No. _____

In the Supreme Court of the United States

JOSEPH EUGENE OSBORNE,

Petitioner,

v.

PELICIA HALL, Commissioner,
Mississippi Department of Corrections,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit
No. 17-60321

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do suspicions trigger AEDPA's statute of limitations even if they would be insufficient to state a factual predicate for a claim under AEDPA?

2. Even if his petition is untimely, does the petitioner's credible showing of actual innocence excuse that procedural defect?

PARTIES TO THE PROCEEDING

Joseph Eugene Osborne, the petitioner, was the petitioner in the district court and the appellant in the court of appeals.

Mississippi Department of Corrections Commissioner Marshall Fisher was the respondent in the district court and Mississippi Department of Corrections Commissioner Pelicia Hall was the appellee in the court of appeals.

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Petitioner Joseph Eugene Osborne respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming the dismissal of his petition for post-conviction relief pursuant to 28 U.S.C. § 2254.

JUDGMENT

The Fifth Circuit's opinion is published at *Osborne v. Hall*, 934 F.3d 428 (5th Cir. 2019), and provided at Appendix A to this petition.

The district court's opinion is not published but is available at *Osborne v. Fisher*, No. 3:13-cv-784, 2017 WL 1166553 (S.D. Miss. Mar. 28, 2017), and is provided at Appendix B. The magistrate judge's report, which the district court adopted, is provided at Appendix C.

JURISDICTION

The Fifth Circuit issued its opinion on August 12, 2019, and no petition for rehearing was filed. This Court granted petitioner until January 9, 2020 to file his petition for certiorari. This Court has jurisdiction over a timely filed petition for certiorari under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Antiterrorism and Effective Death Penalty Act (AEDPA) provides at 28 U.S.C. § 2244(d):

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

AEDPA separately provides at 28 U.S.C. § 2253(c):

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

A. Introduction

Joseph Eugene Osborne was tried in a Mississippi state court in 2004 for the murder of a child. The child had been discovered dead in his own bed. No one suspected that he had been suffocated until Dr. Steven Hayne, the State's forensic pathologist, performed an autopsy. At trial, the only physical evidence of Osborne's guilt was a "death mask": a plaster cast of the child's face made from the child's exhumed remains. Dr. Hayne used this "death mask" to testify that "a large hand," which "would favor a male's hand," suffocated the child. Osborne was convicted and sentenced to life imprisonment.

Osborne's petition for post-conviction relief, his first filed in federal court, alleges that the State elicited false and misleading testimony from Dr. Hayne and failed to disclose *Brady* material relating to Dr. Hayne. In support, the petition points to evidence showing that Dr. Hayne had a pecuniary interest in testimony he gave in support of the State's cases; that Dr. Hayne repeatedly misrepresented under oath his qualifications to testify as a forensic pathologist; and that Dr. Hayne engaged in extensive forensic fraud, which irreparably tainted his findings in Osborne's case and his testimony as a forensic pathologist. Once mere suspicions, these facts are accepted as true today.[1]

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[1] In *Rayner v. State*, the Mississippi Court of Appeals held that the State properly challenged the credibility of Dr. Hayne to testify as to time and cause of death in defense of a criminal defendant. During cross-examination, the State asked Dr. Hayne: "You told me during lunch the reason you have to carry around that big notebook with you is you have to defend yourself nowadays for all the reversals

If Osborne had known these facts in 2004 his trial would have proceeded differently. Instead, Osborne's trial was riddled with nonharmless constitutional error, all stemming from Dr. Hayne's testimony. The State not only elicited false and misleading testimony from Dr. Hayne, it passed off his "death mask" as credible forensic evidence. The jury did not get to hear about Dr. Hayne's pecuniary interest in his relationship with the State, his misrepresentations regarding that relationship and his qualifications, or his prior inconsistent testimony in other cases.

The district court nevertheless dismissed Osborne's petition,[2] and the Fifth Circuit affirmed.[3] Neither court addressed the merits of Osborne's claims. They concluded only that Osborne's claims are untimely under 28 U.S.C. § 2244(d)(1)(D).

Under 28 U.S.C. § 2244(d)(1)(D), a one-year statute of limitations begins to run when a factual predicate for a claim "could have been discovered through the exercise of due diligence." The factual predicates for Osborne's claims arise primarily from four pieces of newly discovered evidence: letters between Mississippi Public Service Commissioner Jim Ingram and the Mississippi Ethics Commission that outline Dr. Hayne's business relationship with the State; the American Board of Pathology exam that Dr. Hayne took and failed; Dr. Hayne's undergraduate

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you've had in the Mississippi Supreme Court; is that correct?" In closing, the State called Dr. Hayne "a discredited doctor in the State of Mississippi." *See Rayner v. State*, 186 So. 3d 881, 889 (Miss. Ct. App. 2015). *See also generally* RADLEY BALKO & TUCKER CARRINGTON, THE CADAVER KING AND THE COUNTRY DENTIST: A TRUE STORY OF INJUSTICE IN THE AMERICAN SOUTH (2018).

[2] App. B, *infra*, at 12a.

[3] App. A, *infra*, at 01a.

record; and a body of information—trial transcripts, autopsy reports, and other trial materials—that represents a career's worth of pseudo-scientific time and cause of death testimony. The evidence was obtained by the Innocence Project in 2012 in the course of, or alongside, discovery conducted as part of the federal lawsuit *Hayne v. Innocence Project*, No. 3:09-cv-218 (S.D. Miss.). Each piece of evidence was used in an April 2012 deposition of Dr. Hayne. By court order, the transcript of that deposition was confidential until May 25, 2012—the earliest date that any third party, including, obviously, an incarcerated third party, could have possibly discovered the evidence.

