

# CSI MISSISSIPPI: THE CAUTIONARY TALE OF MISSISSIPPI'S MEDICO-LEGAL HISTORY

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#### INTRODUCTION

In 1955, Reverend George Lee, an African American, Baptist minister who had the temerity to found a local NAACP chapter in Humphreys County, Mississippi, a county nestled deep in the Mississippi Delta, was found dead in what at first appeared to have been a single-car accident.<sup>1</sup> Witnesses reported hearing several short explosions just prior to the wreck, and a closer examination of the scene revealed that Lee's injuries included significant, specific head trauma, namely from lead shotgun pellets embedded in his head.<sup>2</sup>

It quickly became apparent what had happened to Reverend Lee: He had been murdered in cold blood, an act clearly meant to maintain the state's racial and class status quo by intimidating

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<sup>1</sup> SETH CAGIN & PHILIP DRAY, *WE ARE NOT AFRAID: THE STORY OF GOODMAN, SCHWERNER, AND CHANEY AND THE CIVIL RIGHTS CAMPAIGN FOR MISSISSIPPI* 135 (1988).

<sup>2</sup> *Id.*

anyone courageous enough to work for change. His death was characteristic of many during the era.<sup>3</sup>

But there was something else about Reverend Lee's murder—something less well known—that transformed it from an act of race-based, premeditated murder to state-sanctioned conspiracy. Shortly after his body was discovered in the smoking wreck of his vehicle, the county coroner was summoned to the scene. Among the coroner's duties, required by law, was to convene an inquest into any "violent, sudden, or causal death" occurring within the jurisdiction.<sup>4</sup> A coroner's jury, comprised of local citizens, would listen to testimony about the cause and manner of the victim's death.<sup>5</sup> If the jury determined that the death was "suspicious" then an official investigation followed.<sup>6</sup> On the other hand, deaths deemed to have occurred by natural causes, or by accident, were noted for administrative purposes, the body removed to a local funeral home and prepared for quiet burial.<sup>7</sup>

At the time of Reverend Lee's death, coroners were directly responsible for directing death investigations in their respective counties.<sup>8</sup> Coroners were elected to office (as they are to this day). In 1955, though, enfranchisement was a right exercised almost exclusively by whites, especially in rural Mississippi.

The local sheriff's inquest into Reverend Lee's death concluded that his injuries had indeed been sustained as a result of an unfortunate car accident.<sup>9</sup> As for the shotgun blasts? They were deemed to have been only the sound of blown tires.<sup>10</sup> The lead shotgun pellets removed from Lee's head? The inquest's

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<sup>3</sup> *Biographies of Slain Civil Rights Figures*, CLARION-LEDGER, Dec. 18, 2011.

<sup>4</sup> JOINT LEGISLATIVE COMMITTEE ON PERFORMANCE EVALUATION AND EXPENDITURE REVIEW, AN INVESTIGATION OF MISSISSIPPI'S MEDICO-LEGAL DEATH INVESTIGATION PROCESS, REGULAR SESS., at 4 (2008) [hereinafter PEER REPORT], available at <http://www.peer.state.ms.us/reports/rpt514.pdf>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> David T. Beito & Linda Royster Beito, *The Grim and Overlooked Anniversary of the Murder of Rev. George W. Lee, Civil Rights Activist*, HISTORY NEWS NETWORK (May 9, 2005), <http://hnn.us/articles/11744.html>.

<sup>10</sup> PETE DANIEL, LOST REVOLUTIONS: THE SOUTH IN THE 1950S 222-23 (2000) (citing Ruby Hurley, Memorandum, *Investigation of Death of Reverend G.W. Lee, Belzoni, Mississippi*, found in Mississippi Pressures, II A, box 422, NAACP Papers (May 13, 1955)).

report explained that they were merely tooth fillings.<sup>11</sup> The coroner concurred with the findings, and the official cause of death was listed as “unknown.”<sup>12</sup> No criminal investigation was ever opened; the case remains unsolved to this day.<sup>13</sup> Forensic malfeasance, the kind that ensured the failure of justice in Reverend Lee’s death, as well as many others,<sup>14</sup> has adapted itself

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Reverend Lee’s murder was only one among countless others in which the state’s medico-legal system was employed to whitewash race-based murder. In some instances the fraud was of morbid interest, as in the official medical reports about the death of Robert Johnson, the fabled Mississippi Delta bluesman. Johnson was most likely poisoned by strychnine or lye by a jealous husband at a juke joint near Greenwood, Mississippi, in 1938. PATRICIA SCHROEDER, ROBERT JOHNSON, MYTHMAKING, AND CONTEMPORARY AMERICAN CULTURE 42 (2004). His death was reputedly horrible and protracted. *Id.* He vomited for hours, bled from his mouth and crawled around on the floor howling like a dog. *Id.* He died about three days later. *Id.* The coroner’s report listed the cause of death as “No doctor.” *Id.*

But anyone even passingly familiar with Civil Rights history knows about the summer—“Freedom Summer”—of 1964, when Andrew Goodman, Michael Schwerner, and James Chaney traveled throughout Mississippi in order to help African American Mississippians register to vote. While in Neshoba County, a sheriff’s deputy, Cecil Price, arrested the men for “speeding” and took them to the Neshoba County jail. *Mississippi Freedom Summer Events*, CIVIL RIGHTS MOVEMENT VETERANS, <http://www.crmvet.org/tim/tim64b.htm#1964csg> (last visited Apr. 4, 2013). Price, a member of the Ku Klux Klan, arranged for the men to be released from jail after the Klan had planned an ambush. *Id.* After their release, Price pulled the men over once again and then released them to a Klan mob, which murdered the men and disposed of their bodies in an earthen dam. *Id.* Immediately after the attack, when the three men’s pictures were featured in newspapers across America, Mississippi state officials denied that the men had come to harm, claiming instead that the supposed crimes were merely a hoax for attention. Mississippi Governor Ross Barnett famously proclaimed that “[t]hose boys are in Cuba.” *Id.* When FBI agents discovered the bodies, agents suspected that county officials were involved in the disappearances and that any local forensic medical investigation would attempt to cover up the crime. *Id.* The agents quickly loaded the bodies into a hearse and transported them to the state capitol in Jackson for autopsy. CAGIN & DRAY, *supra* note 1, at 391-402. Federal officials stood by at the autopsies and only supplied the findings to the county coroner much later. *Bodies of Missing Trio Found Buried in Levee*, NESHOPA CNTY DEMOCRAT, Aug. 6, 1964.

In 1965, eighteen Klansmen were arrested by the federal government for conspiring to deprive Goodman, Schwerner, and Chaney of their civil rights. *Mississippi Freedom Summer Events*, *supra*. In 1967, seven Klan members were convicted of conspiracy charges and received relatively trivial sentences. *Id.* All the other federal trials ended in either hung juries or acquittals. *Id.* Mississippi itself refused for decades to investigate, indict, or prosecute the perpetrators. *Id.* It was not until 2005, forty-one years after the murders, that Mississippi took a proactive role in

over time to a new political landscape, one more concerned with power and influence, and the spoils, monetary and otherwise, that come with it.

*A. That Was Then; This Is Now*

Over the last four decades, Mississippi has persisted in condoning systemic medico-legal and forensic malfeasance, and, more specifically, refused to adapt and properly accommodate contemporary forensic science in its courtrooms.<sup>15</sup> The fact of the matter is that Mississippi has never, until very recently, made a good-faith effort to bring its medico-legal death investigation system into line to prohibit the failures of justice that have been its hallmark.

Even though the Mississippi Legislature abolished coroner's juries in the 1980s and created the State Medical Examiner's office to provide meaningful oversight of Mississippi's death investigation system,<sup>16</sup> no demonstrative improvements occurred. In fact, it was just the opposite: During the early 1990s, the Mississippi Department of Public Safety, the administrative agency responsible for appointing a State Medical Examiner, failed to appoint a person to the position.<sup>17</sup> Among the public

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bringing the perpetrators to justice. *Id.* In 2005, a Neshoba County jury returned a guilty verdict against Edgar Ray Killen—the man long believed to be the head of the plot to kill Goodman, Schwerner, and Chaney. *Id.* Even then, Killen was only convicted of manslaughter. *Id.*

Soon after Emmett Till's body was recovered from the Tallahatchie River with a cotton gin fan wired around his neck, the local coroner and other authorities quickly spread lime over the decomposing body and nailed shut the cheap pine coffin, hoping for a quick burial. *The Ghost of Emmett Till*, N.Y. TIMES, Mar. 22, 2004, available at <http://www.nytimes.com/2004/03/22/opinion/the-ghost-of-emmett-till.html> (unsigned op-ed). No autopsy was ordered or performed. *Id.* Till's mother, Mamie, at her home in Chicago, demanded that Mississippi return her son's body to her for burial. *Id.* The State acquiesced on the condition that the coffin remain sealed. *Id.* She famously refused: Funeral photographs of Till's brutalized corpse were printed in *JET Magazine* and horrified and galvanized the nation. *Id.*

<sup>15</sup> There have been voices, albeit in dissent, from the state's highest court, about the course the state was intent on following. In some instances, the dissents were prophetic, see *infra* note 301 and accompanying text, and later, in others, castigatory. *Doss v. State*, No. 2007-CA-00429-SCT, 2008 WL 5174209 (Miss. Dec. 11, 2008) (Diaz, J., dissenting) (opinion withdrawn and superseded on rehearing).

<sup>16</sup> PEER REPORT, *supra* note 4.

<sup>17</sup> Jimmie E. Gates, *1st State Medical Examiner in 15 Years Begins Duties*, CLARION-LEDGER, Nov. 6, 2010, at A1.

health consequences was a medico-legal spoils system that valued pseudoscience and expedient criminal convictions over scientific validity and defendants' basic civil rights.

As a direct and entirely natural correlation, Mississippi produced a significant number—and shocking types—of wrongful convictions and perpetrated some of the most notorious forensic fraud in American legal history. In the spring of 2008, for example, post-conviction DNA testing exonerated Kennedy Brewer,<sup>18</sup> sentenced to death—and as a consequence, Levon Brooks,<sup>19</sup> sentenced to life. Each had been convicted of separate, strikingly similar child homicides in Noxubee County, Mississippi. Their convictions rested on junk science—bite mark identification, specifically—propagated by Dr. Michael West, a clinical dentist from Hattiesburg Mississippi, who moonlighted as a forensic odontologist.<sup>20</sup> He had become involved in each case as a result of his close-working collaboration with his forensic pathologist colleague, Dr. Stephen Hayne, who for years acted as the state's de facto forensic pathologist for the vast majority of criminal prosecutions in Mississippi.<sup>21</sup>

The pervasive impact of Mississippi's broken medico-legal system should come as no surprise. The logical consequence of a system that encourages forensic fraud is forensic fraud; and the logical consequence of forensic fraud is wrongful convictions. Empirical evidence from every jurisdiction in the United States, including Mississippi, bears this out. In a recent national study of wrongful convictions that featured forensic testimony, sixty percent of the forensic witnesses provided inaccurate information.<sup>22</sup>

This Article documents for the first time the complete, tragic history of Mississippi's medico-legal system from the mid-1970s, when initial efforts were made to improve the local, coroner-based

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<sup>18</sup> See *Kennedy Brewer*, MISS. INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Kennedy\\_Brewer.php](http://www.innocenceproject.org/Content/Kennedy_Brewer.php) (last visited Apr. 4, 2013).

<sup>19</sup> See *Levon Brooks*, MISS. INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Levon\\_Brooks.php](http://www.innocenceproject.org/Content/Levon_Brooks.php) (last visited Apr. 4, 2013).

<sup>20</sup> See *id.*

<sup>21</sup> *Id.*

<sup>22</sup> Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 2 (2009).

system, to the present day. Its primary purpose is to provide a comprehensive narrative through which the state might honestly come to terms on a morally acceptable basis with the attendant failures of justice that occurred as a result of the path it chose. In that way this Article also offers up the Mississippi medico-legal system as a cautionary tale, a study in what not to do. Although all of the cases, agencies, and people discussed in this Article are from Mississippi, the lessons learned from Mississippi medico-legal system's breakdown are universal.

Part I of the Article traces the relatively brief history of statutorily enacted reform of the state medico-legal system that began in the mid-1970s and lasted for roughly a decade. Part II documents the subsequent failure to make good on those reforms, including the mechanisms put into place to ensure professional, political, and monetary reward for a few at the cost of public health and civil rights guarantees. Part III traces the participation of various institutions and entities involved in the state's medico-legal troubles. Part IV briefly outlines how the arrangement to obviate the statutory requirements for the state's chief public health office undermined fundamental precepts of due process. Part V examines the current attempts at reform made by the Mississippi legislature and makes further recommendations to improve the system.

#### I. FROM CORONERS' JURIES TO THE CREATION OF THE STATE MEDICAL EXAMINER'S OFFICE

Mississippi's death investigation has always been cause for public health concern. Until 1974, coroner's juries investigated all deaths in Mississippi.<sup>23</sup> Conforming the system to the demands of the modern era, at least as a matter of law, involved a relatively straightforward series of legislative initiatives that began in the mid-1970s. The first, known as the Mississippi Medical Examiners Act of 1974, established the state's first medical examiner's office.<sup>24</sup> In 1981, the law was amended to *require* the medical examiner to investigate all sudden, violent, or suspicious deaths

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<sup>23</sup> PEER REPORT, *supra* note 4, at 4.

<sup>24</sup> *Id.*; see also MISS. CODE ANN. §§ 41-61-1 to -21. (1975) (repealed 1986 and replaced by MISS. CODE ANN. §§ 41-61-51 to -79).

and to develop a centralized administrative plan to make available such services to the entire state.<sup>25</sup> An additional amendment three years later, in 1984, placed the State Medical Examiner's office under the supervision of the Crime Laboratory, a subsidiary agency of the Mississippi Department of Public Safety.<sup>26</sup>

Shortly thereafter, the Mississippi Legislature abandoned the coroner jury system altogether.<sup>27</sup> In 1986, the State Medical Examiner became the central component of Mississippi's death investigation system.<sup>28</sup> When the State Medical Examiner believed that it was in the public interest to conduct further investigation, then he or she possessed the power to perform an autopsy or appoint a "competent pathologist designated" to perform one.<sup>29</sup> By statute, the medical examiner was required to possess a state medical license, as well as board certification in forensic pathology from the American Board of Pathology (ABP), the field's pre-eminent governing body.<sup>30</sup>

## II. DESTRUCTION OF THE STATE MEDICAL EXAMINER'S OFFICE AND THE SUBSEQUENT RISE OF "DESIGNATED PATHOLOGISTS"

Even after the reform efforts of the 1970s and 1980s, the Mississippi State Medical Examiner's office never operated the way the statute required, and over time it was relegated to a perennially under-funded mandate. In 1988, the Joint Legislative Committee on Performance Evaluation and Expenditure Review conducted an independent investigation of the State Medical Examiner's office and found that, due to significant underfunding, the office was not performing all of its legislatively-assigned

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<sup>25</sup> *Id.*

<sup>26</sup> MISS. CODE ANN. § 41-61-23 (1975); PEER REPORT, *supra* note 4, at 5.

<sup>27</sup> PEER REPORT, *supra* note 4, at 5.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 10.

<sup>30</sup> *Id.* at 8; *What Is the American Board of Medical Specialties?*, ASS'N FOR MED. ETHICS, Jan. 12, 2012, <http://www.ethicaldoctor.org/ame-articles/articles-medical-specialties/american-board-medical-specialties> ("[T]he American Board of Medical Specialties (ABMS), is a not-for-profit organization made up of 24 medical specialty Member [including the American Board of Pathology], which acts as the pre-eminent entity overseeing the certification of physician specialists in the United States by certifying which Board officially represents that specialty.").

tasks.<sup>31</sup> Additionally, although the State Medical Examiner was allowed to assign autopsies to “designated pathologists,” the State Medical Examiner’s office itself never properly evaluated those pathologists’ work,<sup>32</sup> and the office itself was a source of constant instability; between 1979 and 1995, five different physicians held the position.<sup>33</sup>

The beginning of the end came in the early 1990s. The Commissioner of Public Safety proposed a scheme to appoint one of the state “designated pathologists”—Dr. Steven T. Hayne—to the State Medical Examiner position without pay, other remuneration, or benefits typically afforded state employees.<sup>34</sup> Instead, according to recently discovered letters that document the arrangement, Dr. Hayne developed a plan that “replaced” the Medical Examiner’s normal salary and benefits,<sup>35</sup> with a state-supplied title—“State Medical Examiner”—and allowed Hayne to continue to perform almost eighty percent of the state’s autopsies (approximately 1000 per year at the time of the suggested arrangements).<sup>36</sup> The set fee at the time was \$500 per autopsy.<sup>37</sup>

In order to gain approval for the plan, the Commissioner wrote a letter to Mississippi Ethics Commission.<sup>38</sup> In essence, the letter asked the following question: Would Mississippi ethics-in-government laws be violated should a designated pathologist be named medical examiner and serve in that capacity without compensation while continuing to conduct autopsies on behalf of the state?<sup>39</sup>

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<sup>31</sup> PEER REPORT, *supra* note 4, at 6.

<sup>32</sup> *Id.* at 9.

<sup>33</sup> Gates, *supra* note 17.

<sup>34</sup> Letter from Jim Ingram, Comm’r of Pub. Safety, to Ronald Crowe, Exec. Dir., Miss. Ethics Comm’n (July 2, 1992) (on file with authors).

<sup>35</sup> *Id.* (“Dr. Hayne has expressed his interest and desire to be Medical Examiner for the state. *At his request*, he will serve without salary or other benefits.” (emphasis added)). At the time, the medical examiner’s salary, excluding benefits, was \$125,000 per year. *Id.*

<sup>36</sup> *Id.* (“He is willing to accept the position without salary because he currently does 80% of all autopsies performed in the State.”).

<sup>37</sup> *Id.* (“[Dr. Hayne] receives \$500 for each autopsy he performs by the individual counties for which he provides the service.”).

