IN THE CIRCUIT COURT OF

LITTLE RIVER COUNTY, ARKANSAS

TIMOTHY LAMONT HOWARD, Petitioner,

V. No. CR 97-105

STATE OF ARKANSAS, Respondent.

PETITION FOR WRIT OF ERROR *CORAM NOBIS*

In support, Petitioner states,

Petitioner, Timothy Lamont Howard, respectfully submits his Petition for Writ of Error *Coram Nobis* and moves this Court to vacate his convictions and death sentences on the following grounds: first, the State withheld exculpatory evidence material to the guilt phase of his trial; and second, that the State withheld favorable evidence material to the penalty phase of his trial in violation of Mr. Howard's constitutional rights as set out in *Brady v. Maryland,* 373 U.S. 83 (1963) and its progeny.

On April 26, 2012, the Arkansas Supreme Court granted, in part, Howard's petition to reinvest jurisdiction before this Court to consider his Petition for Writ of Error *Coram Nobis* . *See Howard v. State,* 2012 Ark. 177. *Infra* II, III. As to those parts that were denied, Howard petitioned the United Supreme Court. Cert. was denied on October 29, 2012. Mandate issued to the Court on November 5, 2012. Although the Arkansas Supreme Court ruled that parts of Howard's petition did not justify *coram nobis* relief, those issues should be considered by this Court in whole when deciding whether prejudice resulted. As such, those issues are contained within this petition for the Court's consideration. *Infra* IV.

Howard expressly requests an evidentiary hearing in order to elicit and prove the facts necessary to support his claim. *See Larimore v. State* , 327 Ark. 271, 282, 938 S.W.2d 818, 821 (1997) (trial court is reinvested with jurisdiction to hear the petition, conduct a hearing, and decide whether the writ should be granted); *see also Penn v. State* , 282 Ark. 571, 677 (1984). Indeed, the Arkansas Supreme Court anticipates a hearing to take place for consideration of Howard's claims.

I. The Writ of Error *Coram Nobis* Is an Appropriate Remedy for Mr. Howard's Claims .

Mr. Howard seeks to raise claims that are cognizable through a writ of error *coram nobis* . A writ of error *coram nobis* is designed to correct "fundamental error of fact extrinsic to the record" which, through no negligence or fault of the defendant, was not brought forward before the judgment. *Larimore v. State* , 327 Ark. 271, 279, 938 S.W.2d 818, 822 (1997). Mr. Howard recognizes that the writ of error *coram nobis* is an "exceedingly narrow" remedy to address errors of the most fundamental nature. *Pitts v. State* , 336 Ark. 580, 584, 986 S.W.2d 407, 409 (1999); *Cloird v. State* , 349 Ark. 33, 36, 76 S.W.3d 813, 815 (2002). Because *coram nobis* lies only for the most fundamental errors, the Court has outlined only four instances where the writ is available: insanity at the time of trial, coerced guilty pleas, *Brady* claims, and third-party confessions between conviction and appeal. *Pitts* , 336 Ark. at 584, 986 S.W.2d at 409. Here, Mr. Howard seeks to secure relief based on the State's failure to disclose exculpatory *Brady* evidence, both at the guilt and penalty phase of trial. Mr. Howard will demonstrate that this petition is meritorious by showing 1) the State withheld exculpatory evidence in the guilt phase of the trial; 2) the State withheld material evidence as to mitigation in the penalty phase; and 3) that he has shown diligence in pursuing these claims once apprised of their existence.

A. Background and Procedural History.

The decedents in this case, Brian and Shanon Day, were Mr. Howard's best friends. Mr. Howard is black, and both the Days were white. All three were actively using and dealing in illegal drugs, principally methamphetamine, although Brian Day was substantially more involved than the other two. Brian Day slid deeply into debt with his suppliers. The Days were afraid of these suppliers, and in the week preceding their murders, witnesses saw violent and unpleasant individuals visiting and arguing with the Days over money. Additionally, Brian Day was arrested with another dealer, Mike May, by a drug task force just two weeks before the Days were killed. Rumors circulated that Brian avoided serving jail time on his recent arrest by becoming a "snitch" and providing the authorities with information about his suppliers and dealers. In fact, Shanon Day told a friend just days before the murders, that if anything happened to her and Brian, it would be Kenny "Chicken" Fields—one of Brian's main meth suppliers—who was responsible.

On December 13, 1997, at 10:20a.m., the body of Brian Day was discovered in the back of a locked U-Haul truck parked on a remote piece of property in Ogden, Arkansas. Several hours later, police found the body of his wife, Shanon Day, in a closet of their home in Ashdown. The Days' seven-month-old son, Trevor Day, was found alive in a duffle bag in the Days' home. As the State's own witnesses would later admit, Mr. Howard was miles away in Texarkana on the morning that these murders occurred.

In spite of these facts, neither Kenny "Chicken" Fields nor any other meth supplier was arrested for the murders; Tim Howard, the Days' best friend, was. Mr. Howard had no prior criminal record, and no hint of violence in his past. The State had no confession, no eyewitnesses, no

murder weapon, no injuries or blood on Mr. Howard, and no evidence placing Mr. Howard at the scene of either crime. The single most important piece of evidence against Mr. Howard were spots of blood and hairs recovered from a pair of brown work boots, which were found placed on the side of the road, 2 and 1/2 miles away from where Brian Day's body was found. The prosecution argued that the boots were Mr. Howard's and that the boots tied him to the murders. The State told the jury that DNA evidence proved that hairs found inside the boots belonged to Mr. Howard and that the blood belonged to Brian Day. At trial, the prosecutor characterized the evidence on the boots as "monumental." (App. Tr. at 3023). The prosecution never disclosed, and the jury never heard, that the DNA testing had been so sloppily done and so badly botched that it failed to prove anything at all. On the basis of this forensic facade, a jury convicted Mr. Howard of two counts of capital murder and sentenced him to death.

A deeply divided Arkansas Supreme Court affirmed Mr. Howard's convictions on May 9, 2002. *Howard v. State* , 348 Ark. 471, 79 S.W.3d 273 (2002). Three of the seven Justices dissented; and notably, all three wrote dissenting opinions, sharply disagreeing with the majority's opinion on the basis that the evidence presented did not prove Mr. Howard was guilty. These Justices doubted Mr. Howard's guilt even though the fundamental flaws in the prosecution's DNA evidence had not yet come to light. Justice Robert Brown wrote:

> The critical question for this court to resolve is whether the evidence was sufficient to convict Howard for the murder of Shannon Day. I do not believe it was. Surely, it was not forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. For that reason, I respectfully dissent.

Id . at 497, 289. Similarly, Justice Thornton was "troubled by the skimpy circumstantial evidence linking appellant to the murder of Brian Day" and argued that the evidence was barely sufficient to

send the case to the jury. *Id* . at 501, 291. Chief Justice Jim Hannah filed a strong dissent and factually distinguished each piece of evidence, finding the majority's opinion "stretches and reaches to assert unsupported conclusions." *Id* . at 511, 298.

Mr. Howard filed a petition for writ of certiorari, which the United States Supreme Court denied on December 2, 2002. *Howard v. Arkansas* , 537 U.S. 606 (2002). Mr. Howard filed a petition for relief under Rule 37.5 of the Arkansas Rules of Criminal Procedure in the Little River Circuit Court on March 21, 2003. The Circuit Court denied the petition, and the denial was affirmed by the Arkansas Supreme Court, which was—again—deeply divided. *Howard v. State* , 367 Ark. 18, 238 S.W.3d 24 (2006). Chief Justice Hannah and Justice Bell dissented. *See Id* . at 49, 51 (asserting again "[this Court failed] to correct a manifest denial of due process and fundamental fairness").

