IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JEFFREY HAVARD PETITIONER

vs. CIVIL ACTION NO. 5:08cv275-KS

CHRISTOPHER EPPS, Commissioner,
Mississippi Department of Corrections, and
JIM HOOD, Attorney General of the State of Mississippi RESPONDENTS

PETITIONER'S MEMORANDUM IN SUPPORT OF PETITION FOR ISSUANCE OF THE WRIT OF HABEAS CORPUS

Petitioner, by and through his undersigned counsel, submits this Memorandum in Support of Petition for Issuance of the Writ of Habeas Corpus (Docket #10). For the grounds set forth in the Petition and elaborated upon herein, Petitioner prays that this Court will issue the writ and grant the relief requested in the Petition.

I. INTRODUCTION

Petitioner, Jeffrey Havard, has been sitting on Death Row in Parchman for nearly seven years for a crime that he did not commit. Petitioner was convicted of murder during the course of sexual battery and sentenced to death, in violation of numerous constitutional rights. His attorneys were incompetent and ineffective throughout the proceedings, as evidenced by their utter failure to investigate and discover readily available evidence that could have explained the basis for the State's allegation of sexual battery. Faced with perhaps the worst possible crime with which one can be charged–sexual abuse of and killing of a six month old child–Petitioner was abandoned by the attorneys who were supposed to protect his rights. As demonstrated herein, Petitioner is entitled to habeas corpus relief because there is no question that both his conviction and sentence resulted from an unfair trial, and are patently unconstitutional.

II. BASIC FACTS

In early 2002, Jeffrey Havard shared a trailer home with his girlfriend, Rebecca Britt, and her 6 month old daughter, Chloe. Jeffrey had invited Rebecca and her daughter to come live with him after he observed drug dealing and other dangerous conditions at Rebecca's prior residence. Out of concern for their safety–and especially the safety of young Chloe–Jeffrey opened his home to them. In the following weeks, Jeffrey, in many ways, cared for Chloe as if she were his own child. Jeffrey, who had, in the past, cared for his younger siblings as well as young children of family and friends, assisted with the daily routines of caring for a 6 month old child.

On February 21, 2002, in the evening, Jeffrey and Rebecca Britt decided that Rebecca would go grocery shopping and to rent some movies. While Rebecca was gone, Jeffrey was to give Chloe a bath and put her to bed. After Jeffrey finished bathing Chloe in an infant tub that was placed inside the trailer's main bath tub, he dropper her, because she was slippery. Chloe's head struck the nearby toilet. In a panic, Jeffrey picked Chloe up and shook her in an attempt to revive her, as it appeared that she was in shock. Chloe began to cry, and Jeffrey comforted her. Several minutes passed, during which time Jeffrey dried Chloe and dressed her. Chloe stopped crying during that time. Believing that all was well since Chloe had stopped crying for several minutes and otherwise seemed okay, Jeffrey put Chloe in her bed.

A short time later, Rebecca came in from the grocery store. She went into Chloe's bedroom and checked on her. Rebecca emerged from Chloe's bedroom and reported that all was well, further putting Jeffrey at ease that he had not hurt Chloe by accidentally dropping her. It was then discovered that Rebecca had forgotten to rent the movies, so she again left the trailer to

do so. When she returned from the movie store, Rebecca again checked on Chloe and discovered that she was blue and not breathing. Rebecca attempted CPR at the trailer, but was unable to resuscitate Chloe. Jeffery then drove himself, Rebecca, and Chloe to Natchez Community Hospital. While they were en route, Rebecca continued to attempt CPR.

Upon their arrival at the hospital emergency room at approximately 9:40 p.m., Jeffrey and Rebecca encountered Shelley Smith, a phlebotomist (drawer of blood) who happened to be in the area near the emergency room entrance. Smith testified at trial that she was told at the outset that Chloe was not breathing. Smith took Chloe from Rebecca, and observed at that time that Chloe was blue and was not breathing. Smith "called a code" and rushed Chloe to a "code room," where efforts to resuscitate her continued. Observers in the hospital noted that both Rebecca and Jeffrey appeared to be upset and in shock.

Angel Godbold, a registered nurse, was involved in these efforts to resuscitate Chloe. She testified that when Chloe was first brought into the emergency room she was cyanotic (i.e., "blue"), had no pulse, had no spontaneous respirations, and "appeared to have been pulseless for an amount of time." Goldbold also testified that Chloe was asystole, meaning that her heart was at a "total standstill." Others on hand during the efforts to resuscitate Chloe made similar observations. Dr. Laurie Patterson, an emergency room physician, testified that Chloe was not breathing, had no circulation, and had no heart tones when she was first brought into the hospital. Dr. Patterson also observed that Chloe lacked muscle tone. Dr. Patterson administered CPR ("mouth to mouth") prior to the arrival of the respiratory team. Dr. Ayesha Dar, Chloe's regular pediatrician, was called to the hospital. When she arrived, the efforts to resuscitate Chloe were

still in progress. Dr. Dar noted at that time that Chloe was blue and that her pupils were fixed and dilated, leading Dr. Dar to conclude that Chloe was brain dead.

Chloe was successfully intubated at 9:56 p.m., approximately 16 minutes after she was brought into the emergency room. Chloe, who was blue when her mother returned from the trip to the movie store and remained so until intubated, was without oxygen for a significant amount of time. It is important to remember that Dr. Dar was of the opinion that Chloe was already "brain dead" before she was successfully intubated.

After Chloe had been intubated, additional efforts to treat her commenced. As part of this effort, nurse Godbold removed Chloe's diaper to take her temperature with a rectal thermometer. This was the first of three times that Chloe's temperature was taken with a rectal thermometer (according to medical records, this was done at 10:06 p.m., 10:13 p.m, and 10:31 p.m.). The first time that Chloe's temperature was taken with a rectal thermometer was approximately 10 minutes after she had been intubated. Nurse Godbold noted at that time that Chloe's anus was dilated to the "size of a quarter." This anal dilation was observed by others in the emergency room, and prompted a call to law enforcement, as it was assumed that sexual abuse had occurred. Though Chloe was resuscitated for almost one hour, she died that night. Emergency room treaters state that she died of a brain herniation or aneurysm, as a result of head trauma.

Following the death of Chloe, an autopsy was ordered by the Adams County Coroner. Chloe's body was sent to Dr. Steven Hayne, a forensic pathologist who, at the time, was the chief medical examiner for the Mississippi Department of Public Safety. Dr. Hayne determined that Chloe died as a result of a closed head injury. His Final Report of Autopsy, attached to the

Petition as Exhibit "D," makes no finding that Chloe had been sexually abused in any way. The Final Report of Autopsy simply notes that a 1 centimeter contusion was found on Chloe's anus.

Petitioner was indicted for capital murder during the course of a sexual battery. The trial court appointed two attorneys to represent Petitioner, who was indigent. Petitioner's trial counsel did not conduct any investigation of the capital murder charges, or of potential mitigation evidence. Most significantly, Petitioner's trial counsel did not learn the science or medicine involved in the allegations of sexual battery, which was chiefly based upon the dilated condition of Chloe's anus that was witnessed in the emergency room.

Counsel filed a one paragraph motion requesting appointment of an independent expert, but did not state with specificity the assistance that was needed and why, or offer any suggested experts to be appointed. The trial court denied the motion and encouraged trial counsel to consult with Dr. Hayne about any questions that they had. Trial counsel, however, did not consult with Dr. Hayne and did not reapply to the court with a sufficient, more specific request for appointment of an expert. (*See* Affidavit of Gus Sermos, attached as Exhibit 2 to Petition for Post-Conviction Relief, at ¶ 6) ("I believe that a pathologist could have assisted in that aspect of the case [challenging sexual battery] but had no funding to hire a pathologist and **I did not consult a pathologist.**) (emphasis added). As a result, Petitioner's trial counsel failed to learn that there were medically-recognized, non-criminal explanations for the dilated condition of Chloe's anus.

Not surprisingly, Petitioner's counsel were wholly unprepared to meet the State's case at trial. Since they did not know of the correct scientific explanations for the dilated anus, the jury never had the opportunity to hear about them. Further, they allowed witnesses who had been

neither tendered nor qualified as expert witnesses to render expert opinions that Chloe had been sexually abused. On top of these failings, Petitioner's trial counsel failed to seek removal of a juror who stated at the outset that she could not be fair to Petitioner, failed to object to improper argument by the prosecutor, failed to object to a demand for a death sentence from the victim's grandmother, failed to put on any meaningful mitigation evidence (since they did not have such evidence, given the lack of investigation), and even admitted that Petitioner was death-eligible by conceding an aggravating circumstance that the State was not even advancing.

Petitioner was convicted of capital murder. Thereafter, the jury sentenced him to death, though it is clear that the jury struggled with that decision, despite the wholly insufficient effort of Petitioner's counsel during the sentencing phase. Petitioner then sought relief from the Mississippi Supreme Court, in both direct appeal and post-conviction proceedings. Petitioner was, however, denied relief on all grounds asserted in that court. Petitioner now seeks review of his unconstitutional conviction and sentence in this Court.

III. STATEMENT OF THE PROCEEDINGS

Trial Proceedings. Petitioner was indicted on June 24, 2002, for capital murder during the course of sexual battery and during the course of felonious child abuse. On the eve of trial, on December 16, 2002, the indictment was amended, charging Petitioner solely with capital murder during the course of sexual battery. Trial was held in the Circuit Court of Adams County, Mississippi, the Honorable Forrest A. Johnson, presiding. Petitioner was tried over the course of two days. The jury convicted Petitioner of capital murder on December 18, 2002. The jury began deliberating Petitioner's sentence that same day, but was unable to reach a decision. After asking several questions of the trial court, the jury sentenced Petitioner to death on

December 19, 2002. The Sentence of Death Upon Jury Verdict was entered on December 19, 2002.

Direct Appeal. Petitioner appealed his conviction and sentence of death directly to the Mississippi Supreme Court, raising fourteen distinct appeal issues. The Mississippi Supreme Court denied relief on all claims raised by Petitioner, and also denied Petitioner's request for re-hearing. *Havard v. State*, 928 So.2d 711 (Miss. 2006) ("*Havard I"*). In so doing, that court disregarded out-of-record evidence that was properly before it. The court instead said that such evidence would be more properly considered during post-conviction proceedings.

Writ of Certiorari. Petitioner then sought relief from the United States Supreme Court. His petition for a writ of certiorari was, however, denied. *Havard v. Mississippi*, 127 S. Ct. 931 (2007).

Post-Conviction Proceedings. Petitioner then filed a request for post-conviction relief in the Mississippi State court system, raising fourteen separate grounds for relief. Petitioner was, however, denied relief on all claims, and was also denied re-hearing. *Havard v. State*, 988 So.2d 322 (Miss. 2008) ("*Havard II*"). Despite stating on direct appeal that it would consider out-of-record evidence, the court disregarded that very evidence, which clearly demonstrated that Petitioner was entitled to have his conviction and sentence set aside.

Habeas Corpus. Petitioner filed his Petition for Writ of Habeas Corpus (Docket # 10) on April 10, 2009, setting forth fifteen distinct claims for relief. Respondents filed their Answer (Docket # 11) on May 8, 2009, and Petitioner filed his Reply on June 12, 2009 (Docket # 17).

IV. STANDARDS APPLICABLE TO CLAIMS RAISED IN PETITION

Petitioner has previously discussed the general application of habeas corpus rules and the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). *See* Petitioner's Reply (Docket # 17) at pp. 14-26. Petitioner will not unduly repeat that same discussion, but does wish to underscore the framework under which his claims are to be decided. Under AEDPA, the question before this Court is first, whether Petitioner was convicted and/or sentenced to death in violation of the United States Constitution, *see* 28 U.S.C. § 2254(a), and if so, then whether the writ of habeas corpus can be granted consistent with the limitations on relief established by 28 U.S.C. § 2254(d)(1) and (2). *See* Petitioner's Reply at pp. 15-17, 20-22 (discussing this two-step analysis).

The claims pled in Havard's Petition involve, with only narrow exceptions, issues that the Mississippi Supreme Court decided on the merits. Accordingly, the same analytical approach applies to all of these claims. *See* 28 U.S.C. § 2254(d)(1) and (2). The narrow exceptions involve claims that were presented to the Mississippi Supreme Court but which that court failed to review on the merits (for instance, the alternative ineffective assistance of counsel ground found in Claim III). For those narrow exceptions, review is de novo. *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 534 (2003) ("[O]ur review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland [v. Washington*, 466 U.S. 668 (1984)] analysis"); *Rompilla v. Beard*, 125 S. Ct. 2456, 2467 (2005) (same); *Weeks v. Angelone*, 176 F.3d 249, 258-60 (4th Cir. 1999) ("When a petitioner has properly presented a claim to the state court but the state court has not adjudicated the claim, . . . our review of questions of law and mixed questions of law and fact is *de novo*.").

As set forth above, with narrow exceptions that warrant de novo review, the Mississippi Supreme Court resolved these claims on the merits. *See Havard v. State*, 928 So.2d 711 (Miss. 2006) ("*Havard I*") (direct appeal); *Havard v. State*, 988 So.2d 322 (Miss. 2008) ("*Havard II*") (state post-conviction proceedings). *See Gonzalez v. Crosby*, 125 S.Ct. 2641, 2648 n.4 (2005) (defining a "merits" decision in a habeas case as "a determination that there exist or do not exist grounds entitling a petitioner" to relief). Therefore, as to each claim, the Mississippi Supreme Court's adjudication can only survive 2254(d)(1) if "neither the **reasoning** nor the **result** of the state court decision contradicts" clearly established Federal law as announced by the United States Supreme Court. *Early v. Packer,* 537 U.S. 3, 8 (2002) (*per curiam*) (emphasis added).

"[C]learly established Federal law" refers to "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision," *Williams*, 529 U.S. at 412, and may constitute a "series of precedents" establishing "the governing legal principle or principles," *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003); *see also Abdul-Kabir v. Quarterman,* 127 S. Ct. 1654, 2007 WL 1201582, *10 (U.S. Apr. 25, 2007) (conducting "careful review of our jurisprudence in this area" to determine the "firmly established" rule at issue). "[T]he relevant Supreme Court precedent need not be directly on point, but must provide a 'governing legal principle' and articulate specific considerations for the lower courts to follow when applying the precedent." *Quinn v. Haynes*, 234 F.3d 837, 844 (10th Cir. 2000). *See also Ryan v. Miller*, 303 F.3d 231, 248 (2nd Cir. 2002) ("[A]lthough the Supreme Court must have acknowledged the right, it need not have considered the exact incarnation of that right or approved the specific theory in order for the underlying right to be clearly established."); *Rashad v. Walsh*, 300 F.3d 27, 35 (1st Cir. 2002) ("[F]actually similar cases from the lower federal courts

may inform such a determination, providing a valuable reference point when the relevant Supreme Court rule is broad and applies to a kaleidoscopic array of fact patterns.”).

Section 2254(d)(1) & (2) set up two additional gauntlets that the Mississippi Supreme Court’s adjudications must run in order to be affirmed by this Court: under that provision, the writ can issue if the State court’s decision on a claim is “an unreasonable application of” clearly established Federal law, or was based on “an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”

The first part of this subsection commands an inquiry into the objective reasonableness of the Mississippi Supreme Court adjudication; if that ruling “correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner’s case,” or “either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply,” the writ should be granted. *Williams (Terry) v. Taylor*, 529 U.S. 362, 407-08 (2000).

Under the second part of 2254(d)(2), this Court must undertake a close analysis of the facts in the State court record to determine whether the Mississippi Supreme Court’s determination of those facts was reasonable. *See Miller-El v. Dretke*, 125 S.Ct. 2317 (2005); *Rompilla v. Beard*, 125 S. Ct. 2456, 2463-66 (2005); *Wiggins v. Smith*, 539 U.S. 510, 519-27 (2003).

V. PETITIONER IS ENTITLED TO RELIEF UNDER EACH CLAIM SET FORTH IN THE PETITION

As demonstrated herein, Petitioner is entitled to habeas corpus relief from this Court on all claims raised in his Petition. Petitioner will discuss below the merits of each of his claims. For each claim, Petitioner will show (1) the facts that support the claim; (2) that Petitioner's constitutional rights have been violated; (3) that there is no limit to the relief that this Court can grant under AEDPA; and (4) the specific relief requested.

At the outset, it is worth noting that numerous references will be made to the ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES ("ABA Guidelines"). These Guidelines were first promulgated in 1989 and were updated in 2003. The 1989 version is attached hereto as "Appendix D" and the 2003 version as "Appendix E." The United States Supreme Court has consistently held that the ABA Guidelines are to be used when "determining what is reasonable" when examining claims of ineffective assistance of counsel. *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Williams v. Taylor*, 529 U.S. 362, 396 (2000).

CLAIM I: PETITIONER'S TRIAL COUNSEL WERE GROSSLY INEFFECTIVE IN CHALLENGING THE UNDERLYING FELONY OF SEXUAL BATTERY, IN VIOLATION OF PETITIONER'S RIGHTS GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

1. Facts

The sole reason that Petitioner was tried for capital murder was because of the allegation that Chloe Britt had been sexually abused. **While the indictment originally charged Petitioner with murder during the course of both felonious child abuse and sexual battery, the**

indictment was amended prior to trial to remove the charge of felonious child abuse. Thus, if there was no proof of sexual battery, then there was no basis for the charge of capital murder and the potential sentence of death. Faced with this fact, Petitioner's trial counsel should have subjected the supposed evidence in support of the sexual battery allegation to rigorous investigation and scrutiny. At a bare minimum, they should have learned the science involved. Petitioner's trial counsel, however, did none of this. They sat idly by, and the results were predictable: Petitioner, charged with perhaps the worst crime imaginable–sexual abuse of a helpless child–was convicted of capital murder and sentenced to die.

To appreciate just how grossly ineffective Petitioner's counsel were, one has to return to the night of Chloe's death. Petitioner was at home alone with Chloe. Chloe's mother, Rebecca Britt, had gone to town to purchase groceries and rent movies. Before she left, she and Petitioner agreed that he would bathe Chloe and put her to bed while Rebecca was gone. Petitioner accidentally dropped Chloe while he was bathing her; as she fell, her head struck the nearby toilet. After several minutes of comforting Chloe, Petitioner thought she was okay and he put her to bed. Rebecca returned and checked on Chloe, and it appeared that she was fine. It was discovered that Rebecca had forgotten to rent the movies, so she left again. When she returned, at approximately 9:00-9:15 p.m., she discovered that Chloe was blue and not breathing. T. 349. Rebecca attempted CPR, but was unable to resuscitate Chloe. T. 349. Rebecca testified that Chloe's throat was "closed up" to the point that she could not even get her finger in while attempting CPR at the trailer. T. 352. Jeffrey drove himself, Chloe, and Rebecca to the hospital. While they were en route, Rebecca continued to attempt CPR. T. 356.

Rebecca and Jeffrey arrived at the hospital with Chloe at 9:40 p.m. (*See* Medical Records, attached as Exhibit "A" to this Brief). Rebecca testified that she told the first person they encountered at the hospital (Shelley Smith) that Chloe was not breathing. T. 351. Smith testified at trial that she was presented with Chloe near the emergency room entrance and told by Rebecca that Chloe was not breathing. T. 360. Smith confirmed that Chloe was blue and not breathing when she got her from Rebecca. T. 361. Smith ran Chloe into the emergency room. T. 361. As she did so, she attempted to give Chloe a "rescue breath," but found that her airway was restricted. T. 361. Smith turned Chloe over to Dr. Laurie Patterson, an emergency room physician.

Dr. Patterson testified that Shelley Smith came into the emergency room holding a baby and calling "a code." T. 402. Dr. Patterson saw at that time that Chloe was not breathing, had no circulation, and had no heart tones. T. 403. Dr. Patterson administered CPR ("mouth to mouth") until the respiratory team arrived. T. 403. An emergency room nurse, Patricia Murphy, testified that she was also present when Shelley Smith brought Chloe into the emergency room, and that Chloe was not breathing that time. T. 387. A "code" was called immediately, and resuscitation efforts began. T. 387.

Angel Godbold, a registered nurse, was also on duty that night, and testified at trial. Nurse Godbold testified that "a code" was called on Chloe (indicating that she was not breathing) as soon as she was brought into the hospital. T. 368-69. Nurse Godbold further testified that Chloe was "cyanotic" (i.e., blue) when she was brought in, had no pulse, had no spontaneous respirations, and "appeared to have been pulseless for an amount of time because she was blue." T. 372. Chloe was asystole (meaning that her heart was at a total standstill), and the emergency

room doctor had trouble intubating Chloe. T. 372. After continued efforts to intubate Chloe, Nurse Godbold testified that medical providers were successful in doing so. T. 373. Medical records indicate that Chloe was successfully intubated at 9:56 p.m., sixteen minutes after arriving at the hospital. (*See* Medical Records, attached as Exhibit "A" to this Brief). Nurse Godbold testified that it was only after Chloe was intubated that the dilated condition of her anus was first observed. T. 377. Nurse Godbold observed the dilated condition of Chloe's anus as she was attempting to take her temperature rectally. T. 377. Medical records indicate that Chloe's temperature was taken rectally on three occasions that night–the first at 10:06 p.m.–twenty-six minutes after she was brought into the hospital and approximately one hour after Rebecca had discovered that she was blue and not breathing.

Chloe's regular doctor, pediatrician Ayesha Dar, was summoned to the hospital that night, and also testified at the trial. Dr. Dar testified that the first report she received about Chloe was that she was "not breathing." T. 413. When Dr. Dar arrived, efforts to intubate Chloe were ongoing. T. 414. While the intubation efforts were ongoing, Dr. Dar saw that Chloe was blue and that Chloe's pupils were fixed and dilated. T. 415. From this evidence, Dr. Dar concluded that Chloe was already "brain dead." T. 415. Again, this was prior to Chloe being successfully intubated, and prior to the point at which the dilated condition of Chloe's anus was first observed.

Law enforcement were called while Chloe was still being treated, and hospital records note that they were present at the hospital by 10:16 p.m., a mere ten minutes after the anal dilation was first observed. At approximately 10:47 p.m., Chloe experienced what medical providers described as an aneurysm. A code was called at 10:50 p.m, and the coroner was

notified at 10:55 p.m. Chloe was left on life support to determine if she was a candidate for organ donation. However, it was determined that she was not a good candidate "due to the length of time down." After Chloe died, it was determined by the Adams County Coroner that an autopsy should be conducted.

Chloe's body was sent to Dr. Steven Hayne, a forensic pathologist who, at the time, was the chief medical examiner for the Mississippi Department of Public Safety. Dr. Hayne determined that Chloe died as a result of a closed head injury. His Final Report of Autopsy, attached to the Petition as Exhibit "D," makes no finding that Chloe had been sexually abused in any way. The Final Report of Autopsy simply notes that a 1 centimeter contusion was found on Chloe's anus. Dr. Hayne determined that Chloe died from "a combination of closed head injury and changes consistent with Shaken Baby Syndrome." (*See* Petition Exhibit "C").

Several specifics of Dr. Hayne's Final Report of Autopsy are worth noting. First, under the section on page 2 termed "SPECIAL STUDIES," it is noted that the Crime Lab report "reveals the absence on serological evaluation for the presence of semen on the oral swab, vulvar swabs, vaginal swabs, and rectal swabs." In the CAUSES OF DEATH & PATHOLOGIC FINDINGS section, on pages 6-7, in the sub-section ACUTE TRAUMATIC INJURIES, there is a complete absence of any findings of tears, rips, bruises, etc. to the anal, genital, or perineum regions of Chloe's body.[1] Again, the report contains absolutely no mention of sexual abuse or battery.

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[1] While the issues of felonious child abuse and "Shaken Baby Syndrome" are not before this Court because Petitioner was tried solely for murder during the commission of sexual battery, Petitioner would note that the autopsy findings are consistent with Chloe being accidentally dropped and striking the toilet, as described by Petitioner. The trial court essentially found this to be true when it stated, on directed verdict, that there was evidence that Chloe's injuries, such as that to her frenulum, could have been caused by a fall.

