R. 157. The Circuit Court refused Instruction P-2, not on its merits, but ostensibly because "[p]art of the proposed instruction is covered in the expert witness instruction. . . . [T]he point made in P-2 is covered elsewhere, so therefore it will be refused." TT. 536, line 21, thru 537, line 4. A quick look at the expert witness instruction, C-2, R. 147, makes clear that the Circuit Court is simply wrong.

Case after case in other jurisdictions holds proper the kind of cautionary instruction requested by Defendant Parvin. *See, e.g., Dunkle v. State*, 139 P.3d 228, 247 (¶54) (Okla. Crim. App. 2006) (similar cautionary instruction should be given); *Commonwealth v. Serge*, 896 A.2d 1170, 1186-87 (Pa. 2006) (same); *Webb v. CSX Transportation, Inc.*, 615 S.E.2d 440, 448 (S. C. 2005) (same); *State v. Sayles*, 662 N.W.2d 1, 7-8, 11 (Iowa 2003) (same); *State v. Stewart*, 643 N.W.2d 281, 296 (Minn. 2002).

The graphic depiction or "animation" presented by Mr. Graham is a very special kind of evidence, with a particularly high potential for prejudice, if it is inaccurate or

otherwise unjustified (as has been explained above). The traditional objection that such an instruction would single out a particular issue is well taken care of in the Circuit Court's clear instruction that it should "not . . . single out one instruction along as stating the law, but you must consider these instructions as a whole." Instruction No. C-1, R. 145.

As above, should there be any imperfection in the proffered instruction P-2, it was incumbent on the Circuit Court to do the necessary that the jury be correctly instructed on this important issue. *Miller v. State*, 733 So.2d at 849 (¶9); *Anderson*, 571 So.2d at 964; *Weathersby*, 556 F.2d at 1255-56.

VI. The Circuit Court Erred When it Failed and Refused to Grant Defendant's Motion for a New Trial

The standard governing a motion for a new trial is familiar. *See, e.g., Jackson v. State*, 69 So.3d 33, 37 (¶12) (Miss. App. 2011); *Blanks v. State*, 542 So.2d 222, 228 (Miss. 1989). As before, the "beyond a reasonable doubt" substantive evidentiary standard should be factored in. As well, the power to grant a new trial is a weapon available, as needed, to enforce the text and policy considerations underlying the Rule 702/*Daubert*/*McLemore*/*Edmonds* rule discussed above. For all of the foregoing reasons, to the extent that one or more may fall short of requiring a "reverse and render" decision, the judgment below should be vacated and this case remanded to the Circuit Court for a new trial *de novo*.

CONCLUSION

On the basis of the arguments advanced above, the legal premises supporting the same, and the authorities cited in support thereof, the judgment of the Circuit Court should be vacated and held for naught, notwithstanding the verdict of the jury. With respect, this Court should

reverse and render or, in the alternative, remand with instructions that the Circuit Court finally dismiss the indictment and order the Defendant discharged.

In the alternative, the judgment below should be vacated and this case remanded for a new trial, limited to the issue of whether Parvin may be guilty of manslaughter by culpable negligence.

In the alternative, the judgment below should be vacated and this case remanded to the Circuit Court for a new trial *de novo*.

All costs should be assessed against the State of Mississippi.

Respectfully submitted, this 12th day of March, 2012.

DAVID W. PARVIN

BY: _____

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ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I, James L. Robertson, one of the attorneys for Appellant, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **Brief of Appellant**, to the following:

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First Circuit Court District of Mississippi
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This the 12th day of March, 2012.

_____
JAMES L. ROBERTSON

Forensic Autopsy

Performance Standards

Prepared by:
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Steven C. Clark, Ph.D. (NAME Consultant)

Approved by General Membership
October 17, 2005 NAME Annual Meeting, Los Angeles, California
October 4, 2010 NAME Annual Meeting, Cleveland, Ohio

Amendments Approved by General Membership
October 16, 2006 NAME Annual Meeting, San Antonio, Texas
August 11, 2011 NAME Annual Meeting, Ketchikan, Alaska

(Sunset date October 4, 2015)

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Contents

Preface

Efforts by the National Association of Medical Examiners (NAME) to promulgate practice standards began in the 1970s. These early efforts subsequently became focused on the operational aspects of medical examiner offices, resulting in the well-known NAME Office *Accreditation Checklist*. More recently, some members suggested that the time was ripe for standards that address the professional aspects of individual death investigations. Then-president Michael Bell appointed this committee to draft such standards.