The district court and the Fifth Circuit, however, disregarded the foregoing evidence and focused instead on "anecdotal evidence"—primarily newspaper articles—that existed prior to 2012. Based on this anecdotal evidence, they concluded that "information casting doubt on Dr. Hayne's qualifications was publicly available by 2008 at the latest."[4]

The district court and the Fifth Circuit's analysis has a fundamental flaw: The anecdotal evidence on which they rely could not trigger the statute of limitations because that evidence would not have been sufficient to constitute a factual predicate for post-conviction relief. Osborne could not have relied on the same anecdotal evidence to file a petition for post-conviction relief because the petition would have been dismissed. This is not speculation: Courts flatly refused to

[4] App. A, *infra*, at 09a. *See also* App. B, *infra*, at 17a-18a ("[E]nough information was publicly available to trigger the statute of limitations long before Hayne's deposition.").

treat the same anecdotal evidence as a sufficient factual predicate in other cases. The district court and the Fifth Circuit's reliance on the same anecdotal evidence here to conclude that Osborne's petition is untimely was patently unfair. They effectively created a trap that makes litigation of Osborne's claims on the merits impossible.

Even if Osborne's petition is untimely, that procedural defect ought to be excused because he makes a credible showing of actual innocence. In light of the newly discovered evidence, no reasonable jury would find him guilty beyond a reasonable doubt.

B. The material facts[5]

i. Osborne's trial

The following facts are taken from the record of Osborne's state court proceedings.

Charlie, a five-year old, was found dead in his bed.

In October 2002, Osborne moved to Meridian, Mississippi, to find work. He moved in with his girlfriend, Cindy Hopkins, and her two sons, five-year-old Charlie and three-year-old Sam. In November, Cindy's family contracted a stomach virus. First, the boys got sick; then Cindy fell ill. Osborne babysat Charlie and Sam the afternoon of November 6, 2002, while Cindy rested. Osborne's friend Kimble Frazier, who had been to the house a few times before, came over and played with

[5] These facts are taken from Osborne's Application for Certificate of Appealability to the Fifth Circuit Court of Appeals. Doc. 1, *Osborne v. Hall*, No. 17-30621 (5th Cir.).

the boys. Later that evening, Osborne fed the boys hotdogs, bathed them, and readied them for bed. He put on a movie in their room while they went to sleep.

Cindy woke up at around 10:30 p.m., checked on the boys, and brushed their teeth while they were sleeping. At around 1:30 a.m., she checked on them again. Each time, she observed Charlie sleeping comfortably on his back. Frazier, who spent the night on the couch, checked on the boys twice during the night—a little after 10:30 p.m. and again later.

The next morning, Sam woke Cindy at around 8 a.m., and they prepared breakfast while Osborne slept. At around 10 a.m., Cindy went into the boys' room to wake Charlie and discovered him face down on the bed. Zyrtec pills were strewn across the floor and Charlie's bed. Frazier woke Osborne, who called 911, and the fire department arrived thereafter.

Law enforcement investigators and Cindy's family initially believed that Charlie had died from accidental drug poisoning. Dr. Hayne, however, performed an autopsy and determined that instead Charlie had died of suffocation. Investigators interviewed Cindy, Osborne, Frazier, and Sam but were unable to identify a suspect.

Authorities questioned Sam about Charlie's death.

The Mississippi Department of Human Services removed Sam from Cindy's home and placed him with Cindy's niece. In early December 2002, Sam was visiting his mother, grandmother, and aunt. When Cindy told Sam to go to bed, Sam said, "Charlie wouldn't go to bed that night."

Concluding that the remark related to Charlie's death, Cindy arranged an interview with the Meridian Police Department. During the resulting forty-five minute interview, Sam was unresponsive to questions about Charlie's death.[6]

Months later, on April 9, 2003, the Attorney General's office retained Dr. Catherine Dixon, an employee of the Children's Advocacy Center, to interview Sam.[7] In an interview that lasted just seven minutes,[8] Sam told a strange tale about how Charlie died. He described Charlie as a "Spiderman" who climbed trees and scaled walls. He said he secretly followed Osborne and Charlie as Osborne chased Charlie around the house and outside. He said that Osborne spanked Charlie and then later re-entered the boys' bedroom and "took his [Charlie's] breath away" while Sam watched with one eye open from his own bed.

Dr. Hayne exhumed Charlie's body.

As a result of Sam's interview with the Meridian Police Department, three months after Charlie's body was interred, Dr. Hayne had Charlie's body exhumed. He then enlisted the services of a forensic odontologist named Lieutenant Commander VanDermark to create a plaster cast—a "death mask," to use Dr. Hayne's terminology—of Charlie's face. Dr. Hayne marked on the mask the sites of injury that purportedly corresponded with marks he previously had made on an autopsy diagram. With the new marks, Dr. Hayne purported to determine the

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[6] *Osborne v. State*, 942 So. 2d 193, 196 (Miss. Ct. App. 2006).
[7] *Id.*
[8] *Id.*

approximate size of the hand that inflicted injuries.[9] The State would later introduce Dr. Hayne's "death mask" into evidence at trial.

The State charged Osborne with Charlie's death.

On August 1, 2003, a Lauderdale County grand jury indicted Osborne for depraved heart murder.[10] On December 1, 2003, a pretrial hearing was held to determine whether Sam—then only four years old—was competent to testify and whether the testimony of the three witnesses who had heard Sam's story was admissible. At the hearing, Sam was unable to remember many details, was unresponsive to questions, and looked to his mother for the answers to questions he was asked. The court, however, ruled that Sam was competent to testify and that Sam's out-of-court statements were admissible as well.

At that same hearing, the judge and attorneys discussed Dr. Hayne's "death mask." The court asked about the "death mask" and whether it was, in essence, "super duper [novel] medical testimony." The prosecutor assured the judge that Dr. Hayne was not another Dr. Michael West—a long-time colleague of Dr. Hayne's and a forensic odontologist notorious for his fraudulent bite mark testimony—and that the "death mask" was not akin to Dr. West's debunked and unreliable alternative light source imaging techniques.

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[9] Dr. Hayne testified that the injuries he saw on the child from the initial autopsy were still apparent but much less distinct and more difficult to visualize directly at the exhumation. He explained he could not place markings on the death mask at the time because it "takes time to cure the death mask before you pull the mold off."

[10] *Osborne v. State*, 942 So. 2d 193, 196 (Miss. Ct. App. 2006).

At trial, Dr. Hayne provided critical evidence of guilt.