Nevertheless, Petitioner was not tried on the charge of murder during the course of felonious child abuse. Rather, Petitioner was tried solely on murder during the course of sexual battery. When asked during interviews with investigators of the Adams County Sheriff's Department if he sexually abused or molested Chloe, Petitioner denied the allegation. When asked to explain the "condition of her bottom" (i.e., the dilated anus), Petitioner stated that he could not. Though non-criminal, scientific explanations were available, they were not known to Petitioner, a layman.[2] Though sources were available for Petitioner's counsel to discover that information (i.e., at a law or medical library), they failed to do so. Worse yet, it is clear that they did not even try to do so, despite the fact that this information was readily available and compelling. (*See* Affidavit of Gus Sermos at ¶ 6, in which one of Petitioner's attorneys admits that he knew medical and forensic evidence was crucial but that he did not seek the assistance of appropriate expert assistance).

Medical literature is replete with sources of information that demonstrate that a dilated anus is not, standing alone, sufficient evidence to determine that child sexual abuse has occurred. Medical literature indicates that "standards of normal" with respect to anal dilation have not been established, and that such evidence "must be interpreted with caution." *See* McCann, Reay, Siebert, Stephens, and Wirtz, *Postmortem Perianal Findings in Children*, 17 THE AMERICAN JOURNAL OF FORENSIC MEDICINE & PATHOLOGY 289-298 (1996) *See* Appendix - A. The preceding article also states that children who have died of closed head injuries have an increased likelihood of anal dilation. *Id.* at 296.

[2] Indeed, they were clearly unknown by the medical providers as well, who did not account for these scientifically-recognized explanations. They erroneously jumped to the conclusion that sexual abuse was the only explanation.

In addition, one journal article (consistent with a bulk of other sources) describes "anal gaping with stool present" (as was the case here)[3] as a "non-specific finding," meaning that it is a sign of "possible" sexual abuse but must be supported by other evidence. Adams, Harper, Knudson, and Revilla, *Examination Findings in Legally Confirmed Child Sexual Abuse: It's Normal to Be Normal*, 94 PEDIATRICS 310, 311 (1994) *See* Appendix - A. *See also* Hobbs and Wynne, *Sexual Abuse of English Boys and Girls: The Importance of Anal Examination*, 13 CHILD ABUSE & NEGLECT 195, 207 (1989) *See* Appendix - A (stating that medical examiners must perform a "differential diagnosis" that accounts for alternatives to sexual abuse, including neurological disease and postmortem anal dilation); Kirschner and Stein, *The Mistaken Diagnosis of Child Abuse: A Form of Medical Abuse?*, 139 AM. J. OF DISEASES OF CHILDREN 873, 873-74 (1985) *See* Appendix - A ("[T]he usual postmortem changes that develop progressively in the hours after death [including gaping of the rectum] may be misinterpreted as evidence of injury."); Bays and Jenny, *Genital and Anal Conditions Confused With Child Sexual Abuse Trauma*, 144 AM. J. OF DISEASES OF CHILDREN 1319, 1321 (1990) *See* Appendix - A (describing various causes for observed anal abnormalities); Muram, *Anal and Perianal Abnormalities in Prepubertal Victims of Sexual Abuse*, 161 AM. J. OBSTETRICS & GYNECOLOGY 278, 280 (1989) *See* Appendix - A ("[T]here is no consensus regarding which perianal or anal abnormalities are the result of sexual abuse and which have other causes (e.g., constipation with passage of large, hard stools). Such determination may not be easy because the anal sphincter and anal canal allow some room for dilation."); Bays and Chadwick, *Medical Diagnosis of the*

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[3] Photographs from the hospital clearly depict the presence of stool. Further, Nurse Godbold testified that she saw stool "oozing out of the rectum" due to the lack of muscle tone in the anus. T. 377. Dr. Patterson observed the same thing. T. 406.

Sexually Abused Child, 17 CHILD ABUSE & NEGLECT 91, 96 (1993) *See* Appendix - A ("Anal changes that might raise questions of sexual abuse can be the result of other medical conditions."); Bays and Chadwick, 17 CHILD ABUSE & NEGLECT at 106-07 *See* Appendix - A (listing "findings unlikely to be due to abuse," including "[s]ingle episode of anal dilation < 15-20 mm or anal dilation with stool in the ampulla.").

It is also worth noting here that the independent expert who reviewed the evidence for Petitioner during direct appeal and post-conviction proceedings, Dr. James Lauridson, cites another medical explanation for the dilated condition of Chloe's anus. Specifically, Dr. Lauridson opined:

> The initial (improper) resuscitation efforts resulted in a large amount of gas (air) accumulating in the stomach and the large and small bowel. This was shown on x-ray studies. The pressure of this gas in the bowel is the likely explanation for the passage of stool from the rectum during resuscitation. The distention of the colon and rectum caused by this accumulation of gas would also have promoted the dilation of the anus observed in the emergency room. Additionally emergency room records remark on the general flaccid condition of the muscles of the body during resuscitation. This flaccid condition of the muscles is a further contributing factor to anal dilation.

(*See* Petition Exhibit "B").

Furthermore, the sexual abuse allegation that was the focus of Petitioner's trial was based solely on the physical findings of the medical providers. Immediately after observing these conditions, the medical providers immediately called law enforcement, erroneously assuming that sexual abuse had occurred. There was no differential diagnosis performed to scientifically confirm these assumptions. There were no eyewitnesses. Petitioner did not admit sexual abuse; to the contrary, he repeatedly denied it. There was no forensic evidence of abuse, such as the

presence of Petitioner's semen or DNA in or on Chloe. The allegation was based solely on medical providers' interpretations of what they say they saw.

Professional literature from the medical field, however, discounts the use of physical examination alone to determine that sexual abuse occurred, especially when dealing with non-specific findings such as the anal dilation that was the focus of this case. *See, e.g.,* Krugman, *Editorial: The More We Learn, the Less We Know "With Reasonable Medical Certainty"?*, 13 CHILD ABUSE & NEGLECT 165 (1989) *See* Appendix - A ("The medical diagnosis of sexual abuse cannot be made on the basis of physical findings alone."); Cmte. On Child Abuse and Neglect, *Guidelines for Evaluation of Sexual Abuse in Children: Subject Review*, 103 PEDIATRICS 186, 188 (1999) *See* Appendix - A ("Physical examination alone is infrequently diagnostic in the absence of a history and/or specific laboratory findings."); McCann, Voris, Simon, and Wells, *Perianal Findings in Prepubertal Children Selected for Nonabuse: A Descriptive Study* 13 CHILD ABUSE & NEGLECT 179, 192 (1989) *See* Appendix - A ("[C]aution must be exercised during the search for the cause of soft tissue changes discovered in the anogenital region of a child."); Bays and Jenny, *Genital and Anal Conditions Confused With Child Sexual Abuse Trauma*, 144 AM. J. OF DISEASES OF CHILDREN 1319, 1322 (1990) *See* Appendix - A ("Sexual abuse is included in the differential diagnosis of a variety of abnormal physical findings in the genital and anal area. It is prudent for clinicians who discover these abnormalities to be aware of other potential diagnoses . . . .); Lamb, *The Investigation of Child Sexual Abuse: An Interdisciplinary Consensus Statement*, 18 CHILD ABUSE & NEGLECT 1021, 1027 (1994) *See* Appendix - A ("[C]onsiderable controversy persists concerning the evaluation of perianal signs . . . in children who may have experienced anal penetration.").

Early in the proceedings, Petitioner's counsel requested, in a one paragraph motion, appointment of an independent forensic pathologist to assist with preparation of Petitioner's defense. Specifically, Petitioner's counsel's motion stated that they "do not have any medical training and need assistance interpreting the autopsy in order to adequately prepare a defense for Jeffrey Havard." In addition, Petitioner's counsel stated at the hearing on this motion that they needed help "concerning exactly what the autopsy report says." Further, they stated that neither of them was "medically inclined, and we don't have a complete understanding of everything that's contained in the autopsy report."

In opposition to the motion, the State argued that "the State is not medically trained either and when we want to know what the autopsy report says or seek an explanation, we call Dr. Hayne and he discusses it with us. Dr. Hayne is not an agent for us, and Dr. Hayne is certainly available to the defense also to explain or discuss the report." The trial court denied the request, holding that Petitioner had not demonstrated sufficient need for the independent pathologist. The trial court suggested that Petitioner's counsel inquire with Dr. Hayne, the pathologist who conducted the autopsy of Chloe and who was eventually called by the State at trial. The trial court left open the possibility of reconsidering the request upon a more sufficient showing of need. Petitioner's counsel did not consult with Dr. Hayne. Petitioner's counsel also did not renew their request with a more sufficient showing of need for independent expert assistance. (*See* Affidavit of Gus Sermos at ¶ 6).

Ross Parker Simons, a Mississippi attorney with significant capital murder trial experience, submitted an affidavit during Petitioner's post-conviction proceedings that opined that Petitioner received ineffective assistance in this regard. (Post-Conviction Exhibit 16). In paragraphs 6, 7, 9 and 10 of that affidavit, Simons concludes:

> I believe that Trial Counsel were ineffective within the meaning provided by *Strickland v. Washington*. Once they recognized the need for an expert in pathology–as evidenced by their one-paragraph request–they had a duty to make a proper showing to the trial court, thus either securing the expert or making a record adequate to appeal the denial.
>
> * * *
>
> What counsel did not do was properly ask the court, enumerating the specific reasons they needed an expert, or even to research a particular expert and that person's normal fee. Counsel did not make further request of the court in this regard, did not seek rehearing and neglected to respond to the Court's denial by offering some particular basis for the expert.
>
> * * *
>
> It is my understanding that the medical examiner did not conclude in the Final Report of Autopsy that the victim had been sexually assaulted. Additionally, there was not DNA evidence of sexual assault and the sexual assault kit referenced in the autopsy report revealed an "*an absence on serological evaluation for the presence of semen on the oral swab, vulvar swabs, vaginal swabs, and rectal swabs*." Consequently, in a case such as this where the State's [sic] was seeking a capital murder conviction based on an alleged sexual assault, and where the evidence was apparently weak and subject to challenge, trial counsel's failure to confer with an expert, take appropriate steps to secure expert assistance and seek relevant discovery all fell below the standard of care expected by attorneys handling capital cases in the State of Mississippi during the relevant time period.
>
> Defense counsel had a duty to be familiar with this Court's [Mississippi Supreme Court] decision in *Harrison v. State*, 635 So.2d 894 (Miss. 1994), to have consulted with an independent pathologist and to have made a proper request for assistance. To have done so would have provided the defense information to rebut the circumstantial conclusion that the injuries to the child's anus resulted from sexual battery or penetration. The affidavit presented by Dr. James Lauridson, meets the test of *Harrison*.

Lacking knowledge of the scientific and medical explanations that could have been discovered by their own investigation or by properly requesting and obtaining the assistance of an independent expert witness, Petitioner's trial counsel proceeded to trial completely unarmed. This left Petitioner vulnerable to improper opinion testimony from medical providers who were neither tendered nor properly qualified as expert witnesses. Their ignorance also prevented them from effectively cross-examining Dr. Hayne, the only properly qualified expert that rendered any opinions concerning sexual abuse. Dr. Hayne recently elaborated on his findings in a manner that demonstrates that effective cross-examination would have yielded information that supported Petitioner's defense that no sexual battery had occurred. (*See* Petition, Exhibit "A").

The State called numerous witnesses who were permitted to offer improper expert opinions concerning the alleged sexual abuse. None of these witnesses was properly tendered or qualified to render expert opinions. This improper opinion testimony–in the order in which it was presented at trial–is detailed below.

Adams County Sheriff William T. Ferrell testified that he was called at home with a report of a child who was "dead on arrival" being brought to a hospital. T. 305. Sheriff Ferrell went to the hospital, and observed the body of Chloe after she had died. T. 306. He states that he saw "trauma to the anal area," including "tears, rips, torn, obvious invasion of the anal area." T. 307. He also testified that he saw "secretions that were still visible from the damaged area." T. 308. It bears noting that Sheriff Ferrell was never tendered nor qualified to render expert opinions concerning child sexual abuse (such as what constitutes an "obvious invasion of the anal area"). Furthermore, the autopsy of Chloe (which is detailed above and a report of which is

attached as Exhibit"D" to the Petition), did not find any "tears" or "rips" in the anal area (and the only secretion found on Chloe was stool).

As set forth above, nurse Godbold was present for some of the treatment of Chloe. She testified that it was she who first noticed the condition of Chloe's anus that resulted in the allegation of sexual abuse. T. 377. She testified that when she went to take the rectal temperature of Chloe that she was "blown away" by what she saw, which was the dilation of the "rectum" to the "size of a quarter." T. 377. She testified that this was "unusual" for an infant. T. 377. She also observed stool oozing out of the rectum "because there was no tone." T. 377. She also claims to have seen lacerations and tears on the anus (though Dr. Hayne's autopsy found none). T. 378-79. She also testified that she "sought counseling" based upon what she saw. T. 379. Nurse Godbold was not tendered or qualified as an expert witness to render opinions as to what was "unusual" about the condition she observed.

Nurse Murphy also offered testimony in this area. She testified that the "rectal area" of Chloe was "gaped open a diameter of two to two and a half centimeters which equals about an inch in diameter, which would probably equal the size of a quarter." T. 392. Murphy continued by stating that "[t]hat is not normal by any means. The rectum is usually - - the rectum sphincter is usually tight and closed." T. 392. When showed a post-mortem photograph of Chloe's anus, she testified that it did not adequately depict what she saw, perhaps because rigor mortis had set in. T. 392-93. She also said that the photograph showed evidence of tears (though Dr. Hayne's autopsy found none). T. 393. It must be noted that Dr. Hayne, who found no tears, took the very photograph to which Murphy was referring.

Nurse Murphy further testified that she has "seen just about the worst of the worst, but this has been the worst." T. 393. She testified that she had seen sexual trauma before, and that the "wounds" she saw on Chloe indicated sexual trauma. T. 393. She said "[i]t definitely appeared it [to evidence sexual trauma] to my notion." T. 393. She further stated she saw bruising around the rectum, vagina, vulva, and perineum (though Dr. Hayne found no such evidence during the autopsy). T. 393. She concluded her testimony by opining that the "wounds" she saw were "consistent with something large being inserted into the rectum." T. 399-400. Nurse Murphy was not tendered or qualified to render expert opinions as to what is "normal," the effects of rigor mortis on physical evidence of sexual abuse, how or why certain "wounds" indicate sexual trauma has occurred, or her opinion that Chloe's injuries were consistent with penetration by a "large object." Her opinions were certainly not supported by any methodology, and it appears that she did not engage in any type of differential diagnosis.

Dr. Patterson also testified at trial and rendered opinions concerning alleged sexual abuse. Dr. Patterson testified that Chloe's "anal opening" was the size of a quarter and that this was not "typical." T. 406. Dr. Patterson further noted that the anus was "very flaccid, like there was no tone there" and also states that she saw a tear (though Dr. Hayne found no tears during the autopsy). T. 406. She observed stool oozing out of the rectum. T. 406. Dr. Patterson continued by stating that the anal condition she saw is "not normal," and is indicative of sexual penetration or "penetration of some sort." T. 407. She opined that what she was evidence of sexual penetration. T. 407. On cross-examination, Dr. Patterson agreed that the anal condition she observed did not contribute to Chloe's death. T. 410. Dr. Patterson was never tendered or

qualified to render expert opinions about whether sexual abuse has been committed or not. She certainly did not support her opinions in that regard with any methodology or objective analysis.

Dr. Dar also testified about the anal condition. She testified that there was a "rectal tear," and that Chloe "was bleeding from her rectum and her opening was dilated, and I could see a tear around about twelve o'clock position." T. 416. It bears noting again that Dr. Hayne found no tears during his autopsy. Dr. Dar opined that the anal condition that she witnessed is "not normal." T. 417. The condition is indicative of sexual abuse, in Dr. Dar's opinion, and indicates that a "[f]oreign object was inserted in her rectum forcibly." T. 417-18. Just as with Dr. Patterson, Dr. Dar was not tendered or qualified to render opinions about whether sexual abuse had occurred. Her opinions were not supported by any methodology, nor is there evidence that she performed any sort of differential diagnosis. Petitioner's trial counsel did not object to her patently improper opinion testimony, and did not even cross-examine Dr. Dar. T. 420.

James Lee, the Adams County Coroner, testified about his investigation. He describes the condition of Chloe's anus as "very unusual for a child this age." T. 425. Looking at Chloe's rectum and perineum told him that something was "terribly wrong," and caused him to opine that something had penetrated the anus. T. 426. Mr. Lee was never tendered or qualified to render any expert opinions, including those about child sexual abuse.

Major John Manley with the Adams County Sheriff's Department also testified. He noted that there were feces in Chloe's diaper when he viewed her body after her death. T. 466-67. He testified: "I observed the rectum. The rectum was distended to a larger than normal size, and I also observed what appeared to be a tear to the recutm." T. 467. He concluded from his

examination that Chloe had been "sexually assaulted." T. 467. Major Manley was not tendered or qualified as expert witness who could give opinions about child sexual abuse.

Before going further, it must be pointed out that the observations made by the State's witnesses are consistent with the medical literature that anal dilation can occur under similar circumstances. These observations are also consistent with the similar opinions of Dr. Hayne (*See* Petition Exhibit "A") and Dr. Lauridson (*See* Petition Exhibit "B") that there were scientific explanations that explain all of the conditions that were observed. It is clear that these recognized scientific and medical reasons were not considered by those who offered improper opinion evidence for the State.

Dr. Steven Hayne was the only properly tendered and qualified expert witness who testified about sexual abuse. Dr. Hayne was tendered as an expert and accepted as such by the defense. T. 541-42. While the bulk of Dr. Hayne's testimony focused on Shaken Baby Syndrome and closed head injury, he made mention of evidence that the State used to support its allegation of sexual abuse. He stated that he found a small contusion on the anus. T. 546. While he described the contusion as being "one inch" in his testimony, his autopsy report states that it was one centimeter. Dr. Hayne's recent Declaration confirms that the contusion was one centimeter. *See* Petition, Exhibit A. Dr. Hayne states that this contusion could be "consistent with the penetration of the rectum with an object." T. 551. It bears noting that Dr. Hayne's recent Declaration clarifies that this small contusion could have many causes, and that medical records indicate that Chloe's temperature was taken rectally 3 times that night. Dr. Hayne continued by noting that he found no tears in the anal area. T. 561.

Recently, Dr. Hayne reviewed the Final Report of Autopsy for Chloe Britt, his trial testimony, and the applicable Mississippi Crime Lab report. After reviewing these materials, Dr. Hayne submitted a sworn Declaration, which is attached to the Petition as Exhibit "A" and incorporated herein by reference as if fully set forth in words. In that Declaration, Dr. Hayne states that he cannot "include or exclude to a reasonable degree of medical certainty that she [Chloe] was sexually assaulted." Further, Dr. Hayne notes that the one centimeter contusion that he found on Chloe's anus "could have a variety of causes and is not sufficient in and of itself to determine that a sexual assault occurred."[4] Dr. Hayne also states that, during the autopsy, he "found no tears of her rectum, anus, anal sphincter, or perineum."

Perhaps most significantly, Dr. Hayne notes that "[d]ilated anal sphincters may be seen on persons who have died, **as well as on a person prior to death without significant brain function.** My experience as well as the medical literature recognize that **a dilated anal sphincter is not, on its own, evidence of anal sexual abuse**, but must be supported by other evidence." (emphases added).[5]

During Petitioner's direct appeal and state post-conviction proceedings, it was first brought to light in this case that there were scientific, non-criminal explanations for the evidence used by the State to support the allegations of sexual battery, such as the dilated condition of Chloe's anus. This evidence was supplied by Dr. James Lauridson, whose opinions are set forth

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[4] Petitioner would note, for instance, that medical records demonstrate that, on the night of her death, emergency room medical providers took Chloe's temperature 3 times with a rectal thermometer.

[5] Medical records and testimony from medical providers demonstrate that Chloe was without oxygen for a significant amount of time and that she was "brain dead" when she arrived at the hospital. Specifically, Dr. Dar testified that, when she first saw Chloe in the emergency room, Chloe's pupils were fixed and dilated, indicating that she was brain dead. This observation was made before Chloe was successfully intubated, and before the anal dilation was first observed.

in Exhibit "B" to the Petition. Dr. Lauridson's findings are set forth in his report dated July 23, 2007 (the contents of the report are an Affidavit dated July 23, 2007; a report dated May 10, 2007; and an Addendum to the report dated July 19, 2007).

In his report, Dr. Lauridson opines as follows:

> An x-ray confirmed large amounts of gas in the stomach and entire small and large bowel.
>
> * * *
>
> He [Dr. Hayne] noted a contusion of the anus, but did not note any other rectal or perianal injury. He specifically did not find any injury to the sphincter muscle.
>
> * * *
>
> In his testimony Dr. Hayne states that rigor mortis causes contracture of muscles after death. That statement is erroneous, and is contrary to the well-known effects of rigor mortis. Rigor mortis causes rigidity of muscles, but does not cause muscles to contract.
>
> * * *
>
> Thus there is no objective evidence for bleeding from the anus or tear of the anal tissues in the autopsy report or in any photographs taken of the anus.
>
> Experienced medical examiners commonly encounter dilated anal sphincter's during postmortem examinations. Experience as well as the medical literature recognizes that this finding does not imply anal sexual abuse. Studies of this phenomenon, in fact have shown that children who have died of brain injuries have an increased likelihood of having a dilated anus. (reference 2).
>
> In children, the inner mucosa (lining) of the rectum is sometimes visible after death and the pink or red color of the lining of the rectum may be mistaken for trauma. Although some of the medical doctors examining the child testified that there was blood coming from the rectum this was not confirmed either photographically or at the time of autopsy. It is suggested that these physicians mistook the lining of the rectum for trauma.
>
> The initial (improper) resuscitation efforts resulted in a large amount of gas (air) accumulating in the stomach and the large and small bowel. This was shown on x-

> ray studies. The pressure of this gas in the bowel is the likely explanation for the passage of stool from the rectum during resuscitation. The distention of the colon and rectum caused by this accumulation of gas would also have promoted the dilation of the anus observed in the emergency room. Additionally emergency room records remark on the general flaccid condition of the muscles of the body during resuscitation. This flaccid condition of the muscles is a further contributing factor to anal dilation.
>
> * * *
>
> The conclusions that Chloe Britt suffered sexual abuse are not supported by objective evidence and are wrong.
> Postmortem anal dilation in infants is a commonly recognized artifact that does not signify sexual abuse. In this case other facts also contributed to the anal dilation: 1). large amounts of gas introduced in the gastrointestinal tract during resuscitation; and 2). generalized muscle flaccidity. No hemorrhage from the anus was documented, and the autopsy failed to reveal tearing of the anal or rectal tissues. As of this date (May 10, 2007). [sic] Independent examination of the anal tissues has not been possible.

Dr. Lauridson's Addendum, dated July 19, 2007, was submitted after he had the opportunity to analyze the anal tissues.[6] This analysis led Dr. Lauridson to opine that "[t]here is no histologic evidence for contusion, or laceration of the surfaces of the anal perianal and colonic tissues. Additionally there is no blood in the lumen of the anus or colon. No evidence of sperm is present."

Finally, despite the fact that the accidental dropping of Chloe was presented to the jury through the statement of Havard, his trial counsel did not seek to have the jury instructed on a lesser-included offense, such as manslaughter or simple murder. This failure presented the jury with a stark choice: convict Petitioner of capital murder or acquit him entirely. In a case

[6] It must be noted that Dr. Lauridson had difficulties obtaining all information that he needed to evaluate the case. (*See* Petition Exhibit "B"). The state court, however, granted leave for discovery to allow Dr. Lauridson the opportunity to conduct a full evaluation.

involving the death of a six month old child, a case charged with emotion and passion, the jury chose the former and then sentenced Petitioner to death.

