IN THE FOURTH JUDICIAL DISTRICT COURT
PARISH OF OUACHITA
STATE OF LOUISIANA

STATE OF LOUISIANA EX REL. JIMMIE C. DUNCAN, Petitioner vs. TIM HOOPER Warden.	No. 94-F0042 Div. G Judge Frederick D. Jones DEATH PENALTY CASE

PETITIONER'S SUPPLEMENT TO POST-CONVICTION PETITION PURSUANT TO LA. C. CR. P. ART. 926.2 WITH CORRESPONDING SUPPLEMENT TO CLAIMS RELATING TO NEWLY DISCOVERED EVIDENCE

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I. Introduction

Jimmie Christian Duncan is an innocent man. Junk science generated by two of the most notorious and unreliable forensic experts in American history—combined with the utterly ineffective representation provided to Mr. Duncan by his trial counsel[1]—turned a tragic drowning into a sensational rape and murder. To support the now-discredited experts' findings, the State ignored obvious evidence contamination and concocted a theory that, absent the false and misleading expert testimony, would not stand up in any court. The State then compounded this travesty with testimony from a jailhouse informant eager to exchange stories of his cellmates' "confessions" for leniency.

Since Mr. Duncan's conviction, it has come to light that Drs. Michael West and Steven Hayne—the only two experts to have physically examined Haley Oliveaux's body—were together responsible for at least *seven* wrongful convictions. They are now revealed as charlatans, running a profit-center masquerading as a medical examiner's office with a documented history of tampering with evidence and falsifying conclusions.

That is precisely what happened here. Dr. West, a forensic "odontologist,"[2] is on video pushing a mold of Mr. Duncan's teeth into the child's body—*creating* the bite marks later wielded by the State as powerful weapons against Mr. Duncan. The State hid the video from its expert, who, without ever seeing how the marks were actually made, unsurprisingly found "bite marks" that matched Mr. Duncan's dentition. Similarly, Dr. Hayne, who could not pass the credentialing test for pathologists, told the jury without equivocation that the evidence proved that Mr. Duncan had anally raped and forcibly drowned the child, without undertaking any reasonable facsimile of the physical and scientific examination necessary to come to such a conclusion—and without preserving any of the evidence that would allow independent analysis of his autopsy report. Even without the physical evidence, however, objective expert review of what autopsy evidence does exist today demonstrates that Dr. Hayne's opinions were completely unsupported.

Moreover, even if the examinations of Drs. West and Hayne had been sound, rather than shoddy and fraudulent, the science underlying their conclusions is no longer considered reliable.

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[1] *See Petitioner's Supplemental Petition for Post-Conviction Relief* for claims of ineffective assistance of counsel.

[2] "Odontologist" and "dentist" are interchangeable terms.

The scientific community has categorically repudiated the forensic technique of bite mark "matching"—now understood to be responsible for at least thirty-six wrongful convictions and indictments. Similarly, what is today understood to be "normal" for the post-mortem appearance of a two-year-old's anus—swelling, dilation, redness and cracks or fissures—was, at the time of Mr. Duncan's trial, believed to indicate sexual abuse. These scientific advances, taken together with the rest of the evidence in the case—including the sexual assault kit that was negative for semen and lack of any blood found at the scene—demonstrate Mr. Duncan's innocence. Science does not support any findings of bite marks or rape. The most likely explanation for what happened to Haley Oliveaux was that she accidentally drowned after having a seizure, and that the "injuries" observed at the time were from prior accidents, diaper rash, excessive cleaning, and the life-saving measures taken on the day of her death.

Finally, the jailhouse informant testimony that the State trumpeted as evidence of a "confession" by Mr. Duncan is now completely contradicted by the informant himself. Today, the jailhouse snitch, Michael Cruse, backs away entirely from the tale he told of a detailed confession by Mr. Duncan. He now says that Mr. Duncan was emotionally devastated at the time and that he never said he was guilty of any crime. Furthermore, it is now clear that the State not only failed to disclose evidence that would have significantly undermined Cruse's credibility, but also elicited false testimony at trial to bolster his credibility. As the Court can appreciate, jailhouse informant testimony is a notorious cause of wrongful convictions, and where, as here, evidence explicitly undermining its reliability emerges, that evidence must be disclosed, and the testimony discredited. Indeed, Mr. Duncan encourages the Court to listen to the only recorded statement he made—on the very day that Haley died—which can only be deemed an innocent account of a terrible accident leading to a tragic death, one that, when viewed with the totality of existing and new evidence, exonerates Mr. Duncan.

This new evidence and the serious deficiencies at Mr. Duncan's trial, together, demonstrate that it is at least highly probable that no reasonable juror could find Mr. Duncan guilty beyond a reasonable doubt. At a new trial, the fraudulent expert witness testimony would be excluded from the jury's consideration. Rather than the State's sensational story of pure horror—including rape, biting, blackouts, a panicked forcible drowning and a cover-up involving massive quantities of blood that Mr. Duncan, cold and calculating, cleaned up before seeking help for the child—the jury would instead hear the true story: Haley accidentally drowned in the

bathtub. Mr. Duncan, who has now spent nearly three decades on death row, is in fact innocent of raping or intentionally murdering Haley Oliveaux, and it is highly probable that no reasonable juror would disagree.

In addition, the newly discovered evidence bolsters Mr. Duncan's existing claims that he is entitled to a new trial based on various constitutional violations.[3]

II. Factual Background

a. Haley Suffers a Series of Seizures and Head Injuries Shortly Before Her Death

In the weeks before Haley's death, doctors twice, after examination and blood testing, diagnosed her as having had a seizure. (Ex. 1 at 2: Nov. 5, 1993 Records from Glenwood Regional Medical Center Emergency Room; Ex. 2 at 2: Nov. 12-13, 1993 Records from Glenwood Regional Medical Center Emergency Room.) In both instances, Haley, while in her mother's care, hit her head earlier in the day and was given pain medication (Pediazole and Ibuprofen), either of which could result in a seizure. (R. 1858; R. 1864-65.)

Haley suffered a third head injury about two and a half weeks before her death when, in an attempt to get something out of her reach, she stepped on an open bottom drawer, causing an entire chest of drawers to fall on her. (Ex. 3 at 2: Nov. 29-Dec. 4, 1993 Records from St. Francis Medical Center Emergency Room and Pediatric Intensive Care Unit ("ICU Records"); *see also* Ex. 4 at 1: Dec. 3, 1993 Report of Dr. Camille Perkins to CPS.) This time it was Mr. Duncan who was home. At the hospital, CT scans showed three skull fractures and a subdural hematoma. (Ex. 3 at 83: ICU Records.) The child spent four days in the intensive care unit and then two more on the pediatric floor.[4] Upon discharge, apparently fearing a seizure as an after-effect of this injury, doctors warned Haley's mother (Mr. Duncan was not present) not to leave her unattended in the bathtub under any circumstances. (R. 4433.) After she was discharged on December 4, the child spent the next two weeks with her maternal grandparents, who were

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[3] *See Petitioner's Supplemental Petition for Post-Conviction Relief, Petitioner's Amendment to Initial Petition for Post-Conviction Relief* and *Petitioner's Second Amendment to Petition for Post-Conviction Relief* ("*Petitioner's Post-Conviction Pleadings*").

[4] Notably, after Haley's grandfather expressed skepticism about Mr. Duncan's account of how the child was injured, Child Protective Services ("CPS") conducted an investigation, interviewing healthcare workers and family members, including Mr. Duncan, and inspecting the scene. After completing the investigation, CPS closed the case as invalidated, finding that the child's injuries and the evidence at the scene were consistent with Mr. Duncan's account, and that none of the healthcare workers interviewed had expressed any concern about potential abuse. (Ex. 6: Dec. 2, 1993 Office of Community Services Child Abuse/Neglect Investigative Summary (making abuse finding "invalid").)

concerned about her fragile state. Haley returned home only the night before she died. (*See* Ex. 5 at 24: Dec. 19, 1995 Deposition of Julie Layton.)

b. Haley Drowns in the Bathtub

The State contends that on the morning of December 18, 1993, Mr. Duncan raped and murdered Haley, cleaned up and disposed of all of the evidence, and staged the scene to look like an accident. (*See* R. 4207-16.) Mr. Duncan's statement given to police later that day, however, reflects a completely different chain of events. After Haley's mother left for work, Mr. Duncan made the child oatmeal for breakfast, celebrated with her after she managed to urinate in her potty, and then put her in the bath, where she accidentally had a bowel movement. (Ex. 7: Dec. 18, 1993 Recording of Mr. Duncan's Police Statements; Ex. 8: Dec. 18, 1993 Transcript of Mr. Duncan's Recorded Statements ("Mr. Duncan's Police Statements").) He drained the water, cleaned Haley and put her into a fresh bath. (*Id.*) He sat with her for a few minutes and then left her in the bath while he went to do the dishes. (*Id.*) At around 10:30 a.m., after hearing a noise, Mr. Duncan checked on Haley and found her lying motionless in the bathtub. Frantic, he grabbed her out of the tub, tried to resuscitate her, and rushed with her in his arms to the neighbors for help. (*Id.*)

c. Neighbors and Medical Personnel Undertake Extensive Life-Saving Efforts

Holding the child, Mr. Duncan banged on the neighbors' door, begging them to call 911 and asking if anyone knew CPR. (R. 4238-39; 4257.) While waiting for the ambulance, and with Mr. Duncan sobbing next to him, the neighbor, Mr. Floyd Bennett, attempted CPR on the child, who appeared blue. (R. 4238, 4258.) When he cleared her throat with his finger, he found oatmeal. (R. 4258.) The ambulance arrived at 10:35 a.m., and first responders took over CPR efforts and then took the child to the hospital. (Ex. 9: Dec. 18, 1993 Metro Ambulance Patient Care Report and Dec. 18, 1993 Metro Ambulance Response Report ("Ambulance Reports").) Mr. Duncan followed with the neighbors because he was so hysterical and distraught that the EMS workers asked for him to be removed so they could work. (R. 4242-48.)

First responders continued CPR efforts, intubating the child and administering epinephrine and atropine in the ambulance. (Ex. 9 at 1: Ambulance Reports.) The child arrived at the hospital at 10:50 a.m., where doctors took over resuscitation efforts, establishing an intravenous line, inserting a nasogastric tube, and drawing blood for lab work. (Ex. 10 at 21: Dec. 18, 1993 Records from Glenwood Regional Medical Emergency Room ("Glenwood

Records").) Doctors replaced the endotracheal tube, which they secured to her face with medical tape, and the child was shocked twice with a defibrillator. (*Id.* at 9-10.) Despite these efforts, doctors pronounced the child dead at 11:15 a.m. (R. 4603.) Her body temperature was recorded as normal at 98.6. (Ex. 10 at 2: Glenwood Records.)

d. Hospital Records Reflect Injuries, but No Bite Marks

The hospital examination after the child's death revealed what staff believed to be both healed and recent injuries to her anus (R. 4485; 4604; 4904), though no injuries to her sigmoid or rectum (R. 4898). Concerned that these injuries could be evidence of past and/or recent sexual abuse, the hospital staff alerted Child Protective Services ("CPS") and the coroner's office. There were no concerns raised about possible bite marks or other acute injuries.

e. CPS Investigation Records[5] Reflect No Bite Marks

A CPS case worker was dispatched to the hospital to investigate. She interviewed hospital staff, police, and family members (R. 4687-88), examined the child and documented her injuries, noting various bruises and scratches, including fading bruises to her face from the chest of drawers incident, but no recent injuries to her face, neck or jaw. (*See* Ex. 11: Dec. 18, 1993 Debra Sherrill Abuse-Neglect Worksheet ("CPS Worksheet"); Ex. 12: Feb. 18, 1994 Fatality Staffing Report.) Similarly, an investigator for the Ouachita Parish Coroner's Office examined the child and documented her injuries, noting bruising to the child's forehead, but no other recent injuries to the child's face, neck, or jaw. (*See* Ex. 13: Dec. 18, 1993 Report of Investigation by Parish Coroner.) Neither examination yielded any alleged "bite marks."

After Haley's death, the lead detective, Chris Sasser, relying exclusively on information relayed to him by Drs. Hayne and West, called the CPS case worker to report that the child had four bite marks on her "arm, shoulder, cheek and somewhere else." (*See* Ex. 12 at 19: Fatality Staffing Report.) The CPS case worker specifically stated that when she "viewed the child [at the hospital], these marks were not readily visible." (*Id.*)

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[5] CPS interviewed many witnesses and did its own investigation into the child's death. Many of these witnesses told CPS a different account of events than their later testimony at the criminal trial.

f. Mr. Duncan Makes Two Recorded Statements to Law Enforcement Acknowledging that He Left Haley Alone in the Tub, and One Unrecorded Statement Allegedly Speculating that He May Have Accidentally Injured Her in His Attempts to Clean Her

Before the child was declared dead, police took Mr. Duncan from the hospital to the police station and interrogated him. Mr. Duncan's recorded statements after police informed him that Haley had died reveal his anguish over the drowning death of the child. (R. 4315; Ex. 8: Mr. Duncan's Police Statements.) The unrehearsed narrative, taken only hours after life-saving efforts failed to save the child, is revelatory. (*See id.*) Speaking extemporaneously after waiving his right to counsel, a sobbing Mr. Duncan made two recorded statements describing the morning's events, clearly struggling to do so through his mounting grief. He described the morning—making Haley her oatmeal for breakfast, celebrating with her after she used the potty, cleaning her after she had an accident, and then, tragically, leaving her alone in the tub and returning to find her motionless.[6] (*Id.*; R. 4336-40.)

In the hour-and-forty-five-minute period between the two recorded statements, Mr. Duncan allegedly made an additional *unrecorded* statement, purportedly speculating that, while wiping Haley after she defecated in the tub, he might have accidently inserted a finger in her anal area. (R. 4692.) However, this alleged statement is not corroborated by anything in the recordings. To the contrary, when asked in the second recording to explain the condition of the child's anus, Mr. Duncan simply said, "I just, you know, the only thing was I washed her. I washed her little butt. I washed around her little butt hole." (Ex. 8 at 4: Mr. Duncan's Police Statements.)

g. Police Charge Mr. Duncan with Negligent Homicide

Following the interrogation that resulted in the recorded statements, detectives charged Mr. Duncan with negligent homicide and formally arrested him. (*See* Ex. 14: Dec. 18, 1993 Affidavit of Probable Cause.) At the time, Det. Sasser had already observed the condition of the child's body, thoroughly investigated the scene, and interrogated Mr. Duncan.

h. Investigation of the Scene Yields No Evidence that the Child Bled around the Time of Her Death

Det. Sasser, a thirteen-year veteran officer (R. 4393), searched for evidence to support a sexual assault over the course of five to six visits to the scene, but, in his words, "at no point at

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[6] These recordings have been preserved, and undersigned counsel urges the Court to listen to them to assess for itself Mr. Duncan's credibility and consider his statements in the context of the newly discovered evidence.

anytime did I find any blood in that house." (R. 4380-81; 4396-97.) Det. Sasser's investigation included photographing multiple rooms in the house, including the kitchen and both bathrooms (R. 4324-28, 4369-70), searching "each room, each bathroom, the bedrooms, the living room and kitchen, up and down the hall," and "check[ing] every conceivable area there could be blood" (R. 4371), including the garbage can and outside perimeter of the house (R. 4389). However, Det. Sasser "[f]ound no blood" (R. 4375), nor did he find clothing, bath towels, tissues or any other items that appeared to have been used to clean up any blood (R. 4389). Det. Sasser averred that, given his years of experience, if there had been any evidence of blood or semen at the scene, he would have found it. (R. 4397-98.)

i. Drs. Hayne and West Perform Forensic Examinations of the Child's Body

On December 18, the child's body was transported to the Rankin County Morgue in Jackson, Mississippi to be autopsied by Dr. Hayne. (R. 4478.) Dr. Hayne brought into the forensic examination his long-time colleague and business partner, Dr. West.

At the time of their examination, neither Dr. Hayne nor Dr. West had been implicated in wrongful convictions and both were in good standing within the professional forensic associations to which they belonged. This would later change dramatically.

i. Drs. Hayne and West Jump to Conclusions of Rape and Biting Based on Only Cursory Visual Inspections

During a preliminary inspection on the evening of December 18, Dr. Hayne identified "suspicious" markings that he thought were consistent with bite marks. He called in his business partner, Dr. West, to review them. (*See* R. 4495.) Dr. West, in turn, performed a preliminary visual inspection at around 9:30 p.m., which he recorded on video (the "West Video"), noting only a solitary bruise on the child's left elbow. (Ex. 15: West Video.) Drs. Hayne and West then decided to put the body in the morgue cooler for twenty-four hours before doing any further analysis. (Ex. 16: Dec. 30, 1993 Dr. West Letter to Ouachita Parish Coroner ("West Report").)

ii. Drs. Hayne and West's Conclusions Based on Cursory Inspections of the Body Cause Police to Elevate Charges from Negligent Homicide to First Degree Murder

Based solely on the cursory inspection described above, Dr. Hayne called Det. Sasser to offer his opinion that the child had been bitten and raped, telling him that:

> at or about the time of death [the child] had suffered lacerations and penetration to the anus; had received multiple contusions to multiple surfaces on the body, and had lacerations and contusions to the scalp and contusions to the right side of the neck. Also observed were bite marks suggestive of adult bite marks on the deceased. These bite

> marks were determined also to have occurred at or about the time of death.