Trial commenced on April 5, 2004. During the State's case, jurors were presented with a hodgepodge of varying accounts and timelines. When Sam testified, he said he could not remember any significant details of Charlie's death,[11] and the facts he did recall cast doubt on prior statements that inculpated Osborne. Sam stated that he assumed any man coming into his room was Osborne because Osborne had been living with his mother, and that although he had overheard others saying Osborne was bad, he was not afraid of him while Osborne lived with him and his mom during the days following Charlie's death.

Cindy and Frazier offered contradictory testimony as to the night's timeline. Although Cindy testified that she stayed up with Osborne and Frazier until 1:30 a.m., Frazier testified that Osborne and Cindy retired at around 10:30 p.m.—approximately fifteen to thirty minutes after the boys went to bed.[12] According to Frazier, who checked on the boys twice, he neither heard nor noticed anyone else checking on them after he did. Frazier testified that Osborne never spanked Charlie that evening, as Sam had claimed.

The State relied on Dr. Hayne to offer testimony concerning the time and mode of death and to introduce the only physical evidence of guilt: Dr. Hayne's

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

[12] Osborne's statement on November 14, 2002 supported Frazier's version of the events: That Osborne went to bed around 10:30 p.m. and Cindy came back to bed thirty minutes later.

"death mask." Indeed, Dr. Hayne's analysis was the only physical evidence that Charlie's death was not an accidental drug poisoning. The State began its examination of Dr. Hayne by establishing him as an experienced pathologist who worked on behalf of the State. The State elicited testimony from Dr. Hayne that gave the impression that his opinions bore the imprimatur of the State of Mississippi's Medical Examiner's Office:

> Q. And are you associated or affiliated in any way with the Mississippi Medical Examiner's Office?
>
> A. I am, sir.
>
> Q. And as an appointed state pathologist, have you testified as an expert in forensic pathology in basically all of the courts in the State of Mississippi as well as other states?
>
> A. Well, I have testified as an expert in forensic pathology in every court in the State of Mississippi.

The State then asked Dr. Hayne to opine on the time of Charlie's death. The State needed to show that Osborne had been present and awake during the period of time that Charlie was suffocated. Dr. Hayne opined that Charlie died one to one-and-a-half hours after eating his dinner at 8 p.m., placing the time of death at around 9:30 p.m. During direct examination, the State elicited testimony from Dr. Hayne about specific findings he made during his autopsy:

> Q. Did you find any pills of any sort there?
>
> A. I did not find any pill material. I did identify approximately a cup and a half of particular food matter including tan, soft, easily crushable material, and also pink meat. And a small amount of food matter had actually entered the first part of the

small bowel, the duodena and (inaudible) of only approximately four inches, sir.

Q. Just from your experience in your own life, was this pink meat that you saw, was it consistent with what we would all think of as a hot dog?

A. A hot dog, it would fit with that.

Q. And why is it significant as to where along in the digestive process this food was?

A. It may indicate or give one significant variable to the determination of the time of death.

Q. And how does it do that?

A. There are certain documented times in which food is passed through the gastrointestinal system after consumption of a large meal. The meal would stay in the stomach for a period of approximately an hour to hour and a half and then will start dumping into the small bowel. This had occurred for a distance of approximately four inches. The small bowel normally measures anywhere from to 30 to 35 to 40 feet in length. So one could see that it just started passing from the stomach into the small bowel.

Q. So what would that tell you as to when he died as reflected by when his digestive system stopped?

A. Using that criteria, it would indicate to me that the decedent had succumbed or died approximately an hour to hour and a half after finishing a relatively large meal for a child of that size.

Finally, the State introduced Dr. Hayne's "death mask" and elicited testimony from Dr. Hayne that Charlie had been suffocated by an adult who placed a hand over his nose and mouth:

Q. From your findings, from what you saw in your external and internal examinations and your opinions and conclusions, would

the injuries and the death be consistent with a person having covered this child's nose and mouth with a hand, like an adult?

A. It would be consistent with that. It would be consistent with a person placing their hand over the child's face, and the injuries located to the right side of the head would be consistent in part with fingernail injuries to the child's right side of the face.

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

A. I was, sir.

Q. How did that come about?

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

Q. I'm sorry. What was performed?

A. Moulage. That is a casting of the face.

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

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

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

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

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

A. Yes, they are.

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

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

Based on markings he placed on the "death mask," Dr. Hayne concluded the injuries were "consistent with a larger hand rather than a smaller or medium sized hand . . . I would favor a male's hand." In closing argument, the State treated Dr. Hayne's testimony as convincing evidence of Osborne's guilt, stating "The hand that was used, according to Dr. Hayne, was a large hand; it was a male hand." After six hours of deliberation, the jury returned a verdict of guilty for depraved heart murder.

ii. Newly discovered evidence

Newly discovered evidence shows that Dr. Hayne and the State had a business arrangement that allowed Dr. Hayne to act as the State's primary forensic pathologist even though he was unqualified for the position; that Dr. Hayne, with the State's knowledge, repeatedly misrepresented under oath his qualifications as a forensic pathologist; and that Dr. Hayne engaged in extensive forensic fraud that irreparably tainted his testimony as a forensic pathologist.

Dr. Hayne's suspicious business arrangement with the State

Newly discovered evidence shows that the State had a business arrangement with Dr. Hayne by which Dr. Hayne was allowed to act as the State's primary forensic pathologist even though he was grossly unqualified. Mississippi law requires that the State Medical Examiner be certified by the American Board of Pathology ("ABP"), the peer-governed association that provides certification for the forensic pathology subspecialty recognized by the American Medical Association. Because Dr. Hayne failed the ABP exam, he was unqualified to serve as State Medical Examiner. Nevertheless, by the early-1990s, the State shifted the bulk of its fee-based autopsy work to Dr. Hayne, who was operating in private practice. This arrangement saved the State approximately $120,000 per year.

There were at least two legal and ethical problems with this arrangement. First, Dr. Hayne was unqualified for the position because he was not certified in forensic pathology by the ABP. Second, Dr. Hayne was, at the time, already performing an unconscionable number of autopsies—well over 1,200 autopsies in 1991 alone. The guidelines of the National Association of Medical Examiners, the industry's primary professional organization, state that a medical examiner should perform a *maximum* of 250 autopsies a year—less if he is also tasked with

administrative duties.[13] Dr. Hayne's autopsy load was a serious affront to the "minimum standards for an adequate medicolegal system."[14]

The State was fully cognizant of these problems. Newly discovered letters reveal that in 1992, Mississippi Public Service Commissioner Jim Ingram asked the Mississippi Ethics Commission for its opinion of the arrangement. The Ethics Commission identified several concerns: It warned "a degree of suspicion among the public" would arise if "a designated pathologist who now conducts a large percentage of state and local autopsies is designated State Medical Examiner" without being properly hired or possessing the statutorily required certification.