2. Petitioner's Constitutional Rights Were Violated

In 1932, Justice Sutherland aptly summarized the necessity of a criminal defendant having capable, effective counsel:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he may be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Powell v. Alabama, 287 U.S. 45, 68-6 (1932). Exactly 70 years later, Petitioner was faced with the very difficulties that Justice Sutherland described–facing a charge that was the product of a rush to judgment by all involved, facing inadmissible and incompetent evidence, and having a perfect defense but unable to establish it. Inexcusably, Petitioner faced these difficulties despite having two court appointed attorneys who were charged with providing him a competent and effective defense, to be his advocates, and to subject to rigorous investigation and scrutiny each and every allegation set forth by the State that was seeking to put him to death. However, for all intents and purposes, Petitioner stood alone. In the face of a capital murder charge, Petitioner's trial counsel effectively abandoned him. Not surprisingly, he was convicted and sentenced to death. As demonstrated herein, Petitioner's counsel were grossly ineffective. Accordingly, Petitioner is entitled to relief from his unconstitutional conviction and sentence.

Perhaps the greatest failing of the many committed by Petitioner's trial counsel was the failure to properly request, retain, or utilize expert assistance. In a case where the offense of capital murder and the death sentence were only in play because of an allegation of child sexual abuse, the failure to obtain expert assistance is objectively unreasonable. This is especially clear when one considers that **Dr. Hayne's Final Report of Autopsy did not contain one mention of sexual assault.** Further, as shown above, there is extensive literature on the medical aspects of child sexual abuse cases and the lack of consensus concerning interpretation of physical findings in such cases. That expert assistance was needed is clear. What is equally clear is that Petitioner's counsel were deficient by not obtaining such assistance.

The Second Circuit Court of Appeals has issued a string of decisions holding that expert testimony is crucial in cases involving the sexual abuse of children and that defense counsel's failure to consult or call an expert can constitute ineffective assistance of counsel.

In *Lindstadt v. Keane*, 239 F.3d 191 (2d Cir. 2001) the prosecution's only evidence that the defendant sexually abused his daughter were (1) bumps and clefts on the child's hymen and (2) sub-dermal scarring of her posterior fourchette that became detectable when a special dye was applied. *Id.* at 201. The prosecution's expert testified that these conditions were caused by sexual abuse, relying on two studies not introduced into evidence. *Id.* at 201-02. It was later determined on appeal that contemporaneous studies contradicted the expert's testimony that sexual abuse must have caused the conditions. *Id.* However, defense counsel did not consult an expert, did not conduct any relevant research, and never requested copies of the studies relied on by the prosecution's expert. *Id.* at 202. Consequently, the court held that defense counsel's assistance was ineffective. *Id.* The court noted that it is "'difficult to imagine a child abuse case .

. . where the defense would not be aided by the assistance of an expert.'" *Id.* at 201 (quoting Beth A. Townsend, *Defending the "Indefensible": A Primer to Defending Allegations of Child Abuse*, 45 A.F. L. Rev. 261, 270 (1998)) *See* Appendix - B.

In *Pavel v. Hollins*, 261 F.3d 210 (2d Cir. 2001), the prosecution's only physical evidence that the defendant sexually abused his two sons was a mild "redness around the anal area" of one of the boys. The prosecution's expert testified that the discoloration was consistent with the boy's allegations of sexual abuse, but that it also could have been caused by diarrhea (a condition which the boy had in the days before the medical examination). *Id.* at 214-15. On appeal, the defendant obtained an affidavit from a prominent child abuse expert who, contrary to the prosecution's expert, unequivocally stated that the mild discoloration was not consistent with the boy's allegations. *Id.* at 227-28. However, defense counsel failed to consult with a medical expert or call one to testify at trial. Consequently, the court held that defense counsel's assistance was ineffective. *Id.* at 223. The court noted that there is "'little question that child sexual abuse cases often present a fertile, indeed, a necessary, area for expert assistance.'" *Id.* at 224 n.17 (quoting *United States v. Tornowski*, 29 M.J. 578, 580 (1989)).

In *Eze v. Senkowski*, 321 F.3d 110 (2d Cir. 2003), the only physical evidence that the defendant sexually abused his two daughters were slightly enlarged hymens on both girls and scar tissue on the hymen of one of the girls. Based on this evidence, the prosecution's expert concluded that the girls had been sexually abused. *Id.* at 116. The Second Circuit opinion points out that contemporaneous medical studies questioned the reliability of hymenal examinations as the basis for determining the occurrence of sexual abuse. *Id.* at 128-29. However, defense counsel did not consult with a medical expert or call one to testify. *Id.* at 128. This, combined

with other failures, led the Court to remand the case to district court in order to give defense counsel an opportunity to explain his deficient conduct. *Id.* at 136-37. Highlighting the "critical" nature of medical expert testimony in child sexual abuse cases, the court proclaimed that "[t]he importance of [expert] consultation and pre-trial investigation is heightened where, as here, the physical evidence is less than conclusive and open to interpretation." *Id.* at 128.

Taken together, *Lindstadt*, *Pavel*, and *Eze* hold that:

> In sexual abuse cases, because of the centrality of medical testimony, the failure to consult with or call a medical expert is often indicative of ineffective assistance of counsel.

Gersten v. Senkowski, 426 F.3d 588, 607 (2d Cir. 2005).

In *Gersten*, defense counsel did not consult or call any expert to rebut claims by defendant's daughter that defendant had sexually abused her over several years. On appeal, it was determined that there were a multitude of experts who would have testified at trial that the physical evidence in the case was not indicative of sexual abuse. *Id.* at 608. The court found that, by not investigating, defense counsel essentially conceded the prosecution's theory that the physical evidence was indicative of sexual abuse. *Id.* The court held that "[f]or counsel to forego even an investigation of the possibility of challenging the physical evidence . . . was not an objectively reasonable performance" and the defendant received ineffective assistance of counsel. *Id.* at 610-11. The court added that:

> Defense counsel may not fail to conduct an investigation and then rely on the resulting ignorance to excuse his failure to explore a strategy that would likely have yielded exculpatory evidence.

Id. at 610. *See also Strickland v. Washington*, 466 U.S. 668, 680 (1984) (counsel has a duty to conduct an "independent examination of the facts, circumstances, pleadings and

laws involved"); *Bell v. Miller*, 500 F.3d 149 (2d Cir. 2007) (counsel ineffective for failing to ask any questions about underlying medical evidence and failing to obtain assistance of expert witness that could have assisted with crucial effort to attack victim's memory loss due to medical conditions); *Rolan v. Vaughn*, 445 F.3d 671 (3d Cir. 2006) (holding that the failure to conduct any pretrial investigation is objectively unreasonable).

Decisions from the Fifth Circuit Court of Appeals also demonstrate that Petitioner's counsel were ineffective in this regard. In *Soffar v. Dretke*, 368 F.3d 441 (5th Cir. 2004), the defendant's murder conviction was reversed by virtue of ineffective assistance of counsel. The court faulted defense counsel for failing to investigate ballistics evidence and for failing to consult or call a ballistics expert when the prosecution's case was largely based on expert testimony about ballistics. *Id.* at 477-78. The court held that defense counsel's failures could "not be described as a reasonable exercise of professional judgment or as 'part of a calculated trial strategy, but is likely the result of either indolence or incompetence.'" *Id.* at 478 (quoting *Anderson v. Johnson*, 338 F.3d 382, 393 (5th Cir. 2003)). *See also Draughton v. Dretke*, 427 F.3d 286 (5th Cir. 2005) (defense counsel ineffective for failing to consult a ballistics expert).

Generally, expert testimony is necessary when the prosecutor's expert witness "testifies about pivotal evidence or directly contradicts the defense theory, defense counsel's failure to present expert testimony on that matter may constitute deficient performance." *Duncan v. Ornoski*, 528 F.3d 1222, 1235 (9th Cir. 2008) (collecting cases). Additionally, expert testimony is "vital in affording effective representation to a criminal defendant . . . [w]hen there is substantial contradiction in a given area of expertise…." *Knott v. Mabry*, 671 F.2d 1208, 1212-13 (8th Cir. 1982). At the very least, "[c]ounsel's failure to become versed in a technical subject matter in

order to conduct effective cross-examination" may constitute ineffective assistance of counsel. *Id.* at 1213. *Accord Dees v. Caspiri*, 904 F.2d 452, 455 (8th Cir. 1990) ("[a]t most [defense] counsel might be deficient for failing to discover and make use of a widely held scientific view."); *Rickey v. Bradshaw*, 498 F.3d 344 (6th Cir. 2007) (counsel ineffective for failing to marshal the available evidence to attack the prosecution's case, which was based upon expert evidence that was "unsound and out of step with prevailing scientific standards").

The above case law fits precisely into the facts of Petitioner's case, and indicates that trial counsel were ineffective and that their ineffectiveness prejudiced Petitioner. Just as in each of the Second Circuit cases concerning child sexual abuse, Petitioner's counsel did not effectively seek, retain, or utilize expert assistance needed to meet tenuous allegations of sexual abuse. Furthermore, they failed to conduct any investigation about the specific need for such assistance. Research in the relevant field would have revealed that the evidence of sexual abuse being put forth by the State was controversial and subject to various interpretations. Medical literature is replete with sources indicating that anal dilation is not sufficient to make a determination that sexual abuse has occurred, since it is has non-criminal, scientifically-recognized causes.

The Fifth Circuit cases involving ballistics experts warrant the same conclusion as the Second Circuit cases involving child sexual abuse. In *Draughon*, there was compelling ballistics evidence available to counter the prosecution's theory that the defendant deliberately killed a person who was pursuing him following a robbery. 427 F.3d at 294. This ballistics evidence indicated that the fatal bullet struck the pavement first and was fired at a great distance. *Id.* This supported the defendant's defense that he had fired his gun in the air in an attempt to scare off his

pursuers, and countered the prosecution's theory of a close-range deliberate killing. *Id.* However, the defendant's trial counsel neither sought nor utilized a ballistics expert. *Id.* at 291.

The Fifth Circuit stated that "[t]he importance of this testimony cannot be overstated. Competent counsel would have been keenly aware of its importance and what would follow without it, the prejudice to [defendant]." *Id.* at 294. It went on to state that "the failure to investigate the forensics of the fatal bullet deprived [defendant] of a substantial argument, and set up an unchallenged factual predicate for the State's main argument that [the defendant] intended to kill. It left little with which to persuade the jury that [the key prosecution witness' statement of distance was faulty]." *Id.* at 296. Accordingly, the Fifth Circuit upheld the district court's grant of the writ of habeas corpus on the grounds of prejudicial ineffective assistance of counsel. *Id.* at 298.

Just as in *Draughon*, the failure of Petitioner's counsel to properly request, employ, and utilize independent expert assistance prejudiced Petitioner's entire trial. Those failures were compounded by the failure to even investigate the State's allegation of sexual battery and any non-criminal, scientific explanations for it. Without independent assistance such as that available from Dr. Lauridson, Petitioner was left with the inability to explain the condition of Chloe's anus, which was the chief evidence that the State used to support its allegation of sexual battery. Clearly, independent expert assistance would have cast this evidence in serious doubt, as there are recognized causes for that condition that are unrelated to sexual abuse. Indeed, as Dr. Hayne states in his Declaration, it is recognized that dilated anal sphincters can be seen on those who are still alive but lack significant brain function. This is precisely what happened in this case. There is no question that Chloe was oxygen-deprived for a significant amount of time

(approximately 45 minutes to one hour). She was blue and not breathing when her mother found her and when she was brought into the hospital. Dr. Dar was of the opinion that Chloe was already brain dead before she was intubated and before the dilated condition of her anus was first observed. The lack of evidence in this regard left the State's factual predicate for capital murder, the commission of sexual battery, unchallenged.

Indeed, the State continually pointed to the fact that Petitioner **could not explain** the condition of Chloe's anus. For instance, during closing argument, the prosecutor argued: "They asked him over and over and over again in that tape, and he kept saying, **"I can't explain it. I don't know. I just can't explain how that happened." There ain't no other way to explain it than to admit that he committed sexual battery, ladies and gentleman. No other way."** T. 624. If Petitioner's counsel had done their job, there certainly would have been an explanation. Thus, prejudice to Petitioner is clear.

Prejudice to Petitioner is also clear for another reason. At trial, the State advanced two physical findings to support its allegation of sexual battery: (1) the condition of Chloe's anus and (2) the tear to Chloe's frenulum (a piece of skin in the mouth). The trial court granted a directed verdict on the frenulum evidence, as there was not sufficient evidence to take it to the jury, in light of testimony that this injury could have resulted from a fall. T. 569-70. In ruling against Petitioner's similar motion as to the anal condition, the court stated that Petitioner "can offer **no explanation whatsoever to the condition of the child's anus**." T. 571 (emphasis added). If Petitioner's trial counsel had been effective and uncovered the medical and scientific explanation for the anal condition, there is a reasonable probability that the court would have similarly

granted a directed verdict on this aspect of the evidence. In that event, the case would have been over, as both aspects of the case would have been insufficient to even be submitted to the jury.

Petitioner's counsel were also ineffective for failing to challenge the improper opinion testimony presented through medical providers, the Coroner, and law enforcement. Mississippi law at the time of trial was clear that evidence concerning the occurrence of sexual abuse, especially in children, can only be rendered by properly tendered and qualified experts whose opinions met standards of objectivity and reliability. *See, e.g., Crawford v. State*, 754 So.2d 1211 (Miss. 2000); *Hall v. State*, 611 So.2d 915 (Miss. 1992); *Hiengpho-Thichack v. State*, 603 So.2d 363 (Miss. 1992); *Goodson v. State*, 566 So.2d 1142 (Miss. 1990); *Hosford v. State*, 560 So.2d 163 (Miss. 1990). Indeed, even counsel for Respondents, in his treatise, states that it is "error for a person who has not been offered or qualified as an expert witness to be allowed to state an opinion that would qualify as an expert opinion." *See* White, Marvin, *Death Penalty Litigation* in THE ENCYCLOPEDIA OF MISSISSIPPI LAW at § 27:10 *See* Appendix - B.

Furthermore, it is clear that even many doctors and nurses lack the specialized training and experience necessary to offer opinions as to child sexual abuse. *See* Myers, EVIDENCE IN CHILD ABUSE & NEGLECT CASES, 3d ed. at 460-61 (1997) *See* Appendix - B (stating that "extraordinary expertise" is required for an expert to render substantive opinions as to child sexual abuse, and that "[i]t is clear that most physicians, psychiatrists, nurses, psychologists, and social workers are not qualified in the specialized field of child sexual abuse. Courts should insist on a showing of genuine expertise before allowing an individual to testify as an expert on child sexual abuse."). *See also* Haralambie, CHILD SEXUAL ABUSE IN CIVIL CASES at 208 (1999) *See* Appendix - B ("Most physicians are not trained to do forensic examinations [for child sexual

abuse]. Even physicians trained to do forensic rape examinations may not have particular expertise with child sexual abuse examinations."); Myers, et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 11-12 *See* Appendix - C ("In the field of child sexual abuse, the critical factors relating to qualification as an expert are: (1) extensive firsthand experience with sexually abused and non-sexually abused children, (2) thorough and up-to-date knowledge of the professional literature on child sexual abuse; and (3) objectivity and neutrality about individual cases.").[7]

Circuit courts have found that defense counsel's failure to object to inadmissible testimony or prosecutorial misconduct constitutes ineffective assistance of counsel. In *Earls v. McCaughtry*, 379 F.3d 489 (7th Cir. 2004), the petitioner claimed that his trial counsel was ineffective for failing to object to expert testimony about the truthfulness of another witness, which was prohibited by state law. While acknowledging that review of counsel's performance must be highly deferential, the court nevertheless held that defense counsel's failure to object fell below an objective standard of reasonableness and therefore constituted deficient performance. *Id.* at 494. The court emphasized that the areas of state evidentiary law relevant in the case were sufficiently clear and thus counsel should have been aware that the testimony was inadmissable. *Id.*

In *Olesen v. Class*, 164 F.3d 1096 (8th Cir. 1999), the petitioner claimed that his trial counsel was ineffective for failing to object to opinion testimony from a lay witness that the alleged victim would not have fabricated her story. The court found that under the state's

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[7] It bears noting that the Mississippi Supreme Court has, on more than one occasion, recommended that judges and counsel involved in child sexual abuse cases review this law review article. *See Hiengpho-Thichack*, 603 So.2d at 365 n.1; *Hosford*, 560 So.2d at 168. It is abundantly clear that Petitioner's trial counsel did not do so.

evidentiary rules and case law a reasonably prudent lawyer would have objected to the testimony and therefore counsel's performance was deficient. *Id.* at 1102. However, despite counsel's deficient performance, the court held that petitioner's conviction would not be set aside because the testimony was brief and effectively cross-examined and therefore it did not render the trial unreliable. *Id.*

In *Washington v. Hofbauer*, 228 F.3d 689 (6th Cir. 2000), the petitioner claimed that his trial counsel was ineffective for failing to object to multiple instances of prosecutorial misconduct during the trial. The court first noted that on several occasions it had found that "a counsel's failure to object to prosecutorial misconduct constitutes defective performance when that failure is due to [anything other than] reasonable trial strategy." *Id.* at 702 (internal citations omitted). Finding that counsel's failures to object was not due to reasonable trial strategy, the court held that counsel's performance was deficient. *Id.* at 709.

In *Dixon v. Snyder*, 266 F.3d 693 (7th Cir. 2001), the petitioner claimed that his trial counsel was ineffective for failing to object to the prosecution's introduction of a witness's prior inconsistent statement as substantive evidence. Defense counsel was unfamiliar with the state statute the prosecution relied upon to admit the statement, and therefore was unaware that the statute should not have applied. *Id.* at 703. The court stated that counsel's conduct could not be considered reasonable "as is accorded most strategic decisions because [counsel's decision] was not based on strategy but rather on a 'startling ignorance of the law.'" *Id.* (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986)). The court further noted that even if counsel had been aware of the statute and simply failed to take advantage of it, his conduct would have been

deemed deficient. *Id.* Consequently, the court held that the petitioner was deprived of effective assistance of counsel. *Id.* at 705.

As in the cases cited above, it is clear that Petitioner's trial counsel in this case were deficient for failing to object to multiple instances of improper opinion testimony. Witness after witness was paraded before the jury and permitted to render opinions about what was "normal" (despite the fact that the medical literature says that there is no standard of normal in this regard) and that Chloe had been sexually assaulted. The only trial witness to have been properly tendered and qualified as an expert to render opinions was Dr. Hayne.[8] All of the others who did so (medical providers, the Coroner, and law enforcement) were not tendered or qualified, despite clear state authority requiring opinion testimony concerning child sexual abuse to come only from qualified experts.[9]

Manifestly, Petitioner's trial counsel either did not know Mississippi evidentiary law in this regard, or they knew and failed to act upon it when to do so would clearly aid Petitioner's defense. In either event, counsel was ineffective. *See Smith v. Dretke*, 417 F.3d 438 (5th Cir. 2005). That Petitioner was prejudiced by this ineffective assistance is also clear. The State was allowed to elicit improper opinion from witness after witness, effectively piling on testimony that was not only improper, lacked the requisite foundation, and was contradicted by the findings and

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[8] Dr. Hayne's trial opinions regarding the sexual abuse allegation were very weak and were couched in terms of possibility. As his recent Declaration reveals, they are clearly insufficient to support any allegation of sexual battery in this case.

[9] The only qualified experts who have reviewed this case and conducted a proper differential diagnosis are Dr. Hayne and Dr. Lauridson. Dr. Lauridson emphatically states that there was **no sexual battery** (*See* Petition Exhibit "B") and Dr. Hayne opines that there is insufficient evidence–based upon the autopsy that he conducted–to support a finding of sexual battery (*See* Petition Exhibit "A").

testimony of Dr. Hayne, but that Petitioner could not rebut (since, as described above, his counsel were wholly ignorant of the medical and forensic issues in the case).

In addition under *Beck v. Alabama*, 447 U.S. 625 (1980), Petitioner was entitled to a lesser-included offense instruction, especially if his trial counsel had performed adequately by requesting one. Their failure to do so was objectively unreasonable, and prejudice to Petitioner is clear. The jury, having been presented no explanation for the condition of Chloe's anus, was left to choose only between complete acquittal and convicting Petitioner of capital murder. The jury chose the latter.

The ineffective assistance of counsel involved in this claim involves multiple failures to comply with both versions of the ABA Guidelines. The 1989 ABA Guidelines involved here include: 11.4.1 (Investigation); 11.5.1 (Filing Pre-Trial Motions); 11.7.1 (General Trial Preparation); and 11.7.3 (Objection to Error). *See* Appendix - D, attached.. The 2003 ABA Guidelines involved include: 10.7 (Investigation); 10.8 (Duty to Assert Legal Claims); and 10.10.1 (Trial Preparation Overall). *See* Appendix - E, attached. Clearly, Petitioner's trial counsel failed to perform up to the standards of the ABA Guidelines, standards which the United States Supreme Court has long held are guides to determining the reasonableness of counsel's performance.

3. There is No Limitation on Relief

The adjudications by the Mississippi Supreme Court on direct appeal and during state post-conviction proceedings involve decisions that were both contrary to and unreasonable applications of clearly established federal law as well as unreasonable determinations of the facts as presented to that Court. With respect to that Court's applications of the law regarding this

claim, there was an unreasonable application of the standards for evaluating claims of ineffective assistance of counsel. Simply put, the Mississippi Supreme Court correctly identified the standards to be considered, which are those set forth in *Strickland*. However, after identifying the correct standard, the Supreme Court failed to reasonably apply that very standard to Petitioner's trial counsel's efforts (or rather, the lack thereof) to challenge the underlying felony of sexual battery. In short, as has been demonstrated herein, that Court was presented with a clear case of ineffective assistance of counsel— a case where Petitioner had a strong defense based on medical and scientific evidence and which contradicted the tenuous, speculative, and prejudicial case presented by the State at trial— but his counsel wholly failed to investigate the bases for that defense and employ them in an effective manner at trial.

Perhaps more significantly, the Mississippi Supreme Court, on multiple instances, made factual determinations with respect to this claim that were not reasonable in light of the evidence before it. To begin, on direct appeal, it is clear that the Court did not even appropriately address the issue that was before it. That Court found that petitioner's trial counsel were not ineffective for pursuing a strategy that attacked the underlying felony. *Havard I*, 928 So.2d at 788. However, the issues raised on direct appeal did not take issue with the choice of strategy, but the utter failure to support that strategy and present it to the jury. Counsel clearly were not effective in presenting the strategy that they chose, because they failed to uncover the very evidence that would provide a scientific explanation for the conditions on Chloe that were the sole basis of the State's allegation of sexual battery.

Furthermore, the Mississippi Supreme Court unreasonably applied the facts of the case with respect to Petitioner's trial counsel's inadequate request for expert assistance. The

Mississippi Supreme Court held that the trial court did not abuse its discretion when it denied Petitioner's one paragraph motion requesting expert assistance. *Id.* at 789. The Court reasoned that a defendant requesting funding for expert assistance must show concrete reasons that establish the specific need for such assistance. Since Petitioner's trial counsel did not do so, the Mississippi Supreme Court held that the trial court did not commit error in denying the request. However, this very same analysis is the basis for a finding of clear ineffective assistance of counsel. If counsel, in a case where medical and forensic evidence was of utmost importance, failed to present the trial court with specific grounds for the need of that assistance (despite case law and admonitions from the Mississippi Supreme Court concerning the need for specific requests for expert assistance, especially in child sexual abuse cases), how could that failure be objectively reasonable under the dictates of *Strickland*? The only reasonable determination of the facts in this circumstance is that Petitioner's trial counsel were ineffective in this regard, and that this ineffectiveness clearly prejudiced the Petitioner, who was left with the inability to present scientific explanations for the evidence on which the allegation of sexual abuse was based.

The unreasonable factual determinations continued during Petitioner's state post-conviction proceedings. With respect to the expert assistance issue, the Mississippi Supreme Court held that Petitioner's trial counsel's consultation with a nurse following denial of the cursory request for an independent pathologist showed that counsel were diligent in carrying out their duties. *Havard II*, 988 So.2d at ¶ 22. This determination is patently unreasonable. To begin, even the Mississippi Supreme Court noted that having a nurse examine evidence that an expert pathologist should properly examine is a questionable practice that it would not condone.

