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

**JEFFREY HAVARD,** *Petitioner*

*versus* **NO. 5:08-cv-275-KS**

**CHRISTOPHER B. EPPS, Commissioner Mississippi Department of Corrections and JIM HOOD, Attorney General, State of Mississippi** *Respondents*

# RESPONDENTS' MEMORANDUM IN SUPPORT OF ANSWER TO PETITION FOR ISSUANCE OF WRIT OF HABEAS CORPUS

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**COME NOW** the Respondents in the above styled and numbered cause and file this memorandum in support of the answer in the above styled and numbered cause.

## INTRODUCTORY STATEMENT

This Court has jurisdiction over habeas corpus petitions under 28 U.S.C. §2254 as amended on April 24, 1996 by the Antiterrorism and Effective Death Penalty Act (AEDPA). The fact that this habeas petition is filed after that date requires that the provisions of the AEDPA be applied with full force to this petition. *Lindh v. Murphy*, 521 U.S. 320, 324-26, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997) (holding that AEDPA applies to all federal habeas applications filed on or after April 24, 1996); *Pippin v. Dretke*, 434 f.3d 782, 786 (5th Cir. 2005); *Aguilar v. Dretke*, 428 F.3d 526, 530 (5th Cir. 2005); *Neville v. Dretke*, 423, F.3d 474,

478 (5th Cir. 2005); *Nobles v. Johnson*, 127 F.3d.. 409 (5th Cir. 1997); *Williams v. Cain*, 125 F.3d 269, 273-74 (5th Cir. 1997); *McBride v. Johnson*, 118 F.3d 432, 436 (5th Cir. 1997) ("Because this case comes within the parameters of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214 (1996), we apply the standard of review embodied in the AEDPA. *See Drinkard v. Johnson*, 97 F.3d 751 (5th Cir.1996), *cert. denied*, 502 U.S. 1107, 117 S.Ct. 1114, 137 L.Ed.2d 315 (1997)."). The proper application of the AEDPA is fully explained in the decision of the United States Supreme Court in *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

## A. PROCEDURAL AND FACTUAL BACKGROUND.

### 1. Procedural Background

The petition at bar comes to this Court from a case originating in the Circuit Court of Adams County, Mississippi, wherein Jeffery Havard was convicted of the crime of capital murder during the commission of a sexual battery, in violation of MISS. CODE ANN. § 97-3-19 (2) (e), and was sentenced to death. Havard was indicted on June 24, 2002, for the capital murder of Chloe Madison Britt, a six month-old-child. Jury selection began in the Adams County Circuit Court on December 16, 2002. Trial was conducted and the jury returned a verdict of guilty on December 18, 2002.

After the jury returned its guilty verdict, a sentencing hearing was held on the capital murder conviction where the jury heard evidence in aggravation and mitigation of sentence. After due deliberation, on December 19, 2002, the jury returned a sentence of death in proper

form. The jury verdict on sentence reads as follows:

> We, the jury, unanimously find from the evidence beyond a reasonable doubt that the following facts existed at the time of the commission of the capital murder. One, that the defendant actually killed Chloe Madison Britt. Next, we, the jury, unanimously find that the aggravating circumstances of
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> that the capital offense was committed while defendant was engaged in the commission of or an attempt to commit sexual battery.
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> That the capital offense was especially heinous, atrocious or cruel
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> exists beyond a reasonable doubt and are sufficient to impose the death penalty and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances, and we further find unanimously that the defendant should suffer death.
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> /s/ Cynthia Ethridge
> foreman of the jury

Petitioner filed a post-trial Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, for a New Trial. The motion was denied on February 3, 2003. Thereafter Havard took his automatic appeal to the Mississippi Supreme Court represented by new counsel, the Mississippi Office of Capital Defense Counsel (MOPCC), and raised the following assignments of error:

I. TRIAL COUNSEL WERE INEFFECTIVE IN FAILING TO ENSURE THAT JUROR DOROTHY SYLVESTER WAS EXCUSED FOR CAUSE WHERE SHE WAS BIASED AGAINST JEFFREY.

II. TRIAL COUNSEL WERE INEFFECTIVE IN FAILING TO ASK ANY QUESTIONS RELATED TO THE POTENTIAL JURORS QUALIFICATIONS TO SERVE OF [SIC] A DEATH PENALTY JURY.

III. THE SEATING OF A JUROR WHO WOULD AUTOMATICALLY VOTE FOR THE DEATH PENALTY IN ANY AND ALL MURDER CASES AND THIS JUROR'S FAILURE TO ANSWER THE TRIAL COURT'S QUESTION ON THIS POINT DEPRIVED JEFFREY HAVARD OF A FAIR TRIAL CONSISTENT WITH THE SIXTH, EIGTH [SIC] AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND THE CORRESPONDING PROVISIONS OF OUR STATE CONSTITUTION.

IV. JEFFREY HAVARD WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL ADOPTED A DEFENSIVE STRATEGY AND THEN FAILED TO INVESTIGATE, SECURE EXPERT ASSISTANCE, OFFER ANY EVIDENCE IN SUPPORT OF THE THEORY OR REQUEST A JURY INSTRUCTION IN SUPPORT OF THE THEORY.

V. PROSECUTORIAL MISCONDUCT AT CLOSING ARGUMENT OF THE CULPABILITY PHASE VIOLATED JEFFREY HAVARD'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS AND DEPRIVED HIM OF A FUNDAMENTALLY FAIR TRIAL.

VI. THE TRIAL COURT ERRED IN ALLOWING THE INTRODUCTION OF VICTIM IMPACT TESTIMONY AT SENTENCING.

VII. COUNSEL WERE INEFFECTIVE FOR NOT DEVELOPING AND PRESENTING COMPELLING EVIDENCE IN MITIGATION OF PUNISHMENT.

VIII. JEFFREY HAVARD WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN CLOSING ARGUMENT AT THE SENTENCING PHASE OF THE TRIAL.

IX. THE TRIAL COURT ERRED IN OVERRULING AN OBJECTION MADE BY DEFENSE COUNSEL TO THE USE OF AN IRRELEVANT LIFE PHOTOGRAPH OF THE VICTIM THEREBY CAUSING PREJUDICIAL SYMPATHY FOR THE VICTIM.

X. THE TRIAL COURT ERRED IN ANSWERING A JURY QUESTION

IN SUCH A WAY AS TO CAUSE SPECULATION OF SOME FUTURE RELEASE IF THE DEFENDANT IS NOT SENTENCED TO DEATH THEREBY INJECTING AN "ARBITRARY FACTOR" INTO THE SENTENCING PHASE OF THIS TRIAL IN VIOLATION OF STATE LAW AND THE STATE AND FEDERAL CONSTITUTIONS.

XI. THE TRIAL COURT'S LIMITING INSTRUCTION OF THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE WAS ITSELF UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

XII. THE DEATH SENTENCE IN THIS CASE MUST BE VACATED BECAUSE THE INDICTMENT FAILED TO CHARGE A DEATH PENALTY ELIGIBLE OFFENSE.

XIII. THE TRIAL COURT ERRED IN ALLOWING THE JURY TO CONSIDER THE AGGRAVATORS OF SEXUAL BATTERY AND ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL, WHICH THE JURY USED IN SUPPORT OF A SENTENCE OF DEATH, DENYING HAVARD OF A RELIABLE SENTENCE AS GUARANTEED BY THE UNITED STATES AND THE MISSISSIPPI CONSTITUTIONS.

XIV. THE AGGREGATE ERROR IN THIS CASE REQUIRES REVERSAL OF THE CONVICTION AND DEATH SENTENCE.

Original Brief of Appellant at vii-viii.

On February 9, 2006, the Mississippi Supreme Court rendered its opinion affirming the conviction of capital murder and sentence of death. A petition for rehearing was filed and denied on May 25, 2006. *See Havard v. State*, 928 So.2d 771 (Miss. 2006).

From that adverse decision, Havard sought relief by filing a petition for writ of certiorari with the United States Supreme Court. In that petition Havard raised the following question:

1. In a death penalty case involving a charge of sexual assault, does counsel render ineffective assistance of counsel where he fails to remove a prospective juror who states on voir dire that as a result of the rape of a family member she can not be fair and in fact serves on the jury that finds the defendant guilty and sentences him to death?

Petition for Certiorari at i.

The United States Supreme Court denied certiorari on January 8, 2007. *Havard v. Mississippi*, 549 U.S. 1119, 127 S.Ct. 931, 166 L.Ed.2d 716 (2007).

On May 25, 2007, Havard filed his Petition for Post-Conviction Relief, followed by a Supplement to that Petition regarding Ground I of his argument, filed on July 24, 2007 and raised the following claims:

GROUND I. DURING THE GUILT PHASE OF HIS TRIAL HAVARD'S LAWYERS FAILED TO ADOPTED (SIC) A DEFENSE STRATEGY.

GROUND II. HAVARD'S RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE OF TRIAL WITHING THE MEANING OF STRICKLAND V. WASHINGTON AND ITS FEDERAL PROGENY, AS GUARANTEED BY THE SIXTH AMENDMENT AS WELL AS THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AS WELL AS THE CORRESPONDING PORTIONS OF THE MISSISSIPPI CONSTITUTION AND MISSISSIPPI CASE LAW WERE DENIED BECAUSE HIS TRIAL COUNSEL WERE INEFFECTIVE BY NOT INVESTIGATING, DEVELOPING AND PRESENTING COMPELLING EVIDENCE IN MITIGATION OF PUNISHMENT.

GROUND III. AS A COMPLETELY SEPARATE AND DISTINCT FAILURE TO RENDER EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE OF TRIAL, HAVARD'S TRIAL COUNSEL WERE INEFFECTIVE IN FAILING TO DEVELOP AND PRESENT COMPELLING EVIDENCE IN MITIGATION OF PUNISHMENT BASED UPON INVESTIGATION INTO JEFFERY'S

CHILDHOOD AND FAMILY HISTORY, WHICH HAD THE EFFECT OF DENYING HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT PHASE OF TRIAL WITHIN THE MEANING OF STRICKLAND V. WASHINGTON AND ITS FEDERAL PROGENY, AS WELL AS THE CORRESPONDING PORTIONS OF THE MISSISSIPPI CONSTITUTION AND MISSISSIPPI CASE LAW.

GROUND IV. AS A SEPARATE ISSUE AND COMPLETELY DIFFERENT GROUND FOR RELIEF TRIAL COUNSEL WERE INEFFECTIVE DURING THE PENALTY PHASE OF TRIAL IN FAILING TO DEVELOP AS A MITIGATION THEORY HAVARD'S SUCCESSFUL ADAPTATION TO HAVING BEEN INSTITUTIONALIZED AT CAMP SHELBY.

GROUND V. TRIAL COUNSEL WERE INEFFECTIVE IN FAILING TO ASK ANY QUESTIONS RELATED TO THE POTENTIAL JURORS' QUALIFICATIONS TO SERVE UPON A DEATH PENALTY JURY WHICH HAD THE EFFECT OF DENYING HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT AND SENTENCING PHASES OF TRIAL WITHING THE MEANING OF STRICKLAND V. WASHINGTON AND ITS FEDERAL PROGENY, AS WELL AS THE CORRESPONDING PORTIONS OF THE MISSISSIPPI CONSTITUTION AND MISSISSIPPI CASE LAW.

GROUND VI. HAVARD WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN CLOSING ARGUMENT AT THE SENTENCING PHASE OF HIS TRIAL WHICH HAD THE EFFECT OF DENYING HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE OF TRIAL WITHIN THE MEANING OF STRICKLAND V. WASHINGTON AND ITS FEDERAL PROGENY, AS WELL AS THE CORRESPONDING PORTIONS OF THE MISSISSIPPI CONSTITUTION AND MISSISSIPPI CASE LAW.

GROUND VII. PROSECUTORIAL MISCONDUCT AT CLOSING ARGUMENT OF THE CULPABILITY PHASE VIOLATED JEFFREY HAVARD'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS AND DEPRIVED HIM OF A FUNDAMENTALLY FAIR TRIAL.

GROUND VIII. THE TRIAL COURT ERRED IN ALLOWING THE INTRODUCTION OF VICTIM IMPACT TESTIMONY AT SENTENCING.

GROUND IX. JEFFERY HAVARD'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE US CONSTITUTION WERE VIOLATED WHEN THE COURT IMPROPERLY RESPONDED TO A QUESTION POSED BY THE JURY DURING THE SENTENCING PHASE.

GROUND X. THE TRIAL COURT'S LIMITING INSTRUCTION OF THE ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE VIOLATED MR. HAVARD'S CONSTITUTIONAL RIGHTS BECAUSE IT WAS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

GROUND XI. PETITIONER'S DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT AND NOTICE AND JURY TRIAL GUARANTEES UNDER THE SIXTH AMENDMENT WERE VIOLATED BECAUSE THE INDICTMENT FAILED TO CHARGE A DEATH PENALTY ELIGIBLE OFFENSE.

GROUND XII. MR. HAVARD'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE TRIAL COURT ALLOWED THE JURY TO COLLECTIVELY CONSIDER TWO PARTICULAR AGGRAVATORS, WHICH THE JURY USED IN SUPPORT OF A SENTENCE OF DEATH, THUS DENYING MR. HAVARD A RELIABLE SENTENCE AS GUARANTEED BY THE US CONSTITUTION.

GROUND XIII. MR. HAVARD'S RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL DURING BOTH THE TRIAL AND PENALTY PHASE OF HIS TRIAL WITHIN THE MEANING OF STRICKLAND V. WASHINGTON AND ITS FEDERAL PROGENY, AS GUARANTEED BY THE SIXTH AMENDMENT AS WELL AS THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AS WELL AS THE CORRESPONDING PORTIONS OF THE MISSISSIPPI CONSTITUTION AND MISSISSIPPI CASE LAW WERE DENIED BECAUSE HIS TRIAL COUNSEL, ROBERT E. CLARK, WAS FULLY INCOMPETENT TO PURSUE LEGAL RELIEF ON MR. HAVARD'S BEHALF.

> GROUND XIV. MR. HAVARD WAS DENIED HIS RIGHT TO A FAIR TRIAL GUARANTEED BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE MISSISSIPPI CONSTITUTION DUE TO CUMULATIVE ERROR. MR. HAVARD'S CONSTITUTIONAL RIGHTS WERE VIOLATED DURING BOTH THE GUILT AND SENTENCING PHASES OF HIS TRIAL AND EACH INDIVIDUAL CLAIM ARTICULATED ABOVE WARRANTS POST-CONVICTION RELIEF. MORE IMPORTANTLY, THE COMBINED PREJUDICIAL EFFECT OF ALL THESE ERRORS, TAKEN TOGETHER, REQUIRES REVERSAL.
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> Petition For Post-Conviction Relief With Exhibits at i-iv.

On May 22, 2008, the Mississippi Supreme Court denied petitioner's motion for post-conviction relief. A petition for rehearing was filed and denied on August 28, 2008. *See Havard v. State*, 988 So.2d 322 (Miss. 2008).

On April 10, 2009, Havard then filed with this Court his Petition for Writ of Habeas Corpus. On July 31, 2009, Havard filed his Memorandum in Support.

**2. Factual Background**

In early 2002, Rebecca Britt (hereinafter Britt) and her months old daughter Chloe, the murder victim, moved into a trailer with Britt's boyfriend, Jeffery Havard, the petitioner. On February 21, 2002, the day began with Chloe being dropped off at the Grace Methodist Church daycare center. Care givers at the center testified that although Chloe did have a cough that day she showed no signs of injuries in her rectal area but did have a diaper rash. Tr. 325-28, 333-34. Later testimony also revealed the daycare employees considered Chloe a clean, well-nourished happy child that was not sickly. Tr. 325-26, 335.

Britt picked up Chloe from the daycare center at approximately 5:30 p.m. and drove

her home. At around 6:30 p.m. Britt fed Chloe and gave her some medication for her cough. Tr. 345. Around 7:30 p.m. the petitioner provided cash and instructed Britt to go to the store and buy food for dinner. She did this and upon returning home the petitioner informed her he had bathed Chloe and put her to bed. Tr. 345-46. Britt found this to be unusual as petitioner had not previously shown much interest in interacting with the child. Tr. 343. Britt also noticed that petitioner had removed the sheets from the bed and had placed them by the kitchen stove. He stated to Britt he intended to wash them. Tr. 346.

Britt checked on Chloe at that time and found the child to be sleeping. In the dimly lighted room she heard Chloe make a little noise so she picked her up to make sure nothing was in her throat. She found Chloe to be fine at that time and put her back to bed. Tr. 347. As Britt was about to begin cooking dinner the petitioner asked her to go to Blockbuster to rent some movies for the evening. Britt found this to be unusual in that they had just purchased a satellite system a few days before from which movies could be rented without leaving the home. Tr. 347-48. Still, Britt did go to Blockbuster and returned with rented movies. Upon her return, petitioner was in the bathroom and Britt proceeded to check on Chloe again. She found that Chloe was not breathing and had turned blue. Tr. 348-49. She rushed the child to the living room and began CPR, and also instructed petitioner to go next door, to his grandparent's house, and call for an ambulance. Tr.349. Instead, petitioner suggested that they take the child to the hospital. Despite Chloe's condition the petitioner was slow to dress himself and proceed to the hospital. Petitioner even drove past the turn for

the hospital and had to be redirected by Britt to turn around and go back in the right direction. Tr. 349-50.

The car arrived at Community Hospital and medical personnel took charge of Chloe. Upon arrival Britt handed Chloe over to Shelley Smith, a phlebotomist at the hospital. Smith immediately noted the child had no pulse and was cyanotic as well as having a bruise on the lip. Tr. 360-61. Smith asked what had happened to the child and petitioner responded that he had given Chloe some medicine and put her to bed. Tr. 362-63. Patricia Murphy, a registered nurse at the hospital, also asked what had happened and petitioner informed her that he had bathed Chloe and put her to bed. When asked if anything out of the ordinary had happened the petitioner stated that "Everything was fine. Everything is fine. Just bathed her and put her in the bed." Tr. 389-91.

Chloe went into cardiorespiratory arrest and a code was called. Registered nurse Angela Godbold secured a specialized system used in the resuscitation of children, then intubated and began an IV on the child. Tr. 368-69, 372. As CPR was begun, a sweep of the child's mouth was done and bruising was found inside of her mouth, along the top of the gum line and frenulum, the tendon that connects the lip to the jaw. The injury was described as usually being caused by the pushing of something large into the mouth. Tr. 395, 405.

The medical personnel managed to restore Chloe's pulse and began to better notice the bruising to her inner thighs, lips and forehead as well as to the inside of her mouth. Tr. 374-75, 381, 394. As Chloe's diaper was removed to attempt to take her temperature the

medical staff was shocked to find her rectum gaping open, described as the size of a quarter, approximately an inch in diameter. Tr. 392. Also observed was the lack of muscle tone to the child's rectum which allowed for a liquidy oozing of fluid mixed with stool, and bruising in the rectal, perineum and vaginal areas. Tr.393, 406. At trial, each of the medical providers for Chloe was shown an autopsy photograph of the baby's rectum. Each medical person testified the picture did not present the real life injury they observed as larger and more gruesome in nature than was depicted in the photograph. The consistent testimony of the medical personnel was that the injury to Chloe's rectum was indicative of sexual penetration and abuse caused by the forcible insertion of a foreign object into her rectum. Tr. 393, 397, 407, 418.

Despite the efforts of the medical staff, Chloe's condition began to deteriorate. Chloe had bled so much that she developed a brain herniation, wherein the brain swells. She also developed rhinorrhea, "which is leakage of clear cerebral spinal fluid out of the nares or nose." Tr. 382-83. The fluid surrounding her brain was now leaking from her ears and nostrils. Tr. 420.

Dr. Dar found Chloe's pupils to be fixed and dilated, an indication of brain death; she also noticed retinal tears or hemorrhages in Chloe's eyes, an indication of shaken baby syndrome. Tr. 414-16. According to the attending physicians there is nothing else that causes such hemorrhages other than shaken baby syndrome.407-08, 416.

Chloe was kept on the ventilator for a while longer until the damage to her brain

caused her to "bleed out". Tr. 365. According to the medical staff, Chloe, "just started to swell [...] Literally swell. Her face, her head, everything just - it was like it blew out from the inside out and it just caused this actual visual swelling of her head." Tr. 408. This type of bleeding, "just fills your face and it just looked like a vacuum–they had turned an air hose on and just blew up her face is what it looked like." Tr. 364. Dr. Patterson noted that, "at that point, we lost everything. There was nothing left, and it was shortly after that the code was called." Tr. 408. Dr. Dar, Chloe's pediatrician, testified that Chloe simply, "exploded. At that point, there is no point in saving it." Tr. 420. At that time, Dr. Dar pronounced Chloe dead.

Amy Winter, a DNA expert presented by the State, testified that no traces of semen were found in Chloe's mouth, vagina or rectum. Tr. 535. Dr. Steven Hayne, pathologist for the Department of Public Safety, conducted Chloe's autopsy. His examination revealed the finding of numerous bruises to the child's body, internally and externally, and to the violent shaking that caused her death as well as the conclusion that her rectum had been penetrated with an object. Tr. 545-46,551,557-58.

**B. APPLICABLE LAW.**

Petitioner filed his petition for writ of habeas corpus with this Court on April 10, 2009, and his Memorandum in Support on July 31, 2009. As stated above, because this petition was filed after April 24, 1996, the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA) apply with full force to this petition. *See Neal v. Puckett*, 286

F.3d 230, 235 (5th Cir.2002) (citing *Lindh v. Murphy*, 521 U.S. 320, 324-26, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997) (noting that AEDPA applies to all federal habeas petitions filed on or after April 24, 1996); *Nobles v. Johnson*, 127 F.3d.. 409 (5th Cir. 1997); *Williams v. Cain*, 125 F.3d 269, 273-74 (5th Cir. 1997); *McBride v. Johnson*, 118 F.3d 432, 436 (5th Cir. 1997) ("Because this case comes within the parameters of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214 (1996), we apply the standard of review embodied in the AEDPA. *See Drinkard v. Johnson*, 97 F.3d 751 (5th Cir.1996), *cert. denied*, 502 U.S. 1107, 117 S.Ct. 1114, 137 L.Ed.2d 315 (1997)."). *See also Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997).

The petition presents grounds for relief which are barred from consideration by this Court on the basis of the imposition of an adequate and independent state law procedural bar. *See Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Ylst v. Nunnemaker*, 501 U.S. 797, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991); *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). The fact that the Mississippi Supreme Court also alternatively addressed the merits of these claims does not vitiate the imposition of the procedural bar. *See Harris v. Reed*, 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989).

Furthermore, the resolution of the merits of the claims by the state court do not represent decisions that are contrary to or an unreasonable application of clearly established federal precedent as announced by the United States Supreme Court. Therefore, under the

standards of review found in the AEDPA, habeas relief cannot be granted with respect to these claims.

The most sweeping change provided in the AEDPA is found in Section 104(3) codified in 28 U.S.C. § 2254(d). This subsection provides as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State Court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
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> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.

The Fifth Circuit addressed this standard of review and explained its application in *Summers v. Dretke*, 431 F.3d 861 (5th Cir. 2005). There the Fifth Circuit held:

> II. STANDARD OF REVIEW
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> Summers filed his petition for a writ of habeas corpus after the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). As a result, the petition is subject to the procedures and standards imposed by AEDPA. *See Lindh v. Murphy*, 521 U.S. 320, 336, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997).
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> *A. Appeal from a Denial of a Habeas Corpus Petition*
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> "In a habeas corpus appeal, we review the district court's findings of fact for clear error and review its conclusions of law de novo, applying the same standard of review to the state court's decision as the district court." *Martinez v. Johnson*, 255 F.3d 229, 237 (5th Cir.2001) (quoting *Thompson v.*

*Cain*, 161 F.3d 802, 805 (5th Cir.1998)). "A federal court's collateral review of a state-court decision must be consistent with the respect due state courts in our federal system." *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). As a result, whether at the district court or the circuit court, a federal court's review of a claim adjudicated in a state court is deferential:

> Under § 2254(d), a federal court cannot grant habeas corpus relief with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of that claim either (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

*Hughes v. Dretke*, 412 F.3d 582, 588-89 (5th Cir.2005) (citing 28 U.S.C. § 2254(d)). Moreover, this court has held that "a federal habeas court is authorized by Section 2254(d) to review only a state court's 'decision,' and not the written opinion explaining that decision." *Pondexter v. Dretke*, 346 F.3d 142, 148 (5th Cir.2003) (quoting *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir.2002) (en banc)). *See also Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir.2001) ("The statute compels federal courts to review for reasonableness the state court's ultimate decision, not every jot of its reasoning.").

*(1) Findings of Fact*

A state court's factual findings are "presumed to be correct." *Hughes*, 412 F.3d at 589 (citing 28 U.S.C. § 2254(e)(1)). Before a federal court, "a petitioner has the burden of rebutting this presumption with clear and convincing evidence." *Id.* (citing 28 U.S.C. § 2254(e)(1)).

*(2) Conclusions of Law*

Under AEDPA, a federal court's assessment of a state court's conclusions of law is similarly deferential. The Supreme Court has determined that section 2254(d)(1) affords a petitioner two avenues, "contrary to" and "unreasonable application," to attack a state court application of law. *See Williams v. Taylor*, 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (noting the clauses have "independent meaning"). Under the first

clause:

> a state court decision is "contrary to . . . clearly established Federal law, as determined by the Supreme Court" if: (1) "the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases," or (2) "the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent."

*Foster v. Johnson*, 293 F.3d 766, 776 (5th Cir.2002) (quoting *Williams*, 529 U.S. at 405-06, 120 S.Ct. 1495).

Under the second clause, "a state court decision is 'an unreasonable application of clearly established' Supreme Court precedent if the state court 'correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case.'" *Id*. (quoting *Williams*, 529 U.S. at 407-08, 120 S.Ct. 1495). The Supreme Court provided further guidance:

> First, the Court indicated that the inquiry into unreasonableness is an objective one. Second, the Court emphasized that "unreasonable" does not mean merely "incorrect": an application of clearly established Supreme Court precedent must be incorrect and unreasonable to warrant federal habeas relief.