It speculated that the person in the post—Dr. Hayne—would use the position for pecuniary gain in violation of state ethics and public policy, which, in its view, would compromise public health priorities. The Ethics Commision had "grave concern . . . as to the practicality and propriety in having a pathologist conducting such a large percentage of the state's autopsies also responsible for the rules and regulations under which he and his professional colleagues perform their public duty." Though it found no *per se* violation of ethics laws as presented, the Ethics Commission warned that "the path he will be forced to follow . . . may be so narrow as to limit his effectiveness."

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[13] OFFICE OF THE MEDICAL EXAMINER, PERFORMANCE AUDIT 13 (Dec. 15, 2011); NAT'L ASS'N OF MED. EXAM'RS, FORENSIC AUTOPSY PERFORMANCE STANDARDS 10 (2011).

[14] VINCENT J. DI MAIO & DOMINIC DI MAIO, FORENSIC PATHOLOGY 19 (2nd ed. 2001); *see also*, NAT'L ASS'N OF MED. EXAM'RS, FORENSIC AUTOPSY PERFORMANCE STANDARDS 10 (2011). Standard B4.5 states that "Autopsies shall be performed as follows: . . . the forensic pathologist shall not perform more than 325 autopsies in a year. Recommended maximum number of autopsies is 250 per year."

The State proceeded with the arrangement anyway. Indeed, the State turned the Ethics Commission's concerns on their head: The unconscionable number of autopsies Dr. Hayne performed each year, for example, became instead proof of his professionalism and work ethic. Within a few years, Dr. Hayne had dubbed himself the "Chief State Pathologist"—"an honorific which Dr. Hayne insisted on adding" to his contract and that the State allowed.

Meanwhile, the Ethics Commission's concerns about a pathologist using his position for pecuniary gain were realized. Dr. Hayne's business became quite lucrative for him. Whereas the State Medical Examiner Act entrusted the decision to hire a pathologist to the State Medical Examiner's Office, the State's arrangement with Dr. Hayne shifted it to county coroners. Dr. Hayne made political contributions to county coroners and others who, in turn, could influence the number of cases sent to him for autopsies. According to his own records, he increased his workload to an average of 1,600 autopsies per year—more than four autopsies a day, 365 days a year, generating approximately $750,000 per year in autopsy fees—and thus enjoyed a significant financial windfall.[15]

Dr. Hayne's repeated misrepresentations of his qualifications

Newly discovered evidence provides objective proof that Dr. Hayne, with the State's knowledge, repeatedly misrepresented under oath his qualifications to testify as a forensic pathologist.

[15] Over the span of Dr. Hayne's career, counties paid him between $400 to $550 per autopsy.

Dr. Hayne's boldest misrepresentation involves his explanation for his failure of the ABP exam. Several times he testified under oath that he walked out of the exam because a certain question insulted his intelligence.[16] The *Clarion Ledger* asked him about the exam in 2008. He explained, as he had under oath, that the exam contained an insulting question about the colors associated with death:

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

After the *Clarion-Ledger* ran the story, ABP officials contacted the newspaper to refute Dr. Hayne's account. According to the ABP's executive director, "there was no question on that examination that was remotely similar to Dr. Hayne's description." In a follow-up story, however, Dr. Hayne continued to lie about why he failed; he characterized the executive director's rebuttal as "flat wrong" and said that "she doesn't know what she's talking about."

In 2012, pursuant to court order, the ABP produced the oft-discussed exam. The exam contained no question that remotely resembled the one Dr. Hayne

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[16] Deposition of Steven Hayne, *Vessel v. Alleman,* No. 99-0307-CI (Warren Cnty. Circuit Ct. June 26, 2003); Deposition of Steven Hayne, *Bennett v. City of Canton Swimming Pool,* No. C1-96-0176 (Madison Cnty. Circuit Ct. June 2, 2001); transcript of proceedings, *State v. Townsend,* No. 2000-127-CR (Montgomery Cnty. Circuit Ct. Mar. 20, 2001); transcript of proceedings, *State v. Williams,* No. 2004-048 (Washington Cnty. Circuit Ct. Oct. 18, 2004).

described under oath. The ABP's production revealed an additional fact: At the time Dr. Hayne "walked out" of the ABP exam, he was failing it.[17]

Because he lacks ABP certification, Dr. Hayne has claimed to be board certified in forensic pathology by a host of other organizations.[18] Most of these claims are false. Dr. Hayne has not been certified in forensic pathology by any organization since 1997. He simply acquired purported *bona fides* from organizations that sounded to laymen like legitimate bodies, but which, in reality, often required nothing more for membership than an annual subscription fee.

In addition to misrepresentations about his certifications, Dr. Hayne's CV included scholarly publications in which he was not listed as an author, as well as presentations in which he did not actually present the material. He also exaggerated his educational achievements to burnish his credibility.[19] For example, when his ability to perform so many autopsies was challenged in one case, Dr. Hayne responded, under oath, that:

> when I was an undergraduate, I carried up to 39 units at a time maintaining a straight A average. So I work at a much more efficient level and much harder than most people. I was blessed with that and

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[17] Dr. Hayne's reported score was 484; 750 was the minimum score required to pass the exam. The test indicated that he had answered questions in every section. Dr. Hayne also failed the ABP examination in anatomical and clinical pathology the first time he took it.

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

[19] Transcript of proceedings, *State v. Williams*, No. 2004-048 (Washington Cnty. Circuit. Ct. Oct. 18, 2004).

> cursed with that, but that's what I carry with me, and I do work very, very hard.[20]

Dr. Hayne's undergraduate record, gained through federal discovery in 2012, discredits these claims too. He was not a straight-A student, as he testified under oath, and his hours carried fell far short of the workload he claims to have managed.