Id. Furthermore, medical literature, which is cited in the Facts section above, explicitly states that most medical providers are not qualified to examine evidence and render opinions concerning child sexual abuse. In addition, the ABA Guidelines require counsel to consult with "appropriate experts." *See* ABA Guideline 10.7 (2003), attached hereto as Appendix - E. In the same vein, as on direct appeal, the Mississippi Supreme Court again found that the failure to adequately request expert assistance did not rise to the level of ineffective assistance of counsel. *Id.* at ¶ 24. For the reasons set forth in the paragraphs above, this determination was unreasonable.

The Mississippi Supreme Court was also unreasonable in its determination of extra-record evidence that Havard presented during post-conviction proceedings. To begin, the Mississippi Supreme Court refused to review this evidence on direct appeal, despite the fact that the procedural rules of the Court at that time would have allowed such review. *See Havard I*, 928 So.2d at 789. However, it is clear that the Mississippi Supreme Court completely disregarded that very evidence on post-conviction review, despite the fact that it held on direct appeal that those proceedings were the proper venue to consider such evidence.

For instance, the Mississippi Supreme Court found that Petitioner was not prejudiced by his counsel's failure to obtain expert assistance because the opinions of Dr. Lauridson (the expert who presented scientific evidence on behalf of Petitioner on both direct appeal and during post-conviction proceedings) found that it was only "possible" that Chloe had not been sexually assaulted. *Havard II*, 988 So.2d at ¶ 26. However, it is clear that the Mississippi Supreme Court, in making this factual determination, focused solely on an early affidavit of Dr. Lauridson that was eventually superceded by a later report that he submitted following his review of the

entirety of the evidence. In Dr. Lauridson's affidavit dated April 13, 2007, he states that it is his "professional opinion that there is a **possibility that Chloe Madison Britt may not have been sexually assaulted and I require the appropriate amount of time and materials to be able to give an accurate, objective, complete and professional opinion in this matter.**" (emphasis added) (Dr. Lauridson's affidavits and reports were attached to the Petition as Exhibit "B"). However, in his later report dated May 10, 2007, Dr. Lauridson opines that "[t]he conclusions that Chloe Britt suffered sexual abuse **are not supported by objective evidence and are wrong.**" (emphasis added).

The Mississippi Supreme Court clearly disregarded this later-provided report, which was submitted following Dr. Lauridson's complete review of the evidence in the case. By disregarding that report, the Mississippi Supreme Court's determination in this regard was clearly unreasonable, as it relied upon Dr. Lauridson's supposed finding of only a "possibility" that no sexual abuse had occurred, when, in fact, his ultimate opinion was that sexual abuse had definitely not occurred and that opinions to the contrary were false. The Mississippi Supreme Court also utterly failed to consider the evidence that Dr. Lauridson presented concerning the effect of the presence of large amounts of air in Chloe's stomach and bowels, which is yet another scientific explanation for the anal condition that serves as the basis for the allegation of sexual battery.

The Supreme Court also unreasonably found that Dr. Lauridson's opinions concerning Dr. Hayne's discussion of rigor mortis during trial were inconsequential. *Havard II*, 988 So.2d at ¶ 27. Dr. Hayne's discussion in this regard, however, bolstered, even if unwittingly, the testimony of medical providers concerning evidence that clearly did not exist. Specifically, Dr.

Hayne's discussion of rigor mortis was used by the State to bolster the testimony of medical providers who stated that they saw tearing on Chloe — tearing that was clearly not found by Dr. Hayne when he performed his autopsy. Indeed, even the Mississippi Supreme Court acknowledges that Dr. Hayne found no tearing when he performed the autopsy. *Id.* at ¶ 26. Accordingly, Dr. Lauridson's opinions that Dr. Hayne's discussion of rigor mortis was medically and factually inaccurate were quite consequential, in that they undermine the prejudicial and factually inaccurate testimony of medical providers who were permitted to provide opinion testimony that sexual abuse had occurred despite the fact that they were neither tendered nor qualified to do so.

Furthermore, the Mississippi Supreme Court unreasonably focused on the fact that Chloe was "in the emergency room and still alive" when the anal dilation was observed as a means to discount Dr. Lauridson's opinions which discuss, among other things, post-mortem findings. *Id.* at ¶ 28. It is, however, beyond dispute that Chloe was without oxygen for a significant amount of time. Furthermore, Dr. Dar observed that Chloe was already brain dead prior to her being intubated and also before the dilated condition of her anus was first observed. The Mississippi Supreme Court, however, assumed that one could be "clinically alive" and yet not undergo the anal dilation that was observed. However, this is not a fair reading of Dr. Lauridson's opinions, and is indeed contradicted by the medical literature as well as the opinions of Dr. Hayne, who recently swore in his Declaration that "[d]ilated anal sphincters may be seen on persons who have died, as well as on a person **prior to death without significant brain function**." (emphasis added) This misplaced focus resulted in a factual determination that was unreasonable.

Further still, the Mississippi Supreme Court found that Dr. Lauridson's opinions were contrary to the testimony of "experienced emergency room doctors and nurses," essentially choosing the opinions of those medical providers over those of Dr. Lauridson, who was Board certified in internal medicine, anatomic pathology, and forensic pathology. However, none of the medical providers were tendered or qualified to render any expert opinions. Their knowledge, training, and experience in evaluating child sexual abuse is unknown. Furthermore, it is clear that the opinions of those medical providers were not based upon any objective criteria or analysis, and that those providers did not consider and discard recognized scientific and medical explanations for the conditions that they observed. Accordingly, the Mississippi Supreme Court's preference of their opinions over those of Dr. Lauridson is clearly unreasonable.

The Mississippi Supreme Court further stated that Dr. Lauridson was inconsistent with respect to the evidence of contusion. *Id.* at ¶ 30. However, Dr. Lauridson's initial discussion of the small anal contusion was based solely upon the review of Dr. Hayne's autopsy report and trial testimony. He did not perform an autopsy or other examination of Chloe. Furthermore, his later finding that the forensic sample that he was sent did not support the finding of a contusion does not contradict his previous discussion of contusion, as the latter opinion was based solely on the evidence that Dr. Lauridson had been provided. What is important about the contusion whether one existed or not, was what Dr. Lauridson opined about the potential cause for any such contusion. Specifically, Dr. Lauridson opined that any contusion found could have been caused by the use of a rectal thermometer, which medical records indicate was used on Chloe three times while she was being treated on the night of her death. The Mississippi Supreme Court's opinion

is silent on this issue. Accordingly, its factual determination concerning contusion and Dr. Lauridson's opinions on that issue are unreasonable.

The Mississippi Supreme Court was also unreasonable in its determination concerning the Affidavit of Ross Parker Simons concerning the ineffective assistance rendered by trial counsel. That court stated that Mr. Simons' affidavit advocated simply a substitution of his legal opinion for that of the Mississippi Supreme Court, which "considered this issue on the merits, in depth, on direct appeal." *Havard II*, 988 So.2d ¶ 24. This analysis does not, however, comport with the record. The Mississippi Supreme Court refused to consider out-of-record evidence on this issue on direct appeal. *Hava rd*, 928 So.2d at 787. Mr. Simon's affidavit was chiefly based on such evidence, and particularly the opinions of Dr. Lauridson and their showing of prejudice in this regard. The Mississippi Supreme Court chose to gloss over this distinction and simply discount the Simons affidavit. This determination was unreasonable.

For all of these reasons, the Mississippi Supreme Court's decision that Petitioner's trial counsel did not render prejudicial ineffective assistance of counsel is unreasonable as both a matter of law and of fact. Simply put, it was objectively unreasonably for Petitioner's counsel to not develop evidence that would clearly have supported (and, indeed, affirmatively established) Petitioner's defense that no sexual battery had occurred. When this evidence was developed and presented to the Mississippi Supreme Court, it was completely disregarded. Therefore, the decision of the Mississippi Supreme Court that Petitioner's trial counsel did not render ineffective assistance of counsel is unreasonable, and the writ should be granted.

Furthermore, the Mississippi Supreme Court unreasonably determined that Petitioner's trial counsel were not ineffective for failing to offer a lesser-included offense instruction at trial.

With regard to that issue, the Mississippi Supreme Court stated that a lesser-included offense instruction should only be granted when supported by the evidence presented. *Havard I*, 928 So.2d at 790. The Mississippi Supreme Court found that Havard's sole theory presented at trial was that he did not commit the underlying offense, and that, therefore, a lesser-included offense instruction was not warranted. *Id.* Accordingly, the decision to not offer a lesser-included offense instruction was found to be in the "realm of appropriate trial strategy." *Id.* On post-conviction review, the Mississippi Supreme Court, citing its opinion on direct appeal, held this issue to be barred by the doctrine of res judicata. *Havard II*, 988 So.2d at ¶¶ 33-34.

The Mississippi Supreme Court's determination of this issue was unreasonable because it disregarded the evidence offered through the statement of Petitioner, which was presented to the jury at trial. During that statement, Petitioner described how he accidentally dropped Chloe after bathing her, which led to the head injury that ultimately claimed her life. Thus, the jury had clearly been presented evidence that would support a lesser-included offense instruction such as manslaughter or simple murder. By failing to offer such an instruction in a highly charged case involving the death of a six month old child, Petitioner's trial counsel presented the jury with the stark choice of completely acquitting Petitioner or convicting him of capital murder only. This decision was objectively unreasonable, and not a legitimate trial strategy in light of Mississippi law on the issue and the stakes of the case. The Mississippi Supreme Court's adjudication to the contrary was unreasonable.

4. Relief Requested

Due to the violation of Petitioner's constitutional right to the effective assistance of counsel and the availability of relief under AEDPA, Petitioner prays that this Court will grant the writ of habeas corpus to relieve Petitioner from his unconstitutional conviction and sentence. At the very least, Petitioner requests that this Court permit him to conduct discovery on the issues raised in this claim and that this Court will hold an evidentiary hearing and grant the writ thereafter.

CLAIM II: PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT IN THE GUILT PHASE OF TRIAL OR, ALTERNATIVELY, BY HIS TRIAL COUNSEL'S FAILURE TO OBJECT TO THE STATE'S IMPROPER AND INFLAMMATORY CLOSING ARGUMENT

1. Facts

During its closing argument, the State argued as follows:

> This case has been filled with emotion, and the Judge has read you an instruction that your decision is not to be based on passion. Your decision is to be based on the facts that came from this witness stand. **Ladies and gentlemen, there has still been a lot of emotion in this case, and I don't think you can disregard the emotion you heard from the witness stand.**
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> * * *
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> This baby was shaken to death having been sexually assaulted, and ladies and gentlemen, **don't try to understand it. Don't try to figure out how it could have happened. Just know what did happen and render your verdict of guilty of capital murder because that's what this man is over there for doing that to this child.**
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> * * *
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> The evidence in this case is more overwhelming that [sic] any I've ever been involved in.

* * *

If you use your good, God-given common sense and listen and listen to what's going on, it is an insult to your intelligence for him to expect you to believe what he just told you while ago. He must think y'all fell off some turnip truck out here on the street before you got up here. **It's ludicrous for you to believe what he told you. I mean, the deputies, the coroner, everybody told you what was wrong with that child's rectum, her anus. And they told you what caused it. It's overwhelming.**

* * *

Continue to lie and protect himself. Tell just enough to make the physical facts fit what he's going to try to say, but, folks he couldn't explain the sexual battery. They asked him over and over and over again in that tape, and he kept saying, **"I can't explain it. I don't know. I just can't explain how that happened." There ain't no other way to explain it than to admit that he committed sexual battery, ladies and gentleman. No other way.** I tell you I've been prosecuting up here for fifteen years, and I've seen confessions and statements. I have never seen a more incriminating statement from a person trying to deny that they committed a crime in my life. Never.

* * *

They ask him did he do it, and I couldn't believe this when I heard it. Says how do you explain the damage that was done to her rear end. He said, "I can't explain it. I don't know." Do you think you've done it. And he said and I quote, "I don't think I did it. I don't recollect doing it. I don't remember doing it." Folks, if you hadn't done that, you'd be saying, hell, no. I didn't do it. You wouldn't be not recollecting doing it or not remembering doing it or not thinking you did it. That ain't reasonable. That ain't common sense. Ladies and gentlemen, I submit to you what happened out there that night was very simple. **Now, I'm not making any accusations. I don't know if anything had ever happened with that child before, but that night he got carried away or something, and he hurt that child more than he intended to in this sexual battery.** He hurt her. You heard him talking about how she was injured in her rectal area, and what does a child do - - what's the only defense an infant baby has got when something like that happens to them? They scream. They don't just cry folks. They scream in pain. **When they're in pain, they scream. And what's he going to do then? She's screaming. He's injured her. Stop her. I got to stop her from screaming. Well, he stopped her all right. She ain't screaming now.**[10]

[10] This is a clearly an improper "back door" argument concerning the felonious child abuse allegation–which was dropped from the indictment prior to trial. Further, the prosecutor infers that an intentional

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> Even the slightest penetration is sufficient to warrant a conviction. And my goodness, he [Petitioner's counsel] wants to ask you why they didn't look for a condom. Do y'all actually think that somebody that would commit this crime would take the time and safety to put on a condom to do it. That's an insult, folks. An insult to you. Reasonable. Common sense. It's not that hard.

T. at pp. 610-12, 622-27 (emphases added). Petitioner's counsel did not object to any of the objectionable argument set forth therein, which appealed to passion, prejudice, and emotion and utilized "evidence" that was not in the record.

2. Petitioner's Constitutional Rights Were Violated

When examining challenges to improper prosecutorial argument, "[t]he relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Viewing the improper argument cited above, it is clear that the State's closing argument offends this standard. Without question, the prosecutor crossed the line time and time again in his wholly improper closing argument during the guilt phase of the trial. The prosecutor included repeated appeals to emotion and bias, continuously **encouraging the jury to not try to determine what happened but to just convict the Petitioner.** The prosecutor also encouraged jurors to disregard the court's instruction to not consider the case based upon emotion. Finally, the closing argument relied upon information that was not in the record; information that appears to have been made up by the prosecutor on the spot. For instance, the prosecutor alluded to prior incidents of sexual abuse of Chloe by Petitioner, when there was absolutely no evidence of that whatsoever.

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killing occurred, when there was no evidence of such and this issue was not before the jury.

It is beyond question that this wholly improper closing argument so infected Petitioner's trial with unfairness as to make the resulting conviction a denial of due process. The prosecutor was permitted–due to the lack of admonition from the trial judge and objection by Petitioner's trial counsel–to repeatedly poison the jury with arguments that appealed to passion, emotion, and prejudice. He encouraged the jurors to not follow the law, and to disregard the instructions of the court. He belittled Petitioner, Petitioner's counsel, and even the jurors, by use of inflammatory language. Such behavior has no place in our system of justice. This closing argument constitutes a denial of Petitioner's right to a fair trial and to due process, and Petitioner is entitled to relief.

In the alternative, Petitioner's trial counsel were ineffective for failing to object to this clearly improper closing argument, which amounted to prosecutorial misconduct. In *Hofbauer*, 228 F.3d 689 (6th Cir. 2000), the petitioner claimed that his trial counsel was ineffective for failing to object to multiple instances of prosecutorial misconduct during the trial. The court first noted that on several occasions it had found that "a counsel's failure to object to prosecutorial misconduct constitutes defective performance when that failure is due to [anything other than] reasonable trial strategy." *Id.* at 702 (internal citations omitted). Finding that counsel's failures to object was not due to reasonable trial strategy, the court held that counsel's performance was deficient. *Id.* at 709. *See also Hodge v. Hurley*, 426 F.3d 368 (6th Cir. 2005) (counsel in a child rape case held to be in ineffective for failing to object to improper closing argument by prosecutor). Just as in those cases, there was no valid strategic reason for Petitioner's counsel not to object to this patently inflammatory and prejudicial argument.

The ineffective assistance of counsel involved in this claim involves a failure to comply with both versions of the ABA Guidelines. The 1989 ABA Guideline involved here is 11.7.3

(Objection to Error). *See* Appendix - D, attached.. The 2003 ABA Guidelines involved is10.8 (Duty to Assert Legal Claims). *See* Appendix - E, attached. Clearly, Petitioner's trial counsel failed to perform up to the standards of the ABA Guidelines, standards which the United States Supreme Court has long held are guides to determining the reasonableness of counsel's performance.

3. There is No Limitation of Relief

The Mississippi Supreme Court's adjudication of this issue involved decisions that were both contrary to and an unreasonable application of clearly announced federal law. That court examined this claim under a far too lenient standard than that which is imposed by United States Supreme Court precedent such as *Darden* discussed above. The Mississippi Supreme Court reviewed the prosecutor's closing argument through the lens of attorneys being given "broad latitude" in closing argument. *Havard I*, 988 So.2d at 791. The sole limitation on that latitude, the Court held, was the proscription of arguing "an impermissible factor." *Id.*[11]

To begin, the Mississippi Supreme Court's analysis was entirely too narrow. Prosecutors' closing arguments are not without boundaries, and those boundaries are more extensive than the few set out by that Court. Prosecution arguments must comport with due process and cannot include arguments that are based on evidence not in the record or appeals to passion or prejudice. Simply put, prosecution arguments that infect the fairness of the trial are

[11] It is worth noting that the Mississippi Supreme Court held that this claim was procedurally barred, but went on to address it on the merits. *Havard I*, 928 So.2d at 791. However, there is no procedural bar because the Mississippi Supreme Court does not consistently apply that bar to instances of prosecutorial misconduct. In the alternative, there is no procedural bar because Petitioner's trial counsel were ineffective for failing to object, as described herein.

not permitted. One need only read the closing argument from Petitioner's trial to see how the State repeatedly crossed the boundaries of permissible argument.

The Mississippi Supreme Court's decision also involved an unreasonable determination of the facts in light of the trial record. That court held that arguments about the alleged sexual battery on the night in question were "a permissible inference" from the State's evidence. However, the argument with which Petitioner was taking issue was the suggestion–which had no evidentiary basis whatsoever–that Petitioner had sexually abused Chloe on prior occasions. The Court did not address this issue, which clearly involved inflammatory and prejudicial accusations, but simply said that the argument was permissible in light of the entirety of the record, that any error was harmless, and because the trial court instructed the jury that attorneys' arguments were not evidence. *Id.* This factual determination is unreasonable, because it completely fails to take into account the specific argument at issue–argument that was extremely prejudicial and based on absolutely no evidence.

Petitioner also raised this issue during his post-conviction proceedings. The court held that the claim was barred under the doctrine of res judicata, since it had been denied on direct appeal. *Havard II*, 988 So.2d at ¶¶ 69-70. Accordingly, the above analysis also applies to the post-conviction adjudication of the Mississippi Supreme Court.

The alternative ground of ineffective assistance of counsel for failing to object to the improper argument was raised by Petitioner on both direct appeal and during state post-conviction proceedings. The Mississippi Supreme Court, however, failed to address the merits of this claim. To the contrary, that court in its direct appeal opinion, acted as if the claim had not been raised. *Havard I*, 928 So.2d at 791 ("Were Havard now alleging ineffective counsel for

failure to object to this statement, our analysis here would be different.”). Accordingly, this Court’s review of this alternative ground is de novo.

4. Relief Requested

The prejudicial closing argument that the State presented at trial violated Petitioner’s constitutional rights. Accordingly, Petitioner prays that this Court will grant the writ in order to relieve him from his unconstitutional conviction and sentence.

CLAIM III: PETITIONER’S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE TRIAL COURT’S ADMISSION OF IMPROPER VICTIM IMPACT TESTIMONY OR, ALTERNATIVELY, BY HIS TRIAL COUNSEL’S FAILURE TO OBJECT TO IMPROPER AND INFLAMMATORY VICTIM IMPACT TESTIMONY

1. Facts

During the sentencing phase of the trial, the State called one victim impact witness, Chloe’s grandmother, Lillian Watson. Her testimony concluded as follows:

> Q: Mrs. Watson, the jury has to make a determination in this case, but if you would tell us in your view, what do you see as an appropriate outcome from this case?
>
> A: I am not a vengeful person. My father was a minister, and I was always taught to not be vengeful. I was also taught an eye for an eye as I know most of you were. I am not here for revenge for Maddie [Chloe], but I am here for justice for Maddie. Justice means her life was taken, and there’s only one way that we can find justice for Maddie. A life for a life.

Tr. at 661-62. Petitioner’s trial counsel did not object to this wholly improper and inflammatory testimony. Petitioner was sentenced to death by the jury.

2. Petitioner’s Constitutional Rights Were Violated

In *Booth v. Maryland*, 482 U.S. 496, 507-09 (1987), the United States Supreme Court held that the admission of victim impact evidence in the penalty phase of a capital trial was a

violation of the Eighth Amendment and thus prohibited. This prohibition included two types of evidence: (1) the personal characteristics of the victim and the impact of the crimes on the victim's family; and (2) family members' opinions and characterizations of the crime, the defendant, and the appropriate sentence. *Id.* The evidence that gave rise to the prohibition against this second type of evidence in *Booth* was testimony from the victim's family members such as "[no one] should be able to do something like that and get away with it" and "[I don't] feel that the people who did this could ever be rehabilitated." *Id.* at 508. The Court held that "formal presentation" of such evidence "can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." *Id.*

Four years later, in *Payne v. Tennessee*, 501 U.S. 808, 827 (1991), the Supreme Court overruled part of *Booth*, holding that the Eighth Amendment does not prohibit evidence of the personal characteristics of victims and the impact of the crimes on victims' families. The Court explicitly noted, however, that its holding did not affect *Booth's* prohibition against evidence of family members' opinions and characterizations of the crime, the defendant, and the appropriate sentence. *Id.* at 830 n.2.

Circuit court decisions interpreting *Payne* have uniformly confirmed that *Booth's* prohibition against this second type of evidence remains good law. *See Humphries v. Ozmint*, 397 F.3d 206, 217 (4th Cir. 2005) (en banc); *United States v. Bernard*, 299 F.3d 467, 480-81 (5th Cir. 2002); *Woods v. Johnson*, 75 F.3d 1017, 1038 (5th Cir. 1996); *Parker v. Powersox*, 188 F.3d 923, 931 (8th Cir. 1999); *Hain v. Gibson*, 287 F.3d 1224, 1238-39 (10th Cir. 2002).

In *Bernard*, the Fifth Circuit Court of Appeals considered several aspects of victim impact testimony introduced during the sentencing phase of a federal double murder trial. Several family members of the victims were presented to offer victim impact testimony. These family members' testimony included, among other things, a description of the religious beliefs and practices of the two victims; that religion had carried the family members through the difficult times following the deaths of the victims; and a direct appeal to the defendants to convert to Christianity so that their sins could be forgiven. 299 F.3d at 478-79.

The Fifth Circuit held that the first two aspects of this testimony were permissible, as they had bearing on the personal characteristics of the victims and the impact of the murders on the family of the victims. *Id.* As described above, such testimony is explicitly permitted by *Payne*. However, the court held that the third aspect of the testimony (the appeal for religious conversion) was not proper, as it did not describe the victims or "relate to the harm inflicted by the crime." *Id.* at 479. While finding that the testimony was improper, the court held that its introduction did not affect the defendants' substantial rights, as the jury was not encouraged to use a religious standard to determine the sentence to be imposed. *Id.* at 480. (citing, in contrast, *Sandoval v. Calderon*, 241 F.3d 765, 775-80 (9th Cir. 2000) (granting habeas relief to the petitioner when the State's arguments in favor of the death sentence appealed to Biblical principles)).