On March 9, 2007, Mr. Howard filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of Arkansas, detailing a series of constitutional errors which state postconviction counsel failed to discover and present to the Arkansas courts. Mr. Howard moved the federal court to hold his federal petition in abeyance so he could seek relief in state court. In July 2009, the federal court ruled that good cause justified Mr. Howard to return to state court. On August 10, 2009, Mr. Howard filed a petition under Ark. R. Crim. P. 37 before this Court. This Court summarily dismissed this petition as well as Mr. Howard's motion to file an overlength petition. Mr. Howard appealed this Court's dismissal to the Arkansas Supreme Court, and on May 6, 2010, the Arkansas Supreme Court dismissed the appeal because Mr. Howard did not first move to recall the mandate.

On May 27, 2010, Mr. Howard filed a Motion to Recall the Mandate to reinvest jurisdiction in the circuit court. The Arkansas Supreme Court denied the Motion on September 9, 2010. Justices Danielson and Sheffield would have granted the Motion. The Arkansas Supreme Court granted Mr. Howard permission to file this Petition for Writ of Error *Coram Nobis* on April 25, 2012. As stated, unsuccessful claims were presented to the United States Supreme Court. Cert. was denied and the mandate issued from the Arkansas Supreme Court investing jurisdiction before this Count on November 5, 2012.

Since 2002, six (6) different Justices of the Arkansas Supreme Court have dissented from decisions that either affirmed Mr. Howard's convictions or denied him access to filing a petition for postconviction relief. Three of those Justices remain on the Arkansas Supreme Court. At a minimum, a majority of the Arkansas Supreme Court is in agreement that the prosecution's case is so thin that further review is necessary. Mr. Howard respectfully requests this Circuit Court, after full investigation, additional time, discovery, access to this Court's subpoena power, expansion of the record, and an evidentiary hearing, grant him relief on a writ of error *coram nobis* .

II. The Prosecution Withheld Material Evidence at the Guilt Phase of Lost and Contaminated DNA Samples.

The state has a constitutional duty to turn over favorable evidence to the defense where the evidence is material either to guilt or to punishment. *Brady v. Maryland* , 373 U.S. 83, 83 (1963). Evidence is material when a reasonable probability exists that, if the evidence had been disclosed to the defense, the result of the trial would have been different. *Kyles v. Whitley* , 514 U.S. 419, 433-434 (1995). Evaluating *Brady* claims requires a three-step examination of whether the evidence was favorable to the accused, if that evidence was suppressed by the state, and, if so,

whether prejudice resulted. *State v. Larimore* , 341 Ark. at 404, 17 S.W.3d at 91, 94. Additionally, the Arkansas Supreme Court requires a petitioner seeking *coram nobis* relief demonstrate a reasonable probability that the judgment of conviction would not have been rendered, or would have been prevented, had the information been disclosed at trial. *See Sanders v. State* , 374 Ark. 70, 72, 285 S.W.3d 630, 633 (2008). Mr. Howard meets both these standards. Here, the State withheld evidence of flawed DNA testing, in addition to other *Brady* evidence throughout the guilt phase. In support of this claim, Mr. Howard alleges the following facts, in addition to those that will be presented after full discovery and an evidentiary hearing. Mr. Howard will show there exists a reasonable probability that had certain evidence at the guilt phase been disclosed, the result would have been different.

A. "Cap had flipped open . . . resulting in sample loss." "Gel was inadvertently erased from the sequencer hard drive." "Previous results were most likely the result of random, spurious contaminants." "An experiment will be done to find the source of the problem."

The State's strongest evidence against Mr. Howard at trial was pubic hairs found in a pair of brown work boots located 2 and 1/2 miles away from where Brian Day's body was discovered. Brian Day's blood was found on one boot. While Mr. Howard was in pre-trial detention, the State took his DNA to compare it to the hair sample found in the boots. The Arkansas State Crime Lab examined the pubic hairs recovered from the boots, but had to ship both Mr. Howard's DNA and the hair samples to Bode Technology Group in Virginia for mitochondrial DNA (mtDNA) testing because the Arkansas lab did not have mtDNA testing capabilities. At trial, the State's expert from Bode Technology Group, Ms. Charity Diefenbach, testified that 99.8% of the population would be excluded from this DNA sequence and that the mtDNA of the pubic hair "matched" the mtDNA

from Mr. Howard.[1] Had the jury heard evidence from the actual Bode Technology file, it would have learned of fatal errors in the DNA testing which suggested a "match" only because Diefenbach contaminated the evidentiary sample with Mr. Howard's DNA sample. On this basis, there is a reasonable probability that the conviction would not have been rendered.

i. *The Bode file was favorable to Mr. Howard.*

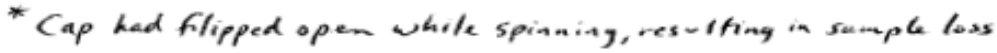
Without a confession, an eyewitness, a murder weapon, or injuries or blood placing Mr. Howard at the scene of the crime, the State clung to evidence of blood and hairs recovered from a pair of work boots found 2 and 1/2 miles away from the crime scene. The State implored the jury in opening statements to pay attention to the boots because the boots "will become important in this case." (App. Tr. at 2360). The State's theory was that forensic testing showed the blood on the boots belonged to Brian Day, and that the boots and the hairs in the boots belonged to Mr. Howard. Based on this evidence, the State zealously asserted at trial that Mr. Howard was not miles away in Texarkana, and that he in fact murdered the Days.

The State's expert witness on this issue was Charity Diefenbach, a twenty-eight-year-old technician for Bode Technology Group in Virginia. Diefenbach had only worked at Bode for a little over a year, and had little experience testing mtDNA. Diefenbach's testimony at trial, however, was flawless, stating that the mtDNA from the boots matched Mr. Howard's DNA and would exclude the general population by 99.8 percent. (App. Tr. at 2729). In making his final point, the prosecutor reemphasized the statistic probability for the jury:

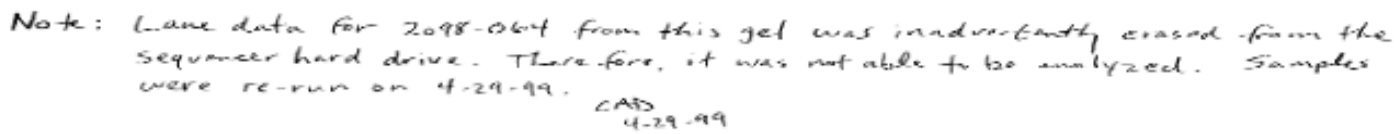
> THE STATE: Just for point of clarification, 99.8 percent of the people would be excluded from this sequence that were in these hairs, but the Defendant's blood DNA was included and is a match?

Id. Diefenbach replied, "That's correct." [2] (App. Tr. at 2730).