<sup>38</sup> *See id.*

<sup>39</sup> Miss. Ethics Comm’n, Advisory Op. 92-132-E (July 10, 1992) (on file with authors).

According to the Commissioner's letter, the proposed arrangement would be ideal. First, relative to Dr. Hayne's work output, the previous medical examiner was inefficient:<sup>40</sup> The previous medical examiner only performed ninety of the 1263 autopsies performed in Mississippi that calendar year, while Dr. Hayne had performed 80% of the total—almost 1000—statewide.<sup>41</sup>

Commissioner Ingram omitted two material concerns from his letter to the Ethics Commission, however. First, there should have been immediate concern about the contractually agreed number of autopsies that Dr. Hayne would be allowed to conduct each year. According to Ingram himself, Dr. Hayne was already performing almost 1000 autopsies in 1991 alone.<sup>42</sup> The guidelines of the National Association of Medical Examiners (NAME), the industry's primary professional organization, dictate that a medical examiner should perform a maximum of 250 autopsies a year—less if he or she is also tasked with administrative duties.<sup>43</sup>

The NAME standards are based on a clinical medical reality: that “[w]hen the number of autopsies performed exceeds this threshold [250 autopsies], there is a tendency for a forensic pathologist, no matter how skilled, to engage in shortcuts (e.g., performing partial autopsies when a full autopsy is warranted), or make mistakes (most commonly errors of omission such as failing to examine an injury or organ, or to record complete relevant findings).”<sup>44</sup> As a result, NAME refuses to provide accreditation to pathologists who perform more than 350 autopsies in a year.<sup>45</sup>

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<sup>40</sup> Letter from Jim Ingram, *supra* note 34.

<sup>41</sup> *Id.* According to Ingram's math, Dr. Hayne performed approximately 938 autopsies in 1991. *Id.* (“Dr. Hayne was requested by all the Coroners across the state to perform 80% of the autopsies done in the State of Mississippi last year (excluding the 90 done by Dr. White).”).

<sup>42</sup> *Id.*

<sup>43</sup> KELLY PYREK, FORENSIC SCIENCE UNDER SIEGE: THE CHALLENGES OF FORENSIC LABORATORIES AND THE MEDICO-LEGAL DEATH INVESTIGATION SYSTEM 199 (Academic Press 2007); OFFICE OF THE MEDICAL EXAMINER, PERFORMANCE AUDIT 13 (Dec. 15, 2011), *available at* <http://www.denvergov.org/Portals/741/documents/Audits2011/Medical%20Examiner%20Audit%20Report%2012-15-11.pdf>; NAT'L ASS'N OF MED. EXAM'RS, FORENSIC AUTOPSY PERFORMANCE STANDARDS 10 (2011), *available at* [http://thename.org/index2.php?option=com\\_docman&task=doc\\_view&gid=160&Itemid=26](http://thename.org/index2.php?option=com_docman&task=doc_view&gid=160&Itemid=26).

<sup>44</sup> PYREK, *supra* note 43, at 199.

<sup>45</sup> *Id.* at 198.

According to NAME, “By the time the [pathologist’s] workload exceeds 350 autopsies per year, mistakes are more likely to be flagrant and involve errors in judgment (e.g., a case many not be autopsied that should have been, or a diagnosis may be hastily made without sufficient basis, thought, or circumspection).”<sup>46</sup> Thus, in accordance with NAME’s reports, there is a practical certainty that performing more than 350 autopsies a year will result in a significant number of material errors.<sup>47</sup> Ingram’s request, in effect, was asking for the State Ethics Commission’s blessing upon Dr. Hayne’s performance of 257% more autopsies than NAME allows.<sup>48</sup>

Dr. Hayne’s workload affected the quality of his autopsies. Take, for example, Dr. Hayne’s autopsy of Randy Cheney. In 2007, Mississippi Department of Corrections (MDOC) inmate Cheney was exhibiting signs of sepsis.<sup>49</sup> After a couple of weeks of deteriorating health, Cheney was finally transported to Parchman Hospital at the Mississippi State Penitentiary.<sup>50</sup> After his condition worsened, he was taken to Greenwood Leflore Hospital.<sup>51</sup> The day after his arrival, he died of septic shock.<sup>52</sup>

Dr. Hayne performed the autopsy and determined that Cheney’s cause of death was hypertensive heart disease and coronary artery disease.<sup>53</sup> He ruled the manner of death to be natural.<sup>54</sup> Of critical import in determining cause and manner of death, of course, should have been Cheney’s ongoing complaint about his infection, the length of time that it took him to receive medical care, and the possibility that the medical care he did receive—medication for a rapid heartbeat—was negligent and was a proximate cause of his death.<sup>55</sup>

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<sup>46</sup> *Id.* at 199.

<sup>47</sup> *Id.*

<sup>48</sup> *See id.*

<sup>49</sup> *See* Complaint ¶ 17, *Cheney v. Collier*, 2012 WL 1952273 (N.D. Miss. Oct. 26, 2009) (No. 4:09CV00111-M-V).

<sup>50</sup> *Id.* ¶ 24.

<sup>51</sup> *Id.* ¶ 26.

<sup>52</sup> *Id.* ¶ 28.

<sup>53</sup> *See* Steven T. Hayne, Final Report of Autopsy, AME# 8-Q5-07 (Aug. 30, 2007) (on file with authors).

<sup>54</sup> *Id.*

<sup>55</sup> *See* Complaint, *supra* note 49, ¶¶ 29-51.

Another issue central to understanding how Cheney died was the condition of his spleen, an organ that is a key part of the immune system and which, if compromised, can increase the risk of sepsis.<sup>56</sup> Dr. Hayne indicated in the autopsy report that Cheney's spleen, "assume[d] its usual left upper quadrant abdominal location, and is noted to weigh 180 grams"—within range of normal for an adult human.<sup>57</sup> After removing and examining it, Dr. Hayne noted that the spleen "capsule is intact and no subcapsular contusions are appreciated. The spleen is cross-sectioned and a moderate amount of serosanguineous fluid exudes from the cut surfaces. Examination of the cross-sectioned segments of the spleen reveals acute splenic congestion. The malpighian corpuscles are of normal size and number."<sup>58</sup> In short, Dr. Hayne's autopsy report concluded that Cheney's spleen presented with no abnormalities or signs that otherwise might have suggested the presence of or connection to massive sepsis.

The problem was that Cheney had no spleen. It had been surgically removed in its entirety in 2003 in a procedure commonly known as a splenectomy—a condition that Cheney had reported to MDOC medical staff upon his admittance to prison.<sup>59</sup> At the time of surgical removal, the spleen weighed 152 grams.<sup>60</sup> In the intervening period of time—at least according to Dr. Hayne's findings—Cheney's spleen had not only regenerated, but grown back bigger than before—by close to thirty grams. Dr. Hayne was recently asked in a deposition to explain this finding: "[W]ell, you know, an accessory spleen can go [sic] in the size of the original spleen. So that would be my interpretation of what

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<sup>56</sup> Justin T. Denholm, Penelope A. Jones, Denis W. Spelman, Paul U. Cameron & Ian J. Woolley, *Spleen Registry May Help Reduce the Incidence of Overwhelming Postsplenectomy Infection in Victoria*, MED. J. AUST., 2010, 192 (1): 49-50, available at <https://www.mja.com.au/journal/2010/192/1/spleen-registry-may-help-reduce-incidence-overwhelming-postsplenectomy-infection>.

<sup>57</sup> Hayne, *supra* note 53.

<sup>58</sup> *Id.*

<sup>59</sup> See N. Miss. Med. Ctr., Dep't of Pathology, Tissue Examination for Randy Cheney (Nov. 28, 2003) (on file with authors).

<sup>60</sup> *Id.*

occurred.”<sup>61</sup> Dr. Hayne offered no additional medical support for his explanation.<sup>62</sup>

In addition to the workload, there was another fundamental concern that should have been raised about Commissioner Ingram’s proposed arrangement: Did not the Public Safety Commission simply hire Dr. Hayne as the State Medical Examiner and bring resolution to the public health crisis? The answer was equally simple: Dr. Hayne did not possess the statutory requirements to be Mississippi’s State Medical Examiner.<sup>63</sup> He was not board certified in forensic pathology by the American Board of Pathology.<sup>64</sup> In fact, he had failed the exam.<sup>65</sup>

Even though Ingram’s query letter neglected to mention these concerns, the Ethics Commission nevertheless advised that allowing Dr. Hayne to serve as the nominal medical examiner while simultaneously serving as a designated pathologist would be patently unethical.<sup>66</sup> According to the Ethics Commission, “[I]f a designated pathologist who now conducts a large percentage of state and local autopsies is designated State Medical Examiner, a degree of suspicion of the public will be raised which will reflect unfavorably upon the state and local government.”<sup>67</sup> The Ethics Commission also questioned whether Dr. Hayne could be an effective State Medical Examiner while performing so many

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<sup>61</sup> Deposition of Dr. Steven Hayne at 239, *Hayne v. Innocence Project*, 2011 WL 198128, No. 3:09-CV-218-KS-LRA (S.D. Miss. Apr. 26, 2012) (on file with authors).

<sup>62</sup> *Id.*

<sup>63</sup> PEER REPORT, *supra* note 4, at 8; MISS. CODE ANN. § 41-61-55 (2012) (“Each applicant for the position of State Medical Examiner shall, as a minimum, be a physician who is eligible for a license to practice medicine in Mississippi and be certified in forensic pathology by the American Board of Pathology.”).

<sup>64</sup> *See* Deposition of Steven Hayne, *supra* note 61, at 255-56.

<sup>65</sup> *Id.* (“Now, if you look at the second page of that document I just handed you, it said your grade is 484 and the pass grade was 750.”). Dr. Hayne walked out of his ABP exam; however, at the time he left, he was failing every decile of the exam. *Id.* (“It has down below for each of the deciles, it has you marked in the first decile of each of the portions of the test.”).

<sup>66</sup> Miss. Ethics Comm’n, Advisory Op. 92-132-E (July 10, 1992) (on file with authors).

<sup>67</sup> *Id.*

autopsies and also shouldering the administrative and supervisory duties required by the post.<sup>68</sup>

The fact that this arrangement was potentially unworkable (and unethical) was not the Commission's only concern, though; the Board also suggested that this arrangement was likely illegal.<sup>69</sup> Mississippi law forbids public servants from using their appointed or elected position for pecuniary gain.<sup>70</sup> Though the Commission decided that the arrangement did not violate Mississippi's ethics laws per se, the Commission advised Commissioner Ingram that the situation would have to be monitored very closely.<sup>71</sup> More critically, the Commission stated categorically:

While serving as both State Medical Examiner and as a designated pathologist, [Dr. Hayne] can in no way use his State Medical Examiner's position to benefit himself or his business. A future determination of fact in each instance will be necessary in order to determine whether or not the prohibitions of the Ethics laws come into play.<sup>72</sup>

The proposed arrangement was shelved for three years, until 1995—after the brief,<sup>73</sup> doomed tenures of two more medical

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<sup>68</sup> *Id.* (“The above is set forth only in summary to voice a grave concern by the Commission 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.”).

<sup>69</sup> *Id.*

<sup>70</sup> MISS. CODE ANN. § 25-4-105(1) (2012) (“No public servant shall use his official position to obtain, or attempt to obtain, pecuniary benefit for himself other than that compensation provided for by law, or to obtain, or attempt to obtain, pecuniary benefit for any relative or any business with which he is associated.”).

<sup>71</sup> Miss. Ethics Comm’n, Advisory Op. 92-132-E, *supra* note 66.

<sup>72</sup> *Id.*

<sup>73</sup> The fact of the matter was that inadequate funding was only one of the ills buffeting the Medical Examiner’s Office. A group of coroners, led by Dr. Michael West, a coroner and forensic odontologist who would later become a frequent collaborator with Dr. Hayne, drafted a petition that enumerated four complaints about the medical examiner’s office and its staff: (1) “failure of the State Medical Examiner to support many of the county Coroners;” (2) “State Medical Examiner assisting defense counsel;” (3) “attempt of the State Medical Examiner to establish a political power base at the expense of the elected Coroners and other elected officials;” and (4) “failure of the State Medical Examiner to cooperate with the Coroners as mandated by State Law.” Petition from Dr. Michael West to Undersigned Coroners (undated) (on file with authors).

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Forty-two coroners lent their names to the petition. *Id.*; *see also* Letter from Dr. Michael West to “Fellow Coroners” (Jan. 25, 1995) (on file with authors).

In addition, district attorneys were upset over what they viewed as the medical examiner’s divided loyalty. Rankin County District Attorney John T. Kitchens wrote to Commissioner Ingram to “voice his concern regarding the activities of our current State Medical Examiner [Dr. Emily Ward].” Letter from John T. Kitchens, District Attorney, Twentieth Judicial District, Rankin and Madison Counties, Miss., to Jim Ingram, Comm’r, Miss. Dep’t of Pub. Safety (Mar. 15, 1994) (on file with authors). According to Kitchens’s view, expressed in his letter, “We in the executive branch of government are charged with the enforcement of criminal laws. In doing so we are duty bound to protect the innocent as well as convict the guilty.” *Id.* To that end, Kitchens urged, “It is my humble request that [Mississippi Public Safety] Department Dictate [sic] that the State Medical Examiner shall not collaborate or confer with counsel or investigators for the criminal defense except under oath in open court or upon consent of the Commissioner and the District Attorney responsible for the prosecution of the particular case. . . . The State Medical Examiner should not confer with the defense at all . . . .” *Id.* Shortly after Kitchens voiced his request, Hinds County District Attorney Edward J. Peters wrote to Commissioner Ingram, as well: “This is to add a big AMEN to John Kitchen’s [sic] letter.” Letter from Edward J. Peters, District Attorney, Seventh Circuit Court District, Jackson, Miss., to Jim Ingram, Comm’r, Miss. Dep’t of Pub. Safety (March 15, 1994) (on file with authors).

Kitchens’s and Peters’s requests were in direct contravention of Mississippi court rules, *see* MISS. UNIF. CRIM. RULES OF CIRC. AND CNTY. COURT PRAC. 4.06; and case law, *see, e.g.*, *Hunt v. State*, 687 So. 2d 1154, 1161 (Miss. 1996) (noting that “[t]his Court recognizes that the State’s refusal to allow any defense interviews with State witnesses violates due process guarantees”); *Gallion v. State*, 396 So. 2d 621, 622 (Miss. 1981); *see also*, *Nixon v. State*, 533 So. 2d 1078, 1088 (Miss. 1987) (interpreting Rule 4.06); *Mims v. State*, 730 So. 2d 76, 79 (Miss. Ct. App. 1998) (finding that a State’s undisclosed witness and statement were required to be disclosed pursuant to court rules and that the statement was inculpatory in nature); as well as State and Federal constitutional guarantees. In *Gallion v. State*, 396 So. 2d 621, 623 (Miss. 1981), for example, the prosecutor (District Attorney Ed Peters, author of the letter quoted above), instructed a prosecution witness “that he did not have to talk to . . . [defense counsel] unless he wanted to.”

In commenting upon the prosecutor’s conduct, the court cited MISS. R. CT. 4.06, and added:

[W]hile a witness has a right not to talk in a private interview even though under a subpoena, it was beyond the prerogative of the state’s counsel to interfere with the attempted interview by defense counsel with eyewitnesses . . . . Both counsel (defense counsel, too, had erred, by neglecting to turn over discovery regarding its witnesses), especially the State’s, were subject to reprimand and possibly contempt in the presence of the court. As officers of the court, the conduct of both left much to be desired, was offensively discourteous, and we express our disapproval thereof. Each should have sought sanctions by the court upon the other’s failure to abide by the rule; they ‘took the rule into their own hands.’

*Id.* at 624-25 (internal citations omitted).

Despite the unequivocal case law, the Rules of Court, and the fundamental Due Process and Confrontation rights at stake, the state nevertheless acceded to the district

examiners—when, by failing to appoint a state medical examiner for the next fifteen years,<sup>74</sup> the proposed arrangement with Dr. Hayne occurred by default.<sup>75</sup> Over that period of time, Dr. Hayne, along with other designated pathologists,<sup>76</sup> were performing all of the State’s autopsies without a medical examiner’s oversight.<sup>77</sup> Of these designated pathologists, Dr. Hayne was far and away the busiest, performing, according to his own records, over 1700 autopsies annually<sup>78</sup>—an average of more than four autopsies a day, every day, seven days a week, without interruption, for nearly twenty years. Also, he was allowed to refer to himself as the “Chief State Pathologist”—“an honorific which Dr. Hayne insisted on adding” to his contract.<sup>79</sup>

Perhaps the most damaging consequence of the Department of Public Safety’s failure to appoint a State Medical Examiner was

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attorneys’ suggestions and, in direct contravention of Due Process and Confrontation guarantees, notified the then-medical examiner to cease the practice of conferring with a defendant’s representatives. In a letter from Charles Head at the Office of the Mississippi Attorney General, Mr. Head wrote that he agreed with DA Kitchens’s letter and that if the “allegations” were true that the medical examiner was talking to defense attorneys, “it should stop immediately.” Letter from Charles S. Head to Jim Ingram, Comm’r, Miss. Dep’t of Pub. Safety (Mar. 10, 1994) (on file with authors). According to Head’s advice, “[T]he State Medical Examiner should not discuss any case with a defense attorney or their investigators without the approval of the District Attorney or one of his assistants.” *Id.* After speaking with the medical examiner, Mr. Head went on to advise the Commissioner. “I feel we now have this problem worked out and that the District Attorney will advise the State Medical Examiner who to talk to and what documents to give the defense attorneys.” *Id.*

<sup>74</sup> Jerry Mitchell, *State to Hire Autopsy Expert*, CLARION-LEDGER, Aug. 6, 2008, at A1 (“The State Medical Examiner] post has been vacant since the mid-1990s. Instead, Hayne has done most of the autopsies.”).

<sup>75</sup> See Gates, *supra* note 17.

<sup>76</sup> The Department of Public Safety determined who was qualified as a designated pathologist. See MISS. CODE ANN. § 41-61-1 (1975) (repealed 1986 and replaced by MISS. CODE ANN. § 41-61-51 (1986)).