In this case, Mrs. Watson's victim impact testimony undoubtedly falls within the second type of evidence prohibited by *Booth* and its progeny. The conclusion of that testimony did not describe the personal characteristics of the victim or the impact of the crimes on the victim's family as permitted by *Payne*. Rather, the testimony constituted Mrs. Watson's opinions and

characterizations of the crime, the defendant, and the appropriate sentence, all of which are expressly prohibited by *Booth*, *Payne*, and their progeny. She impermissibly stated her opinion that the only appropriate punishment was death ("Justice means her life was taken, and there's only one way that we can find justice for Maddie. A life for a life."). Demands by a victim's family for a specific sentence are not constitutionally permissible.

Furthermore, the language Mrs. Watson used (e.g. "an eye for any eye" and "[a] life for a life") was even more direct and damaging than that at issue in *Booth*, the admission of which the Supreme Court held was a violation of the Eighth Amendment. Furthermore, the language used was a direct appeal for the jury to use a religious standard to reach its verdict as to Petitioner's sentence. This is unquestionably improper under *Booth* and *Payne* as well as Fifth Circuit precedent. *See Bernard*, 299 F.3d at 480 (stating that testimony or argument that encourages the jury to use religious standards to determine the sentence to be imposed is plain error and in violation of substantial constitutional rights). Without question, the victim impact testimony offered by Mrs. Watson violated Petitioner's Eighth Amendment rights.

Alternatively, Petitioner's counsel rendered ineffective assistance of counsel by failing to object to the patently inadmissible, inflammatory, and prejudicial victim impact testimony offered by Mrs. Watson. Both versions of the ABA Guidelines require defense counsel to object to improper evidence and to preserve trial error. *See* ABA Guidelines 11.7.3, 11.8.1, 11.8.2, and 11.8.5 (1989); ABA Guidelines 10.8 and 10.11 (2003). The Commentary to ABA Guideline 10.8 (2003) states: " 'One of the most fundamental duties of an attorney defending a capital case at trial is the preservation of any and all conceivable errors for each stage of appellate and post-conviction review. Failure to preserve an issue may result in the client being executed even

though reversible error occurred at trial.'" (quoting Stephen B. Bright, *Preserving Error at Capital Trials*, THE CHAMPION, Apr. 1997, at 42-43). Similarly, Petitioner's counsel had a duty to be familiar with the constitutional limits of victim impact testimony. *See Ozmint*, 366 F.3d at 272 (holding that trial counsel were ineffective for failing to object to impermissible victim impact testimony).

Petitioner's counsel in this case rendered ineffective assistance of counsel with respect to the introduction of Mrs. Watson's victim impact testimony. As set forth above, this testimony was patently unconstitutional and should not have been admitted. Petitioner's trial counsel, however, failed to object to the testimony. This means that they either (a) were not familiar with the dictates of *Booth*, *Payne*, and their progeny or (b) were familiar with that case law and failed to offer an objection that clearly should have been sustained. In either event, this performance constitutes objectively unreasonable ineffective assistance of counsel. Furthermore, there is no question that this ineffectiveness prejudiced the Petitioner, as the jury, which struggled to render its decision on the death sentence, no doubt considered the impassioned, and improper, plea of Chloe's grandmother that justice could only be served by Petitioner being sentenced to death in accordance with the Biblical principles of "an eye for an eye" and "a life for life." Accordingly, the writ should also be granted on this claim because of the ineffective assistance rendered by Petitioner's trial counsel.

The ineffective assistance of counsel involved in this claim involves multiple failures to comply with both versions of the ABA Guidelines. The 1989 ABA Guidelines involved here include: 11.7.3 (Objection to Error), 11.8.1 (Sentencing Phase Obligations); 11.8.2 (Sentencing Options); and 11.8.5 (Meeting the Prosecutor's Case During Sentencing Phase). *See* Appendix -

D, attached. The 2003 ABA Guidelines involved include: 10.8 (Duty to Assert Legal Claims) and 10.11 (Defense Case Concerning Penalty). *See* Appendix - E, attached. Clearly, Petitioner's trial counsel failed to perform up to the standards of the ABA Guidelines, standards which the United States Supreme Court has long held are guides to determining the reasonableness of counsel's performance.

3. There is No Limitation of Relief

On direct appeal, Petitioner challenged the victim impact testimony as exceeding that allowed by *Booth*, *Payne*, and their progeny. The Mississippi Supreme Court, however, held that the testimony was permissible, that any error was cured by the trial court's instruction that the jury was not to be swayed by "passion, prejudice or sympathy,"[12] and that any error also did not prejudice the jury and result in a trial that was fundamentally unfair. *Havard I*, 928 So.2d at 791-93. The Mississippi Supreme Court's decision on this issue is contrary to, or an unreasonable application, of clearly established federal law as well as an unreasonable determination of the facts in light of the evidence presented at Petitioner's trial.

To begin, the Mississippi Supreme Court's decisions about the applicable law are both contrary to and an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States. This is the case because the Mississippi Supreme Court effectively held that *Payne* completely overruled *Booth*, which, as set forth above, it clearly did not. While the Supreme Court in *Payne* did permit victim impact testimony that had previously been prohibited by *Booth* (namely, evidence of the personal characteristics of victims and the impact of the crimes on victims' families), it explicitly stated that *Booth's* prohibition against

[12] An instruction that the prosecution, in closing argument, told the jury to ignore.

evidence of family members' opinions and characterizations of the crime, the defendant, and the appropriate sentence remained undisturbed by the *Payne* decision. *See Payne*, 501 U.S. at 830 n.2. *See also id.* at 833 (O'Connor, J., concurring) and *id.* at 835 n.1 (Souter, J., concurring).

The Fifth Circuit Court of Appeals, along with many sister circuits, has held that the prohibition of evidence of family members' opinions and characterizations of the crime, the defendant, and the appropriate sentence remain in effect post-*Payne*. *See United States v. Bernard*, 299 F.3d 467, 480-81 (5th Cir. 2002); *Woods v. Johnson*, 75 F.3d 1017, 1038 (5th Cir. 1996); *Humphries v. Ozmint*, 397 F.3d 206, 217 (4th Cir. 2005) (en banc); *Parker v. Powersox*, 188 F.3d 923, 931 (8th Cir. 1999); *Hain v. Gibson*, 287 F.3d 1224, 1238-39 (10th Cir. 2002). Contrary to these precedents, the Mississippi Supreme Court stated on Petitioner's direct appeal that "opinions of the victim's family members as to the crimes and the defendant" are permissible victim impact testimony. *Havard I*, 928 So.2d at 792. The opinion goes on to hold that the testimony at issue was proper, which is contrary to any reading of *Booth*, *Payne*, and their progeny, as described above.

Finally, the Mississippi Supreme Court cites *Bernard*, which is discussed above, for the proposition that any error arising from Mrs. Watson's testimony was cured by the court's instruction. However, the Fifth Circuit's decision in *Bernard* cannot be reasonably interpreted to condone the victim impact testimony at issue here. To the contrary, the *Bernard* court noted that a circumstance such as this (where a family member of the victim urges the jury to consider religious reasons for sentencing a defendant to death) would constitute a clear violation of Eighth Amendment rights. In addition, *Bernard* is inapposite to the extent that it holds that a curative

instruction dispensed with any problems caused by the testimony, since the family members in *Bernard* did not demand a specific sentence of death as Mrs. Watson did here.

The Mississippi Supreme Court's decision also involves an unreasonable determination of the facts in light of the evidence presented at Petitioner's trial. The Mississippi Supreme Court stated on direct appeal that Mrs. Watson explicitly stated that she was not seeking revenge, and that her "entire testimony, taken in context, was not designed to incite the jury." *Havard I*, 928 So.2d at 792. This finding is quite surprising, since even the State conceded in its brief on direct appeal that the testimony was erroneously admitted. *See* State's Direct Appeal Brief at p. 70. Furthermore, the court held that Mrs. Watson's testimony, even if impermissible, was not such to prejudice the jury and result in a trial that was fundamentally unfair. *Id.* This analysis, however, ignores the context within which Mrs. Watson's testimony was presented. Mrs. Watson was the sole witness called by the State during the sentencing phase of the trial. While the bulk of her victim impact testimony may have been permissible under *Payne*, the portion of that testimony that is at issue concluded her emotionally charged testimony. Mrs. Watson was able to cap her entire testimony with a demand for a specific punishment. Even the State acknowledges that this was impermissible. The fact that she prefaced this request for vengeance with the hollow statement that she was "not a vengeful person" is irrelevant. Furthermore, the request was made in the context of a discussion of Mrs. Watson's belief in Biblical principles such as "an eye for an eye" and "a life for a life." This testimony was highly inflammatory and designed to urge the jurors to impose a specific sentence by using religious criteria. To hold that this testimony was permissible, not designed to incite the jury, and not prejudicial to the Petitioner defies logic, and is unreasonable.

Petitioner also raised this claim during his state post-conviction proceedings. *See* Petition for Post-Conviction Relief With Exhibits at pp. 70-78. The Mississippi Supreme Court noted that this claim had been presented by Petitioner on direct appeal, and that the court had rejected the claim. *Havard II*, 988 So.2d at ¶72. The Mississippi Supreme Court accordingly held the claimed barred from post-conviction review by the doctrine of *res judicata*, since Petitioner had not presented any new evidence or cited a sudden reversal of law. *Id.* Since the Mississippi Supreme Court's decision on this claim relied entirely upon its decision in *Havard I*, the above arguments are incorporated by reference with respect to the denial of post-conviction relief. For the reasons set forth above, this decision was contrary to, as well as an unreasonable application of, clearly announced federal law, and also an unreasonable determination of the facts in light of the evidence presented at trial.

With respect to Petitioner's alternative ground of ineffective assistance of counsel as to this claim (for failure to object), the Mississippi Supreme Court noted that this ground was raised in Petitioner's Brief on direct appeal. *Havard I*, 928 So.2d at 793. The Court, however, failed to decide the ineffective assistance of counsel claim on its merits. *Id.* Accordingly, this Court's review of that aspect of this claim is de novo.

4. Relief Requested

For the reasons set forth above, Petitioner is entitled to relief from his unconstitutional sentence of death, which was rendered by a jury that heard an impermissible demand for a death sentence from the victim's grandmother. The introduction of that testimony alone is sufficient to warrant relief, but relief is also warranted due to the failure of Petitioner's trial counsel to object

to this patently unconstitutional, improper, and prejudicial testimony. Accordingly, the writ should be granted.

CLAIM IV: PETITIONER'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED BY HIS COUNSEL'S FAILURE TO ADEQUATELY INVESTIGATE AND PRESENT MITIGATION EVIDENCE

1. Facts

At the sentencing phase of Petitioner's trial, defense counsel called just two witnesses, Cheryl Harrell and Ruby Havard. The testimony of both witnesses was brief, comprising a mere eight pages. T. 664-671. Cheryl Harrell testified that she was Jeffrey's mother and that she and Jeffrey's father were not married. T. 665. Cheryl said that Jeffrey had lived with her until he was 13 when he moved to Natchez to live with her parents. T. 666. Cheryl also testified that Jeffrey loved children and that she loved Jeffrey and did not want him to be killed. T. 667-668. Ruby Havard testified that she was Jeffrey's grandmother. T. 669. Ruby also said that Jeffrey was a loving person who loved children. T. 671.

Counsel's argument was about what one would expect given the near total lack of evidence presented in mitigation. The entire argument was less than two full pages and was perhaps more prejudicial than helpful to Havard. Counsel misstated the law when he informed the jury that the age of the victim was an aggravating circumstance–when, in fact, the State was not pursuing that aggravator. T. 677. Not surprisingly, given the virtual absence of mitigating evidence, counsel barely referred to mitigating circumstances. He mentioned the obvious fact that a mitigating circumstance was something that would lead the jury "to lessen the impact of any aggravating circumstances you may find," T. 677, and also mentioned that the jury could

consider the testimony of Cheryl Harrell and Ruby Havard in reaching a decision. T. 678. Although he stated that the jury could show mercy, counsel could not articulate a single reason why the jury should find that the balance of mitigating circumstances and aggravating circumstances tipped in favor of life.

The miserable penalty phase performance was a direct result of counsel's failure to take minimal steps to prepare for the penalty phase. Counsel failed to request investigative or expert assistance to develop mitigating evidence, ignored leads gathered from a fact investigator, and did not even interview the two witnesses who were actually called to testify at the penalty phase.

According to Jeffrey's mother, Cheryl Harrell:

> Mr. Sermos didn't interview me prior to giving testimony and gave me no idea what kind of questions he would ask. I had no clue what to say, I was totally unprepared and nervous about testifying.

(Appeal Exhibit 5,[13] Paragraph 10, Affidavit of Cheryl Harrell). Mrs. Havard had a similar experience:

> Mr. Sermos told me a few days before trial that I would be subpoenaed to be a witness at the sentencing phase. He never told me what was involved, never interviewed me, I didn't know what to do. I was nervous and didn't know what was going to happen, I really didn't know what to say other than we loved him. I tried to ask Mr. Sermos questions about what was going to happen but he just ignored me.

(Appeal Exhibit 6, Paragraph 11, Affidavit of Ruby Havard).

Trial counsel failed to interview any of Petitioner's family members or friends. (See Appeal Exhibit 7, Paragraph 8, Affidavit of Marilyn Cox; Appeal Exhibit 8, Paragraph 14,

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[13] These exhibits were attached to the direct appeal brief and were also attached to the petition for post-conviction relief.

Affidavit of William Havard; Appeal Exhibit 9, Paragraph 10, Affidavit of Daniel Bradshaw; Appeal Exhibit 11, Paragraph 9 Affidavit of Australia Bradshaw; Appeal Exhibit 12, Paragraph 5, Affidavit of Etta White).

Counsel's appointed investigator identified a potential mitigation witness and provided a report on this witness. According to Don Evans:

> In the course of my investigation of this case I was informed of a potential mitigation witness. The witness had two young daughters that Jeffrey had babysat for.

(Appeal Exhibit 13, Paragraph 4, Affidavit of Don Evans). There is no indication in the record or in trial counsel's file that this witness was ever interviewed. Indeed, trial counsel's file contains no interviews with potential mitigation witnesses, no lists of potential witnesses, and no social history records. (See Appeal Exhibit 3, Paragraph 4, Affidavit of Gus Sermos with inventory of trial file attached). A reliable investigation, however, would have uncovered a wealth of evidence of the chaos, abuse, and neglect that persisted throughout Petitioner's life. Counsel also could easily have found evidence of Petitioner's adaptability to incarceration.

Jeffrey Havard was born into a broken home on November 11, 1978. His mother and father were not married. In fact, they were not even dating anymore. His mother, Cheryl, had broken up with his father, Mark Holbrook, when she learned that Mark was using drugs and had gotten another girl pregnant. Mark wanted Cheryl to have an abortion. Jeffrey's father "has never been involved in Jeffrey's life he has only met him a couple of times; he is now in Federal Penitentiary in Oklahoma." (Appeal Exhibit 5, Paragraph 2, Affidavit of Cheryl Harrell).

Cheryl was living at home with her parents and her father didn't want her to keep the baby. (Appeal Exhibit 8, Paragraph 3, Affidavit of William Havard). Before Jeffrey was born,

there was violence in the Havard household. Jeffrey's aunt, Marilyn Cox recounts: I remember when I was a child my father Billy used to beat my mother Ruby. He broke her nose once. (Appeal Exhibit 7, Paragraph 3, Affidavit of Marilyn Cox).

William ("Billy") Havard also had a rocky relationship with both his daughter Cheryl and his son David. Billy would hit Cheryl and fist fight with David. (Appeal Exhibit 7, Paragraph 4, Affidavit of Marilyn Cox). David Havard was killed in a car wreck two weeks after Jeffrey was born. Billy and Ruby Havard thought "the Lord sent grandbaby Jeffrey to fill that part of their life." (Appeal Exhibit 5, Paragraph 4, Affidavit of Cheryl Harrell) Cheryl and Jeffrey lived with Billy and Ruby Havard for about a year until she met her husband Gordon and all three of them moved to LaPlace, Louisiana.

Jeffrey grew up believing Gordon Harrell was his father. It was not until the Havards told Jeffrey that Gordon was not his real father that he found out. (Appeal Exhibit 5, Paragraph 5, Affidavit of Cheryl Harrell). According to Cheryl:

> It was hard raising Jeffrey, we were new to parenting. We were harder on Jeffrey than the other children, he did get spankings. The spanking is something we have changed with our other children.

(Appeal Exhibit 5, Paragraph 6, Affidavit of Cheryl Harrell).

Ruby and Billy Havard saw Cheryl's problems as much greater than being new to parenting. Both Ruby and Billy remember Gordon as having a temper. (Appeal Exhibit 6, Paragraph 4, Affidavit of Ruby Havard; Appeal Exhibit 8, Paragraph 8, Affidavit of William Havard) Billy and Ruby remember Cheryl and Gordon's relationship as being fraught with conflict and filled with violence. Billy stated:

> Cheryl was good to Gordon but he would whip up on her. I remember Cheryl once asked us to come get her because Gordon was beating on her. I found her a place to live in Natchez and my wife went to fetch her from Laplace. Cheryl only stayed about a week then Gordon came to take her back with him and she went. Gordon was the driver of the family, I don't know why she took it.
>
> Gordon had a temper, one time he kicked in my front door and I had to call the Police and they asked him to leave.

(Appeal Exhibit 8, Paragraph 7, 8, Affidavit of William Havard).

Ruby remembers that Cheryl "came to our house once when her face was badly beaten." Ruby describes Gordon as "physically abusive towards Jeffrey." "I remember when Jeffrey came to visit us once his body was black and blue in bruises from Gordon whipping him." (Appeal Exhibit 6, Paragraph 4, Affidavit of Ruby Havard). Cheryl's sister Marilyn recalls the abuse as well:

> Gordon beat Jeffrey as a child. My mother Ruby told me she found marks on Jeffrey's body. When I visited them in Laplace when Jeffrey was two or three years old I saw bruises on Jeffrey's back and his behind.

(Appeal Exhibit 7, Paragraph 7 Affidavit of Marilyn Cox).

The situation in the Harrell house was so violent that Billy "sent Ruby down there to bring Jeffrey back by any means possible." (Appeal Exhibit 8, Paragraph 9, Affidavit of William Havard). Cheryl said that Jeffrey came to live with Billy and Ruby because of "violence in the schools." (Appeal Exhibit 5, Paragraph 8, Affidavit of Cheryl Harrell). However, Billy and Ruby say that it was their concern about Jeffrey's safety that prompted Jeffrey's move to Natchez. Ruby states:

> Cheryl was concerned when Jeffrey was growing up, she was worried he would start to fight back against Gordon and cause more trouble. Jeffrey had asked Cheryl if he could come live with me and my husband.

> I went down to fetch Jeffrey, it took me all day to persuade Gordon to let him go, he like the control he had over Jeffrey.

(Appeal Exhibit 6, Paragraph 6,7, Affidavit of Ruby Havard).

Ruby and Billy, perhaps in an attempt to make up for the abuse Jeffrey suffered at the hands of Gordon, gave him many material things and "spoiled" Jeffrey. Cheryl remembers:

> Jeffrey was always rewarded by them and never punished. He was their favorite, they would do things for him they wouldn't do for the other grandchildren. They never gave him boundaries Jeffrey would do something bad and my mom, Ruby would keep it a secret.

(Appeal Exhibit 5, Paragraph 9, Affidavit of Cheryl Harrell).

Jeffrey did not do well in school and he dropped out. When he was 16, Jeffrey enrolled in the Youth Challenge Program at Camp Shelby. He did very well there and completed the program, got his GED and was chosen as a peer mentor. (Appeal Exhibit 6, Paragraph 9, Affidavit of Ruby Havard; Appeal Exhibit 10, Youth Challenge Certificate; *see also* PCR Exhibit 13, Affidavit of Daniel Bradshaw). According to Jeffrey's friend Daniel Bradshaw, the structured environment at Camp Shelby was tough but Jeffrey thrived there:

> Camp Shelby was tough, we'd run 5 miles a day, eat only what they allowed us to eat. I didn't like it, I liked my freedom but Jeff really enjoyed it, he went back to it after graduation.

(Appeal Exhibit 9, Paragraph 5, Affidavit of Daniel Bradshaw).

In fact, Daniel's fondest memory of Jeffrey is at Camp Shelby graduation. Daniel remembers, "None of Jeff's family came so he came out for a meal with my family in Hattiesburg; this is what really kicked off our friendship." (Appeal Exhibit 9, Paragraph 6, Affidavit of Daniel Bradshaw). Jeffrey had been abandoned by his whole family -- the biggest accomplishment of his life and they did not come to the graduation to share in the celebration.

Despite the violent abuse that he experienced as a child, Jeffrey is remembered fondly by family members and friends as a kind, helpful and caring person who loved children. Jeffrey's co-worker Etta White describes Jeffrey:

> Jeffrey is super, he has a great personality and is a good work colleague. When Jeffery got a different job working offshore on a barge he would still drop by my house when he saw me working out in my yard and ask if he could help me in any way.

(Appeal Exhibit 12, Paragraph 4, Affidavit of Etta White).

Jeffrey's friend Daniel Bradshaw was shocked when Jeff was arrested. Daniel had always known Jeffrey to love kids:

> What shocked me the most about all this is Jeff loves kids. He would keep my sisters, one was just born and the other was 5/6 yrs old, he would change their diapers all the time. Jeff was at the hospital when my son was born, he would take care of him when me and my wife went out.

(Appeal Exhibit 9, Paragraph 9, Affidavit of Daniel Bradshaw). Daniel's wife, Australia, remembers that Jeffrey came up with the name for her son Dalton and that Jeffrey had babysat for Dalton. (Appeal Exhibit 11, Paragraph 8, Affidavit of Australia Bradshaw).

All of this evidence would have made powerful testimony and none of it would have been hard to find. Indeed, Cheryl Harrell and Ruby Havard testified at the sentencing phase of Jeffrey's trial. Billy Havard, Marilyn Cox, Etta White, and Daniel and Australia Bradshaw all live in Natchez. All these people who love Jeffrey were available to testify at his trial.

Competent counsel would have also presented some expert testimony about the consequences of growing up in homes filled with abuse, neglect and conflict are dire. Social Worker Adriane Dorsey-Kidd reviewed Jeffrey Havard's personal records and interviews with family members, co-workers and friends and rendered the following opinion:

> Jeffrey's family/background history has several themes which impacted his life. The first being the absence of a strong parental system. His father is absent from his life and his mom marries a man who is abusive. He did not perceive his mom helping to stop the abuse of him by his stepfather. He claims his grandparents as his "real" parents. However, his relationship with them was not harmonious. The second being Jeffrey had several male figures in his life. All male figures in his life seem to desert him. His biological father terminates the relationship with his mother and he does not see him until he is age fifteen (15); his stepfather is abusive; his relationship with his stepfather transfers to his relationship with his maternal grandfather and is also abusive and full of conflict; his step-grandfather dies and his contact with his uncle is infrequent. Jeffrey as well as family and friends reflect that he had feelings of being a "castaway". The third being physical abuse. Children who are victims of abuse and/or grow up in homes where abuse occurs may have difficulty developing loving, secure attachments or having their physical need met for comfort, stimulation and affection.

(Appeal Exhibit 14, Paragraph 13, Affidavit of Adriane Dorsey-Kidd).

As he got older, Jeffrey began to sleepwalk and suffer from blackouts and flashbacks. According to Ms. Dorsey-Kidd, "Children who are victims of abuse or in homes where abuse occur show symptoms of sleepwalking, blackouts and flashbacks as means of avoidance and escape." (Appeal Exhibit 14, Paragraph 24, Affidavit of Adriane Dorsey-Kidd). Jeffrey also began to use drugs and alcohol. The addition of the drugs and alcohol only made his troubled life more chaotic. According to Ruby Havard:

> I know Jeffrey fooled with drugs but I don't know what kind. My husband would confront him about it and Jeffrey would say ugly things like he wished he had never come to live with us. Jeffrey would act up, argue with us and say ugly things but we never had to chance to punish him because he would get in his truck and leave. He recently told me that he was sorry for the way he acted up, he said he wasn't used to being treated right he'd always come second best and when my husband and I put him first he didn't know how to handle it.

(Appeal Exhibit 6, Paragraph 10, Affidavit of Ruby Havard).