The principal objective of these standards is to provide a constructive framework that defines the fundamental services rendered by a professional forensic pathologist practicing his or her art. Many forensic pathologists will exceed these minimal performance levels and are encouraged to do so.

NAME recognized that certain standards may not be applicable where they conflict with federal, state, and local laws. Deviation from these performance standards is expected only in unusual cases when justified by considered professional judgment.

National Association of Medical Examiners
Standards Committee
August 12, 2005

Committee and Panel Membership

NAME Standards Committee (2005)

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Michael D. Bell, M.D.
Vincent J. M. Di Maio, M.D.
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Karen L. Gunson, M.D.**
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Randy L. Hanzlick, M.D.
John C. Hunsaker, M.D., J.D.
Bruce P. Levy, M.D.
Robert R. Pfalzgraf, M.D.
Gregory A. Schmunk, M.D.

* Completed initial survey instruments - unable to attend meetings.
** Nominated to the committee - unable to attend meetings.

Steven C. Clark, Ph.D. served as project director and Denise McNally, NAME Executive Director, provided administrative support.

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Tracy S. Corey, M.D.
Michael A. Graham, M.D.
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Patricia J. McFeeley, M.D.

Section A: Medicolegal Death Investigation

The purpose of this section is to define responsibility for medicolegal death investigation and to outline the types of cases that are to be investigated by such systems. Investigations can be conducted by inquiry with or without examination. Inquiries are typically conducted via telephone interview, personal interview, or review of records. Examination may include scene investigation, external inspection, and forensic autopsy.

Standard A1 Responsibilities

Medicolegal death investigation officers, be they appointed or elected, are charged by statute to investigate deaths deemed to be in the public interest--serving both the criminal justice, civil justice and public health systems. These officials must investigate cooperatively with, but independent from, law enforcement and prosecutors. The parallel investigation promotes neutral and objective medical assessment of the cause and manner of death.

To promote competent and objective death investigations:

A1.1 Medicolegal death investigation officers should operate without any undue influence from law enforcement agencies and prosecutors.

A1.2 A forensic pathologist or representative shall evaluate the circumstances surrounding all reported deaths.

Standard A2 Initial Inquiry

Medicolegal death investigators assess each death reported to the office to determine whether it falls under their jurisdiction as outlined by statutes, rules, and regulations. The categories below are those which should receive further investigations to protect the public safety and health, and determine the cause and manner of death.

The forensic pathologist or representative shall investigate all:

A2.1 deaths due to violence.
A2.2 known or suspected non-natural deaths.
A2.3 unexpected or unexplained deaths when in apparent good health.
A2.4 unexpected or unexplained deaths of infants and children.
A2.5 deaths occurring under unusual or suspicious circumstances.
A2.6 deaths of persons in custody.
A2.7 deaths known or suspected to be caused by diseases constituting a threat to public health.
A2.8 deaths of persons not under the care of a physician.

Section B: Forensic Autopsies

The purpose of this section is to establish minimum standards for the selection of cases requiring forensic autopsy, who should perform the autopsies, need for special dissection or testing, and who is responsible for interpretations and formation of opinions.

Standard B3 Selecting Deaths Requiring Forensic Autopsies

Medicolegal death investigation officers are appointed or elected to safeguard the public interest. Deaths by criminal violence, deaths of infants and children, and deaths in the custody of law enforcement agencies or governmental institutions-- can arouse public interest, raise questions, or engender mistrust of authority. Further, there are specific types of circumstances in which a forensic autopsy provides the best opportunity for competent investigation, including those needing identification of the deceased and cases involving bodies in water, charred or skeletonized bodies, intoxicants or poisonings, electrocutions, and fatal workplace injuries. Performing autopsies protects the public interest and provides the information necessary to address legal, public health, and public safety issues in each case. For categories other than those listed below, the decision to perform an autopsy involves professional discretion or is dictated by local guidelines. For the categories listed below, the public interest is so compelling that one must always assume that questions will arise that require information obtainable only by forensic autopsy.