(Ex. 17 at 5: Mar. 25, 1994 Pidas Offence Report ("Police Report"); *see also* R. 1194-6.) Based solely on Dr. Hayne's conclusions—made before he performed an autopsy—law enforcement officials, who, based on Det. Sasser's observation of the scene, interviews with witnesses, and statements from Mr. Duncan, had originally charged Mr. Duncan with negligent homicide, upgraded the charge to first degree murder. (R. 1207.)

iii. Dr. West Tampers with the Child's Body, Resulting in the First Documentation of "Bite Marks"

Based on Dr. Hayne's information, the police requested and were granted a warrant to obtain Mr. Duncan's dental impressions, and they delivered those molds to Dr. West on December 19. (Ex. 17 at 6: Police Report.) Dr. West used these molds during his second examination of the child, which took place over several hours on the afternoon of December 19 and was recorded on video. (*See* Ex. 15: West Video.) Dr. West's examination involved what he calls his "direct comparison technique" for bite marks, and the video shows him forcefully pushing the molds of Mr. Duncan's dentition into areas of the child's body. It shows Dr. West repeatedly scraping the molds across the child's right cheek, digging and dragging them down the side of her face, and pushing them into the bruise on her left elbow. After this brutal treatment of the body, Dr. West took photographs of the markings and came to the following conclusions: (1) the left elbow, left wrist, right cheek and right arm all had human bite marks that were "mild to moderate in nature" and "were inflicted within 30 minutes of her death"; (2) there was "a high degree of correlation with the DSM [dental study models] of Chris Duncan and the bite marks on the left elbow, left wrist and right arm"; and (3) there was a "positive match of class and individual characteristics . . . between the DSM of Chris Duncan and the bite mark on the right cheek of Haley Oliveaux." (Ex. 16: West Report.)

iv. Dr. Hayne Makes Factually Unsupportable Findings of Forcible Drowning and Rape Based on a Questionable Autopsy

Dr. Hayne commenced his autopsy after Dr. West completed his examination, late in the afternoon on December 19 (R. 1331) and finished it by 7:00 p.m. (Ex. 18: Dec. 18, 1993 Report of Autopsy.) As such, any and all excision; dissection; tissue sampling, staining, fixing or testing; and microscopic examination could have taken place only within this short window of time. There is no evidence that Dr. Hayne in fact undertook any or all of these standard autopsy procedures, since all that remains are a few low-quality photographs prior to any dissection, and

only scant notes and documentation. Indeed, Dr. Hayne had already (improperly) concluded that the child had been sodomized "at or about the time of death" before whatever microscopic examination he eventually conducted—if any.[7] Additionally, Dr. Hayne issued his final autopsy report without having received any toxicology results. (Ex. 19 at 6: Dec. 19, 1993 Report of Post Mortem Examination.)

Despite these profound shortcomings, Dr. Hayne ultimately concluded that the child had been anally raped and forcibly drowned. (*Id.*)

j. No Evidence of Semen Is Found Anywhere on the Scene

The North Louisiana Criminalistics Laboratory ("Crime Lab") tested numerous items for the presence of semen, including vaginal and anal wipings and an anal wash from the sexual assault kit; Mr. Duncan's clothing, underwear and wipings of his genital area; the child's nightgown, diaper, and bath toys; and wipings from the bathtub. The samples were all *negative* for seminal acid phosphatase and spermatozoa. (R. 1793; *see also* Ex. 20: Records from North Louisiana Criminalistics Laboratory ("Crime Lab Records").)

k. Blood Samples Are Destroyed without Toxicology Screening

The blood samples from Haley that were taken as part of the sexual assault kit were submitted to the Crime Lab for testing on December 21, 1993. (Ex. 20 at 5: Crime Lab Records.) Even though the other items from the kit were tested the next day, the blood samples were not tested at that time. (*Id.* at 16-23.) Beginning in February 1994, the defense sought the toxicology results to determine whether the child had ingested any drugs, such as Pediazole, that might have caused her to have a seizure and accidentally drown. (*See* R. 84-98: Defense Motion for Discovery.) However, the Crime Lab improperly destroyed the child's blood samples in 1995 without seeking permission from defense counsel or the court and *without having ever tested them for toxins*. (R. 1797; 1929.) The director of the Crime Lab later testified that the samples had been mistakenly stored among those regularly destroyed after one year, instead of being preserved with other sexual assault kit samples, as required by the Louisiana Registry. (R. 1791; 1794; 1795.)

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[7] Det. Sasser testified that Dr. Hayne informed him of this conclusion before conducting any microscopic analysis. (R. 1193.)

1. Powerful Exculpatory Evidence Is Excluded from Trial and Never Shown to the Jury

i. Exculpatory Polygraph Examination Is Excluded from Evidence

In an effort to demonstrate his innocence, Mr. Duncan voluntarily took—and passed—a polygraph test on November 11, 1994, conducted by a licensed polygraph examiner, whom the State acknowledged at a hearing was qualified. (R. 1687-88.) Specifically, the test demonstrated that Mr. Duncan was truthful in denying that he had drowned the child, held her head underwater, or done anything physically to cause her death. (*See* Ex. 21: Nov. 11, 1994 Polygraph Results.) However, the jury never heard this evidence of Mr. Duncan's innocence because the court denied his motion to introduce the polygraph results at trial.

ii. "West Video" Showing Dr. West Tampering with the Child's Body Is Excluded from Evidence

The State submitted the West Video—documenting Dr. West pressing and dragging Mr. Duncan's dental molds into and across the child's body—to the trial court under seal for *in camera* review, informing the court that it did not intend to call Dr. West as an expert or use the West Video as evidence. In its submission, the State asserted that the video "does not contain any exculpatory evidence favorable to the Defendant, as you will see from your review." (*See* Ex. 22 at 3: Apr. 11, 1995 Letter to Judge from ADA Johnson.) The State further noted that "Dr. West has become a controversial figure as the result of some of his testimony in other cases," and "the Defense is somehow hoping to drag Dr. West into this case in order to create ancillary issues for the jury." (*Id.*) The Court inexplicably deemed the tape inadmissible, finding that "there is no exculpatory evidence favorable to the defendant contained in the tape." (Ex. 23 at 1: Jun. 19, 1995 Response Letter from Judge.) As a result, the jury was not shown evidence of Dr. West tampering with the body and dragging Mr. Duncan's dental mold across the child's face. Instead, the State was permitted to present "expert" testimony—from an expert other than Dr. West—that Mr. Duncan had bitten the child and created those grotesque injuries at the time of her death.

iii. Evidence of Haley's Prior Injuries Is Excluded from Evidence

In a bizarre, one-sided "deal," Mr. Duncan's trial counsel agreed to a stipulation excluding any evidence of old injuries sustained by Haley before her death, such as those caused by the three accidents she endured in the weeks before she died. (Ex. 24 at 145: Civil Tr. Transc.; *see* R. 4480.) As a result, the defense could not point to these accidents as the cause of, the large bruise on the child's left elbow (*see* Ex. 3 at 22: ICU Records), or fully develop for the jury her recent history of head injuries and seizures, which presented a significant risk of accidental

drowning, as indicated by the doctor's instructions not to leave the child unattended in the bath.

III. Powerful Forensic and Jailhouse Informant Evidence Is Presented at Trial

a. The State Presents Evidence that Mr. Duncan Repeatedly Bit the Child

The State elected not to have Dr. West, the forensic dentist who actually examined the child's body, testify at trial. The State made this strategic decision because, by the time of trial, Dr. West had been suspended by the American Board of Forensic Odontology ("ABFO") for one year for "overstating his credentials" and misidentifying tooth marks. The State instead relied on the testimony of another "board certified" ABFO "diplomate," Dr. Neal Riesner,[8] to establish that there were three adult human single-arch bite marks on the child's body, each of which "matched" Mr. Duncan's dentition. Dr. Riesner did not examine the child and did not see the West Video. Instead, he relied solely on the photographs taken by Dr. West after he had tampered with the child's body—photographs Dr. Riesner assured the jury were "accurate" and allowed him to undertake a "very precise" analysis. (R. 1023; 1030.)

Dr. Riesner first discussed a bruise on the child's left elbow, which he explained was a human bite mark that matched Mr. Duncan's lower teeth "to a reasonable medical dental certainty." (R. 1011-12.) Dr. Riesner explained that "reasonable medical dental certainty" meant not an "absolute fact," but "it could be 99%," and this was the terminology "required" by "the Board [the ABFO] [he was] a member of," and because he was a "forensic scientist." (R. 1014.)

Dr. Riesner explained that his analysis of the photographs permitted him to identify the specific teeth that Mr. Duncan had used to bite the child, pointing with a laser to "one, two, three, four, five teeth" marks that "are present" in the elbow bruise. (R. 1012.) He went on to claim that the "match" of Mr. Duncan's lower teeth to these marks was "[t]ooth for tooth, both the size, shape and individual characteristics," and that he could identify "a little triangle" in the photo as a mark made by Mr. Duncan's "lower eye tooth," and "a little rectangle" made by the adjacent tooth. (*Id.*) Using a shadow box, he demonstrated "tooth by tooth how it matches up" and insisted

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[8] The State emphasized Dr. Riesner's training and certifications in order to impress upon the jury how much of an expert he was. Although there is no requirement that ABFO diplomates demonstrate any proficiency in bite mark identification or bite mark "matching" to become board-certified, the State emphasized that board certification by the ABFO required recertification every five years; and bolstered Dr. Riesner's credibility with the jury by eliciting other credentials including that he had been qualified as an expert at least eighteen times; was the "Chief of Forensic Dentistry for the Westchester County Medical Examiner's Office"; worked as a consultant to the New York City and Nassau County medical examiner's offices; and was "made diplomate of the American Board of Forensic Odontology"—one of only about 110 dentists in the country so-qualified. (R. 1003-05.)

the teeth marks he matched were "individual and characteristic" to Mr. Duncan's dentition, which "matche[d] perfectly" to the injury. (R. 1012; 1018-19; 1030.)

Dr. Riesner testified that he was able to come to these conclusions even though the mark was only a "one arch" bite mark (R. 1011; 1025), that is, that there was no corresponding mark from the upper teeth. (R. 1012-13; 1025.) Dr. Riesner opined that "one arch" bite marks were "not unusual," "not infrequent," and "very common" (R. 1025), emphasizing that they were "recognized" in the manual of the American Society of Forensic Odontology, a "very informative and authoritative work[] in forensic dentistry" (R. 1026). Dr. Riesner told the jury that he had previously testified in single arch cases, including the Robert Golub trial in Long Island, which he had "presented . . . to the American Academy of Forensic Sciences" and, as such, "was a well known and documented case and accepted by my profession." (R. 1028.)

Next, Dr. Riesner diagnosed an abrasion on the child's cheek as a single-arch human bite mark made by Mr. Duncan's lower teeth. (R. 1022.) He testified that his diagnosis was consistent with the "standard for establishing bite marks," which required experts to "identify class characteristics of teeth which are present and identifiable and then individual characteristics of teeth if you want to be able to make a match." (R. 1037.) Asked whether he had followed this standard, Dr. Riesner said, "Yes, of course." (*Id.*)

Dr. Riesner also claimed there were "drag marks" across the child's face, created by Mr. Duncan as he was biting the child at the time of her death. (R. 1022.) According to Dr. Riesner, the "violent," "harsh pull" during the attack caused the skin on the child's cheek to move, which explained why Mr. Duncan's teeth might "look[] like they don't match," but "these match up due to the pressure" on the child's face. (R. 1026-27.) When pressed on cross-examination about whether it was possible to "match" the cheek abrasion to other suspects by turning the teeth in different directions, he retorted, "You think so because you're not a forensic dentist[,] but I can identify this." (R. 1043.)

Dr. Riesner emphasized to the jury that the abrasion on the cheek was "a harsh and violent bite," it "wasn't [gentle] little pressure it was a harsh violent pressure," the injury "was definitely a violent bite, harsh, not a [gentle] thing to [a] small child." (R. 1021-23.) He added that a "torn frenulum" in the child's mouth would "have to" be caused by a "harsh pull, hard or violent, in other words it's just not an accident"; instead, it "had to be caused by trauma." (R. 1026-27.) He

further testified that the "literature" (without citing any) confirmed that in sexual assault cases, it was "common that bite marks appear on the cheek." (R. 1029.)

The third "bite mark" Dr. Riesner diagnosed with "reasonable medical dental certainty" was a bruise below the child's right ear, which he testified "not even in [his] wildest dreams" could have been made by a finger, since he identified "individual characteristics of teeth" in the injury. (R. 1038.) As with the other two alleged bite marks, Dr. Riesner claimed the bruise under the ear was a single arch injury, created by Mr. Duncan's lower teeth. (R. 1037-38.)

Finally, Dr. Riesner was permitted to tell the jury that another unnamed forensic dentist had independently verified all of his conclusions, including matching all three "bite marks" to Mr. Duncan's dentition. (R. 1024-25; *see also* R. 5380.)

b. The Defense Expert Endorses the Science Underlying Bite Mark Matching, but Disagrees with the State Expert's Conclusions

The defense called forensic odontologist Dr. Richard Souviron. Though Dr. Souviron ultimately opined that the specific marks on the child's body were not bite marks, he endorsed the "science" of bite mark analysis and comparison—that is, the principle that forensic odontologists using the proper methodology could identify a mark as a bite mark, including "single arch" marks, and then match it to an individual's dentition.

Dr. Souviron began his testimony by describing the efficacy of bite mark analysis. Similar to Dr. Riesner, he explained how to diagnose an injury in skin as a human bite mark, identify specific teeth in an alleged bite mark, and how to match it to an individual's dentition. Specifically, he claimed the ability to "describe what the person looks like that made the bites[,] [w]hat their teeth look like" and that it was possible to distinguish particular features of those teeth, e.g., "teeth that are crooked," "gaps between their front teeth," "one tooth that is sticking out" or a missing tooth. (R. 4813-15.) Dr. Souviron also claimed forensic dentists could differentiate between bite marks by adults and children. (*Id.*) He emphasized different highly scientific-sounding aspects of the methodology, such as incising the injury from the body for "an additional opinion from another forensic dentist" and approximating the date of injury by using "fingerprint powder" to "lift the bite mark print." (R. 4822; 4849-50.)

Dr. Souviron also endorsed the ABFO, which, he testified, was established "to credential dentists who do this type of work as experts," because "the legal profession and the criminal justice system wanted to know who knew what they there were talking about and who didn't when it came to bite marks." (R. 4817.)

As to the analysis in this case, Dr. Souviron criticized Dr. Riesner's failure to properly document the injuries according to the guidelines in the manual of the American Society of Forensic Odontology or to create test bites from the dental molds. (R. 4856; 4858-60; 4867-68; 4884; 5885.) He further noted that the marks at issue were not visible in the photographs taken at the hospital, and that they in fact appeared to show that the child's cheeks were uninjured below the medical tape, and which Dr. Riesner admittedly did not review prior to forming his opinion. (R. 4865-66; 4870.) Ultimately, Dr. Souviron opined that none of the marks in question was a bite mark, grounding his conclusion in part on the fact that the marks would have had to be made by only a single arch. However, he then conceded on cross-examination that "it [a single arch bite mark] happens" and agreed with Dr. Riesner that the forensic odontology manual "recognize[s]" single arch bite marks. (R. 4886-87.)

Seeking to reinforce Dr. Riesner's credibility as an expert in bite mark evidence, the State elicited once again that he, like Dr. Souviron, was a "Board Certified Forensic Odontologist," and that Dr. Souviron had "congratulated him" on his "great testimony" in the past. (R. 4887-88.)

c. Dr. Hayne Opines that the Child Was Raped, Forcibly Drowned, and Died Long Before Mr. Duncan Sought Help

The State relied on the testimony of Dr. Steven Hayne to establish that (1) the child suffered significant acute injuries at or about the time of her death that led him to conclude that she had been anally raped and likely had been bitten; (2) the cause of her death was forcible drowning; and (3) she had been dead between forty-five minutes and an hour before she was brought to the hospital, and, as such, the timeline suggested by Mr. Duncan—that she had been found in the tub within two minutes of having been alive, immediately taken next door for CPR, and then brought to the hospital within fifteen minutes—was impossible. (R. 4498-99.)

Before the trial court certified him as an expert, Dr. Hayne testified that he was "board certified by three institutions, the American Board of Pathology, the American Academy of Neurologic and Orthopedic Surgery and the American Academy of Forensic Examiners." (R. 4477.) He further testified that he performed between thirty and forty autopsies for Ouachita Parish in a year. (R. 4512.)

Dr. Hayne described injuries that he insisted were consistent with only an adult penis having penetrated the child's anus. He described "a series of tears" commencing at the anus and going into the rectum measuring approximately one-half inch in length and penetrating through

the soft tissue into the muscle tissue. (R. 4485.) He said he concluded based on his external examination and microscopic review of the tissue that these injuries showed no aging, i.e., that the tearing must have been caused at or about the time of death. (R. 4499.) He described the tearing as "severe" and noted that it would have caused severe bleeding, but that there was no visible bleeding because the area had been washed. (R. 4486.) Dr. Hayne emphasized that these injuries were consistent with the insertion of an adult penis, but not with a bowel movement (R. 4501), the accidental insertion of a finger, or injuries from a broomstick or a hairbrush. (R. 4502-03.)[9]

Dr. Hayne testified that the marks on the child's cheek were "highly consistent" with bite marks and could not have been caused by medical tape. (R. 4495.)