Adriane Dorsey-Kidd points out:

> Generations of Jeffrey's family suffer from alcohol abuse – stepfather, biological father. Substance abuse is often a result of growing up in a dysfunctional family. Jeffrey may have been attempting to self-medicate.

(Appeal Exhibit 14, Affidavit of Adriane Dorsey-Kidd).

In fact, Ms. Dorsey-Kidd finds that as a result of the poor parenting skills of his care givers and the abuse and neglect that Jeffrey suffered, he now very likely suffers from an Attachment Disorder:

> Jeffrey very likely suffers from an Attachment disorder due to his family's failure to meet Jeffrey's basic physical need or comfort, stimulation and affection. . . . Attachment is the result of the bonding process that occurs between a child and caregiver during the first couple years of the child's life. When this initial attachment is lacking, children lack the ability to form and maintain loving, intimate relationships. They grow up with an impaired ability to trust that the world is a safe place and that others will take good care of them. Without this sense of trust, children believe that they must be hypervigilant about their own safety. Unfortunately, their idea about safety prevents them from allowing others to take care of them in a loving, nurturing manner. They become extremely demanding and controlling in response to their fear. Emotionally they believe that if they do not control their world then they will die. As a result of this attachment disorder Jeffrey has difficulty developing loving and secure attachments. Jeffrey describes himself as having a rotating group of friends.

(Appeal Exhibit 14, Affidavit of Adriane Dorsey-Kidd).

Counsel failed to undertake even minimal steps to investigate their client's life. As a result, the jury knew nothing of Petitioner's life or the difficult circumstances in which he was raised. Moreover, counsel failed to present evidence that despite the hardships that Havard faced, he was well-regarded and even thrived in structured settings. Counsel could have presented compelling evidence that Havard would have adjusted well to incarceration. The presentation of evidence at the penalty phase was so meager that counsel could not refer to any

mitigating evidence in a two page closing argument that failed to address the actual weighing that the jury was instructed to do to decide Havard's fate.

Even with the scant evidence presented, the jury wrestled with its decision. The jury asked questions about his parole eligibility. T. 684. It also asked the trial judge to adjourn for the night. T. 687. Even when the jury returned the next morning, it asked the judge what the consequences would be if it could not reach a unanimous decision. T. 691. The jury, however, eventually decided to render a death sentence.

2. Petitioner's Constitutional Rights Were Violated

"Essential to the rendition of constitutionally adequate assistance … is a reasonably substantial, independent investigation into the circumstances and the law from which potential defenses may be derived." *Lockett v. Anderson*, 230 F.3d 695 (5th Cir. 2000); *Neal v. Puckett*, 286 F.3d 230, 235 (5th Cir. 2002) ("The Sixth Amendment requires defense counsel to conduct a reasonably thorough pretrial inquiry into the defenses that might be offered in mitigation of punishment."); *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991) ("Failing to interview witnesses or discover mitigating evidence relates to trial preparation and not trial strategy."). *See also Lewis v. Dretke*, 355 F.3d 364 (5th Cir. 2003) (counsel ineffective for failing to investigate and present evidence of abusive childhood).

In *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 2536-2537 (2003), the United States Supreme Court found counsel's decision to limit the scope of their investigation deficient and unreasonable. Citing the ABA guidelines, the Supreme Court found that investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating

evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." (emphasis in original) *Id.* at 2537.

The *Wiggins* Court found counsel's investigation deficient and unreasonable in light of the fact that the limited investigation conducted revealed facts of Kevin Wiggins' life that should have been explored and "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses." *Id.* Wiggins' trial counsel presented an expert witness but failed to develop a social history or present details of his life. *Id.* The Court characterized this as a "half-hearted" mitigation case. *Id.* at 2538.

The mitigation case presented for Jeffrey Havard is less than half-hearted. Trial counsel knew something of the instability in Jeffrey's life, that Jeffrey's parents were not married and that he moved out of his biological mother's house and into his grandparents' house, but trial counsel failed to investigate further. Trial counsel failed to talk to family members and friends and find out the details of Jeffrey's life.

In *Williams v. Taylor*, 120 S. Ct. 1495 (2000), the United States Supreme Court found counsel ineffective in part because of the failure to present evidence "of friends, neighbors and family . . . who would have testified that he had redeeming qualities." *See id.* at 1525 (O'Connor, J., concurring). In *Neal v. Puckett*, 286 F.3d 230 (5th Cir. 2002), the United States Court of Appeal for the Fifth Circuit reviewed a Mississippi death penalty case. The Court noted "Neal's evidence of mitigating factors presented during sentencing consisted of the testimony of only two witnesses: Neal's mother, who gave an overview of Neal's troubled background; and a psychologist, Dr. Dana Alexander, who testified about Neal's mental and emotional difficulties.

Reviewing this testimony does not take long." *Neal* at 237. The mother's testimony was nine pages and the doctor's twenty-four. *Id.* At Havard's trial it was less than eight pages. T. 664 - 71.

The Fifth Circuit found the most troubling aspect of the evidence presented on collateral review was that trial "counsel never contacted any of the other people (with the exception of Neal's mother) who have provided the additional testimony we now have before us, and which would have added to and developed the skeletal evidence before the jury." 286 F.3d at 240. "Because of the extent to which these available materials could reasonably have been expected to augment Neal's case, we conclude that his trial counsel was deficient in failing to investigate, gather, and consider it for purposes of presentation at Neal's sentencing hearing." *Id.*

Given the case law and the wealth of mitigating evidence that counsel did not seek or present, counsel were deficient. Under *Strickland*, Petitioner also "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. *Strickland* defines "reasonable probability" as a "probability sufficient to undermine confidence in the outcome" of the proceeding. *Id.* at 692; *see also Williams v. Taylor*, 120 S. Ct. 1495, 1512 (2000).

This test is not, however, an outcome determinative inquiry. *Strickland* made it clear that the applicant does **not** have to prove that the outcome would have been different, *Id.* at 693-94, because "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694. Thus, "a defendant need **not** show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693 (emphasis added).

Thus, in this context, the question is not whether if counsel had performed adequately would Petitioner have received a life sentence. The appropriate question is whether counsel's conduct so undermined the proper functioning of the adversarial process that this Court cannot be confident that the outcome of the trial would have been the same. Moreover, a reviewing court is to evaluate the totality of the mitigating evidence, and significantly, a reviewing court must consider all evidence even if that evidence "does not undermine or rebut the prosecution's death-eligibility case." *Williams v. Taylor*, 120 S. Ct. 1495, 1516 (2000). In addition, there is nothing impermissible about any overlap between new and old evidence, so arguments that new evidence is cumulative must fail. *See Richards v. Quarterman*, 2009 WL 1111177 at *9 (5th Cir. Apr. 27, 2009).

The Fifth Circuit Court of Appeals applied this standard in granting a writ of habeas corpus "because Lockett's counsel failed to conduct a constitutionally adequate investigation into the available mitigating evidence which, if presented, would have created a reasonable probability that an objectively reasonable juror would decide that death was not the appropriate penalty for the murder of Mrs. Calhoun, notwithstanding its cold and merciless cruelty." *Lockett v. Anderson*, 230 F.3d 695 (5th Cir. 2000); *see also State v. Tokman*, 564 So. 2d 1339 (Miss. 1990) (with timely investigation, mitigation evidence could have been obtained and offered during the penalty phase which would have presented Tokman to the jury as a person other than the cold-blooded, callous murderer portrayed by the State).

In *Neal*, the Fifth Circuit recognized its inquiry into prejudice was "obviously very difficult, but given the amount and character of the mitigating evidence in this case, we believe that there is a reasonable probability that a jury would not have been able to agree unanimously

to impose the death penalty if this additional evidence had been effectively presented and explained to the sentencing jury. In our judgment, then, the Mississippi Supreme Court's conclusion that the additional mitigating evidence was merely redundant and not prejudicial is erroneous." *Neal v. Puckett*, 286 F.3d 230, 244 (5th Cir. 2002).

In this case, counsel were clearly deficient in failing to talk to readily available witnesses. Counsel presented almost no information about Jeffrey Havard and his turbulent life. Counsel's closing argument was only as good as the minimal evidence presented, and counsel did not present the jury with a single mitigating factor to consider. T. 677-679. *See also* Claim V.

Just as clearly, Jeffrey Havard was prejudiced by this deficient performance. The jury in this case seriously considered voting for Life without Parole. The jury retired to deliberate at 5:45 p.m. on December 18, 2002. T. 684. At approximately 6:40 p.m., the jury sent a note to the Court asking questions about life without parole including, "Please define life without parole." T. 684. About 10 minutes later, the jury sent another note requesting to recess for the night and continue the deliberation the next day. T. 687.

The next morning, December 19, 2002, after further deliberations, the jury sent the Court another note asking, "What Happens to the defendant if the jury cannot agree on a sentence?" T. 691. These notes clearly demonstrate that there were some members of the jury considering a life sentence even without the presentation of mitigating evidence or any supporting argument of counsel.

The Supreme Court has stated that prejudice is established if "there is a reasonable probability that *at least one juror* would have struck a different balance" but for the constitutional error. *Wiggins,* 539 U.S. at 534-37 (emphasis added); *see also Neal v. Puckett*,

286 F.3d 230 (5th Cir. 2002); *Lockett v. Anderson*, 230 F.3d 695 (5th Cir. 2000). Surely, in light of the cases discussed above, it can only be said that the details of Jeffrey Havard's chaotic life and his adaptability to a structured setting such as prison, would have affected at least one of the jurors. Jeffrey Havard is therefore entitled to a new sentencing hearing or at least an opportunity to prove these claims at an evidentiary hearing.

The ineffective assistance of counsel involved in this claim involves multiple failures to comply with both versions of the ABA Guidelines. The 1989 ABA Guidelines involved here include: 11.4.1 (Investigation); 11.5.1 (Filing Pre-Trial Motions); 11.7.1 (General Trial Preparation); 11.8.1 (Sentencing Phase Obligations); 11.8.2 (Sentencing Options); 11.8.3 (Preparation for Sentencing Phase); 11.8.5 (Meeting the Prosecutor's Case During Sentencing Phase); and 11.8.6 (Defense Case at Sentencing Phase). *See* Appendix - D, attached.. The 2003 ABA Guidelines involved include: 10.7 (Investigation); 10.8 (Duty to Assert Legal Claims); 10.10.1 (Trial Preparation Overall); and 10.11 (Defense Case Concerning Penalty). *See* Appendix - E, attached. Clearly, Petitioner's trial counsel failed to perform up to the standards of the ABA Guidelines, standards which the United States Supreme Court has long held are guides to determining the reasonableness of counsel's performance.

3. There is No Limitation of Relief

The Mississippi Supreme Court's adjudications concerning the effectiveness of Petitioner's trial counsel during the mitigation phase involved both legal and factual errors for which this Court can grant habeas corpus relief. On direct appeal, the Mississippi Supreme Court held that it would not consider out-of-record evidence to determine if Petitioner's trial counsel were effective during the mitigation phase. *Havard I*, 928 So.2d at 793. Accordingly,

that Court's review of this issue on direct appeal was confined to the record. The Mississippi Supreme Court went on to cite the correct rule set forth in *Wiggins*, which is that counsel for a defendant that is facing the death penalty must conduct an investigation to make "an informed choice" about the mitigation evidence to be presented. *Id.* However, the Mississippi Supreme Court unreasonably applied that very standard on direct appeal. That Court found that Petitioner's attorneys did bring forth "some evidence to mitigate the sentence," and that it accordingly cannot be said that the trial did not produce a just result. *Id.* at 795. However, the Court made absolutely no finding to support its conclusion that Petitioner's counsel conducted any investigation in order to make the "informed choice" that it acknowledged was required under *Wiggins*. Furthermore, the Court's prejudice test (whether the trial produced a just result) is an unreasonable application of the *Strickland* prejudice test, which properly looks at whether there is a reasonable probability that the result of the proceeding would be different if counsel performed in an effective manner. Thus, the Mississippi Supreme Court failed to apply the key rules emanating from *Williams*, *Wiggins*, and ABA guidelines, which require counsel to thoroughly investigate mitigation evidence and not simply toss up a witness and ask questions hoping to get good answers.

There are similar deficiencies in the post-conviction review opinion by the Mississippi Supreme Court. There, that Court utterly failed to account for the out-of-record evidence that was presented to show the utter failure of Petitioner's trial counsel to conduct the investigation required by *Williams*, *Wiggins*, and the ABA guidelines. The Court noted that new details in the affidavits of Cheryl Harrell and Ruby Havard (the only two witnesses to testify for Petitioner during the sentencing phase of trial) brought up new areas that were not the subject of their

testimony at trial. This analysis, however, completely ignores the fact that one of the issues that Petitioner was raising was the failure of his trial counsel to properly prepare Cheryl Harrell and Ruby Havard to testify. The Mississippi Supreme Court also unreasonably held that the affidavits were cumulative of the evidence that was presented in mitigation at the trial. *Havard II*, 988 So.2d at ¶ 51. While some of the evidence was duplicative, there was a host of new evidence presented, such as the evidence of Petitioner's participation in the program at Camp Shelby and detailed information concerning his caring for the children of some of his friends. That there was some overlap between the "new" evidence and that elicited at trial is of no consequence. *See Richards v. Quarterman*, 2009 WL 1111177 at *9 (5th Cir. Apr. 27, 2009).

The Mississippi Supreme Court also unreasonably applied the prejudice prong of *Strickland* during its post-conviction review. That Court held, even if it was assumed for the purpose of argument that Petitioner's trial counsel were deficient during the sentencing phase, that Petitioner had "failed to show that he would have received a different sentence." *Havard II*, 988 So.2d at ¶ 52. Clearly, that court failed to apply the "reasonable probability" test from *Strickland*. The Mississippi Supreme Court also ignored the fact when considering prejudice that the jury had difficulty reaching its decision on the death sentence (the jury recessed for the night and asked several questions demonstrating its struggle prior to ultimately sentencing Petitioner to death).

With regard to the evidence of the program at Camp Shelby in which Petitioner participated, the Supreme Court denied relief by focusing on the fact that he was relying on information solely from his family and friends. However, this is a distinction that makes no difference and has no basis in law. The Mississippi Supreme Court should have properly

reviewed the overall picture of mitigation that could have been presented if Petitioner's trial counsel had conducted the required investigation. By examining isolated pieces of evidence and discounting them on an individual basis, the Mississippi Supreme Court applied *Strickland*, *Williams*, and *Wiggins* in an unreasonable manner.

For all these reasons, it is clear that the adjudications of the Mississippi Supreme Court on this issue were both contrary to and an unreasonable application of clearly established federal law. These adjudications also involved unreasonable determinations of the facts presented to the Mississippi Supreme Court. Accordingly, there is no limitation on the relief that this Court can grant in this proceeding. Accordingly, the writ should be granted.

4. Relief Requested

Petitioner's constitutional right to effective assistance of counsel was denied by the failure of his trial attorneys to investigate, develop, and present mitigation evidence, evidence that was readily available and that could have presented a compelling picture to the jury during the sentencing phase. Accordingly, the writ of habeas corpus should be granted so as to relieve Petitioner from his unconstitutional sentence. At the very least, this Court should permit Petitioner to conduct discovery on this issue, conduct an evidentiary hearing, and issue the writ thereafter.

CLAIM V: PETITIONER'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED BY HIS COUNSEL'S CLOSING ARGUMENT DURING THE SENTENCING PHASE OF TRIAL

1. Facts

Counsel's closing argument at the sentencing phase was so inadequate that it amounted to an abandonment of his client. The complete sentencing phase argument covers less than two

pages of transcript. T. 677-79. By contrast, the State's argument was four times longer. T. 673-77; 679-83.

After briefly stating the law concerning the weighing process, defense counsel conceded an aggravating circumstance that had not even been charged:

> I mean, it's been obviously documented here that this young child died a tragic death at a very young age of six months. That is an aggravating circumstance, and Mr. Rosenblatt explained that to you.

T. 677. The prosecution, however, never presented an aggravating circumstance based upon Chloe's age. Defense counsel then told the jury that they "certainly" could consider the evidence of victim impact presented through Mrs. Watson. T. 678. The impropriety of that testimony is addressed elsewhere in this Brief (See Claim III). After mentioning the fact that Jeffrey's mother and grandmother also testified and that their testimony could be considered, defense counsel told the jury that he was not even going to "try to fit" the mitigation into the instructions from the Court. T. 678.

Counsel did offer what he characterized as two reasons that the jury should consider for life. He advised the jury that they had not been instructed that they must vote for the death penalty and if they determine that Jeffrey should die they may still grant him mercy. T. 678.[14] Defense counsel argued none of the meager evidence of mitigation it had presented.[15]

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[14] Of course, the jury was not instructed that they could consider "mercy". Instructions D-21, CP 194 and D-26, CP 196, were each denied as improper mercy instructions. T. 646, 648.

[15] As discussed more fully in the preceding ground for relief, the entire sentencing phase defense consisted of two witnesses, Jeffrey Havard's mother and grandmother. Their combined testimony covers just over seven (7) pages of transcript. T. 664-71. In their short testimony they barely offered even a brief glimpse into Jeffrey's life. From his mother it was established that Jeffrey went to live with his grandparents at age thirteen because of "a school problem;" he had been born out of wedlock and did not meet his biological father until age sixteen; his father had nothing to do with him and never supported him; and that Jeffrey loves his family and they love him. T. 665-68. From his grandmother it was established that he loves children, he loves his nieces, and she loves him. T. 670-71.

Essentially, defense counsel conceded compelling reasons to sentence Petitioner to death and offered no basis whatsoever for a life sentence other than that the jury essentially could disregard the instructions of the trial judge. Despite counsel's horrendous performance, the jury struggled with its decision, requested an overnight recess to consider the matter further, and asked two questions about their deliberations. T. 684-86, 687, 691. The jury eventually sentenced Petitioner to death.

2. Petitioner's Constitutional Rights Were Violated

In conceding the aggravating circumstance, counsel conceded the death eligibility status. *Tuilaepa v. California*, 512 U.S. 967, 972 (1994). While defense counsel can make tactical decisions to concede facts or factors, where capital counsel concedes aggravation at penalty-phase summation, "it is particularly critical that an attempt be made to present and argue mitigating circumstances." *Smith v. Stewart*, 140 F.3d 1263, 1270 (9th Cir. 1998) (*relying on Evans v. Lewis*, 855 F.2d 631, 637 (9th Cir. 1988)).

That was not done here. To the contrary, aggravation was conceded and the absence of mitigation was conceded. There was essentially no final summation while Jeffrey Havard's life hung in the balance. The United States Supreme Court has clearly articulated the importance of closing argument:

> the very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment.

Herring v. New York, 422 U.S. 853, 862 (1975).

Defense counsel's performance at summation is deficient and prejudicial under *Strickland*. *See Smith v. Stewart*, 140 F.3d 1263, 1269 (9th Cir. 1999); *Blanco v. Singletary*, 943 F.2d 1477, 1500 (11th Cir. 1991) *cert. denied* 504 U.S. 946 (1992); *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991) *cert. denied* 503 U.S. 952 (1992). *Cf. Lewis v. Lane*, 656 F.Supp. 181, 193-94 (C.D. Ill. 1987) *aff'd on other grounds* 832 F.2d 1446 (7th Cir. 1987) *cert. denied* 488 U.S. 829 (1988) (noting "failure to individualize the petitioner as a human being, instead merely presenting an abstract religious argument"). There can be no tactic discerned in defense counsel's summation. *See generally Blanco*, 943 F.2d at 1500, 1504. *Cf. Herring*, 422 U.S. at 858-59 ("[t]here can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial").

Defense counsel, by failing to offer much of a case in mitigation, failing to argue the mitigation that was presented, failing to argue any fact that the jury was instructed it could consider, conceding lack of mitigation and conceding aggravation, prejudiced Jeffrey Havard and deprived him of his constitutional right to effective assistance of counsel. Such abandonment by counsel creates a presumption of prejudice. *See United States v. Cronic*, 466 U.S. 648, 657-58 (1984). That Petitioner was prejudiced by this ineffective assistance of counsel during closing need not only be presumed, it is clear from the record. The jury, despite being presented no reasons whatsoever by Petitioner's trial counsel to spare his life, struggled with its sentencing decision. Had Petitioner's counsel performed in an effective manner, there is a reasonable probability that the sentence handed down by the jury would have been different.

The ineffective assistance of counsel involved in this claim involves multiple failures to comply with both versions of the ABA Guidelines. The 1989 ABA Guidelines involved here

include: 11.7.1 (General Trial Preparation); 11.8.1 (Sentencing Phase Obligations); 11.8.2 (Sentencing Options); 11.8.3 (Preparation for Sentencing Phase); and 11.8.6 (Defense Case at Sentencing Phase). *See* Appendix - D, attached.. The 2003 ABA Guidelines involved include: 10.10.1 (Trial Preparation Overall) and 10.11 (Defense Case Concerning Penalty). *See* Appendix - E, attached. Clearly, Petitioner's trial counsel failed to perform up to the standards of the ABA Guidelines, standards which the United States Supreme Court has long held are guides to determining the reasonableness of counsel's performance.

3. There is No Limitation of Relief

The Mississippi Supreme Court's adjudication regarding this issue involves a decision that is both an unreasonable application of clearly established law as well as an unreasonable determination of the facts in light of the evidence before that court. The decision was an unreasonable application of law because the Mississippi Supreme Court identified the correct standard regarding closing argument but failed to reasonably apply it. Specifically, the Mississippi Supreme Court noted the importance of the sentencing stage is to present an "individualized determination on the basis of character of the individual and the circumstances of the crime." *Havard I*, 928 So.2d at 796. However, as demonstrated above, the closing argument offered by counsel during the sentencing phase failed to individualize Petitioner in any way or to present a cohesive case of mitigation to the jury.

The Mississippi Supreme Court also unreasonably applied the *Strickland* standards that were raised by Petitioner on direct appeal. The Mississippi Supreme Court held that Petitioner's trial counsel could have made a "more forceful" argument, but said nothing about the simple requirement that the closing argument presented must be consistent with the law. This

application of the first prong of *Strickland* failed to account for the fact that defense counsel conceded an aggravating circumstance that the state was not even advancing, informed the jury that it could accept the improper victim impact testimony offered by Chloe's grandmother, and stated that he would not "even try" to fit the meager mitigation evidence presented during sentencing phase into his argument. The Mississippi Supreme Court also unreasonably applied a prejudice prong of *Strickland* by wholly failing to consider the difficulty that the jury had in reaching its decision. Finally, similar reasoning demonstrates that the Mississippi Supreme Court's determination of the facts regarding this claim was also unreasonable. One cannot review the meager closing argument offered by Petitioner's trial counsel during the sentencing phase— a closing argument in which Petitioner's own counsel conceded death eligibility and failed to present an individualized case for mitigation— and determined that this was "reasonable trial strategy" or harmless error. This same analysis applies to the Mississippi Supreme Court's adjudication during Petitioner's state post-conviction proceedings, in which this claim was held to be barred under the doctrine of res judicata. *Havard II*, 988 So.2d at ¶¶ 67-68.

4. Relief Requested

The sentencing phase closing argument by Petitioner's trial counsel constituted ineffective assistance of counsel. The argument essentially conceded the death penalty, and failed to make any meaningful mitigation arguments or arguments in favor of alternative life sentence. Therefore, the writ should be issued to relieve Petitioner from his unconstitutional sentence.

CLAIM VI: THE TRIAL COURT IMPROPERLY ISSUED AN INSTRUCTION TO THE JURY ABOUT THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE

1. Facts

One of two aggravating factor advanced by the State was that the killing of Chloe Britt was "especially heinous, atrocious, or cruel." The trial court's instruction to the jury on that aggravating circumstance was as follows:

> The Court instructs the jury that in considering whether the capital offense was especially heinous, atrocious or cruel; heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others.
>
> An especially heinous, atrocious or cruel capital offense is one accompanied by such additional acts as to set the crime apart from the norm of capital murders–the conscienceless or pitiless crime which is unnecessarily torturous to the victim. If you find the defendant utilized a method of killing which caused serious mutilation, that there was dismemberment of the body prior to death, that the defendant inflicted physical or mental pain before death, that there was mental torture and aggravation before death, or that a lingering or torturous death was suffered by the victim, then you may find this aggravating circumstance.

