IN THE CIRCUIT COURT OF LITTLE RIVER COUNTY, ARKANSAS
CRIMINAL DIVISION

STATE OF ARKANSAS PLAINTIFF

VS. CR 97-105

TIMOTHY LAMONT HOWARD DEFENDANT

MOTION TO DISMISS

In support, Howard states:

I. PROCEDURAL HISTORY

1. Howard was originally tried in the Circuit Court of Little River County on December 6, 1999. On December 9, 1999, the jury returned its verdicts convicting Howard of two (2) counts of capital murder and one (1) count of attempted capital murder. He was sentenced to two (2) death sentences and thirty (30) years in the Arkansas Department of Corrections ("ADC") plus a $15,000 fine. He was immediately transported to "death row" in the ADC.

2. On direct appeal, Howard argued, *inter alia,* that his motion to dismiss should have been granted. *Howard v. State,* 348 Ark. 471, 79 S.W.3d 273 (2002) He argued that the State had failed to provide timely exculpatory information which hindered his counsel's investigation of the case and to show that someone else was responsible for the murders of Brian and Shannon Day and the attempted murder of Trevor Day. *Id.* 348 Ark. at 491. In a 4-3 opinion, the Arkansas Supreme Court denied this and other claims and affirmed on May 9, 2002. Rehearing was denied by the court on June 27, 2002. *Id.*

3. Howard filed a timely Rule 37 petition, and the Court held a hearing on the petition on December 20, 2004. The Court denied the petition on March 17, 2005. Howard filed a timely

notice of appeal and raised seven (7) arguments for reversal. *Howard v. State,* 376 Ark. 18, 238 S.W.3d 24 (2006) In a 5-2 split, the court again affirmed Howard's convictions and sentence. The issues raised that are relevant to this motion are as follows:

a. That Howard was denied due process when the State introduced "evidence" at trial that Shannon Day was pregnant when she was killed. It was argued that the State committed "prosecutorial misconduct" when it presented false testimony through witnesses Penny Granger and Darby Neaves, who both testified that Shannon Day was pregnant at the time of her murder. *Id.* at 31. They further testified that Shannon feared that Howard might be the father of the child. *Howard v. State,* 348 Ark. at 488. This issue was denied as it was not a claim that can be raised for the first time in a Rule 37 petition. 376 Ark. at 32. Indeed, at trial the State relied upon this testimony heavily when asking the jury to convict. Moreover, the majority in Howard's direct appeal gave it considerable weight in denying Howard's sufficiency of evidence argument. 348 Ark. at 488.

b. An ineffective assistance claim was raised contending that his original trial counsel did not challenge the State's expert testimony regarding mitochondrial DNA, hair analysis, fingerprints, and pathology evidence. 376 Ark. at 38. This issue would become an issue in subsequent proceedings, as argued below.

c. A challenge was also made regarding the seating of a juror named Janet Wright. *Id.* at 40. Ms. Wright was the sister of Phillip Bush, one of the State's witnesses. She testified that she did not have a conversation with her brother about the case and she expected Howard to "prove his innocence." Phillip Bush's testimony appeared to provide a direct link to individuals out of Oklahoma who were looking to trade some "green for some white," which Bush understood to mean

marijuana for methamphetamine." It appears from the record that Bush introduced these men to Brian and that Shannon and him had been to Oklahoma to view drug labs. Bush further testified that one of the men from Oklahoma was driving a late 80's red Ford pick-up – a similar vehicle which was later seen in the Day home driveway. 348 Ark. at 505. These facts raised concern to Justice Jim Hannah [1] in his lengthy dissent. *Id.*