The forensic pathologist shall perform a forensic autopsy when:

B3.1 the death is known or suspected to have been caused by apparent criminal violence.
B3.2 the death is unexpected and unexplained in an infant or child.
B3.3 the death is associated with police action.
B3.4 the death is apparently non-natural and in custody of a local, state, or federal institution.
B3.5 the death is due to acute workplace injury.
B3.6 the death is caused by apparent electrocution.
B3.7 the death is by apparent intoxication by alcohol, drugs, or poison.
B3.8 the death is caused by unwitnessed or suspected drowning.
B3.9 the body is unidentified and the autopsy may aid in identification.
B3.10 the body is skeletonized.
B3.11 the body is charred.
B3.12 the forensic pathologist deems a forensic autopsy is necessary to determine cause or manner of death or collect evidence.
B3.13 the deceased is the driver or passenger in a motor vehicle who is dead at the scene or dies in a hospital before his/her injuries can be determined and documented.

Standard B4 Forensic Autopsy Performance

Performance of a forensic autopsy is the practice of medicine. Forensic autopsy performance includes the discretion to determine the need for additional dissection and laboratory tests. A forensic autopsy must be conducted by a licensed physician who is a forensic pathologist or by a physician who is a forensic pathologist-in-training (resident/fellow).* Responsibility for forensic autopsy quality must rest with the forensic pathologist, who must directly supervise support staff. Allowing non-forensic pathologists to conduct forensic autopsy procedures without direct supervision and guidance is fraught with the potential for serious errors and omissions.

Autopsies shall be performed as follows:

B4.1 the forensic pathologist or residents in pathology perform all autopsies.
B4.2 the forensic pathologist directly supervises all assistance rendered during postmortem examinations.
B4.3 the forensic pathologist or residents in pathology performs all dissections of removed organs.
B4.4 the forensic pathologist determines need for special dissections or additional testing.
B4.5 the forensic pathologist shall not perform more than 325 autopsies in a year. Recommended maximum number of autopsies is 250 per year.

Standard B5 Interpretation and Opinions

Interpretations and opinions must be formulated only after consideration of available information and only after all necessary information has been obtained. As the person directing the investigation, the forensic pathologist must be responsible for these activities, as well as the determination of cause of death and manner of death (for the death certificate).

Autopsies shall be performed as follows:

B5.1 the forensic pathologist reviews and interprets all laboratory results the forensic pathologist requested.
B5.2 the forensic pathologist reviews all ancillary and consultative reports the forensic pathologist requested.
B5.3 the forensic pathologist determines cause of death.
B5.4 the forensic pathologist determines manner of death.

* Elsewhere in these standards, where the word “pathologist” appears, it means a physician who is a pathologist or a pathologist-in-training (resident/fellow), as defined by the ACGME.

Section C: Identification

The purpose of this section is to establish procedures for sufficient identification of the deceased, to document information needed to answer questions that may later arise, and to archive information needed for putative identification before burial of unidentified remains.

Standard C7 Standard Identification Procedures

Methods of identification are determined on an individual case basis, but can include viewing of the remains, either directly or by photograph, and comparison of dentition, fingerprints, or radiographs. A photograph of the face, labeled with the case number, documents and preserves the appearance at the time of identification. The same photograph can also be used to minimize and prevent potential errors when multiple fatality incidents occur. When more traditional methods fail in the determination of identification, a routinely-obtained DNA sample may be used to link the remains either to a known antemortem or kindred sample. In addition, a DNA specimen is particularly important for later questions of identity as well as for potential familial genetic analysis and criminalistic comparisons. Preservation of all data used to determine identification is necessary to address future questions and can provide the opportunity for a second objective determination of identification.

In support of identification of the body:

C7.1 the forensic pathologist assesses the sufficiency of presumptive identification.
C7.2 the forensic pathologist or representative takes identification photographs with case number in photograph.
C7.3 the forensic pathologist or representative obtains and archives specimen for DNA on all autopsied cases.