*Id*. (citing *Williams*, 529 U.S. at 409-12, 120 S.Ct. 1495) (internal citations omitted). *See also Morrow v. Dretke*, 367 F.3d 309, 313 (5th Cir.2004) ("[F]ederal habeas relief is only merited where the state court decision is both incorrect and objectively unreasonable."). Only if a state court's application of federal constitutional law fits within this paradigm may this court grant relief.

431 F.3d at 868-69.

Thus, Havard's claims involving mixed questions of law and fact are governed by the dictates of § 2254(d), which holds that a federal court cannot grant habeas corpus relief unless it determines that the state court's decision involved an unreasonable application of

the law to the facts. *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Moore v. Johnson*, 101 F.3d 1069, 1075-76 (5th Cir. 1996) (*citing Drinkard v. Johnson*, 97 F.3d 751, 767-68 (5th Cir. 1996)).[1]

This "unreasonable application" standard of review of state court decisions does not mean that a federal court may grant habeas relief based on a simple disagreement with the state court decision; such a standard would amount to nothing more than a *de novo* review. *Drinkard*, 97 F.3d at 768. Instead, a federal habeas court can grant habeas relief only if the state court decision was unreasonable. In *Williams v. Taylor, supra*, the Supreme Court held:

> Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.
>
> 529 U.S. at 411.

The Court further stated in *Williams*:

> In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied – the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached

[1]While *Moore* and *Drinkard* incorrectly applied the AEDPA retroactively to habeas corpus petitions pending prior its enactment, the manner in which the AEDPA will be applied in a proper case is controlling on this case. *McBride v. Johnson*, 118 F.3d 432, 436 (5th Cir. 1997).

> by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.
>
> 529 U.S. at 412-413.

"In effect, a reasonable, good faith application of Supreme Court precedent will immunize the state court conviction from federal habeas reversal." *Mata v. Johnson*, 99 F.3d 1261, 1268 (5th Cir. 1996), *vacated in part on other grounds*, 105 F.3d 209 (5th Cir. 1997).

Havard has failed to demonstrate how, and respondents assert he cannot show, the resolution of the claims raised on direct appeal or state post-conviction review "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," at the time of the direct appeal and post-conviction review litigation. Further, any claims of ineffective assistance of counsel, being questions of mixed law and fact, do not present decisions that were based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Havard has not stated a claim on which relief can be granted.

The long standing requirement of deference to factual findings made by state courts remains intact in the amendments to § 2254. Section 2254(e) reads:

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be

> correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

This burden of proof is a high burden, more than a preponderance of the evidence burden. Brown cannot meet this burden to overcome the findings of fact made by the State courts by clear and convincing evidence. *See Patterson v. Dretke*, 370 F.3d 480, 484 (5th Cir. 2004); *Morrow v. Dretke*, 367 F.3d 309, 315 (5th Cir. 2004).

In cases governed by the AEDPA, 28 U.S.C. § 2254, the analysis differs depending upon whether the issue is one of law, fact, or both. *See Williams v. Taylor supra*; *Drinkard v. Johnson*, 97 F.3d 751, 767-68 (5th Cir.1996). The Fifth Circuit held in *Brewer v. Dretke*, 410 F.3d 773 (5th Cir. June 2, 2005):

> The Antiterrorism and Effective Death Penalty Act of 1996, at 28 U.S.C. § 2254(d), sets forth the conditions under which a court shall grant a petition for a writ of habeas corpus:
>
> > An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
> >
> > > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> > >
> > > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> Section 2254(d)(1) addresses pure questions of law and mixed questions of law and fact. *See Martin v. Cain*, 246 F.3d 471, 475 (5th Cir.2001). Under the first ("contrary to") clause, a federal district court may grant habeas relief if the state court decided a case differently from how the

> United States Supreme Court decided a case on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 412-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Under the second ("unreasonable application") clause, a court may grant habeas relief if the state court correctly divined a legal principle from the Supreme Court's jurisprudence but misapplied that principle to the facts. *See id*.
>
> Section 2254(d)(2) addresses pure questions of fact. *See Moore v. Johnson*, 225 F.3d 495, 501, 504 (5th Cir.2000). Under this subsection, federal courts must give deference to state court findings of fact unless they are based on an unreasonable interpretation of the evidence presented in the state court proceeding.[3]
>
> _____
>
> 3. *See Chambers v. Johnson*, 218 F.3d 360, 363 (5th Cir.2000) (as modified on denial of rehearing). Factual determinations made by the state court are presumptively correct and will not be disturbed unless the petitioner rebuts the presumption by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

410 F.3d at 775.

Consequently, for questions of fact, habeas relief may be granted only if the Court finds that the state court made a determination of fact which was unreasonable in light of the evidence presented to the state courts. *See* 28 U.S.C. § 2254(d)(2); *Williams v. Taylor, supra*, *Drinkard*, 97 F.3d at 767-68. When reviewing such factual determinations, the Court must presume correct the factual findings of the state court, unless the petitioner *"rebut[s] the presumption of correctness by clear and convincing evidence*." [Emphasis added.] *See* 28 U.S.C. § 2254(e)(1); *Jackson v. Anderson*, 112 F.3d 823, 824-25 (5th Cir.1997).

When considering questions of law, on the other hand, this Court may grant habeas relief only if the state court's determination of law is contrary to "clearly established" Supreme Court precedent. *See* 28 U.S.C. § 2254(d)(1); *Williams v. Taylor, supra*; *Drinkard*,

97 F.3d at 768. The Fifth Circuit, in *Jones v. Dretke*, 375 F.3d 352 (5th Cir. 2004), explained this requirement, stating:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; . . . . 28 U.S.C. § 2254(d) (emphasis added). The Supreme Court, interpreting § 2254(d)(1), held that "a state-court decision is . . . contrary to this Court's precedent if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours." *Williams v. Taylor*, 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). In order to find that a state adjudication is objectively unreasonable, "the state court's application [of federal law] must be more than merely incorrect." *Robertson v. Cockrell*, 325 F.3d 243, 248 (5th Cir.2003) (*en banc*)
>
> 375 F.3d at 353-54.

Therefore, the state court resolution of a claim must "not only be erroneous, but objectively unreasonable" in order for habeas relief to be granted. *Yarborough v. Alvarado*, 541 U.S.652, 124 S.Ct. 2140, 2150 (2004); *Middleton v. McNeil*, 541 U.S. 433, 124 S.Ct. 1830, 1832 (2004); *Mitchell v. Esparza*, 540 U.S.12, 124 S.Ct. 7, 12 (2003); *Yarborough v. Gentry*, 540 U.S. 1, 5, 124 S.Ct. 1, 4, 157 L.Ed.2d 1 (2003); *Lockyer v. Andrade*, 538 U.S. 63, 76, 123 S.Ct. 1166, 1175 (2003); *Williams v. Taylor*, 529 U.S. 362, 409, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). In *Holland v. Jackson*, 542 U.S. 934, 124 S.Ct. 2736, 159 L.Ed.2d 683. (2004), the United States Supreme Court gave the federal habeas courts the following admonition:

> As we explained in *Visciotti*, § 2254(d) requires that "state-court decisions be

> given the benefit of the doubt." *Id*., at 24, 123 S.Ct. 357. "[R]eadiness to attribute error is inconsistent with the presumption that state courts know and follow the law." *Ibid*. The Sixth Circuit ignored those prescriptions.
>
> 124 S.Ct. at 2739.

*See Woodford v. Visciotti*, 537 U.S. 19, 123 S.Ct. 357 (2002).

Looking to claims which are mixed questions of law and fact, the Fifth Circuit held in *Patterson v. Dretke*, 370 F.3d 480 (5th Cir. 2004):

> "Section 2254(d)(1) provides the standard of review for questions of law and mixed questions of law and fact." *Caldwell v. Johnson*, 226 F.3d 367, 372 (5th Cir.2000). A state court's decision is "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States . . . if the state court arrives at a conclusion opposite to that reached by th[e] Court on a question of law or if the state court decides a case differently than th[e] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412- 13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). A decision "involve[s] an unreasonable application of [ ] clearly established Federal law, as determined by the Supreme Court of the United States . . . if the state court identifies the correct governing legal principle from th[e] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id*. at 413, 120 S.Ct. 1495.
>
> 370 F.3d at 483-84.

*See Williams v. Taylor*, 529 U.S. 362, 412-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Haley v. Cockrell*, 306 F.3d 257, 263 (5th Cir. 2002); *Carter v. Johnson*, 110 F.3d 1098, 1106-08 (5th Cir.) ("With a mixed question of law and fact, the facts are presumed correct and then the law is reviewed for reasonableness, not de novo."). These are the standards that must be applied by this Court in determining the claims made in this case.

Habeas relief generally may not be premised on rules of constitutional law that have yet

to be announced or that were announced after the challenged conviction became final on direct review. *See Teague v. Lane*, 489 U.S. 288, 305-07, 109 S.Ct. 1060, 1073, 103 L.Ed.2d 334 (1989). *See also Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004); *Beard v. Banks*, 542 U.S. 406, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004);*Hughes v. Dretke*, 412 F.3d 582, 590-91 (5th Cir. 2005); *Cardenas v. Dretke*, 405 F.3d 244, 249 (5th Cir. 2005). In explaining what rules are to be retroactively applied the United States Supreme Court, held in *Tyler v. Cain*, 533 U.S. 656, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001):

> The Supreme Court does not "ma[k]e" a rule retroactive when it merely establishes principles of retroactivity and leaves the application of those principles to lower courts. In such an event, any legal conclusion that is derived from the principles is developed by the lower court (or perhaps by a combination of courts), not by the Supreme Court.[4] *We thus conclude that a new rule is not "made retroactive to cases on collateral review" unless the Supreme Court holds it to be retroactive*.[5]

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4. Similarly, the Supreme Court does not make a rule retroactive through dictum, which is not binding. *Cf. Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (contrasting dictum with holdings, which include the final disposition of a case as well as the preceding determinations "*necessary* to that result" (emphasis added)).

5. Tyler argues that defining "made" to mean "held" would create an anomaly: When it is obvious that a rule should be retroactive, the courts of appeals will not be in conflict, and this Court will never decide to hear the case and will never make the rule retroactive. Thus, Tyler concludes, we should construe § 2244(b)(2)(A) to allow for retroactive application whenever the "principles" of our decisions, as interpreted by the courts of appeals, indicate that retroactivity is appropriate. This argument is flawed, however. First, even if we disagreed with the legislative decision to establish stringent procedural requirements for retroactive application of new rules, we do not have license to question the decision on policy grounds. *See Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). Second, the "anomalous" result that Tyler predicts is speculative at best, because AEDPA

> does not limit our discretion to grant certiorari to cases in which the courts of appeals have reached divergent results.

533 U.S. at 663, 121 S.Ct. at 2482. [Emphasis added.]

Based on this precedent, no new rule can be retroactively applied unless the Supreme Court has specifically held it to have retroactive application. *See In re Elwood*, 408 F.3d 211, 212-13 (5th Cir. 2005); *Cockerham v. Dretke*, 283 F.3d 657, 660-61 (5th Cir. 2002); *Burdine v. Johonson*, 262 F.3d 336, 390, n.32 (5th Cir. 2001). Further, this Court cannot create a new rule and apply it to this case. *Id.*

Further, even if the Court finds error in some aspect of the case, before the Court can grant habeas relief, the Court must also conduct a harmless error analysis under the dictates of *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). *See Fry v. Pliler*, 551 U.S. 112, 127 S.Ct. 2321, 2007 WL 16611463 (June 11, 2007) (*Brecht* standard applies even if state court did not apply *Chapman* harmless error on direct review or did not apply harmless error review at all.); *Kittelson v. Dretke*, 426 F.3d 306, 320-21 (5th Cir. 2005); *Nixon v. Epps*, 405 F.3d 318, 328-332 (5th Cir. 2005), *cert. denied*, 546 U.S. 1016, 126 S.Ct. 650, 163 L.Ed.2d 528, *reh. denied*, 546 U.S. 1083, 126 S.Ct. 843 (2005); *Billiot v. Puckett*, 135 F.3d 311 (5th Cir. 1998), *cert. denied*, 525 U.S. 966, 119 S.Ct. 413, 142 L.Ed.2d 336 (1998). Any constitutional error found, must be subjected to an analysis to determine whether the "error had a substantial and injurious effect or influence in determining the jury's verdict." 507 U.S. at 637.

Basically, in order for habeas relief to be granted to petitioner, this Court must find that

the State court resolution of the claims raised were contrary to or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Jones v. Dretke*, 375 F.3d 352, 354 (5th Cir. 2004).

Respondents would further point out that petitioner is not entitled to an evidentiary hearing on any of the claims presented in this petition. The AEDPA provides:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –
>
> (A) the claim relies on –
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

Therefore, any factual basis of Havard's claims not developed in the state court proceedings do not fall into either of the exceptions noted by §2254. Havard does not present to this Court anything new for determination. He contends that this Court should conduct an evidentiary hearing at which evidence may be offered concerning the factual allegations raised in the petition. Such a hearing would be contrary to the dictates of the AEDPA. Petitioner is not entitled to an evidentiary hearing to further develop facts not developed at trial, on direct

appeal or state post-conviction review.

In addition, Havard presents issues here which were held to be procedurally barred from consideration on direct appeal or state post-conviction review. Therefore, this Court is similarly barred from consideration of these claims as they rest on the adequate and independent state law ground of procedural bar or waiver unless petitioner can show cause and actual prejudice. *See Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Ylst v. Nunnemaker*, 501 U.S. 797, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991); *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). Petitioner has failed to demonstrate cause and actual prejudice to overcome these bars. Further, in those instances where the state court has imposed a procedural bar and then gone on to address the merits of the claim, the procedural bar must be recognized by this Court as a bar to consideration of the merits of that claim. *See Harris v. Reed*, 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989).

In *Gray v. Netherland*, 518 U.S. 152, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996), the United States Supreme Court held:

> . . . Title 28 U.S.C. § 2254(b) bars the granting of habeas corpus relief "unless it appears that the applicant has exhausted the remedies available in the courts of the State." Because "[t]his requirement . . . refers only to remedies still available at the time of the federal petition," *Engle v. Isaac,* 456 U.S. 107, 125, n. 28, 102 S.Ct. 1558, 1570, n. 28, 71 L.Ed.2d 783 (1982), it is satisfied "if it is clear that [the habeas petitioner's] claims are now procedurally barred under [state] law," *Castille v. Peoples,* 489 U.S. 346, 351, 109 S.Ct. 1056, 1060, 103 L.Ed.2d 380 (1989). However, the procedural bar that gives rise to exhaustion provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim,

> unless the petitioner can demonstrate cause and prejudice for the default. *Teague v. Lane, supra,* at 298, 109 S.Ct., at 1068-1069; *Isaac, supra,* at 125, n. 28, 129, 102 S.Ct., at 1570, n. 28, 1572; *Wainwright v. Sykes,* 433 U.S. 72, 90-91, 97 S.Ct. 2497, 2508-2509, 53 L.Ed.2d 594 (1977).
>
> 518 U.S. at 161-162.

Earlier in *Teague v. Lane*, 489 U.S. 288 (1989), the Court held:

> . . . "It is well established that 'where an appeal was taken from a conviction, the judgment of the reviewing court is *res judicata* as to all issues actually raised, and those that could have been presented but were not are deemed waived.'" *People v. Gaines,* 105 Ill.2d 79, 87-88, 85 Ill.Dec. 269, 274, 473 N.E.2d 868, 873 (1984) (citation omitted), cert. denied, 471 U.S. 1131, 105 S.Ct. 2666, 86 L.Ed.2d 282 (1985). The default prevents petitioner from raising the *Swain* claim in collateral proceedings under the Illinois Post- Conviction Act, Ill.Rev.Stat., ch. 38, ¶ 122-1 *et seq*. (1987), unless fundamental fairness requires that the default be overlooked. *People v. Brown,* 52 Ill.2d 227, 230, 287 N.E.2d 663, 665 (1972).
>
> The fundamental fairness exception is a narrow one, and has been applied in limited circumstances. Compare *People v. Goerger,* 52 Ill.2d 403, 406, 288 N.E.2d 416, 418 (1972) (improper instruction on reasonable doubt "does not constitute such fundamental unfairness as to obviate the *res judicata* and waiver doctrines"), with *People v. Ikerd,* 47 Ill.2d 211, 212, 265 N.E.2d 120, 121 (1970) (fundamental fairness exception applies "where the right relied on has been recognized for the first time after the direct appeal"), and *People v. Hamby,* 32 Ill.2d 291, 294-295, 205 N.E.2d 456, 458 (1965) (fundamental fairness exception applies to claims that defendant asked counsel to raise on direct appeal). It is clear that collateral relief would be unavailable to petitioner. *See People v. Beamon,* 31 Ill.App.3d 145, 145-146, 333 N.E.2d 575, 575-576 (1975) (abstract of decision) (not invoking fundamental fairness exception and holding that *Swain* claim not raised on direct appeal could not be raised for the first time in collateral proceedings). As a result, petitioner has exhausted his state remedies under 28 U.S.C. § 2254(b) with respect to the *Swain* claim. See *Engle v. Isaac,* 456 U.S. 107, 125-126, n. 28, 102 S.Ct. 1558, 15701571, n. 28, 71 L.Ed.2d 783 (1982); *United States ex rel. Williams v. Brantley,* 502 F.2d 1383, 1385-1386 (CA7 1974).
>
> Under *Wainwright v. Sykes,* 433 U.S. 72, 87-91, 97 S.Ct. 2497, 2506-

2509, 53 L.Ed.2d 594 (1977), petitioner is barred from raising the *Swain* claim in a federal habeas corpus proceeding unless he can show cause for the default and prejudice resulting therefrom. See *Engle v. Isaac, supra,* 456 U.S., at 113-114, 117, 124-135, 102 S.Ct., at 1564-1565, 1566, 1570-1576 (applying procedural default rule to claim that had never been raised in state court). Petitioner does not attempt to show cause for his default. Instead, he argues that the claim is not barred because it was addressed by the Illinois Appellate Court. Cf. *Caldwell v. Mississippi*, 472 U.S. 320, 327- 328, 105 S.Ct. 2633, 2638-2639, 86 L.Ed.2d 231 (1985). We cannot agree with petitioner's argument. The Illinois Appellate Court rejected petitioner's Sixth Amendment fair cross section claim *without* mentioning the Equal Protection Clause on which *Swain* was based or discussing whether *Swain* allows a prosecutor to be questioned about his use of peremptory challenges once he volunteers an explanation. See *People v. Teague,* 108 Ill.App.3d, at 895-896, 64 Ill.Dec., at 405, 439 N.E.2d, at 1070. Accordingly, we hold that petitioner' *Swain* claim is procedurally barred, and do not address its merits.

Our application of the procedural default rule here is consistent with *Harris v. Reed,* 489 U.S. 255, 263, 109 S.Ct. 1038, 1043, 103 L.Ed.2d 308 (1989), which holds that a "procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar" (citations and internal quotations omitted). The rule announced in *Harris v. Reed* assumes that a state court has had the opportunity to address a claim that is later raised in a federal habeas proceeding. It is simply inapplicable in a case such as this one, where the claim was never presented to the state courts. *See id.,* at 268- 270, 109 S.Ct., at 1046-1047 (O'CONNOR, J., concurring).

489 U.S. at 297-299.

Respondents would submit that any claim that has not been fairly presented to the state courts is unexhausted. Under the provisions of § 99-39-5 (2)[2] and § 99-39-27 (9)[3], petitioner cannot now exhaust new claims as they would be procedurally barred from consideration by

[2]One year statute of limitations bar.

[3]Successive petition bar.

the state court. Therefore, this Court must hold any such claims to be procedurally barred from consideration on federal habeas review.

Finally, it appears that all of the claims petitioner is raising before this Court, except for those contained in Claims II, III, VII, VIII, XII and XIII, have been presented to the state courts in some fashion and are not barred. The respondents would submit that the resolution of those claims by the Mississippi Supreme Court are not contrary to or an unreasonable application of established precedent as announced by the United States Supreme Court, nor do they represent an unreasonable application of the established precedent to the facts of this case. Havard is entitled to no habeas relief.

## THE CLAIMS

### CLAIM I

**THE MISSISSIPPI SUPREME COURT'S DECISION THAT THE PETITIONER WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN CHALLENGING THE UNDERLYING FELONY WAS NOT CONTRARY TO OR AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW AS ANNOUNCED BY THE UNITED STATES SUPREME COURT, NOR AN UNREASONABLE APPLICATION OF THE LAW TO THE FACTS OF THIS CASE.**

On direct appeal, Havard claimed trial counsel were ineffective for not adequately supporting the defense strategy that Havard did not commit sexual battery upon young Chloe. Havard alleged counsel was ineffective for failing to (1) test and present rebuttal DNA testimony; (2) secure expert assistance; (3) request a lesser offense instruction. The Mississippi Supreme Court considered the arguments raised by Havard and held:

## IV. WHETHER HAVARD WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DUE TO COUNSEL'S FAILURE TO ADEQUATELY SUPPORT THE DEFENSE STRATEGY

¶ 21. Havard again claims ineffective assistance of counsel in that his attorneys at trial developed a trial strategy and then did not investigate, secure expert assistance, offer any evidence in support of the theory, or request a jury instruction in support of the theory. Because trial counsel's theory was to contest the underlying felony of sexual battery, Havard argues that trial counsel should have presented rebuttal evidence and relies on a post-trial affidavit of Dr. James Lauridson to offer the possibility of disproving any sexual battery through DNA testing. Havard also contends that trial counsel was ineffective in failing to secure a pathologist to investigate and present a theory of defense. Trial counsel did request funds for an investigator, but the trial court denied that request.

¶ 22. Again, the State counters with its analysis of Rule 22 as to Dr. Lauridson's outside-the-record affidavit, and, consistent with our discussion of Issue II, supra, we consider this issue, absent Dr. Lauridson's affidavit. FN6

> FN6. Because we have determined we will not consider Dr. Lauridson's outside-the-record affidavit, we deem it unnecessary here to address the authority submitted by Havard's appellate counsel in his Rule 28(j) letter. *Gersten v. Senkowski*, 426 F.3d 588 (2nd Cir.2005). *See* M.R.A.P. 28(j). *Gersten* involved an appeal to the Second Circuit Court of Appeals from a federal district court's grant of a petition for a writ of habeas corpus. Inasmuch as the incarcerated defendant had been tried and convicted in state court, and his conviction and sentence affirmed on direct appeal, the federal district court trial (and thus ensuing appeal to the circuit court of appeals) quite appropriately involved extensive affidavit testimony from experts to discredit the prosecution's theory of sexual abuse of the minor victim. Thus, for today's discussion, *Gersten* is inapplicable.

### 1. Failure to obtain DNA evidence

¶ 23. Havard claims his trial counsel was ineffective for failing to secure a DNA expert to disprove the allegations of sexual battery, the underlying felony in this case. Havard's counsel did however establish on cross-examination of crime lab biologist Amy Winter that no testing was done on Havard or Chloe for DNA

samples. As the State correctly points out in its brief to this Court, showing the absence of DNA evidence on either Chloe or Havard would not absolve Havard of guilt of sexual battery. Sexual battery is defined as sexual penetration of a class of victims. Miss.Code Ann. § 97-3-95. The sexual penetration, as defined by statute, may be penetration with "any object," not necessarily a body part. Miss.Code Ann. § 97-3-97. Indeed, on cross examination, defense counsel produced testimony that no thorough search was conducted for any blunt object which could have been used in the commission of the underlying felony.

¶ 24. In *Branch*, we stated, "an indigent defendant has a right to receive state funds for a DNA expert where the state presents DNA evidence." 882 So.2d at 62 (citing *Richardson v. State*, 767 So.2d 195, 199 (Miss.2000)). The State presented DNA evidence which had been collected from the bed sheet and which matched the DNA of both Havard and Chloe. Defense counsel did adduce testimony on cross-examination that a sexual assault kit from Chloe testing for any of Havard's DNA in her rectum or vagina came back negative. Consistent with long-standing principles of fairness in criminal trials, Havard carried no burden to prove any fact, but held a presumption of innocence which was explained to the jury. The State carried the burden of proving Havard's guilt beyond a reasonable doubt. It is apparent from the record that defense counsel's strategy was to attack the weakness of the State's case, and for reasons discussed, infra, such a defense strategy is not per se ineffective assistance of counsel under *Strickland*.

**2. Failure to secure a pathologist**

¶ 25. Havard claims his trial counsel was ineffective for failing to secure a pathologist to investigate the case and develop a defense strategy. Havard's counsel did request an independent evaluation of the autopsy report based on counsel's lack of medical training and need to develop a defense. The trial court denied the motion because counsel showed no basis for need when Dr. Steven Hayne, the pathologist who prepared the report, was available. Havard now asserts that the failure of his trial counsel to present the trial court with any basis for the request constitutes ineffective assistance. Havard relies on a case from this Court to support his proposition that a denial of a defendant's request for expert assistance can strip an accused of a fair trial. *Harrison v. State*, 635 So.2d 894 (Miss.1994). In *Harrison*, this Court made clear that a right to defense funds to obtain such an expert are conditioned upon a showing of need to prepare a defense, and will depend on the facts and circumstances of each case. *Id.* at 901. As Havard points out through his reliance on *Harrison*, this Court has stated in

*Hansen v. State*, 592 So.2d 114, 125 (Miss.1991) that a showing of substantial need is required for such a request. The defendant must bring forth "concrete reasons" to the trial judge that assistance would be beneficial. *Harrison*, 635 So.2d at 901. Because trial counsel failed to bring forth any concrete reasons or show any substantial need, Havard alleges ineffective assistance of counsel.

¶ 26. We stated in *Harrison* that because no single test exists for determining when an expert's services are necessary, and because the determination is made on a case-by-case basis, the trial judge has the sound discretion to decide when a need exists. *Id.* In *Johnson v. State*, 529 So.2d 577, 590 (Miss.1988), we stated that we will grant relief to a defendant for denial of expert assistance only where the defendant demonstrates that the trial court abused its discretion so egregiously that it denied him due process and rendered his trial fundamentally unfair.