d. The last issue raised that is relevant to this motion occurred during the State's closing argument regarding what Shannon Day's last vision before she left this world was Trevor Day, her baby son, being strangled in front of her and "hanging" from an extension cord. In a more scathing tone, Justice Hannah found that the State's closing argument was based upon "pure fiction," and "beyond flagrant" and not based upon any evidence presented at trial. *Id.* at 516-517 Justice Hannah concluded that the "State's attorney deprived Howard of his right of cross-examination of the witness..." LaFave, *Criminal Procedure §* 24.7(e), at 555 (1999). In his dissent as to the Rule 37 appeal, [2] now Chief Justice Hannah revisited the State's closing argument as to the picture presented by the State's attorney as to Shannon Day "[seeing] her child hanging from an extension cord before she died." 376 Ark. at 50. He found that the "[f]acts arising from a horrendous and brutal murder were used by the State to overwhelm and obscure the State's failure to present sufficient evidence to prove that Howard was the killer." *Id.*

4. On April 26, 2012, the Arkansas Supreme Court granted leave to reinvest jurisdiction

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[1] The Honorable Jim Hannah is now the Chief Justice of the Arkansas Supreme Court.

[2] CJ Hannah, and Special Justice A. Watson Bell also found trial counsel ineffective for a number of failures, primarily regarding their investigation. Both joined in each other dissents and found that Howard's petition should have been granted by the trial court and given a new trial. 376 Ark. at 51

in the trial court to consider his petition for writ of error *coram nobis* regarding two (2) claims. *Howard v. State,* 2012 Ark. 177, 403 S.W.3d 38 (2012). Howard outlined several claims of prosecutorial misconduct and argued that the State had made several violations of *Brady v. Maryland,* 373 U.S. 83 (1963). They are as follows:

a. The State failed to make a full report, including Charity Diefenbach's handwritten notes available to defense counsel during trial " regarding testing done on Negroid hairs found on the work boots. There were several extensive errors made by Diefenbach during the mtDNA process. First, that the "cap flipped open while spinning, resulting in sample loss," which contended contaminated the sample tested. Second, the loss of raw data so the entire sample had to be reprocessed. Third, a handwritten note saying that the "right side of the gel did not run properly," and therefore, the samples had to be re-run." Fourth, another handwritten note on the report read that "all negative controls gave a positive result. An experiment will be done to find the source of the problem." Lastly, a final handwritten note read that "all negatives are clean, indicating the previous results were most likely a result of random, spurious contaminants..." A unanimous court found that the "State suppressed the evidence either inadvertently or willfully..." and sufficient prejudice resulted. 403 S.W.3d at 46-47.

b. Howard presented a second *Brady* claim as to the report of Lisa Sakevicius, who was a criminalist for the Arkansas State Crime Laboratory and analyzed wood particles found on the same work boots. Her report concluded that the wood particles did not match the door of the Day's home. At trial the state introduced photographs which made it appear that the door had been kicked in prior to Shannon Day's murder. The court found that the report was dated May 7, 1998, which was more than one (1) year before Howard's original trial. The court found that this claim had

merit in that "Howard maintained at trial that he did not murder the Days." Further, the court opined that "the wood particles – found on the work boots alleged by the State to be his – did not match the door of the Days' home appears to support his claim." *Id.* at 50. Again, another *Brady* violation.

c. The court refused to grant a claim regarding a *Brady* violation allegation as to the State's failure to timely disclose that it had submitted finger prints to the Arkansas State Crime Lab to be compared with a print found on the glass frames that were found on top of Shannon Day's body. The original trial attorneys only learned about this information on the second day of trial. The court found that since it was learned at trial, that no relief was warranted. However, Howard re-raises the claim herein as it goes to a continual failure of following both discovery rules and *Brady* violations that have been a consistent and non-stop theme of the State throughout these proceedings. *Id.*

d. Howard also alleged in support of leave that Penny Granger's had mental health history that was not revealed by the State at trial. The court denied this claim, but Howard alleged that her testimony was false and that Shannon Day was not pregnant at the time of her death. *Id.* at 51. This issue will be revisited below as to the intentional withholding of evidence by the State in violation of *Brady* as set out below.