The Bode file, however, revealed a much less pristine analysis of Mr. Howard's hair sample. Quite frankly, Diefenbach botched the testing for this case, resulting in a contamination of the evidentiary sample. The Bode file was replete with evidence of testing error after testing error, all of which would have supplied the defense with rich material for impeachment and exculpation. Notations indicating the contamination and testing errors were not buried within scientific jargon unnoticeable to a lay person. In fact, the analysts notations in the report are unmistakable. First, while amplifying and preparing a hair for analysis, the cap to the container holding the specimen flipped open, resulting in contamination and sample loss:



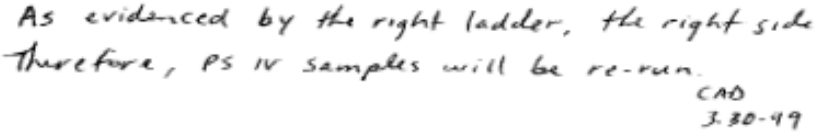
Add. K at 5 ("Cap had flipped open while spinning, resulting in sample loss"). In addition, after sequencing the mtDNA sample and preparing the results for the computer analysis, Diefenbach erased the raw data from the hard drive of the computer. The data were not able to be analyzed, and the samples had to be reprocessed:



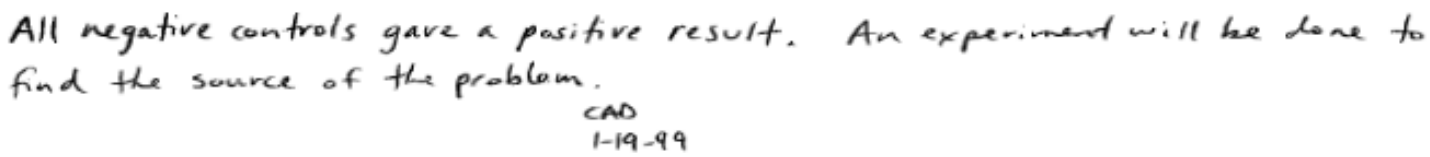
Id. at 6 ("Note: Lane data for 2098-064 from this gel was inadvertently erased from the sequencer hard drive. Therefore, it was not able to be analyzed. Samples were re-run on 4-29-99. CAD 4-29-99").

Again, when preparing the gels for electrophoresis, Diefenbach contaminated the entire right side of the gels, and she was forced to reprocess the sample. A third time, on this same hair sample, the amplification process was compromised by Diefenbach's sloppy performance and, because she

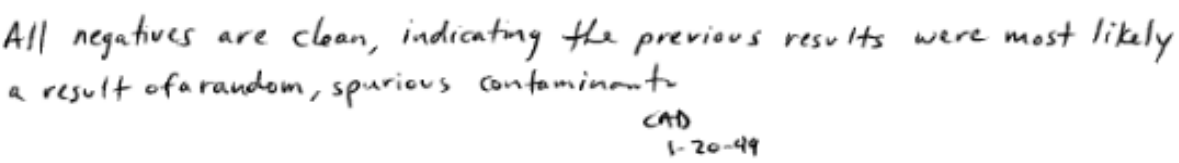
could not identify the exact point in the testing procedure when the errors occurred, she was forced to reprocess the sample using all new reagents. This suggests that the reagent lot that she had been using was faulty or contaminated:



Id. at 7 ("As evidenced by the right ladder, the right side of the gel did not run properly. Therefore, PS IV samples will be re-run. CAD 3-30-99"). Not surprisingly, at the end of processing the same hair sample, all the negative controls used to ensure reliability in the testing process showed a positive result:



Id. at 13 ("All negative controls gave a positive result. An experiment will be done to find the source of the problem. CAD 1-19-99"). Diefenbach conducted an experiment to find the source of the problem and concluded that the positive results were the result of spurious contaminants:



Id. at 11 ("All negatives are clean, indicating the previous results were most likely a result of a random, spurious contaminants. CAD 1-20-99").

These notations establish fundamental testing errors that render the testing results untrustworthy and unreliable. There is a constant danger in laboratories that cross-contamination occurs between the probe DNA and the sample DNA, or even between two sample DNAs. *See* National Research Council, *Strengthening Forensic Science in the United States* 86-87 (2009 ed.). Diefenbach's notes demonstrate at least three different examples of cross-contamination in the testing process. *See* Add. K at 5, 13. For example, the cap flipped open while spinning, resulting in contamination and degradation of the forensic sample. *Id.* at 5. Then, when preparing the gels for

electrophoresis, Diefenbach contaminated the entire right side of the gels, and was forced to reprocess the sample. A third instance of contamination occurred when Diefenbach—after correcting her earlier mistakes—noted that Mr. Howard's DNA contaminated the controls, creating positive results in the negative controls. *Id* . at 13. A positive result in a negative control demonstrates that DNA contamination has occurred. *See* National Research Counsel, *supra* at 88-89. Diefenbach failed to control both the laboratory and the testing environment, resulting in contamination of not only the samples, but of the testing mechanism as a whole.

The State's presentation of DNA evidence tying Mr. Howard to the scene is undermined by Diefenbach's own file. Diefenbach's notes are both exculpatory and impeaching, as they cast significant doubt on the reliability of her testimony and the results. In *Cloird v. State* , the petitioner sought *coram nobis* relief asserting that a DNA report suppressed by the State did not show his DNA was found on the victim. 357 Ark. 446, 451, 182 S.W.3d 477, 480 (2004). The Ark. Sup. Ct. denied relief, citing evidence at trial that the petitioner *orally* raped the victim twice, and the DNA swabs were *vaginal* samples. Therefore, the DNA results of the vaginal swab were neither favorable nor unfavorable to the defendant. *Id.* at 454, 482.

The concomitant circumstances in *Cloird* are not present here. Without Diefenbach's testimony purporting to show that Mr. Howard's DNA was in the boots, the State had no evidence that Mr. Howard was anywhere near the scene of the crime. *See* App. Tr. at 3080 ("Because these boots connect this Defendant to the murder of Brian Day, no doubt about it."). In fact, the State's own witnesses testified that Mr. Howard was in Texarkana and not Ogden when the Days were killed. The hair in the boots was not only material and favorable, it was essential to the State to prove its

case. Proof that Diefenbach's testing was marred by contamination and botched procedures would have undermined her credibility and nullified the only significant evidence tying Mr. Howard to the scene.

ii. *The State suppressed the Bode file.*

Suppression of material favorable evidence violates the Constitution "irrespective of the good faith or bad faith of the prosecution," *Cloird* , 349 Ark. at 37, 76 S.W.3d at 815 (citing *Brady* , 337 U.S. at 87), and thus a defendant need not show that the prosecutor was subjectively aware of the favorable evidence, *id.* at 38, 816. Rather, "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in th[e] case, including the police." *Andrews v. State* , 344 Ark. 606, 619, 42 S.W.3d 484, 493 (2001)(quoting *Strickler v. Greene* , 527 U.S. 263 (1999)). While Mr. Howard made pre-trial discovery motions on this issue, the State has an affirmative duty to disclose favorable evidence, regardless of whether the defense made any such request. *Kyles v. Whitley* , 514 U.S. 419, 432 (1995). The fact that a pre-trial discovery request was made only supports the proposition that Mr. Howard was diligent and that the laboratory files were on the State's radar of documents requested. *See infra* , Sec. V.

On August 27, 1998, defense counsel filed a pre-trial motion captioned Motion for Discovery and Disclosure requesting all records and reports of forensic examinations, investigations, and analyses undertaken in Mr. Howard's case. Add. B. In that same motion, counsel requested a list of expert qualifications, a description of anticipated testimony, and "his or her report." *Id* . Additionally, Mr. Howard moved for preservation of all rough notes or field notes of investigatory agencies because of potential *Brady* implications, which the court granted. Add. C; E. If the pre-

trial discovery motions failed to alert the State of the information requested, certainly the trial court's December 1, 1998 Order did. In that Order, the court ordered the State to turn over all reports from the Arkansas State Crime Laboratory, including the Medical Examiner's Office, and provide the defense with all copies of "any and all documentation and/or laboratory reports, including autopsies, supporting said findings and conclusions." Add. E. Just two months prior to that Order, the State contracted with Bode to analyze the DNA because the State Crime Laboratory did not have the capabilities to run the mtDNA testing. *See* Add. L; M.