¶ 27. As noted, Havard offers the affidavit of Dr. James Lauridson and an accompanying medical journal article to show this substantial need which his trial counsel failed to show. Dr. Lauridson reviewed the autopsy report before submitting his affidavit. Again, we deem it inappropriate to consider this outside-the-record documentation. Thus, the question before this Court is whether trial counsel was ineffective for failure to make a more diligent effort to request his own pathologist by obtaining this information and showing need. We cannot find that defense counsel's efforts rose to such a level so as to offend Strickland. Trial counsel made the request based on a need for assistance in interpreting the autopsy report. Now on appeal, Havard's counsel has an independent evaluation of that autopsy report. The trial court exercised its discretion in refusing defense counsel's request for an independent evaluation, and we find no abuse of discretion in the trial court's actions so as to deny Havard a fundamentally fair trial.

**3. Failure to include a lesser offense instruction**

¶ 28. Havard claims his trial counsel was ineffective for not including a lesser offense instruction on murder or manslaughter. When claiming ineffective assistance of trial counsel because of jury instructions, "[i]t is the duty of the appellant to demonstrate both error in failing to receive the instruction and the prejudice to the defense." *Burnside v. State*, 882 So.2d 212, 216 (Miss.2004).

¶ 29. Havard relies on *Woodward v. State*, 635 So.2d 805 (Miss.1993) to support his assertion that his trial counsel had an obligation to submit a jury instruction

on non-capital (simple) murder when embracing a theory of defending against the underlying felony. This Court in *Woodward* found trial counsel to be ineffective, but not for failing to submit jury instructions. *Id.* at 810. The accused in *Woodward* claimed ineffective assistance because defense counsel admitted that the defendant committed murder. *Id.* at 808. In *Woodward*, the defendant, who was on trial for capital murder, had admitted to shooting the victim but claimed it was not during the commission of the underlying felony of rape; therefore, counsel admitted at trial that the defendant was guilty of simple murder, a lesser crime than that of capital murder. *Id.* at 808.

¶ 30. As in any case, jury instructions are critical in homicide cases. "In a homicide case, as in other criminal cases, the court should instruct the jury as to theories and grounds of defense, justification, or excuse supported by the evidence, and a failure to do so is error requiring reversal of a judgment of conviction." *Giles v. State*, 650 So.2d 846, 849 (Miss.1995). "We have repeatedly held that lesser-included offense instructions should not be indiscriminately granted. Rather, they should be submitted to the jury only where there is an evidentiary basis in the record therefor." *Lee v. State*, 469 So.2d 1225, 1230 (Miss.1985) (citations omitted). We also stated in *Giles* that even if the defenses are based on meager evidence and highly unlikely, "a defendant is entitled to have every legal defense he asserts to be submitted as a factual issue for determination by the jury under proper instruction of the court." *Giles*, 650 So.2d at 849. In *Giles*, defense counsel's only instruction submitted for his theory of defense was rejected by the trial court. Both *Giles* and *Woodward* emphasized that the jury instructions which reflect the defenses counsel employs must be submitted to the jury. In both *Giles* and *Woodward*, as in today's case, counsel's proposed jury instructions reflected the defenses proffered. Havard's counsel presented a theory that Havard did not commit the underlying offense. Had the jury found this to be true, the jury's only choice would have been to acquit Havard.

¶ 31. With regard to all three of the above assignments of attorney error, we reiterate that counsel is given broad discretion to plan a trial strategy and to carry it out. In *Branch*, we said, "When evaluating the overall performance of counsel, counsel must make strategic discretionary decisions including whether or not to file certain motions, call certain witnesses, ask certain questions or make certain objections." *Branch*, 882 So.2d at 52 (citation omitted). Such decisions do not necessarily equate to ineffective assistance simply because counsel was not successful at trial. These trial decisions by counsel did not decidedly result in performance deficient under *Strickland*, but even if they did, the inquiry does not

end there. "Once a deficient performance is shown, a 'defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *Woodward*, 635 So.2d at 808 (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052).

¶ 32. To prevail on this claim, Havard must show under *Strickland* that counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686, 104 S.Ct. 2052. As to whether defense counsel's trial strategies and decisions were sound, Havard has no guarantee of flawless, or successful, representation. "There is no constitutional right to errorless counsel." *Branch*, 882 So.2d at 52. The record before us raises serious doubts as to whether the evidence supported the giving of a non-capital murder instruction or a manslaughter instruction. Admittedly, had defense counsel submitted such lesser offense instructions, this action would not have been contrary to the defense theory that there was insufficient evidence for the jury to find that Havard was guilty of the underlying felony of sexual battery. However, we view this decision by Havard's counsel not to be outside the realm of appropriate trial strategy. Because defense counsel did not submit the lesser offense instructions, had the jury found that the State failed to prove Havard guilty of the underlying felony of sexual battery, the jury would have been required to find Havard not guilty of capital murder, thus rendering him a free man. On the other hand, if any lesser offense instruction had been given to the jury, if the jury found that the State had failed to prove the underlying felony, the jury still could have found Havard guilty of the lesser offense, thus placing him in the state penitentiary for twenty years to life (depending on whether the jury had found Havard guilty of manslaughter or non-capital murder). Trial counsel's decision not to submit lesser offense instructions, while it turned out to be unsuccessful, was appropriate trial strategy, and thus beyond the realm of serious consideration on a claim of ineffective assistance of counsel. We thus cannot say that trial counsel's performance was deficient and that, but for counsel's deficient performance at trial with regard to this issue, a reasonable probability exists that the outcome would have been different. Thus, this issue fails under *Strickland* and is without merit.

*Havard* I at 787-91.

Havard again brought the same issues to the attention of the Mississippi Supreme Court

in his petition for post-conviction relief, where that court held:

> **I. Ineffective assistance of counsel for failure to adopt defense strategy during guilt phase.**
>
> ¶ 7. Havard asserts the following three sub-claims of ineffective assistance of counsel: (A) trial counsel failed to secure expert assistance to develop evidence to support the defense's theory of the case; (B) trial counsel failed to research case law supporting their defense theory in order to obtain relief during trial in the form of an appropriate expert witness and/or preserve the trial court's denial of an expert for direct appeal; and (C) trial counsel, having adopted the theory that no sexual battery occurred, failed to seek a jury instruction to support the theory. On direct appeal, Havard claimed that he received ineffective assistance of counsel due to counsels' failure to adequately support the defense strategy. Havard also raised the three sub-claims listed above.
>
> ¶ 8. The theory of defense was that no sexual battery occurred, thereby eliminating the underlying felony to the capital murder charge. If this defense had proved successful, Havard would have avoided the death penalty. On direct appeal, Havard argued that trial counsel should have presented rebuttal evidence, and he relied on the post-trial affidavit of Dr. James Lauridson to offer the possibility of disproving, through the use of DNA testing, the state's theory that sexual battery had occurred. *See Havard v. State*, 928 So.2d 771, 787-88 (Miss.2006). Havard also claimed that trial counsel was ineffective for failing to secure, or adequately prepare a motion to secure, a pathologist to investigate the case and develop a defense strategy; and that his counsel was ineffective for failing to include a lesser-offense instruction on murder or manslaughter. *Id.* at 788-91.
>
> ¶ 9. When addressing these issues on direct appeal, this Court determined that it would not consider Dr. Lauridson's outside-the-record affidavit. *Id.* at 787-88 n. 6. The state now argues that Havard is attempting to relitigate the claims already presented on direct appeal and that the issue is barred from post-conviction proceedings by the doctrine of *res judicata* pursuant to Mississippi Code Annotated Section 99-39-21(3) (Rev.2007). *See also Wiley v. State*, 750 So.2d 1193, 1200 (Miss.1999); *Foster v. State*, 687 So.2d 1124, 1129 (Miss.1996); *Wiley v. State*, 517 So.2d 1373, 1377 (Miss.1987).
>
> ¶ 10. As we explained more fully in Havard's direct appeal, the version of Mississippi Rule of Appellate Procedure 22(b) effective at the time of Havard's

direct appeal, like the current version, stated:

> **(b) Post-conviction issues raised on direct appeal.** Issues which may be raised in post-conviction proceedings may also be raised on direct appeal *if such issues are based on facts fully apparent from the record*. Where the appellant is represented by counsel who did not represent the appellant at trial, the failure to raise such issues on direct appeal shall constitute a waiver barring consideration of the issues in post-conviction proceedings.

Mississippi Rule of Appellate Procedure 22(b) (2005) (emphasis added). *Havard*, 928 So.2d at 783. However, as we noted in *Havard*, the version of Rule 22(b) in effect at the time of Havard's trial did not contain the words that appear in italics above. *Id.* at n. 5. The amendment adding the italicized words to Rule 22(b) took effect February 10, 2005. The Court agreed with Havard that the prior version was controlling on direct appeal. After a thorough analysis, we determined that

> [i]t would indeed be dangerous here for us to begin a precedent of considering on direct appeals post-trial affidavits by affiants who have not been subjected to cross-examination. The utilization of affidavits is better served in the post-conviction relief proceedings allowable by statute. Miss.Code Ann. § 99-39-1 et seq. (Rev.2000). Having raised this issue with different counsel on direct appeal, Havard has preserved his right to raise this issue, supported by affidavits, in future post-conviction relief proceedings.

*Id.* at 786. The Court proceeded to discuss Havard's issues absent certain post-trial affidavits.

¶ 11. In considering the issue *sub judice* on direct appeal, the Court stated that, "... consistent with our discussion of Issue II, supra, we consider this issue, absent Dr. Lauridson's affidavit." *Id.* at 787. The Court then considered this issue on the merits. Unlike Havard's Issue II as discussed in Havard's direct appeal, this Court did not specifically state that Havard had preserved his right to raise the instant issue in post-conviction-relief proceedings. However, the Court's reasoning for preserving Havard's Issue II on direct appeal for post-conviction proceedings applies to the instant issue. FN2

> FN2. To be abundantly clear, the "Issue II" on direct appeal was

> whether trial counsel rendered ineffective assistance by failing to ask "reverse- *Witherspoon* " questions during voir dire. In our discussion of Issue II, we addressed an "outside-the-record" juror affidavit and found that "[t]he utilization of affidavits is better served in the post-conviction relief proceedings allowable by statute." *Havard*, 928 So.2d at 786 (complete discussion of Issue II is found as follows: *Havard*, 928 So.2d at 782-87). However in discussing Issue IV (whether Havard was denied ineffective assistance of counsel due to trial counsel's failure to adequately support the defense strategy), we adopted by reference our reasoning set out in Issue II in determining that Dr. James Lauridson's "outside-the-record" affidavit should likewise not be considered on direct appeal, but instead was better suited for consideration during post-conviction-relief proceedings. *Id.* at 787.
>
> ¶ 12. The only difference in the instant issue as it is presented here in post-conviction proceedings and its presentation on direct appeal is that Dr. Lauridson's affidavits and reports are now properly before the Court. Therefore, the issue and its sub-issues are considered to determine if the affidavits and reports provide support for Havard's claims, which were previously considered to be without merit.

¶ 13. The test for ineffective assistance of counsel is well-settled. "The benchmark for judging any claim of ineffectiveness [of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prevail on this claim, Havard must demonstrate that his counsels' performance was deficient and that the deficiency prejudiced the defense of the case. *Id.* at 687, 104 S.Ct. 2052. "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Stringer v. State*, 454 So.2d 468, 477 (Miss.1984) (citing *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052).

¶ 14. Defense counsel is presumed competent. *Washington v. State*, 620 So.2d 966 (Miss.1993). However, even where professional error is shown, a reviewing court must determine whether there is "a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceedings would have been different." *Mohr v. State*, 584 So.2d 426, 430 (Miss.1991). When reviewing a case involving the death penalty, the most important inquiry is "whether there is a reasonable probability that, absent the errors, the sentencer-including an appellate court, to the extent it independently reweighs the evidence-would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052. If Havard's post-conviction application fails on either of the *Strickland* prongs, the proceedings end. *Foster v. State*, 687 So.2d 1124, 1129-30 (Miss.1996).

***(A) Failure to obtain DNA evidence.***

¶ 15. As we already have noted, counsels' theory of defense was that Havard did not commit a sexual battery, and thus he could not be guilty of capital murder. Havard asserts that his trial counsel were ineffective for failing to secure an expert to perform independent DNA analysis to aid in discrediting the state's proof that a sexual battery occurred.

¶ 16. Havard starts by pointing out that only one witness was presented by the defense to establish that a rape kit was performed and that samples were taken from Havard. He next points out that, on cross-examination of the state's witness, Mississippi Crime Laboratory Forensic Biologist Amy Winters, defense counsel established that DNA testing could have been performed on the sexual assault kit done on Chloe Britt. Winters testified that she conducted serological analysis of an oral swab, vaginal swab, vulvar swab and rectal swab, each taken from Chloe Britt. The results of Winters's analysis of the swabs were negative. Winters explained that the tests were for the presence of semen and not for DNA. Throughout closing argument, defense counsel made the argument that DNA testing could have been done, and the state's failure to test for DNA was evidence that there was no sexual battery.

¶ 17. Havard accuses his defense counsel of being ineffective because they "failed to realize or to act upon clearly established law in this State that gave his client access to 'all these DNA people,' or more precisely to independent DNA evaluation and the services of other expert witnesses at state expense." Havard relies on *Richardson v. State*, 767 So.2d 195 (Miss.2000), to support this claim, and he correctly asserts that *Richardson* stands for the proposition that, even where the state does not present DNA results to a jury, a defendant still may have a right to have the evidence tested at state expense. "The fact that the State did not present DNA results before the jury does not deny the defendant the right

to have the evidence tested. The defendant should be permitted to inspect tangible evidence that might be used against him or which might be useful in his defense." *Id.* at 199 (citing *Armstrong v. State*, 214 So.2d 589, 596 (Miss.1968)). The "determination of whether the State must pay for an expert witness for an indigent defendant must be made on a case by case basis." *Id.* (quoting *Davis v. State*, 374 So.2d 1293, 1297 (Miss.1979)). However, Havard's reliance on *Richardson* is misplaced.

¶ 18. Even if counsel had successfully procured an independent DNA expert and that expert had testified that Havard's DNA was not present on the rape kit samples taken from Chloe, that does not exonerate Havard of the sexual battery charge, as this Court previously explained on direct appeal. *Havard*, 928 So.2d at 788. Mississippi Code Annotated Section 97-3-95 defines sexual battery as sexual penetration with a class of victims. Sexual penetration, as defined by statute, may be by "insertion of any object into the genital or anal opening of another person's body." Miss.Code Ann. § 97-3-97 (Rev.2006). Therefore, the absence of Havard's DNA does not exclude his use of "any object."

¶ 19. Dr. Lauridson's affidavit does not lend support to Havard's claim. Dr. Lauridson's affidavit states that it is his opinion that "... there is a possibility that Chloe Madison Britt was not sexually assaulted." Nothing in his affidavit is related to the presence or absence of Havard's DNA on the rape kit samples taken from Chloe Britt. As will be discussed more fully *infra*, Dr. Lauridson's report states that no semen was found in samples taken from the victim. This is cumulative of the testimony of Amy Winters. Therefore, for the purposes of Havard's claim that counsel was ineffective for not successfully procuring an expert to independently test for DNA, Dr. Lauridson's affidavit provides no additional support. Havard's claim does not pass the standard set forth in Strickland and is without merit.

***(B) Failure to secure a pathologist.***

¶ 20. For purposes of post-conviction relief, Havard again claims that counsel was ineffective in failing to research case law, which he asserts would have insured him an expert witness to aid in his defense. Havard further asserts that counsel failed to preserve this issue for direct appeal. Havard relies on *Harrison v. State*, 635 So.2d 894, 901 (Miss.1994) as did this Court on direct appeal. *Havard*, 928 So.2d at 788-89.

¶ 21. On direct appeal, Havard claimed that his trial counsel were ineffective for

failing to secure a pathologist to investigate the case and develop a defense strategy. It was made clear that a defendant's right to defense funds for obtaining such an expert is conditioned upon a showing of need of the expert in order to prepare a defense and will depend on the facts and circumstances of each case. *Id.* (citing *Harrison*, 635 So.2d at 901). Havard's trial counsel made the request based on the need for assistance in interpreting the autopsy reports. The trial court denied the request. This Court held that the trial court did not abuse its discretion and that defense counsel's efforts did not rise "to such a level so as to offend *Strickland*." *Havard*, 928 So.2d at 789.

¶ 22. Also worth noting is an affidavit from one of Havard's defense attorneys, Gus Sermos, who stated that he believes a pathologist could have assisted with the case but he had no funding for this purpose and did not consult with one. He also stated that he did consult with a registered nurse. Although we in no way through *dicta* intend to suggest that a registered nurse will suffice when a defendant in a criminal case requests a pathologist, we simply note that counsel's consultation with a registered nurse does evidence counsel's diligence when the request for independent pathologist funding was denied.

¶ 23. The test provided by *Strickland* and its progeny is two-fold. Havard must show that counsels' performance was deficient. *Id.*, 466 U.S. at 687, 104 S.Ct. 2052. Second, if the first prong is met, Havard must show that counsels' deficient performance was prejudicial to Havard's defense. *Id.* In this post-conviction proceeding, Havard presents the affidavit of Attorney Ross Parker Simons, who stated that he (Simons) has practiced law in Mississippi for more than twenty years with extensive death-penalty experience.FN3 Simons stated in his affidavit that he was of the opinion that Havard's counsel were ineffective within the meaning of Strickland because they recognized the need for expert assistance with the defense, as evidenced by their request in the trial court, but they failed in their duty to make a proper showing of need to the trial court. Because of this, Simons further opines that Havard's trial counsel failed to secure an expert or make an adequate record to preserve this issue on appeal.

> FN3. Simons also stated in his affidavit that he was co-counsel for the defense of Henry Lee Harrison, reported as *Harrison v. State*, 635 So.2d 894 (Miss.1994) just cited above. (Havard's Exhibit 16, at ¶ 3).

¶ 24. As previously stated, this Court considered this issue on the merits, in depth, on direct appeal. We decided that the trial court did not abuse its

discretion by denying the defense's request for an independent expert. *Havard*, 928 So.2d at 788-89. This Court decided that Havard's trial counsel were not ineffective. With all due respect, the affidavit of Simons amounts to nothing more than his legal opinion, and this Court will not substitute Simons's opinion for its own simply because Simons respectfully disagrees with this Court concerning our Strickland analysis based on the record with which we are presented. Havard's contention that trial counsel failed to preserve this issue for direct appeal is without merit because this matter was raised and discussed on direct appeal.

¶ 25. Havard has failed to meet the burden of *Strickland's* first prong, thus, the issue is without merit, and the Court is not required to proceed to the second prong. *Foster v. State*, 687 So.2d 1124, 1129-30 (Miss.1996).

¶ 26. However, assuming *arguendo* that Havard did prevail on the first prong by showing that counsel's performance was deficient, he is unable to show that his defense was prejudiced. Havard again presents the affidavits and reports of Lauridson, who opined in his affidavit "that there is a possibility that Chloe Madison Brit was not sexually assaulted." Taking this statement to its logical conclusion, this leaves open the possibility that she was. Dr. Lauridson's report also is somewhat cumulative when compared with Dr. Steven Hayne's testimony regarding the absence of tearing of the anal sphincter. Dr. Hayne testified as follows:

> Q. [by defense counsel] If there were any tears down there in your report when you put a contusion of the anus is noted, I presume you would have also written tears were noticed also; is that correct?
>
> A. [by Dr. Hayne] If I had seen them, I would put down laceration. I did not see it in this case, and I did not exclude it, but I didn't see it.

Dr. Lauridson's report is also cumulative of Amy Winters's testimony that no semen was found on the rape kit swabs taken from the victim.

¶ 27. Dr. Lauridson's reports do, however, differ from expert testimony at trial in some instances. First, Dr. Lauridson asserted that Dr. Hayne was incorrect in his testimony that rigor mortis causes contracture of muscles after death, which Dr. Hayne explained could prevent him from discovering a slight tear. Dr.

Lauridson's indication that Dr. Hayne was incorrect is inconsequential to the point of Dr. Hayne's testimony. Both doctors agreed that they did not discover a tear. Dr. Lauridson also belabored the point that Dr. Hayne was incorrect regarding the contracture of the anal sphincter muscle by asserting that photographs of the victim's anus taken in the emergency room compared to photographs taken during autopsy revealed the same amount of anal relaxation. It is difficult to understand how Dr. Lauridson reached this conclusion, because he admitted that no scales were used in either set of photographs. Further, every doctor and/or nurse present in the emergency room who testified at Havard's trial told the jury that the autopsy photograph of Chloe's relaxed anus did not do justice to the dilated anus they each described as being open about "the size of a quarter." Again, both doctors agreed that there was no tearing of the anus.

¶ 28. Dr. Lauridson also asserted:

> [e]xperienced medical examiners commonly encounter dilated anal sphincter's [sic] 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.

Dr. Lauridson concluded his report stating, "Postmortem anal dilation in infants is a commonly recognized artifact that does not signify sexual abuse." However, as the state points out, Chloe's dilated anal sphincter was discovered while Chloe was in the emergency room and still alive.

¶ 29. Further, Dr. Lauridson's conclusion was not only contrary to that of Dr. Hayne, it was contrary to the sworn testimony from experienced emergency-room doctors and nurses. Angel Godbold, a registered nurse for eleven years with eight years experience in the emergency room, testified that Chloe's anus was very "unusual" for an infant and the trauma she observed to Chloe's anus led her to later seek counseling. She also described seeing tears. Patricia Murphy, a registered nurse of nearly thirty years, twenty years of which were spent in the emergency room, testified that Chloe's rectum was "not normal by any means," that she had seen sexual trauma before, that she was of the opinion that the injuries sustained by Chloe were the result of sexual trauma, and that it was the worst she had ever seen. Dr. Laurie Patterson, an emergency-room physician who treated Chloe, testified that what she saw of Chloe's anus was not normal and was indicative of sexual penetration. She also testified that she

observed a tear of the anus. Dr. Ayesha Dar, Chloe's pediatrician, also tried to save Chloe in the emergency room. She testified that the injury to Chloe's rectum was from sexual abuse consistent with a foreign object being forcibly inserted. Dr. Dar testified that Chloe was bleeding from the anus and she observed a tear. Reverend James E. Lee, the duly elected Adams County coroner, testified that he observed Chloe and noticed something was terribly wrong. He stated that it appeared that something had penetrated the baby's anus.

¶ 30. Additionally, Dr. Hayne testified that there was a contusion in the victim's rectum measuring approximately one inch. Dr. Hayne further testified that the contusion "would be consistent with penetration of the rectum with an object...." Dr. Lauridson stated that "[t]he lining of the anus and rectum is a delicate tissue and can easily be injured, producing a contusion if a foreign object is inserted." He then reminded this Court that a thermometer was inserted during resuscitation. He offered this for the explanation of why Dr. Hayne discovered a contusion during the autopsy, yet Dr. Lauridson disagreed in his next report that there was a contusion. "There is no histologic evidence for contusion, or laceration of the surfaces of the anal perianal or colonic tissues."

¶ 31. Again, assuming *arguendo* that Havard's counsel was deficient, Havard has not met the second prong of *Strickland* in that Dr. Lauridson's reports and affidavits do not contain evidence that would create a reasonable probability that, but for counsel's deficient performance, the outcome of Havard's trial would have been different. Havard's claim thus does not pass the standard set forth in *Strickland*. This issue is without merit.

***( C) Failure to include a lesser-offense instruction.***

¶ 32. Havard asserts that his trial counsel were ineffective for failing to include a lesser-offense instruction. This issue was raised and fully addressed in depth on the merits. *See Havard*, 928 So.2d at 789-91. This claim was clearly discernable from the record before the Court on direct appeal, and Havard did not offer outside-the-record evidence as he did on the other two previously discussed subissues. Further, Havard does not present anything other than the record that was before us on direct appeal. Therefore, unlike the other issues found to be preserved for post-conviction proceedings, this sub-issue is procedurally barred by the doctrine of res judicata. Miss.Code Ann. § 99-39-21(3) (Rev.2007).

¶ 33. In *Lockett v. State*, 614 So.2d 888 (Miss.1992), this Court considered the

post-conviction application of Carl Daniel Lockett, who like Havard, was convicted of capital murder and sentenced to death. When asked to reconsider issues that were discussed on direct appeal, this Court stated:

> The procedural bars of waiver, different theories, and *res judicata* and the exception thereto as defined in Miss.Code Ann. § 99-39-21(1-5) are applicable in death penalty PCR Applications. *Irving v. State*, 498 So.2d 305 (Miss.1986); *Evans v. State*, 485 So.2d 276 (Miss.1986). Rephrasing direct appeal issues for post-conviction purposes will not defeat the procedural bar of *res judicata*. *Irving v. State*, 498 So.2d 305 (Miss.1986); *Rideout v. State*, 496 So.2d 667 (Miss.1986); *Gilliard v. State*, 446 So.2d 590 (Miss.1984). The Petitioner carries the burden of demonstrating that his claim is not procedurally barred. Miss.Code Ann. § 99-39-21(6) (Supp.1991); *Cabello v. State*, 524 So.2d 313, 320 (Miss.1988). However, 'an alleged error should be reviewed, in spite of any procedural bar, only where the claim is so novel that it has not previously been litigated, or, perhaps, where an appellate court has suddenly reversed itself on an issue previously thought settled.' *Irving v. State*, 498 So.2d 305, 311 (Miss.1986).

*Lockett*, 614 So.2d at 893.

> ¶ 34. Havard has not demonstrated a novel claim or a sudden reversal of law relative to this issue which would exempt it from the procedural bar of res judicata pursuant to Mississippi Code Annotated Section 99-39-21(3) (Rev.2007). This issue is procedurally barred.

*Havard* II at 327-33.

Havard now argues in his habeas memorandum that the Mississippi Supreme Court's determinations were contrary to and unreasonable applications of clearly established law as established by the United States Supreme Court and that the court below also unreasonably applied the facts of the case.