<sup>77</sup> See Gates, *supra* note 17 (“In 2008, the state ended its contract with Dr. Steven Hayne, who had handled most of the autopsies in criminal cases.”); Mitchell, *supra* note 74.

<sup>78</sup> Steven T. Hayne, Number of Autopsies (undated) (on file with authors).

<sup>79</sup> Letter from James W. Younger, Office of General Counsel, Miss. Dep’t of Pub. Safety, to Merrida Coxwell, counsel for Steven Hayne (June 27, 2008) (“You also asked if Dr. Hayne has been acting as Chief State Pathologist since July 1, 2006[.] Although the contract refers to Dr. Hayne as the Chief State Pathologist, this term is an honorific which Dr. Hayne insisted upon adding to the language of the contract. Under the contract, [Dr. Hayne] is an independent contractor and does not hold any state office.”) (on file with authors).

to transform what was by statutory and public health policy design an objective, medically sound system insulated from adulterating influences, into the complete opposite: a spoils system where the goal was to satisfy a customer base while maximizing profit. Within this new regime, Dr. Hayne had a leg up on the competition, an advantage created by the State's deal with him. Making matters worse, there was no attempt whatsoever to provide official oversight for the "designated pathologists,"<sup>80</sup> even though Mississippi law contemplated that the State Medical Examiner would oversee them.<sup>81</sup>

According to his former business partner, Dr. Hayne began to do what anyone angling for political favors would do: He started making political contributions to the very people who would decide whether an autopsy should be performed and who would perform it.<sup>82</sup> A bulk rate autopsy business, after all, depends on bodies to autopsy; the very people who could supply him years of lucrative business were Mississippi coroners.<sup>83</sup>

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<sup>80</sup> MISS. CODE ANN. § 41-61-65 (2012) ("If, in the opinion of the medical examiner investigating the case, it is advisable and in the public interest that an autopsy or other study be made for the purpose of determining the primary and/or contributing cause of death, an autopsy or other study shall be made by the State Medical Examiner, or by a competent pathologist designated by the State Medical Examiner.").

<sup>81</sup> PEER REPORT, *supra* note 4, at 16-17. Even when there was a State Medical Examiner in the early to mid 1990s there was no oversight exercised over the "designated pathologists." *See id.*

<sup>82</sup> *See* Deposition of Cecil McCrory at 90, Hayne v. Innocence Project, 2011 WL 198128, No. 3:09-CV-218-KS-LRA (S.D. Miss. Apr. 24, 2012) (on file with authors).

Q. How about—were there any donations to coroners around your office?

A. Uh-huh.

Q. Who were they?

A. I—I can't remember. Jimmy Roberts, because he's local. But the rest of them, I don't even remember their names. I couldn't tell you their names today, of the current ones, because I don't deal with them.

...

Q. Did Dr. Hayne make any political donations through his pool that was left in the Investigative Research—

A. That's where it came from.

*Id.*

<sup>83</sup> *Id.*

III. MISSISSIPPI'S MEDICO-LEGAL BREAKDOWN: THE ROLE OF  
PROSECUTORS, MISSISSIPPI TRIAL AND APPELLATE COURTS, AND  
GOVERNING ENTITIES

*A. Prosecutors*

By failing to appoint a medical examiner, the Public Safety Commission created an environment ripe for abuse,<sup>84</sup> but the various tragic outcomes were not necessarily a foregone conclusion. There were other stakeholders who had (or should have had) an interest in the integrity of the state's medico-legal system; they could have prevented the damage had they chosen to be guided by their ethical and professional obligations<sup>85</sup>—and had they simply paid better attention to what was happening. Instead, more often than not they cynically extended and intensified the failures. First among those responsible were certain state prosecutors, many of whom at trials introduced Dr. Hayne's opinions in forensic fields for which he was either under-qualified or not qualified at all; among them, ballistics,<sup>86</sup> wound pattern analysis,<sup>87</sup> time of death,<sup>88</sup> and blood spatter analysis.<sup>89</sup> Not only have these areas proven notoriously conducive to forensic abuse,<sup>90</sup>

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<sup>84</sup> See Gates, *supra* note 17.

<sup>85</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2007) (outlining the special responsibilities of a prosecutor); MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3)(2007) (prohibiting an attorney from "offer[ing] evidence that the lawyer knows to be false"); MISS. RULES OF PROF'L CONDUCT R. 3.3(a) (2004), available at [http://courts.ms.gov/rules/msrulesofcourt/rules\\_of\\_professional\\_conduct](http://courts.ms.gov/rules/msrulesofcourt/rules_of_professional_conduct); MISS. RULES OF PROF'L CONDUCT R. 3.8(d) (2004), available at [http://courts.ms.gov/rules/msrulesofcourt/rules\\_of\\_professional\\_conduct.pdf](http://courts.ms.gov/rules/msrulesofcourt/rules_of_professional_conduct.pdf). The ABA Standards for Criminal Justice also state that it is unprofessional conduct for a prosecutor to "knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses." ABA CRIM. JUSTICE STANDARD § 3-5.6(a), available at [http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_pfunc\\_blk.html](http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blk.html).

<sup>86</sup> See generally Edmonds v. State, 955 So. 2d 787, 791-92 (Miss. 2007); Transcript of Record at 200-14, State v. Parvin, No. CR09-135 (Monroe Cnty. Circuit Ct. June 13, 2011).

<sup>87</sup> See Kelly v. State, 735 So. 2d 1071, 1079 (Miss. Ct. App.1999) (noting that the prosecution introduced Dr. Hayne's "pattern injury testimony" to match marks on the victims to an Iron Man watch worn by the alleged perpetrator).

<sup>88</sup> See Transcript of Record at 401-03, State v. Dendy, No. CR02-243 (Monroe Cnty. Circuit Ct. 2003).

<sup>89</sup> See Flaggs v. State, 999 So. 2d 393, 401-02 (Miss. Ct. App. 2008).

<sup>90</sup> See generally Garrett & Neufeld, *supra* note 22.

none of Dr. Hayne's available curriculum vitae contain indication of any training, study, or purported expertise in them.<sup>91</sup>

Arguably worse were the prosecutors who retained Dr. West's services as a self-styled expert in wound pattern analysis<sup>92</sup>—specifically bite mark identification,<sup>93</sup> though also in other instances as a ballistics<sup>94</sup> and video enhancement expert.<sup>95</sup> Dr. West, who was usually brought into a case through Dr. Hayne, whose autopsy findings he claimed suggested the possible presence of bite marks, left a trail of forensic malfeasance that is unrivalled not only for the gross miscarriages of justice it produced, but also in its taste for the macabre.

### 1. Mark Oppie

In the early summer of 1990, someone used a pillow to suffocate John Shumock in his bed in Pascagoula, Mississippi. Local law enforcement contacted Dr. West and provided him with photographs of the suspect's—Mark Oppie—wounds. Oppie had sustained what appeared to West to be scratch marks on his arms, neck, and face. Without explanation or apparent medical evidence, West went to the local funeral home where Shumock's body was being prepared for burial to obtain “fingernail molds.”<sup>96</sup>

When West went to the jail to compare the molds to Oppie's wounds, he was unable to rule him out as the attacker and felt that further study was warranted.<sup>97</sup> In one of his more ghoulish undertakings, West returned to the funeral home where he

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<sup>91</sup> See collected CVs of Dr. Steven T. Hayne provided pursuant to discovery in *Hayne v. Innocence Project*, 2011 WL 198128, No. 3:09-CV-218-KS-LRA (S.D. Miss. Apr. 24, 2012) (on file with authors).

<sup>92</sup> Mark Hansen, *Out of the Blue*, ABA JOURNAL, Feb. 1, 1996 4:48 PM, [http://www.abajournal.com/magazine/article/out\\_of\\_the\\_blue/](http://www.abajournal.com/magazine/article/out_of_the_blue/).

<sup>93</sup> See *Brooks v. State*, 748 So. 2d 736, 739 (Miss. 1999).

<sup>94</sup> See Transcript of Record at 778-82, *State v. Ross*, No. 200-109 (Sunflower Cnty. Circuit Ct. May 1-4, 2002).

<sup>95</sup> Radley Balko, *Video Shows Controversial Forensic Specialist Michael West Fabricating Bite Marks*, HUFFINGTON POST, Sept. 1, 2011, [http://www.huffingtonpost.com/2011/09/01/michael-west-fabricating-bite-marks\\_n\\_944228.html](http://www.huffingtonpost.com/2011/09/01/michael-west-fabricating-bite-marks_n_944228.html).

<sup>96</sup> Aff. of Ross Parker Simons (Oct. 6, 2010) (on file with authors).

<sup>97</sup> *Id.*

removed Shumock's fingernails.<sup>98</sup> West then mounted the nails onto sticks, returned to the jail, and in a procedure that remains unparalleled in the annals of forensic science, came to the conclusion that Shumock's fingernails had "indeed and without doubt" caused the marks on Oppie's arms.<sup>99</sup> Dr. West admitted that he neglected (1) to make test marks with the fingernails, (2) to evaluate the fingernails' class and individual characteristics, and (3) to establish the reproducibility of this test.<sup>100</sup> Oppie was charged with capital murder, and prosecutors announced that they would seek the death penalty.<sup>101</sup> He later pleaded guilty.<sup>102</sup>

## 2. Calvin Banks

On August 14, 1993, an elderly woman in Clay County, Mississippi, ate a bologna sandwich for lunch. Sometime that same afternoon, she was murdered. Suspicion fell upon Calvin Banks, who knew the woman and had lived in her house for a brief period of time. According to several witnesses, Banks had been playing poker during the afternoon of the murder. After a run of bad luck, he found himself low on money. He left the game for a while and, according to one witness, was seen shortly thereafter stepping off of the victim's front porch. He returned later to the poker game, flush with cash. Banks was arrested and charged with capital murder.<sup>103</sup>

Dr. Hayne performed the autopsy.<sup>104</sup> Though there were no bite marks on the victim, Dr. Hayne retained Dr. West's services for an entirely new forensic purpose. Crime scene search officers had discovered the partially eaten bologna sandwich in the victim's kitchen, and Hayne recovered portions of it from the victim's digestive tract. Months later, West examined the frozen

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<sup>98</sup> *Id.*

<sup>99</sup> Letter from Michael H. West to Jim McAnally, Lieutenant of Jackson County, Miss. Sheriffs Off. (June 18, 1990) (on file with authors).

<sup>100</sup> Paul C. Giannelli & Kevin C. McMunigal, *Prosecutors, Ethics, and Forensic Witnesses*, 76 *FORDHAM L. REV.* 1493, 1502 (2007).

<sup>101</sup> *Id.*

<sup>102</sup> Letter from John Holdridge to Post Prison Transfer Board, Alfred Ray Case Matter (on file with authors).

<sup>103</sup> *Banks v. State*, 725 So. 2d 711, 713 (Miss. 1997).

<sup>104</sup> *Id.*

remains of the sandwich and then requested a mold of Banks' teeth.<sup>105</sup> After comparing the mold to the bite mark in the bologna sandwich, West determined that there was an exact match.<sup>106</sup> When Banks's lawyers hired their own expert to examine Dr. West's findings, West told them that he had destroyed the sandwich.<sup>107</sup> According to him, he had made several efforts to preserve it, but the bologna had begun to putrefy and had to be thrown away.<sup>108</sup> When questions were raised about why he had not simply frozen the sandwich again, he explained that a test piece of bologna had become dehydrated when frozen and was rendered unsuitable for additional testing.<sup>109</sup> He offered no explanation as to how the original sandwich—which law enforcement had frozen before being given to him for testing—had not been similarly compromised.<sup>110</sup> Banks is currently serving a life sentence.<sup>111</sup>

### 3. Suspension and Resignation

In 1994, the ethics committee of the American Academy of Forensic Sciences expelled Dr. West based upon its findings that he had “misrepresented data in order to support his testimony.”<sup>112</sup> Similarly, the American Board of Forensic Odontologists voted to suspend him for a year because he had “materially misrepresented . . . evidence and data.”<sup>113</sup> It also concluded that the “West Phenomenon”—a process that Dr. West invented and named after himself, where he would don yellow goggles and perform wound pattern analysis under ultraviolet light—was not “founded on scientific principles” and that Dr. West had testified “outside the field of forensic odontology.”<sup>114</sup> Notwithstanding these peer-

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<sup>105</sup> *See id.*

<sup>106</sup> *Id.* at 715.

<sup>107</sup> *Id.* at 714.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 716.

<sup>112</sup> AMERICAN ASSOCIATION OF FORENSIC SCIENTISTS, ETHICS COMMITTEE REPORT, Case No. 143 (1994) (on file with authors).

<sup>113</sup> AMERICAN BOARD OF FORENSIC ODONTOLOGY, ETHICS COMMITTEE REPORT, Complaint No. 93-B (1994) (on file with authors).

<sup>114</sup> *Id.*

instituted sanctions, Mississippi prosecutors continued to frequently use Dr. West as a witness in criminal cases.

#### 4. Kennedy Brewer

In 1995, soon after Dr. West had been sanctioned and a week after testifying in *Banks*, he matched nineteen marks on the body of a three-year-old victim to Kennedy Brewer's dentition; Brewer was facing the death penalty.<sup>115</sup>

In Brewer's case, what made the prosecution's use of West's bite mark testimony especially egregious was that the prosecutor knew about Dr. West's reputation and nonetheless sought to keep information concerning West's credibility away from the jurors.<sup>116</sup> During the course of trial, ABC News was set to air a segment on the television program *20/20*, as well as an interview with Peter Jennings, involving a less than favorable assessment of Dr. West's work.<sup>117</sup> In response, the prosecutor, District Attorney Forrest Allgood, sought assurances from the court that all of the television sets from the juror's hotel rooms had been removed so that they would not be exposed to ABC News's report criticizing Dr. West's credibility.<sup>118</sup> Brewer was convicted of capital murder and sentenced to death, primarily on the basis of Dr. West's bite mark findings. Brewer and Levon Brooks (who was convicted in a companion case involving West's bite mark testimony) were exonerated in 2008.<sup>119</sup>

#### 5. The Dead Dog Case

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<sup>115</sup> Transcript of Record at 745, *State v. Brewer*, No. 94-162-CR1 (Lowndes Cnty. Circuit Ct. Mar. 23, 1995) (on file with authors).

<sup>116</sup> *See id.* at 526. After Brewer was exonerated in 2008, the prosecutor, Forrest Allgood, defended his use of Dr. West in a letter to the editor of the local newspaper. The prosecutor's recollection of Dr. West's stature amongst his peers stands in contrast to the now, widely-accepted reality: "Much has been made of our use of Dr. West in . . . [the Brewer trial]," Allgood has explained. "Dr. West was, at the time, one of the foremost names in forensic odontology . . . . He enjoyed an international reputation and was lecturing in London and China. . . . It was not 'junk' science." Forrest Allgood, *District Attorney Offers Comments on Brewer, Brooks Cases*, MACON BEACON, Aug. 7, 2008, at 7.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *See supra* notes 23-24.

In 2002, in *State v. Ross*, a capital murder case where the primary issue was whether the decedent was murdered or committed suicide, prosecutors introduced Dr. Hayne's testimony that the distance between the gun and the wound in decedent's head was two to three inches—a distance, the state argued, that was consistent with homicide.<sup>120</sup> To reach his conclusion, Dr. Hayne (along with Dr. West, who was in his employ) performed a “test fire” of the gun that killed the alleged victim to replicate the gunpowder marks—tattooing—allegedly observed during the autopsy.<sup>121</sup> Because Remington, the ammunition maker, had discontinued the specific type of ammunition used in the shooting, Dr. West re-created this type of bullet by measuring the amount of gunpowder in an unfired cartridge found in the gun, and personally reloaded with the same amount of gunpowder the bullets that he and Dr. Hayne “test fired.”<sup>122</sup> They then fired the pistol into “regular . . . white paper” and “freshly harvested canine skin” which they “shaved . . . down removing the hair to see at which level the tattooing would mimic what was found at the autopsy.”<sup>123</sup> In answer to the prosecutor's question about whether he and Dr. Hayne had “go[ne] out and kill[ed] a dog to do this,” Dr. West answered, “No, ma'am. We went to the humane society and harvested some skin from dogs that had been euthanized that day.”<sup>124</sup> In addition, Dr. West explained, he and Dr. Hayne “[u]sually . . . use porcine, pig skin. But when you have a pattern that involves the hair of the head, you have to try to get a target that has hair that can simulate the head hair of a human and the hair on the pig is too sparse . . . so we chose to use canine.”<sup>125</sup>

Satisfied that they had replicated the “tattooing” found around the wound on the decedent's head, the pair concluded that the gun had been two to three inches away from the entrance point when it was fired.<sup>126</sup> Thereafter, Dr. Hayne testified that the

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<sup>120</sup> Transcript of Record at 275, 281, *State v. Ross*, No. 200-109 (Sunflower Cnty. Circuit Ct. May 1-4, 2002) (on file with authors).

<sup>121</sup> *Id.* at 768.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 770.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 778.

<sup>126</sup> *Id.* at 779.

angles of trajectory and the distance between the gun and the decedent's head made it more likely than not that the death was a homicide instead of a suicide.<sup>127</sup> Although there is no record of dead-dog test fires being admitted into any other court in the United States—or the world for that matter—as a valid means of ballistics analysis, prosecutors introduced, and the trial court admitted, this evidence to procure a capital murder conviction and life sentence.<sup>128</sup>

### 6. Videotape Enhancement

In 2000, Tammy Vance and Vicki Leigh Stubbs were arrested and tried for assaulting another woman, Kimberly Williams, in a motel room.<sup>129</sup> Williams was later transported in a comatose state to the University of Mississippi Medical Center. Even though no medical personnel at the hospital, including Intensive Care Unit doctors, reported seeing any bite marks on the Williams's body, Dr. West, true to form, claimed to have found one on her thigh.<sup>130</sup> Then, Dr. West had dental impressions made from the teeth of Stubbs, Vance, and two other suspects.<sup>131</sup> By the time all of the impressions were available for comparison, the “bite marks” had faded.<sup>132</sup> Undaunted, Dr. West performed his analysis based on photographs he had taken of the “bite mark” days earlier.<sup>133</sup> After his comparison, Dr. West submitted a one-page report to local law enforcement, which, without any further explanation, concluded

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<sup>127</sup> *Id.* at 275-81.