Dr. Hayne concluded that the child's cause of death was freshwater drowning (R. 4497), and that her injuries were consistent with someone holding her head underneath the water (R. 4499). He testified that the contusion on the back of the child's head and the markings on her jaw were consistent with forcible drowning (R. 4498), and that the injuries to her lip and frenulum—the connective tissue inside of her lip—indicated that her teeth were pressed against her lip, consistent with having been forced down on a hard surface. (R. 4494.) Moreover, he testified that a bruise located over the back right side of her head was consistent with a digit, such as a thumb, pressing down on the back of her head. (R. 4496.)

Dr. Hayne's time of death testimony was used to undermine Mr. Duncan's statements to investigators concerning his efforts to save the child's life. Dr Hayne claimed, based on a measurement of her arterial blood gas, that the child died at least thirty-five, but more likely forty-five, minutes before she entered the emergency room and, thus, that Mr. Duncan's account of bringing her from the bath immediately to the neighbors was not true. (R. 4498-99.)

Finally, Dr. Hayne testified that Mr. Duncan could not have fed the child oatmeal for breakfast because, if the child had eaten oatmeal, he would have found some in her stomach or

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[9] The State later bolstered this with testimony from Dr. Edward Gustavson, a pediatric doctor with no experience or expertise in forensic pathology. Based on his review of the photographs of the child's anus, Dr. Gustavson testified that the injuries could not have been caused by a thumb, a broom, a pointed toe leather shoe, or a Coke bottle, because those objects "are most traumatic at their tip and in this case when we look at an injury such as this the damage to the skin is on the surface and as the object is going inside the little girl's rectum it's injuring on the surface as the bone of the individual, we call it the pubic bone or the pelvis of the man, is hitting against her bone of her pelvis and as the two bones grind together they're tearing this tissue." (R. 4658-60.) He concluded that "there is no other explanation for how the injuries [to the anus] came to be the way they did" except by an adult male penis. (R. 4661; 4666-68.)

bowel. Instead, he testified that he found only remnants of pickle, tomato and onion. (R. 4496; 4501.)

d. Defense Pathology Expert Fails to Criticize Dr. Hayne's Inappropriate Methodology

The defense retained forensic pathologist and child-abuse expert, Dr. Robert Kirschner, who testified that it was not possible to conclude with any certainty the cause of the abnormality to the anus, although it may have been caused by several fingers. (R. 4909-10.) Dr. Kirschner disagreed with Dr. Hayne's conclusion that the child was forcibly drowned. He testified that the child's drowning may have been the result of a seizure produced either by an assault or by drugs. (R. 4912.) He was apparently not shown the West Video and did not question the "science" of bite marks, but he stated that there were no bite marks on her body. (R. 4902-03.)

e. The State Presents Testimony Describing a Dramatic Jailhouse Confession by Mr. Duncan

The State bolstered Dr. Hayne's testimony by calling jailhouse snitch Michael Cruse, who was in the Cell D drunk cell on December 28, 1993, when Mr. Duncan was brought in prior to a court appearance. (R. 4447.) Although he and Mr. Duncan were together in a crowded jail cell, Cruse claimed that Mr. Duncan nevertheless confessed to him, sobbing, that on the morning the child died, she had been pointing to his penis and calling it a "bottle" or "bobble," that he "was really frustrated," that he blacked out twice, and that "it must have been the devil" because, when he came to the second time, he was trying to have sex with the baby, who was hysterical. (R 4449.) Cruse testified that Mr. Duncan told him that "he couldn't get the baby to be quiet . . . all he wanted was for the baby to stop" and that "they couldn't kill him for being sick." (*Id.*) Mr. Duncan purportedly made this statement despite the widely known fact that charges of child sexual assault leave prisoners vulnerable to attack by fellow inmates. Moreover, this alleged statement to Cruse—a total stranger—was the only directly incriminating statement that Mr. Duncan is alleged to have made in the four plus years between his arrest and trial.

f. The State's Closing Arguments Rely Heavily on Forensics and Snitch Testimony to Paint a Story of Calculated Horror and Brutality

The State closed with a wild story of vicious brutality supported in the main by the forensic and snitch testimony the State elicited during trial. The State's theory was that immediately after the child's mother left for work, Mr. Duncan—who had no history of sexual violence—viciously attacked the child, biting and raping her, and then drowned her to avoid getting caught. To try to fit the facts to this story, the prosecutor argued that Mr. Duncan had

time after killing the child to let her "bleed out" and clean up all evidence of blood in the home and stage the scene to look like an accident, including by putting dry flakes of oatmeal in the baby's mouth. (R. 4931.)

The State described the child as "molested, bitten, forcibly drown[ed]" (R. 4933), placing great emphasis on Dr. Hayne's testimony, arguing that his interpretation of the child's injuries—the "thumb print bruise" behind her head, "finger print marks" on the side of her neck, her torn frenulum, and bruising of the lips—was evidence of "specific intent to kill or inflict great bodily harm" (R. 4923). The State's closing argument emphasized that the forcible drowning was "[p]roved to you unrebutted by the marks on the baby's face, back of her head and on the side of her face. He held her down. He drowned her . . . She tore her frenulum." (R. 4977.) With respect to Dr. Hayne's conclusions about anal rape, the State pointed to S-4, a photograph, noting, "Folks, if I haven't showed you an attempt to inflict great bodily harm by S-4, you've never seen it." (R. 4927.) The State claimed the photo showed "an anus that was gaping open, dilated, ripped, torn and abused." (*Id.*)

The State then cited Dr. Hayne's conclusion of the time of death, arguing "[t]ime nails him[,] [t]ime got him, [t]ime convicts him." (R. 4931.) The closing argument contended that Dr. Hayne's time of death determination proved that Mr. Duncan did not immediately rush the child to the neighbors, as he claimed, but rather took the time to cover up a heinous crime—that he let the child bleed out and then washed her injuries. The State argued, "[y]ou guys that hunt know what happened. You hang them and let them bleed out . . . . It takes time to bleed out . . . . That's why it took so long for him to get next door. He had to wait. He had to wait. He had to clean it up." (R. 4931-32.)

The State ended this story by turning to the jailhouse snitch, Cruse, reminding the jury that Mr. Duncan made a full confession to Cruse: "[Cruse] told you information that only one person in this earth knew at the time and [that person] was Jimmie Duncan." (R. 4976.)

IV. Newly Discovered Evidence Completely Undermines the Forensic and Jailhouse Informant Testimony That the State Relied Upon at Trial

Newly discovered evidence reveals that evidence presented at trial was false and/or unreliable, and the most reasonable explanation for Haley's death is that she accidentally drowned in the bathtub. This newly discovered evidence includes the fact that the State withheld critical evidence in the form of the West Video from its own expert to ultimately elicit fraudulent testimony. Furthermore, since Mr. Duncan's trial, it has been acknowledged that bite mark

evidence is wholly unreliable. It has also become apparent since trial that Dr. Hayne's business was corrupt, that his examination of the child in this case was deficient and incomplete and thus unreliable, and that either the State failed to preserve evidence collected during the examination or Dr. Hayne never collected the specimens in the first place. Finally, newly discovered evidence reveals that the jailhouse snitch testimony against Mr. Duncan was false, with Michael Cruse now maintaining that Mr. Duncan never said he was guilty.

a. New Evidence Reveals that the State's "Bite Mark" Evidence Amounted to a Fraud on the Court

The West Video revealing that the visible injuries to the child's face appeared only after Dr. West repeatedly dragged a dental mold across it was never shown to the jury. Newly discovered evidence demonstrates that the State withheld the fact of this video and its connection to the marks on the child's body from the very expert it called to testify that the marks were bite marks matching Mr. Duncan's teeth. The State affirmatively admitted this fact in its Response to Defendant's Application for Post-Conviction Relief filed in January 2013 ("Answer"). (*Answer* at Tab 4, p. 2.) This rendered the expert's opinion false and unreliable.

In a deft sleight of hand, the State did not call Dr. West—who examined the body and made the video, but whose questionable practices, as discussed above, were beginning to tarnish his reputation—as its expert at trial. Instead, the State called Dr. Neal Riesner. Based solely on photographs Dr. West took after tampering with the child's body, Dr. Reisner offered elaborately detailed opinions of bite marks, as described above. What the jury did not learn, however, was that before hiring Dr. Riesner, the State first consulted with another forensic odontologist, Dr. Lowell Levine, a "founding father" of the ABFO,[10] and at the time one of the nation's leading bite mark experts. The State sent Dr. Levine the dental molds of Mr. Duncan's teeth and, likely, the photographs of the child's injuries for comparison. (Ex. 25 ¶ 7: Nov. 11, 2022 Affidavit of Dr. Lowell Levine ("Levine Aff.").)

Concerned about Dr. West's reliability, however, Dr. Levine told the State he would not participate in the case and referred the State to Dr. Riesner, a colleague with whom he had a close professional relationship. (*Id.* ¶ 9.) Shortly before trial, Dr. Riesner asked Dr. Levine to review a single photograph of a mark on the child's cheek, which Dr. Levine told him may or

[10] American Board of Forensic Odontology, Inc., *A Brief History* (Jun. 2006), http://www.abfo.org/wp-content/uploads/2012/11/2-Brief-History-ABFO.pdf.

may not have been a bite mark. (*Id.* ¶ 12.) Dr. Levine based this opinion solely on the one photograph. Dr. Levine later testified to this in a 1998 post-trial deposition. (*Id.* ¶ 14.)[11]

Critically, the State never asked either Dr. Levine or Dr. Riesner to view the West Video. Dr. Levine first saw the West Video only in October 2022, when it was provided to him by Mr. Duncan's current attorneys.

Dr. Levine's opinion following his viewing of the West Video is as follows:

> [I]t is my professional opinion that Dr. West's examination of Ms. Oliveaux as depicted in the West Video is completely inappropriate in the field of odontology. Dr. West totally compromised the validity of the evidence of the mark in question. Apparently, Dr. West never photo-documented the alleged bite marks in question prior to pushing dental study models of Mr. Duncan into the tissue of the cheek and other areas with what appears to be great force. From the standpoint of a forensic odontologist, it completely destroyed the value of those alleged injuries as evidence. Dr. West never photo-documented the injuries prior to that, and thus has no way of proving that the evidence was not altered.
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> . . .
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> [I]t would be totally inappropriate for anyone properly qualified in the field of forensic odontology to ever make any comparisons of any markings on Ms. Oliveaux and any individual's teeth, whether Mr. Duncan or anyone else. It is my opinion that any credible forensic odontologist practicing at the time who reviewed the West Video would have declined to attempt to do any comparisons with the marks on Ms. Oliveaux's body that were compromised by Dr. West's forcing study models into those areas.

(*Id.* ¶¶ 18-19.) Had Dr. Levine seen this video before Dr. Riesner contacted him on the eve of Mr. Duncan's trial, he would have:

> urged [Dr. Riesner] as strongly as I could not to testify as it would be a significant professional error to use evidence that was tampered with. Also, I would not have told Dr. Riesner in 1998 that the mark on the cheek depicted in the photograph may have been a bite mark. I also would not have testified during my 1998 Testimony that the mark on the cheek depicted in the photograph may have been a bite mark caused by Mr. Duncan, but instead that it could have resulted from Dr. West's manipulation of the evidence.

(*Id.* ¶ 17.) Moreover, had he seen the West Video when the State first contacted him, Dr. Levine would never have referred the State to Dr. Riesner. (*Id.* ¶ 20.) Rather, "to avoid a miscarriage of justice, I would have informed the D.A.'s Office of how deeply troubling it is that there was no documentation of the cheek of Ms. Oliveaux prior to Dr. West's 'examination.'" (*Id.*) In addition, he would have explained to the State that Dr. West's "direct comparison" technique should

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[11] It was not until after Mr. Duncan's trial had concluded that the defense first became aware that Dr. Levine might have information relevant to Mr. Duncan's case.

"never" be used because it "destroys any evidentiary value of an actual marking the body might have." (*Id.*) Finally, he would have "strongly recommended" to Dr. Riesner that he not testify and is confident that Dr. Riesner would have heeded his advice. (*Id.* ¶ 22.)

Based on his long-standing relationship with Dr. Riesner, Dr. Levine believes that the fact that Dr. Riesner never discussed the West Video with him indicates that the State never provided it to Dr. Riesner (*id.* ¶ 22), a fact later confirmed by the State itself (*Answer* at Tab 4, p. 2).

b. State Experts and Scientific Community Repudiate "Bite Mark" Matching as False Evidence

Though commonly admitted into evidence at the time of Mr. Duncan's trial, bite mark comparison is now understood to be false evidence. The Innocence Project has documented thirty-six cases in which bite mark evidence falsely linked an innocent person to a purported bite mark injury; twenty-nine were wrongful convictions after jury trials, and seven more were cases in which forensic dentists "matched" defendants to "bite marks," but the defendants were exonerated prior to trial, many after serving several years in jail. Incredibly, *seven* of these wrongful convictions are directly attributable to one or both of the examining experts in this case—Drs. West and/or Hayne.[12] In the aggregate, these wrongfully convicted men and women served over *four centuries* in prison for crimes they did not commit.[13]

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[12] *Kennedy Brewer*, The National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3047 (exonerated in 2008) (Hayne and West);

Levon Brooks, The National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3058 (exonerated in 2008) (Hayne and West);

Sherwood Brown, The National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6039 (exonerated in 2021) (Hayne and West);

Eddie Lee Howard, The National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5911 (exonerated in 2021) (Hayne and West);

Anthony Keko, The National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4203 (exonerated in 1998) (Hayne and West);

Leigh Stubbs, The National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5398 (exonerated in 2013) (West);

Tammy Vance, The National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=5399 (exonerated in 2013) (West).

[13] *See Description of Bite Mark Exonerations*, Innocence Project (Jul. 6, 2021), https://tinyurl.com/5xxjzmek (documenting known wrongful convictions and indictments).

The bite mark evidence admitted in Mr. Duncan's trial has now been recanted by the State's own experts, debunked by leading experts in the field, and discredited by the scientific community. However, because it was still widely accepted in the 1990s, Mr. Duncan's attorneys were unable to exclude it from the jury's consideration or effectively attack it at trial.

i. The State's Experts Repudiate Bite Mark Evidence

Since Mr. Duncan's trial, Dr. West and Dr. Hayne (now deceased) have disavowed the field's usefulness as a forensic identification method. 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?
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> 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.[14]

Similarly, Dr. Hayne, who also opined on the "bite marks" at trial, has testified that he "would be very reluctant to call in a forensic odontologist to do a bite mark comparison study."[15]

ii. Two Forensic Dentists, including a Past-President of the American Board of Forensic Odontology, also Reject Dr. Riesner's Testimony

Dr. Adam Freeman, past president of the ABFO, and Dr. Iain Pretty, one of the leading scientists in forensic odontology for over twenty years, reviewed both the literature and the methodology employed by Dr. Riesner to reach the conclusions he delivered during his trial testimony. (Ex. 28: Curriculum Vitae of Drs. Iain Alistair Pretty and Adam J. Freeman.) In their joint declaration, the forensic dentists summarized their findings:

> Dr. Neal Riesner, an ABFO board-certified odontologist, gave testimony at Mr. Duncan's trial that has since been rejected by the entire scientific community, including the ABFO. His testimony is now understood to be scientifically indefensible, both as to his conclusions about the abilities and limitations of bite mark comparison evidence generally, and as to his conclusions regarding the alleged bite marks at issue in this case.

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[14] Ex. 26 at 37: Deposition of Michael West, *Stubbs v. State*, No. 2011-387-LS-LT (Lincoln Cnty. Circuit Ct. Feb. 11, 2012).

[15] Ex. 27 at 172-74: Deposition of Dr. Steven Hayne, *Hayne v. Innocence Project*, No 3:09-CV-218-KS-LRA (S.D. Miss. Apr. 26, 2012).

(Ex. 29 ¶ 32: Dec. 12, 2022 Declaration of Drs. Iain Alistair Pretty and Adam J. Freeman ("Pretty/Freedman Dcl.").)

Drs. Pretty and Freeman explain in their declaration that since the time of Mr. Duncan's trial the "scientific community's understanding of bite mark evidence has shifted significantly as a result of new research and through the impartial review of the technique by a number of scientific bodies, as well as due to an astonishing and ever-growing number of wrongful convictions based on bite mark evidence." (*Id.* ¶ 6 (citing the change to the ABFO Reference Manual (*see infra* n.34 and the unanimus findings of the four major scientific reports discussed below).)

Drs. Pretty and Freeman's condemnation of the field of "bite marks" is also grounded in their own empirical research, which demonstrates that "even experienced, board-certified forensic dentists cannot reliably answer the threshold inquiry in bite mark analysis—whether the injury at issue is or is not a bite mark—rendering the discipline unreliable from the outset." (*Id.* ¶¶ 12-17.)

Drs. Pretty and Freeman ground their rejection of Dr. Riesner's forensic work in Mr. Duncan's case as follows:

> Dr. Riesner testified in this case that an abrasion on the child's cheek and two bruises, one on the child's elbow and another under the right ear, were human bite marks, even though he claimed that all three "bite marks" were created only by lower teeth, or "single arch" bite marks (Tr. at 1008-1010). But Dr. Riesner's conclusions about whether each injury was a bite mark have been undermined by the advances in the scientific understanding of bite marks.
>
> Dr. Riesner testified at trial that his diagnosis of a single arch bite mark was consistent with the "standard for establishing bite marks". R. 1037. At the time of his testimony, this was an accurate statement. However, analyzed under today's scientific understanding and ABFO Standards and Guidelines, *none* of the "single arch" injuries at issue could be diagnosed as a human bite mark. None of the injuries is a "circular or oval patterned injury consisting of two opposing (facing) symmetrical, U-shaped arches separated at their bases by open spaces." (citing the ABFO Standards and Guidelines' definition of a "bite mark").