The State would first note that Havard has abandoned the allegation regarding counsel's ineffectiveness in the failure to obtain DNA testing as petitioner's habeas argument is devoid

of any mention of that particular issue that was ruled on in the court below. When an issue is not addressed in the brief it is waived. *See Lookingbill v. Cockrell*, 293 F.2d 256, 264 (5th Cir. 2002).

As to Havard's claim that the court below erred in holding defense counsel were not ineffective regarding the allegation of failure to obtain the service of a pathologist, that court's analysis is not contrary to clearly established law as announced by the Supreme Court nor was it unreasonable as applied to the facts of this case. Petitioner's argument is centered on the assertion that the Mississippi Supreme Court was unreasonable in not finding counsel ineffective for failure to successfully request an expert pathologist, and then that the court below was unreasonable in not being swayed by the assertions made in Dr. Lauridson's affidavits.

The standard of review for considering a claim of ineffective assistance of counsel is found in *Strickland v. Washington*, 466 U.S. 668 (1984). "The benchmark for judging any claim of ineffectiveness [of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. Ineffective assistance claims require a two-part analysis: a demonstration that counsel's performance was deficient and that the deficiency prejudiced the defense. *Id.* at 687. "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Id.*

The first inquiry, whether was trial counsel's performance deficient, is evaluated by

whether or not counsel's advice to petitioner fell "outside objective parameters of reasonableness. *Id.* at 678-88. The second inquiry, prejudice, focuses on whether there is a reasonable probability that, absent the alleged errors, the trial court would have concluded that petitioner did not deserve death. *Id.* at 695.

To properly and fairly judge counsel's performance, this Court must make every effort, "[T]o eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. Because of the difficulties inherent in making that type of evaluation, this Court must indulge in a strong presumption that counsel's conduct falls withing the wide range of reasonable professional assistance; that is, petitioner must overcome the presumption that, under the circumstances, the action might be sound trial strategy. The facts of this case show that when measured by the objective standard of reasonable professional competence, trial counsel's actions were effective.

What was presented to the court below was that the trial court ruled the defense had access to Dr. Hayne, the pathologist that conducted the autopsy, and there was no showing of need for another pathologist, and there has still been no such showing. Dr. Hayne, an independent expert—testifying on behalf of neither the State nor the petitioner—examined all of the evidence, and, after thorough direct and cross examination, he opined that Chloe Britt's rectum had been penetrated by an object.

In determining that the court should have granted defendant's request for an expert, the lower court analyzed the origins of such a right, found in *Ake v. Oklahoma*, 470 U.S. 68, 105

S.Ct. 1087 (1985). Pursuant to *Ake*, at a minimum the State must assure a defendant access to competent experts. However, a defendant does not have a constitutional right to choose an expert of his personal liking or to receive funds to hire his own. The concern in *Ake* was that the defendant have "access" to experts. *Ake, id.* at 83. In this case, Havard failed to make a showing that Dr. Hayne was not an independent witness.[4] Petitioner failed to show that he could not have taken advantage of Dr. Hayne's obvious expertise well before trial. Havard has failed to make a showing of concrete reasons why another evaluation of Chloe Britt would have been beneficial. Dr. Lauridson, petitioner's "expert" offers nothing more than a statement that he disagrees that Dr. Hayne's evaluation was correct and a suggested that something else could have caused Chloe's injuries.

Trial counsel, in his effort to defend petitioner against both the sexual battery and shaken baby charges, moved for the production of all of Chloe's medical records and for an independent evaluation of Chloe's autopsy report, noting specifically that there are situations "when accidental injuries appear to be shaken baby syndrome." The current evidence is no stronger than the evidence trial counsel presented to the court; both are simply claims that medical science suggests something else could be the cause of Chloe Britt's injuries.

The court properly found no basis under the law to grant Havard's motion for an additional expert. For the court, Dr. Hayne was equally available to both sides, and he was not prevented from testifying in favor of the petitioner himself, should the evidence support such

[4]This fact of independence is even more apparent in that petitioner has now offered the unsworn declaration of Dr. Hayne in an attempt to legitimize his argument regarding the sexual assault.

testimony. At all times Dr. Hayne testified only on behalf of the evidence– not the State or the petitioner– it cannot be said that there was any error of the trial court, or any deficiency on the part of counsel, in failing to secure an additional expert.

The Mississippi Supreme Court did take into account and fully explore the affidavits filed by Havard's chosen pathologist, Dr. Lauridson, during post-conviction argument and found there was nothing in his writings to attack the credibility of the previous holding. A review of those reports showed the information to be mostly cumulative to information presented by witnesses at trial and that petitioner did not show a reasonable probability that the non-cumulative information would have resulted in a different outcome.

The cumulative information provided by Dr. Lauridson's report included that no semen was present in Chloe's rectum. That fact was established by the State's DNA expert on direct examination during the trial. Tr. 535. Also, Dr. Lauridson, upon review of photographs, was not able to detect tearing in the anal area, which falls in line with the cross-examination testimony of Dr. Hayne at trial. Tr. 560-61. There was testimony at trial by one witness from the emergency room that stated she did not see rectal hemorrhages that were noted by others in the room, which agrees in part with Dr. Lauridson's report. Tr. 380.

Dr. Lauridson report went on to state that medical examiners commonly encounter dilated anal sphincter's during postmortem exams. While Chloe's dilated anus was certainly dilated at the time of her autopsy, Dr. Lauridson provided no explanation to refute the evidence of the dilated (*ie*. gaping) anus that was observed by the doctors and nurses in the emergency room when Chloe was alive and being cared for. What Lauridson did not explain is how this

finding was relevant to this case in that Chloe was very much alive at the time her "dilated" rectum was discovered. Dr. Lauridson goes so far as to suggest that the injury to Chloe's anus; her gaping, oozing anus, opened to the size of about a quarter, or about a inch in diameter opened anus, could have been caused by insertion of an infant thermometer. Dr. Lauridson, in making this assumption, ignores the testimony that it was when the emergency room medical personnel were first going to take a rectal temperature is the point in time when they discovered the dilated condition of Chloe's anus.

The information provided by Dr. Lauridson was weak, vague and conclusory. He totally ignored and gave no credit to the sworn testimony provided by the experienced emergency room doctors and nurses that observed Chloe's injuries closely and close in proximity in time to their infliction by the petitioner. He ignored the testimony of Angel Godbold, a registered nurse for eleven years, with eight years emergency room experience, which outlined the trauma she observed to Chloe's anus that led her to later seek counseling. Tr. 367-68, 379. He ignored the testimony of Patricia Murphy, a registered nurse of nearly thirty years, twenty of it in the emergency room, that it was her opinion that the injuries were the result of sexual trauma, the worst she has ever seen. Tr. 386,393. He ignored the testimony of Dr. Laurie Patterson, an emergency room physician that Chloe's rectum had been penetrated Tr. 402, 407. He ignored the testimony of Dr. Ayesha Dar, Chloe's pediatrician that also tried to save Chloe in the emergency room describing the injury to the rectum as sexual abuse in that a foreign object had been forcibly inserted. Tr. 412,418.

Now, for the first time, petitioner includes the unsworn declaration of Dr. Hayne, that

does not contradict or refute his trial testimony. The writing attributed to Dr. Hayne in no invalidates the conclusion that Chloe was sexually assaulted. It merely says that his findings in the autopsy, standing alone, would not *per se* support a finding of assault. But as been mentioned, the court below was presented with volumes of additional facts that solidified the finding.

The court below took issue with Dr. Lauridson's reports regarding his conclusions. The petitioner relied upon Dr. Lauridson's report only in his attempt to claim that he did not sexually penetrate Chloe, petitioner makes no claim that he was not the one that inflicted the fatal injuries to the child. Interestingly, Dr. Lauridson did not attack the competence of the "clinical observers" (doctors and nurses) in their detection, evaluation and interpretation of more subtle injuries found to have been inflicted on the child causing her death. Dr. Lauridson only questions the conclusions regarding the wounds to the child's anus, those wounds that were closely and personally observed by all the doctors and nurses present in the emergency room. It is on this point alone that Dr. Lauridson questioned their credibility. Dr. Lauridson goes so far as to suggest the physicians were mistaken when they described the presence of blood in Chloe's rectum. Of course Dr. Lauridson was not present and therefore his suggestion was mere speculation on his part.

Further, because Dr. Lauridson's reports were based in great part on conjecture, speculation and are, to a great degree, cumulative of the testimony adduced at trial, they can hardly be said to have contained evidence that would create a reasonable probability that the outcome of the trial would have been different. His total discounting of the testimony of the

doctors and nurses who were present and observing the injuries to Chole on the night of her death, suggesting that they did not see what they testified under oath that they saw, makes his reports highly questionable.

Taking the reports of Dr. Lauridson into consideration it still cannot be said that counsel rendered ineffective assistance of counsel. There is no reasonable probability that a jury after hearing the testimony of the doctors and nurses who were present and treating Chloe describing how they discovered the dilation of her anus and describing what they contemporaneously observed during their attempts to save her life would have placed much credence in the testimony of Dr. Lauridson which, without being present or ever examining Chole, contradicts their testimony based on mere speculation.

All of this is to say that the addition of Dr. Lauridson's unsworn reports did not create a reasonable probability that the jury would not have returned a verdict of capital murder based on the underlying felony of sexual battery. Petitioner failed to demonstrate resulting prejudice to sustain a claim of ineffective assistance of counsel under *Strickland*. As such, the Mississippi Supreme Court rendered a decision that was not contrary to nor an unreasonable application of clearly established law as announced by the United States Supreme Court, nor was the decision unreasonable in applying the law to the facts of the case. Havard is entitled to no relief on this claim.

Petitioner also argues the court below was unreasonable in not taking into account the affidavit offered by attorney Ross Parker Simmons, that in his review of the case, Havard's counsel had rendered ineffective assistance of counsel. In agreement with the holding of the

Mississippi Supreme Court, the Fifth Circuit recently found disfavor with attorney affidavits regarding ineffective assistance claims:

> This court is intimately acquainted with the legal standards governing ineffective assistance of counsel claims. Expert testimony purporting to tell the court how those legal standards apply to the facts of a particular case invade the court's province as trier of the law, and are not helpful to the court in determining the facts of the case. Because the proposed expert testimony both moves beyond the appropriate boundaries of expert testimony and is unhelpful to the court in its role as trier of fact, the affidavits will not be considered.
>
> We conclude that, for the reasons given by the district court, the district court did not abuse its discretion in refusing to consider the attorney affidavits. We agree with the reasoning of the Eleventh Circuit in *Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir.1998):
>
> > [I]t would not matter if a petitioner could assemble affidavits from a dozen attorneys swearing that the strategy used at his trial was unreasonable. The question is not one to be decided by plebiscite, by affidavits, by deposition, or by live testimony. It is a question of law to be decided by the state courts, by the district court, and by this Court, each in its own turn.

*Johnson v. Quarterman*, 306 Fed.Appx. 116, 128-29 (5th. Cir. 2009).

This decision by the lower court was clearly not unreasonable nor in contradiction to any federal law.

As to Havard's claim that the court below erred in holding defense counsel were not ineffective regarding the allegation of failure to obtain a lesser offense instruction, that court's analysis was not contrary to established law as announced by the Supreme Court nor was in unreasonable as applied to the facts of this case. The Mississippi Supreme Court found the decision not to ask for a lesser offense instruction was reasonable trial strategy. Nothing in petitioner's argument attacks the validity of that determination other than the bare allegation

that it was unreasonable based on the fact that Havard had claimed Chloe's death was the end result of an accidental dropping. If petitioner's version of the facts was to be believed the incident did not rise to the level of simple murder or manslaughter. For simple murder to have been shown, there must have been evidence that Havard had a felonious and premeditated intent to kill the child. For manslaughter to have been shown, there must have been evidence that Havard killed Chloe in a provoked heat of passion. *See* Miss. Code Ann. 97-3-35. No evidence was presented to support either of these charges, and Havard presents none here. Counsel cannot be deficient for failing to request an instruction unsupported by the evidence and contrary to the valid theory of the defense (accidental injury and no evidence of battery). "'Where no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process." *Hopkins v. Reeves*, 524 U.S. at 99 (quoting *Spaziano v. Florida*, 468 U.S. 447, 455 (1984)). Thus, counsel's decision not to request such instruction was proper.

There was no presentation of prejudicial evidence resulting from counsel's decision not to employ a lesser included offense instruction, such that the giving of either of these instructions would have, by a reasonable probability, affected the outcome of Havard's trial. Use of such instruction ran the higher risk of petitioner being found guilty for at least one crime, while not using such instruction limited the jury's choices to only guilty or not guilty. Neither murder nor manslaughter was supported by the evidence; therefore, there was no likelihood that the jury would have found petitioner guilty of either of these two lesser crimes.

For all of the reasons set forth above, there is no *Strickland* error by trial counsel and

therefore no error by the Mississippi Supreme Court in the finding that Havard was not the victim of ineffective assistance. Petitioner is not entitled to relief on this issue.

Lastly, Havard now claims in his habeas memorandum, for the first time, that counsel were ineffective for failure to object to the testimony of the medical personnel regarding Chloe's injuries. This new argument by Havard has never before been fairly presented to the court below for consideration and is therefore unexhausted. The petitioner clearly argues an issue here in his habeas corpus petition that was never presented below.

Respondents would assert that petitioner did not "fairly present" this claim of ineffective assistance that deals with the allegation of failure to object to the testimony of the attending doctors and nurses. In *Ruiz v. Quarterman*, 460 F.3d 638 (5th Cir. 2006), the Fifth Circuit held:

> The exhaustion doctrine of 28 U.S.C. § 2254(b)(1) codifies long-developed principles of comity. Before a federal court can find merit in alleged errors by state courts, *a petitioner must have first provided the state's highest court with a fair opportunity to apply (1) the controlling federal constitutional principles to (2) the same factual allegations*. This requirement is designed to give state courts the initial opportunity to pass upon and, if necessary, correct errors of federal law in a state prisoner's conviction or sentence. The purpose of exhaustion "is not to create a procedural hurdle on the path to federal habeas court, but to channel claims into an appropriate forum, where meritorious claims may be vindicated and unfounded litigation obviated before resort to federal court."
>
> A fair opportunity requires that all the grounds of the claim be first and "fairly presented" to the state courts. *In other words, in order for a claim to be exhausted, the state court system must have been presented with the same facts and legal theory upon which the petitioner bases his current assertions. "[I]t is not enough . . . that a somewhat similar state-law claim was made." An argument based on a legal theory distinct from that relied upon in the state court does not meet the exhaustion requirement. "Exhaustion 'requires a state prisoner to present the state courts with the same claim he urges upon the federal courts.'"* AEDPA excuses these requirements only if the petitioner shows "(i)

> there is an absence of available state remedies in the courts of the State, or (ii) circumstances exist that render such processes ineffective to protect the rights of the applicant."
>
> Furthermore, where a petitioner has failed to exhaust claims in state court, and that failure would now result in the state procedurally rejecting those claims, the petitioner has procedurally defaulted the claims and we must find them procedurally barred. Exceptions to procedural default exist where the petitioner shows "cause and actual prejudice" or that application of the procedural bar will result in a "fundamental miscarriage of justice."
>
> 460 F.3d at 642-43. [Emphasis added] [footnotes omitted].

Respondents would assert that this issue was never presented to the Mississippi Supreme Court in the context of an allegations of ineffective assistance for failure to object. In order for this Court to consider a claim it must have been fairly presented to the state court. This claim of ineffective assistance is unexhausted. While the claim is now unexhausted it is now incapable of being exhausted in the state courts and must be held to be procedurally barred by this Court unless petitioner can show cause and prejudice for not raising it before the state court. See *Gray v. Netherland*, 518 U.S. 152, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996); *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); *Bagwell v. Dretke*, 372 F.3d 748, 755 (5th Cir.2004); *Lockett v. Anderson*, 230 F.3d 695, 709-10 (5th Cir.2000). Under the provisions of Miss. Code § 99-39–5 (2)[5] and § 99-39-27 (9)[6], petitioner cannot now exhaust this claim as it would be held to be barred from consideration in any state collateral proceeding.

Therefore, this Court, without a showing of cause and actual prejudice, must hold this

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[5]One year statute of limitations bar.

[6]Successive petition bar.

claim which has not previously been fairly presented to the Mississippi Supreme Court to be procedurally barred from consideration on federal habeas review. *See Castille v. Peoples*, 489 U.S. 346, 351, 109 S.Ct. 1056, 1060, 103 L.Ed.2d 380 (1989). Petitioner has made no cognizable allegation of either cause or actual prejudice in an attempt to overcome the procedural bars and this claim regarding ineffective assistance of counsel must be barred from consideration by this Court.

Havard's allegations are barred in part as well as without merit and he is not entitled to relief on this claim.

**CLAIM II**

**THE PETITIONER'S CLAIM THAT THE PROSECUTION'S CLOSING ARGUMENT ROSE TO THE LEVEL OF MISCONDUCT IS BARRED FROM CONSIDERATION BY AN ADEQUATE AND INDEPENDENT STATE COURT GROUND.**

On direct appeal the petitioner took issue with a particular statement made by the prosecution during closing argument at the end of the guilt phase of the trial.

> I don't know if anything had ever happened with that child before, but that night he got carried away of (sic) something, and he hurt that child more than he intended to in this sexual battery.

*See* Original Brief of Appellant at 19, quoting Tr. at 626.

The petitioner claimed this statement was a suggestion of other crimes or bad acts and constituted prosecutorial misconduct. The Mississippi Supreme Court considered the issue and found it to be procedurally barred from consideration, holding:

**V. WHETHER HAVARD WAS DENIED HIS CONSTITUTIONAL RIGHT OF A FUNDAMENTALLY FAIR TRIAL BECAUSE OF**

**PROSECUTORIAL MISCONDUCT AT CLOSING ARGUMENT**

> ¶ 33. In closing argument, counsel for the State stated, "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." Havard claims this amounts to a suggestion that Havard had previously sexually assaulted Chloe and is prosecutorial misconduct.
>
> ¶ 34. Havard's counsel failed to object to these statements at trial. The applicable rule here is clear. "In order to preserve an issue for appeal, counsel must object. The failure to object acts as a waiver." *Carr v. State*, 873 So.2d 991, 1004 (Miss.2004). Were Havard now alleging ineffective counsel for failure to object to this statement, our analysis here would be different. Because trial counsel failed to object at trial, this issue is waived. Procedural bar notwithstanding, we also address this issue on its merits.
>
> ¶ 35. It has long been the rule that defense counsel is entitled to broad latitude in closing argument and that the prosecuting attorney enjoys a similar freedom. *Neal v. State*, 451 So.2d 743, 762 (Miss.1984). A prosecuting attorney's restriction to this latitude is that he or she may not argue some impermissible factor, such as the right of appeal or the fact that the defendant chose not to testify. *Id.* The statements about that night's alleged sexual battery were a permissible inference from the evidence the State had presented. This is acceptable under *Holland v. State*, 705 So.2d 307, 345 (Miss.1997). Havard complains that the statement infers that Havard may have been sexually inappropriate with Chloe in the past. However, we have long held that the prosecutors remarks are viewed in light of the entire trial. *Byrom v. State*, 863 So.2d 836, 872 (Miss.2003). Looking at the record of the entire trial, we cannot find that the actions of the State constituted prosecutorial misconduct. Additionally, considering the totality of the record, even if we were to somehow find error in these statements, such error was unquestionably harmless. Lastly, the jury was properly instructed that comments from the attorneys were not to be regarded as evidence when the jury deliberated on its verdict. Accordingly, this issue is without merit.

*Havard* I at 791.

Havard then made a nearly identical argument regarding the specific statement complained of in his post-conviction pleadings. *See* Petition for Post-Conviction Relief at 69.

The Mississippi Supreme Court again held the issue to be procedurally barred:

> **VII. Prosecutorial misconduct during closing argument at the guilt phase.**
>
> ¶ 69. During closing arguments, the prosecutor stated, "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." Havard argued on direct appeal that the prosecutor's comments suggested to the jury that Havard had previously sexually assaulted Chloe and amounted to prosecutorial misconduct. This Court noted that defense counsel failed to object and that Havard was not raising the issue under a claim of ineffective assistance of counsel for failing to object. The Court found the issue to be barred but, nonetheless, discussed the issue on the merits. This Court held:
>
> > Looking at the record of the entire trial, we cannot find that the actions of the State constituted prosecutorial misconduct. Additionally, considering the totality of the record, even if we were to somehow find error in these statements, such error was unquestionably harmless. Lastly, the jury was properly instructed that comments from the attorneys were not to be regarded as evidence when the jury deliberated on its verdict. Accordingly, this issue is without merit.
>
> *Havard*, 928 So.2d at 791.
>
> ¶ 70. Havard has not demonstrated a novel claim or a sudden reversal of law relative to this issue which would exempt it from the procedural bar of res judicata pursuant to Mississippi Code Annotated Section 99-39-21(3) (Rev.2007). *See also Lockett v. State*, 614 So.2d 888, 897 (Miss.1992) (citing *Rideout v. State*, 496 So.2d 667 (Miss.1986); *Gilliard v. State*, 446 So.2d 590 (Miss.1984)).

*Havard* II at342.

Havard now claims in his habeas memorandum, for the first time, that the prosecution crossed "the line time and time again"during closing argument in an attempt to appeal to the emotions of the jury and bias them against the petitioner. This new argument by the petitioner

has never before been fairly presented to the court below for consideration and is therefore unexhausted. The petitioner clearly argues a different issue here in his habeas corpus petition than the issue argued below.

Respondents would assert that petitioner did not "fairly present" this claim of prosecutorial misconduct that deals with the allegation of repeated statements by the prosecution intended to inflame and bias the jury against petitioner, rather than the handling of the specific statement complained of by the petitioner which was the issue raised and ruled upon by the court below. In *Ruiz v. Quarterman*, 460 F.3d 638 (5th Cir. 2006), the Fifth Circuit held:

> The exhaustion doctrine of 28 U.S.C. § 2254(b)(1) codifies long-developed principles of comity. Before a federal court can find merit in alleged errors by state courts, *a petitioner must have first provided the state's highest court with a fair opportunity to apply (1) the controlling federal constitutional principles to (2) the same factual allegations*. This requirement is designed to give state courts the initial opportunity to pass upon and, if necessary, correct errors of federal law in a state prisoner's conviction or sentence. The purpose of exhaustion "is not to create a procedural hurdle on the path to federal habeas court, but to channel claims into an appropriate forum, where meritorious claims may be vindicated and unfounded litigation obviated before resort to federal court."
>
> A fair opportunity requires that all the grounds of the claim be first and "fairly presented" to the state courts. *In other words, in order for a claim to be exhausted, the state court system must have been presented with the same facts and legal theory upon which the petitioner bases his current assertions. "[I]t is not enough . . . that a somewhat similar state-law claim was made." An argument based on a legal theory distinct from that relied upon in the state court does not meet the exhaustion requirement. "Exhaustion 'requires a state prisoner to present the state courts with the same claim he urges upon the federal courts.'"* AEDPA excuses these requirements only if the petitioner shows "(i) there is an absence of available state remedies in the courts of the State, or (ii) circumstances exist that render such processes ineffective to protect the rights of the applicant."

> Furthermore, where a petitioner has failed to exhaust claims in state court, and that failure would now result in the state procedurally rejecting those claims, the petitioner has procedurally defaulted the claims and we must find them procedurally barred. Exceptions to procedural default exist where the petitioner shows "cause and actual prejudice" or that application of the procedural bar will result in a "fundamental miscarriage of justice."

460 F.3d at 642-43. [Emphasis added] [footnotes omitted].

Respondents would assert that this issue was never presented to the Mississippi Supreme Court in the context of allegations of repeated misconduct by the prosecution at closing. In order for this Court to consider a claim it must have been fairly presented to the state court. This expanded claim of prosecutorial misconduct is unexhausted. While the claim is now unexhausted it is now incapable of being exhausted in the state courts and must be held to be procedurally barred by this Court unless petitioner can show cause and prejudice for not raising it before the state court. See *Gray v. Netherland*, 518 U.S. 152, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996); *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); *Bagwell v. Dretke*, 372 F.3d 748, 755 (5th Cir.2004); *Lockett v. Anderson*, 230 F.3d 695, 709-10 (5th Cir.2000). Under the provisions of Miss. Code § 99-39–5 (2) and § 99-39-27 (9), petitioner cannot now exhaust this claim as it would be held to be barred from consideration in any state collateral proceeding.

Therefore, this Court, without a showing of cause and actual prejudice, must hold this claim which has not previously been fairly presented to the Mississippi Supreme Court to be procedurally barred from consideration on federal habeas review. *See Castille v. Peoples*, 489 U.S. 346, 351, 109 S.Ct. 1056, 1060, 103 L.Ed.2d 380 (1989). Petitioner has made no

cognizable allegation of either cause or actual prejudice in an attempt to overcome the procedural bars and this claim regarding ineffective assistance of counsel must be barred from consideration by this Court.

Additionally, the issue is barred from consideration by the adequate and independent state court ground that there was no contemporaneous objection at trial to the complained of language. Havard failed to offer a contemporaneous objection to the complained of statement by the prosecution and his argument was therefore barred from consideration at the state court level and is now barred from consideration by an adequate and independent state court ground. As no objection was made then there is an independent and adequate state law ground which procedurally bars the issue from further presentation.

Regarding the lack of a contemporaneous objection to issues presented at trial, where the State court "clearly and expressly bases its dismissal of a claim on a state procedural rule, and that procedural rule provides an independent and adequate ground for the dismissal," the claim is procedurally defaulted for purposes of federal habeas review. *See Bledsue v. Johnson,* 188 F.3d 250, 254 (5th Cir.1999). The Court of Appeals for the Fifth Circuit has held that Mississippi's contemporaneous objection rule has been regularly and consistently applied. *See Smith v. Black*, 970 F.2d 1383, 1387 (5th Cir.1992); *Stokes v. Anderson*, 123 F.3d 858, 860 (5th Cir.1997) (petitioner arguing procedural bar not strictly or regularly applied bears burden of demonstrating State fails to apply bar to similar claims). The Mississippi Supreme Court's alternative discussion of the merits of petitioner's claims does not vitiate the imposed bar. *See Harris v. Reed*, 489 U.S. 255, 264 n. 10, 109 S.Ct. 1038, 1044 n. 10, 103 L.Ed.2d 308 (1989);

*Fisher v. Texas*, 169 F.3d 295, 300 (5th Cir.1999) ("A state court expressly and unambiguously bases its denial of relief on a state procedural default even if it alternatively reaches the merits of a defendant's claim."). The petitioner makes no claim of cause and prejudice to overcome the procedural bar on this issue.