e. A claim related to Phillip Bush and the failure to disclose material evidence that implicated him in the murders. Specifically, he argued that on the morning of the murders, witnesses saw Bush and others Leaving the scene at a high rate of speed, acting very suspiciously, and cleaning a revolver the day of the murders. Also argued, was that Bush shaved his head after Caucasian hairs were found on the work boots. That this information was known to local law

enforcement, including Danny Russell, who at the time of the offense was the Sheriff of Little River County and was related to Bush by marriage. *Id.*

f. The falsehood of Shannon Day's pregnancy was also raised, but denied by the Court. Howard outlines this issue, because subsequent to the granting of leave to pursue his error *coram nobis* claims to the court, counsel's new trial counsel that this information was known by the State and not turned over the defense in violation of *Brady.* *See infra.*

g. The court also found that the State violated *Brady* when if failed to disclose a Little River County sheriff's report concerning Howard's childhood abuse at the hands of his step-father, Bruce Howard. *Id.* at 54. This allegation is being offered merely to outline a consistent theme that the State purposefully withheld exculpatory information that was favorable to Howard during his original trial.

5. This Court granted a new trial on October 29, 2013 finding merit as to the "Bode Labs claim." This matter is set for trial on March 2, 2015.

II. FURTHER VIOLATIONS IN SUPPORT OF DISMISSAL

6. Once the new trial was granted, Mr. Howard's defense team was entitled to proper discovery. Proper discovery is established by the prosecution following: The federal and Arkansas Constitutions, federal and state case law of *Brady* and its prodigy, Article V of the Arkansas Rules of Criminal Procedure, and Rules 3.3, 3.4, and 3.8 of the Arkansas Rules of Professional Conduct.

7. The State has systematically disregarded the Rules of Criminal Procedure, Rules of Evidence, Rules of Professional Conduct, the U.S. Constitution, and the Arkansas Constitution throughout every phase of this case beginning in 1997 to the present. Two themes have developed over the entirety of this case. One, in which the State has provided discovery to the Defense in an

untimely fashion. The State has continually "attempted to provide" discovery in an untimely, piecemeal fashion beginning in 1998 with crucial files kept at the Ashdown Police Department that were only accidently stumbled upon by the original defense team, to Mark Ardwin's discovery of a new file in his trunk when he went to wash his car, to the continual drips of discovery provided to the current defense team. Two, the State has simply failed to turn over exculpatory and/or potentially exculpatory information.

8. UNTIMELY DISCOVERY

a. Howard received a never before viewed, seventeen year old, crime scene video. The video tape was found in November 2014 by Fred McGraw who at the time of the murders was working for the Little River County Sheriff's Department. Deputy McGraw shot this footage on his own video recorder of the Brian Day crime scene and the subsequent Boots crime scene with a multitude of other law enforcement entities at both scenes. McGraw did not believe this video to be relevant, thus he did not turn it over to the Defense. McGraw finally alerted the Prosecutor of the taped scenes when he came across the video recorder while he was going through some old things at his home in November of 2014.

b. The Defense has discovered more photographs of the "Brian Day" crime scene that had never been turned over by the prosecution. Investigator McWhirter testified that he took the pictures of the Brian Day crime scene, however, the Defense has learned that to not be accurate. Jim Williamson, who at the time owned part of the Ashdown news paper and was an auxillary police officer, took photographs of the scene as well. It was common for Williamson to take pictures of crime scenes back then because he had better photography equipment and access to a dark room. Interestingly enough, some of Williamson's crime scene pictures contain scenes of

Fred McGraw holding his video recorder on his shoulder and filming the area.

c. The Defense has been asking the State for the whereabouts of Shannon Day's panties and sweat pants for months. They were finally located on January 28, 2015, in the evidence storage room of the Ashdown Police Department, along with the missing window frame, baby mattress, and box taken as evidence from the Day home.

d. The Defense has received more information from the Arkansas State Crime Lab (ARSCL) that was not previously provided by the State. The Defense had to make numerous calls to and have numerous meetings with the ARSCL to hunt down suspected missing information. This missing information specifically deals with the examiners' / analysts' bench notes and lab worksheets. These items are essential to the lab personal in reaching their final opinions, which in turn are just as crucial to the Defense.