Certainly Diefenbach's findings and her laboratory report fell under the trial court's December 1, 1998 Order requiring the State to turn over all supporting findings and conclusions. Acting as a paid agent of the State by performing the mtDNA testing, Bode's possession of this favorable evidence is attributable to the government. *See Kyles* , 514 U.S. at 437-38 (a prosecutor has a duty to learn of favorable evidence known to other prosecution and investigative agencies acting on the prosecution's behalf, including police agencies); *see also United States v. Joselyn* , 206 F.3d 114, 153 (1st Cir. 2000) (private party's knowledge of exculpatory evidence is not attributable to the government when the government did not have access to the evidence and the interests of the third party was not identical or congruent with that of the prosecution). Not only did the State have exclusive access to the evidence turned over to Bode, but the State contracted for a substantial fee for the analysis. *See* Add. F (trial court order authorizing the Treasurer of Little River County to disburse $10,500 to Bode). Accordingly, the State, through Bode, was in the possession of favorable evidence that the prosecutor unconstitutionally failed to disclose.

On January 27, 1998 , the State disclosed over a hundred pages of discovery material, including

multiple laboratory reports from the Arkansas Crime Laboratory. Add. O. The Bode file was not disclosed to the defense at that time. *Id.* In that correspondence, the prosecutor informed the defense that if any additional material was received, the State would provide a copy to the defense. *Id* . Seven months later, on July 26, 1999, the State again supplemented discovery. Add. P. The Bode file still went undisclosed. *Id* . Finally, on November 4, 1999, one month before trial the defense again requested that the prosecutor try to locate any additional law enforcement reports and "any other reports from witnesses that have been re-contacted or otherwise that have not been made available to defense counsel." Add. Q. The Bode file was not turned over. Mr. Howard was under no obligation to "scavenge for hints of undisclosed *Brady* material" when the State represented that all such material had been disclosed. *See Banks v. Dretke* , 540 U.S. 668 (2004) ("a rule thus declaring the 'prosecutor may hide, the defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process."). Even at trial, no mention was made of the Bode file. It was never introduced as evidence with Diefenbach's testimony, nor was the report or data mentioned in direct examination. *Compare* App. Tr. at 2641-42 (Chantelle Baquette, Arkansas State Crime Laboratory criminalist, referencing language in her report) *and id.* at 2674 (Robert Humphreys, latent fingerprint examiner, introducing the latent prints into evidence) *with id.* at 2727-30 (Diefenbach testimony never mentioning the lab report, file, or testing).

After Mr. Howard was convicted, the State continued to suppress the file. *See Strickler v. Greene* , 527 U.S. 263, 284 (1999) (when trial counsel rely upon the reasonable expectation that the prosecution will obey its duty to disclose impeachment material, state habeas counsel may

properly do the same). The file went undisclosed to the defense until 2004, when Mr. Howard removed the trial court for production of the Bode file, which the State again opposed. *See* Add. G. The State prayed that Mr. Howard's motion be denied and pled that it was not "obligated" to spend any money to produce the file. Add. H. Further, the State stated that Mr. Howard needed to obtain a waiver from the State to release Bode's file to undersigned counsel and only then, after the State gave permission for the release, would Bode turn over its file. *Id* . Further, the State requested that Mr. Howard bear the cost of the production of the file. *Id.* It was not until January 23, 2007 that Mr. Howard finally received the file. *See infra* , Sec. V.

As the Supreme Court cautioned, a prudent prosecutor will err on the side of transparency, resolving "doubtful questions in favor of disclosure." *See Kyles* , 514 U.S. at 439. Here, the State withheld and continued to resist disclosure of raw test data, laboratory notes, and communications between Bode and the prosecutor's office that was within the State's possession. Accordingly, the State's actions beginning in pre-trial litigation and lasting through 2007 demonstrate that the Bode file was withheld.

iii. *Prejudice ensued.*

If the jury had known of the blundering methods of Diefenbach in her testing, when considering the danger that there was a "match" simply because of contamination, it is *at least* reasonably probable that the jury would have rejected the State's theory of events. *Kyles* , 514 U.S. at 436-37 . To merit *coram nobis* relief, Mr. Howard must additionally demonstrate that there is a reasonable probability that the judgment of conviction would not have been rendered, or would have been prevented, had the suppressed information been disclosed at trial. *See Buckley* , 2010 Ark. 154,

2010 WL 1255763 at *1 (2010). Mr. Howard meets this standard.

The impact of the contamination of the DNA sample on the jury would have been colossal. This Court need not look further than the trial transcript itself to learn how severely prejudiced Mr. Howard was by Diefenbach's testimony "matching" his DNA to the boots. The State opened by alerting the jurors that the boots "will become important in this case." (App. Tr. at 2360). The State then echoed and amplified Diefenbach's findings of Mr. Howard's purported hair on the boots throughout trial. The State referenced the DNA on the boots over nine times in closing, devoting entire sections of the argument to demonstrating how the DNA on Mr. Howard's boots was, in the prosecutor's words, "monumental." *Id.* at 3023. The prejudice is most directly seen in the words of the prosecutor, who punctuated his closing argument with incessant mention of the boots:

- "Ladies and gentlemen, the State had two big breaks in this case. . . The second big break was whenever they found those boots. . . There was mitochondrial DNA testing on the pubic hairs that were found in those boots and it said that there's a 99.8% chance that's the pubic hair from Tim Howard. *There's no doubt about it, those are the Defendant's boots."* (App. Tr. at 3053). (emphasis added).
- "There was no hiding at any point about the boots, but [the defense] really don't want to talk about the boots. *If anything connects this Defendant to the crime, it's the boots." Id.* at 3078 (emphasis added).
- "Those are Tim Howard's boots. And because the evidence was so overwhelming, they don't even fight that issue anymore." *Id.*
- "No, [Mr. Howard] had the boots on. He had the boots on, and [the defense] don't want to address that issue. They want you to forget that. *Because these boots connect this Defendant to the murder of Brian Day, no doubt about it* ." (App. Tr. at 3080). (emphasis added).
- "Use your common sense, ladies and gentlemen. Those are his boots; he wore those boots." *Id.*
- "The point is, his hair is in the boots." (App. Tr. at 3082).

The importance of the DNA on the boots was not lost on the jury; only forty-five minutes after deliberating, the jury requested to see the boots. (App. Tr. at 3102).

Disclosure of the Bode file would have significantly strengthened Mr. Howard's case, and substantially weakened the State's theory of events. The critical component linking Mr. Howard to the crime was his DNA purportedly found on the boots; without Diefenbach, there would be no physical evidence linking Mr. Howard with those boots. Armed with this file on cross-examination, the defense easily could have eviscerated the mtDNA testing measures, showing how they were terribly flawed. Add. GG. The jury would have learned that all the controls failed during testing of the hair sample, and how that affected the results. The jury would have learned how the samples were mishandled and how the hair sample was lost during testing. With this information, the defense would have had a compelling argument that this was not Mr. Howard's DNA. Instead, the defense was left with nothing to challenge the State's evidence. *See* App. Tr. at 3046 (In closing, the defense attempts to challenge the testimony, "The state has stressed these boots to you a lot," but says nothing to impeach or even cast doubt on Diefenbach's testimony).

Further, Mr. Howard will show that had the suppressed Bode file been disclosed, it was such that it would have prevented rendition of the judgment had it been known at the time of trial. *See Buckley* , 2010 WL 1255763 at *1. The history of Mr. Howard's case before this Court, even before evidence of contaminated DNA surfaced, demonstrates there is a reasonable probability the jury would not have convicted Mr. Howard. *See Howard* , 348 Ark. at 497, 500, 501, 79 S.W.3d at 289, 291, 292 (J. Brown, dissenting) (Even when considering the mtDNA analysis, "[the evidence of Mr. Howard's guilt] was not forceful enough to compel a conclusion one way or the

other beyond suspicion or conjecture." "The proof implicating Howard in Shanon's murder is paper thin.") (J. Thornton, dissenting) ("I also believe that the evidence to support a conviction for the murder of Brian Day was very thin.") (J. Hannah, dissenting) ("[T]he jury was left to speculation and conjecture which may not support a conviction.").