Without waiving the procedural bar, it is clear petitioner's claim is without merit. The Mississippi Supreme Court's decision was not contrary to or an unreasonable application of any established federal law that would require habeas relief be granted as to this claim and it is therefore due to be dismissed.

As to the claim of misconduct regarding the specific allegation presented to the court below for consideration, Havard does include the same language among his allegations of misconduct. In this case, the record reflects that the State simply urged the jury to focus on the evidence. The State's comments at issue were not misstatements of the law. Moreover, the State's comments were in direct response to the closing argument of defense counsel and, taken both by themselves and in the context of the sentencing phase, were completely proper. The State's comments were not speculative, and they did not suggest Havard had committed previous sexual assaults on Chloe Britt or on anyone else. The jury was instructed as to the statutory law it was required to apply in determining whether Havard should be sentenced to death. Finally, the jury was amply instructed that the State's comments were not to be considered as evidence. As such, aside from the procedural bar, there was no error.

During closing argument by Havard, defense counsel repeatedly argued that the State had failed to present sufficient evidence to support its burden of proving him guilty beyond a

reasonable doubt. In making this argument, defense counsel reminded the jury that the State had no confession, no eyewitnesses to the crime, and no physical evidence of a sexual battery. The State had not even hypothesized as to what object could have caused the sexual injury to Chloe Britt, and it had failed to test Havard himself for any physical signs of sexual battery. Thus, argued defense counsel, it was plausible to believe Havard's version of events: that Chloe slipped as Havard was bathing her, and that he panicked and shook Chloe, starting an accidental chain of events that lead to her unfortunate death. Havard's argument was that Chloe Britt's death was an accident, and the State did not present enough evidence to prove otherwise.

In responding to defense counsel's argument, the State, in pertinent part, made the following comment:

> He admits it, ladies and gentlemen, but they want you to believe this house of cards they're building over here. And this to me the most incriminating thing he says in this statement, folks. They ask him did he do it, and I couldn't believe this when I heard it. 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.

It can hardly be said that this statement by the prosecutor amounted to misconduct sufficient to warrant reversal. The prosecutor's argument consisted of proper rebuttal to defense counsel's claim that there was simply not enough evidence to definitively show what happened to Chloe Britt on the night of February 21st. The State properly responded by arguing that

while it may not know this child's history, while it may not know what happened to Chloe Britt in the past, and while it may not know what Chloe Britt's relationship with Havard was in the past, what is known– beyond a reasonable doubt– is what happened the night of Chloe Britt's death. And then the State continued by showing the jury exactly what happened:

> 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 [...]

The State informed the jury it was not making allegations against anyone and never mentioned previous sexual abuse or battery. The State never even mentioned Havard's name in noting that it did not know if anything had ever happened to Chloe before the night he murdered her.

The State used this fleeting reference as part of a larger rebuttal tool: to argue against Havard's theory that the State had not presented sufficient evidence to show what happened the night of Chloe Britt's death. What the State knew, what it told the jury, was that Havard intentionally harmed Chloe the night of her murder. And after making this affirmation, the State set forth the facts to prove it.

Not only was this comment not in error, assuming this Court finds otherwise, the State also notes that this one sentence statement was so fleeting, so unimportant, that it could not be prejudicial. There had been no suggestion at trial that Havard had ever injured or abused Chloe prior to the night of the murder; therefore, any alleged speculation by the State surely fell flat

in that there was absolutely nothing to support it.

Moreover, the court instructed the jury that the comments of the attorneys are not law. The court also instructed the jury that, "arguments, statements and remarks of counsel are intended to help you understand the evidence and apply the law, but are not evidence. If any argument, statement or remark has no basis in the evidence, then you should disregard [it]." The court also instructed the jury that their verdict, "should be based on the evidence and not upon speculation, guesswork or conjecture." In light of these instructions, there could be no prejudice caused by the prosecution's statement.

The State simply encouraged the jury to do their duty by looking to the facts of what happened on the night of Chloe Britt's death; as such, it properly comported with the law. Responding to Havard's closing argument, the State properly cautioned the jury not to believe his theory that anything could have happened. In doing so, it noted that while such theory may have rung true if some other time period– a period for which the State had no evidence– were at issue, it could not be true for the night of the murder. On that night, evidence against Havard was in abundance. This was an acceptable line of argument. Therefore, even if this claim were not procedurally barred for failure to object to this comment at trial, such claim is unsubstantiated by the record and, alternatively, without legal merit. The record clearly shows Havard received a fair trial; as such, aside from the procedural bars, this claim is due to be dismissed.

Havard's alternative argument, that trial counsel were ineffective for failure to object to the complained of statements at closing is likewise barred from consideration in this habeas

filing as he failed to exhaust the claim. This new argument by the petitioner has never before been fairly presented to the court below for consideration and is therefore unexhausted. The petitioner clearly argues a different issue here in his habeas corpus petition than the issue argued below.

Havard did bring up the possibility of ineffectiveness in his brief but only indirectly in a footnote. *See* Original Brief of Appellant at 20, footnote 6. Respondents would assert that petitioner did not "fairly present" this ineffective assistance of counsel claim dealing with the failure to object to the closing statement. As discussed *supra*, this issue is barred from consideration for failure to fairly present to the court below for consideration. *Ruiz*, 460 F.3d 638, 642-43.

Respondents would assert that this issue was never fairly presented to the Mississippi Supreme Court in the context of ineffective assistance for failure to object to closing statements. In order for this Court to consider a claim it must have been fairly presented to the state court. This expanded claim of prosecutorial misconduct is unexhausted. While the claim is now unexhausted it is now incapable of being exhausted in the state courts and must be held to be procedurally barred by this Court unless petitioner can show cause and prejudice for not raising it before the state court. *See Gray*, 518 U.S. 152, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996); *Teague*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); *Bagwell*, 372 F.3d 748, 755 (5th Cir.2004); *Lockett*, 230 F.3d 695, 709-10 (5th Cir.2000). Under the provisions of Miss. Code § 99-39–5 (2) and § 99-39-27 (9), petitioner cannot now exhaust this claim as it would be held to be barred from consideration in any state collateral proceeding.

Therefore, this Court, without a showing of cause and actual prejudice, must hold this claim which has not previously been fairly presented to the Mississippi Supreme Court to be procedurally barred from consideration on federal habeas review. *See Castille*, 489 U.S. 346, 351, 109 S.Ct. 1056, 1060, 103 L.Ed.2d 380 (1989). Petitioner has made no cognizable allegation of either cause or actual prejudice in an attempt to overcome the procedural bars and this claim regarding ineffective assistance of counsel must be barred from consideration by this Court.

The allegations contained in this claim are barred from consideration and alternatively without merit and therefore the petitioner is entitled to no relief.

## CLAIM III

### PETITIONER'S CLAIM REGARDING THE ALLEGATION OF IMPROPER VICTIM IMPACT TESTIMONY IS BARRED FROM CONSIDERATION BY AN ADEQUATE AND INDEPENDENT STATE COURT GROUND.

On direct appeal, Havard complained that during the victim impact testimony of Chloe's grand mother, she inappropriately incited the jury by asking for "a life for a life". The Mississippi Supreme Court considered the argument and held:

> **VI. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE INTRODUCTION OF VICTIM IMPACT TESTIMONY AT SENTENCING**
>
> ¶ 36. The next issue is whether the trial court erred in allowing the victim impact testimony of Lillian Watson, Chloe's maternal grandmother who said, "Justice means [Chloe's] life was taken, and there is only one way that we can find justice for Maddie. A life for a life." Havard argues that because the testimony exceeded the bounds of allowable victim impact testimony, this amounts to trial court error

in allowing this testimony.

¶ 37. Victim impact evidence is admissible at sentencing, though not at the culpability phase of trial. *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). We have allowed such evidence, recognizing that Payne only laid out what was constitutionally permitted, but not necessarily mandatory. Hansen, 592 So.2d at 146-47. "Victim impact evidence, if relevant, is admissible in the sentencing stage." *Wilcher v. State*, 697 So.2d 1087, 1104 (Miss.1997). As it is constitutionally permissible, this Court will allow such testimony, when relevant, in narrow circumstances. *Branch*, 882 So.2d at 67. "The evidence offered was proper and necessary to a development of the case and true characteristics of the victim and could not serve in any way to incite the jury." *Jenkins v. State*, 607 So.2d 1171, 1183 (Miss.1992). We have also allowed the opinions of the victim's family members as to the crimes and the defendant as permissible victim impact testimony. *See Wells v. State*, 698 So.2d 497, 512 (Miss.1997). In the testimony that Watson gave at sentencing, she also made clear that she was not seeking revenge and did not consider herself a vengeful person. Her entire testimony, taken in context, was not designed to incite the jury. The vast majority of her testimony went straight to the relationships between her family members, including Chloe, and the impact losing Chloe had on them, all part of permissible testimony under our case law. *See Edwards v. State*, 737 So.2d 275, 290-91 (Miss.1999). In *Edwards*, the State made closing remarks during sentencing that injustice would be hard to bear by the family and friends of the victim. Also, the State asked rhetorically whether it was justice for the defendant to remain sitting in jail reading, sleeping and watching television. *Id.* at 291. In *Wells* we allowed comments by the prosecution referring to testimony that opined the defendant in that case was not acting under duress and "knew exactly what he did, and when he did it" because of the manner in which the defendant killed the stabbing victim and cleaned up the crime scene. *Wells*, 698 So.2d at 512. We did not find either of these to exceed the boundaries of permissible victim impact testimony.

¶ 38. Even assuming, arguendo, that Watson's testimony may have constituted error, we borrow the reasoning from the Fifth Circuit, and find that requests by a family member for the jury to sentence the defendant to death can constitute harmless error when any prejudice that did result from the statements was mitigated by the trial court's jury instructions not to be swayed by passion, prejudice or sympathy. *U.S. v. Bernard*, 299 F.3d 467, 480-81 (5th Cir.2002). Though the witnesses offering victim impact testimony in that case did not ask for the death penalty, the court in *Bernard* provides persuasive reasoning for this Court. The *Bernard* court also looked to the context of the entire testimony and

> pointed out that victim impact testimony is a way to inform the jury about the specific harm caused by the crime, about the victim, and about the victim's family. *Id.* Impermissible testimony must be unduly prejudicial and render the trial fundamentally unfair. *Id.* The Supreme Court clearly recognized the unlikelihood that a brief statement would inflame a jury more than the facts of the case. *Payne*, 501 U.S. at 832, 111 S.Ct. 2597. Even if we were to find that the statement was outside the boundaries of *Payne* and possibly constituted error, when all of the testimony is taken together in context, the result was not such as to prejudice the jury and render the trial fundamentally unfair.
>
> ¶ 39. Again, Havard's counsel failed to object to this statement at trial. Though Havard mentions in a footnote that failure to object to this statement constitutes ineffective counsel, the assignment of error here is focused on trial court error in allowing the testimony. Because the trial judge cannot be faulted for not ruling on an objection which was not made, and because this claim is also waived due to failure to object, this issue is without merit. Likewise, even considering this issue on its merits, we find it has no merit.

*Havard* I at 791-93.

In his post-conviction petition, Havard repeated his argument, that his sentence should be reversed based on Ms. Watson's voicing of her opinion as to the preferred punishment for the murder of Chloe. The court below again looked to the issue and held:

> **VIII. Victim-impact testimony.**
>
> ¶ 71. During the sentencing phase of Havard's trial, the state called Lillian Watson, Chloe's maternal grandmother. Watson testified as follows:
>
> > I am not a vengeful person. My father was a minister and I was always taught an eye for an eye as I know most of you were. I am not here for revenge for [Chloe], but I am here for Justice for [Chloe]. Justice means her life was taken, and there is only one way that we can find justice for [Chloe]. A life for a life.
>
> ¶ 72. Havard asserts that Watson's testimony was highly prejudicial and exceeded the bounds of allowable victim-impact testimony. Again, this Court is presented with an issue on post-conviction relief that clearly was discussed in depth on direct appeal and decided adversely to Havard. *Havard*, 928 So.2d at 791-93.

> Today, Havard presents nothing novel in his argument before the Court nor does he argue a sudden reversal in the law related to this issue. The issue is procedurally barred by the doctrine of res judicata. Miss.Code Ann. § 99-39-21(3) (Rev.2007); *Lockett*, 614 So.2d at 897.

*Havard* II at 342-43.

Now, on habeas review, Havard continues his argument that the testimony of the child's grandmother was improper and declares that his sentence must be set aside as a result.

This issue is barred from consideration by the adequate and independent state court ground that there was no contemporaneous objection at trial to the testimony now complained of in petitioner's habeas claim. Havard failed to offer a contemporaneous objection to the complained of statement by the witness and his argument was therefore barred from consideration at the state court level and is now barred from consideration by an adequate and independent state court ground. As no objection was made then there is an independent and adequate state law ground which procedurally bars the issue from further presentation.

Regarding the lack of a contemporaneous objection to issues presented at trial, where the State court "clearly and expressly bases its dismissal of a claim on a state procedural rule, and that procedural rule provides an independent and adequate ground for the dismissal," the claim is procedurally defaulted for purposes of federal habeas review. *See Bledsue,* 188 F.3d 250, 254 (5th Cir.1999). The Court of Appeals for the Fifth Circuit has held that Mississippi's contemporaneous objection rule has been regularly and consistently applied. *See Smith*, 970 F.2d 1383, 1387 (5th Cir.1992); *Stokes*, 123 F.3d 858, 860 (5th Cir.1997) (petitioner arguing procedural bar not strictly or regularly applied bears burden of demonstrating State fails to apply

bar to similar claims). The Mississippi Supreme Court's alternative discussion of the merits of petitioner's claims does not vitiate the imposed bar. *See Harris*, 489 U.S. 255, 264 n. 10, 109 S.Ct. 1038, 1044 n. 10, 103 L.Ed.2d 308 (1989); *Fisher*, 169 F.3d 295, 300 (5th Cir.1999) ("A state court expressly and unambiguously bases its denial of relief on a state procedural default even if it alternatively reaches the merits of a defendant's claim."). The petitioner makes no claim of cause and prejudice to overcome the procedural bar on this issue.

Similar to the issues raised in Claim II, *supra*, petitioner alleges, in the alternative, that trial counsel were ineffective for not raising an objection to the witness' testimony. Havard's alternative argument, that trial counsel were ineffective for failure to object to the complained of testimony by Chloe's grandmother is likewise barred from consideration in this habeas filing as he failed to exhaust the claim. This new argument by the petitioner has never before been fairly presented to the court below for consideration and is therefore unexhausted. The petitioner clearly argues a new issue here in his habeas corpus petition that was not fairly presented below.

Havard did bring up the possibility of ineffectiveness in his brief but only indirectly in a footnote. *See* Original Brief of Appellant at 2, footnote 7. The footnote was acknowledged by the Mississippi Supreme Court and found to be outside of the argument presented in the Brief. Respondents would assert that petitioner did not "fairly present" this ineffective assistance of counsel claim dealing with the failure to object to the grandmother's testimony. As discussed *supra*, this issue is barred from consideration for failure to fairly present it to the court below for consideration. *Ruiz*, 460 F.3d at 642-43.

Respondents would assert that this issue was never fairly presented to the Mississippi Supreme Court in the context of ineffective assistance for failure to the witness' testimony. In order for this Court to consider a claim it must have been fairly presented to the state court. This new claim of ineffective assistance is unexhausted. While the claim is now unexhausted it is now incapable of being exhausted in the state courts and must be held to be procedurally barred by this Court unless petitioner can show cause and prejudice for not raising it before the state court. *See Gray*, 518 U.S. 152, 116 S.Ct. 2074, 135 L.Ed.2d 457; *Teague*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334; *Bagwell*, 372 F.3d 748, 755; *Lockett*, 230 F.3d 695, 709-10. Under the provisions of Miss. Code § 99-39–5 (2) and § 99-39-27 (9), petitioner cannot now exhaust this claim as it would be held to be barred from consideration in any state collateral proceeding.

Therefore, this Court, without a showing of cause and actual prejudice, must hold this claim which has not previously been fairly presented to the Mississippi Supreme Court to be procedurally barred from consideration on federal habeas review. *See Castille*, 489 U.S. 346, 351, 109 S.Ct. 1056, 1060, 103 L.Ed.2d 380. Petitioner has made no cognizable allegation of either cause or actual prejudice in an attempt to overcome the procedural bars and this claim regarding ineffective assistance of counsel must be barred from consideration by this Court.

Alternatively, looking to any possible merit to petitioner's claim it is clear that the testimony provided by the grandmother was not impermissible. Victim impact evidence is admissible at sentencing. The United States Supreme Court endorsed the use of victim impact testimony in *Payne v. Tennessee*, 501 U.S. 808 (1991):

Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities. We think the Booth court was wrong in stating that this kind of evidence leads to the arbitrary imposition of the death penalty. In the majority of cases, and in this case, victim impact evidence serves entirely legitimate purposes. In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief. *See Darden v. Wainwright*, 477 U.S. 168, 179-183, 106 S.Ct. 2464, 2470-2472, 91 L.Ed.2d 144 (1986). Courts have always taken into consideration the harm done by the defendant in imposing sentence, and the evidence adduced in this case was illustrative of the harm caused by Payne's double murder.

We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." *Booth*, 482 U.S. at 517, 107 S.Ct. at 2540 (WHITE, J., dissenting) (citation omitted). By turning the victim into a "faceless stranger at the penalty phase of a capital trial," *Gathers*, 490 U.S. at 821, 109 S.Ct. at 2216 (O'CONNOR, J., dissenting), *Booth* deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder.

*Payne*, *id.* at 825.

The Fifth Circuit has adopted the rationale of *Payne*:

In *Payne v. Tennessee*, the Supreme Court held that victim impact evidence is admissible to "show [...] each victim's uniqueness as an individual human being." 501 U.S. 808, 823-27, 111 S.Ct. 2597, 115 L.ED.2d 720 (1991). "Victim impact evidence is [a] method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities." *Id.* at 825, 111 S.Ct. 2597. Evidence "about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is

> treated." *Id.* at 827, 111 S.Ct. at 2609. Victim impact evidence is admissible unless it "is so unduly prejudicial that it renders the trial fundamentally unfair" in violation of a defendant's Due Process rights. *Id.* at 825, 111 S.Ct. 2597; *see also Jones v. United States*, 527 U.S. 373, 401-02, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999).

*U.S. v. Bernard*, *et al.*, 299 F.3d 467, 480-81 (5th Cir. 2002) (emphasis added) (noting that improper characterizations of the defendant by the victims and requests for the jury to sentence the victim to death are the types of evidence that are considered inadmissible on this subject but, nonetheless, holding the error harmless).

The State acknowledges that victim impact testimony is not limitless in its admissibility. However, in the case sub judice the comment of Lillian Watson amounts, at worst, to harmless error. The facts in this case are similar to *U.S. v. Bernard*, 299 F.3d 467, 480-81 (5th Cir. 2002), in which the Fifth Circuit held that any improper characterizations of the defendant and requests for the jury to sentence the victim to death can constitute harmless error. In *Bernard*, the Fifth Circuit took issue with several victim impact statements in which the defendants were characterized as hard hearted individuals, who recklessly stole the lives of two innocent children. One witness asked the defendants why they committed the murders, stating, "there was no profit to be gained, no angry exchange, it was just a useless act of violence and a total disregard of life." Another told the defendants that they needed to be afraid because hell was a real place. *Id.*

The Fifth Circuit held that such statements did constitute *Booth* error. However, it declined to reverse the convictions or sentences, holding that such brief statements did not unduly prejudice the jury, especially in light of the facts of the crime. The court also held that

because the statements were irrelevant to the jury's sentencing determination, they could not have prejudiced the jury against the defendants. Finally, the court noted that the jury was instructed not to be swayed by passion, sympathy or prejudice, therefore, any error also was cured by the giving of such instruction. "Taken in context, the inadmissible portion of the victim impact testimony was short and minor compared to the crimes and the pathos of the admissible impact on the parents." *Bernard*, *id.* at 481.

In this case, Lillian Watson made one comment during the seven pages of her sentencing testimony that she felt punishment should be "a life for a life." It is impossible to think the jury would have been influenced by this one statement to the extent that they would have based a capital punishment entirely on it. The jury looked to all of the evidence presented. A six-month-old girl had been sexually abused by her mother's boyfriend. Her rectum had been torn open. The medical staff unanimously deemed the injury horrendous. Chloe Britt also had been beaten, and her mouth torn open by petitioner. Finally, she had been shaken back and forth so hard that her brain filled up with blood, her retinas detached and she exploded.

Havard had no credible explanation for what happened to Chloe Britt. Furthermore, he tried to hide what he had done: when medical care was critical, Havard did not drive Chloe to the hospital, he tried to drive her away from the hospital; he also failed to tell doctors what happened while they were trying to ascertain the cause of her injuries and formulate proper treatment. The jury sentenced Havard to death based on these facts, not on a fleeting statement by a sentencing witness.

Moreover, the jury was amply instructed that they were not to be "influenced by bias,

sympathy or prejudice." (C.P. 166). The jury also was separately instructed that they were to render a decision "based on the evidence free from prejudice or passion." (C.P. 181). These instructions cured any error resulting from Lillian Watson's statement. Finally, the remainder of Mrs. Watson's seven page testimony was clearly admissible. Mrs. Watson testified about her relationship with Chloe Britt; she testified about being present for Chloe's birth and bonding with her immediately; she testified about her relationship with Chloe's mother (and Lillian's daughter), Rebecca Britt; she testified about the actions she took to support Chloe (including paying for daycare, babysitting, letting Rebecca and Chloe live with her, etc.); and she testified about how the months after Chloe's death affected her. R. 657-63. As such, even if this issue were not procedurally barred, in light of the facts of this case, the instructions imposed on the jury, and Mrs. Watson's cumulative testimony, this one statement was at the most clearly harmless and there was no error in the lower court's ruling on the issue.

The allegations contained in this claim are barred from consideration and alternatively without merit and therefore the petitioner is entitled to no relief.

**CLAIM IV**

**THE MISSISSIPPI SUPREME COURT'S DECISION THAT THE PETITIONER WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO ADEQUATELY INVESTIGATE AND PRESENT MITIGATION EVIDENCE WAS NOT CONTRARY TO OR AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW AS ANNOUNCED BY THE UNITED STATES SUPREME COURT, NOR AN UNREASONABLE APPLICATION OF THE LAW TO THE FACTS OF THIS CASE.**

On direct appeal, Havard complained that trial counsel were ineffective for only calling

two witnesses during the sentencing phase of the trial; Havard's mother and grandmother. Havard argued that more witnesses would willingly have testified if asked and described Havard's "chaotic life" to the jury. The Mississippi Supreme Court reviewed the issue and held:

> **VII. WHETHER TRIAL COUNSEL WERE INEFFECTIVE FOR NOT DEVELOPING AND PRESENTING COMPELLING EVIDENCE IN MITIGATION OF PUNISHMENT**
>
> ¶ 40. At the sentencing phase of the trial, Havard's counsel called two witnesses, Cheryl Harrell, Havard's mother, and Ruby Havard, his grandmother, to offer testimony in mitigation. Havard now contends this was ineffective assistance of counsel in that only calling these two witnesses, and giving them virtually no preparation for trial, was an inadequate attempt at giving the jury evidence in order to consider a sentence less than death. Havard further contends the full background of his life would have shown the jury the hardships he suffered and his capacity to love. To support this issue, Havard submits several affidavits of friends, family, and a social worker who reviewed his life history.
>
> ¶ 41. Once more, the State responds to Havard's argument by referring to its Rule 22 and *Branch* analysis, stating that this Court cannot consider the issue on direct appeal because the record is absent of any facts to support the claim. Again, the former Rule 22, the version of the rule controlling here, allows us to consider these claims on direct appeal in this death penalty case, even if those claims are not based on facts fully apparent from the record, where counsel at trial was different from that on appeal. These affidavits reveal that Havard's life was full of abuse, neglect and hardships. He did not know his father, who is now serving time in a federal prison. He had been abused by his mother's boyfriend and his grandfather who took Havard in as a son. Havard also has a history of drug use. The affidavit of a social worker, Adriane Kidd, reveals the negative effects such a life can have on a person. Havard asserts the jury should have been entitled to hear in more detail this part of his past. Havard also contends now that trial counsel should have drawn attention to his good qualities, such as his ability to show love and compassion, especially to small children. However, this issue can more effectively be submitted and argued via post-conviction proceedings because Havard's argument on this issue relies for the most part on outside-the-record documentation to which the State is unable to respond.
>
> ¶ 42. Without considering these affidavits, which are not part of the official record, we note that the record does reveal that Havard's trial counsel procured

testimony from Harrell that his father deserted him at a young age and did not play a role in rearing him. Harrell also testified as to Havard's tender side, specifically discussing Havard's showing love for other children in Harrell's family. Ruby Havard testified to her relationship with Havard as a boy and discussed his love for children, specifically his two nieces. She also testified that Havard had planned to marry Chloe's mother to care for both of them. On the other hand, both Ruby Havard and Harrell stated in their affidavits that trial counsel did not prepare them for their testimony and that they did not know what to say when asked shortly before trial to testify.