Dr. Hayne's extensive forensic fraud

Newly discovered evidence provides objective proof that Dr. Hayne engaged in extensive forensic fraud, which irreparably tainted his testimony as a forensic pathologist and his findings in this case, including his conclusions about the time and cause of Charlie's death.

With no official oversight, Dr. Hayne promoted himself as an expert in various pseudo-forensic sub-specialties, which he used to support the State's cases. Although bogus, his testimony related to areas about which forensic pathologists might have knowledge—blood-spatter or time of death determinations, for example. A close review of Dr. Hayne's testimony over time—an advantage previously unavailable because of an inability to access information such as autopsy reports and other materials that State officials refused to disclose—reveals that in a series of cases, Dr. Hayne provided critical testimony that was unscientific, directly contrary to his testimony in previous cases in the same subject matter area, and opposed by a consensus of credentialed forensic pathologists.

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[20] *Id.*

For example, Dr. Hayne provided fraudulent wound pattern analysis testimony: In theory, wound-pattern analysis attempts "to identify a specific source of the impression" of a wound by identifying "class and individual characteristics" belonging to a piece of evidence and comparing it to an impression found on a person's body.[21] Dr. Hayne possesses no credentials reflecting even the most basic knowledge or training in this highly technical forensic field. Nevertheless, he testified to matching a variety of mass-produced objects to a multiplicity of wound types.[22] He then implicated defendants by linking an object owned or otherwise connected to them to a respective victim's wounds.[23] In Mississippi criminal prosecutions, Dr. Hayne dubiously determined that each of the following objects was likely the source of wounds found on victims' bodies: a wristwatch,[24] bolt cutters,[25] an aluminum baseball bat,[26] a chunk of concrete,[27] a kaiser blade,[28] a hoe handle,[29]

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

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

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

[24] *Id.*

[25] *Duplantis v. State*, 708 So. 2d 1327 (Miss. 1998).

[26] *Cooper v. State*, 76 So. 3d 749, 752 (Miss. Ct. App. 2011).

[27] *Walters v. State*, 720 So. 2d 856, 860 (Miss. 1998).

[28] *Sanders v. State*, 801 So. 2d 694 (Miss. 2001).

[29] *Id.*

a broom handle,[30] and, in the instant case—the only of its kind ever documented—a defendant's bare hand vis-à-vis a "death mask."

Dr. Hayne also provided fraudulent and contradictory time of death testimony: Time of death is often critical in criminal cases, particularly when law enforcement is trying to assess suspects' alibis. Yet, "all methods . . . to determine time of death are to a degree unreliable and inaccurate."[31] In fact, the "longer the postmortem interval . . . the less precise the estimate."[32] When it suited a prosecution, Dr. Hayne acknowledged that any "attempt to determine the time of death is essentially a leap into darkness."[33] Dr. Hayne has even said that forensic television shows claiming that someone died at "x hour" were "almost laughable."[34]

Nevertheless, in a case in which the State needed to establish time of death during a precise window of time, his autopsy report did so using observations of *rigor mortis* and *livor mortis*.[35] Prosecutors in that case did not disclose that, using the same observations, Dr. Hayne testified only one year prior that "[putting all the factors] together [is] still a difficult area, and one is best only giving an opinion as to

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[30] *Ware v. State*, 914 So. 2d 751 (Miss. Ct. App. 2001).
[31] VINCENT J. DI MAIO & DOMINIC DI MAIO, FORENSIC PATHOLOGY 21 (2nd ed. 2001).
[32] *Id.* Examples of common methods used to determine time of death include: *livor mortis*, *rigor mortis*, body temperature, degree of decomposition, vitreous analysis, gastric examination, and others. *Id.*
[33] Transcript of proceedings, *State v. Baldwin*, No. 96-672-CR1 (Lowndes Cnty. Circuit Ct. March 24, 1999).
[34] Transcript of proceedings, *State v. Brooks*, No. 5937 (Noxubee Cnty. Circuit Ct. Jan. 15, 1992).
[35] Transcript of proceedings, *State v. Hughes*, No. CR96-68-C-T (Tate Cnty. Circuit Ct. Nov. 12, 1996).

the general time frame as opposed to very specific times."[36] "It is now more difficult to determine time of death," Dr. Hayne warned, "than it ever was before."

In Osborne's case, the State needed to establish that Charlie suffocated around 9:30 p.m.—an hour following dinner and an hour before Charlie's mother and another guest would have had the opportunity. Dr. Hayne, based on findings derived from Charlie's gastrointestinal content, fixed time of death in that window. His testimony is suspect not only because gastrointestinal content is a variable that is problematic and changeable,[37] but also because it is inconsistent with his own testimony in other cases regarding his or anyone else's ability to determine time of death.

iii. Osborne's post-conviction proceedings

Osborne timely filed his petition.

Osborne filed the underlying petition for post-conviction relief, his first filed in federal court, on December 17, 2013. The petition alleges that the State elicited false and misleading testimony from Dr. Hayne and failed to disclose *Brady* material relating to Dr. Hayne. In support, the petition points to the foregoing newly discovered evidence showing that Dr. Hayne had a pecuniary interest in

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[36] Transcript of proceedings, *State v. Young,* No. 97-KP-0162 (Coahoma Cnty. Circuit Ct. Nov. 20, 1995).

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

testimony he gave in support of the State's cases; that Dr. Hayne repeatedly misrepresented under oath his qualifications to testify as a forensic pathologist; and that Dr. Hayne engaged in extensive forensic fraud that irreparably tainted his testimony as a forensic pathologist and his findings in Osborne's case.

The State moved to dismiss Osborne's petition, arguing both that Osborne did not state a constitutional violation and that Osborne's petition was untimely.

In response, Osborne showed that his petition states a factual predicate for a constitutional violation, as required for first-time petitions for post-conviction relief under 28 U.S.C. §§ 2254(d)(1) and (e)(2)(A)(ii).[38] There can be no genuine dispute that it does: In its briefing, the State conceded that the newly discovered evidence is, at minimum, impeachment evidence. The failure to disclose impeachment evidence violates the Due Process and Confrontation Clauses of the United States Constitution.[39] The State's failure to disclose the evidence in question prior to Osborne's trial violated Osborne's constitutional rights. Osborne states a factual predicate for a constitutional violation.