<sup>128</sup> See *Ross v. State*, 883 So. 2d 1181 (Miss. Ct. App. 2004). Experts have employed numerous mediums, including pig skin, and more recently ballistics gel, with limited degrees of reported success to replicate the effect of ballistics on human skin. See, e.g., DUNCAN MACPHERSON, *BULLET PENETRATION: MODELING THE DYNAMICS AND THE INCAPACITATION RESULTING FROM WOUND TRAUMA* (1994); T.A. WARLOW, *FIREARMS, THE LAW AND FORENSIC BALLISTICS* (2011).

<sup>129</sup> Radley Balko, *Leigh Stubbs, Mississippi Woman, Serving 44-Year Sentence Despite Discredited Testimony*, HUFFINGTON POST (Oct. 9, 2011), [http://www.huffingtonpost.com/2011/08/09/leigh-stubbs-michael-west-forensics-discredited-testimony\\_n\\_922219.html](http://www.huffingtonpost.com/2011/08/09/leigh-stubbs-michael-west-forensics-discredited-testimony_n_922219.html).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

that Stubbs's dental models "[were] consistent with" the victim's purported bite mark.<sup>134</sup>

Because the alleged victim had no recollection at all of the events of the night in question, one of the most important pieces of evidence in the case was a surveillance video taken in the parking lot of the motel where Stubbs, Vance, and Williams stayed that night.<sup>135</sup> After watching the raw, murky surveillance footage, and then "enhancing" the same footage on his home computer, Dr. West determined that the video showed Stubbs lifting William's body up and out of the toolbox in the bed of Stubbs's truck—offering his interpretation as proof that Stubbs and Vance had stuffed Williams into the toolbox after they had attacked her.<sup>136</sup> To further support this theory, Dr. West examined the toolbox itself, noticed that there were two latches on its lid, and matched the pattern of the latches to the abrasions on the side of Williams's head.<sup>137</sup>

Meanwhile, prosecutors sent the surveillance video Dr. West had watched and interpreted to the FBI Crime Lab for analysis; the FBI returned a report to the state saying that its experts had enhanced the video, and that, even then, the quality of the footage was so poor that analysts could not determine anything more than "an object or objects" being carried by the figure.<sup>138</sup> The analysts never detected a single action on the part of the individual that suggested anyone was removing a person's body from the back of the truck.<sup>139</sup>

The prosecutors, however, did not turn over the FBI report to Stubbs's and Vance's lawyers, who never knew about the exculpatory report at all. Instead, prosecutors called Dr. West at

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<sup>134</sup> See Letter from Dr. West to Noland Jones (Apr. 21, 2001) (detailing bite mark findings) (on file with authors). Neither prior to trial, at trial, or since did Dr. West provide the State or any other known party with further written information (e.g., about the methods used, data from the analysis) as to how he came to the conclusion that Stubbs's dental molds were consistent with the alleged bite marks.

<sup>135</sup> Transcript of Record at 504, *State v. Stubbs*, No. 2000-362-MS-LT-2 (Lincoln Cnty. Circuit Ct. June 27-30, 2001).

<sup>136</sup> *Id.* at 505.

<sup>137</sup> *Id.*; see also Letter from Dr. West, *supra* note 134 (detailing findings regarding the toolbox latch).

<sup>138</sup> See FBI REPORT, Sept. 11, 2000 (detailing the examination of the surveillance video) (on file with authors).

<sup>139</sup> *Id.*

trial to present his own version of events, as revealed to him through his analysis. In addition to his testimony that the video footage showed Stubbs lifting the victim's limp body from the toolbox,<sup>140</sup> West said he had been able to read the body language of one of the defendants on the video: That particular defendant was exhibiting "anxious" behavior, often associated with a "fight or flight" response.<sup>141</sup>

Not satisfied with merely introducing junk bite mark and video testimony into the trial, the prosecutor then elicited testimony about the defendants' sexuality.<sup>142</sup> After suggesting to jurors that Stubbs was a lesbian, the prosecutor asked Dr. West whether it was especially likely to find bite marks in an assault perpetrated by a homosexual.<sup>143</sup> West testified, in turn, "[I]t wouldn't be unusual."<sup>144</sup> Encouraged, the prosecutor asked Dr. West whether bite marks in such cases "would almost be expected."<sup>145</sup> West replied, "Almost."<sup>146</sup>

Stubbs and Vance were convicted and sentenced to forty-four years in prison, the statutory maximum.<sup>147</sup> Recently, their convictions were overturned on a finding that prosecutors failed to turn over the FBI report (which the court determined was critical *Brady*<sup>148</sup> material) to the defense.<sup>149</sup> Prosecutors from the Mississippi Attorney General's Office have expressed their intention to re prosecute Stubbs and Vance on the original indictment, even though it was likely procured using Dr. West's bite mark and video interpretation testimony.<sup>150</sup> The original prosecutors in the case have not been reprimanded.<sup>151</sup>

Despite the stunning, variegated acts of forensic malfeasance in all these cases—malfeasance that prosecutors aided and

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> See *infra* note 192 and accompanying text.

<sup>149</sup> See Transcript of Motion Hearing, *Stubbs v. State*, No. 2011-388 (Lincoln Cnty. Circuit Ct. Oct. 25, 2011).

<sup>150</sup> *Id.*

<sup>151</sup> Balko, *supra* note 129.

abetted—reaction to them, to the extent that there has even been one, is best described as incorrigible. In a recent interview with the *New York Times*, John T. Kitchens,<sup>152</sup> a former district attorney, discussed Dr. Hayne's close relationship to prosecutors.<sup>153</sup> According to Kitchens, "I'm sure there's a lot of people that don't like Hayne, but from a prosecutor's standpoint I don't know anybody who didn't like him."<sup>154</sup> Kitchens further explained, "He was always so helpful and useful."<sup>155</sup>

### B. Trial and Appellate Courts

Prosecutors were not the only individuals who eschewed proper professional and ethical rigor. Mississippi circuit courts also played a decisive role in the admission of pseudo-scientific trial evidence. Trial courts are obligated to serve as gatekeepers for the admissibility of expert testimony, allowing only valid, scientific evidence and rejecting testimony that is not founded on sound scientific principles.<sup>156</sup> Rule 702 of the Rules of Evidence was designed to aid trial courts in vetting such evidence.<sup>157</sup> Yet, time and time again, Mississippi trial courts failed to properly screen forensic evidence that prosecutors presented in criminal cases, especially when the defendants were indigent.

In *State v. Osborne*, for example, prosecutors charged the defendant with the murder by suffocation of a five-year-old child. The critical piece of evidence was a "death mask" that Dr. Hayne had commissioned three months after the child was buried.<sup>158</sup> In

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<sup>152</sup> Kitchens had also criticized previous State Medical Examiners for cooperating with discovery requests from defense attorneys. Letter from John T. Kitchens, District Attorney, Twentieth Judicial District, Rankin and Madison Counties, Miss., to Jim Ingram, Comm'r, Miss. Dep't of Pub. Safety (Mar. 15, 1994) (on file with authors).

<sup>153</sup> Campbell Robertson, *Questions Left for Mississippi Over Doctor's Autopsies*, N.Y. TIMES, Jan. 8, 2013, <http://www.nytimes.com/2013/01/08/us/questions-for-mississippi-doctor-after-thousands-of-autopsies.html>.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Sherwin-Williams Co. v. Gaines*, 75 So. 3d 41, 46 (Miss. 2011) ("Our trial judges work exceedingly hard and have discretion in how they discharge their gatekeeping duty, but we take this opportunity to reiterate that such duty includes making sure that the [expert] opinions themselves are based on sufficient facts or data and are the product of reliable principles and methods.").

<sup>157</sup> MISS. R. EVID. 702.

<sup>158</sup> Transcript of Record at 474, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 7, 2004).

accordance with Dr. Hayne's request, the child's body was exhumed, and a forensic odontologist (not Dr. West) created a plaster mold of the child's face.<sup>159</sup> Dr. Hayne made markings on the mask consistent with injuries on the child's face that he claimed to have observed during his original autopsy.<sup>160</sup> According to Dr. Hayne, the death mask was necessary "to determine the approximate size of a hand that could inflict [the child's] injuries."<sup>161</sup> The record is silent as to why Dr. Hayne waited until three months after the child was buried to utilize his methodologies and make these findings.<sup>162</sup>

During a pre-trial hearing addressing the admissibility of the death mask, the trial court evinced some concern that the mask might in fact be some "super duper [novel] medical testimony."<sup>163</sup> In response, the prosecutor assured the court that Dr. Hayne was not another Dr. West (evidently a known quantity by this time) and that the death mask was not akin to Dr. West's debunked and unreliable alternative light source imaging techniques.<sup>164</sup> Neither mentioned whether the "death mask" passed the strictures of Rule 702.

Unsurprisingly, use of a Plaster of Paris death mask is not standard forensic practice. When reported opinions refer to a death mask, they refer only to a postmortem photograph of a decedent's face, not to a sui generis forensic procedure involving an actual effigy of the deceased's face.<sup>165</sup> In reported cases that use the term "death mask," courts have had to address whether the admission of such a postmortem photograph is more probative than prejudicial; this kind of analysis has nothing to do with Dr. Hayne's handiwork in *Osborne*. In fact, nationwide, *Osborne's* case is the only reported instance of a plaster cast of the decedent's face being admitted into evidence for this purpose.

In other words, Hayne's death-mask tactic in *Osborne* was novel, with no apparent foundation in forensic science, and a

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *See generally* Transcript of Record, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 7, 2004).

<sup>163</sup> *Id.* at 141.

<sup>164</sup> *See supra* note 113.

<sup>165</sup> *See generally* *Lee v. State*, 735 N.E.2d 1169, 1172 (Ind. 2008).

simple search in Google, Westlaw, or Lexis would have readily revealed this fact. The prosecutor should have revealed the absurdity of Dr. Hayne's death-mask analysis to the trial court, consistent with her ethical duty.<sup>166</sup> And the trial court itself should have subjected the evidence to the rigors of Rule 702. But no such calculus was employed.

Instead, the trial court allowed Dr. Hayne to testify that the injuries on the child's face were "consistent with a larger hand rather than a smaller or medium sized hand" and, when asked whether he could tell if the marks were from a male or female hand, responded that he "would favor a male's hand."<sup>167</sup> This evidence necessarily precluded the other potential suspect in the child's death, the child's mother, and pointed the proverbial finger directly at the defendant, Joseph Osborne.<sup>168</sup> Osborne was convicted of capital murder and sentenced to life imprisonment.<sup>169</sup>

As for Dr. Hayne's death-mask testimony, in a 2013 interview with the *New York Times*, Dr. Hayne confirmed the dubious and novel nature of his death-mask testimony, conceding "[m]aybe we should've published."<sup>170</sup> Presumably, Dr. Hayne meant that he should have attempted to justify scientifically in a published paper the methods and reasoning used in creating and

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<sup>166</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2007) (outlining the special responsibilities of a prosecutor); MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3)(2007) (prohibiting an attorney from "offer[ing] evidence that the lawyer knows to be false"); MISS. RULES OF PROF'L CONDUCT R. 3.3(a)(2004), available at [http://courts.ms.gov/rules/msrulesofcourt/rules\\_of\\_professional\\_conduct](http://courts.ms.gov/rules/msrulesofcourt/rules_of_professional_conduct); MISS. RULES OF PROF'L CONDUCT R. 3.8(d)(2004), available at [http://courts.ms.gov/rules/msrulesofcourt/rules\\_of\\_professional\\_conduct.pdf](http://courts.ms.gov/rules/msrulesofcourt/rules_of_professional_conduct.pdf). The ABA Standards for Criminal Justice also state that it is unprofessional conduct for a prosecutor to "knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses." ABA CRIM. JUSTICE STANDARD § 3-5.6(a), available at [http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_pfunc\\_blk.html](http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blk.html).

<sup>167</sup> Transcript of Record at 477, *State v. Osborne*, No. 499-03 (Lauderdale Cnty. Circuit Ct. Apr. 5, 2004).

<sup>168</sup> *Id.* at 12-13. During the pre-trial hearing, the prosecution explained that Dr. Hayne had for comparison the handprints of the child's mother, another man who was in the house at that time and Osborne, and that Osborne's hands were significantly bigger than the other two. *Id.*

<sup>169</sup> *Id.* at 555.

<sup>170</sup> Campbell Robertson, *Questions Left for Mississippi Over Doctor's Autopsies*, N.Y. TIMES, Jan. 8, 2013, <http://www.nytimes.com/2013/01/08/us/questions-for-mississippi-doctor-after-thousands-of-autopsies.html>.

using the death mask to inculcate Osborne. In the same article, Dr. Andrew Baker, the president of the Medical Examiners Association and Chief Medical Examiner for Hennepin County, Minnesota criticized Dr. Hayne's death mask.<sup>171</sup> Dr. Baker explained, "I saw a very similar case like that on 'Law & Order: SVU' . . . . [However,] I've never heard of it in real life."<sup>172</sup> According to Dr. Baker, both Dr. Hayne's technique in the creating the "death mask" as well as his ability to determine the alleged assailant's gender was completely unheard of in the practice of forensic pathology.<sup>173</sup>

Similarly, in *State v. Flaggs*, the prosecutor sought to introduce Dr. Hayne's blood-spatter analysis into evidence to show that Flaggs murdered the decedent.<sup>174</sup> Here, Dr. Hayne's testimony was the keystone of the state's case. Without it, the state could not even have indicted defendant Flaggs for the murder; other than Hayne's findings, all the other crime scene evidence (along with Flaggs's version of events) indicated that Flaggs had acted in self-defense.<sup>175</sup> Dr. Hayne came to his blood-spatter findings by looking at grainy pictures of the crime scene that he had never visited.<sup>176</sup> He also never examined any actual samples from the discolored area of the apartment wall to determine whether the substance was, in fact, blood.<sup>177</sup>

Dr. Hayne lists no expertise, training, or study of blood spatter on any of his readily available curricula vitae.<sup>178</sup> As a point of contrast, professional organizations, like the Scientific Working Group on Bloodstain Pattern Analysis (SWGSTAIN) and the International Association for Identification (IAI), require rigorous training and 240 hours of course study to testify as an expert in blood-spatter analysis.<sup>179</sup> Notwithstanding Dr. Hayne's lack of

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> Transcript of Record at 338-39, *State v. Flaggs*, No. 05-0-933 (Hinds Cnty. Circuit Ct. July 26, 2006).

<sup>175</sup> *Id.* at 189-390.

<sup>176</sup> *Id.* at 338-39.

<sup>177</sup> *Id.* at 338-42.

<sup>178</sup> Steven T. Hayne, *Curriculum Vitae* (Mar. 13, 2001) (on file with authors).

<sup>179</sup> COMMITTEE ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCES COMMUNITY ET AL., NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE

training and certification in bloodstain pattern analysis, the trial judge admitted Dr. Hayne's testimony after the following exchange:

[Defense Attorney]: Your Honor, I'm going to object at this point. [Dr. Hayne] has no knowledge of the actual scene of the crime, where the body was found, any other personal knowledge. He has none, and I would object to him giving his opinion as to that. I think he's testified as to what he found on the body which is his job.

[Prosecutor]: That's why it was in the form of a hypothetical question, Your Honor.

[Trial Judge]: Overruled at this point.<sup>180</sup>

What makes matters worse is how the Mississippi Court of Appeals responded to this exchange.<sup>181</sup> The Court decided that, the trial court's failure to examine but nevertheless admit Dr. Hayne's expert opinion in this area was without error, because in *Wooten v. State*<sup>182</sup> another court had earlier held that his testimony in this area was admissible.<sup>183</sup> *Wooten*, however, did not even directly address Dr. Hayne's ability to testify as a blood-spatter expert; instead, it discussed testimony—about blood spatter—that he supplied at trial that had not been previously disclosed pursuant to discovery.<sup>184</sup> This kind of derelict legal reasoning (which is not by any means unique to Mississippi appellate courts) has created a dangerous echo chamber, in which Dr. Hayne's testimony has been deemed valid and admissible based on circular and unsupported legal reasoning.

Since the close of Flagg's trial, blood spatter evidence has become the subject of intense scrutiny. As summarized by the National Academy of Sciences:

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UNITED STATES: A PATH FORWARD 177 (2009) [hereinafter A PATH FORWARD], available at <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>.

<sup>180</sup> Transcript of Record, *supra* note 174.

<sup>181</sup> *Flaggs v. State*, 999 So. 2d 393, 401-03 (Miss. Ct. App. 2008).

<sup>182</sup> *Wooten v. State*, 811 So. 2d 355, 358 (Miss. Ct. App. 2001).

<sup>183</sup> *Flaggs*, 999 So. 2d at 402.

<sup>184</sup> *Wooten*, 811 So. 2d at 358.

The uncertainties associated with bloodstain pattern analysis are enormous. . . . [I]nterpreting and integrating bloodstain patterns into a reconstruction requires, at a minimum: an appropriate scientific education; knowledge of the terminology employed (e.g., angle of impact, arterial spurting, back spatter, castoff pattern); an understanding of the limitations of the measurement tools used to make bloodstain pattern measurements (e.g., calculators, software, lasers, protractors); an understanding of applied mathematics and the use of significant figures; an understanding of the physics of fluid transfer.<sup>185</sup>

Despite (or because of) Dr. Hayne's dubious testimony in a difficult forensic field in which he lacks expertise, Tavares Flagg is serving a life sentence.<sup>186</sup>

The *Brooks* and *Brewer* cases stand as similar examples of Mississippi appellate courts giving deference to clear forensic fraud. Not only did the Mississippi Supreme Court affirm Brooks's and Brewer's convictions, both of which centered on bite-mark evidence,<sup>187</sup> but in Brooks's case, three justices provided a concurrence in which they urged that bite-mark evidence be admitted as a matter of course in Mississippi trial courts.<sup>188</sup> The concurrence adjudged bite-mark evidence as sound neither by examining the scientific validity of bite-mark evidence, nor by examining whether any of the cases it cited in support had engaged in that kind of vigorous analysis. Instead, the concurring opinion simply argued for the admission of the testimony because other jurisdictions had admitted it.<sup>189</sup> Put plainly, Mississippi appellate courts reviewing *Brooks*, *Brewer*, *Osborne*, and *Flaggs* decided to jump off a jurisprudential bridge just because everyone else was doing it.