One example of the importance of these newly discovered items is the second page of Shannon Day's "Medical Examiner's Investigator's Report" that was missing. The information obtained in this report was a correspondence dated December 13, 1997 from the State's lead investigator on the case, Arkansas State Police Investigator Hay McWhirter to ARSCL employee Stephen Dillon. The second page of the report states in part, "The Sheriff's Office received a 911 call about being concerned about not seeing the victim at home. The Sheriff's officer arrived at the scene and had to kick in the carport door." This leads one to believe that someone, currently an unknown caller, contacted the Sheriff's Department about the whereabouts of Shannon Day before the Day home was even searched. The 911 tape contains new information as to the murders of the Days as well as a new witness that to the Defense's knowledge has never been interviewed. The Defense has been told by the Prosecutor, Brian Chesshir, that 911 did not exist in December of 1997;

however, the date on the report given by Investigator McWhirter to Stephen Dillon is dated December 13, 1997, which directly contradicts the prosecution's assertion. To date no 911 tape has been turned over to the Defense.

9. ITEMS NOT YET RECEIVED THAT ARE EXCULPATORY OR POTENTIALLY EXCULPATORY IN NATURE

a. The State has simply refused or overlooked turning over exculpatory or potentially exculpatory information to the Defense. These items that the Defense knows of are as follows:

i. Jennifer Qualls' recorded statement at Millwood Park to Investigator McWhirter and Sherif Danny Russell. This statement was a basis for issuing an arrest warrant for Tim Howard.

ii. Howard's statement given to Arkansas State Police Investigator Ocie Ratliff and Hays McWhirter in Hope, Arkansas. [T-1375]

iii. The State has acquired Cellmark Forensics to analyze hairs found in boots with Brian Day's blood on it by using mitochondrial DNA analysis. The Defense has received a copy of the final results of the analysis, but has still not received a copy of the discoverable information as to how the examiner reach his conclusions. The report was finished on July 23, 2014. The Defense has requested and has made numerous request for discovery involving this report since it was finalized on the above date.

iv. There is at least one more picture the Defense has not received from the State or has been forced to find on its own investigation. A careful reading of the Gary Gregory's trial testimony reveals a picture of the kicked in carport door at the Day's home. [T-1680]. The Defense has never been provided with said picture. One can only speculate that there are more pictures that have still not been turned over. Also, the Defense has never been provided with

color crime scene pictures even after asking the Prosecution for them.

v. The Defense has never been provided with Game and Fish officer Mark Kennemore's report. Kennemore was at both crime scenes, and allegedly helped find Trevor Day and the body of Shannon Day.

vi. The Defense has been provided with the coroner's report of Brian Day, however, no such report has been giving to the Defense regarding Shannon Day. The coroner at the time of the murders was Dr. George Covert and states that he did reports for both Brian and Shannon and turned them over to the authorities.

vii. Dr. Covert states that X-rays were done on Brian Day, however, no X-rays have been given to the Defense. The Medical Examiner's Investigative Report independently confirms this statement. The Report states that X-rays of Brian Day were delivered to the ARSCL.

viii. There is a missing second page of items taken from Jennifer Qualls' car. This car is the same one where the black, nylon camera bag was found that is alleged to be Tim Howard's. It goes without saying that Qualls' is a critical witness for the State. During this inventory a syringe was discovered inside the car and then discarded by Hays McWhirter. It is of note that the inventory list was written by Hays McWhirter. [Bates #116] The Defense has never received this missing page and does not know what else was taken, found, and / or discarded from Qualls' car.

ix. There are missing items from the black, nylon camera bag that the State purports belongs to Tim Howard. Those items are a toothbrush and a piece of leather. These items were not in either of the two evidence viewings the Defense has taken part in at the Little River County Jail. The Defense discovered these items were missing from looking through worksheets

of serologist Lisa Channell of the ARSCL that were initially provided. As of this date the State can still not produce these items.