Osborne also showed that his petition is timely under § 2244(d)(1)(D) because the factual predicates for his claims could not have been discovered previously through the exercise of due diligence. Osborne showed that the Innocence Project obtained the newly discovered evidence in 2012 in the course of, or alongside, discovery conducted as part of the lawsuit *Hayne v. Innocence Project*, No. 3:09-cv-

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[38] Doc. 17, *Osborne v. Epps*, No. 3:13-cv-784 (S.D. Miss.).
[39] Impeachment evidence is *Brady* material. *United States v. Bagley*, 473 U.S. 667, 676 (1985) ("This Court has rejected any such distinction between impeachment evidence and exculpatory evidence.").

218 (S.D. Miss.).[40] The Innocence Project used the newly discovered evidence in an April 2012 deposition of Dr. Hayne. By court order, the transcript of that deposition was confidential until May 25, 2012—the earliest date that any third party, including, obviously, an incarcerated third party, could have possibly discovered the evidence.

To further establish that the newly discovered evidence was, in fact, new, Osborne offered declarations of criminal defense lawyers who sought out some of the very same evidence regarding Dr. Hayne's qualifications for years, without success. These criminal defense lawyers specifically cross-examined Dr. Hayne about his qualifications, his failure of the ABP exam, and his excessive workload—but without the newly discovered evidence could not prove Dr. Hayne's testimony on those subjects was false. One criminal defense lawyer filed a civil lawsuit in which he issued discovery requests to obtain information regarding Dr. Hayne; after the State resisted discovery, the civil lawsuit was dismissed. The same criminal defense lawyer even moved to secure the attendance of the ABP's executive director at a *Daubert* hearing; the State vociferously objected and the trial court denied the motion.

The district court dismissed Osborne's petition as untimely.

After briefing, the magistrate judge issued a report recommending that Osborne's petition be dismissed.[41] The report expressly did not address the merits

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[40] Dr. Hayne sued the Innocence Project because he alleged it had defamed him.
[41] App. C, *infra*, at 22a.

of Osborne's claims.[42] Instead it concluded only that his claims are untimely under 28 U.S.C. § 2244(d)(1)(D).

In reaching that conclusion, the report disregarded the foregoing newly discovered evidence and focused instead on "anecdotal evidence," consisting primarily of newspaper articles that existed prior to 2012. Based on this anecdotal evidence, the report concluded that "enough information was publicly available to trigger the statute of limitations long before Hayne's deposition."[43]

The report dismissed "autopsy reports or previously undisclosed material" as unnecessary to Osborne's factual predicates because, the report surmised, the same facts might have been summarized in court opinions. The report concluded that Osborne could have obtained court opinions and even trial transcripts all by himself: "If counsel for the Innocence Project was able to obtain those records, they were not unavailable."[44]

Osborne objected to the magistrate judge's report on the basis that the anecdotal evidence on which the report relied did not trigger the statute of limitations; that the report misapplied the due diligence standard; and that the report did not address Osborne's actual innocence claim.[45]

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[42] App. C, *infra*, at 35a ("At this juncture, the undersigned expresses no opinion as to whether the evidence and testimony to which Osborne directs the Court's attention would actually impeach his trial testimony or whether Osborne suffered any prejudice from its exclusion.").
[43] App. C, *infra*, at 44a.
[44] App. C, *infra*, at 50a.
[45] Doc. 23, *Osborne v. Epps*, No. 3:13-cv-784 (S.D. Miss.).

The district court nevertheless adopted the magistrate judge's report and dismissed Osborne's petition.[46] The district court pretermitted Osborne's request for a certificate of appealability.[47]

The Fifth Circuit issued a certificate of appealability.

Osborne timely requested from the Fifth Circuit a certificate of appealability pursuant to 28 U.S.C. § 2253. He argued both that the district court erred in dismissing his petition as untimely and that the district court failed to address his actual innocence claim.

The Fifth Circuit granted a certificate of appealability only "with respect to [Osborne's] argument that the factual predicate for his claims could not have been discovered earlier through the exercise of due diligence."[48]

The Fifth Circuit affirmed the district court's dismissal.

After briefing and oral argument, the Fifth Circuit affirmed the district court's dismissal of Osborne's petition as untimely. Like the district court, the Fifth Circuit concluded that "serious concerns about Dr. Hayne's qualifications as a forensic pathologist and as an expert witness"[49] existed "by 2008 at the latest,"[50] therefore Osborne could have discovered the factual predicate for his claims earlier through the exercise of due diligence.

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[46] App. B, *infra*, at 12a.
[47] App. B, *infra*, at 21a.
[48] App. D, *infra*, at 53a ("Osborne's motion for a COA is GRANTED with respect to this issue and otherwise DENIED.").
[49] App. A, *infra*, at 07a.
[50] App. A, *infra*, at 09a.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit's decision creates a trap that makes litigation of meritorious claims for post-conviction relief impossible.

The Fifth Circuit effectively holds that anecdotal evidence triggers AEDPA's statute of limitations even though it is insufficient to state a factual predicate for a claim under AEDPA. Other federal courts have warned against this trap, which makes litigation of meritorious claims for post-conviction relief impossible. There is a distinction between suspicions, which do not constitute a factual predicate for post-conviction relief, and vital facts, which do.

This case perfectly illustrates the distinction. In support of its conclusion that Osborne's petition for post-conviction relief is untimely, the Fifth Circuit observed that "information casting doubt on Dr. Hayne's qualifications was publicly available by 2008 at the latest."[51] The court pointed to:

1. a concurrence to the majority opinion in *Edmonds v. State*, 955 So. 2d 787 (Miss. 2007), which summarized the allegations against Dr. Hayne;
2. two articles written by Radley Balko published in *Reason* magazine in 2006 and 2007 that reported that Dr. Hayne lacked certification yet made "millions" by performing 80% of all forensic autopsies in the state;
3. articles published in the *Jackson Free Press* and the *Clarion Ledger* in 2008 that reported that Dr. Hayne lacked certification and made serious mistakes, yet "nets roughly $1 million annually" by performing far more than the recommended autopsies per year; and
4. three press releases published by the Innocence Project in 2008 that describe Dr. Hayne's misconduct.[52]

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[51] App. A, *infra*, at 09a.