¶ 43. This Court certainly recognizes the importance of presenting mitigating evidence at capital sentencing proceedings. *State v. Tokman*, 564 So.2d 1339 (Miss.1990). We recognized in *Tokman* that "counsel has a duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Id.* at 1342. The United States Supreme Court in *Wiggins v. Smith*, 539 U.S. 510, 525, 123 S.Ct. 2527, 2537, 156 L.Ed.2d 471 (2003) stated that "any reasonably competent attorney" would realize the value in pursuing leads "necessary to making an informed choice among possible defenses." *Id.* In what the Court called a "half-hearted" mitigation case, trial counsel in *Wiggins* presented one expert witness but did not present the defendant's life history or social details. *Id.*

¶ 44. Havard uses *Wiggins* to argue that a reasonable probability exists that at least one juror would have found a different balance between the mitigating and aggravating circumstances but for the alleged constitutional error, and that he has therefore established prejudice against him. *Id.* To make his point, Havard relies on several cases where this Court has vacated criminal sentences based, at least in part, on ineffective assistance of counsel during the sentencing/mitigation phase. *See Moody v. State*, 644 So.2d 451 (Miss.1994) (aggravated assault, robbery, and larceny case where counsel did not use facts in mitigation that were readily available, including the age of the two defendants at the time of trial, the lack of prior convictions and history of psychological problems of one defendant, and the fact that the other defendant was married and the father of three children); *Woodward*, 635 So.2d 805 (Miss.1993) (post-conviction relief case where counsel argued for mitigation through "redeeming love" and failed to present the critical portion of the expert witness's testimony that psychological tests showed the defendant suffered from severe mental disturbance at the time of the crime, in the form of a major depressive disorder with psychotic features, as well as a detailed history brought out during the interviews between the expert and the defendant); *Tokman*, 564 So.2d 1339 (appeal from a post-conviction proceeding where, despite a serious conflict in the evidence of the defendant's psychological

and psychiatric condition, the trial judge found that with timely investigation, mitigation evidence could have been obtained and offered during the penalty phase which would have presented the defendant to the jury as a person other than the cold-blooded, callous murderer portrayed by the State); *Leatherwood v. State*, 473 So.2d 964 (Miss.1985) (on motion to vacate or set aside judgment and sentence, this Court found the attorney failed to call favorable, willing witnesses, including defendant's military commander and pastor, who could be discovered by questioning the defendant). As can be seen from the circumstances of each case listed, not all the cases are applicable, and none of these cases convince us that Havard's argument requires reversal on this issue. First, *Moody* was not a death penalty case. Further, neither *Woodward*, *Leatherwood*, nor *Tokman* were death penalty cases before us on direct appeal. Those three cases involved post-conviction relief proceedings following our affirmance on direct appeal.

¶ 45. The State cites cases in response where no ineffective assistance of counsel existed despite not discovering all mitigating evidence. *See Gray v. State*, 887 So.2d 158 (Miss.2004) (counsel not ineffective when he presented a case in mitigation by calling witnesses who testified to defendant's low IQ, nonviolent predisposition, childhood history and emotional trauma); *Holly v. State*, 716 So.2d 979 (Miss.1998) (counsel was deficient for failing to get mental expert for mitigation and only presenting one witness, defendant's mother, but defendant did not show this prejudiced him).

¶ 46. In *Stringer v. Jackson*, 862 F.2d 1108, 1116 (5th Cir.1988), the Fifth Circuit held that "[t]he failure to present a case in mitigation during the sentencing phase of a capital trial is not, per se, ineffective assistance of counsel." We have in the past recognized the *Stringer* rule. *See Gray*, 887 So.2d at 167 (Miss.2004). *See also Williams v. State*, 722 So.2d 447, 450 (Miss.1998) (citing *Williams v. Cain*, 125 F.3d 269, 277 (5th Cir.1997)). We have relied on *Stringer* in cases before us on direct appeal. "The focus of the inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Jones v. State*, 857 So.2d 740, 745 (Miss.2003) (life imprisonment sentence following murder conviction). "This court has often upheld decisions not to put on mitigating evidence where the decision resulted from a strategic choice." *Howard v. State*, 853 So.2d 781, 799 (Miss.2003) (quoting *Stringer*, 862 F.2d at 1116) (death sentence following capital murder conviction).

¶ 47. Havard argues that trial counsel's failure to prepare Ruby Havard and Harrell to testify, and counsel's failure to investigate potential mitigating evidence, created a possibility that trial counsel's actions concerning this issue were unreasonably deficient and not what the Sixth Amendment guarantees.

> However, Havard's trial counsel did bring forth and present some evidence to mitigate the sentence through the testimony of two witnesses. We are therefore unable to conclude from this record that the trial cannot be relied upon as having produced a just result. To meet the *Strickland* standard, Havard must show us this-the lack of a reliable, just result from the trial because of his counsel. It is also incumbent upon Havard under *Strickland* to demonstrate both that his counsel was deficient and that the deficiency prejudiced the case. A reasonable probability must exist that the outcome of the sentencing would have been different but for counsel's actions. His sentence must have resulted from a breakdown in the adversary process that renders the result unreliable. Given the testimony provided in mitigation and what it did show the jury about Havard's life and tendencies, we simply cannot find such breakdown, or a prejudicial deficiency in trial counsel's performance.
>
> ¶ 48. Havard has now preserved the issue for any PCR proceedings by not failing to waive it here on direct appeal. We decline the invitation to start a dangerous precedent of considering post-trial affidavits in this instance by affiants who have not been subjected to cross-examination.
>
> ¶ 49. Additionally, the new comment under the current M.R.A.P. 22 makes clear that "[o]ther post-conviction issues which cannot be raised at the time of appeal because they involve actions or inaction outside the record are not waived since they cannot practically be raised without further development or investigation." This issue is certainly one to which this Rule would apply. Opposing counsel simply has not had the opportunity to cross-examine or test the new testimony Havard has presented via these affidavits. In this direct appeal, we may consider many issues the old version of Rule 22 broadly allows, but we still look to *Branch* and *Hodges* as authority interpreting Rule 22, even though we decided *Hodges* after the rule's 2005 amendment. Both cases and the current rule and its comment give appropriate guidance. In this direct appeal, this issue is plainly one which cannot be raised and adequately addressed without further development or investigation.
>
> ¶ 50. For all of these reasons, we find this issue to be without merit.

*Havard* I at 793-96.

Havard brought the issue forward once again in his petition for post-conviction relief and essentially offered the same argument that had been made at direct appeal. After considering

the issue again the Mississippi Supreme Court held:

> **II. Ineffective assistance of counsel for failure to investigate, develop and present mitigation evidence during penalty phase.**
>
> **III. Ineffective assistance of counsel for failing to develop and present compelling evidence of Havard's childhood and family life in mitigation of punishment.**
>
> ¶ 35. Issues II and III both involve claims of ineffective assistance of counsel arising from the assertion that trial counsel failed to investigate, develop, and present mitigation evidence. Therefore, these issues will be discussed together.
>
> ¶ 36. On direct appeal, Havard argued that trial counsel were ineffective for not developing and presenting compelling evidence in mitigation of punishment. In *Wiggins v. Smith*, 539 U.S. 510, 525, 123 S.Ct. 2527, 2537, 156 L.Ed.2d 471 (2003), the United States Supreme Court stated that "any reasonably competent attorney" would realize the value in pursuing leads "necessary to making an informed choice among possible defenses." *Id.* In what the Court called a "half-hearted" mitigation case, trial counsel in *Wiggins* presented one expert witness but did not present the defendant's life history or social details. *Id.*
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> ¶ 37. This Court has held that "[i]t is critical that mitigating evidence be presented at capital sentencing proceedings." *Leatherwood v. State*, 473 So.2d 964, 970 (Miss.1985). This Court recognized in *State v. Tokman*, 564 So.2d 1339 (Miss.1990), that "counsel has a duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Id.* at 1342. Additionally,
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> > [i]n *Stringer v. Jackson*, 862 F.2d 1108, 1116 (5th Cir.1988), the Fifth Circuit held that "the failure to present a case in mitigation during the sentencing phase of a capital trial is not, per se, ineffective assistance of counsel." We have in the past recognized the Stringer rule. *See Gray [v. State]*, 887 So.2d [158,] at 167 (Miss.2004). *See also Williams v. State*, 722 So.2d 447, 450 (Miss.1998) (citing *Williams v. Cain*, 125 F.3d 269, 277 (5th Cir.1997)). We have relied on *Stringer* in cases before us on direct appeal. "The focus of the inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Jones v. State*, 857 So.2d 740, 745 (Miss.2003) (life imprisonment sentence following murder conviction). "This court has often

> upheld decisions not to put on mitigating evidence where the decision resulted from a strategic choice." *Howard v. State*, 853 So.2d 781, 799 (Miss.2003) (quoting *Stringer*, 862 F.2d at 1116) (death sentence following capital murder conviction).

*Havard*, 928 So.2d at 795.

¶ 38. Havard submitted several affidavits on direct appeal from friends and family, as well as from a social worker who reviewed Havard's life history. Again, because the former Mississippi Rule of Appellate Procedure 22 was found to be controlling at the time of Havard's direct appeal, this Court considered the issue absent the outside-the-record affidavits, but also held that Havard preserved the issue for post-conviction proceedings. *Id.*

¶ 39. In reviewing the issue on direct appeal, the Court ruled adversely to Havard, finding that, "[g]iven the testimony provided in mitigation and what it did show the jury about Havard's life and tendencies, we simply cannot find ... prejudicial deficiency in trial counsel's performance." *Id.* The Court is now asked to revisit this issue in conjunction with the affidavits of Havard's family, friends, and the social worker.

¶ 40. Just as on direct appeal, Havard again argues that he received ineffective assistance of counsel because trial counsel called only two witnesses in mitigation, and he alleges that counsel did not prepare the two witnesses for trial or investigate other potential mitigating evidence. The state points out that, during the examination of Cheryl Harrell, she was asked to "describe" her relationship with Havard. She was asked about Havard's relationship with his stepfather, Gordon Harrell. Counsel asked her about Havard's relationship with his biological father. Counsel also asked Harrell to tell the jury why Havard should not receive the death penalty. These open-ended questions allowed the jury to learn that Havard and his mother "have always been close;" that Havard moved in with his grandparents when he was thirteen because of something he had seen happen at school; that Havard visited his mother every chance he got; that Havard was born out of wedlock and that he did not meet his biological father until he was sixteen; and that Havard's father never had a place in his life and never supported him. Cheryl Harrell also described her son as a "kind, tender-loving person" and discussed his love for children. She told the jury about how Havard came to the defense of his niece, a child afflicted with Down's Syndrome, when she was ridiculed by others, and how Havard cared for his younger half-brother when he was young.

¶ 41. The second mitigation witness called by the defense was Havard's grandmother, Ruby Havard. She was asked similar open-ended questions, and the jury was told about how Havard allowed Rebecca Britt and Chloe to move in with him; about how hard Havard worked at his job; and about Havard had told her that he planned to ask Rebecca Britt to marry him so that he could take care of her and Chloe. She told the jury that Havard is a loving person and that he loves children. She explained that Havard had two pictures of Chloe in his billfold and how Havard "dearly loved that baby."

¶ 42. The state argues that the affidavits are cumulative of testimony the jury heard, and that most of them "contain more damning evidence than praising." In the affidavit of Marilyn Cox, Havard's aunt, she stated that Havard's grandfather, William Havard, used to hit Havard's mother and uncle when they argued with him as children and that William once broke Ruby's nose. Marilyn also concluded that Havard's stepfather, Gordon Harrell, beat Havard because Ruby told Marilyn of bruises found on Havard's body. Marilyn stated that she, too, found bruises on Havard's back and behind. Marilyn never stated that she saw Havard being beaten or that she had any other firsthand knowledge. In the same paragraph in which she concluded that Havard was beaten, Marilyn stated that Cheryl was worried about Havard and agreed that he should go live with his grandparents. Ironically, Cheryl and Ruby, who both testified at trial and now asserted in their affidavits that counsel never interviewed them, did not paint the same picture as Marilyn. Cheryl stated in her affidavit that Havard went to live with his grandparents because of the violence in the schools where he was living. This is consistent with her trial testimony and Ruby's trial testimony. Marilyn's affidavit adds nothing to the testimony heard by the jury except hearsay of Havard's abuse by his stepfather.

¶ 43. William Havard stated in his affidavit that Havard was like a son to him. William stated that he "knew" Gordon was "whipping on" Havard. Again, nothing in the affidavit stated that he ever witnessed these events. He did state that Gordon had a temper and Gordon once kicked in William's front door, forcing William to call the police. William's affidavit then took a turn and negatively described his relationship with Havard. William explained how he bought Havard a truck "so he could get to and from work, but Jeffrey quit as soon as he got it." He stated that Havard caused problems, such as staying out late. Havard would not listen to his grandfather and would get into arguments because Havard did not like being told what to do. In fact, William explained how he sometimes had to call the police to "calm him down." Havard's grandparents had to ask a neighbor to call the police because Havard would not let his grandparents get to their phone. William provided Havard with a trailer up the street. Ruby

Havard testified at trial that they provided the trailer, paid the utilities and part of the groceries. William further stated in his affidavit that Havard would have people over using drugs, and that William and Ruby did not approve of Havard's drug activities.

¶ 44. Daniel Bradshaw, Havard's friend since childhood, went to the Youth Challenge Program at Camp Shelby with Havard. He described how Havard's family did not attend Havard's graduation from Camp Shelby, so Havard went to lunch with Daniel's family. Daniel discussed how Havard came to live with him and his wife, Australia. Daniel trained Havard to work on boats. Daniel stated that Havard started "using a lot of drugs, hanging out with the wrong crowd." Daniel stated that Havard loved children and would take care of their son when Daniel and Australia went out.

¶ 45. Australia Bradshaw, also Havard's childhood friend, described how she met Havard at church after he moved in with his grandparents. She described him as "happy go lucky." She corroborated Daniel's affidavit about Havard and Daniel being together at Camp Shelby and how Havard came to live with them when Havard had problems with his grandfather. She described Havard's grandfather getting angry with Havard when Havard stayed out late. She stated that Havard would say "hurtful words to his grandfather." She also witnessed when the police came to the house of Havard's grandfather a couple of times when they "had gotten into it because Jeffrey would race around in his truck and screech his tires." She described Havard and his grandfather as "stubborn." She also told of Havard watching her son.

¶ 46. Etta White, Havard's co-worker, described him as "super, he has a great personality and is a good work colleague." She told of Havard stopping by to offer help when he saw Etta out working in the yard.

¶ 47. Cheryl Harrell's affidavit restated her trial testimony but also offered new information that she did not tell the jury during Havard's sentencing hearing. She described her father fighting and getting physical with her brothers when they were young, but did not mention that she was beaten as described by Marilyn. Cheryl described her father as thinking that Jeffrey was sent by the Lord to replace her brother after his death, and William brought "lots of gifts when Jeffrey was born." William and Ruby let Cheryl and Jeffrey live with them for a year until Cheryl met her husband, Gordon. Cheryl stated that it was hard raising Havard and he did get "spankings." As previously discussed, she stated that Havard went to live with his grandparents because of the "violence in the schools." When speaking of Havard's grandparents, Cheryl stated, "Jeffrey was

always rewarded by them and never punished. He was their favorite, they would do things for him that they wouldn't do for the other grandchildren." Ironically, Cheryl never discussed Havard being abused by his stepfather at trial or in her affidavit. None of the other affiants stated that they witnessed it or that Havard ever told them that he was abused.

¶ 48. Ruby Havard's affidavit placed blame for Havard's problems with his stepfather, whom she described as having a temper. She stated that Gordon beat Havard, but did not state that she ever witnessed or was told of these beatings. She remembered Havard came to visit once, and he was black and blues with bruises. She then stated that Cheryl was concerned when Havard was growing up because she was worried Havard would start to fight back against Gordon and cause more trouble. Ruby never mentioned any of this at trial. She testified that Havard asked if he could go live with his grandparents because "[h]e liked the schools." In her affidavit, Ruby then described him as dropping out of high school, attending the Youth Challenge Program, and getting his GED. Havard was offered a job as a peer mentor in the program, and William and Ruby bought him a truck so he could travel to his job. She stated that Havard used drugs, and when confronted about it, he "would say ugly things like he wished he had never come to live with us." They never had a chance to punish Havard because he would get in his truck and leave.

¶ 49. Adrian Dorsey Kidd, a social worker who was asked by post-conviction counsel to review Havard's social history record and notes of mitigation interviews with Havard's family and friends, clearly noted that she never personally interviewed Havard or a single family member or friend. Ms. Kidd's affidavit amounted to a compilation of school records, records from the Youth Challenge Program at Camp Shelby, interview notes from those who personally interviewed Havard, affidavits from Havard's family members and friends, interview notes from those who interviewed Havard's family members and friends, Havard's employment records, and incident reports from various sheriffs' departments.

¶ 50. Ms. Kidd speculated that Havard suffered from a "attachment disorder" and provided a lengthy, general description of the effects of the disorder. Ms. Kidd reached the conclusion that the disorder caused Havard to have problems developing loving and secure attachments. As the state points out, this conclusion is in conflict with the affidavits of family and friends, who described Havard as a loving and good person for whom they would do anything. A review of Ms. Kidd's affidavit reveals a recitation of various records and statements of others amounting to little more than speculation.

> ¶ 51. The affidavits presented in this post-conviction proceeding contain information that is cumulative of the testimony given at trial. The statements provided in the affidavits regarding Havard's abuse do not even amount to hearsay. None of the affiants stated that they witnessed any abuse or that Havard ever told them that he had been abused. Havard himself did not mention abuse in his own affidavit. The remainder of the statements in the affidavits reflected negatively on Havard's character. The sum of these affidavits paints a picture of Havard being raised by grandparents who provided opportunities for him, but Havard chose to take drugs, argue and say hurtful things to those who had his best interest at heart-often resulting in law enforcement officials having to be called to calm him down.
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> ¶ 52. Havard's counsel are presumed competent. *Washington v. State*, 620 So.2d 966 (Miss.1993). As already noted, the affidavit of Don Evans, an investigator hired to investigate mitigation evidence, is telling of counsels' effort to investigate. Counsel called two witnesses who gave intelligent and specific mitigation testimony. Not calling witnesses who will testify negatively for a client or who will testify to matters cumulative in nature is not deficient performance by counsel. Additionally, even if this Court were to assume arguendo that Havard's counsel were deficient, Havard has failed to show that he would have received a different sentence. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Stringer v. State*, 454 So.2d 468, 477 (Miss.1984) (citing *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052). This issue is without merit.

*Havard* II at 333-38.

Now on habeas review, Havard claims the Mississippi Supreme Court erred in finding that counsel were not ineffective in the investigation and presentation of mitigation evidence at trial.

As previously stated, the standard of review for considering a claim of ineffective assistance of counsel is found in *Strickland v. Washington*, 466 U.S. 668 (1984). "The benchmark for judging any claim of ineffectiveness [of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot

be relied on as having produced a just result." *Id.* at 686. Ineffective assistance claims require a two-part analysis: a demonstration that counsel's performance was deficient and that the deficiency prejudiced the defense. *Id.* at 687. "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Id.*

The first inquiry, whether was trial counsel's performance deficient, is evaluated by whether or not counsel's advice to petitioner fell "outside objective parameters of reasonableness. *Id.* at 678-88. The second inquiry, prejudice, focuses on whether there is a reasonable probability that, absent the alleged errors, the trial court would have concluded that petitioner did not deserve death. *Id*. at 695.

To properly and fairly judge counsel's performance, this Court must make every effort, "[T]o eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. Because of the difficulties inherent in making that type of evaluation, this Court must indulge in a strong presumption that counsel's conduct falls withing the wide range of reasonable professional assistance; that is, petitioner must overcome the presumption that, under the circumstances, the action might be sound trial strategy. The facts of this case show that when measured by the objective standard of reasonable professional competence, trial counsel's actions were effective.

With respect to this specific claim, the failure to present a case in mitigation during the sentencing phase of a capital trial is not, *per se*, ineffective assistance of counsel. Furthermore,

when such appeal makes no showing that interviewing additional witnesses would have produced a different outcome, petitioner failed to make out a prima facie case of ineffectiveness. *U.S. v. Green*, 882 F.2d 999, 1003 (5th Cir. 1989). Comparing the standard of *Strickland* and the prior findings of the court below on the issue of what constitutes ineffectiveness during sentencing, with the facts set forth in this case, the evidence showed counsel was not deficient, nor was petitioner prejudiced by this nonexistent deficiency. As such, there was no error and the Mississippi Supreme Court correctly ruled that there was no *Strickland* error by counsel.

On direct appeal and post-conviction proceedings the court below addressed the issue of counsel's effectiveness regarding mitigation and found that defense counsel had performed in a constitutionally acceptable manner. Havard now states that the Mississippi Supreme Court was incorrect in its analysis of the facts before it, however, the record before the court below was replete with facts and information that supported that court's decisions.

What the state court found was that during mitigation, petitioner's counsel called two supporting witnesses: petitioner's mother, Cheryl Harrell, and his grandmother, Ruby Havard. During direct examination of Cheryl Harrell, counsel asked Harrell to "describe" her relationship with petitioner. Counsel asked Harrell about petitioner's step-father, Gordon Harrell. Counsel asked Harrell about petitioner's relationship with his biological father. Petitioner also asked Harrell to tell the jury specifically why petitioner should not be sentenced to death. With these open-ended questions, counsel elicited from Harrell that she and petitioner had always been close; that petitioner had moved in with his grandparents when he

was a teenager due to something he had seen at school; that she and petitioner never had problems with their relationship; that petitioner visited her every chance he got; that petitioner had been born out of wedlock when Harrell was only nineteen; that petitioner did not even meet his father until he was sixteen; that petitioner's father had no place in petitioner's life and had never supported him.

Harrell also told the jury that petitioner was a "kind, tender-loving person" who loves children. Harrell told the jury stories about how petitioner came to the defense of his niece, a child afflicted with Down Syndrome, when others made fun of her; and about how petitioner affectionately cared for his younger half-brother when he was little. Harrell's testimony ended with her admonishment to the jury that only God should be able to take a life, and the jury did not have the right to do so.

Additionally, trial counsel called petitioner's grandmother, Ruby Havard. As a result of counsel's open-ended questioning, Mrs. Havard spoke of how petitioner had allowed Rebecca Britt and Chloe to move in with him; she spoke of how hard petitioner worked at the Carline Boat Line. Mrs. Havard spoke of the years petitioner lived with her (as well as petitioner's grandfather) while he was a teenager; Mrs. Havard informed the jury that petitioner moved away from his mother and in with her because, "He liked the schools here. He had always loved us."

Mrs. Havard spoke of petitioner's love for both Rebecca and Chloe Britt, noting that petitioner kept pictures of Britt in his wallet. Mrs. Havard spoke of petitioner's love for other children, including his two nieces. Mrs. Havard told the jury that petitioner had wanted to

marry Rebecca Britt so that he could "take care of her and the baby because she had nowhere else to go." Finally, Mrs. Havard begged the jury to save petitioner's life, noting that she had lost a son years ago and did not want to lose another. This testimony, in itself, was sufficient mitigation.

The affidavits produced by petitioner and considered by the court below on post-conviction review were cumulative to the information that had already been presented. Most of them contain more damning evidence than praising. All of them are based on the same two-part theme: that trial counsel never contacted the affiant, and that the affiant "would do anything" to help petitioner. These are the types of biased affidavits offered for consideration.

An examination of these affidavits revealed: Marilyn Cox, petitioner's aunt, saw bruises on petitioner one time and concluded that he had been beaten; she never saw how petitioner acquired these bruises. Marilyn's father (petitioner's grandfather) had fought with his children and hit his wife on an occasion before petitioner was even born. Marilyn also noted that petitioner did not have contact with his biological father (as the jury already knew, pursuant to the testimony of Cheryl Harrell).

William Havard, petitioner's grandfather, noted that petitioner was like a son to him. He stated he "knew" petitioner's stepfather was beating both petitioner and Cheryl Harrell; however he never witnessed these events. In fact, William Havard stated he did not see petitioner much when he was younger, as he was always with his stepfather. William Havard also provided a lengthy diatribe on petitioner's negative qualities. After petitioner came to live with him, Havard bought petitioner a truck so that he could get to work. Petitioner took the

truck and immediately quit the job. Petitioner caused problems, stayed out late, would not listen, fought with his grandparents, and did not like the idea of Havard telling him anything. William Havard called the police on petitioner several times "to calm him down." On many of those occasions, petitioner would keep William Havard from getting to the phone, so he had to ask the neighbors to call the police. Petitioner lived in the trailer William provided him, but he often associated with people who used drugs and brought them to the house.

Daniel Bradshaw, a friend of petitioner's from Camp Shelby, noted that petitioner had his problems. He stated that petitioner's family did not attend his graduation at Camp Shelby, so petitioner went to lunch that day with Bradshaw and his family, who befriended him and came to think of him as a son. Bradshaw stated that petitioner loved children and was trying to make something of his life. However, he also noted that petitioner used lots of drugs and hung out with the wrong people.

Australia Bradshaw, another friend of petitioner, noted that she and petitioner had gone to church together when petitioner was thirteen years old. She remembered petitioner as a talkative, happy guy. However, she also remembered that petitioner would stay with her when he was fighting with his grandfather. Bradshaw noted that petitioner's grandfather did not like the fact that petitioner was staying out late with a bad crowd; petitioner would often respond to William Havard's concern with "a lot of hurtful words." Petitioner and his grandfather would "get into it", and the police would have to come out to the house; Bradshaw remembered petitioner during those times racing around in his truck and screeching his tires. Bradshaw remembered both petitioner and his grandfather butting heads and being stubborn.

Finally, Etta White, a co-worker of petitioner's, noted that petitioner was good at his job and had a great personality.

An examination of the affidavits reveals no person ever witnessed petitioner being beaten in any way by anyone. Their statements do not even constitute hearsay because petitioner never told them of this abuse; their statements are nothing more than conjecture. Petitioner never witnessed his grandfather arguing with family members or his wife—indeed, he had not even been born at the time. Moreover, each of these affiants describe petitioner as a stubborn, sullen man, who would "say a lot of hurtful words" to his grandparents—the people who raised him—when they became upset over the fact that petitioner used drugs, stayed out late, hung out with the wrong crowd and would not obey or listen to their rightful authority. Petitioner's temper was so volatile that his grandparents had to call the police, not once, but several times; Petitioner physically attempted to prevent his grandparents from making those calls.