x. The Defense has never received an interview that took place between then Sheriff Danny Russell and his cousin, Phillip Bush. Russell came to Bush's business and interviewed him. However, no report or notes of that interview have ever been turned over.

xi. The State called Penny Granger to the stand to testify that Shannon told her that she could be pregnant by Tim Howard. The State held her out to be a credible witness and inferred that the murders were due in part because of this alleged pregnancy. However, the State has failed to turn over her mental health records to the defense. She apparently suffered from some sort of mental issues and eventually took her own life around 2000. The fact of the matter is that Granger might not have been competent to testify in this trial or at the very least her credibility would have been called into question based on the information found in her mental health records.

xii. As previously stated Granger is thought by the Defense to have committed suicide, but no investigative report or coroner's report has been supplied to the Defense.

xiii. During trial the previous Defense team learned that McWhirter had asked the ARSCL to run the fingerprints of Danny Merrill to see if they matched the unidentified prints on the picture frames piled on top of Shannon Day's body. McWhirter testified that he had received a "tip" from a hotline set up for this case that suggested Merrill as a possible suspect. The Defense has asked for all tips from that hot line to be handed over, so a proper investigation of that information can be done. This information may develop new leads to suspects yet investigated. As of yet, no information has been given to the Defense regarding said hotline tips.

xiv. The Prosecution has, as recently as a month ago, sent a fiber found under the thumb of Shannon Day to the ARSCL for testing. No report has been released to the Defense regarding this results of this fiber.

xv. Vickie Howard, another key witness for the State, has met with the Prosecutor, Brian Chesshir, and Investigator Hays McWhirter on two separate occasions to discuss the events of the days leading up to and after the murders. However, no reports of these encounters have been given to the Defense.

xvi. The Defense has still not received the criminal histories of the State's potential witnesses.

xvii. The Defense has not received evidence that the State intends on using in the sentencing phase should it be needed.

xviii. The Defense has not received evidence in the State's possession that Tim Howard was abused by his father, Bruce Howard, as a child.

III. Due to the Cumulative Effect of Brady and Discovery Violations Done by the State and Failures in its Investigation Before, During, and After Mr. Howard's Original Trial, and Since the Granting of His New Trial, Double Jeopardy has Attached to these Proceedings and Due to This, This Case Must be Dismissed

1. One of the founding principles of the United States of America is that no person shall be subjected to Double Jeopardy in criminal proceedings. This protected right is stated in the federal Constitution as no person shall be "subject for the same offence to be twice put in jeopardy of life or limb;" U.S. Const. amend. V (Federal Constitution's Double Jeopardy Clause applied to Arkansas through U.S. Const. amend. XIV).

a. This protection has been expanded through the United States Supreme Court's interpretation of the federal Double Jeopardy Clause to include a bar to a second trial "where the governmental conduct in question is intended to goad the defendant into moving for a mistrial[;]" *Oregon v. Kennedy*, 456 U.S. 667, 102 S. Ct. 2083 (U.S. 1982). This protection was expanded by the United States Supreme Court to protect a defendant's federal constitutional interest to freely choose between whether he should request or not request a mistrial; *Id*. When the prosecutor acts in a way, which forces the defendant to file a motion for mistrial, the defendant's choice is not freely made. When the defendant's choice is not freely made, the defendant's rights, under the federal Double Jeopardy Clause, are subverted, and it is this subversion that precludes the government from trying a defendant again on the same charges; *Id.*

b. Arkansas has adopted this expansion of the federal double jeopardy clause as well; *Atchley v. State*, 68 Ark. App. 16, 2 S.W.3d 86 (Ark. 1999). It should be noted though that this standard is the federal standard of protection to double jeopardy; and as such, is the minimum standard of protection that any federal or state jurisdiction must provide to its people; *Cooper v. State of California*; 386 U.S. 58, 87 S. Ct. 788 (U.S. 1967).