Brooks's and Brewer's convictions have, of course, been overturned. Given the nature of the pseudo-science, it is

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<sup>185</sup> A PATH FORWARD, *supra* note 179.

<sup>186</sup> *Flaggs*, 999 So. 2d at 395.

<sup>187</sup> *Brooks v. State*, 748 So. 2d 736 (Miss. 1999); *Brewer v. State*, 725 So. 2d 106 (Miss. 1998).

<sup>188</sup> *Brooks*, 748 So. 2d at 746-47 (Smith, J., concurring) (citing to approximately two dozen cases nationally for support and concluding that this "majority view is correct and long overdue").

<sup>189</sup> *See id.*

unsurprising that several of the cases that the Mississippi Supreme Court cited in support of bite-mark testimony have, like *Brooks* and *Brewer*, been investigated and the defendants exonerated.<sup>190</sup> The National Academy of Sciences has produced an

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<sup>190</sup> See, e.g., *State v. Stinson*, 397 N.W.2d 136, 140 (Wis. Ct. App. 1986). The Court, in *Brooks*, cited *State v. Stinson* for the proposition that “bite-mark identification evidence presented by an expert witness can be a valuable aid to a jury in understanding and interpreting evidence.” *Brooks*, 748 So. 2d at 746 (Smith, J., concurring).

Robert Lee Stinson served over twenty-three years in a Wisconsin prison for a brutal rape and murder that DNA testing later proved he did not commit. After examining the body, dental scientist Dr. Lowell Thomas Johnson worked with a police sketch artist and determined that the bite marks on the body must have come from someone missing an upper front tooth. The police questioned multiple suspects, including two men arrested for violent sexual assaults. Police investigators also questioned Stinson, whose backyard was connected to the vacant lot where the victim’s body was discovered. While interviewing Stinson, the investigators told him a joke, and noticed both a missing front tooth and a crooked tooth when he laughed. Based on these observations, and his proximity to the crime scene, Stinson was arrested and charged with murder. After DNA testing excluded Stinson, it was uploaded to a national database where it conclusively matched another man, Moses Malone, who then confessed and explained how he committed the crime. See *Robert Lee Stinson*, MISS. INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Robert\\_Lee\\_Stinson.php](http://www.innocenceproject.org/Content/Robert_Lee_Stinson.php). (last visited Apr. 4, 2013).

The Court also cited to *State v. Richards*, 804 P.2d 109, 111 (Ariz. Ct. App. 1990), for the proposition that “where bite-mark evidence is presented by a qualified expert, a *Frye* hearing is not required.” But, in *State v. Tankersly*, 121 P.3d 829 (Ariz. 2005), a case occurring subsequent to *Richards*, the Arizona Supreme Court noted that at Tankersly’s trial a “forensic odontologist, Dr. Norman Sperber, testified that it was ‘highly probable’ that Tankersley had bitten the victim’s left breast. Another forensic odontologist, Dr. Raymond Rawson, testified that Tankersley’s teeth ‘matched’ various bite marks on the victim.” *Id.* Thereafter, “[w]hile the petition for review was pending, another defendant convicted of first degree murder at whose trial Dr. Rawson had also testified about a ‘match’ between the defendant’s [Ray Krone’s] teeth and bite marks on the victim was exonerated by DNA testing.” See *Ray Krone*, MISS. INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Ray\\_Krone.php](http://www.innocenceproject.org/Content/Ray_Krone.php) (last visited Apr. 4, 2012). “In light of this development, the State and Tankersley asked the Court to stay further proceedings on the petition for review to allow for additional DNA examination of the available remaining evidence.” *Id.* Later, after post-conviction DNA testing was conducted,

testimony was presented concerning the new DNA analysis by experts retained by the State and Tankersley. Although these experts differed somewhat in their conclusions, all agreed that the DNA evidence did not definitively identify Tankersley as having bitten the victim or as the source for the hair at the crime scene.

*Id.*

extensive written report that definitively exposes bite-mark evidence as propounded by Dr. West as fraudulent pseudo-science.<sup>191</sup> As a result, several states have rewritten their rules of evidence as they apply to the admission of evidence like bite-mark matching.<sup>192</sup>

In the wake of *Daubert v. Merrell Dow Pharmaceuticals*,<sup>193</sup> the Mississippi Supreme Court's 2003 decision in *Mississippi Transportation Commission v. McLemore*,<sup>194</sup> and the amendment of Mississippi Rules of Evidence 701 and 702,<sup>195</sup> the mechanism for admitting expert evidence is clearly delineated. Rule 702 mandates that the reliability determination has three components: (1) the expert must base his opinion upon sufficient facts or data; (2) the expert must ground the opinion in reliable principles and methods; (3) the expert must apply those principles and methods to the facts of the case in a reliable manner.<sup>196</sup> Additionally, courts may also consider:

[w]hether the theory or technique can be and has been tested; whether it has been subjected to peer review and publication; whether, in respect to a particular technique, there is high known or potential rate of error; and whether the theory or technique enjoys general acceptance within a relevant scientific community.<sup>197</sup>

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<sup>191</sup> See *supra* note 168 and accompanying text.

<sup>192</sup> See, e.g., Order Amending the ARIZ. R. EVID. & ARIZ. R. CRIM. P. 17.4(f), No. 10-0035, (Ariz. Sept. 8, 2011), available at <http://www.azcourts.gov/Portals/20/R100035Amended.pdf>.

<sup>193</sup> 509 U.S. 579 (1993).

<sup>194</sup> 863 So. 2d 31 (Miss. 2003).

<sup>195</sup> Pursuant to *In Re Mississippi Rules of Evidence*, No. 89-R-99002-SCT (Miss. May 29, 2003), available at <http://courts.ms.gov/images/Opinions/154532.pdf>, the Mississippi Supreme Court amended Mississippi Rules of Evidence 701 and 702. As a result of the amendments, the two rules are identical to the corresponding Federal Rules of Evidence. Thus, the amendments made the rights that flow from the state rules commensurate with Federal decisions interpreting the same language. *Williams v. State*, 667 So. 2d 15, 19 n.1 (Miss. 1996), overruled on other grounds by *Smith v. State*, 986 So. 2d 290 (Miss. 2006).

<sup>196</sup> MISS. R. EVID. 702.

<sup>197</sup> *Anderson v. State*, 62 So. 3d 927, 937 (Miss. 2011) (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593-94 (1993)); *Poole v. Avara*, 908 So. 2d 716, 723 (Miss. 2005) (admitted "novel" theory not subject to peer review reasoning that the *Daubert* factors were not exhaustive).

The State's expert evidence in *Brooks, Brewer, Osborne and Flaggs*, as a matter of law, did not meet Rule 702's requirements. The expert evidence would have fallen far short of each of the criteria had it been subjected to them. Nonetheless it was presented, admitted without proper examination, and the convictions affirmed on an inadequate record. To the extent that defendants' substantive rights are bound up in the processes that dictate the admissibility of critical forensic evidence, actors in the State's criminal justice system were failing to respect and protect these guarantees in these kinds of cases. As a result, Kennedy Brewer and Levon Brooks together served over thirty years in prison for crimes that they did not commit; Osborne's and Flaggs's post-conviction petitions are pending.<sup>198</sup>

#### IV. THE COST TO FUNDAMENTAL GUARANTEES OF DUE PROCESS

In criminal prosecutions where medico-legal evidence played a critical role—in a dispute, for example, over whether a death was a murder or, instead, self-defense, or time-of-death in an alibi case—defendants' basic fair trial guarantees were placed at risk. Dr. Hayne's medico-legal testimony seemed to emanate from a forensic witness who gave the appearance of having been vetted by the state, an illusion created in part by the fact that he had been adorned with the state-approved laurel of "Chief State Pathologist." Unbeknownst to juries, Dr. Hayne was working under a for-profit arrangement with no professional, objective

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More specifically, if Rule 702 is implicated, a court must consider the following questions: Whether the theory or technique in question has been, or can be, tested. Do standards and controls exist? If so, have they been maintained? *Bocanegra v. Vicmar Servs., Inc.*, 320 F.3d 581, 585 (5th Cir. 2003). Is the expert testimony based on research the expert has conducted independent of the litigation? *Daubert*, 43 F.3d at 1317, *cert. denied*, 516 U.S. 869 (1995). Are the findings or conclusions of the proffered testimony the result of valid extrapolations from accepted studies or techniques? *Bocanegra*, 320 F.3d at 586. Has the expert previously testified to his opinion in a proceeding that has no connection to the matter at bar? *Ambrosini v. Labarraque*, 101 F.3d 129, 139 (D.C. Cir. 1996), *cert. dismissed*, 520 U.S. 1205 (1997). Has the expert adequately accounted for obvious alternative explanations? *Michaels v. Avitech, Inc.*, 202 F.3d 746, 753 (5th Cir. 2000), *cert. denied* 531 U.S. 126 (2000). Is there too great of an analytical gap between the data and the opinion? *Gen. Elec. v. Joiner*, 522 U.S. 136, 146 (1997).

<sup>198</sup> See Petition for Post-Conviction Relief, *Osborne v. State*, 2012-M-1845 (Miss. 2012); Petition for Post-Conviction Relief, *Flaggs v. State*, 2012-M-1848 (Miss. 2012).

oversight. It was therefore critically important that state prosecutors make available to defense counsel this information about the witness. They did not, though fundamental rights hung in the balance, and, oftentimes, the difference between a conviction and an acquittal.<sup>199</sup>

The Sixth Amendment's Confrontation Clause, for example, can be only satisfied "where defense counsel has been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness."<sup>200</sup> The right to confrontation "means more than being allowed to confront the witness physically";<sup>201</sup> it also means that "[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination."<sup>202</sup> Similarly jeopardized were basic Due Process guarantees, like those ensured by *Brady v. Maryland*<sup>203</sup> and its progeny, which require disclosure of exculpatory and impeachment material, or *Napue v. Illinois*,<sup>204</sup> which prohibits the introduction of false evidence.

Whether it was through the egregious sponsoring of bogus testimony, like bite-mark evidence, or the more pedestrian elicitation of suspect medico-legal *bona fides*, prosecutors introduced, and trial courts admitted these kinds of evidence, while unsuspecting defense attorneys sat idly by as defendants' rights were sacrificed. Take, for example, Dr. Hayne's (lack of) ABP board certification, a common statutory requirement in most states (including Mississippi<sup>205</sup>) that have medical examiners and most hospitals that employ forensic pathologists.<sup>206</sup> For years, Dr. Hayne's lack of ABP certification, to the extent it was even recognized, was never considered as a relevant issue, but as evidence of his forensic grift increased, his explanation—that he

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<sup>199</sup> See *supra* note 129 and accompanying text.

<sup>200</sup> U.S. CONST. amend. VI; *United States v. Restivo*, 8 F.3d 274, 278 (5th Cir. 1993) (internal quotations omitted).

<sup>201</sup> *Davis v. Alaska*, 415 U.S. 308, 315 (1974).

<sup>202</sup> *Id.* at 315-16 (internal quotations omitted).

<sup>203</sup> 373 U.S. 83 (1963).

<sup>204</sup> *Napue v. Illinois*, 360 U.S. 264 (1959).

<sup>205</sup> MISS. CODE ANN. § 41-61-55(2) (2012).

<sup>206</sup> See generally W.G. Eckert, *The Forensic Pathology Specialty Certifications*, 9 AM. J. FORENSIC MED. AND PATHOLOGY 85-89 (1988).

walked out of the exam because a question on it was so insulting to his intelligence that he refused to participate<sup>207</sup>—came under closer scrutiny.<sup>208</sup>

In 2008, shortly after Brooks and Brewer were exonerated, when a reporter from the Jackson *Clarion-Ledger* questioned his lack of ABP forensic pathology certification, Dr. Hayne replied that the exam contained a supposedly culturally biased question asking about the color most closely associated with death.<sup>209</sup> As he explained:

In the Orient, white is associated with death. Green is a color of decomposition, certainly associated with death. Blood is obviously associated with death. To me, it was just the final absurd question. So I got up, handed my paper to the proctor and said, “I leave, I quit. I’m not going to answer this type of material.”<sup>210</sup>

After the *Clarion-Ledger* reported Dr. Hayne’s version, ABP officials contacted the newspaper to refute it. “As the executive director of the American Board of Pathology I was surprised by Dr. Hayne’s description of the ‘stupid question’ (related to colors associated with funerals) on his forensic pathology examination that caused him to walk out of the exam,” wrote Dr. Betsy Bennett.<sup>211</sup> “Dr. Hayne took the forensic pathology examination in 1989. I pulled the text of this examination from our files, and there was no question on that examination that was remotely similar to Dr. Hayne’s description.”<sup>212</sup>

After encountering skepticism over his story, Dr. Hayne contacted the ABP and requested the exam himself. He was told

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<sup>207</sup> Jerry Mitchell, *Doctor’s Autopsy Abilities Targeted*, CLARION-LEDGER, Apr. 27, 2008, at A1.

<sup>208</sup> See Deposition of Steven Hayne at 56-57, *Vessel v. Alleman*, No. 99-0307-CI (Warren Cnty. Circuit Ct. June 26, 2003); Deposition of Steven Hayne at 48-49, *Bennett v. City of Canton Swimming Pool*, No. C1-96-0176 (Madison Cnty. Circuit Ct. June 2, 2001); Transcript of Record at 19, *State v. Townsend*, No. 2000-127-CR (Montgomery Cnty. Circuit Ct. Mar. 20, 2001); Transcript of Record at 367-68, *State v. Williams*, No. 2004-048 (Washington Cnty. Circuit Ct. Oct. 18, 2004).

<sup>209</sup> Mitchell, *supra* note 207.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

that it was not available.<sup>213</sup> Thereafter, Dr. Hayne upped the ante, characterizing Dr. Bennett's rebuttal to his story as "flat wrong" and reiterated that she "doesn't know what she's talking about."<sup>214</sup> Recently, however, also pursuant to the discovery agreement in Hayne's defamation case,<sup>215</sup> the ABP actually produced the exam. Nowhere on it is there any question remotely resembling the one Dr. Hayne described was on it. When confronted with a copy of the exam itself, he finally admitted that, in fact, no such question existed; and when asked, confessed that he could provide "no explanation for that."<sup>216</sup> The ABP's production also revealed an additional fact: At the time Dr. Hayne "walked out" of the ABP exam, he was failing it.<sup>217</sup>

Confusion over Dr. Hayne's credentials did not stop with his ABP certification. In lieu of the ABP, Dr. Hayne claimed certification by a host of other governing organizations.<sup>218</sup> For example, in 2011, Dr. Hayne provided the following testimony concerning his certification to practice forensic pathology:

Q. Do you belong to the American Board of Pathology?

...

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<sup>213</sup> See Deposition of Steven Hayne at 246, *Hayne v. Innocence Project*, No. 3:09-CV-218-KS-LRA (S.D. Miss. Apr. 26, 2012) (on file with authors).

<sup>214</sup> See Mitchell, *supra* note 207.

<sup>215</sup> Dr. Hayne sued Peter Neufeld and Vanessa Potkin, attorneys at the Innocence Project, and Tucker Carrington, one of the co-authors, for, among other things, libel, slander and defamation. See *Hayne v. The Innocence Project*, No. 2008-247 (Rankin Cnty. Circuit Ct. Oct. 8, 2008). The case was ultimately dismissed. Dr. Hayne then brought a second suit in federal court in the Southern District of Mississippi. *Id.* Though the grounds were essentially the same, Carrington was not named as a defendant.

<sup>216</sup> See Deposition of Steven Hayne at 244-45, *Hayne v. Innocence Project*, No. 3:09-CV-218-KS-LRA (S.D. Miss. Apr. 26, 2012) (on file with authors).

<sup>217</sup> Dr. Hayne's reported score was 484; 750 was the minimal score required to pass the exam. *Id.* at 255-56.

<sup>218</sup> 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 twenty-four affiliate boards, including the ABP. AM. BD. MED. SPECIALTIES, <http://www.abms.org> (last visited Apr. 18, 2013). When doctors claim to be "board certified," it is understood that their claim refers to the ABMS's oversight. Mitchell, *supra* note 207.

*[I am not certified] by them [in forensic pathology]. I am certified by the American Board of Forensic Pathology, and actually I was recertified two years ago.*

...

Q. Were you certified back when you did the autopsy in this case?

A. Yes, sir.<sup>219</sup>

The problem with his testimony is not just that the American Board of Forensic Pathology (ABFP) is not an adequate substitute for the American Board of Pathology; the problem is that the ABFP no longer exists. It is a now-defunct “specialty board” of the American Academy of Neurological Orthopedic Surgeons (AANOS); AANOS disbanded the ABFP in 1995.<sup>220</sup> The ABFP has never been recognized as a legitimate certifying organization.<sup>221</sup> AANOS requires recertification of its members every five years, and, according to its executive director, “re-certification [by AANOS has] . . . not [been] possible in Boards such as Forensic Pathology” since 1996.<sup>222</sup> Dr. Hayne joined the ABFP in 1992.<sup>223</sup> Thus, because Dr. Hayne was certified on June 26, 1992 by an organization that requires recertification every five years and that no longer supports the ABFP, the fact is that Dr. Hayne’s APFB certification in forensic pathology, for whatever it was worth, expired on June 27, 1997.<sup>224</sup> When confronted with this fact, Dr. Hayne first suggested that he did not know the APFB had been

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<sup>219</sup> Transcript of Record at 195-96, *State v. Parvin*, No. CR09-135 (Monroe Cnty. Circuit Ct. June 13, 2011) (emphasis added) (on file with authors).