Standard C8 Procedures Prior to Disposition of Unidentified Bodies

Prior to disposition of the unidentified remains, inventory and archiving of potentially useful objective data are required. A forensic autopsy can disclose medical conditions useful for identification. Full-body radiographs document skeletal characteristics and radio-opaque foreign bodies such as bullets, pacemakers, and artificial joints. Dental charting and radiography preserve unique dental characteristics. The documentation of a decedent's clothing and personal effects archives details that are familiar to the next-of-kin. Careful preservation and archiving provide an objective basis for future identification and thereby avoid the need for exhumation.

Prior to disposition of an unidentified body the forensic pathologist shall:

C8.1 perform a forensic autopsy.
C8.2 take or cause to be taken radiographs of head, neck, chest, extremities, and torso in their entirety.
C8.3 cause the dentition to be charted and x-rayed.
C8.4 document or cause to be documented decedent's clothing and personal effects.

Section D: External Examinations: General Procedures

The purpose of this section is to establish minimum standards for the external examination of all bodies.

Standard D9 Preliminary Procedures

These standards underscore the need for assessment of all available information prior to the forensic autopsy to (1) direct the performance of the forensic autopsy, (2) answer specific questions unique to the circumstances of the case, (3) document evidence, the initial external appearance of the body, and its clothing and property items, and (4) correlate alterations in these items with injury patterns on the body. Just as a surgeon does not operate without first preparing a history and physical examination, so must the forensic pathologist ascertain enough history and circumstances and may need to inspect the body to decide whether a forensic autopsy is indicated and to direct the forensic autopsy toward relevant case questions.

Preliminary procedures are as follows:

D9.1 forensic pathologist reviews the circumstances of death prior to forensic autopsy.
D9.2 forensic pathologist or representative measures and records body length.
D9.3 forensic pathologist or representative measures and records body weight.
D9.4 forensic pathologist examines the external aspects of the body before internal examination.
D9.5 forensic pathologist or representative photographs, or forensic pathologist describes decedent as presented.
D9.6 forensic pathologist documents and correlates clothing findings with injuries of the body in criminal cases.
D9.7 forensic pathologist or representative identifies and collects trace evidence on clothing in criminal cases.
D9.8 forensic pathologist or representative removes clothing.
D9.9 forensic pathologist or representative photographs or lists clothing and personal effects.

Standard D10 Physical Characteristics

The external examination documents identifying features, signs of or absence of disease and trauma, and signs of death. Recording identifying features provides evidence for or against a putative identification. Recording signs of disease and trauma is a primary purpose of the forensic autopsy.

The forensic pathologist shall:

D10.1 document apparent age.
D10.2 establish sex.
D10.3 describe apparent race or racial characteristics.
D10.4 describe hair.
D10.5 describe eyes.
D10.6 describe abnormal body habitus.
D10.7 document prominent scars, tattoos, skin lesions, and amputations.
D10.8 document presence or absence of dentition.
D10.9 inspect and describe head, neck, thorax, abdomen, extremities, and hands.
D10.10 inspect and describe posterior body surface and genitals.
D10.11 document evidence of medical or surgical intervention.

Standard D11 Postmortem Changes

Recording *rigor mortis* documents a sign of death that cannot be captured by photography. Recording *livor mortis* helps to answer later questions about bruises and body position. Notation of postmortem artifacts is useful for interpretation of subsequent forensic autopsy findings. Each of these may be useful in estimation of the postmortem interval.

The forensic pathologist shall:

D11.1 describe *livor mortis*.
D11.2 describe *rigor mortis*.
D11.3 describe postmortem changes.
D11.4 describe evidence of embalming.
D11.5 describe decompositional changes.

Section E: External Examinations: Specific Procedures

The purpose of this section is to establish minimum standards for external examination of bodies with documentation of injuries or suspected sexual assault.

Standard E12 Suspected Sexual Assault

Collection of swabs, combings, clippings, and trace evidence may be necessary to 1) determine if sexual assault occurred; 2) link multiple, apparently unrelated deaths; or 3) link the death to an assailant. DNA analysis is now the test of choice on swabs, hair, and fingernail clippings. These collections shall be performed in accordance with the requirements of the crime laboratory procedures.