c. States have the ability to grant greater, but not lesser, protections to their people than the federal government; *Id.* Additionally states have granted higher levels of Double Jeopardy protection to individuals through their constitution's double jeopardy clauses, as applied through cases in their state supreme courts; *State v. Rogan*, 91 Hawai'i 405, 984 P.2d 1231 (1999); *Commonwealth v. Smith*, 532 Pa. 177, 615 A. 2d 321 (1992); *State v. Breit*, 122 N.M. 655, 930 P.2d 792 (1996); *Pool v. Superior Ct.*, 139 Ariz. 98, 677 P.2d 261 (1984); *State v. Kennedy*, 295 Or. 260, 666 P.2d 1316 (1983).

d. In *State v. Rogan*, the Hawai'i Supreme Court determined that under Article 1 § 10 of its state constitution's Double Jeopardy Clause, which states that "nor shall any person be subject for the same offense to be twice put in jeopardy;" a retrial is barred following mistrial or reversal based on prosecutorial misconduct where from an objective standpoint misconduct clearly denied the defendant a fair trial; 91 Hawai'i 405, 984 P.2d 1231.

e. In *Commonwealth v. Smith*, the Pennsylvania Supreme Court determined that under Article 1 § 10 of its state constitution's Double Jeopardy Clause, which states that "[n]o person shall, for the same offense, be twice put in jeopardy of life or limb;" a retrial is barred "not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial[;]"532 Pa. 177, 615 A. 2d 321.

f. In *State v. Breit*, the New Mexico Supreme Court determined that under Article II § 15 of its state constitution's Double Jeopardy Clause, which states that "nor shall any person be twice put in jeopardy for the same offense;" a retrial is barred "in those situations in which the prosecutor engaged in any misconduct for the purpose of precipitating a motion for a mistrial, gaining a better chance for conviction upon retrial, or subjecting the defendant to the harassment and inconvenience of successive trials[;]"122 N.M. 655, 930 P.2d 792.

g. In *Pool v. Superior Ct.*, the Arizona Supreme Court determined that under Article 2 § 10 of its state constitution's Double Jeopardy Clause, which states that "[n]o person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense[;]" a retrial is barred when the prosecutor intentionally engaged in conduct which he knew to be improper, that he did so with indifference, if not a specific intent, to

prejudice defendant for purpose of avoiding significant danger of acquittal which had arisen, and to prejudice jury and obtain conviction no matter what the danger of mistrial or reversal 139 Ariz. 98, 677 P.2d 261 (1984).

h. In *State v. Kennedy,* 295 Or. 260, 666 P.2d 1316, the Oregon Supreme Court determined that under Article I § 12 of its state constitution's Double Jeopardy Clause, which states that "[n]o person shall be put in jeopardy twice for the same offence;" a retrial is barred when:

> [I]mproper official conduct is so prejudicial to the defendant that it cannot be cured by means short of a mistrial, and if the official knows that the conduct is improper and prejudicial and either intends or is indifferent to the resulting mistrial or reversal. When this occurs, it is clear that the burden of a second trial is not attributable to the defendant's preference for a new trial over completing the trial infected by an error. Rather, it results from the state's readiness, though perhaps not calculated intent, to force the defendant to such a choice.

i. Just like the above states, Arkansas on multiple occasions, through its Supreme Court's interpretation of the Arkansas Constitution, has granted higher levels of constitutional protection to its people than the federal constitution provides; *State v. Brown*, 356 Ark. 460, 156 S.W. 3d 722 (Ark. 2004); *Jegley v. Picado,* 349 Ark. 600, 80 S.W.3d 332 (Ark. 2002); *State v. Sullivan*, 348 Ark. 647, 74 S.W. 3d 215 (Ark. 2002); *Griffin v. State*, 347 Ark. 788, 67 S.W. 3d 582 (Ark. 2002).

j. Arkansas case law has also established that the court will entertain an argument of cumulative error in rare and egregious cases; *Vick v. State*, 314 Ark. 618, 863 S.W. 2d 820 (Ark. 1993). Rare and egregious cases occur when the cumulative effect of the errors committed denied the defendant a fair trial; *See Harris v. State*, 264 Ark. 391, 572 S.W. 2d 389 (Ark. 1978); *Alexander v. Champion*, 289 Ark. 238, 711 S.W. 2d 765 (Ark. 1986); *Dillion v. State*, 311 Ark.