(*Id.* ¶¶ 33-34.)

Drs. Pretty and Freeman also reviewed the West Video and Dr. West's assessment, including the "troubling question concerning the provenance of the injury of the cheek injury." (*Id.* ¶ 36). The injury on the child's cheek, they concluded, was "created by Dr. Michael West's manipulation of the dental cast against the child's face." (*Id.*) More specifically, Dr. West created the injury "when he placed Mr. Duncan's dental mold on the decedent's cheek and repeatedly

impressed it against the skin and dragged it across her face." (*Id.* ¶ 44.) It is for this reason—destruction of evidence—that the "direct comparison" method Dr. West used "is not a recognised methodology for bite mark comparisons." (*Id.* ¶ 43; *see also* Ex. 25 ¶¶ 18-19: Levine Aff. (Dr. West's method "completely destroyed the value of those alleged injuries as evidence.").)

Finally, Drs. Pretty and Freeman reviewed Dr. Richard Souviron's testimony. Although Dr. Souviron was a defense expert, the seismic shift in the scientific understanding of bite mark evidence discussed above had not yet occurred, and his testimony reflected many of the same false claims concerning the capabilities of bite mark evidence included in Dr. Riesner's testimony. Both Dr. Riesner and Dr. Souviron claimed that "single arch" bite marks could be reliably identified as human bites and used to "match" those injuries to a suspect. This claim an resulting testimony are today understood to be false, even by the standards of the ABFO. (Ex. 29 ¶ 34: Pretty/Freedman Dcl.) Moreover, Dr. Souviron's testimony claiming the ability to diagnose injuries as human bite marks; predict and describe the teeth that created a particular bite mark; and distinguish between bite marks created by adults and children, has likewise been shown to be false. (*Id.* ¶¶ 45-46 (citing TFSC Report).)[16]

In their conclusion, Drs. Pretty and Freeman emphatically reject all of the expert forensic testimony that was presented at Mr. Duncan's trial as "scientific" evidence establishing that Mr. Duncan "violently" and viciously bit the child's face, the areas under her ear, and her elblow:

> [A]pplying the contemporary scientific understanding of bite mark evidence (agreed by all authoritative bodies and the general scientific community to be junk science) in this case, none of the injuries that Dr. Riesner testified were bite marks are actually bite marks. Because that threshold inquiry cannot be satisfied in this case, there would be no comparison, under today's standards, between the injuries and any known dentition. Nor could any ABFO-certified forensic odontologist testify as to the source of any of the injuries in this case, which is contrary to what Dr. Riesner did at Mr. Duncan's trial.

(*Id.* ¶ 47.)

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[16] Indeed, it has been revealed since the time of trial that Dr. Souviron's bite mark matching testimony led to at least three wrongful convictions, and, in recognition of the discrediting of his field, that he has recanted his testimony in several cases. *See Description of Bite Mark Exonerations*, Innocence Project (Jul. 6, 2021), https://tinyurl.com/5xxjzmek (listing three of Dr. Souviron's wrongful convictions); *Gary Cifizzari*, The National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5650 (discussing Dr. Souviron's recantation prior to the exoneration of Gary Cifizzari, who served in excess of thirty-five years in prison for a murder and rape he did not commit).

iii. The Scientific Community Rejects Bite Mark Evidence

As noted, for much of the last four decades, bite mark evidence was an accepted forensic technique, generally understood by its practitioners and by the scientific community to be both valid and reliable. Forensic odontologists examining purported bite marks were thought to be capable of reliably distinguishing a human bite mark from other pattern injuries and identifying the source or likely source of an injury purported to be a bite mark.

The 2009 Report by the National Academy of Sciences ("NAS Report")[17] was the first independent examination of the validity and reliability of the alleged scientific foundations for bite mark comparison testimony by a neutral committee of scientists and represents the culmination of nearly four years of work.[18] This authoritative and groundbreaking report demonstrated the lack of biological, statistical, and epistemological foundation for bite mark comparison testimony. Although the NAS Report discussed numerous forensic fields, no other subject received criticism as scathing, with the NAS concluding that:

> (1) The ability of human dentition, if unique, to transfer a unique pattern to human skin and the ability of the skin to maintain that uniqueness has not been scientifically established.
>
> (2) A standard for the type, quality, and number of individual characteristics required to indicate that a bite mark has reached a threshold of evidentiary value has not been established. [19]

The NAS Report further found that no scientifically valid studies had ever been conducted to determine what aspects of the teeth and bite mark should be measured to make any such comparisons, and that "there is no established science indicating what percentage of the population or subgroup of the population could also have produced the bite."[20] As such, testimony purporting to identify a probable match between a biter and a bite mark has "inherent

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[17] *See* National Research Council, Committee on Identifying the Needs of the Forensic Science Community, *Strengthening Forensic Science in the United States: A Path Forward* (2009), https://www.nap.edu/catalog/12589/strengthening-forensic-science-in-the-united-states-a-path-forward ("NAS Report").

[18] Congress authorized and funded "the National Academy of Sciences to conduct a study on forensic science" and directed that the committee tasked with assessing and identifying the needs of the forensic sciences in this country to "include members of the forensics community representing operational crime laboratories, medical examiners, and coroners; legal experts; and other scientists as determined appropriate." *Id.* Before issuing its report, the NAS heard extensive testimony from a vast array of scientists, law enforcement officials, medical examiners, crime laboratory officials, investigators, attorneys, and leaders of professional and standard-setting organizations, including the ABFO, and conducted an extensive review of bite mark literature and research. *Id.*

[19] *Id.* at 175-76.

[20] *Id.* at 174.

weaknesses" and "basic problems" which have "led to questioning of the value and scientific objectivity" of the discipline.[21]

Seven years after the NAS Report, a blue-ribbon panel of scientists and lawyers from the Texas Forensic Science Commission ("TFSC") formally recommended a moratorium on admitting bite mark comparison testimony in all Texas criminal cases.[22] After considering the relevant evidence, the TFSC found that "there is no scientific basis for stating that a particular patterned injury can be associated to an individual's dentition," as Dr. Riesner purported to do at Mr. Duncan's trial.[23] Additionally, the TFSC found that there is "no scientific basis for assigning probability or statistical weight to an association [of a bite mark to a biter]," despite the fact that "these types of claims were once thought to be acceptable."[24]

In 2016, the President's Council of Advisors on Science and Technology ("PCAST"), an advisory group of the nation's leading scientists and engineers,[25] conducted an "extensive literature review" of more than 2,000 articles, papers, and other relevant literature, and heard testimony from across the spectrum of the forensic science community.[26] Like the NAS and the TFSC before it, PCAST found that what little research has been done on bite marks "cast[s] serious doubt on the fundamental premises of the field," and demonstrates that "forensic odontologists do not consistently agree even on whether an injury is a human bite mark at all."[27] Indeed, the PCAST Report concluded that that "the prospects of developing bite mark analysis into a scientifically valid method [are too] low" to justify "devoting significant resources to such efforts."[28]

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[21] *Id.* at 174, 176.

[22] Texas Forensic Science Commission, *Final Report on Complaint No. 15.07, National Innocence Project on Behalf of Steven Mark Chaney (Bite Mark Analysis)* (Apr. 12, 2016), https://www.txcourts.gov/media/1454027/fr_chaney-04122016.pdf ("TFSC Report").

[23] *Id.* at 11-12.

[24] *Id.* at 12.

[25] PCAST was a nineteen-member advisory group of the nation's leading scientists and engineers appointed by the President to augment the science and technology advice available to him from inside the White House and from cabinet departments and other federal agencies. Its membership included academics, scientists, government employees, and private practitioners.

[26] Executive Office of the President President's Council of Advisors on Science and Technology, Forensic Science in Criminal Courts: Ensuring the Validity of Feature-Comparison Methods Report of the President's Council of Advisors on Science and Technology (Sept. 20, 2016), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf ("PCAST Report").

[27] *Id.* at 83-85 (citing Drs. Pretty and Freeman's research).

[28] *Id.* at 9.

Most recently, October 11, 2022, the National Institute of Standards and Technology ("NIST") released its draft report examining the scientific basis of bite mark evidence.[29] As with every other scientific entity that has examined bite mark analysis, NIST condemned the technique as unscientific; specifically, finding that it "*lacks a sufficient scientific foundation.*"[30] NIST went on to conclude that diagnosis of an injury as a human bite mark is unreliable, as human dentition has not been demonstrated to be unique, and bite mark experts are not capable of reliably including or excluding an individual as the source of an alleged bite mark.[31] Similar to the TFSC, NIST cited as an authority for its conclusions the Construct Validity Study discussed above, noting that the Pretty/Freeman study "casts doubt on the utility of bite mark analysis as a viable method of excluding or not excluding individuals."[32] (Ex. 29 ¶¶ 12-18: Pretty/Freedman Dcl.)

The wholesale repudiation of bite mark comparison testimony has been echoed by dozens of prominent scientists, statisticians, and law-and-science scholars or practitioners, who have publicly stated that bite mark comparison evidence "stands on a foundation of very thin scientific support—if any at all."[33] In short, the overwhelming majority of the relevant scientific community has affirmatively rejected the validity of bite mark comparison testimony. The lack of even a single study showing accurate, positive associations between a putative biter and an injury confirms that this field is unreliable and that testimony purporting to identify an injury as a bite mark or an individual as the likely source of that mark must be—and today would be—excluded from a jury's consideration. *See Starks v. City of Waukegan*, 123 F. Supp. 3d 1036, 1052 (N.D. Ill. 2015) (finding it "doubtful that 'expert' bite mark analysis would pass muster under Federal Rule of Evidence 702," because FRE 702(c) requires that "expert testimony be 'the product of reliable principles and methods'").

Following the PCAST Report, the ABFO revised its standards and guidelines for board-certified forensic odontologists. (Ex. 29 ¶ 30: Pretty/Freeman Dcl. (citing March 2016 ABFO's

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[29] National Institute of Standards and Technology, U.S. Dep't of Com., *Bite Mark Analysis: A NIST Scientific Foundation Review* (Oct. 11, 2022), https://www.nist.gov/news-events/news/2022/10/forensic-bitemark-analysis-not-supported-sufficient-data-nist-draft-review ("NIST Report").

[30] *Id.* at 2 (emphasis added).

[31] *Id.* at 2.

[32] *Id.* at 23.

[33] Michael J. Saks, Thomas Albright, Thomas L. Bohan, *Forensic bitemark identification: weak foundations, exaggerated claims*, J.L. & Biosciences (Dec. 2016), https://tinyurl.com/34axe73x.

Diplomates Reference Manual[34] ("ABFO Reference Manual")).) These guidelines contained significant changes. First, contrary to both Dr. Riesner and Dr. Souviron's trial testimony, the field of forensic dentistry no longer accepts "single arch" bite marks. (*Id.* ¶¶ 34 (citing ABFO Reference Manual, *supra* n.34, at 115).) Additionally, when examining an injury to determine whether it may or may not be a bite mark, if a forensic dentist can conclude only that it is a probable bite mark, is inconclusive, or is not a bite mark, the analysis ends. (Ex. 29 ¶ 20: Pretty/Freeman Dcl.) Thus, today, if a forensic dentist encounters injuries they believe are only a probable bite mark, they do not (and cannot) evaluate it further or compare it to a known dentition. Thus, here, no comparison to Mr. Duncan's teeth could have been conducted.

Second, forensic dentists are no longer authorized to conclude that a given bite mark was made by a specific set of teeth. In other words, the analyzing dentist cannot conclude a given source "matches" the dental impression or offer any similar probabilistic testimony affirmatively identifying a source dentition to an unknown bite mark. Rather, the most a forensic dentist may validly conclude after comparing a bite mark with a given set of teeth is that the results are inconclusive, or the dentition can or cannot be excluded as having made the bite mark.[35]

Third, forensic odontologists may no longer offer testimony to a "reasonable medical dental certainty," as Dr. Riesner did here. (Ex. 29 ¶ 35: Pretty/Freeman Dcl. (citing R. 1011-12; ABFO Reference Manual, *supra* n.34).) This, too, is in line with advancements in scientific understanding since the time of Mr. Duncan's 1998 trial, and Dr. Riesner's trial testimony that he matched certain marks on the body with Mr. Duncan's dentition with "reasonable medical dental certainty" (R. 1011-12) would not have run afoul of the guidelines at that time. As reported by the National Commission on Forensic Science[36] in its recommendations to the Attorney General issued in March of 2016: "These terms have no scientific meaning and may mislead factfinders about the level of objectivity involved in the analysis, its scientific reliability and limitations, and the ability of the analysis to reach a conclusion."[37]

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[34] *Diplomates Reference Manual,* American Board of Forensic Odontology, Inc. (Mar. 2016), https://tinyurl.com/432keka2.

[35] *See* ABFO Reference Manual, *supra* n.33, at 102-03.

[36] The National Commission on Forensic Sciences consisted of forensic science service providers, research scientists, academics, law enforcement officials, prosecuting attorneys, defense attorneys, and judges. It was established in 2013 by the Department of Justice, in partnership with the National Institute of Standards and Technology, "to enhance the practice and improve the reliability of forensic science." (National Commission on Forensic Science, U.S. Dep't of Justice, https://www.justice.gov/ncfs.)

[37] Recommendation to the Attorney General Use of the Term "Reasonable Scientific Certainty", National Commission on Forensic Science, U.S. Dep't of Justice (Mar. 22, 2016), https://tinyurl.com/2bp3k896.

Finally, as noted above, the ABFO has repudiated the comparison of "single arch" bitemarks. (Ex. 29 ¶ 34: Pretty/Freedman Dcl.)

c. Dr. Hayne's Autopsy Business Is Exposed as Utterly Unreliable and Fundamentally Corrupt

Given what we know today, no capital conviction can rest on the forensic analysis and testimony of Drs. West and Hayne. In the time since Mr. Duncan's conviction, shocking investigative journalism pieces and a series of cases have made clear what in 1998 was not: the partnership between Drs. Hayne and West—responsible for the autopsy and bite mark examinations in Mr. Duncan's case—was responsible *for at least seven wrongful convictions* as well as myriad cases of falsified results while their private business was essentially allowed to operate as the Mississippi office of the medical examiner. This arrangement sacrificed medical and legal rigor, and ultimately, the rights of criminal defendants, like Mr. Duncan, who were wrongfully prosecuted and convicted of serious offenses.

Because of his arrangement with the State of Mississippi, Dr. Hayne was able to refer to himself as the "state designated pathologist," obfuscating a vitally important fact: he was categorically unqualified to perform autopsies. Indeed, Dr. Hayne *failed* his sole attempt at certification by the American Board of Pathology ("ABP")—the peer-governed association recognized by the American Medical Association as responsible for certification for this sub-specialty—a fact he lied about for years, including at the time of Mr. Duncan's trial.[38]

It has also come to light since 1998 that, in addition to obfuscating his qualifications, Dr. Hayne regularly misrepresented those qualifications on his curriculum vitae, claiming responsibility for articles he did not write and presentations he did not give.[39]

Despite his lack of qualifications, Dr. Hayne's business arrangement with Mississippi enabled him to turn his office into a major profit center, with Dr. Hayne churning through over 1,000 autopsies a year—over 1,200 in 1991 alone—well in excess of the guidelines of the

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[38] 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. (R. 1269; *see also, e.g.*, Ex. 30: Deposition of Steven Hayne, 56-57, *Vessel v. Alleman*, No. 99-0307-CI (Warren Cnty. Circuit Ct. Jun. 26, 2003); Ex. 31: Deposition of Steven Hayne, 48-49, *Bennett v. City of Canton Swimming Pool*, No. C1-96-0176 (Madison Cnty. Circuit Ct. Jun. 2, 2001); Ex. 32: Transcript of Record, 19, *State v. Townsend*, No. 2000-127-CR (Montgomery Cnty. Circuit Ct. Mar. 20, 2001); Ex. 33: Transcript of Record, 367-68, *State v. Williams*, No. 2004-048 (Washington Cnty. Circuit Ct. Oct. 18, 2004).) That explanation was completely false. The truth was that, at the point that he walked out of the exam, he was failing every single section. (*See* Ex. 34 at 25: May 5, 2011 Deposition of Steven Hayne.)

[39] *See, e.g.*, Ex. 35: Mar. 13, 2001 Curriculum Vitae of Steven T. Hayne (listing publications and presentations, but omitting authors' names).

National Association of Medical Examiners (NAME), the industry's primary professional organization. NAME strongly recommends no more than 250 autopsies a year—fewer if paired with administrative duties.[40] By NAME's standards, performing autopsies at the rate of Dr. Hayne amounted to gross negligence and a serious affront to the "minimum standards for an adequate medicolegal system."[41]

In the years since Mr. Duncan's trial, it has become clear that—whether from lack of qualifications or profit-chasing—Dr. Hayne's results were often, as in this case, wildly unreliable, if not outright fraudulent. For example, in 2007, Dr. Hayne performed an autopsy on Mississippi Department of Corrections inmate Randy Cheney, who died in custody several weeks after exhibiting signs of sepsis. (*See* Ex. 36: Complaint ¶¶ 17-28, *Cheney v. Collier*, No. 4:09CV00111 (N.D. Miss. Oct. 26, 2009).) Dr. Hayne concluded that Mr. Cheney's cause of death was not due to inadequate care for this infection but instead was "natural" due to hypertensive heart disease and coronary artery disease. (Ex. 37: Aug. 30, 2007 Final Autopsy Report of Dr. Steven T. Hayne (Case No. AME# 8-Q5-07).) Critical to this determination was the normal condition of Mr. Cheney's spleen, about which Dr. Hayne included detailed information, noting that it "assume[d] its usual left upper quadrant abdominal location, and is noted to weigh 180 grams" and that the "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.*) The problem was that Mr. Cheney *had no spleen.* It had been surgically removed in its entirety in 2003. (*See* Ex. 38: Nov. 28, 2003 Tissue Examination for Randy Cheney by North Mississippi Medical Center's Department of Pathology.)