The forensic pathologist or representative shall, prior to cleaning the body:

E12.1 collect swabs of oral, vaginal, and rectal cavities.
E12.2 collect pubic hair combings or tape lifts.
E12.3 collect fingernail scrapings or clippings.
E12.4 collect pubic and head hair exemplars.
E12.5 identify and preserve foreign hairs, fibers, and biological stains.

Standard E13 Injuries: General

Documentation of injuries may be necessary to determine the nature of the object used to inflict the wounds, how the injuries were incurred, and whether the injuries were a result of an accident, homicide, or suicide. Written, diagrammatic, and photographic documentation of the injuries may be used in court. Observations and findings are documented to support or refute interpretations, to provide evidence for court, and to serve as a record.

The forensic pathologist shall:

E13.1 describe injuries.
E13.2 describe injury by type.
E13.3 describe injury by location.
E13.4 describe injury by size.
E13.5 describe injury by shape.
E13.6 describe injury by pattern.

Standard E14 Photographic Documentation

Photographic documentation complements written documentation of wounds and creates a permanent record of forensic autopsy details. Photographic documentation of major wounds and injury shall include a reference scale in at least one photograph of the wound or injury to allow for 1:1 reproduction.

The forensic pathologist or representative shall:

E14.1 photograph injuries unobstructed by blood, foreign matter, or clothing.
E14.2 photograph major injuries with a scale.

Standard E15 Firearm Injuries

Documentation of firearm wounds as listed below should include detail sufficient to provide meaningful information to users of the forensic autopsy report, and to permit another forensic pathologist to draw independent conclusions based on the documentation.

The forensic pathologist shall:

E15.1 describe injuries.
E15.2 measure wound size.
E15.3 locate cutaneous wounds of the head, neck, torso, or lower extremities by measuring from either the top of head or sole of foot.
E15.4 locate cutaneous wounds of the head, neck, torso, or lower extremities by measuring from either the anterior or posterior midline.
E15.5 locate cutaneous wounds of the upper extremities by measuring from anatomic landmarks.
E15.6 descriptively locate cutaneous wounds in an anatomic region.
E15.7 describe presence or absence of soot and stippling.
E15.8 describe presence of abrasion ring, searing, muzzle imprint, lacerations.

Standard E16 Sharp Force Injuries

Documentation of sharp force injuries as listed below should include detail sufficient to provide meaningful information to users of the forensic autopsy report, and to permit another forensic pathologist to draw independent conclusions based on the documentation.

The forensic pathologist shall:

E16.1 describe wound.
E16.2 measure wound size.
E16.3 locate wound in anatomic region.
E16.4 estimate depth of wound
E16.5 determine organs and structures involved
E16.6 estimate direction of stab wound tracks

Standard E17 Burn Injuries

Documentation of burn injuries as listed below should include detail sufficient to provide meaningful information to users of the forensic autopsy report, and to permit another forensic pathologist to draw independent conclusions based on the documentation.

The forensic pathologist shall:

E17.1 describe appearance of burn.
E17.2 describe distribution of burn.

Standard E18 Patterned Injuries

Documentation of patterned injuries as listed below should include detail sufficient to provide meaningful information to users of the forensic autopsy report, and to permit another forensic pathologist to draw independent conclusions based on the documentation. Bite marks should be swabbed to collect specimens to use for DNA comparison with putative assailants.

The forensic pathologist shall:

E18.1 measure injury size.
E18.2 describe location of injury.
E18.3 describe injury pattern.
E18.4 swab recent or fresh bite mark.

Section F: Internal Examination

The purpose of this section is to establish minimum standards for internal examinations.*

Standard F19 Thoracic and Abdominal Cavities

Because some findings are only ascertained by *in situ* inspection, the thoracic and abdominal cavities must be examined before and after the removal of organs so as to identify signs of disease, injury, and therapy.

The forensic pathologist shall:

F19.1 examine internal organs *in situ.*
F19.2 describe adhesions and abnormal fluids.
F19.3 document abnormal position of medical devices.
F19.4 describe evidence of surgery.

Standard F20 Internal Organs and Viscera

The major internal organs and viscera must be examined after their removal from the body so as to identify signs of disease, injury, and therapy.