The positive aspects of these affidavits consist of nothing more than statements that petitioner was a good guy and a good employee, who went to church when he was a teenager, who loved children, who did not know his biological father, and who apparently suffered the traumatic and *life-altering* experience of not having family members attend a ceremony at Camp Shelby (forcing him to have lunch with friends so close they thought of petitioner as their own son).

This information was mostly cumulative to that already presented by petitioner's mitigation witnesses; moreover, petitioner did not show that there was a reasonable probability

that the presentation of any of this noncumulative information would have resulted in a different sentencing outcome. Petitioner sexually battered and beat a child to death; then he lied about it. Petitioner also presents affidavits from his mother and grandmother, who both testified at sentencing. Cheryl Harrell reiterates that petitioner was a good person who loved his siblings and was good with kids. Cheryl reiterates that petitioner went to live with his grandparents at age thirteen after seeing violence in school. Cheryl reiterates that she just wanted to tell the jury how much she loved petitioner "and how special he is to his family."

Cheryl Harrell also volunteered some new information, apparently things she simply forgot to mention when pleading for the life of her child: that it was hard raising petitioner, that petitioner received spankings as a child, and that petitioner's father and her own father wanted her to abort petitioner. How any of this affected petitioner's life is anyone's guess; Harrell did not elaborate. Moreover, petitioner's grandfather stated petitioner was like a son to him, petitioner's other affiants belabor the fact that they care about petitioner, and Harrell herself testified at trial about how close she and petitioner were. Obviously, after petitioner was born, he was loved.

What was missing from Harrell's affidavit, and absent in her trial testimony, is information concerning petitioner's alleged abusive childhood. Indeed, although all the other affiants talk about the atrocities of petitioner's stepfather (even though none has ever actually seen it occur), Cheryl Harrell makes no mention of any abuse. She did not mention it during the trial, and she does not mention it in her affidavit. No one else claims to have seen this abuse take place; no one else claims petitioner told them he was abused. Cheryl Harrell and

Petitioner are the only two witnesses vested with firsthand knowledge of this alleged abuse, yet neither one has volunteered a shred of information to confirm it, even when afforded the opportunity at trial to do so.

Cheryl Harrell also stated that petitioner's problems lay with his grandparents, who were too lenient in raising him. This led to the post-trial affidavit of Ruby Havard, which is in grand contradiction to Harrell's affidavit and places blame for petitioner's problems with his stepfather. Ruby Havard's affidavit stated that petitioner was physically abused by his stepfather, who had a temper. Ruby never volunteered this information at trial. Even when trial counsel asked about petitioner leaving his stepfather's home and coming to live with her, Ruby Havard simply stated, "He loved the schools. He always loved us." Moreover, even later Ruby Havard did not state that she witnessed a single act of abuse towards petitioner or that petitioner ever told her he had been abused.

Interestingly, Ruby Havard's affidavit consists mostly of statements that would harm petitioner, not help him: statements concerning the fact that petitioner did not get on well at high school; that he fooled around with drugs and when confronted by his grandfather would "say ugly things like he wished he had never come to live with us"; that he would "act up, argue with us and say ugly things but we never had a chance to punish him because he would get in his truck and leave."

Cheryl Harrell and Ruby Havard presented compelling, specific, intelligent mitigation testimony during the sentencing phase of petitioner's trial. The contradictory testimony these two women later presented lessens the credibility of both, a result that does nothing but weaken

petitioner's case. Their new affidavits consisted of testimony already presented in mitigation, testimony highlighting petitioner's negative character traits, testimony that could have been presented during trial (and by its absence is therefore suspicious), and in the case of the alleged abuse, testimony that has not once been confirmed by an actual witness (who either witnessed it, or heard it from petitioner's own mouth)– and, therefore, is nothing more than conjecture.

There was no deficiency on trial counsel's part in deciding not to present cumulative information drafted by individuals who, to a person, "would do anything to help" petitioner. These affidavits, in large part, also focus on the negative characteristics of petitioner's nature, not the positive ones; that counsel chose not to present witnesses who would discuss petitioner's drug use, run-ins with the police, rebellion against his family, and other problems, shows that counsel understood the meaning of the word "mitigation." His decision not to use these witnesses was proper.

Moreover, these affidavits contain information that petitioner and his mitigation witnesses were in the best position to know. At the point petitioner, Cheryl Harrell and Ruby Havard chose to withhold that information, the blame lay with petitioner himself. Such blame cannot be shifted simply because petitioner chose to inform the court of the many problems he suffered as a child. Petitioner, his mother and his grandmother were in the best position to know of any possible helpful mitigation evidence and inform trial counsel of it. *See Johnson v. Cockrell*, 306 F.3d 249, 253 (5th Cir. 2002).

"This Court has consistently refused to hold attorneys responsible for introducing mitigation evidence that their client and other witnesses fail to disclose." *Id*. (citing *Soria v.*

*Johnson*, 207 F.3d 232, 250-51 (5th Cir. 2000); *West v. Johnson*, 92 F.3d 1385, 1408-09 (5th Cir. 1996). Trial counsel cannot be faulted for discarding evidence that was never disclosed or that would not have been helpful (or would have been harmful) in the pursuit of his trial strategy. In that counsel was not deficient, and inasmuch as petitioner's collateral evidence lacks value and does not create a reasonable probability that this case would have resulted in a different outcome had such evidence been presented to the jury, there was no *Strickland* error.

Other affidavits presented by the petitioner included those of trial investigator Don Evans, and the affidavit of Adriane Kidd, a social worker in Jackson. Mr. Evans stated in his affidavit that he interviewed a "potential" mitigation witness, who had two daughters for whom petitioner used to babysit. Mr. Evans stated that he gave this information to trial counsel. Petitioner claims that trial counsel should have used this witness.

With respect to the affidavit of Ms. Kidd, it is noted she never personally interviewed a single family member or friend of petitioner; nor has Ms. Kidd interviewed petitioner himself. Going strictly from school records and interview notes (who exactly conducted these interviews is not disclosed, but Ms. Kidd indicates that she was not present for these interviews), Ms. Kidd has developed an assessment of "mitigating factors that could have been addressed at [petitioner's] trial." *Moore v. Johnson*, 225 F.3d 495 (5th Cir. 2000), supports the fact that petitioner is not allowed this type of "mitigation expert." "An indigent defendant requesting non-psychiatric experts [such as mitigation experts] must demonstrate something more than a mere possibility of assistance from a requested expert." Petitioner fails

to do this. *See Moore*, at 503-04. Ms. Kidd's affidavit consists of nothing more than undocumented, un-notarized evidence drafted solely for the purposes of securing petitioner a new trial.

The State would assert that trial counsel's presentation of mitigation evidence, as seen in the record itself, was sufficient. Trial counsel's presentation of mitigation evidence, taking into consideration the collateral evidence petitioner now presents again, was still sufficient. As such, there was no error.

The Mississippi Supreme Court's decision on this issue was not an unreasonable application of clearly established law as announced by the United States Supreme Court nor did that court improperly apply the law to the facts of the case. Havard is entitled to no relief on this claim.

**CLAIM V**

**THE MISSISSIPPI SUPREME COURT'S DECISION THAT THE PETITIONER WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING CLOSING ARGUMENT AT SENTENCING WAS NOT CONTRARY TO OR AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW AS ANNOUNCED BY THE UNITED STATES SUPREME COURT, NOR AN UNREASONABLE APPLICATION OF THE LAW TO THE FACTS OF THIS CASE.**

On direct appeal, Havard complained that his counsel were ineffective in the presentation of closing argument by not pointing out enough mitigation in a short closing statement and conceded to aggravating factors. The Mississippi Supreme Court considered the issue and held:

**VIII. WHETHER HAVARD WAS DENIED HIS RIGHT TO EFFECTIVE**

**ASSISTANCE OF COUNSEL IN CLOSING ARGUMENT AT THE SENTENCING PHASE OF TRIAL**

¶ 51. Havard next asserts he was denied effective assistance of counsel during the closing arguments of the sentencing phase of his trial. Havard asserts that in a brief closing argument, trial counsel conceded the aggravating circumstance of Chloe's tender age and failed to argue mitigating circumstances beyond commenting that mitigating circumstances are what individuals on the jury can find in their souls to lessen the impact of the aggravating circumstances. Trial counsel also alluded to the testimony of Havard's mother and grandmother.

¶ 52. "What is important at the [sentencing] stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime." *Tuilaepa v. California*, 512 U.S. 967, 972, 114 S.Ct. 2630, 2635, 129 L.Ed.2d 750 (1994). During sentencing, the jury determines whether a defendant eligible for the death penalty should in fact receive that sentence. *Id.* The above requirement is met when the jury is able to consider the relevant mitigating evidence, including the character of the defendant and the circumstances of the crime. Id. The question in today's case is whether the performance of Havard's trial counsel was deficient to the extent that it falls short of the Sixth Amendment guarantees. Certainly, at the sentencing phase, trial counsel for a defendant focuses on efforts to save the defendant's life. Guilt is no longer an issue. While trial counsel's closing arguments at the sentencing phase of Havard's trial, when viewed with the benefit of hindsight, could have been presented more forcibly, this Court has been consistent in finding that closing argument falls under the ambit of defense counsel's trial strategy. *Pruitt v. State*, 807 So.2d 1236, 1240 (Miss.2002). For this reason, we have also been consistently hesitant to vacate a sentence based on closing arguments by defense counsel. Standing alone, this error, if any indeed exists, is harmless as far as its ultimate effect on the outcome of the trial. Defense counsel made a relatively short closing argument which in the end did not sway the minds of the jurors. Havard relies on *Woodward*, 635 So.2d at 810, but this is distinguishable because in that case the trial counsel went so far as to admit the guilt of his client and even told the jury he could not ask the jury to spare the defendant's life based on the facts. We have also often held that "[s]o long as counsel in his address to the jury keeps fairly within the evidence and the issues involved, wide latitude of discussion is allowed." *Brewer v. State*, 704 So.2d 70, 73 (Miss.1997) (quoting *Clemons v. State*, 320 So.2d 368, 371-72 (Miss.1975)). Given this wide latitude and any strategic decisions counsel could have made with regard to his approach to the trial of this case, we are unable to find this issue presents us with an instance of reversible error. We thus find this

issue to be without merit.

*Havard* I at 796.

On post-conviction review the court below determined the issue to have been sufficiently dealt with on direct appeal and found the issue to be procedurally barred for post-conviction purposes, holding:

> **VI. Ineffective assistance of counsel during closing argument at the penalty phase.**
>
> ¶ 66. Havard asserts that he was denied effective assistance of counsel during closing argument of the sentencing phase of the trial. Defense counsel stated, "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." On direct appeal, Havard argued that this his counsel conceded the aggravating circumstance of Chloe's tender age and failed to argue mitigating circumstances. Havard now raises the same arguments via these post-conviction-relief proceedings.
>
> ¶ 67. This issue was presented to this Court on direct appeal and found to be without merit. *Havard*, 928 So.2d at 798. Therefore, this issue is procedurally barred by the doctrine of res judicata pursuant to Mississippi Code Annotated Section 99-39-21(3) (Rev.2007), which states: "The doctrine of res judicata shall apply to all issues, both factual and legal, decided at trial and on direct appeal."
>
> ¶ 68. Havard has not demonstrated a novel claim or a sudden reversal of law relative to this issue which would exempt it from the procedural bar of res judicata pursuant to Mississippi Code Annotated Section 99-39-21(3) (Rev.2007). *See also Lockett v. State*, 614 So.2d 888 (Miss.1992) (citing *Rideout v. State*, 496 So.2d 667 (Miss.1986); *Gilliard v. State*, 446 So.2d 590 (Miss.1984)).

*Havard* II at 341-42.

Now, here in his habeas petition, Havard presents the same argument as before in support of the claim that the Mississippi Supreme Court erred in finding that counsel were not

ineffective in the presentation of closing argument. Looking to the facts presented to the court below it is clear that the decision was not contrary to or an unreasonable application of clearly established law as announced by the United States Supreme Court. Havard again claims counsel's closing argument was "so inadequate that it amounted to an abandonment of his client." According to Havard, counsel conceded an aggravating factor that had not been presented to the jury, conceded that the jury could consider victim impact testimony, and gave only two reasons why the jury should vote for life. Petitioner also claims that counsel asserted that there were no mitigating factors. Havard claims that, combined with the absence of mitigation actually presented during sentencing, counsel's closing was prejudicially deficient, thus necessitating a reversal of Havard's sentence.

The *Strickland* analysis of an ineffective assistance of counsel claim has been fully set forth in Claim I, *supra*. Havard lists several actions by counsel he claims occurred during closing argument that constituted *Strickland* error. First, Havard claims counsel conceded an aggravating factor that had not been presented to the jury. During closing argument, counsel noted:

> 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.

It is unclear as to what part of the State's closing (presented by Mr. Rosenblatt) counsel was referring; although it is known that the only aggravators the State mentioned were sexual battery and HAC. Regardless of what counsel was referring to, the fact that Chloe Britt died tragically at a young age is not an aggravator. It is not an aggravator used in this trial, and it

is not an aggravator at all.

The fact that Chloe Britt died at a young age is, as counsel put it, "documented." Moreover, the fact that counsel referred to that death as an aggravator is harmless, in that the jury was never instructed on such nonexistent (both factually and statutorily) aggravating circumstance. The jury was presented with the aggravating circumstances of sexual battery (the underlying felony) and of the murder being "heinous, atrocious or cruel." It could only find these aggravators. Therefore, any inadvertent use of the word "aggravator" in counsel's concession that Chloe's death was tragic has no effect on the jury's verdict. There was no prejudice resulting from the use of the word "aggravator" to describe a situation 1) that is not an aggravator and 2) on which the jury was never instructed to find or use in deciding on capital punishment.

Moreover, Havard's claim that the concession of this aggravator amounted to a concession of his eligibility for the death penalty is incorrect. Miss. Code Ann. § 1-3-4 states:

> The term "capital murder" when used in any statute shall denote criminal cases, offenses and crimes punishable by death, or imprisonment for life in the state penitentiary.

*See* Miss. Code Ann. § 99-19-101(1) (setting forth capital sentencing procedures to be employed "[u]pon conviction or adjudication of guilt of a defendant of capital murder..."). The charge of capital murder, in this case, was based on the underlying felony of sexual battery. Once Havard was indicted for capital murder he was immediately eligible upon conviction for the maximum sentence: death. Assuming counsel had conceded any aggravator, including the underlying felony, such action would not have been a concession of the death eligibility.

Petitioner was death eligible whether counsel conceded an aggravator or not; counsel could not concede that which had already come to light. Moreover, in that the facts petitioner mentioned did not constitute an aggravating circumstance at all, much less one on which the jury was instructed, his "concession" actually conceded nothing.

Counsel's statement that Chloe Britt died a tragic death at a young age did not in any way concede an aggravator or Havard's eligibility for the death penalty. As such, there was no prejudice in the making of this statement (assuming any deficiency occurred, which the State does not). This assumption of error is without merit.

Havard asserts that counsel improperly gave only two reasons why the jury should impose a life sentence, and he informed the jury there were no mitigating factors. However, again counsel's actions were clearly sufficient and Havard misstates the facts. Counsel began his closing by noting the most important element of sentencing:

> [O]bviously the main concentration of what I talk to you about would be mitigating circumstances [...] Mitigating is something that will lessen the affect [sic] of the aggravating circumstances obviously, and mitigating circumstances can be anything that you find in your mind or in your heart or in your soul that enables you and causes you to want to lessen the impact of any aggravating circumstances you may find.

In stressing this theme of "mitigation" counsel asked the jury to consider the testimony of Havard's mother, and how she begged the jury to spare her son's life. Counsel asked the jury to consider the testimony of Havard's grandmother, who raised him. Counsel then urged the jury to remember that there is no law requiring the jury to sentence petitioner to death. Counsel urged the jury to have mercy on Havard, stressing the fact that he would never get out

of jail. Finally, counsel urged the jury to decide on a life sentence by any means possible, whether it was because of the mitigating factors or whether it was "emotional or factual or whatever."

Counsel never conceded the absence of mitigation. On the contrary, counsel reminded the jury about the testimony presented by Havard's mitigation witnesses; he reminded the jury that they did not have to sentence him to death; he asked the jury to show mercy. Moreover, the jury was instructed on the following mitigating circumstances which counsel either discussed during closing, elicited during sentencing, or both:

> 1. Whether the defendant has no significant history of prior criminal activity.
>
> 2. Any other matter, and other aspect of the defendant's character or record, and any other circumstance of the offense brought to you during the trial of this cause which you, the jury, deem to be mitigating on behalf of the defendant.
>
> 3. The defendant's family wants his life to be spared
>
> 4. The defendant will never be eligible for parole or probation, and will serve the rest of his life in prison.

The claim that counsel told the jury "he was not even going to 'try to fit the mitigation into the instructions from the Court" is taken out of context and is a misstatement of the facts. Trial counsel was reminding the jury of the testimony presented by all witnesses—both state and defense—during sentencing. Trial counsel concluded by empathizing with the jury, telling them he did could not begin to know all the things that would be going through their minds when they were considering "the circumstances that are in the instructions" (presumably both aggravating and mitigating). Trial counsel then stated that he wouldn't "even try to fit it on

that." This was not a concession of mitigation; certainly not in light of the testimony presented, counsel's reminder to the jury of that testimony, and the instructions charging the jury with possible mitigating circumstances. This was simply an attorney trying to connect with his jury, stating that he would not insult them by pretending to know how they would look at the evidence when determining mitigators and aggravators. Trial counsel then took that connection and used it, immediately segueing into a reminder to the jury to consider the factors supporting a life sentence in this case.

Moreover, the jury was instructed that they could find death was not warranted even though there are aggravating circumstances and not a single mitigating circumstance. The jury was instructed that they did not have to find mitigators in order to return a life sentence. The jury was instructed that they must consider mitigating circumstances as individual jurors, and that even if the other jurors fail to find such mitigator, if one juror believes it exists, it must be weighed in deliberations.

Petitioner also takes issue with counsel's alleged concession to the jury that they should consider victim impact testimony. Again, however, taken both by itself and in the context of counsel's argument, the comment made was proper. During closing, counsel stated as follows:

> there are certainly certain things you can look at in making your decision, whether it's the testimony of the grandmother, Mrs. Watson, and what she said, or the testimony of Jeffrey Havard's mother, Cheryl Hannah, and what she said about why she would ask you and why she did ask you to spare her son's life and also the testimony of the grandmother, Ruby Havard, who basically raised Jeffrey during his teenage years. When you go back in there, I simply don't know all the things that will be going through your mind about what you decide about the circumstances that are in the instructions the Judge gives you [...]

There was no error in this comment. Obviously, the jury is allowed to consider victim impact testimony, as they are also allowed to consider testimony from the Havard's family and friends. Trial counsel's comment was nothing more than a start to his plea for the jury consider the mitigation in this case. With respect to the issue of Lillian Watson's "life for a life" statement, the State noted that such statement was merely one sentence in a seven page examination of that witness. Telling the jury it could consider Mrs. Watson's statements was nothing more than a "compare or contrast" line of argument: counsel was merely reminding the jury to consider the defendant's witnesses just as the State asked them to consider their own.

In light of the mitigation evidence, argument and instructions presented by trial counsel, there is no deficiency. Petitioner failed to show to the court below a reasonable probability that, but for any deficient conduct, the outcome of his trial would have been different. As such, there was no error.

The Mississippi Supreme Court's decision on this issue was not an unreasonable application of clearly established law as announced by the United States Supreme Court nor did that court improperly apply the law to the facts of the case. Havard is entitled to no relief on this claim.

**CLAIM VI**

**THE MISSISSIPPI SUPREME COURT'S DECISION THAT THERE WAS NO TRIAL COURT ERROR IN INSTRUCTING THE JURY REGARDING THE AGGRAVATING CIRCUMSTANCE OF ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL WAS NOT CONTRARY TO OR AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW AS ANNOUNCED BY THE UNITED STATES SUPREME COURT, NOR AN UNREASONABLE**

**APPLICATION OF THE LAW TO THE FACTS OF THIS CASE.**

On direct appeal, Havard conceded that the limiting instruction associated with the especially heinous, atrocious or cruel aggravator had been repeatedly found by the Mississippi Supreme Court to be constitutionally sufficient. In spite of that concession, Havard went on to claim the limiting instruction was unconstitutionally vague and the court must overrule itself on the matter. The court below took up the issue and held:

> **XI. WHETHER THE TRIAL COURT'S LIMITING INSTRUCTION OF AN AGGRAVATING CIRCUMSTANCE WAS ITSELF UNCONSTITUTIONALLY VAGUE AND OVERBROAD**
>
> ¶ 58. The trial court's sentencing instruction S-9 defined for the jury what constituted a heinous, atrocious, or cruel (HAC) capital offense and instructed the jury that it may consider such, if found, an aggravating circumstance. Havard concedes in his brief to this Court that we have held this instruction to be constitutionally sufficient. Nonetheless, Havard challenges this instruction as unconstitutionally vague. The instruction read 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 from the evidence beyond a reasonable doubt that 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.

This issue is quickly laid to rest. "This Court has repeatedly held that the 'especially heinous, atrocious or cruel' provision of Miss.Code Ann. § 99-19-101(5)(h) is not so vague and overbroad as to violate the United States Constitution." *Stevens v. State*, 806 So.2d 1031, 1060 (Miss.2001). *See also Crawford v. State*, 716 So.2d 1028 (Miss.1998); *Mhoon v. State*, 464 So.2d 77 (Miss.1985); *Coleman v. State*, 378 So.2d 640 (Miss.1979). Indeed Havard himself concedes this Court's recognition of the constitutionality of this instruction. Despite this concession, Havard urges this Court to find that the United States Supreme Court in *Shell v. Mississippi*, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990) held this instruction unconstitutional. We briefly revisit what we stated a little more than a year ago with regard to this same challenge:

> Thorson argues that first paragraph of the above instruction was held unconstitutional by the United States Supreme Court in *Shell v. Mississippi*, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990). Thorson further contends that in *Hansen v. State*, 592 So.2d 114 (Miss.1991), this Court announced that the language held unconstitutional in Shell should not be submitted to juries. Therefore, Thorson concludes that Instruction SP-2 has been determined by the United States Supreme Court and this Court to be per se objectionable. In *Shell*, the Supreme Court found that when used alone, language identical to that used in the first paragraph of instruction SP-2 was not constitutionally sufficient. 498 U.S. at 2, 111 S.Ct. 313, 112 L.Ed.2d 1. However, in *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), the Supreme Court determined that the first sentence of the second paragraph was a proper limiting instruction when used in conjunction with the language from *Shell*. This Court has repeatedly held this identical instruction to be constitutionally sufficient. *See Knox v. State*, 805 So.2d 527, 533 (Miss.2002); *Puckett v. State*, 737 So.2d 322, 359-60 (Miss.1999); *Jackson v. State*, 684 So.2d 1213, 1236-37 (Miss.1996).

*Thorson v. State*, 895 So.2d 85, 104 (Miss.2004). Havard invites us to overturn firmly entrenched Mississippi precedent on this issue. We decline to do so. For these reasons, this issue is without merit.

*Havard* I at 799-800.

Then, in his post-conviction petition, Havard again claimed to the court below that the

limiting instruction was too vague to pass constitutional muster. The court found the issue to have been sufficiently covered on direct appeal and declined to discuss the matter further due to the procedural bar of *res judicata*.

> **X. Limiting instruction of especially heinous, atrocious, or cruel aggravating circumstance.**
>
> ¶ 75. In this claim, Havard asserts that the trial court's limiting instruction of especially heinous, atrocious, or cruel aggravating circumstances violated his constitutional rights because it was unconstitutionally vague. This Court considered this issue on direct appeal, and the decision was adverse to Havard. "This Court has repeatedly held that the 'especially heinous, atrocious or cruel' provision of Mississippi Code Annotated Section 99-19-101(5)(h) is not so vague and overbroad as to violate the United States Constitution." *Havard*, 928 So.2d at 800 ( citing *Stevens v. State*, 806 So.2d 1031, 1060 (Miss.2001)). *See also Crawford v. State*, 716 So.2d 1028 (Miss.1998); *Mhoon v. State*, 464 So.2d 77 (Miss.1985); *Coleman v. State*, 378 So.2d 640 (Miss.1979).
>
> ¶ 76. Havard has presenting nothing novel to support this claim nor has he made a showing of a sudden reversal in the law related to this issue. Therefore, Havard's claim is procedurally barred. Miss.Code Ann. § 99-39-21(3) (Rev.2007). *See also Lockett*, 614 So.2d at 897.

*Havard* II at 343.

Now, in his habeas argument, Havard asserts that the Mississippi Supreme Court erred in holding that the instruction given at trial was constitutionally permissible. The decision of the United States Supreme Court in *Bell v. Cone*, 543 U.S. 447, 125 S.Ct. 847, 160 L.Ed.2d 881 (2005), affirmatively settles the vagueness question raised by petitioner in this case. The Sixth Circuit granted habeas relief to the petitioner on the basis of a vague, overbroad "especially heinous" aggravating circumstance. The instruction given by the trial court in that case was, in fact, broad and vague. It was the same instruction as that found "constitutionally

insufficient" in *Shell v. Mississippi*, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990) (per curiam). Even though the instruction was vague the Court reversed the Sixth Circuit because of the manner in which the Tennessee Supreme Court had, in other cases, limited the reach of the aggravator.

While petitioner is challenging the instruction in this case, the Supreme Court's discussion of vagueness challenges to aggravating circumstances is pertinent to the discussion here. The Supreme Court held:

> The law governing vagueness challenges to statutory aggravating circumstances was summarized aptly in *Walton v. Arizona, supra*, overruled on other grounds, *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002):
>
> > "When a federal court is asked to review a state court's application of an individual statutory aggravating or mitigating circumstance in a particular case, it must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer. If so, then the federal court must attempt to determine whether the state courts have further defined the vague terms and, if they have done so, whether those definitions are constitutionally sufficient, *i.e.*, whether they provide some guidance to the sentencer." *Walton, supra*, at 654, 110 S.Ct. 3047.
>
> These principles were plain enough at the time the State Supreme Court decided respondent's appeal. In *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), we upheld the aggravating circumstance that the murder was "'especially heinous, atrocious or cruel'" on the express ground that a narrowing construction had been adopted by that State's Supreme Court. *Id.*, at 255, 96 S.Ct. 2960 (joint opinion of STEWART, POWELL, and STEVENS, JJ.). And, in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), we refused to invalidate the aggravating circumstance that the murder was "'outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim,'" because "there [was] no reason to assume that the Supreme Court of Georgia will adopt . . . an open-ended

> construction" that is potentially applicable to any murder. *Id*., at 201, 96 S.Ct. 2909 (joint opinion of STEWART, POWELL, and STEVENS, JJ.). *See generally Lewis v. Jeffers*, 497 U.S. 764, 774-777, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990) (reviewing cases).