In another case in 1998, the same year as his testimony in this case, Dr. Hayne found cause of death in an autopsy to be natural causes, but, after the state medical examiner in Birmingham performed a second autopsy, it was revealed that many of the internal organs Dr.

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[40] *Performance Audit 13*, Office of the Medical Examiner (Dec. 15, 2011), http://www.denvergov.org/Portals/741/documents/Audits2011/Medical%20Examiner%20Audit%20Report%2012-15-11.pdf; *Forensic Autopsy Performance Standards 10*, Nat'l Ass'n of Med. Exam'rs (2011), http://thename.org/index2.php?option=com_docman&task=doc_view&gid=160&Itemid=26.

[41] Vincent J. Di Maio & Dominic Di Maio, Forensic Pathology 19 (2nd ed. 2001); *see also Forensic Autopsy Performance Standards 10*, Nat'l Ass'n of Med. Exam'rs (2011) http://thename.org/index2.php?option=com_docman&task=doc_view&gid=160&Itemid=26 (Standard B4.5 states that "[a]utopsies 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.").

Hayne claimed to have examined *had not been touched*—he had not even emptied the decedent's pockets.[42] Indeed, it has become clear that Dr. Hayne's autopsies were rife with intentional misrepresentations and gross negligence, if not outright fraud.[43]

d. The State Failed to Preserve Key Evidence from Dr. Hayne's Autopsy—to the Extent It Ever Existed

Compounding Dr. Hayne's deficient and incomplete examination and written autopsy report in this case is the fact that none of his findings can be reviewed against the forensic evidence he claims to have collected because he failed to preserve any of that evidence. Despite his claim that he excised and microscopically analyzed numerous tissue samples, there are no such samples, tissue slides, or paraffin blocks in existence today, nor are there any histology notes, lab reports, or other documentation of Dr. Hayne's purported analyses other than the final autopsy report itself. (Ex. 39: Apr. 27, 2010 Affidavit of Dr. Hayne (explaining that he destroyed his notes); Ex. 40: Feb. 11, 2020 Affidavit of Sam Howell.) There is not even a single photograph of the actual autopsy that Dr. Hayne claims to have performed.

The State failed to preserve other vital evidence as well. As discussed above, the Crime Lab destroyed the blood evidence before it was ever tested for toxins or anything else. The remaining items from the sexual assault kit also were not properly preserved. A report from the Crime Lab indicates that the samples were returned to the Ouachita Parish Coroner's Office in 2013, but the Coroner has not been able to find them, and they are not in the police or State files. (Ex. 41: Aug. 26, 2022 Affidavit of Warren Lee; Ex. 42: Nov. 19, 2019 Affidavit of Melisa Guice.)

e. The Scientific Community Today Recognizes Non-Abuse Causes for the Anal Abnormalities Seen in this Case

At Mr. Duncan's trial, two expert witnesses, including one who was not even a pathologist, claimed that only penetration by a penis could have caused the post-mortem appearance of the child's anus. This is false. As explained in the report of Dr. Janice Ophoven, a nationally renowned pediatric forensic pathologist, there have been significant developments

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[42] *See* Radley Balko, *CSI: Mississippi: A Case Study in Expert Testimony Gone Horribly Wrong*, Reason Magazine, (Oct. 8, 2007), http://reason.com/archives/2007/10/08/csi-mississippi/print.

[43] *See id.*; *see also* Radley Balko, "Indeed, and Without a Doubt", Reason Magazine (Aug. 2, 2007, 7:42 AM), http://reason.com/archives/2007/08/02/indeed-and-without-a-doubt; Jerry Mitchell, Doctor's Autopsy Abilities Targeted, Clarion Ledger, Apr. 27, 2008; Radley Balko, CSI: Mississippi, Wall Street Journal (Oct. 7, 2007), http://online.wsj.com/article/SB119162544567850662.html.; Radley Balko, *Solving Kathy Mabry's Murder: Brutal 15-Year-Old Crime Highlights Decades-Long Mississippi Scandal*, Huffington Post (Nov. 7, 2013, 9:46 a.m.),http://www.huffingtonpost.com/2013/01/17/kathy-mabry-murder-steven-hayne-michaelwest_n_2456970.html.

in the diagnosis of child sexual abuse since the time of Mr. Duncan's trial. (Ex. 43 at 3: Dec. 13, 2022 Report of Dr. Janice Ophoven ("Ophoven Rpt.").) For example, in 1998, the presence of anal dilation, erythema (redness), fissures, and bruising were all considered diagnostic of sexual abuse. (*Id.*) Today, however, *none* of these findings is considered useful in the diagnosis of sexual penetration. (*Id.* at 3-4.) In fact, the only indicator diagnostic of forcible penetration is a very specific description of deep lacerations with exposure of subdermal connective tissue, that is, with exposed fat. (*Id.* at 4.) Careful examination of an acute laceration would show "tissue bridging" and "brisk bleeding with evidence of tearing into the deeper perianal tissues." (*Id.*) Dr. Ophoven concludes: "None of these findings were described here." (*Id.*)

f. Newly Discovered Evidence Reveals that Michael Cruse's Testimony Was Unreliable

In the years since Mr. Duncan's trial, new evidence has come to light that demonstrates Michael Cruse's story of Mr. Duncan's jailhouse "confession" was false. First, Cruse himself today tells a different story, maintaining that Mr. Duncan never said he was guilty. Second, another person who was in the cell with Cruse and Mr. Duncan confirms this account. Third, the State failed to turn over key information—Cruse's letter offering his testimony in exchange for leniency, his recorded statement to police and the State, his full criminal history, and the photo array from which he allegedly identified Mr. Duncan—all of which constitute newly discovered evidence and, together, reveal the classic hallmarks of false jailhouse snitch testimony: Cruse was seeking leniency in exchange for providing testimony about the alleged confession; his story changed over time and came to include salient additional details only after he met with police and prosecutors; and he gave false testimony at trial.

i. Cruse Now Maintains that Mr. Duncan Did Not Confess

Michael Cruse now completely contradicts his testimony at trial, stating that Mr. Duncan never said he was guilty of raping or murdering the child. Eileen Rice, an investigator retained by current counsel, met with Cruse on November 9, 2022. Cruse described his interaction with Mr. Duncan to her. (Ex. 44: Dec. 8, 2022 Affidavit of Eileen Rice ("Rice Aff.").) He described being in the holding cell in Monroe, Louisiana, when a new guy was brought in who, while sobbing, told him about the death of a baby. (*Id.* ¶ 8.) Cruse said the man told Cruse that he tried to resuscitate the girl and that his little finger may have accidentally slipped into her rectum. (*Id.*) Cruse related to Ms. Rice that the man said the death was *accidental* and the man *never said he was guilty*. (*Id.* (emphasis added).)

ii. A Witness to Mr. Duncan's Conversation with Cruse Confirms Mr. Duncan Never Said He Was Guilty

Cruse's current account is consistent with that of another man who was in the holding cell with Mr. Duncan and Cruse at the time Mr. Duncan allegedly confessed. Post-conviction counsel obtained the declaration of Michael Lucas, who, unlike Cruse, had nothing to gain from his statement and who said he remembered the conversation that took place that day. He said he spoke with Mr. Duncan, who "started telling me about his charge and [Mr. Duncan] said that he didn't do anything and that's the way he found her . . . . [H]e just cried over and over again saying he didn't do it he didn't do it." (*See* Ex. 45: Declaration of Michael Lucas.) When asked whether Mr. Duncan may have confessed to someone else while he was in the holding cell on December 28th, Mr. Lucas was unequivocal: "No, and if anyone said he did I would call them a liar." (*Id.*).

iii. Previously Undisclosed Evidence Reveals Cruse Was Seeking Leniency in Exchange for His Testimony

The State failed to provide the defense with a letter from Cruse offering to testify about two purported jailhouse "confessions" in exchange for leniency. (Ex. 46: Letter to D.A. from Cruse[44] ("D.A. Letter").) When he wrote the letter, Cruse was facing felony burglary charges. (Ex. 47: Jan. 5, 1994 Bill of Information.) In the letter, Cruse claimed to have heard not one, but two jailhouse confessions. (Ex. 46: D.A. Letter.) One was from Lyndell Scott, who was in jail on aggravated rape charges and who Cruse claimed told him "exactly what he did" and gave a "complete confession." (*Id.*) The second concerned "a guy in here for killing that 2 year old baby," who "broke down and started crying (bawling) and told me one horrible story about his crime (a complete confession) after he had first tried to deniey [sic] it." (*Id.*) The letter did not mention Mr. Duncan's name, nor did it provide any details about Mr. Duncan, his case, or any alleged confession.[45]

Cruse's intention in sending the letter was clear: he was seeking "the obvious[]," as he put it—freedom from incarceration. He explained that he "would like to try and rectify my situation" and that his family needed him out of jail to be working to support them financially.

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[44] This was obtained by post-conviction counsel during discovery inspections of the case file held at the District Attorney's office.

[45] In fact, the limited information in the letter is the same information that Cruse later told the police and prosecutor that he had seen on TV while in jail. (*See* Ex. 48: Feb. 1, 1994 Statement of Michael Wayne Cruse ("Cruse Police Statement") at 7 (describing seeing something on the TV about a man who "was arrested for killing a two-year-old").)

In addition to his willingness to testify that two different people confessed to him, he offered to "help in other areas," such as serving as a drug informant "if I can work this [situation] out." (*Id.*)[46]

iv. Previously Undisclosed Evidence Demonstrates that Cruse's Story Changed Over Time to Align with the State's Theory

As noted above, Cruse's initial letter contained no details about Mr. Duncan or the contents of his alleged confession. In fact, Cruse provided details only after several news accounts concerning the case (*see* Ex. 53: Monroe News-Star Articles), and after Cruse met with the lead detective (Det. Sasser) and prosecuting attorneys. (*See* Ex. 48: Cruse Police Statement.) Moreover, the recording of Cruse's statement to the police and State—a recording that the State failed to produce before trial[47]—reveals that there was a discussion between Cruse and the investigating officials before his official statement began. (*See id.* at 2 (Det. Sasser stating that Cruse "relayed to us a few minutes ago a conversation [Cruse] had had with one of the fellow inmates" and asking Cruse to "go over this and tell me again what you said" now that it was being recorded).) It was only after his discussion with the investigating officials—a critical conversation about which he was never cross-examined at trial—that Cruse for the first time provided vivid details involving sexual assault—details that conformed perfectly to the State's theory of the case.

For example, in his recorded statement, Cruse said that Mr. Duncan, in the presence of multiple fellow prisoners, told him he let the baby suck on his penis as she had done before and that she began choking on it. (Ex. 48 at 3: Cruse Police Statement.) Similarly, Cruse said in his statement that Mr. Duncan said there was bleeding around the baby's anus, and that he ran bath water to wipe the blood off of her bottom. (*Id.* at 4.) Cruse described having the impression that

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[46] The other reasons Cruse gave in his letter—that he was doing it for his family (a pregnant wife and three children) who desperately needed him; that he wanted to help because he came from a law enforcement family that included a retired detective father who was shot in the chest in the line of duty; and that he was a good, religious, and non-violent person who simply "messed up" (*see id.*)—are all lies. It is true that he had a pregnant wife and three children at the time, but he had a long history of being violent and abusive toward them. (*See* Ex. 49 ¶¶ 12, 14, 16, 19, 21: Dec. 13, 2022 Affidavit of Eugenia Crump ("Crump Aff.").) In California in 1990, he pled guilty to two counts of battery relating to charges of infliction of injury to wife or child. (*See* Ex. 50: Kings County Court Records for M. Cruse.) This and other prior criminal history appeared in a background check run by the police department on December 27, 1993, but were never disclosed to the defense. (*See* Ex. 51: Dec. 27, 1993 Louisiana State Police Criminal Record Search ("Background Report").) Moreover, in 1992, the State of California had removed one of Cruse's children from the home, and Cruse's parental rights to the child were eventually terminated effective March 11, 1994. (Crump Aff. ¶ 12; Ex. 52: San Diego County Court Records for M. Cruse.) Cruse's pregnant wife considered his December 25, 1993 arrest a "Christmas miracle," and she begged the police officer to keep him in jail long enough to allow her and her two remaining children to escape, which they did by Greyhound bus. (Ex. 49: Crump Aff. ¶¶ 15-16.)

[47] The transcript of Cruse's statement to investigators was obtained by post-conviction counsel during discovery inspection of the case file held at the District Attorney's office.

the baby was hurt so badly that Mr. Duncan would have to take her to the hospital, and there was "no way just [to] bandage it up" or "cover up what he'd just d[one]." (*Id.* at 4-5.)

There were other inconsistencies between his letter to the D.A. and his recorded statement as well. For example, in his recorded statement, Cruse shortened the time period in which he shared a cell with Mr. Duncan from one day (Ex. 46: D.A. Letter) to "no longer than say thirty minutes to an hour" (Ex. 48 at 6: Cruse Police Statement). Later, at trial, Cruse testified that Mr. Duncan had been in the cell with him for approximately two hours before he suddenly confessed. (R. 4461.)

Moreover, Cruse's identification of Mr. Duncan is unreliable. In his letter, he did not mention Mr. Duncan by name, referring to him only as "that guy in here." (Ex. 46: D.A. Letter.) After meeting with the prosecutor and lead detective, Cruse named Mr. Duncan and said he could point him out if he were to see him. (Ex. 48 at 2: Cruse Police Statement.) However, at trial, Cruse refused to swear to his identification of Mr. Duncan as the man he spoke with, testifying only that he "thought" it was him. (R. 4456.) Cruse testified that he had previously identified Mr. Duncan from a photo array; however, the photos from the array—which were not produced to the defense before trial[48]—include each person's date of arrest. (Ex. 54: Compilation of Lineup Photos (indicating that the dates of arrest were December 28, 1993, December 31, 1993, January 1, 1994, and January 22, 1994, respectively).) The only person represented in the photo array who was arrested before the date of the alleged "confession"—December 28, 1993—is Mr. Duncan. As such, Cruse's "identification" of Mr. Duncan is meaningless.

Such changes and inconsistencies could have served as valuable impeachment material for Mr. Duncan's trial counsel, but, because the State failed to disclose the D.A. Letter, the recorded statement, or photos from the array, there was no way for defense counsel to demonstrate the numerous glaring contradictions in Cruse's testimony or how his story evolved to more closely align with the State's theory. Now that they have come to light, however, they reveal Cruse's story for what it was—lies that Cruse attempted to use as currency to get what he wanted from the State.[49] Put simply, the State used patently unreliable snitch testimony to bolster junk science.

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[48] This was obtained by post-conviction counsel during discovery review of the case file held at the West Monroe Police Department.

[49] As discussed more fully in Mr. Duncan's previous submissions to this Court, there are numerous indications that Ouachita Parish law enforcement, led by Deputy Sheriff Jay Via, made a concerted effort to manufacture a case against Mr. Duncan in the years he was in custody prior to trial. (*See* Mr. Duncan's *Supplemental Petition for*

v. The State Knowingly Elicited False Testimony from Cruse

The State elicited false testimony from Cruse to give the appearance that he had not received any benefit in exchange for his testimony. Under questioning from Assistant District Attorney Mike Ruddick, Cruse testified at Mr. Duncan's trial that he was currently serving time because of a probation revocation obtained by Ruddick himself. (R. 4452; 4467-68.) To support this testimony, Ruddick offered into evidence a "certified copy" of his April 24, 1996 motion to revoke probation. (*See* S-27.) However, at the time Ruddick purportedly filed this document, the motion had already been filed by a *different* prosecutor, and the court had already set a hearing date.[50] As such, Ruddick's motion would have been entirely superfluous, and the implication that Ruddick was personally responsible for Cruse's incarceration was false and misleading. In any event, when he testified at Mr. Duncan's trial, Cruse was not serving time for a *probation* violation, but rather for violating his later-issued *parole* by absconding to Florida, a fact the District Attorney's Office was fully aware of when it elicited Cruse's false testimony. (Ex. 57: Dep't of Corrections Records.)[51]

The State also did not disclose that Cruse had theft charges pending against him at the time he testified; charges that were quickly dismissed after trial by none other than Ruddick. (Ex. 58: May 7, 1998 Motion to Dismiss (showing motion to dismiss per JMR (John Michael Ruddick) and RBS (Robert B. Staley).)[52]

V. Other Evidence That Would Be Admissible

As explained in the reports of Drs. Robert Bux and Judy Melinek, two well-respected and—unlike Dr. Hayne—board-certified forensic pathologists, the most likely explanation for the child's death is that it was the result of an accidental drowning. Although, without the

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Post-Conviction Relief and Motion for Evidentiary Hearing, filed December 23, 2008 ("First Supplemental Petition"), at 131; 134-37.) In fact, the same jail nurse whom Cruse says encouraged him to write the letter to the D.A. took steps to convert another inmate, Clifton Williams, into a state actor. She approached Mr. Williams twice to ask if Mr. Duncan had said anything to him about his case and told Mr. Williams to report anything that Mr. Duncan did say about the charges pending against him. (*See id.* at 139-40; *see also* Ex. 55: Dec. 5, 2008 Declaration of Clifton Williams.)