See Havard I, 928 So.2d at 799-800. Petitioner's counsel objected to this instruction, essentially arguing that it would confuse the jury and did not comply with constitutional standards. T. 641. The objection was overruled. T. 641. During the sentencing phase, the jury found that the killing of Chloe Britt was especially heinous, atrocious or cruel, T. 692, and Petitioner was sentenced to death.

2. Petitioner's Constitutional Rights Were Violated

The correct standard for reviewing an instruction challenged as unconstitutional is to determine whether, taking the instruction as a whole, there is a reasonable likelihood that the jury

interpreted the instruction in an unconstitutional manner. *Boyde v. California*, 110 S.Ct. 1190, 1200 (1990). An instruction attempting to narrow the class of capital murderers eligible for the death penalty is unconstitutionally vague and overbroad when a "person of ordinary sensibility could fairly characterize almost every murder as" falling within its scope. *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980). *See also Maynard v. Cartwright*, 486 U.S. 356 (1988); *Clemons v. Mississippi*, 110 S.Ct. 1452 (1990); *Stringer v. Black*, 503 U.S. 222 (1992).

In this case, there is clearly a reasonable likelihood that the jury at the defendant's capital sentencing trial interpreted the trial court's limiting instruction in an unconstitutional manner. In *Shell v. Mississippi*, 111 S.Ct. 313 (1990) (per curiam), the United States Supreme held that the first paragraph of the instruction was unconstitutionally vague.

The second paragraph includes numerous alternate definitions of the terms "heinous, atrocious, or cruel" and purportedly provides a non-exclusive list of some vague examples of heinous, atrocious or cruel offenses. However, the alternate definitions and the non-exclusive list are themselves unconstitutionally vague. The first sentence of the second paragraph does nothing to cure the unconstitutionality. It is readily apparent that a person of ordinary sensibility could fairly characterize almost every death as a conscienceless or pitiless crime that is unnecessarily tortuous. Thus, the first sentence of the second paragraph did nothing to channel the discretion of the jury or limit the class of murderers eligible for the death penalty and is itself unconstitutionally vague and overbroad. *See Godfrey*, 446 U.S. at 428.

The second sentence of the second paragraph is also clearly unconstitutional. A person of ordinary sensibility could fairly characterize almost every murder as involving physical pain before death, or mental pain before death, or mental torture and aggravation before death, or a lingering or

tortuous death, or causing serious mutilation. Like the first sentence, the second one did nothing to channel the discretion of the jury or limit the class of murderers eligible for the death penalty and is itself unconstitutionally vague and overbroad. *See Godfrey*, 446 U.S. at 428.

Moreover, even if discrete portions of the instruction pass constitutional muster, the instruction must be declared unconstitutional when taken as a whole. There is obviously a reasonable likelihood that the jury relied on the vague and overly broad portions. The United States Supreme Court has repeatedly held that the State may not pile alternate definition upon alternate definition in an utterly confusing attempt to define vague terms, and that an otherwise vague definition of vague terms is not cured by the inclusion of an alternate, constitutionally adequate definition unless there is no reasonable likelihood that the jury relied on the vague terms. *See Leary v. United States*, 395 U.S. 6, 31-32 (1969); *Boyde v. California*, 110 S.Ct. 1190 (1990); *Shell v. Mississippi*, 111 S.Ct. 313, 314 (Marshall, J., concurring); *Bachellar v. Maryland*, 397 U.S. 564, 569-71 (1970).

The jury's use of such a vague and overly broad factor in this case is even worse, in light of the fact that Mississippi's capital sentencing structure weights aggravating circumstances against mitigating circumstances. 503 U.S. at 235-36 ("A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance. Because the use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty, we cautioned in *Zant* that there might be a requirement that when the weighing process has been infected with a vague factor the death sentence must be invalidated."). Since the especially heinous, atrocious or cruel aggravator was one of only two aggravating circumstances put forth

by the State during Petitioner's trial, Petitioner was clearly prejudiced by this vague, nebulous, and arbitrary instruction.

3. There is No Limitation of Relief

The Mississippi Supreme Court's adjudication of this claim involves a decision that is contrary to and an unreasonable application of clearly established federal law. That court held that the "especially heinous, atrocious, or cruel" instruction given by the trial court was "not so vague and overbroad as to violate the United States Constitution." *Havard I*, 928 So.2d at 800. Thus, the claim was found to have no merit on direct appeal. *Id.* During state post-conviction proceedings, this issue was barred by the Mississippi Supreme Court under the doctrine of res judicata. *Havard II*, 988 So.2d at ¶¶ 75-76.

As demonstrated above, the instruction on this aggravating circumstance was vague, nebulous, and inadequate to channel the discretion of the jury as required by United States Supreme Court precedent. Accordingly, AEDPA does not limit the relief available to Petitioner for this constitutional violation.

4. Relief Requested

The vague and illusory instructions from the trial court on the especially heinous, atrocious, or cruel aggravating circumstance resulted in an unconstitutional sentence being rendered in this case. Accordingly, Petitioner prays that this Court will issue the writ so as to relieve him from his unconstitutional sentence.

CLAIM VII: THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE AGGRAVATING CIRCUMSTANCE THAT THE KILLING WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL

1. Facts

One of two aggravating factor advanced by the State was that the killing of Chloe Britt was "especially heinous, atrocious, or cruel." The trial court's instruction to the jury on that aggravating circumstance was as follows:

> The Court instructs the jury that in considering whether the capital offense was especially heinous, atrocious or cruel; heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others.
>
> An especially heinous, atrocious or cruel capital offense is one accompanied by such additional acts as to set the crime apart from the norm of capital murders–the conscienceless or pitiless crime which is unnecessarily torturous to the victim. If you find the defendant utilized a method of killing which caused serious mutilation, that there was dismemberment of the body prior to death, that the defendant inflicted physical or mental pain before death, that there was mental torture and aggravation before death, or that a lingering or torturous death was suffered by the victim, then you may find this aggravating circumstance.

See Havard I, 928 So.2d at 799-800. Petitioner's counsel objected to this instruction, essentially arguing that it would confuse the jury and did not comply with constitutional standards. T. 641. The objection was overruled. T. 641. During the sentencing phase, the jury found that the killing of Chloe Britt was especially heinous, atrocious or cruel, T. 692, and Petitioner was sentenced to death.

2. Petitioner's Constitutional Rights Were Violated

"No person shall be made to suffer the onus of a criminal conviction except upon sufficient proof–defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson v. Virginia*, 443 U.S. 313, 316 (1979). "What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged, and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements." *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993) (internal citations omitted). B"It is self-evident, we think, that the *Fifth Amendment* requirement of proof beyond a reasonable doubt and the *Sixth Amendment* requirement of a jury verdict are interrelated . . . . In other words, the jury verdict required by the *Sixth Amendment* is a jury verdict of guilty beyond a reasonable doubt." *Id.* at 278.

To find that the killing of Chloe Britt in this case was "especially heinous, atrocious, or cruel" requires fantasizing as to the events surrounding the killing, which fails to meet the requirement that the State prove the existence of the aggravator beyond a reasonable doubt. Indeed, the circumstances of this case do not meet any of those set forth in the trial court's instruction on the especially heinous, atrocious or cruel aggravating circumstance. There simply was no evidence to support the submission of this aggravator to the jury. Indeed, counsel for Respondents, in his treatise, notes that "relevant evidence" must be presented to support the "especially heinous, atrocious, or cruel" aggravating circumstance. *See* White, Marvin, *Death Penalty Litigation* in THE ENCYCLOPEDIA OF MISSISSIPPI LAW at § 27:38.

3. There is No Limitation of Relief

The Mississippi Supreme Court's adjudication of this claim involves both legal and factual errors that can be remedied by this Court under AEDPA. That court found, on direct appeal, that "[t]he totality of the evidence supported the jury's finding of one or more statutory aggravating circumstances." *Havard I*, 928 So.2d at 804. That court also reasoned that the jury's finding that the killing of Chloe was "especially heinous, atrocious, or cruel" could have been based on factors other than the alleged sexual battery, such as the relationship between Petitioner and Chloe's mother as well as Chloe's age. *Id.*

The decision of the Mississippi Supreme Court did not subject the State's evidence in support of the "especially heinous, atrocious, or cruel" aggravating circumstance to the rigors of proof beyond reasonable doubt as required by United States Supreme Court precedent. Further, that court's discussion of bases other than sexual batter that the jury could have found is utter speculation. On top of that, the very alternative factors mentioned by the court— the relationship between Havard and Chloe's mother and Chloe's age— bear no rational relation to the aggravating circumstance at issue.[16] In short, the legal and factual errors made by the Mississippi Supreme Court demonstrate that the evidence in support of the "especially heinous, atrocious, or cruel" aggravating circumstance was never subjected to appropriate constitutional scrutiny. Since this was but one of two aggravating factors advanced by the State in seeking the death sentence, the prejudice to Petitioner is clear, and Petitioner is entitled to relief.

[16] It must also be noted that these factors were neither advanced by the State nor part of the trial court's instructions on this aggravating circumstance. To find that the jury could have based its decision on these factors is unreasonable.

4. Relief Requested

The jury's finding that the killing of Chloe was "especially heinous, atrocious, or cruel" does not comport with the constitutional requirement that aggravating circumstances be proved beyond a reasonable doubt. Accordingly, Petitioner requests that this Court issue the writ of habeas corpus so as to grant him relief from his unconstitutional sentence.

CLAIM VIII: THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL OFFENSE WAS COMMITTED DURING THE COMMISSION OF, OR AN ATTEMPT TO COMMIT, SEXUAL BATTERY

1. Facts

Petitioner incorporates by reference, as is fully reproduced, the Facts Section for Claim I, *supra*.

2. Petitioner's Constitutional Rights Were Violated

"No person shall be made to suffer the onus of a criminal conviction except upon sufficient proof–defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson v. Virginia*, 443 U.S. 313, 316 (1979). "What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged, and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements." *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993) (internal citations omitted). B"It is self-evident, we think, that the *Fifth Amendment* requirement of proof beyond a reasonable doubt and the *Sixth Amendment* requirement of a jury verdict are interrelated . . . . In

other words, the jury verdict required by the *Sixth Amendment* is a jury verdict of guilty beyond a reasonable doubt." *Id.* at 278.

Petitioner's conviction of capital murder and death sentence are both based solely upon the allegation that Chloe Britt was sexually abused by Havard. However, as demonstrated extensively in Claim I above, the evidence presented at trial was not sufficient to prove beyond a reasonable doubt that any sexual battery occurred. The body of evidence in support of sexual battery had non-criminal, scientific explanations and was dependent on improper opinion testimony from medical providers, law enforcement, and the Coroner. Petitioner was thus convicted and sentenced in violation of *Jackson v. Virginia* and its progeny. The Mississippi Supreme Court's failure to consider that standard when examining the adequacy of the aggravating circumstances is constitutionally erroneous.

3. There is No Limitation of Relief

The Mississippi Supreme Court's adjudication of this claim involves both legal and factual errors that can be remedied by this Court under AEDPA. That court found, on direct appeal, that "[t]he totality of the evidence supported the jury's finding of one or more statutory aggravating circumstances." *Havard I*, 928 So.2d at 804. However, the Court did not address the sufficiency of the evidence in support of the aggravating circumstance that the crime was committed during an actual or attempted sexual battery. That court's discussion of the aggravating circumstances was limited to the "especially heinous, atrocious, and cruel" aggravation. Since the Court did not reach the merits of this particular aggravation, despite a statutory mandate to do so, this Court's review id de novo.

4. Relief Requested

The jury's finding that Chloe was killed during the course of sexual battery or attempted sexual battery does not comport with the constitutional requirement that aggravating circumstances be proved beyond a reasonable doubt. Accordingly, Petitioner requests that this Court issue the writ of habeas corpus so as to grant him relief from his unconstitutional sentence. At the very least, Petitioner requests that the Court (a) permit him to conduct discovery on the issues raised in this claim, (b) conduct an evidentiary hearing, and (c) grant the writ thereafter.

CLAIM IX: THE TRIAL COURT IMPROPERLY ANSWERED A QUESTION FROM THE JURY CONCERNING THE DEFINITION OF LIFE WITHOUT PAROLE

1. Facts

During deliberations in the sentencing phase of the trial, the jury sent out a series of questions to the trial judge. The trial record reflects the following:

> BY THE COURT: Let the record show that the Court has all counsel present, the jury having sent a note to the Court through the bailiff. The Court has allowed the attorneys to read the question which is as follows. This will be preserved for the record. Says, "Please define life without parole. One, will he spend the rest of his life in prison or will he ever be eligible for parole. Question"–this says number two, I guess. "Three, can the law be changed to allow him parole in the future" All right. Any comments for the record . . . .
>
> BY MR. HARPER: Whatever the State feels appropriate. I don't have any suggestion.
>
> BY MR. CLARK: Okay. Whatever you want to do.
>
> BY THE COURT: It's the Court's understanding that number one, if matters can be answered, they should always be answered truthfully to the jury. There are clearly some questions that can't be answered. It would be my inclination to give you a chance to object to anything before it goes, but it's my inclination to respond that life without parole means life in prison without any eligibility for parole. It essentially says the same thing, but it does, I think, answer the first two questions more

> adequately about it that life without parole life in prison without any eligibility for parole. Now, the last question is, of course, the more difficult question. The Court would answer this with a statement that it would be up to the legislature to determine any changes in the law in the future.
>
> * * *
>
> BY THE COURT: No, no. This is what the Court is inclined to do. Everybody listen very carefully. The Court intends to respond as follows. Life without parole means life in prison without any eligibility for parole. It would be up to the legislature to make any future changes in the law. You may state your objections.
>
> BY MR. SERMOS: The only thing I would ask, Your Honor, is the Court considers without eligibility for parole or early release of any type . . . .
>
> * * *
>
> BY THE COURT: So this will be the what the Court will write. "Life without parole means life in prison without eligibility for parole or early release. It would be up to the legislature to make any future changes of the law." Any objection to that?
>
> BY MR. SERMOS: I think just what you got is–I like that.
>
> T. 684-687. Not long after this response was given, the jury sentenced Petitioner to death.

2. Petitioner's Constitutional Rights Were Violated

It is fundamental that a death sentence cannot be obtained by way of information that a defendant has "no opportunity to deny or explain." *Gardner v. Florida*, 430 U.S. 349, 362 (1977). Furthermore, Supreme Court precedent directs that a death sentence cannot be obtained in accordance with the Sixth, Eighth, and Fourteenth Amendments by use of an arbitrary factor–the discretion of the jury must be channeled by the trial court throughout the proceedings. With respect to the issue of parole eligibility, the Supreme Court has held: "When a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole, due process entitles the

defendant to inform the jury of his parole ineligibility, either by a jury instruction or in arguments by counsel." *Simmons v. South Carolina*, 512 U.S. 154, 169 (1994). *See also Kelly v. South Carolina*, 534 U.S. 246 (2002); *Schafer v. South Carolina*, 532 U.S. 36 (2001).

The trial court properly recognized that "[t]here are clearly some questions that can't be answered," but then went on to answer one of them. The jury was obviously concerned about the "future dangerousness" of Petitioner if he were ever released from prison. By informing the jury that it was possible that the legislature could change the law to allow Petitioner's release, the trial court, though perhaps unwittingly, directed the jury toward its sentence of death. The court's response led the jury to speculate how in the future, the legislature may exercise its power to amend the law making the defendant eligible for parole. At a bare minimum, the Court's answer introduced to the jury an arbitrary factor that Petitioner could neither explain nor deny.

The arbitrariness of the response given by the trial court is clear. Before the defendant would be released under the scenario about which the trial court allowed the jury to speculate, three highly unlikely events would have to occur. First, the legislature would have to change the law to allow for parole eligibility for convictions of capital murder, make that new law retroactive,[17] and ultimately the Parole Board would have to grant parole. With the jury considering such matters when determining Petitioner's fate, it is likely that its sentence was the result of an arbitrary factor.

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[17] Defense counsel asked that the Court at least tell the jury that the legislature would have to clearly state that any law change would apply to Mr. Havard. T. 686. The State of Mississippi objected and the trial court rejected the defense request. T. 686.

3. There is No Limitation of Relief

The Mississippi Supreme Court's adjudication of this issue involves both legal and factual errors, relief from which is not barred under AEDPA. With respect to the trial court's answer, which stated that the law could be changed to permit Petitioner's early release, the Mississippi Supreme Court held that it "was indeed a correct statement in an honest effort by the judge to answer the jury's question, and the statement was one which should hardly come as a surprise to our citizens sitting on a jury." *Havard I*, 928 So.2d at 799. That court also held that the answer was "as general as possible," and that there was no basis on which to find to that it affected the jury's sentence of death. *Id.* This claim was barred by res judicata during post-conviction proceedings. *Havard II*, 988 So.2d at ¶ 74.

To begin, the Mississippi Supreme Court did not properly frame the legal issue. That court focused simply on whether the trial court's answer was correct, and not, as required, on the ability of Petitioner to explain to the jury the application of this answer to Petitioner's case and sentence. In this respect, the context of the answer is important. The jury was given the answer while it was deliberating, thus leaving Petitioner's counsel unable to explain to the jury the manifest unlikelihood that the Mississippi Legislature would pass a law making capital murder parole-eligible; that the Governor would sign the law, that the law would be retroactive, and that Petitioner would be released by the Parole Board. Being unable to offer such an explanation does not comport with due process, and the Mississippi Supreme Court's decision to the contrary was unreasonable.

Likewise, that Court's determination that there was no basis to reason that the jury's decision was affected by the trial court's answer is also unreasonable in light of the trail record.

The jury began its sentencing deliberation on December 18, 2002. On that day, the question concerning the meaning of life without parole was asked by the jury and answered by the trial court. The jury broke off its deliberations and resumed the next day, during which it again indicated to the Court its struggle to determine a sentence and its concern about the possibility of parole. Clearly, then the Court's answer, which stated that early release was possible, did affect the jury's decision to sentence Petitioner to death. The Mississippi Supreme Court unreasonably determined otherwise by disregarding this evidence that was in the record.

4. Relief Requested

The trial court's improper response to the jury's question concerning the definition of life without parole violated Petitioner's constitutional rights to due process. Accordingly, Petitioner prays that the Court will grant the writ of habeas corpus so as to relieve him from his unconstitutional sentence.

CLAIM X: PETITIONER'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED BY HIS COUNSEL'S FAILURE TO ASK DEATH-QUALIFYING QUESTIONS DURING VOIR DIRE

1. Facts

During voir dire, Petitioner's trial counsel did not ask the potential jurors any questions about their feelings about the death penalty or mitigating evidence. Voir dire covers 130 pages of the trial court transcript. T. 110-240. Only 10 pages of that total contains questioning of potential jurors by Petitioner's trial counsel. T. 167-77. Petitioner's counsel asked no open-ended questions and accordingly elicited virtually no information from the potential jurors.

In fact, Petitioner's trial counsel asked only 13 questions during voir dire. Specifically, Petitioner's counsel asked:

a. Whether any of the venire members were personal friends of the trial court judge, the District Attorney or the Assistant District Attorney.

b. Whether any of the venire members were sworn officers, federal agents, or reserve officers.

c. Whether any of the venire members were friends with deputies or police officers.

d. Whether any of the venire members were medicated and, if so, whether the medication made them drowsy or sleepy.

e. Whether any of the venire members had been victims of crime.

f. Whether any of the venire members were related to one another.

g. Whether, if the State failed to prove its case, the venire members could find Petitioner "not guilty."

h. Whether any of the venire members would change their vote just to create jury unanimity, and for no other reason.

T. 167-77. There was absolutely no attempt by Petitioner's trial counsel to "life qualify" the prospective jurors.

Because of the failure of Petitioner's trial counsel to ask basic questions in jury selection in a capital case, at least one juror who was not qualified to serve in a death penalty case was selected to judge Petitioner's guilt or innocence and determine his sentence. That juror, Willie Thomas, admitted after the trial that he believes that a death sentence is the only appropriate punishment in any murder case. Specifically, Mr. Thomas believes that [i]f you take a life, a life is required" and that "[i]f people knew they would pay with their lives, there would be less killing." (Direct Appeal Exhibit 2, Affidavit of Willie Thomas). Mr. Thomas stated that he held those beliefs before the trial of Petitioner.

An experienced capital litigation, Natman Schaye, opined as follows during Petitioner's direct appeal and post-conviction proceedings: "no attorney competent to try a capital murder case reasonably would have been ignorant of the holdings related to capital juror selection . . . ." (Direct Appeal Exhibit 1, Affidavit of Natman Schaye).

2. Petitioner's Constitutional Rights Were Violated

Petitioner's trial counsel were ineffective for failing to ask any "Reverse-*Witherspoon*" questions. In this case, counsel conducted no "Reverse-*Witherspoon*" voir dire to ensure the exclusion of jurors who could not fairly consider a life sentence once they had found the accused guilty of capital murder.

Counsel did not ask any questions about jurors' feelings about the death penalty or mitigating evidence. Voir dire comprises 130 pages of the trial transcript. T. 110-240. Defense questioning covers a mere ten pages. T. 167-177. Counsel asked no open-ended questions and therefore elicited virtually no information from the jurors. This was ineffective assistance of counsel under *Strickland*, as it is clear that Petitioner's counsel either did not know the law in this regard, or that they knew the law and failed to utilize it a manner that would have assisted their client by choosing a fair and impartial jury.

Morgan v. Illinois, 504 U.S. 719 (1992) provides that it is a violation of a defendant's due process rights to prevent him, in a capital case, from inquiring whether prospective jurors would automatically impose the death penalty upon a conviction. Moreover, an inadequate voir dire cripples a defendant's ability to intelligently exercise peremptory and cause challenges. *See Knox v. Collins*, 928 F.2d 657 (5th Cir. 1991). The failure of Petitioner's trial counsel to

exercise these fundamental rights on behalf of their client was objectively unreasonable and inexcusable.

The *Morgan* Court concluded that "[b]ecause the 'inadequacy of voir dire' leads us to doubt that petitioner was sentenced to death by a jury empaneled in compliance with the Fourteenth Amendment, his sentence cannot stand." 504. U.S. at 739 (internal citation omitted). No less can be said of this case. It makes no difference whether it is error on the part of the trial court in preventing adequate voir dire or, as here, the defense attorney's incompetence. The result is the same, the denial of a fundamentally fair trial and sentencing proceeding. Mr. Havard was clearly prejudiced by this deficient performance. Juror Willie Thomas was impaneled even though his views on the death penalty disqualified him from jury service. The jury, which included Thomas as a member, convicted Petitioner of capital murder and sentenced him to death.

The ineffective assistance of counsel involved in this claim involves a failure to comply with both versions of the ABA Guidelines. The 1989 ABA Guidelines involved is 11.7.2 (Voir Dire and Jury Selection). *See* Appendix - D, attached.. The 2003 ABA Guidelines involved is 10.10.2 (Voir Dire and Jury Selection). *See* Appendix - E, attached. Clearly, Petitioner's trial counsel failed to perform up to the standards of the ABA Guidelines, standards which the United States Supreme Court has long held are guides to determining the reasonableness of counsel's performance.

3. There is No Limitation of Relief

The Mississippi Supreme Court's adjudication of this claim involves both legal and factual errors for which this Court can grant relief. To begin, the Mississippi Supreme Court

refused to consider out-of-record evidence on direct appeal (such as the affidavit of juror Willie Thomas), despite the fact that such evidence was proper under the procedural rules. *Havard I*, 928 So.2d at 786. The Mississippi Supreme Court then went on to adjudge the claim without consideration of the out-of-record evidence. That Court focused its inquiry solely on the several broad questions that the trial judge asked about jurors' opinions concerning the death penalty (since Petitioner's counsel asked none). However, the Mississippi Supreme Court's inquiry glaringly omits any consideration of the standard of care for counsel. The law requires that jurors who will always impose the death penalty should not serve on a capital jury (*See Morgan v. Illinois*, 504 U.S. 719 (1992)), and defense attorneys have an obligation to ask questions to find out which jurors are biased. By failing to account for these standards, the Mississippi Supreme Court's adjudication of this issue is unreasonable.