[52] App. A, *infra*, at 07a.

Setting aside that Osborne was incarcerated when the foregoing items were published,[53] even if he had been aware of any of them, he could not have relied on their information to file a petition for post-conviction relief *because the petition would have been dismisse*d. This is not speculation: Courts flatly refused to treat the same anecdotal evidence as bases for factual predicates in other cases. Courts held the anecdotal evidence did not offer facts but instead only suspicions. *E.g., Austin v. Caskey*, No. 2:07-cv-84, 2007 WL 2783332, *3 (N.D. Miss. Sept. 21, 2007) (*Edmonds* concurrence) ("Justice Diaz's concurring opinion in *Edmonds*—in which Justice Diaz stated his belief that Dr. Hayne should not have been qualified as an expert . . . does not constitute 'new evidence' for purposes of § 2244(d)(1)(D)."); *Council v. Bingham*, No. 2:09-cv-19, 2011 WL 589808, *6 (S.D. Miss. Jan. 19, 2011) (2007 Radley Balko article) ("The fact that Dr. Hayne may have been criticized in a magazine article does not establish that he is a 'forensic fraud' . . . ."); *Brown v. Kelly*, No. 5:07-cv-176, 2009 WL 3297577, *14 (S.D. Miss. Oct. 9, 2009) (unidentified magazine article) ("[T]hat Dr. Haynes [sic] may have been criticized in a magazine article does not establish that he was not qualified to render an expert opinion at Petitioner's trial."); *Grant v. Epps*, No. 1:10-cv-320, 2012 WL 3965224, *5 (S.D. Miss. May 30, 2012) (*Edmonds* concurrence).

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[53] The Fifth Circuit rejected the argument that its due diligence inquiry ought to take into account the fact that Osborne's incarceration necessarily limits his ability to discover facts. App. A, *infra*, at 08a. Having decided that the specific items to which it pointed should have been sufficient to state a claim, the court observed that Osborne did not have not "scour the court records" to discover new facts. *Id.*

The Fifth Circuit's reliance on the same anecdotal evidence to conclude that Osborne's petition is untimely is patently unfair. Had Osborne filed his petition earlier, relying solely on the anecdotal evidence to which the Fifth Circuit now points, the district court would have rejected his claims as unsubstantiated, for the reason that no court has ever accepted the same anecdotal evidence as good enough to establish Dr. Hayne was a fraud. Osborne instead waited for newly discovered evidence that proves the publicized allegations against Dr. Hayne are true—but now the Fifth Circuit tells him that he should have filed his petition earlier (and faced certain dismissal). No one doubts that Osborne's claims are meritorious, and yet the Fifth Circuit's decision makes litigation of Osborne's claims on the merits impossible. Other federal courts have warned against this very trap. *See, e.g., Jefferson v. United States*, 730 F.3d 537, 548 (6th Cir. 2013) *cert. denied*, 573 U.S. 918 (2014) ("The government's position ignores the distinction between suspicions of misconduct and having sufficient facts to sustain a § 2255 motion. . . . We decline to interpret AEDPA's competing requirements—the requirement to plead at least some facts and the requirement of filing within one year of discovering the 'vital facts'—so as to create a trap that renders litigation of a successful § 2255 claim effectively impossible."). *See also Blackman v. Stephens*, No. 3:13-cv-2073, 2016 WL 777695, *6 (N.D. Tex. Jan. 19, 2016) ("there is a tension between AEDPA's requirement that a petition contain enough factual plausibility and its requirement, under Section 2241(d)(1)(D), that a petition be filed 'within one year of discovering the 'vital facts' that support a claim'") (quoting *Jefferson*, 730 F.3d at 547–48); *Bing*

v. United States, Nos. 3:12–cv–446 & 3:08–cr–281, 2014 WL 4206193, at *3 n.2 (M.D. Fla. Aug. 25, 2014) ("The Court is aware of the tension between the requirement that a habeas petitioner plead his claims with specificity and factual support and that under § 2255(f)(4) he must plead his claim within a year of discovering just the 'vital facts' that form the basis of his claim") (citing *Jefferson*, 730 F.3d at 547–48).

Congress did not define "factual predicate," as used in § 2244(d)(1)(D)—but "[g]enerally, courts have held that 'conclusory allegations alone, without supporting factual averments, are insufficient to state a valid claim." *Jefferson*, 730 F.3d at 547 (quoting *United States v. Moya*, 676 F.3d 1211, 1213 (10th Cir. 2012) (citing *United States v. Fisher*, 38 F.3d 1144, 1147 (10th Cir. 1994)). There is a distinction between suspicions, which do not constitute a factual predicate for post-conviction relief, and actual vital facts, which do. By ignoring that distinction, the Fifth Circuit's decision deems a petitioner such as Osborne at the same time too early and too late:

> [I]t is likely that when a prisoner spends a tremendous amount of time establishing the validity of the facts, a court may find that the initial piece of uncorroborated information would be deemed a 'factual predicate' to start the statute-of-limitations period; if, however, a prisoner chooses to submit an application with the same piece of 'raw' information, it may fail the fact-pleading requirement.

Id. (quoting Limin Zheng, *Actual Innocence as a Gateway through the State-of-Limitations Bar on the Filing of Federal Habeas Corpus Petitions*, 90 Cal. L. Rev. 2101, 2135 (2002)).

The Fifth Circuit's understanding of what suffices to state a valid claim conflicts with other circuits' understanding. The Second Circuit has succinctly stated that "[t]he facts vital to a habeas claim are those without which the claim would necessarily be dismissed." *Rivas v. Fischer*, 687 F.3d 514, 535 (2d Cir. 2012). Applying that understanding here, the newly discovered evidence on which Osborne's petition relies is necessarily "vital" for without it his claims certainly would have been dismissed as unsubstantiated. Whereas prior petitions could only allege that Dr. Hayne was a fraud, with the new discovered evidence Osborne can prove it.