[50] On April 12, 1996, Judge Benjamin Jones of the 4th Judicial District Court of Ouachita Parish, issued an order setting a hearing on the "undersigned" Assistant District Attorney's Motion to Revoke probation. (Ex. 56: Apr. 12, 1996 Order.) Though the signature on the motion is not legible, it is clear that it is not Ruddick's.

[51] This was obtained by post-conviction counsel pursuant to a request submitted to the Louisiana Department of Public Safety and Corrections under the Louisiana Public Records Act, La. R.S. 44:1, *et seq.*, and a search of records at the Ouachita Parish 4th Judicial Circuit Court.

[52] It should be noted that Cruse was repeatedly arrested and in and out of jail during the time that he was testifying—giving him an ongoing incentive to cooperate. (*See* Ex. 44 ¶¶ 9-10: Rice Aff.) It is now clear that defense counsel did not have a complete record of his criminal history for impeachment purposes, particularly regarding his parole violation and the theft charges pending against him at the time of Mr. Duncan's trial, as discussed above.

physical evidence that should have been created and preserved from the autopsy, it is impossible to make any conclusive determinations, Drs. Bux and Melinek, who wrote separate reports without conferring with one another, are resolute that there is utterly no support for Dr. Hayne's conclusions. Dr. Hayne described a vicious attack where Mr. Duncan repeatedly bit, anally raped, and forcibly drowned the child. However, reviewing all of the physical evidence available today, Drs. Bux and Melinek each found the child's death and injuries to be best explained as a combination of old injuries, the after-effects of resuscitation efforts, and infection, as well as the result of Dr. West's having tampered with the child's body. These explanations are consistent with both the evidence and Mr. Duncan's contemporaneous account of what transpired on the day the child died.

a. Dr. Hayne's Testimony Was at Best Unreliable and, More Likely, a Fraud on the Court

The only way to definitively diagnose the cause of the child's various conditions and death would be through the microscopic examination of slides of tissue from each of the relevant areas, along with testing of the affected tissue for the presence of certain compounds and viral or bacterial infection, and testing of her blood for toxic substances. It is impossible to come to conclusions regarding "acute" injuries and the depth of lacerations without microscopic examination of slides. (Ex. 59 ¶ 43: Dec. 8, 2022 Report of Dr. Robert C. Bux ("Bux Rpt."); Ex. 60 at 2-3: Dec. 4, 2022 Report of Dr. Judy Melinek ("Melinek Rpt.").) The process of creating such slides (removing the relevant organs, segmenting and fixing them, and then microscopically examining them) is time-consuming and takes between several hours and several days. (Ex. 59 ¶ 44: Bux. Rpt.)

The documentation reveals that Dr. Hayne had at most two hours in which to complete his entire internal examination from beginning to end. As such, *it is highly unlikely that he actually created slides at all* (*Id.* ¶ 46), which is consistent with what we know today about Dr. Hayne's recklessness, gross incompetence and dishonesty. Indeed, Dr. Hayne's documentation includes no photographs of any internal examination, excised tissue, or slides, and no tissue samples, slides, or paraffin blocks (used in the process of creating slides) exist today. Further, descriptions of Dr. Hayne's purported "observations" of the slides in the autopsy report are often incomplete, contradicted by other evidence, and unverifiable. (*See, e.g.*, Ex. 60 at 2-3: Melinek Rpt. ("The microscopic sections of the right occipital scalp overlying the skull fracture only reportedly show 'rare extravasated erythrocytes' and do not appear to have been tested for the

presence of iron (hemosiderin), which would indicate whether this injury was acute, or from the prior documented dresser accident. The skull bone itself at the point of the non-displaced fracture was not sampled, so the injury could not be accurately forensically dated. These are severe methodological oversights on the part of the forensic pathologist."); *id.* at 4 (discussing Dr. Hayne's notations regarding the anal injuries "no slides are available for me to review, so I cannot substantiate the reliability of this description").)

Moreover, Dr. Hayne skipped other steps vital to the process. He never had any tissue samples tested for compounds that might help him age certain injuries, or for bacterial or viral infection, and he came to his conclusions without any toxicology report on the child's blood. (Ex. 60 at 6: Melinek Rpt. ("[O]mission of toxicology testing is a huge oversight that violates basic forensic methodology and standards in child deaths . . . intoxication by medications or drugs can be an overriding cause of death, or a reason for the unconsciousness leading to the trauma, which would make it a significant contributory condition to drowning.").)

Finally, Dr. Hayne's determination regarding the child's time of death—central to the State's effort to undermine Mr. Duncan's account of the morning—is not defensible as a matter of science. The child's PO2 level upon admission to the hospital is simply not diagnostically significant. (Ex. 59 ¶ 59: Bux Rpt.; Ex. 60 at 6-7: Melinek Rpt. ("There is no basis whatsoever in the peer-reviewed literature that would support an estimation of time of death or even 'down time' (time since last stopped breathing) based on PO2 measurements in drowning cases.").) More relevant to time of death is the child's core body temperature, which was recorded in the emergency room as 98.6, suggesting that CPR was commenced very soon after her heart stopped beating, consistent with Mr. Duncan's account. (Ex. 59 ¶ 60: Bux Rpt.)

b. The Best Explanation for What Happened to Haley, Based on Current Scientific Understanding, Is Accidental Drowning, with the Observed Injuries Caused by Resuscitation Efforts, Infection, and Normal Post-Mortem Dilation of the Anus

Given the evidence that exists today, the best explanation for Haley's death is exactly what Mr. Duncan repeatedly told investigators: that it was due to accidental drowning, a leading cause of death among infants in the United States. (Ex. 59 ¶ 19: Bux Rpt.) It would not be unexpected for a child, particularly one with Haley's history of seizures and head injuries, to have a seizure in the bath and drown. (Ex. 60 at 3, 7: Melinek Rpt.; *see also id.* at 7 (noting that Dr. Hayne's statement that "the brain showed no evidence of seizure activity" inappropriately

"[gave] the court the impression that a seizure could be affirmatively diagnosed by examining the brain. It can't").)

Moreover, nothing in the records reflects that Haley suffered any bruising to her knees, elbows, nose or chin—all areas where one would expect to find injuries if she were forced facedown into a tub. (Ex. 59 ¶ 6: Bux Rpt.) The injuries that she did exhibit are best explained as either the expected result of life-saving measures or as older injuries suffered in the documented accidental falls she took in the weeks before her death. Her torn frenulum, the marks on her cheeks, the scratches on her neck, and bruising to the back of her head would all be expected after-effects of intubation, the tape used to hold the tubing in place, attempts to find her pulse, and the pressure sustained by her head while CPR was performed, respectively. (*Id.* ¶¶ 7-10.) Moreover, accidental drowning is consistent with Mr. Duncan's contemporaneous account of what happened when the child died, which is a diagnostically relevant consideration. As Dr. Melinek concludes:

> The material I have reviewed does not support a conclusion of forcible drowning. Dr. Hayne's testimony and opinions with regard to this mechanism of death are wildly inappropriate and outside the standards of a forensic pathologist expert when testifying. His lack of qualifications notwithstanding, it is his testimony itself that indicates that he is outside the realm of expertise.

(Ex. 60 at 5: Melinek Rpt.).

Given the evidence available today, the best explanation for the condition of the child's anus is that she sustained some tearing and redness as a result of over-zealous washing and/or infection. (Ex. 60 at 4: Melinek Rpt. ("In the absence of sperm or a sexual assault kit indicating a perpetrator with a sexual intent, in my experience these types of injuries can be seen in toddlers who are toilet training when a caregiver attempts to clean them following a toileting accident, as Mr. Duncan reported doing."); Ex. 59 ¶¶ 18-19: Bux Rpt.) These irritants, along with the natural dilation of the anus that occurs after death (Ex. 60 at 4: Melinek Rpt.), would fully explain the appearance of her anus. Moreover, this explanation would be consistent with Mr. Duncan's account of the child's accident in the tub, as well as her grandmother's report to the police—a report that the State failed to produce to the defense before trial—describing the child complaining of pain and a "real redness" in the child's anal area in the days before her death, when she was in her grandmother's care. (Ex. 61 at 170: Dec. 22, 1993 Tr. of Police Interview of Julie Layton.). As Dr. Bux explains, the "even radial lines surrounding the circumference of the anus" are much more likely to be caused by infection than penetration, which would normally

result in lacerations that are not symmetrical, of even depth, or radial around the circumference of the anus. (Ex. 59 ¶¶ 18, 19: Bux Rpt.)

Additionally, Dr. Hayne's description of one-half inch lacerations is not supported by the physical evidence. Most obviously, the tearing he described would necessarily be accompanied by significant bleeding, and the photographs show no evidence of acute bleeding, clots, epidermal injuries, scabs, inflammation, or scarring. (Ex. 59 ¶ 19: Bux Rpt.; Ex. 60 at 4: Melinek Rpt. (describing the photographs and noting "[t]he injuries themselves are superficial and are not associated with life-threatening internal organ injury or blood loss").). As noted above, there was no blood whatsoever found at the scene.

Finally, and critically, there are no other indicia of rape. The sexual assault kit used to test the child was negative for any semen. No semen was found anywhere on the scene or on the samples taken from Mr. Duncan's clothing, or the gauze wipings of his genital area and the bathtub. (Ex. 59 ¶ 20: Bux Rpt.; Ex. 60 at 5: Melinek Rpt.). In short, according to Dr. Melinek, Dr. Hayne's testimony "that the anorectal injury was 'consistent with an adult male penis making penetration' is without any scientific basis or explanation given the absence of semen." (Ex. 60 at 5: Melinek Rpt.)

VI. The Evidence Available Today Demonstrates that Mr. Duncan Is Innocent and that No Reasonable Juror Would Find Him Guilty Beyond a Reasonable Doubt

The newly discovered evidence demonstrates what at trial was obscured by bad science, shoddy forensic work, ineffective assistance of counsel, and prosecutorial malfeasance: Mr. Duncan is innocent of intentional rape and murder. Haley's death was a tragic accident.

In brief, the newly discovered evidence in this case consists of the following:

- The State perpetrated a fraud on the court by presenting expert testimony that Mr. Duncan's dentition "matched" marks on the child's body while at the same time withholding key evidence from that expert;
- The State "experts" who examined the child's body have been exposed as having a pattern of fabricating evidence and coming to unscientific conclusions, leading to at least seven wrongful convictions;
- The scientific community has repudiated bite mark "matching";
- The scientific community recognizes non-abuse causes for the anal condition observed in this case;
- The State failed to preserve key evidence from Dr. Hayne's autopsy—to the extent it ever existed; and
- New information—which the State failed to disclose before trial—vitiates the jailhouse snitch testimony regarding the only evidence of a "confession" by Mr. Duncan.

This evidence meets Louisiana's standard for newly discovered evidence meriting a new trial: it is "new, reliable, and noncumulative evidence that would be legally admissible at trial and that was not known or discoverable at or prior to trial" and that "when viewed in light of all of the relevant evidence . . . proves by clear and convincing evidence that, had [it] been presented at trial, no rational juror would have found the petitioner guilty beyond a reasonable doubt." La. C. Cr. P. art. 926.2(B). To prove a matter by clear and convincing evidence means to demonstrate "the existence of the disputed fact must be highly probable, that is, much more probable than its non-existence." *State v. Henry*, 302 So. 3d 1167, 1173 (La. App. 4th Cir. 2020).

a. This Evidence Is New, Reliable and Non-Cumulative Legally Admissible Evidence that Could Not Have Been Discovered at the Time of Trial

It is now clear that the State's forensic case rested on evidence that we today understand was at least unreliable if not outright fraudulent. The forensic evidence goes to the heart of the case against Mr. Duncan—identifying him as the perpetrator of brutal violence against the child. Indeed, it was only after learning of discredited findings by a discredited forensic pathologist (Dr. Hayne) that investigators charged Mr. Duncan with capital murder. Moreover, the only evidence of a "confession" by Mr. Duncan came from a jailhouse informant who helped the State paint a scene of horrific sexual abuse and murder. However, newly discovered evidence casts serious doubt on the veracity of his testimony. All of this newly discovered evidence is new, reliable and non-cumulative legally admissible evidence that could not have been discovered at the time of trial. La. C. Cr. P. art. 926.2(B)

i. The Current Scientific Understanding of "Bite Marks" and the Appearance of a Normal Anus Are Newly Discovered Evidence

The advancement of science in general—and the understanding of the validity of both bite mark comparison and the diagnosis of child sexual assault based on the appearance of the anus, in particular—has been found by courts across the country to constitute newly discovered evidence. *See People v. Prante*, No. 5-20-0074, 2021 WL 1381347 at *31-32 (Ill. App. Ct. Apr. 12, 2021) ("Although bite mark evidence has been admitted into evidence in Illinois for more than 50 years . . . . the scientific community has only recently come to question the scientific foundation of this evidence."); *Howard v. State*, 300 So. 3d 1011 (Miss. 2020) (same); *State v. Denton*, No. 04-R-330, 2020 WL 7232303 at *2 (Ga. Super. Ct. Feb. 7, 2020) ("[N]ew scientific developments" that "challenged the reliability of the bite mark evidence presented at [petitioner's] trial" were newly discovered evidence); *Ex parte Chaney*, 563 S.W.3d 239, 278

(Tex. Crim. App. 2018) (reversing conviction based in part on scientific developments discrediting bite mark evidence and recantation by trial expert); *Commonwealth v. Kunco*, 173 A.3d 817, 824 (Pa. Super. Ct. 2017) (citing testimony by three ABFO board-certified dentists at a post-conviction evidentiary hearing concerning the change in scientific understanding of the limitations of bite mark evidence); *State v. Hill*, 125 N.E.3d 158, 168 (Ohio Ct. App. 2018) ("[The] trial court's own statements acknowledge[ed] that the [discrediting of] bite mark evidence is newly discovered evidence"); *Haas v. Virginia*, 74 Va. App. 586, 627 (2022) (vacating sodomy conviction based, in part, on newly discovered evidence of the evolution in scientific understanding of what constitutes a "normal" anus); *see also Smith v. State*, No. S22A1051, 2022 WL 17813596 (Ga. Dec. 20, 2022) (remanding for hearing on motion for new trial based on advancements in the understanding of "Shaken Baby Syndrome"); *Jones v. State*, No. 03-K-98-003820, 2021 WL 346552 (Md. Ct. Spec. App. Feb. 2, 2021) (changes in scientific understanding of Shaken Baby Syndrome constituted newly discovered evidence); *Ex parte Henderson*, 384 S.W.3d 833, 833-34 (Tex. Crim. App. 2012) (granting a new trial based on newly discovered evidence after testimony from medical examiner that he "now believes there is no way to determine with a reasonable degree of medical certainty whether [the victim]'s injuries resulted from an intentional act of abuse or an accidental fall").

Specifically, the evidence at issue here regarding both bite marks and the diagnosis of child sexual assault based on the appearance of the anus is new, since it has emerged only since Mr. Duncan's trial and, as such, Mr. Duncan could not have presented this view of the science at trial. For example, though Mr. Duncan offered expert testimony from Dr. Souviron critiquing the State's *conclusions* concerning bite marks, Dr. Souviron *endorsed the technique*—including, specifically, the "matching" of single-arch bite marks—that is now acknowledged by not only by the scientific community but also the State's own experts to be unreliable. *Compare with State v. Jackson*, 570 So. 2d 227, 230 (La. Ct. App. 1990) (bite mark and fingerprint opinions that *could* have been rendered at the time of trial not newly discovered evidence).

Similarly, the State's admission that it withheld key information from its testifying expert about how Dr. West tampered with the child's body constitutes newly discovered evidence, as does Dr. Levine's opinion that this withholding effectively resulted in fraudulent expert testimony that Mr. Duncan repeatedly bit the child. Dr. Levine's affidavit is new—he signed it in November 2022—and could not have been discovered at the time of trial, since Mr. Duncan

was not aware of Dr. Levine's involvement in the case until after the trial had concluded. The evidence is non-cumulative—Dr. Riesner was not confronted with the West Video at trial; indeed, the defense was precluded from introducing it at all—and it directly undercuts the basis of Dr. Riesner's conclusions that the marks on the child's body matched Mr. Duncan's dentition, evidence that was key to establishing Mr. Duncan's supposed intent.