<sup>220</sup> Letter from Nick Rebel, Exec. Dir. of the Am. Acad. of Neurological and Orthopedic Surgeons, to Jim Lappan (May 18, 2010) (on file with authors); Mitchell, *supra* note 207.

<sup>221</sup> Letter from Barbara Schneidman, Assoc. Vice President of the Am. Bd. of Med. Specialties, to Emily W. Ward, Assistant Professor of Pathology (June 18, 1996) (“The American Board of Forensic Pathology is not recognized by the American Board of Medical Specialties (ABMS) and is not authorized to provide certification.”) (on file with authors); Mitchell, *supra* note 207.

<sup>222</sup> Mitchell, *supra* note 207; Letter from Nick Rebel, *supra* note 220.

<sup>223</sup> See Certificate issued from Am. Bd. of Forensic Pathology to Steven Hayne (June 26, 1992) (on file with authors).

<sup>224</sup> See Letter From Nick Rebel, Exec. Dir. of the Am. Acad. of Neurological and Orthopedic Surgeons, to Jim Lappan (Aug. 17, 2010) (on file with authors).

abolished; then, he later explained, “I was told I was always in good standing.”<sup>225</sup> There has been no forthcoming explanation from Dr. Hayne as to how he was recertified by the APFB in 2008.

It is inarguable that Dr. Hayne’s lack of board certification is material and should have been disclosed to defense counsel (and to juries) in the course of criminal trial. Dr. Hayne’s inconsistent testimony about what certification he did possess would have been prime fodder for a robust cross-examination. Whether it was the elicitation of misleading testimony about Dr. Hayne’s credentials or the failure to disclose the information to begin with, Mississippi’s medico-legal arrangement compromised defendants’ ability to fully exercise their constitutionally guaranteed trial rights. “[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the fact-finder the reasons for giving scant weight to the witness’ testimony.”<sup>226</sup> Of particular relevance here, “the exposure of a witness’ motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.”<sup>227</sup> But Mississippi’s statutory mechanisms to ensure professional medical soundness were circumvented, prosecutors took full advantage of the lax oversight, *Brady* obligations remained unfulfilled, and *Napue*’s prohibition against the introduction of false evidence was violated. In cases where the medico-legal testimony was critical—where prosecutors relied on it to form the core of their theory and to rebut an affirmative defense (and the defense remained unaware of the weaknesses in the state’s star witness’s professional qualifications), the state gained an unfair and decisive advantage at the expense of defendants’ most basic rights, including the right to not be wrongfully convicted.<sup>228</sup>

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<sup>225</sup> Mitchell, *supra* note 207.

<sup>226</sup> Delaware v. Fensterer, 474 U.S. 15, 22 (1985).

<sup>227</sup> Davis v. Alaska, 415 U.S. 309, 316-17 (citing Greene v. McElroy, 360 U.S. 474, 496 (1959)).

<sup>228</sup> Regardless of the precise level of culpability on eliciting such information, the United States Supreme Court noted in *Napue v. Illinois*,

A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . . That the district attorney’s

Thus, it is clear, that even when defense attorneys attempted to cross-examine the state's witnesses about their credentials, prosecutors were less than forthcoming. There is no record of any prosecutor in the State of Mississippi turning over (1) *Brady* evidence concerning Dr. Hayne's failure of the ABP exam; (2) the credibility of the American Board of Forensic Pathology; or (3) any prior inconsistent statements that Dr. Hayne may have made with

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silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.

360 U.S. 264, 269-70 (1959) (internal quotation omitted).

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

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

*People v. Cornille*, 448 N.E.2d 857, 865 (Ill. 1983); *see also id.* at 865-66 ("Moreover, it is obvious that every party, including the State, has an obligation to verify the credentials of its expert witnesses. It is only on the basis of these credentials that experts are permitted to offer their professional opinions concerning the factual issues disputed in the criminal proceeding. This type of purportedly objective opinion testimony may have considerable influence on the jury, and the rules for qualifying expert witnesses are designed to ensure that only genuine experts will offer it.").

The same principle is true for the content presented by an expert witness. In *Imbler v. Craven*, 298 F. Supp. 795, 808-09 (C.D. Cal. 1969), *aff'd per curiam*, 424 F.2d 631 (9th Cir. 1970), the court held that reckless use of highly suspicious false testimony violates Due Process:

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

*Id.*; *see also* *N. Mariana Islands v. Bowie*, 243 F.3d 1109, 1118 (9th Cir. 2001) ("[A prosecutor's due process duty] requires a prosecutor to act when put on notice of the real possibility of false testimony. This duty is not discharged by attempting to finesse the problem by pressing ahead without a diligent and a good faith attempt to resolve it. A prosecutor cannot avoid this obligation by refusing to search for the truth and remaining willfully ignorant of the facts."); *Curran v. Delaware*, 259 F.2d 707 (3d Cir. 1958); *White v. Ragen*, 324 U.S. 760 (1945); *New York v. Wilson*, 318 U.S. 688 (1943); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Mooney v. Holohan*, 294 U.S. 103 (1935).

regard to his board certification.<sup>229</sup> Though overall the issue is not with Dr. Hayne's board certification per se; the issue is that this information would have been critical to defendants like Tyler Edmonds, where Dr. Hayne's two-fingers-on-the-trigger testimony played a central role in his conviction.

#### V. MISSISSIPPI'S HALF-STEP TOWARD CHANGE

It is unthinkable that Mississippi has regressed in the medico-legal investigation of death into a veritable state of rigor mortis . . . . We live in a world that now expects CSI efficiency, and we are giving them the Wild West and Gunsmoke. For most of the past 34 years, no one has bothered to ponder its flaws until things have been grossly and irreparably botched<sup>230</sup>

Dr. Dwalia South  
Past President, Mississippi State Medical Association

Mississippi was not quick to correct its medico-legal catastrophe. It was not until August of 2008, several months after the Brooks and Brewer exonerations, that newly appointed Commissioner of Public Safety, Stephen B. Simpson, informed Dr. Hayne that he had been "removed from the list of designated pathologists and may no longer conduct autopsies at the State Medical Examiner Facility."<sup>231</sup> The main issue, it seemed, was not Dr. Hayne's testimony in numerous criminal cases; instead, Simpson explained that Dr. Hayne was being removed because he had a "backlog" of autopsy reports—almost 500—that he had not completed and provided to the Department of Public Safety, as required by law.<sup>232</sup>

To the extent that any additional, targeted action was taken, it was characterized, both in quantity and quality, as supportive of

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<sup>229</sup> See Jerry Mitchell, *Pathologist's Credibility on Line*, CLARION-LEDGER, Nov. 6, 2012.

<sup>230</sup> Jerry Mitchell, *Lack of Medical Examiner Slows Investigations*, CLARION-LEDGER, June 16, 2008, at A1.

<sup>231</sup> Letter from Stephen B. Simpson, Miss. Comm'r of Pub. Safety, to Dr. Steven T. Hayne (Aug. 4, 2008) (on file with authors).

<sup>232</sup> See MISS. CODE ANN. § 41-61-65 (2012); Letter from Stephen B. Simpson, Miss. Comm'r of Pub. Safety, to Dr. Steven T. Hayne (Aug. 4, 2008) (on file with authors).

the status quo. For example, Innocence Project and Mississippi Innocence Project attorneys, in an effort to gather information about Dr. Hayne's former cases, sent requests to district attorneys throughout the state. The requests were made pursuant to Mississippi Public Records Act, and were narrowly tailored so that information deemed private could be excised from the request.<sup>233</sup> By law, this information is to be made available upon request.<sup>234</sup>

Every state district attorney refused to comply.<sup>235</sup> The District Attorney for the Twelfth Judicial District, which includes Forrest and Perry Counties, wrote that "As district attorney, I am not aware of any wrongful convictions in my district."<sup>236</sup> Two years later, Phillip Bivens and Bobby Ray Dixon were exonerated in Hattiesburg, the Forrest County seat, after spending thirty years in prison after their wrongful conviction for murder.<sup>237</sup> Larry Ruffin, also convicted, was cleared, too. Ruffin, however, died in prison in 2002.<sup>238</sup>

County medical examiner investigators also took action. Their effort was aimed at circumventing Commissioner Simpson's decision to remove Dr. Hayne from the designated state pathologist list.<sup>239</sup> As contemplated, their plan was to contract on their own with Dr. Hayne. There was some concern, however, about contracting with him—still uncertified and no longer working pursuant to a state contract—and so the county medical examiner investigators turned to the Mississippi Attorney General's office for legal advice.<sup>240</sup> According to the Attorney

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<sup>233</sup> MISS. CODE ANN. § 25-61-1 (2012).

<sup>234</sup> *Id.*

<sup>235</sup> See Compilation of responses from district attorneys to the Miss. Public Records Act request (on file with authors).

<sup>236</sup> Letter from Jon Mark Weathers, District Attorney, Twelfth Judicial District, to Gabriel S. Oberfield, Staff Attorney, Innocence Project (Mar. 20, 2008) (on file with authors).

<sup>237</sup> Campbell Robertson, *30 Years Later, Freedom in a Case With Tragedy for All Involved*, N.Y. TIMES, Sept. 17, 2010, <http://www.nytimes.com/2010/09/17/us/17exonerate.html>.

<sup>238</sup> *Id.*

<sup>239</sup> See generally Letter from James Y. Dale, Special Assistant Att'y Gen., to Ricky Shivers, Cnty. Coroner (June 26, 2009) (on file with authors).

<sup>240</sup> *Id.*

General's opinion, there was nothing illegal about continuing to employ Dr. Hayne.<sup>241</sup>

The Public Safety Commissioner's decision not to renew Dr. Hayne's contract was, on the one hand, a large step in correcting the wayward course of the state's medico-legal system. But, like the legislative reforms of the 1970s and 1980s, absent concerted support from other stakeholders, the measure risked becoming ineffectual. What occurred was even worse.

Not only did the Attorney General's response embolden certain coroners to move forward with a plan to reinstate Dr. Hayne as the favored county coroner for select counties, but the Attorney General's response did not address, at all, whether such action was good public policy, omitted any mention of the State Ethics Commission's conclusions about the problems with this type of arrangement, and did not mention anything about Dr. Hayne's disgraceful track record as a forensic pathologist.<sup>242</sup>

During the 2010 regular legislative session, the Mississippi legislature introduced a bill that would have put an end to some counties' efforts to contract independently with Dr. Hayne to perform their autopsies.<sup>243</sup> The bill required that counties that contract separately with pathologists do so only with pathologists that were board certified by the ABP in forensic pathology.<sup>244</sup> At that point, the Attorney General's office made explicit what was implicit in its legal opinion of the previous year: protecting the status quo. In an e-mail to county medical examiner investigators, and others, Mississippi Attorney General Jim Hood wrote:

Please be advised House Bill 1456 amends Section 41-61-65 and allows the Department of Public Safety to appoint a Pathologist which [sic] must be qualified to perform post-mortem examinations. Further, this bill requires the Pathologist be an M.D. or D.O. who is certified in Forensic Pathology by the American Board of Pathology. This is an Innocence Project bill which threatens cases which involved Dr. Hayne. This bill has passed the Senate and is headed to the House of Representatives. Please contact your House

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<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> See H.B. 1456, Reg. Sess. (Miss. 2010).

<sup>244</sup> *Id.*

Member and encourage him or her to defeat this bill. Our office is working diligently to stop this potentially harmful legislation.<sup>245</sup>

In spite of Attorney General Hood's lobbying, the bill passed in both the House of Representatives and the Senate.<sup>246</sup> When the bill landed on the desk of Governor Barbour, county medical examiners and their investigators began writing to him requesting that Dr. Hayne "be reinstated as our State Pathologist."<sup>247</sup> Their efforts were all for naught. Governor Barbour signed the bill into law, and counties can no longer contract with Dr. Hayne—at least not until he passes the ABP examination.<sup>248</sup>

Also, in 2008, the Mississippi Legislature started making good faith efforts towards filling the State Medical Examiner's Office.<sup>249</sup> The Legislature made a \$500,000 appropriation to the long-vacant office out of funds earned from selling NASCAR car tags.<sup>250</sup> At the end of 2010, the Department of Public Safety finally filled the office with a board-certified forensic pathologist: Dr. Adel Shaker.<sup>251</sup> But even this did not save the office from turmoil. In early 2011, scandal erupted because Dr. Shaker was the subject of an inquest about a falsified autopsy report; he abandoned his post entirely later that year.<sup>252</sup>

In 2011, the Legislature also changed how State Medical Examiners are appointed in Mississippi.<sup>253</sup> Whereas before the commissioner of the Department of Public Safety was responsible for appointing the State Medical Examiner, the new law ensured more oversight over the process.<sup>254</sup> Under the new scheme, the

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<sup>245</sup> Radley Balko, *Mississippi AG Hood Still Actively Supporting Steven Hayne*, REASON.COM (Mar. 20, 2012, 1:16 PM), <http://reason.com/blog/2010/03/12/mississippi-ag-jim-hood-still>.

<sup>246</sup> See H.B. 1456, Reg. Sess. (Miss. 2010).

<sup>247</sup> Letter from Dexter "Skip" Howard, Holmes Cnty. Coroner, to Haley Barbour, Governor of Miss. (Aug. 19, 2008); see also Letter from Clay McMorris, Lincoln Cnty. Coroner, to Haley Barbour, Governor of Mississippi (Aug. 25, 2008) (on file with authors).

<sup>248</sup> See MISS. CODE ANN. § 41-61-65 (2012).

<sup>249</sup> Mitchell, *supra* note 230.

<sup>250</sup> *Id.*

<sup>251</sup> Gates, *supra* note 17.

<sup>252</sup> Jerry Mitchell, *State Pathologist Gone*, CLARION-LEDGER, Nov. 18, 2011.

<sup>253</sup> See S.B. 2435, Reg. Sess. (Miss. 2011).

<sup>254</sup> *Id.*

commissioner of the Department of Public Safety is still responsible for appointing a doctor to the post, and a nine-member board must confirm the appointment.<sup>255</sup> The nine-member board consists of members who represent a variety of interests in the State Medical Examiner's office: dean of the University of Mississippi Medical Center School of Medicine, commissioner of Department of Public Safety, State Health Officer, the Attorney General, president of the Mississippi Coroners' Association, president of the Mississippi Prosecutors Association, president of the Mississippi Public Defenders Association, president of the Mississippi Association of Chiefs of Police, and the president of the Mississippi Sheriff's Association.<sup>256</sup>

As for Dr. West, he is no longer in private practice, is no longer peddling the eponymous "West Phenomenon" in Mississippi courts, and is currently the staff dentist at the South Mississippi Correctional Institute in Leakesville, Mississippi.<sup>257</sup> Dr. Hayne still practices forensic pathology in Mississippi and continues to testify regularly in criminal trials. In light of the change in law, he has been courting a new customer base: criminal defense attorneys. He recently sent out a letter stating:

We are pleased to announce that Steven Hayne, M.D. will be available immediately to assist criminal defense attorneys in the State of Mississippi. . . . Dr. Hayne is available to give testimony as an expert witness in all criminal cases involving violent crimes and death of unknown origin.<sup>258</sup>

Defense attorneys have eagerly taken him up on the offer.<sup>259</sup>

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<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> Deposition of Michael West at 11-12, Hayne v. Innocence Project, 2011 WL 198128, No 3:09-CV-218-KS-LRA (S.D. Miss. Mar. 13, 2012).

<sup>258</sup> Letter from Pathology Consultants, Inc., Dr. Steven T. Hayne M.D. (on file with authors).

<sup>259</sup> Recently, a defense attorney retained Dr. Hayne in an Oktibbeha County criminal case. See Transcript of Record at 51, State v. Sharp, No. 2010-158-CRH (Oktibbeha Cnty. Circuit Ct., Sept. 26, 2011). The defendant, accused of murder for the shooting death of her paramour, claimed self-defense. See David Miller, *Leslie Sharp Found Not Guilty*, DISPATCH, Sept. 30, 2011, <http://www.cdispatch.com/news/article.asp?aid=13309>. The defendant, however, shot the victim seven times—including several shots in the back, which, arguably, were

VI. PUTTING THE LEGAL INTO THE MEDICO-LEGAL SYSTEM:  
RECOMMENDATIONS FOR SUSTAINABLE CHANGE IN MISSISSIPPI

*A. Thorough Investigation of Past Wrongs*

In the United States, we treat the rare occurrence of a plane crash with overwhelming vigilance. The media coverage and the official inquiries begin almost immediately. After the crash, the National Transportation Safety Board (NTSB), an agency with subpoena power, commences to answer the important and obvious questions:

What went wrong? Was it system error or an individual's mistake? Was there any official misconduct? And, most important of all, what can be done to correct the problem and prevent it from happening again?<sup>260</sup>

The act of an innocent person being convicted is the legal system's equivalent of a plane crash.<sup>261</sup> Not only have several persons—a victim, a community—been ill served, but an innocent person has lost their life, or a substantial amount of their freedom, in the process; all at the hands of a system, the existence of which is predicated on making sure that such a situation never occurs.

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proof of the defendant being the aggressor, not the victim. *Id.* Evidence about which shots were fired first would be critical. Eyewitness accounts were not helpful, so both sides turned to forensic evidence.

The State's pathologist, Dr. Adele Lewis, testified that there was no way to determine which shot was fired first because of the multiple variables involved—including, among other things, the position of the shooter and the decedent, and the angle of the weapon at the time it was fired. "There's an infinite number of scenarios in which you can pose the shooter," Dr. Lewis testified. Transcript of Record at 48, *State v. Sharp*, No. 2010-158-CRH (Oktibbeha Cnty. Circuit Ct., Sept. 26, 2011). "[A]n honest and competent pathologist would not be able to tell you which order the shots were fired and the position of the person. It's not scientifically possible." *Id.* at 51. But the defense had not retained an honest and competent pathologist. The defense had retained Dr. Hayne. According to Dr. Hayne, the first bullets fired hit the decedent in the front of his body; the gunshot wounds to his back were among the last to occur. Transcript of Record at 27, *State v. Sharp*, No. 2010-158-CRH (Oktibbeha Cnty. Circuit Ct., Sept. 26, 2011).