529, 844 S.W. 2d 944 (Ark. 1993).

k. Additionally, Arkansas's state constitution provides protection against double jeopardy to its people. Arkansas's state constitution states in Article 2 § 8 that "no person, for the same offense, shall be twice put in jeopardy of life or liberty."

l. The wording of Arkansas's Double Jeopardy Clause bears a striking resemblance to Pennsylvania, Hawaii, New Mexico, Arizona, and Oregon's state constitution Double Jeopardy Clauses, which have all been held to have a broader protection of a person's right against double jeopardy than offered by the federal constitution and that retrial should be barred if a fair trial cannot be had due to the prosecution's misconduct.

2. Since 1997 in Mr. Howard's case, the prosecution has continually failed to either timely disclose or disclose at all exculpatory evidence in favor of Mr. Howard or impeaching evidence against the prosecution's witnesses, as stated in section II of this motion. Additionally the prosecution continuously failed in conducting a proper investigation and intentionally used evidence which it reasonably should have known was false. This continual failure by the prosecution, in this case, to timely disclose or disclose at all pertinent evidence, conduct a proper investigation, and use evidence they reasonably should have known to be false resulted in Mr. Howard's conviction being overturned and he being granted the rare remedy of a new trial.

a. Examples of the prosecution's failure in timely disclosing or disclosing at all pertinent evidence since Mr. Howard was granted a new trial is discussed in section II of this motion. Examples of the prosecution's failure in timely disclosing or disclosing at all pertinent evidence prior to and in the original trial include:

i. The prosecution's failure for thirteen months to turn over statements of forty-three

witnesses (twenty-nine of those unknown to defense counsel at the time); [T- 392]

ii. The prosecution's failure for fifteen months to turn over new photographs, a fingerprint card of Mr. Howard, and exculpatory statements by Penny Granger; [T- 403]

iii. The prosecution's failure for sixteen months to turn over notes of anonymous callers and now signed witness statements; and, [T- 407]

iv. The prosecution's failure to turn over exculpatory statements made by a possible witness during trial; [T- 2908-2920]

b. Examples of misconduct by the state in the original trial include:

i. Danny Russell, sheriff of Little River County at the time of the murders. He investigated both murder scenes, he was a key witness for the prosecution, yet he was allowed to be the bailiff for the jury. He was in constant contact with the jury. He escorted jurors, provided coffee, and saw after their needs. This interaction undermined the basic guarantees of trial by jury; *Howard v. State (Hannah Dissent)*, 367 Ark. 18 (Ark. 2006); *citing, Turner v. Louisiana,* 379 U.S. 466, 85 S. Ct. 546, 13 L.Ed 2d 424 (U.S. 1965).

ii. The closing argument statement made by the prosecution that Trevor was placed in the bag to "muffle his pleading cries for help;" *Howard, Id.*

iii. The closing argument statement made by the prosecution that:

> [P]robably the most horrible thing that happened that night was [Shannon Day] watching her seven month old child being strangled in front of her. I submit to you, ladies and gentlemen, the last thing that Shannon Day saw before she died was her seven month old baby hanging from an extension cord. That's how she left this world. *Id.*

c. An example of the prosecutions failure in conducting a proper investigation include:

i. Failure to test the Caucasian hair found in the boots located at the side of the road;

ii. Failure to identify the fingerprints on the wooden frame found on Shannon's body; *Id.*

iii. Failure to test scrapings from beneath Shannon's nails; *Id.*

iv. The failure to test Mr. Howard's clothes; *Id.*

v. Destroying the syringe found in Jennifer Qualls' car and not testing it for serological or DNA trace evidence; and,

vi. Failure to take into custody pill bottles that were found in the North Kaylee crime scene and not testing those pill bottles for serological or DNA trace evidence.

d. An example of the prosecution using evidence which it reasonably should have known was false is its use of the testimony of Penny Granger.