Dr. Riesner and Dr. Souviron both testified that the literature and the ABFO endorsed the diagnosis of "single arch" bite marks. That testimony was accurate at the time, as Dr. Souviron conceded. Today, however, the literature and the ABFO—the very organization that provided both experts with board certification—entirely reject such conclusions. (Ex. 29 ¶¶ 12-17: Pretty/Freeman Dcl.) Had these dramatic changes been in place at the time of trial, Dr. Reisner, as a board-certified "diplotate" of the ABFO, would not been permitted to diagnosis any of the injuries as human bite marks, to say nothing of "matching" them to anyone. (*Id.*)

Moreover, Drs. Hayne and Wests' own repudiation of bite mark-matching, as well as the shocking revelations about their malfeasance, corruption, and incompetence is newly discovered evidence. While at the time of trial there were some concerns about Dr. West's reputation, since Mr. Duncan's conviction, it has become clear that precisely the kind of unreliable techniques and outright fabrication of evidence undertaken by both Drs. Hayne and West has resulted in *at least seven wrongful convictions*. Though newly discovered evidence concerning only a witness's credibility "ordinarily will not support a motion for a new trial," courts possess the discretion to grant a new trial where—as here—the witness's testimony "is uncorroborated and dispositive of the question of guilt and it appears that had the impeaching evidence been introduced, it is likely that the jury would have reached a different result." *State v. Beaner*, 974 So. 2d 667, 680-81 (La. App. 2d Cir. 2007), *writ denied*, 983 So. 2d 896 (La. 2008). Here, despite his central role in the examination of the child's body at autopsy, Dr. West never testified, was never cross-examined about his handling of the child's body. Exposing such fraudulent conduct and blatant evidence tampering in front of Mr. Duncan's jury surely would have led the jury to reach a different conclusion.

ii. Cruse's Recantation and Revelations About His Incentives to Lie Constitute Newly Discovered Evidence

Finally, the new information undermining Cruse's testimony about Mr. Duncan's one-and-only purported confession—his position today that Mr. Duncan never said he was guilty, the statement of another cellmate corroborating this, the letter Cruse sent to the DA baldly

seeking freedom in exchange for "confession" testimony, the subsequent emergence of details in his story that perfectly fit the State's theory of the case, as well as the fact that it is now clear that the State elicited testimony from Cruse falsely suggesting that he received no benefit for his testimony—also qualifies as newly discovered evidence. *See State v. Ayo*, 167 So. 3d 608 (La. 2015) (information undermining State's key witness constituted newly discovered evidence meriting a new trial). None of this information was available to Mr. Duncan at the time of his trial.

b. The Newly Discovered Evidence Eviscerates the State's Forensic Evidence Used to Establish a Brutal Attack

There were no eyewitnesses to this tragic death. Mr. Duncan had no history of sexual violence, and he provided a compelling contemporaneous statement to investigators. There was no blood anywhere at the scene. There was no semen anywhere: not in the rape kit, Mr. Duncan's clothes or genitals, or the child's diaper. Given the total repudiation of bite mark-matching, the evolution of the diagnosis of child sexual abuse based on the appearance of the anus, and the evidence that the State withheld the West Video from its testifying expert, it is doubtful that *any* of the forensic evidence the State relied on to establish that Mr. Duncan viciously attacked the child—that is, that he bit, raped or forcibly drowned her—would be admissible today. Expert testimony in Louisiana is inadmissible absent a demonstration that it is "the product of reliable principles and methods" and has been "reliably applied" to the facts of the case. La. C. Ev. art. 702. Courts make this reliability determination taking into account the factors laid out in *Daubert*[53] and adopted by the Louisiana Supreme Court in *Foret*: whether the theory or technique has been tested; whether it "has been subjected to peer review and/or publication;" "the known or potential rate of error;" and "the existence and maintenance of standards controlling the technique's operation." *Foret*, 628 So. 2d at 1122 (citing *Daubert*, 509 U.S. at 593-94). Recognizing that "scientific conclusions are subject to perpetual revision," *Daubert* requires courts to do more than rely on past decisions admitting or precluding expert testimony, and instead to reevaluate the question of reliability *in each case*. 509 U.S. at 597. As such, that courts have traditionally accepted bite mark or this type of conclusion regarding child sexual abuse testimony uncritically and without limitation is not controlling. *See State v. Lee*, 217 So. 3d 1266,

[53] *See, e.g., Motorola Inc. v. Murray*, 147 A.3d 751, 754 (D.C. 2016) (finding *Daubert*'s "general holding—setting forth the trial judge's general 'gatekeeping' obligation—applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge").

1273 (La. Ct. App. 4th Cir. 2017) ("[T]o the extent that developments in our understanding of the forensic sciences create doubt with respect to any methodology, the State cannot rest solely on its history of acceptance in the courtroom or the witness' history of being accepted as an expert as a proxy for a showing that the testimony is reliable in the case at hand."); *c.f. Starks*, 123 F. Supp. 3d at 1052 (finding it "doubtful that 'expert' bite mark analysis would pass muster under Federal Rule of Evidence 702," because Federal Rule of Evidence 702(c) requires that "expert testimony be 'the product of reliable principles and methods'"); *State v. Denton*, No. 04-R-330, 2020 WL 7232303 at *6-8 (Ga. Super. Ct. Feb. 7, 2020) ("[T]he bite mark evidence used at trial is now known to be unsupported by science . . . . The future of admissibility of such evidence is dubious at best.").

Where, as here, the evolution in scientific understanding conclusively demonstrates that a forensic technique is unreliable and unvalidated, it will not be admitted into evidence. Moreover, given the flagrant malfeasance underpinning the physical examination in this case—Dr. West's having tampered with the child's body, Dr. Hayne's having failed to undertake the necessary microscopic examinations, and the established reputation of both doctors for having done (or failed to do) precisely the same things in the past—the State would be unable to demonstrate that the examination techniques were reliable "as applied." Indeed, Mr. Duncan would be able to present Dr. Levine's opinion that, given Dr. West's tampering with the body, admission of any bite mark evidence would yield "a miscarriage of justice." (Ex. 25 ¶ 20: Levine Aff.)

Even in the unlikely case that the bite mark and pathology evidence were admitted in court at a new trial, with present-day scientific understanding, Mr. Duncan's attorneys—assuming competent attorneys this time[54]—would be able to discredit the evidence through the presentation of expert testimony about the repudiation of the science as well as effective cross-examination regarding the exposure of the fraudulent and indefensible practices of Drs. Hayne and West, all of which, as discussed above, would have been impossible at the time of trial.

c. The State's Spoliation of Critical Forensic Evidence Entitles Mr. Duncan to, at a Minimum, a Curative Instruction at a New Trial

The State's destruction since Mr. Duncan's trial of all biological material from the autopsy—the tissue slides, paraffin blocks, and sexual assault kit samples—is additional newly

[54] *See Petitioner's Supplemental Petition for Post-Conviction Relief* for claims of ineffective assistance of counsel.

discovered evidence that further undermines the strength of its case. At a new trial, Mr. Duncan would be entitled, at a minimum, to an instruction that testing of those materials would be exculpatory. Courts have broad discretion to sanction a litigant's spoliation of evidence such as through an adverse inference instruction, exclusion of evidence or even dismissal, "since the destruction of evidence clearly interferes with the court's ability to fairly administer justice." *Carter v. Hi Nabor Super Market L.L.C.*, 168 So. 3d 698, 703-04 (La. App. 1st Cir. 2014).

To determine the appropriate sanction, if any, courts examine the relevance of the spoiled material, the culpability of the spoliator, and what type of sanction will least prejudice the opposing party while deterring such conduct by others in the future. *See Schmid v. Milwaukee Flee Tool Corp.*, 13 F.3d 76 (3d Cir. 1994). As to culpability, spoliation encompasses a broad range of acts beyond those that are purely intentional or done in bad faith, such as destruction where the party had a duty to preserve the evidence or where there is pending or anticipated litigation. *See BancorpSouth Bank v. Kelinpeter Trace, L.L.C.*, 155 So. 3d 614, 640 (La. App. 1st Cir. 2014) (A litigant that "has notice that certain evidence within its control is relevant to pending or imminent litigation . . . has an obligation to preserve the evidence."); *see also Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) (holding that the duty to preserve evidence arises when a party knows or reasonably should know that the evidence may be relevant to pending or anticipated future litigation).

Where—as here—someone charged with a crime can establish bath faith, spoliation of evidence can even amount to a due process violation. *State v. Seals*, 83 So. 3d 285 (La. Ct. App. 5th Cir. 2011) ("Due process requires that the State provide a defendant with any exculpatory evidence in its possession that is material to defendant's guilt or punishment, regardless of the good faith or bad faith of the prosecutor. Where a defendant claims that his due process rights have been violated due to the State's failure to preserve potentially useful evidence, the defendant has the burden of showing that the State acted in bad faith.").

Mr. Duncan is seriously prejudiced by the destruction of the autopsy materials which, if available, would likely conclusively contradict Dr. Hayne's foundation-free findings. As for the State's culpability with respect to the missing microscopic slides and paraffin blocks, as discussed at length, above, the evidence suggests blatant malfeasance. The impossible time frame, lack of documentation, incomplete measurements, and contradictory notations all strongly suggest that Dr. Hayne not only never performed the proper procedures to create the

slides or blocks that would have allowed him to examine and preserve the evidence, but also *lied to the court* about having done so. That he lied is not only supported by the evidence in this case but is consistent with the many cases that have come to light since Mr. Duncan's trial in which he did precisely the same thing—that is, claimed his conclusions were supported by examinations that it was later demonstrated he never undertook. Moreover, the unanimous opinions of the pathologists who have reviewed the remaining evidence is that Dr. Hayne's conclusions were wrong, and that the child most likely had an ano-genital infection and suffered injuries from prior accidents and resuscitation efforts—something that Mr. Duncan could prove had the State not spoliated the relevant evidence.

As such, at a new trial, the State's case—already devastated by the repudiation of the forensic evidence of biting and rape presented at trial and the total unravelling of the reputations of Drs. Hayne and West—would be further weakened by an instruction that, had these materials been preserved for testing, Dr. Hayne's conclusions would have been contradicted. Indeed, given the stark evidence of the State's bad faith, the spoliation of evidence arguably amounts to a due process violation. *See Seals*, 83 So. 3d 28.

d. The Newly Discovered Evidence Proves by Clear and Convincing Evidence that No Reasonable Juror Could Find Mr. Duncan Guilty Beyond a Reasonable Doubt

With today's slate of evidence, it is at least highly probable, *State v. Henry*, 302 So. 3d 1167, 1173 (La. App. 4th Cir. 2020)—if not crystal clear—that no reasonable juror could find Mr. Duncan guilty beyond a reasonable doubt of rape and intentional murder.[55] La. C. Cr. P. art. 926.2(B). The only evidence of any attack comes from two sources: (1) the State's "experts," who it is now clear were all either lying, tampering with evidence, relying on outdated science, tricked by the State's failure to share full information, or some combination of the four; and (2) Michael Cruse, whose testimony, similarly, is now highly suspect. Without these two sources—or even with them, but in light of the mountain of evidence now casting significant doubt on their reliability—there is no meaningful physical evidence of *any* attack, no meaningful physical evidence to support the State's contention that Mr. Duncan had time to clean up a crime scene, and no meaningful evidence of any confession.

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[55] At most, a jury may have found Mr. Duncan guilty of Negligent Homicide under La. R.S. 14:32. Notably, this is not a lesser included offense of first degree murder. *See* La. R.S. 14:30. As such, even if Mr. Duncan is guilty of negligent homicide, he is still factually innocent of first degree murder and entitled to relief under Louisiana Code of Criminal Procedure article 926.2.

It is highly probable that this new slate of forensic evidence, alone, would change the outcome of the trial. The impact of this kind of scientific evidence on jurors—and, by extension, the outcome of trials—cannot be overstated. As the Supreme Court has noted, "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." *See Daubert*, 509 U.S. 579; *see also United States. v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004) ("Simply put, expert testimony may be assigned talismanic significance in the eyes of lay jurors, and, therefore, the district courts must take care to weigh the value of such evidence against its potential to mislead or confuse."); *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974) (expert scientific evidence may "assume a posture of mystic infallibility in the eyes of a jury of laymen"); Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence Is Sound: It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991) ("Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it.").

The bite mark and pathology evidence at issue here are particularly prejudicial because they are direct evidence of horrific violence against the child. The impact of "evidence" that a child was raped is self-evident and, paired with "evidence" of biting, is powerfully prejudicial. Indeed, bite mark evidence is among the most prejudicial forms of forensic evidence ever introduced in this country's legal system. Unlike DNA, fingerprints, or firearms matching, there is virtually never an innocent explanation for a suspect to bite someone, particularly at or near the time of death, as was alleged in Mr. Duncan's case.

Bite mark evidence is junk science, even when performed by more credible experts than Dr. West. Yet no critique of the discredited technique was put before the jury. Instead, Dr. Reisner was presented as a highly qualified, "board certified diplomate" of ABFO and the chief forensic dentist for Westchester County Medical Examiner's office. He was permitted to claim that "single arch" bite mark were "accepted" in his profession and was even permitted to tell the jury that he had "presented" a single arch case "to the American Academy of Forensic Sciences" and, as such, "was a well known and documented case and accepted by my profession." (R. 1028.) Leveraging his status as an "expert," Dr. Riesner testified in the most graphic terms about the "a harsh and violent bite," that it "wasn't [gentle] little pressure it was a harsh violent pressure," the injury "was definitely a violent bite, harsh, not a [gentle] thing to small child." (R. 1021-23.) He added that a "torn frenulum" in the child's mouth would "have to" have been caused by a "harsh pull, hard or violent, in other words it's just not an accident"; instead, it "had

to be caused by trauma." (R. 1026-27.) He further testified that the "literature" confirmed that in sexual assault cases, it was "common that bite marks appear on the cheek." (R. 1029.) More prejudicial "expert" testimony is difficult to conceive of, yet none of Dr. Riesner's assertions and conclusions had any basis in science whatsoever. It was false, inflammatory rhetoric presented to Mr. Duncan's jury as conclusive scientific evidence of guilt.

In overturning convictions, courts have recognized the unique, unfair prejudice of bite mark evidence in particular. *See, e.g.*, *Ex parte Chaney*, 563 S.W.3d 239, 258 (Tex. Crim. App. 2018) (observing that bite mark evidence, "which once appeared proof positive of . . . guilt, no longer proves anything"); *Howard v. State*, 300 So. 3d 1011, 1019 (Miss. 2020) (acknowledging Howard's statements about the murder were "suspicious" but reversing conviction because bite mark evidence was "by far the State's most important evidence at Howard's trial"); *People v. Prante*, No. 5-20-0074, 2021 WL 1381347 at *27 (Ill. App. Ct. Apr. 12, 2021) ("[T]he fact that the injury was definitively identified as a human bite mark by the State's expert witnesses was likely enough to seal the petitioner's fate").

In light of the wholesale repudiation of these techniques and the unfair prejudice caused by their use at trial, courts across the country have found both the discrediting of bite mark matching and diagnosis of child sexual assault based on the appearance of the anus to be newly discovered evidence meriting a new trial. *See Prante*, 2021 WL 1381347 at *31-32 (bite mark); *Howard*, 300 So. 3d 1011 (same); *State v. Denton*, No. 04-R-330, 2020 WL 7232303 at *2 (Ga. Super. Ct. Feb. 7, 2020) (same); *Chaney*, 563 S.W.3d at 278 (same); *Commonwealth v. Kunco*, 173 A.3d 817, 824 (Pa. Super. Ct. 2017) (same)); *Hill*, 125 N.E.3d at 168 (same); *Haas v. Virginia*, 871 S.E.2d 257, 278 (Va. App. 2022) (diagnosis of child sexual assault based on appearance of anus); *see also Jones v. State*, 03-K-98-003820, 2021 WL 346552 (Md. Ct. Spec. App. Feb. 2, 2021) (evolution of pathology/Shaken baby syndrome); *Ex parte Henderson*, 384 S.W.3d 833, 833-34 (Tex. Crim. App. 2012) (same).

Similarly, the new evidence totally undermines the credibility of the only person to allegedly have heard anything even approximating a confession from Mr. Duncan. Informant testimony is highly unreliable in the best of circumstances.[56] Here, not only has Cruse backed off of this version of the story and acknowledged that Mr. Duncan never said he was guilty, but

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[56] *See Informing Injustice: The Disturbing Use of Jailhouse Informants*, Innocence Project (2019), https://innocenceproject.org/informing-injustice/.

the newly discovered evidence demonstrates that he was peddling potential confessions to the State, hoping to receive leniency, that his story evolved to contain just the details the State needed to clinch its case, and that the prosecutor misled the jury by suggesting he was personally responsible for Cruse's incarceration. Courts have found that evidence undermining the credibility of a key witness to be newly discovered evidence meriting a new trial. *State v. Ayo*, 167 So. 3d 608, 613-14 (La. 2015) (granting a new trial where new evidence of one witness's evolving story and the other's having received transactional immunity rendered the credibility of these two key witnesses "objectively tenuous").

Indeed, at a new trial, rather than a grotesque story of pure horror involving rape, biting, blackouts, a panicked forcible drowning, and a cover-up involving tremendous quantities of blood that Mr. Duncan—cold and calculating—cleaned up before seeking help for the child, the jury would understand what in fact happened in this case. Mr. Duncan left Haley alone in the bath and, tragically, she drowned. Mr. Duncan is in fact innocent of having raped or intentionally murdered the child, and it is highly probable that no reasonable juror would disagree.

The conclusion that the child's death was accidental is consistent with what detectives thought when they first charged Mr. Duncan with only negligent homicide based on their observations of the scene, the child's injuries in the hospital, and Mr. Duncan's statements. This accidental death conclusion is also consistent with the evidence as it developed: the fact that testing revealed no bleeding at the scene and no semen in the sexual assault kit, the bathtub, the diaper, or on either the child's or Mr. Duncan's clothes. Moreover, it is consistent with Mr. Duncan's heartbreaking real-time account of what happened when the child died and with the fact that she was at a higher risk of drowning in the tub due to her recent head injuries and seizure history. Further, this conclusion is consistent with the opinions of today's experts, who have concluded that the most likely cause of the child's death was accidental drowning precipitated by a seizure, that her anus displayed the effects of diaper rash and perhaps overzealous cleaning, and that the marks on her body were likely either old injuries or injuries caused by resuscitation efforts. Paired with an inference that testing of the spoliated autopsy materials would be exculpatory, this evidence, taken as a whole, renders it highly probable that no reasonable juror would find Mr. Duncan guilty beyond a reasonable doubt. *See* Art. 926.2(B); *Henry*, 302 So. 3d at 1173.