Three Justices of the Arkansas Supreme Court strongly doubted the sufficiency of the evidence, without considering the effect of the contaminated DNA on the jury. Jurors are highly troubled by the fear that faulty scientific evidence may have led to a wrongful conviction. [3] *See also* National Research Council, *supra* at 86-87. As a result of Diefenbach's unchallenged testimony, the jurors were told that Mr. Howard belonged to less than 1% of the population who could have matched the DNA found on the boots, and therefore, could infer that Mr. Howard committed the murders. In *Buckley v. State* , the petitioner there alleged the State wrongfully withheld a videotaped statement from a witness that cast doubt on the witness's testimony. 2010 WL 1255763, *2-3 (2010). In demonstrating prejudice, the petitioner averred that with the videotape, he could have exploited the significant discrepancies to impeach the witness and undermine his credibility. Despite the State's protestations that the inconsistencies did not refute the petitioner's guilt, the Arkansas Supreme Court held that the "significant role of the witness" at trial warranted an evidentiary hearing on the writ of error *coram nobis* . *Id.* at *3. Here, Diefenbach's testimony directly connected Mr. Howard to the murders; therefore, her testimony was more than significant, it was invaluable.

Taking Diefenbach's notes at face value, an admission that the testing was contaminated and mishandled would have prevented rendition of the conviction here. Documented cases of wrongful convictions because of error and mishandling of DNA evidence, including cross-contamination of

samples, exist in laboratories across the country. [4] Analysts are now realizing an unexpectedly high rate of laboratory errors involving mix-up and cross-contamination of DNA samples which lead to a "match" between the evidentiary sample and the suspect's DNA. [5] The probative nature of evidence of contamination is strengthened when one learns of problems associated with Bode's DNA testing in other cases. In 2005, the Illinois State Police canceled the state's $7.7 million contract with Bode, expressing "outrage" over the poor work quality after Bode failed to identify semen on 22 percent of the rape kit samples it was charged with testing. *See* Candace Rondeaux, *Virginia DNA Review Hobbled as Crime Lab Chief Steps Down, Slow Pace is Criticized* , Washington Post (December 27, 2006) ("I wouldn't trust anything that [Bode] did–not after seeing their work on several cases and the problems in Illinois," said Edward Black of Forensic Science Associates in California.).

Diefenbach's file recites a starkly different analysis than the one presented at trial, the existence of which belies the seemingly straightforward and unequivocal nature of her testimony. DNA testing requires a series of distinct steps, which can be independently reviewed for reliability and validity. *See* National Research Council, *supra* at 88-89. The suppression of her file allowed for no such review. Diefenbach botched the testing in this case. She lost data. She lost and contaminated samples and negative controls. The jury certainly would have been troubled by these revelations. Such a degree of unreliability, when considering the State's strongest direct evidence was the DNA in the boots, demonstrates a reasonable probability that the jury would have reasonably doubted the State's version of events. The six dissenting votes over time from the seven Justices of the Arkansas Supreme Court is a compelling indication that the Arkansas

Supreme Court has little confidence in the jury's verdict, particularly because those votes were cast before evidence of botched testing ever surfaced. The doubt continues to mount. As such, this Court should grant Mr. Howard's writ and vacate his conviction and sentence of death.

III. The Prosecution Withheld Material Evidence at the Guilt Phase of a Report Showing that Wood Particles Found On Boots Did Not Match Particles From the Day Home.

The prosecution unconstitutionally failed to disclose to Mr. Howard's counsel material, exculpatory evidence that was within the State's actual or constructive control. First, the State asked Ms. Sakevicius, a criminalist with the Arkansas State Crime Laboratory, to analyze wood particles found on the pair of boots the prosecution maintained belonged to Tim Howard. Her report concluded the wood particles did not match or could not have come from a door in the Day home, which had been kicked in at one time. Add. R. This information was never disclosed to the defense and is material exculpatory information. The prosecution's theory was that Ms. Day died after a struggle with Mr. Howard in her house. The determination that the wood particles on the boots alleged to belong to Mr. Howard were not the same as the kicked-in door is material exculpatory evidence showing the violence in the Day house had not been caused by Mr. Howard. *Cf. Cloird* , 349 Ark. at 38, 76 S.W.3d at 816 (possible showing of materiality found where State allegedly suppressed DNA report excluding petitioner as donor of samples taken from victim).

IV. In the Penalty Phase of the Trial, the State Failed to Disclose Evidence of Police Records That Provided Documentary Proof of Child Abuse.

A State's constitutional obligations to disclose material, favorable information extends through the penalty phase of the trial. *See Brady* , 373 U.S. at 87-88 (prosecution must not withhold evidence that "would tend to exculpate [a defendant] *or reduce the penalty* "). The State's

suppression of a police report detailing the violent abuse Mr. Howard suffered as a minor could have been used in mitigation to advocate for a sentence less than death. In support of this Claim, Mr. Howard alleges the following facts, in addition to those that will be presented after a full investigation, additional time, discovery, access to the Court's subpoena power, expansion of the record and an evidentiary hearing.

A. The police report detailing facts that Mr. Howard's father violently beat him and his mother, and threatened to "rip [Mr. Howard's] head off with a gun," when Mr. Howard was only seventeen years old was favorable mitigating evidence.

The State has in its possession an undisclosed Little River Sheriff's Office report from a seventeen-year-old Tim Howard stating that he was afraid to go home because his father, Bruce Howard, threatened to kill him and had previously violently assaulted Mr. Howard's mother. Mr. Howard is the product of a violent childhood, during which he was subjected to extreme physical abuse. Bruce Howard was an exceptionally violent man, who murdered his first wife before he married Mr. Howard's mother, Add. W; CC, and later murdered a girlfriend whom he lived with after Mr. Howard's mother died. Add. DD. Bruce served fifteen years in the penitentiary for the murder of his first wife and at the time Mr. Howard made this report to the Little River Sheriff's Office, Bruce Howard was out on bond for another murder charge. Add. W.

Bruce beat Mr. Howard severely and repeatedly from an early age. At the age of five, Bruce beat Mr. Howard with a clothes hanger; years later, Bruce would pound Mr. Howard with thick slabs of wood. Add. FF. As Mr. Howard grew older, the violence perpetrated against him worsened, and he would sometimes flee his home for long periods of time because he was afraid to come home and face Bruce. After his mother died when he was eleven, Mr. Howard went to live

with Bruce's new wife, Clorastine Aings, who also physically abused Mr. Howard. Bruce gunned down Clorastine one afternoon in the middle of a public sidewalk, killing her. Add. FF.

It was not until Mr. Howard was seventeen when Bruce pulled out a shotgun and threatened to kill him that he fled the house on foot to the Little Rock Sheriff's Office where he reported the incident and sought protection. Add. W. It is believed that the Little River Sheriff's Office report recorded statements made by Mr. Howard that he was afraid to go home, that his father had slapped him around and that, earlier that day, Bruce brandished a gun from his pick-up truck and threatened to "rip [Mr. Howard's] head off." Add. W. At the time, Mr. Howard had been living with a young white couple in Kings, Texas, and Mr .Howard had returned to Ogden so that his father would sign him into school there. *Id.* Bruce refused to sign the paper, and quickly turned violent. It was then that Bruce brandished a gun and threatened to kill Mr. Howard. According to the Arkansas Social Services Division (ASSD) report, this abuse was preserved in an official, written sheriff's report at the Little River Sheriff's Office. Add. W.