<sup>260</sup> Barry C. Scheck & Peter J. Neufeld, *Toward the Formation of "Innocence Commissions" in America by Monitoring and Investigating Errors in the Criminal Justice System, Innocence Commissions Could Help Remedy Systemic Defects that Bring About Wrongful Convictions*, 86 JUDICATURE 98 (2002).

<sup>261</sup> *See id.*

Yet, even in light of multiple people being wrongfully convicted as a result of Mississippi fast and loose medico-legal oligarchy, there has been no uniform, formal inquiry into the what went wrong.

The Mississippi Attorney General's Office claims to be investigating cases involving Dr. West. This investigation is being led by Marvin Sanders, a prosecutor with the Attorney General's office.<sup>262</sup> Sanders, however, is the prosecutor seeking to reprosecute Stubbs and Vance on the original indictment issued in 2000, an indictment procured almost exclusively with Dr. West's bite-mark and video-enhancement testimony.<sup>263</sup>

Despite the fact that the Attorney General's Office has been aware of the dubious nature of Dr. West's work since 1992 and Mississippi Courts began overturning convictions based on Dr. West's bite-mark analysis in 2008, the progress on Sanders's investigation is underwhelming, to say the least. In a recent update on the investigation, Sanders explained, "I pulled all of [Dr. West's] cases just via Westlaw search and just have not had time to review them for any . . . forensics or whatever."<sup>264</sup>

In other words, the Mississippi Attorney General's office has no plans to undertake a serious inquiry into forensic fraud committed in Mississippi, Dr. West's work, or Dr. Hayne's work. It is no wonder much of the non-scientific forensic testimony that inundated the courts of Mississippi throughout the 1990s and 2000s was defended on appeal by the Attorney General's office.

As long as Mississippi relies on these actors, there will never be an effective and thorough investigation of wrongful convictions cases. A better alternative to the Attorney General's Office's anemic and self-interested efforts is to establish a legislative innocence commission with the ability to inquire into Mississippi's checkered past, examine individual cases, and make recommendations concerning sustainable change to Mississippi's forensic system. Other states have chosen this option. North Carolina has had an innocence commission in place, in one form or

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<sup>262</sup> Transcript of Motion Hearing at 91, *Stubbs v. State*, No. 2011-388 (Lincoln Cnty. Circuit Ct. Oct. 25, 2011).

<sup>263</sup> *See generally id.*

<sup>264</sup> *Id.*

another, since 2003.<sup>265</sup> Furthermore, the North Carolina Innocence Commission model is widely regarded as the most successful model currently being utilized in the United States.<sup>266</sup>

### 1. The North Carolina Model

In order to implement an innocence commission like North Carolina's, it is important to first understand how the North Carolinian model works. North Carolina was the first state to voluntarily undertake an innocence commission.<sup>267</sup> The commission was the brainchild of Justice I. Beverly Lake Jr. of the North Carolina Supreme Court.<sup>268</sup> Justice Lake decided to host a round table discussion about wrongful convictions and invited representatives from law enforcement, criminal justice, and legal academia to join him in the discussion.<sup>269</sup> According to Justice Lake's invitation, "[E]xonerations challenge us to further review our criminal justice system for potential changes which can minimize future convictions of the innocent, without jeopardizing the conviction of the guilty, and also establish a mechanism for objective review of credible innocence claims."<sup>270</sup> Justice Lake assured members that their effort would be appreciated, explaining that "our joint efforts can have a strong positive impact on North Carolina's justice system and our citizen's faith in it."<sup>271</sup>

After the commission was established, the primary objective of its thirty-one members was to "make recommendations which reduce or eliminate the possibility of the wrongful conviction of an innocent person."<sup>272</sup> This included formulating the plan to put into place the commission's ability to review swiftly and effectively wrongful conviction cases.<sup>273</sup>

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<sup>265</sup> See Christine C. Mumma, *The North Carolina Innocence Commission: Uncommon Perspectives Joined by a Common Cause*, 52 DRAKE L. REV. 647, 648 (2004).

<sup>266</sup> See generally David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1049 (2010).

<sup>267</sup> See Mumma, *supra* note 265, at 648-49.

<sup>268</sup> *Id.* at 648.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 649.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at 650.

<sup>273</sup> Wolitz, *supra* note 266, at 1049.

In 2006, based in large part upon the recommendations of Justice Lake's innocence commission, the North Carolina Legislature passed a bill establishing the North Carolina Innocence Inquiry Commission (NCIIC), an independent innocence commission with the power to inquire into claims of actual innocence.<sup>274</sup> Eight members comprise the NCIIC: one superior court judge, one prosecutor, one criminal defense attorney, one victim advocate, one sheriff, one member of the general public, and two more discretionary members.<sup>275</sup> The Chief Justice of the Supreme Court and the Chief Judge of the North Carolina Court of Appeals share responsibility for appointing the NCIIC's members.<sup>276</sup>

The legislature also provided the NCIIC with \$375,000 of annual funding, which allowed the Commission to maintain an office with an executive director and five staff members to carry out administrative, recordkeeping, and preliminary investigative tasks.<sup>277</sup>

Before the NCIIC reviews any case, the convicted person must first give his or her express consent for the review and fill out a questionnaire.<sup>278</sup> Part of the consent for Commission review involves waiving privileges that the claimant enjoys during formal court proceedings, including: "the right against self-incrimination, attorney-client privilege, spousal privilege, patient-physician privilege, priest-penitent privilege, and any other type of privileged communication."<sup>279</sup>

Then, after the claimant fills out the questionnaire and provides consent for the inquiry, the NCIIC staff decides whether to launch a "formal inquiry."<sup>280</sup> To prepare for a "formal inquiry,"

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<sup>274</sup> *Id.*

<sup>275</sup> N.C. GEN. STAT. §15A-1463(a) (2010).

<sup>276</sup> *Id.*

<sup>277</sup> Wolitz, *supra* note 266, at 1049-50.

<sup>278</sup> *Id.* at 1050.

<sup>279</sup> CHRISTINE MUMMA, GUIDELINES FOR COUNSEL APPOINTED BY INDIGENT DEFENSE SERVICES FOR CLAIMS INVESTIGATED BY THE NORTH CAROLINA INNOCENCE INQUIRY COMMISSION 2 (2011), *available at* <http://www.ncids.org/other%20manuals/Innocence%20Inquiry/guidelines%20for%20iic%20appointed%20counsel.pdf>. Many applicants are immediately eliminated from the process, because they do not provide their consent or they do not complete the questionnaire. Wolitz, *supra* note 266, at 1050.

<sup>280</sup> *Id.*

the Commission staff compiles legal documents as well as other information about the case; staff may also perform a preliminary factual investigation, in order to determine whether the claimant has a valid factual innocence claim.<sup>281</sup> If the claim obviously is lacking one of the statutory requirements to establish an innocence claim before the Commission, the claim is rejected, and the Commission takes no further action.<sup>282</sup>

If the Commission decides to undertake a “formal inquiry,” it can “issue process to compel the attendance of witnesses and the production of evidence, administer oaths, . . . and prescribe its own rules of procedure.”<sup>283</sup> It can also utilize any procedures available in the North Carolina Criminal Procedures Act or the North Carolina Rules of Civil Procedure.<sup>284</sup>

A “formal inquiry” is not anything like a criminal trial; in fact, it is not an adversarial proceeding.<sup>285</sup> Whereas during a criminal trial, the prosecutor and defense attorney are central to the presentation of evidence and advancement of the case; during a “formal inquiry,” the lawyers sit on the sidelines.<sup>286</sup> The inquiry process is akin to France and Italy’s “inquisitorial” judicial system.<sup>287</sup> Instead of lawyers, the Commission’s staff drives the process, “searching for and compelling disclosure of information as it sees fit.”<sup>288</sup> Furthermore, the Commission’s proceedings are not a matter of public record.<sup>289</sup> The Commission’s proceedings remain confidential unless the Commission decides to refer the case to a three-judge panel. Then, all of the facts surrounding the case become open to the public.<sup>290</sup>

At the end of the “formal inquiry,” the Commission holds a hearing in order to determine whether “there is sufficient evidence

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<sup>281</sup> *Id.* Of note, most claims are rejected before the Commission launches a “formal inquiry.” *Id.*

<sup>282</sup> *Id.* If a claimant’s application is rejected, he or she has no statutory right to appeal the rejection. *Id.*

<sup>283</sup> N.C. GEN. STAT. §15A-1467(d) (2010).

<sup>284</sup> *Id.*; Wolitz, *supra* note 266, at 1051.

<sup>285</sup> Wolitz, *supra* note 266, at 1051.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* at 1051-52.

<sup>290</sup> *Id.* at 1052.

of factual innocence to merit judicial review.”<sup>291</sup> Then, all eight commissioners vote.<sup>292</sup> In a case where the claimant was convicted of a felony after a trial, five or more commission members must vote in favor of judicial referral.<sup>293</sup> If the convicted person pleaded guilty at trial, the vote must be unanimous in favor of referral.<sup>294</sup>

If the case passes the Commission’s vote, the Commission refers the case to the Chief Justice of the North Carolina Supreme Court, who appoints a three-judge panel to conduct an evidentiary hearing on the matter.<sup>295</sup> Once the innocence claim is before the three-judge panel, the process transforms once again; it becomes noticeably more adversarial.<sup>296</sup> Prosecutors present the state’s interests, and the claimant’s attorney argues for his or her client’s innocence.<sup>297</sup> If all three judges conclude that the claimant has proved that he or she is actually innocent, then his or her conviction is overturned.<sup>298</sup> If the vote is not unanimous, the claimant receives no relief whatsoever and has no right to appeal.<sup>299</sup>

## 2. Using North Carolina’s Innocence Commission as Inspiration for a Mississippi Innocence Commission

Although the North Carolina system may not be perfect, it is substantially more advanced than any system Mississippi has in place, and there are many things that North Carolina has done properly. First, an innocence commission is preferable to the ordinary appellate court system or the Attorney General’s Office because it provides expedited, specialized attention to innocence cases. Innocent persons should not have to sit in jail indefinitely as their case winds its way through the court system. Furthermore, an innocence commission would allow Mississippi to review a massive number of cases without burdening the

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<sup>291</sup> N.C. GEN. STAT. §15A-1468(c) (2010).

<sup>292</sup> Wolitz, *supra* note 266, at 1052.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* If the case does not pass the Commission vote, whether it be failure to obtain the five-person majority or unanimity, then case is closed. *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

traditional court system. Given that Mississippi allowed its medico-legal system to go completely unattended for almost twenty years, this bulk approach to case review is necessary.

In Mississippi, the courts have released wrongfully convicted inmates after years of appeals; however, there has been no consistent effort to identify and address the problems that lead to their convictions in the first place. The first thing that North Carolina did was convene specialists in the field of innocence claims to make recommendations regarding the causes of wrongful convictions in the state. This proactive approach was designed not just to aid in overturning convictions but also to allay the ills of the system. For there to be any positive, substantive change to the system, Mississippi must take a similar approach, relying upon the knowledge of experts and allowing the experts to tailor an appropriate response.

Next, the North Carolina State Legislature took into consideration the recommendations of the commission when passing legislation. This resulted in the establishment of an independent innocence commission that was based on the collective knowledge of experts. The Mississippi Legislature must likewise defer to the knowledge of experts in order for Mississippi's innocence commission to be similarly successfully. Furthermore, one of the reasons that Mississippi got into this medico-legal mess to begin with is its good-old-boy network and resistance to change. There must be a way to assure that appointments to the innocence commission are based upon merit, experience, and fairness, instead of political cache. North Carolina found that incorporating the appointments of the Chief Justice of the Supreme Court and Chief Judge of the Court of Appeals sufficiently ensured the quality of appointments; Mississippi's solution may be different. However, making sure that the commission is knowledgeable and fair should be of the highest priority; otherwise, the commission would be horribly inefficient and continue to favor the status quo.

Significantly, the North Carolina Legislature provided adequate funding for the NCIIC.<sup>300</sup> It almost goes without saying that for an innocence commission to be successful, it must be

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<sup>300</sup> *Id.* at 1050.

sufficiently funded to complete its job. Additionally, the breadth of North Carolina's Commission's jurisdiction was over all actual innocence claims, not just those requiring DNA testing. In Mississippi, many of the possible innocence claims involve a wide variety of forensic science and cannot be overturned through DNA testing alone. Thus, an innocence commission with the ability to hear a wide breadth of cases is necessary to overturn all of the probable wrongful convictions within the State.

Also, North Carolina provides its Commission with the power to effectively investigate its cases, by providing it with the subpoena power, the power to investigate, and all other powers afforded to trial courts. This discovery function is key to the effective investigation of wrongful convictions. If the commission does not have this function, it would be practically useless.

Finally, the multifaceted approach of the North Carolina innocence commission ensures that precious resources are preserved. The Commission's staff sifts through and bifurcates the claimants' applications. Some applications are frivolous, and those do not continue further in the process. Those claims that are potentially meritorious get the exclusive attention of the Commission, without the distraction of unsuitable claims. Only those claims with a high likelihood for success are referred to a three-judge panel, a process that saves both monetary and temporal resources.

### 3. Building on North Carolina's Solid Foundation

A system like North Carolina's would be a good starting place for Mississippi, but Mississippi has one need that North Carolina's system does not address: the failure to investigate and hold people criminally responsible for their actions.

Other states, facing similar medico-legal scenarios, have taken a proactive approach toward holding people accountable for knowingly introducing forensic fraud into courtrooms. For example, in Texas, state pathologist Ralph Erdmann was prosecuted for his derelict work.<sup>301</sup> For years Dr. Erdmann, like

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<sup>301</sup> Prophetically, in his dissent in *Brooks*, Justice McRae warned that continued acceptance of Dr. West's forensic testimony might well lead to the "risk [of] having West become the Ralph Erdmann of Mississippi." *Brooks v. State*, 748 So. 2d 736, 750 (Miss. 1999) (McCrae, J., dissenting).

Dr. Hayne, worked on contract for the state of Texas performing autopsies.<sup>302</sup> Also like Dr. Hayne, he performed hundreds of autopsies a year, many in rural parts of the state where there were not adequate medical facilities.<sup>303</sup> Though there had been suspicions for some time about the quality and rigor of Dr. Erdmann's forensic pathology work, he nonetheless continued to receive state support and work until he performed an autopsy where he claimed to have removed, examined, and recorded the weight of a decedent's spleen.<sup>304</sup> As in Dr. Hayne's autopsy of Randy Cheney, the decedent's spleen had been surgically removed years before.<sup>305</sup> As a result, law enforcement investigated Erdmann's malfeasance and, in 1992, Dr. Erdmann was convicted of seven felony charges involving forensic fraud.<sup>306</sup> Dr. Erdmann had his medical license revoked and received ten years of probation, 200 hours of community service, and forced to pay restitution of \$17,000.<sup>307</sup>

Likewise, in West Virginia, Fred Zain, a State Police forensic expert, falsified his credentials and fabricated blood test results as a state serologist. State officials never checked his résumé nor subjected him to quality control reviews. Following a wrongful imprisonment lawsuit brought by a man whose 1987 rape convictions were based on Zain's fraudulent testimony, the local county prosecutor, William Forbes, began a criminal investigation into Zain and his work.<sup>308</sup> Through his investigation, Forbes requested the West Virginia Supreme Court of Appeals to appoint a special judge and panel of attorneys and scientists to investigate

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<sup>302</sup> Paul Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439, 449-51 (1997) (internal citation omitted).

<sup>303</sup> *Id.* Incidentally, Dr. Erdmann was the darling of prosecutors. According to a special prosecutor assigned to investigate Erdmann, Erdmann was prone to "shad[ing] things to follow along with the police theory of a case." *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> Roberto Suro, *Ripples of a Pathologist's Misconduct in Graves and Courts of West Texas*, N.Y. TIMES, Nov. 22, 1992, <http://www.nytimes.com/1992/11/22/us/ripples-of-a-pathologist-s-misconduct-in-graves-and-courts-of-west-texas.html>.

<sup>307</sup> *Id.*

<sup>308</sup> *Court Invalidates a Decade of Blood Test Results in Criminal Cases*, N.Y. TIMES, Nov. 12, 1993, <http://www.nytimes.com/1993/11/12/us/court-invalidates-a-decade-of-blood-test-results-in-criminal-cases.html>.

Zain's testimony. The investigation resulted in the discovery of Zain's widespread fraud.<sup>309</sup>

After reviewing the report, the West Virginia Supreme Court of Appeals ruled that hundreds of blood tests used by prosecutors to link defendants to crimes during the ten-year span that Zain was testifying in state courts were invalid because of Zain's potential fabrication.<sup>310</sup> The report included findings by an independent team of serologists that Zain "had lied about, made up or manipulated evidence to win convictions in every single case"<sup>311</sup> and that his supervisors had deliberately "ignored or concealed complaints of his misconduct."<sup>312</sup> The court further noted that at least 134 prisoners could be entitled to new hearings based on Zain's falsified testimony.<sup>313</sup>

Because it appears that Mississippi's effort to hold people accountable for their forensic testimony amounts to a single Westlaw search, it may be necessary to create a criminal investigation arm to Mississippi's innocence commission. The innocence commission should have the power to refer certain cases where it suspects that there was criminal wrongdoing to the Mississippi Attorney General's Office and to the relevant district attorney's office for potential criminal prosecution.