In the original trial and under oath, Penny Granger claimed Shannon Day was not only pregnant, but that Mr. Howard was the father. The prosecution used her testimony as proof of Mr. Howard's motive for murder, despite no evidence showing that Mr. Howard had any knowledge of such accusations, and despite conclusive medical evidence that Ms. Day was not pregnant. That conclusive evidence came from the State's medical examiner, Dr. Daniel Konzelman who preformed the autopsy of Shannon Day. Interestingly enough, Dr. Konzelman was not called as a witness by the prosecution in the original trial, but another medical examiner, Dr. Charles Kokes was. Dr. Konzelman's conclusive medical findings were not uncovered by the defense until Mr. Howard's Rule 37 hearing.

In the Rule 37 hearing Dr. Konzelman stated that in his initial review of Shannon Day, he did not believe she was pregnant. Dr. Konzelman went on to say that after the original trial, he went back and reviewed his own findings of Shannon Day in preparation for the Rule 37 Hearing. After reviewing his findings, he reinforced his original conclusion that it was medically

impossible that Shannon Day was pregnant at the time of her death. Lead investigator Hays McWhirter also reinforced, through his Rule 37 testimony, that Dr. Konzelman determined before the original trial that Shannon Day was not pregnant at the time of her death.

Since lead investigator Hays McWhirter was imputed to be part of the prosecution, this means that the prosecution knew that Dr. Konzelman had determined that Shannon Day was not pregnant. However, this analysis is not required since McWhirter's admitted, in his Rule 37 testimony, to telling both the prosecutors, before the original trial, that Dr. Konzelman had concluded that Shannon Day was not pregnant. This left the prosecution with the undeniable fact that Penny Granger had lied about Shannon Day being pregnant. Despite this conclusive information the prosecution totally disregarded it, and allowed Penny Granger to lie to the jury under oath.

Additionally, the prosecution failed to turn over Penny Granger's longstanding history of mental illness and mental health treatment. Instead the prosecution presented Granger as Shannon Day's trustworthy confidant. After Mr. Howard's trial, in 2000, Granger took her own life by shooting herself in the head. This evidence is highly material as Granger's history of mental illness, along with other evidence now known to the defense, would have caused a jury to doubt whether or not Granger was testifying truthfully.

3. Since the granting of Mr. Howard's new trial, the prosecution has continued to ignore its obligation under the Arkansas Rules of Criminal Procedure, Rules of Evidence, Rules of Professional Conduct, the U.S. Constitution, and the Arkansas Constitution, as shown above.

4. This continued failure by the prosecution has resulted in the inability for Mr. Howard to receive a fair trial.

5. Due to the inability for Mr. Howard to have a fair trial, the only remedy available to Mr. Howard, to properly rectify the prosecutions many violations, is for this Honorable Court to attach jeopardy to Mr. Howard's case and grant this motion to dismiss.

IV. CONCLUSION

Due to the many discovery and *Brady* violations, faulty investigation, and misconduct done by the prosecution before, during, and after the original trial, and since Mr. Howard has been granted a new trial, Mr. Howard cannot have a fair trial - resulting in violation of his right to due process and protection against double jeopardy. Due to this, the only proper remedy is for this Honorable Court to dismiss the charges against Mr. Howard.

WHEREFORE, premises considered, Howard prays that the Court grant his Motion to Dismiss and address these and other matters accordingly at the February 13, 2015 hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy was faxed, mailed, or hand delivered to the Office of the Prosecuting Attorney on February 13, 2015.

/s/ Patrick J. Benca