Procedures are as follows:

F20.1 the forensic pathologist or representative removes organs from cranial, thoracic, abdominal, and pelvic cavities.
F20.2 the forensic pathologist or representative records measured weights of brain, heart, lungs, liver, spleen, and kidneys.
F20.3 the forensic pathologist dissects and describes organs.

Standard F21 Head

Because some findings are only ascertained by *in situ* inspection, the scalp and cranial contents must be examined before and after the removal of the brain so as to identify signs of disease, injury, and therapy.

Procedures are as follows:

F21.1 the forensic pathologist shall inspect and describe scalp, skull, and meninges.
F21.2 the forensic pathologist shall document any epidural, subdural, or subarachnoid hemorrhage.
F21.3 the forensic pathologist shall inspect the brain *in situ* prior to removal and sectioning.
F21.4 the forensic pathologist shall document purulent material and abnormal fluids.
F21.5 the forensic pathologist or representative removes the dura mater and the forensic pathologist inspects the skull.

Standard F22 Neck

The muscles, soft tissues, airways, and vascular structures of the anterior neck must be examined to identify signs of disease, injury, and therapy. A layer-by-layer dissection is necessary for proper evaluation of trauma to the anterior neck. Removal and *ex situ* dissection of the upper airway, pharynx, and upper esophagus is a necessary component of this evaluation. A dissection of the posterior neck is necessary when occult neck injury is suspected.

The forensic pathologist shall:

F22.1 examine *in situ* muscles and soft tissues of the anterior neck.
F22.2 ensure proper removal of neck organs and airways.
F22.3 examine neck organs and airways.
F22.4 dissect the posterior neck in cases of suspected occult neck injury.
F22.5 perform anterior neck dissection in neck trauma cases.

Standard F23 Penetrating Injuries, Including Gunshot and Sharp Force Injuries

Documentation of penetrating injuries as listed below should include detail sufficient to provide meaningful information to users of the forensic autopsy report, and to permit another forensic pathologist to draw independent conclusions based on the documentation. The recovery and documentation of foreign bodies is important for evidentiary purposes. Internal wound pathway(s) shall be described according to organs and tissues and size of defects of these organs and tissues.

The forensic pathologist shall:

F23.1 correlate internal injury to external injury
F23.2 describe and document the track of wound
F23.3 describe and document the direction of wound
F23.4 recover foreign bodies of evidentiary value
F23.5 describe and document recovered foreign body

Standard F24 Blunt Impact Injuries

Documentation of blunt impact injuries as listed below should include detail sufficient to provide meaningful information to users of the forensic autopsy report, and to permit another forensic pathologist to draw independent conclusions based on the documentation.

The forensic pathologist shall:

F24.1 describe internal and external injuries with appropriate correlations.
F24.2 describe and document injuries to skeletal system.
F24.3 describe and document injuries to internal organs, structures, and soft tissue.

Section G: Ancillary Tests and Support Services

The purpose of this section is to establish minimum standards for the use of scientific tests, procedures, and support services. This section also addresses the need for certain equipment and access to consultants. For toxicology reports, it also specifies the report content needed by the forensic pathologist for interpretation and establishes minimum standards for handling and documenting evidence.

Standard G25 Radiography

Radiographs of infants are required to detect occult fractures which may be the only physical evidence of abuse. Radiographs detect and locate foreign bodies and projectiles. Charred remains have lost external evidence of penetrating injury and identifying features.

The forensic pathologist or representative shall:

G25.1 X-ray all infants.
G25.2 X-ray explosion victims.
G25.3 X-ray gunshot victims.
G25.4 X-ray charred remains.

Standard G26 Specimens for Laboratory Testing

Specimens must be routinely collected, labeled, and preserved to be available for needed laboratory tests, and so that results of any testing will be valid. The blood specimen source should be documented for proper interpretation of results.

The forensic pathologist or representative shall:

G26.1 collect blood, urine, and vitreous.
G26.2 collect, package, label, and preserve biological samples.
G26.3 document whether blood is central, peripheral, or from cavity.

Standard G27 Histological Examination

Histological examination may reveal pathologic changes related to the cause of death.

The forensic pathologist shall:

G27.1 perform histological examination in cases with no gross anatomic cause of death unless remains are skeletonized.