As a result, arrangements were made to transport Mr. Howard into the custody of the Southern Arkansas Youth Shelter in Magnolia, Arkansas. *Id.* Language in this ASSD report suggests that Mr. Howard's reports of violence were credible as the dispatcher at the sheriff's office noted that she believe Mr. Howard because he sat in the office alone for three hours waiting for assistance and shelter. *Id* . As a result of this report, the Southern Arkansas Youth Shelter picked up Mr. Howard from the sheriff's office and requested an emergency hearing for temporary custody because Mr. Howard was "in eminent [sic] danger." *Id* .; Add. V. On August 31, 1986, the Juvenile Court of Little River County, Arkansas ordered Mr. Howard removed from the custody of

Bruce Howard. Add. X. Mr. Howard was placed in foster care. *Id.*

None of this information, including evidence of Mr. Howard's troubled and violent past, was ever presented to the jury in the penalty phase of his trial.

B. The State suppressed documentary evidence of child abuse.

The State suppressed, and continues to suppress, the official 1986 Little River Sheriff Office report detailing Bruce Howard's violent abuse of Mr. Howard. The report remained—and still remains—undisturbed in the files of the Little River Sheriff's Office. The report has never been disclosed despite defense counsel's numerous informal requests and a Freedom of Information Act request. Add. Z; AA. Using the ASSD Intake narrative filed as part of the petition for temporary custody that day in 1986, defense counsel was able to glean that a lengthy report was taken at the sheriff's office. [6] *See* Add. W (stating "Ms. Cannon showed worker the official report" and "The report stated that [Mr. Howard] . . . stated that he was afraid to go home."). Despite clear indications from a state agency, ASSD, quoting from the official sheriff's report, the State has never turned over the report to defense counsel. It was only through the ASSD narrative referencing the official report that Mr. Howard was even able to raise this claim. Even then, the extent of the documented abuse is unknown, as the ASSD narrative only provides a snapshot of what happened. [7]

Certainly the State cannot use evidence in police files to convict Mr. Howard while at the same time absolving themselves of the responsibility to disclose favorable evidence where mitigation is concerned. *See Moore v. Illinois* , 408 U.S. 786, 810 (1972) (Marshall, J., concurring in part and

dissenting in part)(stating that when officers help the prosecution, those officers cannot then conceal evidence that the prosecutor would have a duty to disclose). This evidence was not filed away in a box in a distant part of the county, but located in the Little River Sheriff's station—the same station where Mr. Howard was arrested and the same station that investigated Mr. Howard for these murders. The fact that the report has still not been disclosed is telling. Accordingly, the State continues to suppress this report.

C. The suppression of the report prejudiced Mr. Howard.

Mr. Howard is prepared to prove that without the evidence documenting the abuse he suffered growing up, there is a reasonable probability that the jury would not have rendered its death sentence. *See Kyles* , 514 U.S. at 433-34; *see also Thrash v. State* , 2010 Ark. 118, 2011 WL 913211, *2 (2011). Without this evidence, the jury was given the impression that Mr. Howard's childhood was neither uncommon nor violent. Defense counsel's elicitation of Mr. Howard's *positive* family life demonstrates that counsel was completely unaware of the violent childhood Mr. Howard endured. For example, defense counsel elicited from Deborah Lockett, Mr. Howard's aunt, that Bruce Howard was involved in a positive way in Mr. Howard's life, and that "[Bruce is] still a father to Tim. [Bruce] still be [sic] there for him." (App. Tr. at 3159). Similarly, when defense counsel asked Mr. Howard's sister, Chiffon Howard, how Mr. Howard behaved as a child, she testified that "[Mr. Howard] was always kind, always fun to be around" and that the two "always had fun growing up." *Id.* at 3171. This is a stark contrast from the 1986 sheriff's report detailing the violent abuse Mr. Howard suffered at the hands of his father Bruce.

The prejudice was further compounded when the prosecutor in closing argument in the penalty

phase exploited Mr. Howard's loving relationship with his family:

> Everybody has family. I've got family, you've got family. Family is going to come for you, no matter what you've done. You can't blame family for what he's done. You can't blame sisters, his brother-in-law, you can't blame anybody, and I'm not going to. I'm not going to criticize them, I'm not going to say anything bad about them coming up and standing up for someone they love. I wouldn't do that.

App. Tr. at 3258-59. The suppression of the report allowed the State to argue that Mr. Howard's family is no different than anyone else's family, and that his life should not be spared simply because his family members were "standing up for someone they love." *Id* . Courts have repeatedly found that evidence of profound abuse in a person's life is persuasive and effective evidence to be argued to a jury to spare someone's life. *See Williams v. Taylor* , 529 U.S. 362 (2000)("graphic description of Williams' childhood, filled with abuse and privation . . . might well have influenced the jury's appraisal of his moral culpability"); *see also Wiggins v. Smith* , 539 U.S. 510 (2003); *Rompilla v. Beard* , 545 U.S. 374 (2005). Certainly evidence that Bruce murdered two women, physically beat Mr. Howard from a very young age, and pulled out a gun and threatened to "rip" Mr. Howard's head off when he was seventeen years old creates a reasonable probability that the death sentence would have been prevented.

Furthermore, prejudice is not limited to the suppression of the report itself. Reasonable counsel, upon learning of the documented abuse in the report, would have investigated further and uncovered a trove of classically mitigating evidence regarding Bruce Howard's abuse of his son and murder of his wives. *See Wiggins* , 539 U.S. at 525 (finding that counsel's possession of a pre-sentence investigation report should have caused a reasonable attorney to investigate further to reveal a history of physical and sexual abuse to present to a jury in the penalty phase). Here, the

only "Mr. Howard" the jury knew was the defense's portrayal of him as an average family man, leaving the jury with no sympathetic context for the terrible crimes of which Mr. Howard stood convicted. The only abuse mentioned in the penalty phase was a fleeting reference to one instance of abuse between Mr. Howard's parents, and it was so quickly referenced that we do not know if Mr. Howard even witnessed it. (App. Tr. at 3158). The violence Mr. Howard experienced growing up was nothing but extraordinary and atypical. The jury, however, was ignorant of this powerful mitigating evidence.

Finally, Mr. Howard was actually prejudiced by the State's suppression of the report as further evidenced by the jury verdict forms. When the judge instructed the jury that they could consider as a mitigating circumstance the fact that "Timothy Howard lived in an abusive household as a youth," the jury had no evidence to support the assertion. In combing through defense counsel's closing argument in the penalty phase, counsel never once mentioned any abuse Mr. Howard suffered as a minor, nor any abuse he witnessed at all as a child. No witness testified to it. The court's instruction was simply ink on a page; the jury had no knowledge of the violent mistreatment Mr. Howard suffered at the hands of his father or any indication of the father's violent past. This point is illustrated by the jury's actual verdict form, in which the jury purposefully did not check "Mr. Howard's life in an abusive household" as a reason to show mercy. *See* Add. I.

The jury that sentenced Mr. Howard never learned that Mr. Howard was beaten as a child, that his father murdered two prior wives, and that the abuse got so bad that at the age of seventeen, after being threatened with a shotgun, Mr. Howard walked to the Little River Sheriff's Office to

sit for three hours seeking refuge because he was terrified to go home. As a result of this report, Mr. Howard was placed in foster care. The prosecution's failure to disclose this report is particularly prejudicial because the jury found that Mr. Howard did not grow up in an abusive household, and there is a reasonable probability that if the jury did learn of the abuse, the death sentence would not have been rendered. *See Williams* , 529 U.S. at 398 (mitigation evidence detailing abuse "might well have influenced the jury's appraisal of his moral culpability."). The report remains suppressed to this day in the files of the Little River Sheriff's Office. Accordingly, this Court should grant the Writ and vacate Mr. Howard's conviction and sentence.