But it is clear in Mississippi, that, historically, these same offices have not been held accountable for prosecuting or investigating these types of crimes. Thus, when giving the innocence commission the power to investigate the criminal wrongdoing of certain state actors, the Mississippi Legislature should establish a failsafe mechanism to ensure that prosecutors are following up on these referrals in good faith. A good example of an appropriate accountability mechanism is the one that Congress established when United States Attorneys were declining to prosecute major crimes, such as rape and murder, in Indian Country. U.S. Attorneys have the duty to investigate and try most major crimes committed in Indian Country; however, U.S. Attorneys were declining to prosecute approximately half of these

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<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

crimes.<sup>314</sup> In response, Congress demanded much more accountability from the U.S. Attorneys' Offices by requiring the Department of Justice to maintain data on reservation case terminations and declinations by federal district.<sup>315</sup> Furthermore, the Department of Justice was required to submit an annual report to Congress on the findings with an explanatory statement as to why the Department was declining to prosecute those cases.<sup>316</sup>

A similar system may also work in Mississippi, especially with the aid of the innocence commission. First, if the innocence commission is able to refer cases to prosecutors, then much of the original investigation and discovery in the case will have already been done. With such cases there would likely already be probable cause for arrest. Thus, in the absence of an affirmative finding exculpating the person from wrongdoing, there should be very few excuses for failing to prosecute the person. Furthermore, with the legislature checking up on offices declining to prosecute, many prosecutors should feel a greater sense of duty and accountability in prosecuting these crimes.

*B. No More Deference for Forensics: Exposing Every Forensic Expert to a Vigorous 702 Analysis*

Of course, the appropriate response to Mississippi's tarnished legacy of forensic science is not to reject the introduction of science in the courtroom. The fact of the matter is that forensic science has become an indispensable part of the criminal and civil court systems. However, it is also undeniably true that forensic science, at least when it is practiced ethically, has almost no resemblance to an episode of *CSI*. In fact, no forensic method, other than nuclear DNA analysis, has the capacity to consistently "support conclusions about 'individualization' (more commonly known as 'matching' of an unknown item of evidence to a specific known [person or] source)."<sup>317</sup>

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<sup>314</sup> BYRON DORGAN, THE TRIBAL LAW AND ORDER ACT OF 2009, S. Doc. No. 111-93, at 44 (1st Sess. 2009).

<sup>315</sup> *Id.* at 46.

<sup>316</sup> *Id.*

<sup>317</sup> See A PATH FORWARD, *supra* note 179, at 87.

Yet, many Mississippi trial court judges do not seem to understand the limited admissibility of forensic science in courtrooms. It appears that most Mississippi judges understand that Rule 702 mandates a reliability determination with three components: (1) the expert must base his opinion upon sufficient facts or data; (2) the expert must ground the opinion in reliable principles and methods; (3) the expert must apply those principles and methods to the facts of the case in a reliable manner.<sup>318</sup> Additionally, courts may utilize the following criteria to decide whether an expert's opinion is admissible:

[w]hether the theory or technique can be and has been tested; whether it has been subjected to peer review and publication; whether, in respect to a particular technique, there is high known or potential rate of error; and whether the theory or technique enjoys general acceptance within a relevant scientific community.<sup>319</sup>

Despite the mandate of Rule 702, time after time, Mississippi trial courts admitted pseudo-science that bordered upon the absurd: a dentition matching the marks on a bologna sandwich, the results of shooting dead dogs from the pound, video enhancement done on a dentist's home computer, and the list goes on. Clearly, the existence of Rule 702 alone has not lead judges to properly limit

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<sup>318</sup> MISS. R. EVID. 702.

<sup>319</sup> *Anderson v. State*, 62 So. 3d 927, 937 (Miss. 2011) (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593-94 (1993)); *Poole v. Avara*, 908 So. 2d 716, 723 (Miss. 2005) (admitted "novel" theory not subject to peer review reasoning that the *Daubert* factors were not exhaustive). More specifically, if Rule 702 is implicated, a court must consider the following questions: Whether the theory or technique in question has been, or can be, tested; Do standards and controls exist? If so, have they been maintained? *Bocanegra v. Vicmar Servs., Inc.*, 320 F.3d 581, 585 (5th Cir. 2003). Is the expert testimony is based on research the expert has conducted independent of the litigation? *Daubert*, 43 F.3d at 1317, *cert. denied*, 516 U.S. 869 (1995). Are the findings or conclusions of the proffered testimony are the result of valid extrapolations from accepted studies or techniques? *Bocanegra*, 320 F.3d at 586. Has the expert previously testified to his opinion in a proceeding that has no connection to the matter at bar? *Ambrosini v. Labarraque*, 101 F.3d 129, 139 (D.C. Cir. 1996), *cert. dismissed*, 520 U.S. 1205 (1997). Has the expert adequately accounted for obvious alternative explanations? *Michaels v. Avitech, Inc.*, 202 F.3d 746, 753 (5th Cir. 2000), *cert. denied*, 531 U.S. 926 (2000). Is there too great of an analytical gap between the data and the opinion. *Gen. Elec. v. Joiner*, 522 U.S. 136 (1997).

expert testimony. So what would aid in stopping the proliferation of forensic fraud?

First, Mississippi can insist that its trial judges understand what hard science is—and apply their gatekeeping duty accordingly. Second, trial court judges should be subject to greater accountability, in the form of more exacting review by Mississippi's appellate courts. One of the biggest trends in the admission of non-reliable scientific testimony in Mississippi criminal cases is the regular absence of analysis by the trial court. Not only is this an abdication of duty, but it stands in stark contrast to the analysis that is typically found in state civil cases.<sup>320</sup> The best way for the Mississippi Supreme Court to ensure that trial court judges are performing this duty is to require a written Rule 702 analysis, similar to that required in child custody and alimony cases. If the judge has to sit down and carefully examine the reliability of the expert and his or her testimony, the judge is more likely to make the correct decision the first time and subject the expert to a vigorous Rule 702 analysis. Furthermore, a document preserving the trial judge's decision-making process would aid appellate courts in reviewing and interpreting the record of the trial.

Finally, trial courts, and affirming appellate courts, need to stop attempting to utilize a one-size-fits-all admissibility approach when it comes to forensic science. When assessing the admissibility of expert evidence, the trial court's duty is, as it always has been, to focus on "the task at hand"—which means closely examining the scientific findings that the parties seek to admit in that particular case.<sup>321</sup> Too many times, Mississippi courts have deferred to the fact that another court has admitted that type of testimony and concluded that it was admissible by default. Take again the Mississippi Court of Appeals' logical bungle in *Flaggs*, where it decided that Dr. Hayne's blood-spatter testimony in that case was admissible, not because the judge subjected it to any inquiry, but because Dr. Hayne had

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<sup>320</sup> See *e.g.*, *Patterson v. Tibbs*, 60 So. 3d 742 (Miss. 2011); *Denham v. Holmes*, 60 So. 3d 773 (Miss. 2011); *Sherwin Williams Co. v. Gaines*, 75 So. 3d 41 (Miss. 2011); *McKee v. Bowers Window & Door Co.*, 926 So. 3d 926 (Miss. 2011).

<sup>321</sup> See generally D. Michael Risinger, *Defining the "Task at Hand": Non-Science Forensic Science After Kumho Tire Co. v. Carmichael*, 57 WASH. & LEE L. REV. 767 (2000).

purportedly been admitted as a blood spatter expert in another case.<sup>322</sup>

The most notorious instance of courts shoehorning a forensic science method into a one-size-fits-all approach has been the courts' deference to bite-mark analysis. Courts would routinely admit bite-mark identifications, reasoning that they had been admitted in other courts in other cases.<sup>323</sup> In the end, such circular reasoning harms all involved. The court has failed to do its job, and the defendant suffers as a result. Forensic science should never be admitted as a matter of course, and the judge must decide whether the methods used to establish the scientific testimony in that case are sufficiently reliable and replicable.

*C. A Slap on the Wrist: Punishment for Prosecutors Who Knowingly Introduce Forensic Fraud into the Courtroom*

There have been little to no repercussions for prosecutors who knowingly introduced false or misleading forensic evidence and did not disclose the suspect nature of this testimony to the defense. In theory, prosecutors who knowingly introduced false evidence during the 1990s and 2000s violated Mississippi Rule of Professional Conduct 3.8(d), which requires that a prosecutor "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." Recently, the American Bar Association's Standing Committee on Legal Ethics and Professional Responsibility published *Formal Opinion* 09-454,

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<sup>322</sup> See *Flaggs v. State*, 999 So. 2d 393, 401-03 (Miss. Ct. App. 2008).

<sup>323</sup> See, e.g., *Calhoun v. State*, 932 So. 2d 923, 952-53 (Ala. Ct. App. 2005) (finding bite-mark testimony admissible because it has "received evidentiary acceptance in nineteen jurisdictions" and "[n]o jurisdiction has rejected the admission of such evidence"); *State v. Swinton*, 847 A.2d 921, 933 n.14 (Conn. 2004) (citing cases finding bite-mark testimony admissible); *People v. Lester*, No. 2004-198274-FH, 2006 WL 3421799, at \*2 (Mich. Ct. App. Nov. 28, 2006) (finding bite-mark testimony admissible in Michigan without a "Davis/Frye hearing" because it is generally accepted); *Stubbs v. State*, 845 So. 2d 656 (Miss. 2003) (holding that bite-mark testimony is admissible in Mississippi, citing cases); *State v. Blamer*, No. 00CA07, 2001 WL 109130, at \*4 (Ohio Ct. App. Feb. 6, 2001) (citing Rule 702 and *Daubert* without analysis, stating "it is clear" that expert's testimony was qualified and citing other cases that found bite-mark testimony admissible); *Seivewright v. State*, 7 P.3d 24, 30 (Wyo. 2000) (finding bite-mark testimony admissible in a burglary prosecution without a *Daubert* hearing because courts have widely accepted it).

which explains that a prosecutor's ethical duty under Rule 3.8 is broader in scope than the constitutional disclosure requirements under *Brady v. Maryland*.<sup>324</sup> The key difference between the rules, according to the Committee, is that Rule 3.8(d) "requires the disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on the trial's outcome."<sup>325</sup> By contrast, the United States Constitution only requires that the prosecutor turn over evidence that will affect the outcome of the trial.<sup>326</sup>

The plain language of Rule 3.8(d) contains no express intent requirement. Thus, if a prosecutor fails to turn over evidence, he or she has violated the rule. Given the Rule's express language, it appears that a vast number of prosecutors have failed to comply. In addition to the evidentiary ethical duties imposed upon prosecutors, all lawyers are held to the ethical standard that they must not "offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."<sup>327</sup> There appears to have been no effort by prosecutors to remediate the introduction of bite-mark evidence in cases. Even after Dr. West's analyses have been patently debunked, Mississippi prosecutors continued to employ Dr. West almost a decade after he was suspended from single odontological professional associations for "misrepresent[ing] data in order to support his testimony."<sup>328</sup> It cannot be plausibly argued that this was not the knowing presentation of false evidence. Not only is the introduction of such evidence a violation of the ethical rule, prosecutors' failure to put any effort into mitigating the effects of this information is also a violation of their professional obligations.

Thus, prosecutors across the State have received a free pass, escaping any culpability or punishment for violating ethical rules that should govern their behavior. So long as there are no consequences for this behavior, prosecutors are going to keep

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<sup>324</sup> ABA COMM. ON ETHICS AND PROF'L RESPONSIBILITY, Formal Op. 09-454 (2009).

<sup>325</sup> *Id.*

<sup>326</sup> *See id.*

<sup>327</sup> MISS R. PROF'L CONDUCT 3.3.

<sup>328</sup> AMERICAN ASSOCIATION OF FORENSIC SCIENTISTS, ETHICS COMMITTEE REPORT, Case No. 143 (1994) (on file with author).

eliciting and introducing pseudo-science during trials; it makes their job easier. So easy, in fact, that prosecutors were able to obtain convictions against completely innocent people at an alarming rate.

Ultimately, prosecutors will continue to push the boundaries of the Rules of Evidence, soliciting junk science to obtain faulty convictions until the Mississippi Bar treats every wrongful conviction as an automatic bar complaint against the prosecutor. In the case of a wrongful conviction, the Mississippi Bar should launch an independent investigation and punish complicit prosecutors accordingly. Because prosecutors have criminal immunity for much of their conduct, this may be the only way to curb prosecutors' continued attempts at soliciting and introducing junk science into criminal trials.

Mississippi courts and its Bar are not the only organizations that need to hold prosecutors to a higher standard. The Mississippi Supreme Court needs to consider passing new, more specific ethical rules to prevent Mississippi prosecutors' bad conduct. Currently, the Mississippi Supreme Court has only adopted five of the eight ethical rules concerning prosecutors that the ABA recommends.<sup>329</sup> Thus, even compared to most other jurisdictions, Mississippi prosecutors are held to a less stringent standard of conduct.

Conspicuously absent from the professional rules governing Mississippi prosecutors' conduct are the two most recent rules passed by the ABA—rules that address wrongful convictions.<sup>330</sup> The ABA Model Rules of Professional Conduct impose a twofold duty upon prosecutors that learn of a wrongful conviction. First, if a prosecutor learns of “new, credible and material” evidence that creates a “reasonable likelihood” that a convicted defendant did not commit the crime, the prosecutor must promptly inform the appropriate court.<sup>331</sup> If the wrongful conviction occurred in the prosecutor's jurisdiction, the rule imposes a further duty: he or she must both inform the defendant and investigate further.<sup>332</sup> The

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<sup>329</sup> Compare MISS R. PROF'L CONDUCT 3.3, with MODEL RULES OF PROF'L CONDUCT R. 3.8.

<sup>330</sup> MODEL RULES OF PROF'L CONDUCT R. 3.8(g)-(h).

<sup>331</sup> MODEL RULES OF PROF'L CONDUCT R. 3.8(g)(1).

<sup>332</sup> MODEL RULES OF PROF'L CONDUCT R. 3.8(g)(2).

second ABA Rule concerning wrongful convictions imposes a greater ethical duty on prosecutors if they have “clear and convincing” evidence establishing that a convicted defendant in the prosecutor’s jurisdiction did not commit the offense.<sup>333</sup> In this case, he or she must “seek to remedy the conviction.”<sup>334</sup>

These Rules, of course, are a logical extension of rules already in place for prosecutors: that they must remedy the presentation of false evidence. This rule is not a trap for the well-meaning prosecutor. It only imposes a duty to reveal “known” evidence, not evidence that the prosecutor *should have* known.<sup>335</sup> Also, the commentary to the rule indicates that a prosecutor who makes a good faith judgment that evidence does not trigger disclosure obligations is immune to ethical sanction.<sup>336</sup>

Mississippi prosecutors, as a whole, have been resistant to this increased ethical duty.<sup>337</sup> Mississippi should no longer allow prosecutors to run roughshod over the Rules of Evidence, their ethical duties to the Bar, and their greater duties to society. Because Mississippi has been ground zero for some of the most shocking wrongful convictions in the country, it cannot be reasonably argued that the Mississippi Rules of Professional Conduct are complete without imposing a duty upon prosecutors to mitigate wrongful convictions.

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The Mississippi medico-legal system will not be healed just by the efforts of prosecutors, the courts, and the Mississippi Bar. Defense attorneys must participate as well. Just like prosecutors, defense attorneys have ethical obligations, obligations to the courts as well as their clients. Defense attorneys owe their clients a duty of due diligence, which means that they “should act with

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<sup>333</sup> MODEL RULES OF PROF'L CONDUCT R. 3.8(h).

<sup>334</sup> *Id.*

<sup>335</sup> Niki Kuckes, *Prosecutors' New Ethical Duty Relating to Wrongful Convictions*, R.I. BAR J., Sept.-Oct. 2008, at 37.

<sup>336</sup> *Id.* at 38.

<sup>337</sup> *See id.*

commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."<sup>338</sup>

But one thing sorely absent from courts during the 1990s and 2000s was defense attorneys' zealousness on their clients' behalves. Time and time again, defense attorneys stipulated to Dr. Hayne's credentials, forgoing a prize opportunity for cross-examination. These defense attorneys did not do their homework, trusting that whatever forensic evidence prosecutors sought to introduce was admissible. If defense attorneys had been more zealous, trial courts would have had to perform much more meticulous analysis before admitting an expert.

Instead, assuming an attitude of defeat, defense attorneys took a seat on the sideline. The criminal trial system is meant to be adversarial; two rivals presenting conflicting accounts and evidence, with the best case winning. It cannot work without defense attorneys' zealousness in cross-examination. For the Mississippi medico-legal system to improve, defense attorneys must scrutinize the admission of all forensic evidence and forensic experts. Without zealousness and scrutiny on behalf of defense attorney, regardless of whether the rest of the suggested reforms are implemented, Mississippi will continue on the course of the status quo.

#### CONCLUSION

Ultimately, the failure of justice in Mississippi is threefold. First, there are those charged with protecting criminal defendants' constitutional rights who failed in that duty. Every criminal defendant is fundamentally guaranteed the right to a fair criminal trial through multiple constitutional provisions and doctrines: the Fourteenth Amendment, *Brady*, *Napue*, the Sixth Amendment's Confrontation Clause, and the right to effective legal counsel, among them. Apparently without hesitation or professional conscience, state prosecutors and courts together ignored these guarantees for a host of reasons, but in the end the result was the same: a conviction based on fraudulent, fabricated evidence, that deprived innocent people of a fair trial.

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<sup>338</sup> MISS R. PROF'L CONDUCT 1.3 cmt.

The second tragedy in this sad saga is the diminished integrity of Mississippi courts. The Mississippi Supreme Court—vis-à-vis the Rules of Professional Conduct—imposes a duty upon lawyers not to knowingly introduce false or fabricated evidence before Mississippi's courts. This duty was of no moment to the state; prosecutors charged ahead, using non-scientific forensic testimony at almost every available opportunity. Every single time the prosecutors introduced pseudo-scientific perjury into evidence and trial courts allowed this to happen without a hitch, the reputation, the strictures, and the fairness of Mississippi's judiciary were irrevocably perverted.

The final outrage of this cautionary tale is that even though it is 2013, relatively little has been done to banish the ghosts of Mississippi's medico-legal past. Dr. Hayne continues to practice and to testify—in both civil and criminal cases. Dr. West, after ruining so many lives, no longer testifies, though the state has not distanced itself from the use of his testimony or from the convictions, which it secured. So long as innocent people remain in prison as a result of this wanton and derelict use of forensic evidence, this regrettable era in the history of Mississippi abides. For any substantial progress to be made, key players in Mississippi, including courts and prosecutors, need to commit to cultivating a healthier system that holds people accountable for past wrongs.