When the Mississippi Supreme Court did consider the affidavit of Willie Thomas on post-conviction review, it did so in an unreasonable manner. The Mississippi Supreme Court held that the Thomas affidavit should not be considered because it violates *Mississippi Rule of Evidence* 606. *Havard II*, 988 So.2d at ¶ 63. This, however, is not the case. The Thomas affidavit addressed the question of juror bias— bias that Thomas admitted that he had prior to serving as a juror in Petitioner's trial. To the contrary, Rule 606 bars introduction of evidence impeaching a jury's verdict. The Mississippi Supreme Court, however, failed to recognize that there is a difference between exploring juror bias (which the rule does not prohibit) and second-guessing the verdict or deliberations process (which is does prohibit).

The Mississippi Supreme Court's alternative analysis of the Thomas affidavit is also unreasonable. That Court held that the affidavit "simply shows that Thomas supports the death

penalty." *Havard II*, 988 So.2d at ¶ 63. However, the Thomas affidavit shows much more, in that it demonstrates that jurors' pre-trial firmly held opinion that those convicted of "all killings" should be sentenced to death regardless of the individual circumstances of the case. These views clearly disqualify Thomas from juror service, and the Mississippi Supreme Court's determination to the contrary was unreasonable.

4. Relief Requested

Petitioner's constitutional rights to effective assistance of counsel and a fair and impartial jury were denied by the failure of his counsel to conduct a meaningful voir dire of the venire. The conviction and death sentence handed down by that jury are thus unconstitutional. Therefore, Petitioner requests that this Court will grant the writ of habeas corpus in order to relieve him from his conviction and sentence. At the very least, Petitioner requests that this Court (a) permit him to conduct discovery on the issues presented in this claim, (b) conduct an evidentiary hearing, and (c) grant the writ thereafter.

CLAIM XI: PETITIONER'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED BY HIS COUNSEL'S FAILURE TO EXCUSE A JUROR WHO STATED THAT SHE COULD NOT BE FAIR TO PETITIONER

1. Facts

During voir dire, one of the potential jurors, Dorothy Sylvester, stated as follows: "I don't know him [Havard], but I had a niece to be raped - - you know - - I don't think I could I could be fair about it, too." T. 136. After Sylvester's statement admitting her bias, the trial court told her that they would "get to" that issue; but neither the trial court nor any of the attorneys asked any further questions of her. T. 136. This potential juror, who was also a registered

nurse[18] of nearly 20 years was eventually selected to sit on the jury that convicted Havard of capital murder during the course of sexual battery. The Petitioner's attorneys did not seek to excuse Sylvester for cause or to use one of their peremptory challenges on Sylvester. T. 240-66. In fact, Petitioner's trial counsel explicitly accepted Sylvester as a juror, despite her stated bias. T. 263. Petitioner's counsel did not utilize all of the peremptory challenges available to Petitioner. T. 263-65.

2. Petitioner's Constitutional Rights Were Violated

In a case involving allegations of bodily injury to an elderly person, the Fifth Circuit Court of Appeals found counsel to be ineffective for failing to remove biased jurors. *Virgil v. Dretke*, 446 F.3d 598 (5th Cir. 2006). In *Virgil*, two jurors expressly stated at the outset of the proceedings that they could not be fair and impartial to the defendant. One had close relationships with law enforcement officers and another was influenced by his mother's prior mugging. The defendant's counsel did not attempt to have either juror removed for cause, and did not exercise peremptory challenges on either juror. The Fifth Circuit found this performance to be deficient because there was "no suggestion of a trial strategy" for counsel's inaction. Prejudice was found because both jurors admitted their bias, and there was the potential that the biases of these jurors infected other jurors. The Fifth Circuit held that the state court's decision that failing to remove these jurors did not constitute ineffective assistance of counsel was unreasonable and granted the writ of habeas corpus.

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[18] The sole proof of the alleged sexual battery came in the form of improper opinion testimony from emergency room nurses and doctors, the Sheriff, and a the Coroner. *See supra*, Claim I.

In another case with a similar factual scenario, the United States Court of Appeals for the Sixth Circuit found counsel ineffective in a theft of government property case for failing to strike a juror who stated during voir dire that she would not be fair. *Hughes v. United States*, 258 F.3d 453 (6th Cir. 2001). The case involved theft of a federal marshal's weapon at gunpoint, and the juror expressed bias because her nephew was a police officer and she was quite close to several detectives. For these reasons, she stated she did not think she could be fair in a case involving allegations of theft of a weapon from a law enforcement officer. *Id.* at 456. The Sixth Circuit found that counsel's failure to ask follow-up questions was objectively unreasonable under the standards of *Strickland*. *Hughes*, 258 F.3d at 462. The court determined that the question of whether to seat a biased juror is not a discretionary or strategic decision. *Id.* at 463. The Sixth Circuit further concluded that "given that a biased juror was impaneled in this case, prejudice under *Strickland* is presumed and a new trial is required." *Id.*

In this case, as in *Virgil* and *Hughes*, a potential juror who specifically admitted her bias against Petitioner during voir dire was seated to judge his guilt and eventual death sentence. Petitioner's trial counsel did not ask any follow up questions of Sylvester, did not seek to have her excused for cause, and did not use a peremptory challenge to remove her despite the fact that they had such challenges remaining. Indeed, Petitioner's trial counsel explicitly accepted this admittedly biased juror. In a case involving allegations of sexual abuse of a child, it was objectively unreasonable to retain a juror who admitted that she was biased against the defendant due to the fact that her niece had been raped. There is simply no strategic reasoning involved in such a decision. On top of that, Sylvester was a registered nurse. Since the testimony of medical providers, including nurses, was so central to the State's case, this is yet another reason why it

was inexcusable for trial counsel to not seek to have this juror removed. That Petitioner was prejudiced by this deficient performance is clear, as he was convicted of capital murder and sentenced to death by a jury that included a member who stated at the outset that she could not be fair. Sylvester's admitted bias, and her potential to infect other jurors with her bias, clearly show prejudice to Petitioner.

The ineffective assistance of counsel involved in this claim involves a failure to comply with both versions of the ABA Guidelines. The 1989 ABA Guidelines involved is 11.7.2 (Voir Dire and Jury Selection). *See* Appendix - D, attached.. The 2003 ABA Guidelines involved is 10.10.2 (Voir Dire and Jury Selection). *See* Appendix - E, attached. Clearly, Petitioner's trial counsel failed to perform up to the standards of the ABA Guidelines, standards which the United States Supreme Court has long held are guides to determining the reasonableness of counsel's performance.

3. There is No Limitation of Relief

The Mississippi Supreme Court's adjudication of this claim involves both legal and factual errors for which this Court can grant habeas relief. The Mississippi Supreme Court stated the voir dire process "emphasized fairness" through its entirety. *Havard I*, 928 So.2d at 780. This determination, however, when considering the issue of juror Sylvester is unreasonable, as she is the only juror who admitted up front that she could not be fair yet ended up serving on the jury. The Mississippi Supreme Court also bases its decision on the fact that the potential jurors "were continually under oath to be truthful." *Id.* at 781. However, it is unreasonable to presume that Sylvester was truthful throughout the proceedings when she admitted at the beginning of those proceedings that she was biased yet never answered any other questions that potentially

could have applied to her situation. Indeed, the Mississippi Supreme Court recognizes that Sylvester did not respond to a later question regarding whether a family member had been a victim of a crime. *Id.* at 781. This despite the fact that this was the basis for her stated bias.

The Mississippi Supreme Court also put stock in the fact that Petitioner's trial counsel did exercise "some" of his peremptory challenges. This determination is unreasonable, however, because it fails to address why Petitioner's trial counsel did not excuse a juror that admitted that she could not be fair to Petitioner because her niece had been raped. This is patently unreasonable in a case involving allegations of child sexual abuse. Furthermore, the Mississippi Supreme Court concludes that Petitioner's trial counsel did not render in effective assistance for failing to ask the same questions that the trial court and the State asked. *Id.* at 782. This analysis wholly fails to address the question of ineffective assistance of counsel for failure to strike Sylvester when Petitioner clearly had peremptory strikes remaining. The Mississippi Supreme Court erroneously concludes its analysis by stating that even if there was error, it did not rise to the level of prejudice under *Strickland*. *Havard I*, 928 So.2d at 782.

There were also unreasonable determinations of facts regarding this claim. The Mississippi Supreme Court noted that the trial judge initially told Sylvester that he would return to her concern about her family member, but then relied on the other voir dire questions about "fairness" as though the trial judge in fact covered that ground with Sylvester. However, the trial judge did not return to the issue of Sylvester's bias. The Mississippi Supreme Court also noted that the trial judge asked jurors about family members and pointed out that Sylvester did not respond. Clearly, there was at least a need for Petitioner's counsel to ask Sylvester about her possible bias. The Mississippi Supreme Court also relied upon the fact that Petitioner's counsel

simply did not duplicate questions that had already been asked. However, since no one had gone back to question Sylvester about her admitted bias, counsel would not have been duplicating anything had they done so. Under these facts, there is no conceivable reason why Petitioner's trial counsel would not ask her additional questions, seek to have her removed for cause, or exercise a peremptory challenge (especially since, again, Petitioner had peremptory challenges remaining). These determinations are unreasonable in light of the record evidence that was before the Mississippi Supreme Court.

4. Relief Requested

Petitioner's constitutional rights to effective assistance of counsel and a fair and impartial jury were denied by the failure of his counsel to remove a potential juror who stated at the outset of the trial that she could not be fair to Petitioner. The conviction and death sentence handed down by the jury that included that biased juror are thus unconstitutional. Therefore, Petitioner requests that this Court will grant the writ of habeas corpus in order to relieve him from his conviction and sentence. At the very least, Petitioner requests that this Court (a) permit him to conduct discovery on the issues presented in this claim, (b) conduct an evidentiary hearing, and (c) grant the writ thereafter.

CLAIM XII: PETITIONER'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL WERE VIOLATED BECAUSE HIS JURY WAS COMPOSED OF AT LEAST ONE MEMBER WHO WAS BIASED AGAINST HIM

1. Facts

One of the jurors who ended up being on the panel revealed after the trial that he had preconceived biases against Petitioner. That juror, Willie Thomas, admitted after the trial that he believes that a death sentence is the only appropriate punishment in any murder case.

Specifically, Mr. Thomas believes that [i]f you take a life, a life is required" and that "[i]f people knew they would pay with their lives, there would be less killing." (Direct Appeal Exhibit 2, Affidavit of Willie Thomas). Mr. Thomas stated that he held those beliefs before the trial of Petitioner. The jury, which included this member, convicted Petitioner of capital murder and sentenced him to death.

2. Petitioner's Constitutional Rights Were Violated

The views of the death penalty espoused by juror Thomas–views that he admittedly held before Petitioner's trial–disqualify him from jury service in a capital case. *See Morgan v. Illinois*, 504 U.S. 719 (1992). Under *Morgan*, a defendant is entitled to have a juror challenged for cause and removed from the venire who will automatically vote for the death penalty in every case of murder. Such a juror fails to meet the requirements of impartiality of the Sixth and Fourteenth Amendments, and may be challenged for cause. *Id.* at 729. The Supreme Court stated in *Morgan* that "[i]f even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence." *Id.*

Moreover, juror Thomas failed to answer a relevant, unambiguous question (posed to the entire venire) concerning views of the death penalty. Thomas, based upon his sworn affidavit, had knowledge of the information sought. A forthright answer to that question would have revealed Thomas' belief that all defendants convicted of "any killing" (much less, murder) should receive the death penalty. Petitioner was thus prejudiced in that a juror, unqualified by his views on the death penalty, served on his jury. At a bare minimum, Petitioner was prohibited from intelligently exercising his peremptory challenges. It is well settled that a juror's silence regarding matters inquired about during *voir dire* can "so infect[] the trial as to deny due process." *Williams v.*

Taylor, 120 S. Ct. 1479, 1493 (2000) (holding juror bias evidenced where juror failed to give truthful responses on *voir dire* and where the juror's explanations for so doing were incredible); *see also Smith v. Phillips*, 455 U.S. 209, 217, 219-221, 102 S.Ct. 940 (1982); *Donnelly v. DeChristoforo*, 416 U.S. 637, 647-648, 94 S. Ct. 1868 (1974).

3. There is No Limitation of Relief

Petitioner presented this claim and supported it with an out-of-record affidavit from Willie Thomas. However, the Mississippi Supreme Court declined to decide this claim on its merits, despite the fact that this evidence was properly before it under the procedural rules applicable at that time. *Havard I*, 928 So.2d at 787. Accordingly, this Court's review of this claims is de novo.

Alternatively, the Mississippi Supreme Court considered the evidence offered in the affidavit of Thomas during post-conviction proceedings. *See Havard II*, 988 So.2d at ¶ 63. The Mississippi Supreme Court rejected consideration of that affidavit, holding that it was barred under *Mississippi Rule of Evidence* 606. However, this is an unreasonable determination, because that Rule of Evidence is focused on evidence that attacks the credibility of a jury's verdict or a jury's decision-making process. However, the Thomas affidavit clearly concerned only the issue of juror bias, which is not prohibited by *Mississippi Rule of Evidence* 606. Furthermore, the Mississippi Supreme Court unreasonably determined that the Thomas affidavit did not demonstrate that he was a biased juror. The Court held that the affidavit simply shows that Thomas "believed in the death penalty." However, a clear reading of that affidavit demonstrates that Thomas believes that "all killings" deserve the death penalty, regardless of individual circumstance, and that he held this belief prior to Petitioner's trial. Thomas was

clearly biased against Petitioner, and the Mississippi Supreme Court's decision to the contrary was unreasonable.

4. Relief Requested

Petitioner's constitutional right to a fair and impartial jury was denied by the presence of a juror that was not qualified to serve on a death penalty jury since his pre-conceived belief was that all persons guilty of "any killing" should be sentenced to death. This is clearly contrary to well-established law, and the juror failed to reveal his beliefs despite questioning from the trial court on this very topic. The conviction and death sentence handed down by the jury that included this biased juror are thus unconstitutional. Therefore, Petitioner requests that this Court will grant the writ of habeas corpus in order to relieve him from his conviction and sentence. At the very least, Petitioner requests that this Court (a) permit him to conduct discovery on the issues presented in this claim, (b) conduct an evidentiary hearing, and (c) grant the writ thereafter.

CLAIM XIII: THE MISSISSIPPI SUPREME COURT'S "AGGREGATE ERROR" REVIEW WAS INADEQUATE AND DEPRIVED PETITIONER OF DUE PROCESS

1. Facts

During Petitioner's direct appeal, the Mississippi Supreme Court conducted an "aggregate review" of Petitioner's conviction and sentence. *See Havard I*, 928 So.2d at 803. The Court, in cursory fashion, held that the aggregate errors in the case were not sufficient to require reversal. Petitioner's conviction and death sentence were affirmed.

2. Petitioner's Constitutional Rights Were Violated

"[W]hen a State opts to act in a field where its action has significant discretionary

elements, it must nonetheless act in accord with the dictates of the Constitution–and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). *See also Hewitt v. Helms*, 459 U.S. 460, 466 (1983); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1 (1979); *Meachum v. Fano*, 427 U.S. 215, 226 (1976).

"A capital sentencing scheme must, in short, provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not." *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (internal citations omitted). "This means that if a state wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Id.* at 428. In so doing, the State "must channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death." *Id.* (internal citations omitted). *See also Stringer v. Black*, 503 U.S. 222 (1992); *Clemons v. Mississippi*, 494 U.S. 738 (1990); *Maynard v. Cartright*, 486 U.S. 356 (1988).

Though the Mississippi Supreme Court purported to conduct an aggregate error review, it did not do so in any meaningful way. To the contrary, that court simply concluded that there was no error, harmless or otherwise. By establishing an aggregate review procedure, the State of Mississippi has created a due process right in its being applied fairly. The review in this case falls well short of any due process standards, and Petitioner's constitutional rights have clearly been violated.

3. There is No Limitation of Relief

The Mississippi Supreme Court's determination of this claim involved a decision that was contrary to and an unreasonable application of clearly established federal law as well as an unreasonable determination of the facts in light of the evidence before that Court. To begin, the aggregate error review conducted by the Mississippi Supreme Court can only be kindly characterized as cursory. That Court, with no analysis whatsoever, simply found that there was no aggregate error. This review failed the dictates of due process to which Petitioner was entitled.

The aggregate error review that the Mississippi Supreme Court conducted during post-conviction proceedings, was similarly insufficient. That Court purported to conduct an "aggregate error review," resolving all doubts in favor of Petitioner. *Havard II*, 988 So.2d at ¶ 87. The Court again, however, without any analysis, simply concluded that it found no error in the proceedings, "harmless or otherwise." *Id.* at ¶ 89. This review is also contrary to the dictates of due process, which have been clearly established by the United States Supreme Court.

The adjudications of the Mississippi Supreme Court also involve unreasonable determination of facts. As demonstrated throughout the Petition and this brief, there were numerous errors committed during Petitioner's trial, which, when considered together, demonstrate that Petitioner's conviction and sentence are constitutionally infirm. There was clearly aggregate error present, and the Mississippi Supreme Court's decision to the contrary was unreasonable.

4. Relief Requested

Petitioner's due process rights were violated by the aggregate error review that the Mississippi Supreme Court purported to undertake. Accordingly, his conviction and death sentence are unconstitutional, and Petitioner requests that this Court issue the writ of habeas corpus in order to relieve him from his conviction and sentence.

CLAIM XIV: PETITIONER'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED BY THE CUMULATIVE EFFECT OF THE MANY FAILURES OF HIS TRIAL COUNSEL THAT LED TO A TRIAL THAT WAS NOT TRULY ADVERSARIAL

1. Facts

Petitioner incorporates by reference, as if fully reproduced herein, the Facts sections for Claims I, II, III, IV, V, X, and XI. Those sections demonstrate a pattern of ineffective assistance of counsel that resulted in a trial that was not truly adversarial and thus, fundamentally unfair. As a result of this non-adversarial trial, Petitioner was convicted of capital murder and sentenced to death.

2. Petitioner's Constitutional Rights Were Violated

Petitioner incorporates by reference, as if fully reproduced, his discussion of constitutional violations of the right to effective assistance of counsel that are set forth in claims I, II, III, IV, V, X, and XI. Each of these failings is sufficient, standing alone, to determine that Petitioner's right to effective assistance of counsel as set forth in *Strickland* and its progeny was violated. Taken together, it is even more clear that Petitioner's trial counsel were deficient and that but for their deficient performance there is a reasonable likelihood that the result of the trial would have been different.

The ineffective assistance of counsel involved in this claim involves multiple failures to comply with both versions of the ABA Guidelines. As demonstrated in the discussion of the individual claims above, there were multiple failings under the 1989 ABA Guidelines. *See* Appendix - D, attached.. Similarly, there were multiple failings under 2003 ABA Guidelines as well. *See* Appendix - E, attached. Clearly, Petitioner's trial counsel failed to perform up to the standards of the ABA Guidelines, standards which the United States Supreme Court has long held are guides to determining the reasonableness of counsel's performance.

3. There is No Limitation of Relief

The Mississippi Supreme Court held that "[e]ach and every claim of ineffective assistance of counsel" raised by Petitioner on both direct appeal and in post-conviction proceedings "has been found to be without merit." *Havard II*, 988 So.2d at ¶ 86. This adjudication involves errors of both legal and factual determinations that permit this Court to grant relief under AEDPA.

As stated above, the Mississippi Supreme Court, in both its direct appeal post-conviction opinions, properly framed the legal issue (i.e., analysis under *Strickland*) but then failed to reasonably apply the legal standards to Petitioner's case or make reasonable factual determinations. For specific demonstrations of these failings, Petitioner incorporates by reference, as if fully reproduced, his discussion of claims I, II, III, IV, V, X, and XI as they relate to ineffective assistance of counsel. By failing to recognize the prejudicial ineffective assistance of counsel that Petitioner received through his trial and remedy those multiple violations of Petitioner's right to counsel and a fair trial, the Mississippi Supreme Court made unreasonable decisions that can be remedied by this Court.

4. Relief Requested

As demonstrated in his Petition and throughout this brief, Petitioner's trial counsel rendered ineffective assistance throughout the proceedings that resulted in Petitioner's conviction and sentence of death. From pre-trial proceedings through sentencing, Petitioner essentially stood on his own. Accordingly, Petitioner requests that this Court issue the writ in order to relieve him from unconstitutional conviction and sentence. At the very least, Petitioner requests that this Court (a) permit him to conduct discovery on the issues raised in this claim, (b) conduct an evidentiary hearing, and (c) grant the writ thereafter.

CLAIM XV: PETITIONER IS ENTITLED TO HABEAS CORPUS RELIEF DUE TO THE CUMULATIVE EFFECT OF THE ERRORS AT HIS TRIAL

1. Facts

Petitioner incorporates by reference, as if fully reproduced herein, all facts alleged in Claims I through XIV of this Petition. As demonstrated herein, the errors committed at trial and, in particular, the many failures of Petitioner's trial counsel, combined to produce a proceeding that was, from beginning to end, fundamentally unfair. The aggregate effect of all of these infirmities render Petitioner's conviction and sentence unconstitutional.

2. Petitioner's Constitutional Rights Were Violated

Petitioner incorporates by reference, as if fully reproduced herein, his arguments for Claims I-XIV, *supra*. Under the United States Constitution, Petitioner was entitled to a fair trial by an impartial jury in which he was represented by effective counsel. As demonstrated throughout the Petition and this brief, Petitioner clearly did not receive such a trial. His conviction and sentence are thus patently unconstitutional.

3. There is No Limitation of Relief

With respect to this issue, the Mississippi Supreme Court held on direct appeal that it found there to be no aggregate error. *Havard I*, 928 So.2d at 803. The state post-conviction proceedings, the Mississippi Supreme Court found that the "Record supports no finding of error, harmless or otherwise." *Havard II*, 988 So.2d at ¶ 89. The insufficiency of both of these review under due process standards is discussed elsewhere. See Claim XIII. The separate and distinct ground for relief presented in this claim involves unreasonable determinations of fact by the Mississippi Supreme Court.

The many errors that clearly affected the entirety of Petitioner's trial have already been discussed at length, and Petitioner will not repeat that discussion here. Petitioner does incorporate by reference, as if fully reproduced, his discussion of Claims I-XIV herein. In light of the multiplicity of grave constitutional errors that were presented to the Mississippi Supreme Court, its determination that there was no error, "harmless or otherwise," was manifestly unreasonable. Petitioner is clearly entitled to relief, and AEDPA does not constrain relief on this claim.

4. Relief Requested

As demonstrated in his Petition and throughout this brief, numerous errors infected Petitioner's entire trial. From pre-trial proceedings through sentencing, a variety of errors were committed by trial counsel and the trial court, and there was also prosecutorial misconduct. All of these errors resulted in a trial that was fundamentally unfair. Accordingly, Petitioner requests that this Court issue the writ in order to relieve him from unconstitutional conviction and sentence. At the very least, Petitioner requests that this Court (a) permit him to conduct

discovery on the issues raised in this claim, (b) conduct an evidentiary hearing, and (c) grant the writ thereafter.

VI. CONCLUSION

In summary, it is clear that Petitioner was convicted of capital murder and sentenced to death in violation of numerous constitutional rights. Furthermore, there is no limitation on the relief that this Court can grant under AEDPA. Accordingly, Petitioner requests that this Court issue the writ of habeas corpus so as to relieve Petitioner from his unconstitutional conviction sentence and grant all other relief requested in the Petition.

Respectfully submitted,

JEFFREY HAVARD, PETITIONER

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2009, I electronically filed the foregoing with the Clerk of the Court using the ECF System which sent notification of such filing to the following:

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