IV. The State Additionally Failed to Disclose Material Evidence at Key Points in the Guilt Phase That Undermined its Own Case for Guilt.

Additional evidence in the guilt phase was later uncovered by postconviction counsel, which, when viewed separately and cumulatively, rendered Mr. Howard's trial fundamentally unfair. *See Newman v. State* , 2009 Ark. 539, — S.W.3d — (2009). In support of this claim, Mr. Howard alleges the following facts, in addition to those that will be presented after a full investigation, additional time, discovery, access to this Court's subpoena power, expansion of the record and an evidentiary hearing:

a. *Information that implicated Danny Merrell in the murder of the Days* . Danny Merrell was a methamphetamine user in the area and a cousin of Mark Ardwin, an officer on the Ashdown Police force. Criminalist Robert Humphreys testified that an investigator, most likely Hays McWhirter, telephoned him and asked him to compare the unknown prints submitted to him with Danny Merrell. The information that the police initially suspected Danny Merrell was not disclosed to defense counsel until Agent Humphrey testified on the second day of trial. This information is

material to Mr. Howard's defense that Mr. and Ms. Day were killed by drug suppliers. *Cf. Echols* , 354 Ark. at 422, 125 S.W.3d at 159 (suggesting that evidence "point[ing] directly toward the guilt of a[ ]particular third party" would be material).

b. *Impeachment information raising serious doubts about the credibility, reliability, and biases of Penny Granger* . Penny Granger claimed Shanon Day was not only pregnant, but that Mr. Howard was the father. The prosecution used her testimony as proof of Mr. Howard's motive for murder, despite conclusive medical evidence that Ms. Day was not pregnant. Granger had a longstanding history of mental illness and mental health treatment. Despite this the State presented Granger as Shanon Day's longstanding and trustworthy confidant. After Mr. Howard's trial, in 2000, Granger took her own life by shooting herself in the head. Add. U . This evidence is highly material as Granger's history of mental illness, along with other evidence now known to the defense, would have caused a jury to doubt whether or not Granger was testifying truthfully.

c. *Mr. Day's arrest two weeks before his murder* . There was evidence that Brian Day was arrested with another drug dealer, Mike May, two weeks before his murder. Brian Day was released on personal recognizance and rumors spread that he "snitched" to be released. This information would have strongly supported Mr. Howard's theory that Mr. Day was murdered by powerful drug suppliers. These higher-level criminals understandably would have feared that Mr. Day would become an informant against them in order to avoid the serious charges he most surely was facing. Such evidence is classically material and this information would have had a cumulative affect as to the weakness of the State's case. This is particularly so, because the State was aware of Shanon Day's statement that if anything happened to them it would be Kenny

"Chicken" Fields who did it, and that it was the defense theory that it was "Chicken" and these violent, out-of-state drug dealers who killed the Days.

d. *Impeachment evidence related to key fact witness Jennifer Qualls* . The prosecution was actually in possession of extensive impeachment information of Jennifer Qualls, which included her Texarkana, Texas felony cocaine possession conviction, her numerous convictions and arrests indicating dishonesty and abuse of the criminal justice system, and her history of mental and emotional instability and violence. Add. S; T. In fact, Qualls had a pattern of using judicial proceedings to retaliate against boyfriends who wanted to end their relationships with her or whom she believed were cheating on her. *Id.* Evidence casting doubt on the credibility of Qualls is material, as Qualls provided key facts to support the State's theory of events. App. Tr. at 2549 (testifying that she thought she saw Mr. Howard with a gun), *id.* at 2556 (testifying Mr. Howard was acting strange around the time of the murders), *id.* at 2560 (testifying Mr. Howard gave her two $100 bills). It was the defense theory that Qualls was a scorned lover of Mr. Howard, and evidence of her convictions of false statements and abuse of the criminal justice system would have been favorable in light of the new information now available to the defense.

e. *Information that implicated Phillip Bush in the murder* . Phillip Bush was a major player in Brian Day's drug business. Phillip Bush admitted to being with Brian Day the night of the murders. At 4 or 5 a.m. on the morning of the murders, witnesses saw Bush driving his car at an unreasonably high rate of speed and acting extremely suspicious. Later in the morning of the Days' murders, witnesses saw Bush cleaning a hand gun. Furthermore, after the police found a suspicious and unidentified Caucasian hair, Bush, a white man, shaved his head for the first time in

his life and has kept this unusual haircut ever since. Bush's fingerprints or hair were never tested. Members of the Little River County Sheriff's Department suspected that Bush was the killer, but leads implicating him were abandoned because Bush is related to Sheriff Danny Russell. The information implicating Phillip Bush in the murder of the Days was and is material evidence and if the jurors had heard this material evidence, along with the other evidence Howard can now show, it is reasonably likely that the jury would have had a reasonable doubt that Mr. Howard, rather than Bush, was the killer.

f. *Information that Ms. Day was not pregnant.* Lastly, Mr. Howard will demonstrate that Shanon Day was not actually pregnant at the time of the murders. This evidence included, but was not limited to, evidence that would cause the State to doubt Granger's version of events. Scientific studies show pregnancy tests have an almost 100 percent accuracy rate. Because Shanon Day was not actually pregnant, it would be impossible for Granger to have seen a positive home pregnancy test.

V. Mr. Howard Has Been Diligent in Asserting His Claims.

Mr. Howard has exercised due diligence in bringing his claims before the courts. Due diligence requires that the defendant be unaware of the facts underlying his claim at the time of trial; that he could not, in the exercise of due diligence, have presented those facts at trial; and that upon discovering the facts, he did not delay in bringing the petition. *See Newman v. State* , 2009 Ark. 539, — S.W.3d — (2000). By the very nature of *Brady* claims, it is axiomatic that Mr. Howard was not aware of the facts at trial, and could not have presented, in the exercise of due diligence, the facts at trial. It is for this precise reason that the prosecution has a continuing *Brady* obligation

to disclose material evidence to the defense. Mr. Howard avers, however, that once he discovered the facts, he did not delay in bringing the claim before the courts. Mr. Howard will address each claim in turn.

Concerning Mr. Howard's claim of the suppression of the Bode file, Mr. Howard was made aware of the testing errors in 2007. Add. EE. Three years earlier, in 2004, Mr. Howard filed a motion to produce the entire Bode file. Add. G. In opposing that motion, the State argued that the motion should be denied and that the State was not "obligated" to spend any money to obtain the file. Add. H.

As recounted earlier, in spite of its *Brady* obligations, the prosecution failed to disclose a copy of the Bode file to Mr. Howard pre-trial, during trial, and after his conviction. *See supra* , Sec. II, A.ii, incorporated by reference herein. Howard first requested the file from Bode directly, but was told that the State needed to sign a waiver of any privilege the State had with Bode Technology Group. On January 8, 2007, defense counsel requested that Prosecuting Attorney Tom Cooper sign a waiver. On January 11, 2007, Mr. Cooper signed the waiver. Add. N. After the State authorized its release and Bode finally disclosed the file on January 23, 2007, Mr. Howard was diligent in putting this claim, and his other *Brady* claims, before the Court:

- On March 9, 2007, five weeks after receiving the file, Mr. Howard included this claim in his Petition for Habeas Corpus filed in the U.S. District Court. *See* Petition for Habeas Corpus, Claim III at ¶3.E.b-j ("Trial Counsel Rendered Constitutionally Ineffective Assistance of Counsel") and X ¶ 2.F.a ("Mr. Howard Was Denied A Fair Trial Due To Misconduct of the Prosecutors").
- After the U.S. District Court remanded Mr. Howard's case to state court, Mr. Howard included this claim in his Petition for Postconviction Relief. *See* Pet. For Postconviction Relief Pursuant to Ark. R. Crim. P. 37, Claim III at ¶E ("Trial Counsel Rendered Constitutionally Ineffective Assistance at the Guilt Phase") and Claim X at ¶2 ("Information

in the possession of the prosecution or imputed to be in the possession of the prosecution about mitochondrial DNA testing done by Bode Technologies").