The Fifth Circuit cited the Second Circuit's decision in *Rivas* for the proposition that "press coverage [is] sufficient to put [a] petitioner on notice of the factual predicate for his claim."[54] But *Rivas* presented a situation opposite to the one at hand. In *Rivas*, the state's medical examiner was being investigated by the state at the very same time that the state called him to testify at Rivas's trial. *Rivas*, 687 F.3d at 521. In his petition for post-conviction relief, Rivas pointed to news articles predating his trial to establish the fact of the investigation. *Id.* at 536. Plainly *the fact* of the investigation was not newly discovered, only the conclusions Rivas drew from it. "Conclusions drawn from preexisting facts, even if the conclusions are themselves new, are not factual predicates for a claim." *Id.* at 535.

The Fifth Circuit wants to treat the fact of Dr. Hayne's fraud as a preexisting fact—but the reality is that no court accepted that fact as true at the time the Fifth

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[54] App. A, *infra*, at 08a.

Circuit says Osborne should have filed his petition. At the time, courts treated allegations against Dr. Hayne—even highly publicized allegations—as conclusions *without bases in fact*. *E.g.*, *Austin*, 2007 WL 2783332, *3 (Mississippi Supreme Court justice's "belief" that Dr. Hayne was a fraud "d[id] not constitute 'new evidence' for purposes of § 2244(d)(1)(D)"); *Grant*, 2012 WL 3965224, *5 (same); *Council*, 2011 WL 589808, *6 (magazine article that "criticized" Dr. Hayne "d[id] not establish that he is a 'forensic fraud'"); *Brown*, 2009 WL 3297577, *14 (same). Osborne's is not a situation in which "new information is discovered that merely supports or strengthens a claim *that could have been properly stated without the discovery*." *Rivas*, 687 F.3d at 535 (emphasis added). Every court to have considered the same anecdotal evidence to which the Fifth Circuit now points firmly held that suspicions—mere "belief," to use one court's word, *Austin*, 2007 WL 2783332, *3, or "doubt," to use the Fifth Circuit's[55]—are not enough. Every court demanded that petitioners *prove* Dr. Hayne's fraud. Now that Osborne has done that, the Fifth Circuit says Osborne's petition is untimely.

The Fifth Circuit's decision disregards other circuits' warnings and raises important questions that this Court has not, but should, address. What suffices to state a factual predicate for a claim under AEDPA? Do suspicions trigger AEDPA's statute of limitations even where courts have held that they are insufficient to state a factual predicate? This Court's guidance is needed to spare Osborne and future

[55] App. A, *infra*, at 09a ("information casting doubt").

petitioners from the trap of being both too early and too late. Without this Court's guidance, their meritorious claims are effectively un-litigable.

II. Osborne makes a credible showing of actual innocence.

Even if Osborne's petition was not timely filed, that procedural defect ought to be excused because he makes a credible showing of actual innocence.

"[H]abeas corpus is, at its core, an equitable remedy," and its rules are applied with an eye toward "the ends of justice." *Schlup v. Delo*, 513 U.S. 298, 299 (1995). Where a petitioner makes a credible showing of actual innocence, a procedural defect, such as untimeliness, may be excused. This rule "is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013) (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)).

A credible showing of actual innocence is only a "gateway" through which a petition may pass such that, procedural defect notwithstanding, its merits may be reviewed. *Id.* at 386. To qualify, a petitioner need not establish a "conclusive exoneration." *House v. Bell*, 547 U.S. 518, 553 (2006). It is enough that the "petition presents 'evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.'" *McQuiggin*, 569 U.S. at 401 (quoting *Schlup*, 513 U.S. at 316).

Stated differently: "A petitioner's burden at the gateway stage is [simply] to demonstrate more likely than not, in light of the new evidence, no reasonable jury

would find him guilty beyond a reasonable doubt—or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt." *House*, 547 U.S. at 538 (citing *Schlup*, 513 U.S. 298).

In light of the newly discovered evidence, more likely than not any reasonable juror would have reasonable doubt about Osborne's guilt. At a minimum, the Fifth Circuit should have issued a certificate of appealability with respect to the issue,[56] because certainly "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

Osborne's trial was riddled with nonharmless constitutional error, all stemming from Dr. Hayne. To establish that Charlie died by suffocation as opposed to an accidental drug poisoning, the State passed off Dr. Hayne's "death mask" as credible forensic evidence. There were two men at the home on the night in question and to establish that Osborne was the only man present and awake, the State elicited false and misleading testimony from Dr. Hayne regarding time of death. The jury did not get to hear about Dr. Hayne's pecuniary interest in his relationship with the State, his misrepresentations regarding that relationship and his qualifications, or his prior inconsistent testimony—including regarding time of death in other cases.[57] Without Dr. Hayne's testimony, the State would have had to

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[56] App. D, *infra*, at 53a ("Osborne's motion for a COA is . . . otherwise DENIED.").
[57] Even the district court agreed that Osborne's newly discovered evidence "may have had bearing on [Dr.] Hayne's credibility." App. B, *infra*, at 20a. The district

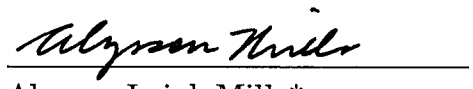
rely primarily on the testimony of a child whose ability to recollect the night changed several times even during trial.

More likely than not, any reasonable juror would have reasonable doubt about Osborne's guilt. Because Osborne makes a credible showing of actual innocence, it is only just that a court consider the merits of his claims.

CONCLUSION

The petition for certiorari should be granted and the Fifth Circuit's judgment dismissing Osborne's petition for post-conviction relief—or alternatively the Fifth Circuit's denial of a certificate of appealability to address Osborne's credible showing of actual innocence—reversed.

Respectfully submitted,



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court nevertheless rejected Osborne's arguments because he did not "demonstrate actual innocence." *Id.* at 21a. Of course that is not the standard to qualify for the "gateway."

CERTIFICATE OF COMPLIANCE

The foregoing petition for writ of certiorari complies with page limits for documents prepared under Supreme Court Rule 33.2 because it does not exceed 40 pages.

I declare under penalty of perjury that the foregoing is true and correct.

New Orleans, Louisiana
January 9, 2020

Alysson Mills

Alysson Leigh Mills

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Appendix A — Fifth Circuit's opinion

Appendix B — District court's opinion

Appendix C — Magistrate judge's report

Appendix D — Fifth Circuit's certificate of appealability