VII. Supplement to Claims Presented in Mr. Duncan's Supplemental Petition for Post-Conviction Relief Related to Newly Discovered Evidence

The newly discovered evidence outlined above also supports claims previously presented in *Petitioner's Post-Conviction Pleadings*.[57] Those claims are hereby supplemented pursuant to Article V, § 2 of the Louisiana Constitution and Louisiana Code of Criminal Procedure articles 924 to 930. Mr. Duncan incorporates by reference the facts cited in his federal and state constitutional law as well as the facts cited in *Petitioner's Post-Conviction Pleadings*, as well as Mr. Duncan's *Reply to State's Answer to Petitioner's Application for Post-Conviction Relief*, which is filed simultaneously with this supplement.

a. Newly Discovered Evidence Demonstrates Repeated Constitutional Violations (Claims I & IV)

The newly discovered evidence regarding both the forensic and jailhouse informant testimony further supports Mr. Duncan's claim that his conviction was obtained in violation of his right to Due Process. *Brady v. Maryland*, 373 U.S. 83 (1963); *Kyles v. Whitley*, 115 S. Ct. 1555 (1995); *Napue v. Illinois*, 360 U.S. 264 (1959) and *Giglio v. United States*, 405 U.S. 150 (1972).

i. Newly Discovered Evidence Reveals Repeated *Brady* Violations (Claims I & IV)

The State failed to disclose the information that would have fundamentally undermined the twin pillars of the State's case against Mr. Duncan: the forensic evidence demonstrating a brutal attack, and jailhouse informant testimony of Mr. Duncan's purported "confession." These failures entitle Mr. Duncan to a new trial.

A new trial is warranted where, as here, the State failed to disclose evidence favorable to the accused and material to guilt or punishment. *See* La. C. Cr. P. art. 723(B); *State v. Felde*, 422 So. 2d 370, 383-84 (La. 1982), *cert. denied*, 461 U.S. 918 (1983); *Brady*, 373 U.S. at 87; *United States v. Agurs*, 427 U.S. 97, 107-11 (1976). The State's duty to disclose favorable evidence under *Brady* exists whether or not a defendant specifically requests the favorable evidence, *see id.*, and covers not only exculpatory evidence but also information that could be used to impeach State witnesses. *See Giglio*, 405 U.S. at 154; *United States v. Bagley*, 473 U.S. 667, 676 (1985).

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[57] In addition to Mr. Duncan's *First Supplemental Petition* (*see supra* n.48), *Petitioner's Post-Conviction Pleadings* collectively include Mr. Duncan's *pro se Petition for Post-Conviction Relief and Request for Counsel* filed on October 15, 2002 ("Pro Se Petition"), Mr. Duncan's *Amendment to Initial Amended Petition for Post-Conviction Relief* filed March 18, 2010 ("First Amendment to Supplemental Petition"), and Mr. Duncan's *Second Amendment to Initial Amended Petition for Post-Conviction Relief, Motion to Compel Answer and Request for Status Conference* filed April 20, 2012 ("Second Amendment to Supplemental Petition").

It also includes evidence—admissible or not—that it is reasonably likely would lead to exculpatory or impeachment evidence. *Brady*, 373 U.S. at 87; *Kyles*, 514 U.S. at 437; *Wood v. Bartholomew*, 516 U.S. 1 (1995).[58] Furthermore, the intent of the State is irrelevant when considering a failure to disclose material evidence, which requires reversal "irrespective of the good faith or bad faith of the State." *Brady*, 373 U.S at 87.

A *Brady* violation is material to guilt or punishment if the new evidence "is sufficient to 'undermine confidence' in the verdict." *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (quoting *Smith v. Cain*, 132 S. Ct. 627, 630 (2012)). For example, undisclosed evidence is material if it "would have raised opportunities to attack . . . the thoroughness and even the good faith of the investigation," or could have been used to "attack[ ] . . . the investigation as shoddy," and lessen the credibility of the State's case. *Kyles*, 514 U.S. at 445. Similarly, undisclosed evidence is material if it would have enabled the defense to "construct a plausible alternative narrative of the crime and raise reasonable doubt in the minds of the jurors." *Bies v. Sheldon*, 775 F.3d 386, 400 (6th Cir. 2014). The determination of materiality turns on evaluation of the *cumulative* effect of all the undisclosed evidence on the jury, rather than evaluation of the materiality of each individual piece of evidence. *Wearry*, 136 S. Ct. at 1007.

As discussed *supra* (at Section IV), newly discovered evidence reveals that the State withheld the fact of the West Video and its connection to the marks on the child's body from its testifying bite mark expert, rendering his opinion false and unreliable. (Claim I.)

Similarly, as discussed *supra* (at Section IV), the State failed to disclose key information regarding the jailhouse informant who provided the only evidence at trial of any confession by Mr. Duncan—testimony that the prosecution relied upon heavily to make its case. Specifically, as discussed, above, the State failed to disclose Cruse's letter to the D.A. seeking leniency in exchange for testimony regarding purported jailhouse confessions, his recorded statement demonstrating how his story evolved over time to conform to the State's theory of the case, and information concerning his criminal history, including the fact that he had charges pending

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[58] *See also Ellsworth v. Warden*, 333 F.3d 1, 5 C.A. 1 (N.H. 2003) ("[G]iven the policy underlying *Brady*, we think it plain that evidence itself inadmissible *could* be so promising a lead to strong exculpatory evidence that there could be no justification for withholding it. *Wood v. Bartholomew* implicitly assumes this is so."); *Akers v. Commonwealth*, 172 S.W.3d 414, 417 (Ky. 2005) ("[T]he Commonwealth's failure to disclose Trooper White's assault report prejudiced [the defendant's] ability to prepare a defense. Defense counsel labored under a misconception that there was no physical evidence. We cannot reasonably conclude that, had Akers been provided the assault report, defense counsel would have proceeded in the same manner or the jury would have reached the same result."); *Taylor v. Commonwealth*, 41 Va. App. 429, 433 (Va. App. 2003) (noting that *Brady* is violated by the non-disclosure of evidence which would lead to admissible exculpatory evidence).

against him at the time he testified that were quickly dismissed after Mr. Duncan's trial. Together, this evidence totally discredits Cruse's testimony. (Claim IV.)

The State's failures to disclose information devastating to the two key pillars of its case—the forensic evidence purporting to establish a vicious attack as well as the only "confession" evidence—violated its *Brady* obligations and entitle Mr. Duncan to a new trial. *See Brady*, 373 U.S. 83; *Agurs*, 427 U.S. 97; *Kyles*, 514 U.S. at 433; *Bagley*, 473 U.S. at 676; *see also Ham v. State*, 760 S.W.2d 55 (Tex. App. 1988) (reversing conviction where State concealed fact that it had consulted an expert whose opinion matched that of the defense expert regarding timing of injuries); *see also Floyd v. State*, 902 So. 2d 775 (Fla. 2005) (reversing conviction on *Brady* grounds where State suppressed evidence included a letter written by jailhouse informant "offering cooperation and seeking a deal"); *Conyers v. State*, 790 A.2d 15 (Md. 2002) (reversing murder conviction due to State's suppression of evidence showing that a jailhouse informant requested a benefit when he first approached the police).

ii. Newly Discovered Evidence Reveals that Mr. Duncan's Conviction Was Obtained Using False Evidence (Claims I & IV)

The newly discovered evidence similarly reveals that these twin pillars of the State's case—the forensic and jailhouse informant evidence—rested on testimony that was false and misleading. A new trial is required where the State has obtained a conviction based on testimony that it knew or should have known was false or misleading, where the testimony could "in any reasonable likelihood have affected the judgment of the jury." *Giglio*, 405 U.S. at 154 (quoting *Napue*, 360 U.S. at 271). Indeed, as the Supreme Court has held "deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." *Id.* at 153 (internal quotation marks omitted). This is true whether the false testimony goes to the credibility of a witness or directly to the defendant's guilt, and regardless of whether the State's missteps were willful or inadvertent. *Napue*, 360 U.S. at 269-70; *see also State v. Broadway*, 753 So. 2d 801, 814 (La. 1999).

As discussed *supra* (at Section IV), newly discovered evidence reveals that the State withheld the fact of the West Video and its connection to the marks on the child's body from its testifying bite mark expert, rendering his opinion false and unreliable. (*See* Claim I.)

Moreover, as discussed *supra* (at Section IV), Dr. Hayne was a fraud, and newly discovered evidence reveals that he repeated engaged in precisely the types of fraudulent practices suggested by what remains of the physical evidence here—that is, that he skipped entire

portions of an autopsy examination and came to wholly unsupportable diagnostic conclusions. (*See* Claim I.)

Similarly, as discussed *supra* (at Section IV), the State elicited false testimony from Cruse that bolstered his credibility. (*See* Claim IV.)

Thus, newly discovered demonstrates that the lynchpin of the prosecution's case was predicated on false testimony, and as such, Mr. Duncan's due process rights were violated, and he must be granted a new trial. *See Napue*, 360 U.S. at 269; *Giglio*, 405 U.S. at 92; *Miller v. Pate*, 386 U.S. 1 (1967); *Agurs*, 427 U.S. at 103; *see also Anderson v. South Carolina*, 709 F.2d 887, 888 (4th Cir. 1983) (State's presentation which created inference that bruises on arms were imparted at time of death violated due process where medical opinion in autopsy report indicated bruises may have been several days old); *Turner v. Ward*, 321 F.2d 918, 920-21 (10th Cir. 1963) (State's use of expert medical testimony that a rape had been committed when the prosecutor knew the medical opinion only supported sodomy violated due process); *Foster v. Lockhart*, 811 F.Supp. 1363 (E.D. Ark. 1992), *aff'd* on other grounds, 9 F.3d 722 (8th Cir. 1993) (writ granted where State presented false serological evidence/argument in rape case).

iii. The Use of What Is Now Understood to Be False Forensic Evidence Violated Mr. Duncan's Due Process Rights (Claim I)

The State's reliance on "what new scientific evidence has proven to be fundamentally unreliable expert testimony," such as the aforementioned expert opinions regarding pathology and bite marks, renders Mr. Duncan's resulting conviction fundamentally unfair in violation of his constitutional right to due process. *See Han Tak Lee v. Glunt*, 667 F.3d 397, 403 (3d Cir. 2012) (quoting *Keller v. Larkins*, 251 F.3d 408, 413 (3d Cir. 2001)); *see also Gimenez v. Ochoa*, 821 F.3d 1136, 1145 (9th Cir. 2016) ("We join the Third Circuit in recognizing that habeas petitioners can allege a constitutional violation from the introduction of flawed expert testimony at trial if they show that the introduction of this evidence 'undermined the fundamental fairness of the entire trial.'") (quoting *Lee v. Houtzdale SCI*, 798 F.3d 159, 162 (3d Cir. 2015)); *Ege v. Yukins*, 485 F.3d 364, 375 (6th Cir. 2007) (holding that the "improper admission of certain evidence injurious to the defendant" violates due process when it "deprive[s] a defendant of her rights to a fair trial" (emphasis omitted)); *see also Ex parte Henderson*, 384 S.W.3d 833, 834 (Tex. Crim. App. 2012) (per curiam) (remanding for a new trial where the petitioner's murder conviction was obtained through now-discredited scientific evidence).

Courts across the country have found that use of such grossly unreliable scientific evidence, like the now-debunked scientific evidence admitted against Mr. Duncan at his trial, amounts to a due process violation by depriving "a defendant of a fair trial as required by the Fifth and Sixth Amendment." *United States v. Ausby*, 916 F.3d 1089, 1092 (D.C. Cir. 2019) (introduction of false scientific evidence violates due process); *State v. Bridges*, No. 90 CRS 23102-04, 2015 WL 12670468 at *2 (N.C. Super. Ct. Oct. 1, 2015) (hair analysis "violated the Defendant's right to due process because it exceeded the limits of the science and overstated the significance of the hair analysis to the jury"); *People v. Genrich*, 471 P.3d 1102, 1123 (Colo. App. 2019), *as modified on denial of reh'g* (Nov. 27, 2019) (Burger, J. concurring) ("Given the significant potential for [the expert's] individualization testimony to have swayed the jury to convict Genrich, I . . . conclude that Genrich's due process claims warrant an evidentiary hearing."). Recently, an Illinois Appellate Court, in *Prante*, recognized that there is a constitutional due process right that is "violated by the State's use of faulty and unreliable bite[ ]mark evidence to obtain [a] conviction." *People v. Prante*, No. 5-20-0074, 2021 WL 1381347 at *12 (Ill. App. Ct. Apr. 12, 2021).

Mr. Duncan's case presents both the intentional (as discussed above) *and* unintentional use of false evidence by the State. Though a traditional "false evidence" claim requires that the State *intentionally* presented false evidence to a jury, a due process claim based on the "faulty evidence" of repudiated science exists even if the defendant's conviction was based on up-to-date knowledge at the time and the prosecutor acted in good faith, *see Jones v. United States*, 202 A.3d 1154, 1157 (D.C. Ct. App. 2019) (explaining that "the touchstone of due process in cases such as this is the fairness of the trial, not the culpability of the prosecutor") (quoting *Woodall v. United States*, 842 A.2d 690, 697 (D.C. Cir. 2004)); *see also Henderson*, 384 S.W.3d at 834 (granting a new trial where conviction was predicated on discredited evidence). Indeed, "recognizing such a claim is essential in an age where forensics that were once considered unassailable are subject to serious doubt[,]" because "flawed analytical methods may not be debunked until well after" a petition would ordinarily be timely. *Gimenez,* 821 F.3d at 1144.

As discussed above, the admission of the now-repudiated bite mark and pathology evidence rendered Mr. Duncan's trial fundamentally unfair. Instead of confronting a case that we now understand to be *devoid* of forensic evidence connecting Mr. Duncan to the crime, every person in the courtroom—the State, the jury, the judge—was operating with the understanding

that a mountain of powerful forensic evidence presented by numerous experts identified Mr. Duncan as the perpetrator and was direct evidence of violence perpetrated by him. All of this evidence is now understood to be false. This collective misapprehension effectively eviscerated the adversarial process, which is one of the fundamental protections of our criminal legal system.[59] As such, Mr. Duncan's conviction was fundamentally unfair and procured in violation of due process, and he is entitled to a new trial. *See Ege,* 485 F. 3d at 375 (holding that the "improper admission of certain evidence injurious to the defendant" violates due process when it "deprive[s] a defendant of her rights to a fair trial" (emphasis omitted)).

iv. The State's Spoliation of Evidence Violated Mr. Duncan's Constitutional Rights

As discussed *supra* (at Section VI), the State's spoliation of evidence in this case was so egregious as to amount to a due process violation. (Claim I).

Accordingly, and for all the reasons set forth in *Petitioner's Post-Conviction Pleadings*, this Court should grant Mr. Duncan relief on Claims I and IV.

b. The Newly Discovered Evidence Demonstrates that the Bite Mark and Pathology Evidence Should Have Been Barred as Unreliable Under *Daubert/Foret* (Claim II)

As discussed *supra* (at Section IV), given the current understanding of the facts and science relevant to this case, none of the forensic evidence that the State used to establish that Mr. Duncan bit, raped, or forcibly drowned the child should have been deemed sufficiently reliable to be admitted into evidence. Specifically, the evidence is all totally discredited given the total repudiation of bite mark-matching, the evolution of the diagnosis of child sexual abuse based on the appearance of the anus, the evidence that the State withheld the West Video from its testifying expert, and the flagrant malfeasance underpinning the physical examination in this case—Dr. West's having tampered with the child's body, Dr. Hayne's having failed to undertake the necessary microscopic examinations, and the established reputation of both doctors for having done (or failed to do) precisely the same things in the past. The admission of this forensic evidence was a violation of Mr. Duncan's due process rights, and Mr. Duncan must be granted a new trial. *See House v. Bell*, 126 S.Ct. 2064, 2086 (2006). (Claim II.)

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[59] Indeed, our system requires the testing of evidence in a number of contexts to ensure the adversarial process. *See, e.g., Strickland*, 466 U.S. at 686 (1984) (holding that the fundamental question in judging any claim of ineffective assistance is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result"); *Crawford v. Washington*, 541 U.S. 36, 69-70 (2004) ("[T]he only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.").

Accordingly, and for all the reasons set forth in *Petitioner's Post-Conviction Pleadings*, this Court should grant Mr. Duncan relief on Claim II.

VIII. Conclusion

For the foregoing reasons, as well as all of the reasons set forth in *Petitioner's Initial Petition, Supplemental Petition* and *First and Second Amendments to the Petition*, the Court should grant Mr. Duncan's request for post-conviction relief.

Respectfully submitted,

Faciane

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Dated: December 29, 2022

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petitioner's Supplement to Post-Conviction Petition Pursuant to La. C. Cr. P. Art. 926.2 With Corresponding Supplement to Claims Relating to Newly Discovered Evidence has been served to the Office of the District Attorney, Ouachita Parish, 400 St. John Street, Monroe, LA 71210, via U.S. Mail on this 29th day of December, 2022.

C Faciane

Charlotte Faciane