- On September 9, 2010, four weeks after The Ark. Sup Ct denied Mr. Howard's Motion to Recall the Mandate to allow him to file his Rule 37 Petition, Mr. Howard filed an Application with the Court.

In sum, the longest period of time between when the State finally disclosed the file and when Mr. Howard raised this claim before the courts was approximately five weeks—forty-five days to be exact. Mr. Howard has been diligent.

The Ark. Sup. Ct. has made clear that if a petitioner pursued claims in a different forum before seeking a writ of error *coram nobis* , the filing in different courts cannot negate his diligence. *See Newman v. State* , 2009 Ark. 539, —S.W.3d— (2009)(rejecting the State's argument that petitioner was not diligent because he only filed his application to reinvest jurisdiction after the federal district court directed him to exhaust and advance his claims in state court). It need not matter which court heard the claim, only that Mr. Howard raised the claim. Unlike the petitioner in *Echols* who was denied permission to file for *coram nobis* because counsel was aware of his history of mental treatments at the time of trial, here, Mr. Howard never received the Bode file until 2007, and only after the State gave Bode permission to release the file to Mr. Howard. 354 Ark. at 419, 125 S.W.3d at 157. Mr. Howard has been diligent.

Nor may Mr. Howard be charged with lack of diligence with respect to his penalty phase *Brady* claim. Mr. Howard has presented to this Court a *Brady* violation although to date the evidence is still being suppressed. As counsel still has not received a copy of the actual report, Mr. Howard is, if anything, hyper-diligent in asserting this claim. Mr. Howard learned of the underlying facts—here, the existence of the Sheriff's report—in late 2006. Previously, all of Mr. Howard's juvenile

and social services records were sealed by the court. It was then, on November 21, 2006, that the Little River Circuit Court ordered a release of Mr Howard's juvenile and social services file to defense counsel. *See* Add. Y (directing the Arkansas Department of Health and Human Services to release to defense counsel "any and all records . . . [including] but not limited to all juvenile and social services files."). Like the guilt phase *Brady* claims, three and a half months after learning of information in the report, Mr. Howard included this claim in his original Petition for Habeas Corpus, *see* Pet. for Habeas Corpus, Claim X, and again in his Petition for Postconviction Relief, *see* Pet. For Postconviction Relief Pursuant to Ark. R. Crim. P. 37, Claim X. On September 9, 2010, the Arkansas Supreme Court denied Mr. Howard's motion to recall and mandate, and one month later he included this claim in the error *corum nobis* application.

In sum, Mr. Howard's rapid response in including these claims in petitions before the courts precludes any finding of a lack of diligence. Once apprised of the relevant facts, Mr. Howard did not delay in raising these claims.

VI. Conclusion.

The prejudicial effect of withholding such valuable exculpatory evidence to the defense remains so long as Mr. Howard's verdict stands. As the Supreme Court in *Kyles v. Whitley* recognized, the cumulative effect of *Brady* violations cannot be ignored. *Kyles* , 514 U.S. at 454. Each instance of suppression of favorable evidence is qualitatively different. The value of the hair sample is obvious, particularly in light of testimony that Mr. Howard was miles away in Texarkana when the Days were killed, and not two and a half miles away like the State asserts. Similarly, testimony about wood on the boots not matching the wood on the Days' door, or even evidence of an

alternative suspect who shaved his head the morning after Caucasian hairs were found, provide strong evidence in Mr. Howard's favor. On the other hand, the value of the 1986 Sheriff's report is more nuanced, and its prejudicial effect is only apparent when viewed in the totality of the defense mitigation case. When evaluating these claims altogether, the prejudice is apparent.

For the foregoing reasons, Timothy Lamont Howard respectfully requests that his Petition be granted, and that his conviction and sentence of death be vacated.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 29 day of November, 2012 the foregoing Petition for Writ of Error *Coram Nobis* was placed in the United States Mail, first class postage prepaid, for delivery to Assistant Attorneys General David R. Raupp and Lauren Elizabeth Heil, Catlett-Prien Tower Bldg., 323 Center Street, Suite 200, Little Rock, AR 72201-2610.

_____

Patrick J. Benca

FOOTNOTES

1:

At the time it performed its mtDNA tests, Bode had not yet received national ASCLD accreditation to perform mtDNA testing. Bode had only begun performing mtDNA tests two years earlier in 1997. In those two years, Bode conducted only 25 analyses, and only two of those cases had ever been admitted as evidence in a court of law. The particular methodologies Bode used to test the hairs for mtDNA were novel. Even the best established method of mtDNA typing at the time were, and still are, controversial in courts across the country.

2:

This testimony about the "match" itself proves Diefenbach's inexperience with mtDNA testing. Mitochondrial DNA tests are not a means of "matching" or identifying individuals; it can only "exclude" or "fail to exclude" a suspect. National Research Council, *Strengthening Forensic Science in the United States* 130-32 (2009 ed.). In mtDNA testing, an analyst sequences the mtDNA and then checks the sequence against a larger database, reporting that the sequence was found "X" number of times in the database. It follows that if the results are checked against the number of samples actually in the database, the more diverse the samples in the database, the better the statistics will be for a random frequency estimate. Thus, mtDNA can never prove a "match." Here, the population database was 1,657, and of that number, only 380 African American profiles were available. To suggest that a search of 380 African American mtDNA profiles is sufficient to assess the probability that another African American in the entire population will "match" that specific DNA profile, to a 99.8 percentile, is statistically unsound.

3:

See Phoebe Zerwick, *Mixed Results: Forensics, Right or Wrong, Often Impresses Jurors* ,

Winston-Salem Journal , Aug. 29, 2005, at A1 (reviewing a series of North Carolina cases in which new forensics disproved trial evidence, and discussing the strong impact of forensic evidence on jurors generally).

4:

See William C. Thompson, "Tarnish on the 'Gold Standard': Recent Problems in Forensic DNA Testing," *The Champion* , January/February 2006 (In Texas, the Houston Police Department shut down the DNA and serology section of its crime laboratory after a television expose revealed serious deficiencies in lab procedure and botched lab work; in Virginia, the State Division of Forensic Sciences botched the analysis, failed to follow proper procedure and misinterpreted its own results; in Washington state, 23 DNA testing errors in the Washington State Patrol laboratory were documented in 2005).

5:

Id . at 7.

6:

The ASSD report was sealed. The defense only learned of the report after the circuit court in Little River ordered a release of Mr. Howard's juvenile and social services file to defense counsel in late 2006. Add. Y; *discussed infra* , Sec. V.

7:

It cannot be said that because Mr. Howard made the report, he himself could have informed his lawyers of the violent abuse he suffered as a child. Courts are resoundingly clear that counsel has a duty to investigate, and prosecutors have a duty to turn over, favorable mitigating evidence irrespective of whether or not a client volunteers to share with his court-appointed lawyer the

tormented abuse he suffered growing up. *See Wiggins v. Smith* , 539 U.S. 510 (2003); *see also United States v. Howell* , 231 F.3d 615, 625 (9th Cir. 2000) (quoting *United States v. McElroy* , 697 F.2d 459) (2d Cir. 1982) ("[d]efense counsel is entitled to plan his trial strategy on the basis of full disclosure of the government, regardless of the defendant's knowledge or memory of the disclosed statements.")