Standard G28 Forensic Pathologists' Access to Scientific Services and Equipment

The forensic pathologist requires access to special scientific services, equipment, and expertise. Radiographs, body weights, and organ weights are needed for evaluation of pathologic processes. These procedures need to be available during the forensic autopsy. Also, it is not reasonable, practical, or safe to carry bodies or organs to other locations for weighing or imaging.

The forensic pathologist shall have access to:

G28.1 a histology laboratory.
G28.2 a radiologist.
G28.3 a forensic anthropologist.
G28.4 a forensic odontologist.
G28.5 toxicology testing.
G28.6 on-site radiographic equipment.
G28.7 on-site body and organ scales.
G28.8 a clinical chemistry lab.
G28.9 a microbiology lab.

Standard G29 Content of Toxicology Lab Report

For correct interpretation, understanding, and follow-up of toxicology reports, the forensic pathologist requires specific knowledge of the items listed below.

The forensic pathologist shall require the toxicologist or the toxicology report to provide the:

G29.1 source of sample.
G29.2 type of screen.
G29.3 test results.

Standard G30 Evidence Processing

Custodial maintenance and chain of custody are legally required elements for documenting the handling of evidence.

The forensic pathologist or representative shall:

G30.1 collect, package, label, and preserve all evidentiary items.
G30.2 document chain of custody of all evidentiary items.

Section H: Documentation and Reports

The purpose of this section includes standards for the content and format of the postmortem record.

Standard H31 Postmortem Examination Report

Postmortem inspection and forensic autopsy reports must be readable, descriptive of findings, and include interpretations and opinions to make them informative. The report typically includes two separate parts of the forensic pathologist's work product, (1) the objective forensic autopsy with its findings including toxicological tests, special tests, microscopic examination, etc., and (2) the interpretations of the forensic pathologist including cause and manner of death.

The forensic pathologist shall:

H31.1 prepare a written narrative report for each postmortem examination.
H31.2 include the date, place, and time of examination.
H31.3 include the name of deceased, if known.
H31.4 include the case number.
H31.5 include observations of the external examination, and when performed, the internal examination.
H31.6 include a separate section on injuries.
H31.7 include a description of internal and external injuries.
H31.8 include descriptions of findings in sufficient detail to support diagnoses, opinions, and conclusions.
H31.9 include a list of the diagnoses and interpretations in forensic autopsy reports.
H31.10 include cause of death.
H31.11 include manner of death.
H31.12 include the name and title of each forensic pathologist.
H31.13 sign and date each postmortem examination report.

Terms and Definitions

1. Autopsy

An examination and dissection of a dead body by a physician for the purpose of determining the cause, mechanism, or manner of death, or the seat of disease, confirming the clinical diagnosis, obtaining specimens for specialized testing, retrieving physical evidence, identifying the deceased or educating medical professionals and students.

2. Cause of Death

The underlying disease or injury responsible for setting in motion a series of physiologic events culminating in death.

3. Direct Supervision

Supervision of personnel performing actions in the immediate presence of the supervisor.

4. Forensic Autopsy

An autopsy performed pursuant to statute, by or under the order of a medical examiner or coroner.

5. Forensic Pathologist

A physician who is certified in forensic pathology by the American Board of Pathology or who, prior to 2006, has completed a training program in forensic pathology that is accredited by the Accreditation Council on Graduate Medical Education or its international equivalent or has been officially “qualified for examination” in forensic pathology by the ABP.

6. Manner of Death

A simple system for classifying deaths based in large part on the presence or absence of intent to harm, and the presence or absence of violence, the purpose of which is to guide vital statistics nosologists to the correct external causation code in the International Classification of Diseases. The choices are natural, accident, homicide, suicide, undetermined, and in some registration districts for vital statistics, unclassified.

7. Medicolegal Death Investigator

An individual who is employed by a medicolegal death investigation system to conduct investigations into the circumstances of deaths in a jurisdiction.

8. Forensic Pathologist's "Representative"

Any individual who carries out duties under the direction or authority of the forensic pathologist. Individuals performing these various duties may range from technicians to licensed physician medical examiners, and may be law enforcement or crime laboratory technicians.