Indeed, in *Godfrey*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398, the case on which the Court of Appeals relied in declaring the aggravating circumstance to be unconstitutionally vague, the controlling plurality opinion followed precisely this procedure. Like the court below, the plurality looked first to the language of the aggravating circumstance found by the jury and concluded that there "was nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." *Id*., at 428, 100 S.Ct. 1759. But the plurality did not stop there: It next evaluated whether the Georgia Supreme Court "applied a constitutional construction" of the aggravating circumstance on appeal. *Id*., at 432, 100 S.Ct. 1759. Because the facts of the case did not resemble those in which the state court had previously applied a narrower construction of the aggravating circumstance and because the state court gave no explanation for its decision other than to say that the verdict was "factually substantiated," the plurality concluded that it did not. *Id*., at 432-433, 100 S.Ct. 1759. As we have subsequently explained, this conclusion was the linchpin of the Court's holding: "Had the Georgia Supreme Court applied a narrowing construction of the aggravator, we would have rejected the Eighth Amendment challenge to Godfrey's sentence, notwithstanding the failure to instruct the jury on that narrowing construction." *Lambrix v. Singletary*, 520 U.S. 518, 531, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997). *See also Walton*, 497 U.S., at 653-654, 110 S.Ct. 3047; *Cartwright*, 486 U.S., at 363-365, 108 S.Ct. 1853 (refusing to countenance the Oklahoma Court of Criminal Appeals' affirmance of a death sentence based on a facially vague aggravating circumstance where that court had not adopted a narrowing construction of its aggravator when it affirmed the prisoner's sentence).

In this case, however, the Sixth Circuit rejected the possibility that the Tennessee Supreme Court cured any error in the jury instruction by applying a narrowing construction of the statutory "heinous, atrocious, or cruel" aggravator. The court asserted that the State Supreme Court "did not apply, or even mention, any narrowing interpretation or cite to [sic] *Dicks*," the case in which the State Supreme Court had adopted a narrowing construction of the aggravating circumstance. 359 F.3d, at 797. "Instead," the court said, "the [state] court simply, but explicitly, satisfied itself that the labels 'heinous, atrocious, or cruel,'

without more, applied to [respondent's] crime." *Ibid*.

> We do not think that a federal court can presume so lightly that a state court failed to apply its own law. As we have said before, § 2254(d) dictates a "'highly deferential standard for evaluating state-court rulings,' *Lindh v. Murphy*, 521 U.S. 320, 333 n. 7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), which demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (per curiam). To the extent that the Court of Appeals rested its decision on the state court's failure to cite *Dicks*, it was mistaken. Federal courts are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation. *See Mitchell v. Esparza*, 540 U.S. 12, 16, 124 S.Ct. 7, 157 L.Ed.2d 263 (2003) (per curiam); *Early v. Packer*, 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002) (per curiam).
>
> More importantly, however, we find no basis for the Court of Appeals' statement that the state court "simply, but explicitly, satisfied itself that the labels 'heinous, atrocious, or cruel,' without more, applied" to the murder. 359 F.3d, at 797. The state court's opinion does not disclaim application of that court's established construction of the aggravating circumstance; the only thing that it states "explicitly" is that the evidence in this case supported the jury's finding of the statutory aggravator. *See Cone*, 665 S.W.2d, at 95 (stating that the aggravating circumstance was "indisputably established by the record"). As we explain below, the State Supreme Court had construed the aggravating circumstance narrowly and had followed that precedent numerous times; absent an affirmative indication to the contrary, we must presume that it did the same thing here. *See Visciotti, supra*, at 24, 123 S.Ct. 357 (stating the presumption that state courts "know and follow the law"); *Lambrix, supra*, at 532, n. 4, 117 S.Ct. 1517; *Walton, supra*, at 653, 110 S.Ct. 3047. That is especially true in a case such as this one, where the state court has recognized that its narrowing construction is constitutionally compelled and has affirmatively assumed the responsibility to ensure that the aggravating circumstance is applied constitutionally in each case. *See State v. Pritchett*, 621 S.W.2d 127, 139, 140 (Tenn.1981).
>
> 125 S.Ct. at 851-53. [Footnote omitted.]

Clearly, the Mississippi Supreme Court is familiar with the law in this area as three of the cases involving vagueness challenges the "especially heinous" aggravating circumstances originated

in that court. *See Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990); *Shell v. Mississippi*, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990) (per curiam); *Stringer v. Black*, 503 U.S. 222, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992).

However, the most important precedent to be gleaned from the opinion is the that the United States Supreme Court held:

> The only remaining question is whether the narrowing construction that the Tennessee Supreme Court applied was itself unconstitutionally vague. *See Walton*, 497 U.S., at 654, 110 S.Ct. 3047; *Godfrey, supra*, at 428, 100 S.Ct. 1759. It was not. In *State v. Dicks*, 615 S.W.2d 126 (Tenn.1981), the *state court adopted the exact construction of the aggravator that we approved in Proffitt, 428 U.S., at 255, 96 S.Ct. 2960: that the aggravator was "directed at 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim,'"* *Dicks, supra*, at 132. *See also Sochor v. Florida*, 504 U.S. 527, 536, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992). *In light of Proffitt, we think this interpretation of the aggravator, standing alone, would be sufficient to overcome the claim that the aggravating circumstance applied by the state court was "contrary to" clearly established federal law under 28 U.S.C. § 2254(d)(1).*
>
> 125 S.Ct. at 854-55. [Emphasis added.]

The second paragraph of the instruction approved by the Mississippi Supreme Court in this case contains the operative language: "the conscienceless or pitiless crime which is unnecessarily tortuous to the victim". The Court has now held that this language sanding alone would be sufficient to overcome the claim that the instruction on this aggravating circumstance is "contrary to" clearly established Supreme Court precedent. *Id.*

It is also informative to look to what language the United States Supreme Court found persuasive to indicate that a proper limiting construction had been applied by the Tennessee Supreme Court. We find the Court noting the following constructions of the aggravator:

> Even absent such a presumption in the state court's favor, however, we would still conclude in this case that the state court applied the narrower construction of the "heinous, atrocious, or cruel" aggravating circumstance. The State Supreme Court's reasoning in this case closely tracked its rationale for affirming the death sentences in other cases in which it expressly applied a narrowed construction of the same "heinous, atrocious, or cruel" aggravator. *Accord*, *Godfrey*, 446 U.S., at 432, 100 S.Ct. 1759 (holding that "the circumstances of this case . . . do not satisfy the criteria [for torture] laid out by the Georgia Supreme Court itself" in its cases construing the aggravating circumstance). The facts the court relied on to affirm the jury's verdict – *that the elderly victims attempted to resist, that their deaths were not instantaneous, that respondent's actions towards them were "unspeakably brutal" and that they endured "terror, fright and horror" before being killed*, 665 S.W.2d, at 95 – match, almost exactly, the reasons the state court gave when it held the evidence in *State v. Melson*, 638 S.W.2d 342, 367 (1982), to be sufficient to satisfy the torture prong of the narrowed "heinous, atrocious, or cruel" aggravating circumstance. *See also Pritchett, supra*, at 139 (finding the evidence to be insufficient to satisfy a narrowed construction of the aggravator where the victim's death was "instantaneous"); *State v. Campbell*, 664 S.W.2d 281, 284 (Tenn.1984) (holding that evidence of the aggravator was "overwhelming" where an *elderly murder victim was beaten to death with a blunt object and his hands showed that he had attempted to defend himself*). Similarly, the state court's findings that respondent's *victims had been "brutally beaten to death by multiple crushing blows to the skulls," that "[b]lood was spattered throughout the house," and that the victims were helpless*, 665 S.W.2d, at 94-95, accord with the reasons that the state court had previously found sufficient to support findings of depravity of mind. *See Melson, supra*, at 367; *State v. Groseclose*, 615 S.W.2d 142, 151 (Tenn.1981); *Strouth v. State*, 999 S.W.2d 759, 766 (Tenn.1999). In sum, a review of the state court's previous decisions interpreting and applying the narrowed construction of the "heinous, atrocious, or cruel" aggravator leaves little doubt that the State Supreme Court applied that same construction in respondent's case.
>
> 125 S.Ct. at 853-54. [Emphasis added.]

The Court further noted:

> The State Supreme Court's subsequent application of this aggravating circumstance, as construed in *Dicks*, stands as further proof that it could be applied meaningfully to narrow the class of death-eligible offenders. Later in the year that *Dicks* was decided, the court elaborated on the meaning of the

aggravator:

> "Although the Tennessee aggravating circumstances [sic] [that the murder was heinous, atrocious, or cruel], does not contain the phrase, 'an aggravated battery to the victim' it is clear that a constitutional construction of this aggravating circumstance requires evidence that the defendant inflicted torture on the victim before death or that [the] defendant committed acts evincing a depraved state of mind; that the depraved state of mind or the torture inflicted must meet the test of heinous, atrocious, or cruel." *Pritchett*, 621 S.W.2d, at 139 (citation omitted).
>
> With respect to the meaning of "torture," the court held that the aggravator was not satisfied where the victim dies instantly, *ibid*., but that it was where "the uncontradicted proof shows that *[the victim] had defensive injuries to her arms and hands, proving that there was time for her to realize what was happening, to feel fear, and to try to protect herself*, "*Melson, supra*, at 367. *Accord*, *Cartwright*, 486 U.S., at 364-365, 108 S.Ct. 1853 (approving the limitation of the "heinous, atrocious, or cruel" aggravating circumstance to killings in which the victim suffered "some kind of torture or serious physical abuse" prior to the murder). As to "depravity of mind," the court held the fact that the defendant fired a second shotgun blast into a victim after he was dead to be insufficient as a matter of law, *see Pritchett*, 621 S.W.2d, at 139 (explaining that the depravity in such an action falls short of that exhibited by the defendant in *Godfrey, supra*), but concluded that, "a killing wherein the *victim is struck up to thirty times, causing an entire room to be covered with a spray of flying blood, and causing the victim's brains to extrude through the gaping hole in her skull,"* sufficed, *Melson*, 638 S.W.2d, at 367.[8] In light of these holdings, we are satisfied that the State's aggravating circumstance, as construed by the Tennessee Supreme Court, ensured that there was a "principled basis" for distinguishing between those cases in which the death penalty was assessed and those cases in which it was not. *Arave v. Creech*, 507 U.S. 463, 474, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993).
>
> 125 S.Ct. at 855. [Emphasis added.]

For all practical purposes the highlighted language the United States Supreme Court found persuasive as a proper limiting constructions are almost identical in import to that found in the second sentence of paragraph two of the instruction given in this case. Clearly, the

approval of this instruction by the Mississippi Supreme Court does not represent a decision that is contrary to or an unreasonable application of clearly established Supreme Court precedent.

Respondents would assert that the giving of this instruction was neither contrary to or an unreasonable application of established federal law, as announced by the United States Supreme Court. Havard is entitled to no relief on this claim.

**CLAIM VII**

**PETITIONER'S CLAIM THAT THE MISSISSIPPI SUPREME COURT ERRED IN HOLDING THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE AGGRAVATING CIRCUMSTANCE THAT THE KILLING WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL IS BARRED FROM CONSIDERATION BY AN ADEQUATE AND INDEPENDENT STATE COURT GROUND.**

On direct appeal, Havard argued that the especially heinous, atrocious or cruel aggravator "subsumed" the sexual battery aggravator and therefore the trial court had erred in allowing the aggravators to be considered by the jury in deliberations. The Mississippi Supreme Court considered the issue and held:

> **XIII. WHETHER HAVARD WAS DENIED HIS CONSTITUTIONAL RIGHT TO A RELIABLE SENTENCE BECAUSE THE TRIAL COURT ALLOWED THE JURY TO CONSIDER AGGRAVATORS TO SUPPORT THE SENTENCE OF DEATH**
>
> ¶ 63. Havard claims the trial court erred because the jury was instructed concerning two aggravators: (1) "the capital offense was committed while [defendant] was engaged in the commission of, or an attempt to commit, sexual battery," and (2) "the capital offense was especially heinous, atrocious or cruel." The first aggravator is the underlying felony on which Havard's capital murder conviction was based, and is set out in Miss.Code Ann. Section 99-19-101(5)(d). The second aggravator was a separate statutory aggravating

circumstance. Miss.Code Ann. § 99-19-101(5)(h). Havard also claims that because the HAC aggravator wholly subsumed the sexual battery aggravator, the two aggravating circumstances could not be submitted together to the jury. The State again claims a procedural bar to these issues as Havard did not raise these issues at the trial level. Additionally, the State claims that Havard fails to cite relevant authority with regard to the assertion that one aggravator subsumes the other. *See Simmons v. State*, 805 So.2d 452, 487 (Miss.2001). When a party fails to cite authority to support an argument on an issue, this Court is not required to review such issue. *Id.* On both claims, the State is correct. However, procedural bar notwithstanding, we will address the merits of these issues.

¶ 64. The concept of one aggravating factor subsuming another exists in order to avoid "double counting," or allowing aggravating factors to become unconstitutionally duplicative, thus unfairly affecting the weighing process in states like Mississippi, whose criminal law requires mitigating factors to be weighed against aggravating factors. The Tenth Circuit is an example of one jurisdiction replete with cases dealing with questions of aggravating factors subsuming one another and offers helpful explanations in its opinions. "Under our cases, one aggravating circumstance is improperly duplicative of another only if the first aggravator 'necessarily subsumes' the other." *Patton v. Mullin*, 425 F.3d 788, 809 (10th Cir.2005). "The fact that two aggravating circumstances rely on some of the same evidence does not render them duplicative." *Id.* The concern is that the aggravators are not duplicative. *Id.* When they are not duplicative, the Tenth Circuit allows use of the same evidence to support different aggravators. *Id.* The test for determining when aggravating factors impermissibly overlap and are duplicative is whether one aggravating factor necessarily subsumes the other, not whether certain evidence is relevant to both aggravators. *Fields v. Gibson*, 277 F.3d 1203, 1218-19 (10th Cir.2002). Of the two aggravators on which Havard focuses, one does not necessarily subsume the other. The jury could have found from the evidence presented at trial that Havard was engaged in the commission of sexual battery while committing the acts on Chloe which led to her death. Additionally, the jury could have found this crime to meet the HAC standard because of factors other than the sexual battery, such as the relationship between Havard and Chloe's mother or Chloe's age.

¶ 65. Finally, Havard claims that the evidence of the underlying felony used to elevate this crime to capital murder may not also be used as an aggravating circumstance. The State cites several examples of this Court's case law which disprove this assertion, laying it quickly to rest. *See, e.g., Manning v. State*,

> 735 So.2d 323 (Miss.1999); *Smith v. State*, 729 So.2d 1191 (Miss.1998). *See also Evans v. State*, 725 So.2d 613 (Miss.1997) (sexual battery of ten-year old sufficient as both underlying felony and aggravating circumstance); *Walker v. State*, 671 So.2d 581 (Miss.1995) (sexual battery of teenager sufficient as both underlying felony and aggravating circumstance). This issue is without merit.

*Havard* I at 802-03.

The petitioner then repeated the claim in his petition for post-conviction relief which the court below found to have been sufficiently addressed on direct appeal, and barred from further consideration. The Mississippi Supreme Court held:

> **XII. Jury consideration of aggravating circumstances.**
>
> ¶ 78. Havard's entire argument on this issue is restated, verbatim, as follows:
>
> > 277. The trial jury based Mr. Havard's death sentence of [sic] two factors, namely:
> >
> > (a) That the capital offense was committed while the defendant was engaged in the commission of, or attempt to commit, sexual battery; and
> >
> > (b) The capital offense was especially heinous, atrocious, and cruel.
> >
> > 278. This finding was erroneous in two ways. First, these two particular aggravating circumstances cannot be submitted where "sexual battery" was an element of the offense. R. 26, 31.
> >
> > 279. The trial court recognized that [the] "especially heinous" aggravator fully encompassed the "sexual battery" aggravator. Where one aggravator fully subsumes another, they cannot both be submitted to the jury. *Jones v. U.S.*, 527 U.S. 373[, 119 S.Ct. 2090, 144 L.Ed.2d 370] (1999) at 399. In weighing states, such as Mississippi, this error demands that the death sentence be vacated. *Stringer v. Black*, 503 U.S. 2002[222][, 112 S.Ct. 1130, 117 L.Ed.2d 367] (1992). Accordingly, Mr. Havard is entitled to relief on this ground.

¶ 79. On direct appeal, this Court found Havard's identical issue to be barred because no contemporaneous objection was raised at trial, and Havard did not support his claim with authority. Despite the procedural bars, the Court engaged in a full discussion on the merits of Havard's claim, and found none. This Court found the Tenth Circuit to be helpful due to its abundance of case law surrounding this issue. *Havard*, 928 So.2d at 802.

> "Under our cases, one aggravating circumstance is improperly duplicative of another only if the first aggravator 'necessarily subsumes' the other." *Patton v. Mullin*, 425 F.3d 788, 809 (10th Cir.2005). "The fact that two aggravating circumstances rely on some of the same evidence does not render them duplicative." *Id.* The concern is that the aggravators are not duplicative. Id. When they are not duplicative, the Tenth Circuit allows use of the same evidence to support different aggravators. *Id.* The test for determining when aggravating factors impermissibly overlap and are duplicative is whether one aggravating factor necessarily subsumes the other, not whether certain evidence is relevant to both aggravators. *Fields v. Gibson*, 277 F.3d 1203, 1218-19 (10th Cir.2002).

*Id.*

¶ 80. Specifically noteworthy is this Court's holding on direct appeal that:

> [o]f the two aggravators on which Havard focuses, one does not *necessarily subsume* the other. The jury could have found from the evidence presented at trial that Havard was engaged in the commission of sexual battery while committing the acts on Chloe which led to her death. Additionally, the jury could have found this crime to meet the [heinous, atrocious, or cruel] standard because of factors other than the sexual battery, such as the relationship between Havard and Chloe's mother or Chloe's age.

*Havard*, 928 So.2d at 802-03 (emphasis added). Additionally, in *Loden v. State*, 971 So.2d 548, 570 (Miss.2007), this Court held that "[t]he fact that aggravating circumstances share relevant evidence does not make them duplicative. *See Jones v. United States*, 527 U.S. 373, 399-400, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999)."

> ¶ 81. It is also worth noting that in Jones, on which Havard now relies for his argument before this Court, the United States Supreme Court stated:
>
> > *We have never before held that aggravating factors could be duplicative so as to render them constitutionally invalid, nor have we passed on the "double counting" theory that the Tenth Circuit advanced in [U.S. v.] McCullah[*, 76 F.3d 1087 (10th Cir.1996)] and the Fifth Circuit appears to have followed here. What we have said is that the weighing process may be impermissibly skewed if the sentencing jury considers an invalid factor. *See Stringer v. Black*, 503 U.S. 222, 232, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992).
>
> *Jones v. United States*, 527 U.S. 373, 398, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999) (footnote omitted) (emphasis in original).
>
> ¶ 82. Because Havard does not present a novel claim or a sudden reversal of relevant law, this issue is barred by res judicata. Miss.Code Ann. § 99-39-21(3) (Rev.2007); *see also Lockett*, 614 So.2d at 897.

*Havard* II at 344-45.

Now, in this memorandum in support of his petition for habeas corpus the petitioner abandons the earlier claims made to the court below and inserts the new argument, without support, that the aggravator was not sufficiently proven at trial.

First, this claim by the petitioner, the only claim regarding the aggravator in question, is barred from consideration as the court below found the issue barred from consideration. As stated by the state supreme court, *supra* the issue was capable of having been presented to the trial court and was not. As the issue was not preserved then there is an independent and adequate state law ground which procedurally bars the issue from further presentation.

Regarding the failure to present bar, where the State court "clearly and expressly bases its dismissal of a claim on a state procedural rule, and that procedural rule provides an

independent and adequate ground for the dismissal," the claim is procedurally defaulted for purposes of federal habeas review. *See Bledsue v. Johnson,* 188 F.3d 250, 254 (5th Cir.1999).

Because the Mississippi Supreme Court imposed an independent and adequate state law procedural bar, this Court is similarly barred from consideration of this claim. Only by the showing of both cause and actual prejudice can this bar be overcome. Petitioner has made no showing of either cause or actual prejudice in an attempt to overcome this bar. As such the claims are barred from consideration by this Court. *See Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Ylst v. Nunnemaker*, 501 U.S. 797, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991); *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982).

Even though the Mississippi Supreme Court alternatively held the claim to be without merit that does not vitiate the procedural bar imposed by the Court. The United States Supreme Court has held that in those instances where the state court has plainly stated that it is imposing a procedural bar and then gone on to address the merits of the claim, the procedural bar must be recognized by the Court as a bar to consideration of the merits of that claim. In *Harris v. Reed*, 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989), the United States Supreme Court held:

> A state court remains free under the *Long* rule to rely on a state procedural bar and thereby to foreclose federal habeas review to the extent permitted by *Sykes*.[10] Requiring a state court to be explicit in its reliance on a procedural default does not interfere unduly with state judicial decision making. As *Long* itself recognized, it would be more intrusive for a federal court to

second-guess a state court's determination of state law. 463 U.S., at 1041, 103 S.Ct., at 3476. Moreover, state courts have become familiar with the "plain statement" requirement under *Long* and *Caldwell*. Under our decision today, a state court need do nothing more to preclude habeas review than it must do to preclude direct review.

_____

FN10. *Moreover, a state court need not fear reaching the merits of a federal claim in an alternative holding. By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law. See Fox Film Corp. v. Muller*, 296 U.S. 207, 210, 56 S.Ct. 183, 184, 80 L.Ed. 158 (1935).

Thus, by applying this doctrine to habeas cases, *Sykes* curtails reconsideration of the federal issue on federal habeas as long as the state court explicitly invokes a state procedural bar rule as a separate basis for decision. In this way, a state court may reach a federal question without sacrificing its interests in finality, federalism, and comity.
489 U.S. at 264. [Emphasis added.]

The Fifth Circuit applied the *Harris* doctrine in *Williams v. Puckett*, 283 F.3d 272 (5th Cir. 2002), where it held:

A state court may deny relief on procedural grounds and then reach the merits of the claim in the alternative. "[A] state court need not fear reaching the merits of a federal claim in an alternative holding. By its very definition, the adequate and independent state-ground doctrine requires the federal courts to honor a state holding that is a sufficient basis for the state court judgment, even when the state court also relied on federal law." *Harris v. Reed*, 489 U.S. 255, 264 n. 10, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989). In sum, the Mississippi Supreme Court's ruling on the merits need not be addressed if its invocation of the procedural bar was constitutionally appropriate.

The Supreme Court has held that procedural bars are cognizable in habeas cases where (1) there is an independent and adequate state procedural rule and (2) the petitioner does not demonstrate both cause for the default and actual prejudice as a result of the violation of federal law, or demonstrate that a failure to consider the claims will result in a "miscarriage of justice."

> *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 86, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).
>
> 283 F.3d at 280.

*See Busby v. Dretke*, 359 F.3d 708, 718 (5th Cir. 2004).

The procedural bar imposed in this case, the failure to raise bar found in MISS. CODE ANN. § 99-39-21 (1), has been recognized by the Fifth Circuit as an adequate and independent state law procedural ground sufficient to bar federal habeas review of a claim. *See Stokes v. Anderson*, 123 F.2d 858, 860-61 (5th Cir. 1997); *Pitt v. Anderson*, 122 F.2d 275, 279 (5th Cir. 1997). Petitioner has made no argument in which he attempts to overcome this bar by a showing of cause and actual prejudice or fundamental miscarriage of justice. This claim is barred from consideration by this Court by the imposition of an adequate and independent state law bar. Havard is entitled to no habeas relief on this claim.

Additionally, the claim presented by Havard in this habeas filing has never before been presented to the court below to be fairly considered and is further barred for that reason. This new argument by the petitioner has never before been fairly presented to the court below for consideration and is therefore unexhausted. The petitioner clearly argues a new issue here in his habeas corpus petition that was not fairly presented below.

As discussed *supra*, this issue is barred from consideration for failure to fairly present it to the court below for consideration. *Ruiz*, 460 F.3d at 642-43.

Respondents would assert that this issue was never fairly presented to the Mississippi Supreme Court in the context of sufficiency. In order for this Court to consider a claim it

must have been fairly presented to the state court. This claim that there was insufficient evidence of an aggravating factor is unexhausted. While the claim is now unexhausted it is now incapable of being exhausted in the state courts and must be held to be procedurally barred by this Court unless petitioner can show cause and prejudice for not raising it before the state court. *See Gray*, 518 U.S. 152, 116 S.Ct. 2074, 135 L.Ed.2d 457; *Teague*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334; *Bagwell*, 372 F.3d 748, 755; *Lockett*, 230 F.3d 695, 709-10. Under the provisions of Miss. Code § 99-39–5 (2) and § 99-39-27 (9), petitioner cannot now exhaust this claim as it would be held to be barred from consideration in any state collateral proceeding.

Therefore, this Court, without a showing of cause and actual prejudice, must hold this claim which has not previously been fairly presented to the Mississippi Supreme Court to be procedurally barred from consideration on federal habeas review. *See Castille*, 489 U.S. 346, 351, 109 S.Ct. 1056, 1060, 103 L.Ed.2d 380. Petitioner has made no cognizable allegation of either cause or actual prejudice in an attempt to overcome the procedural bars and this claim regarding ineffective assistance of counsel must be barred from consideration by this Court.

This claim is barred from consideration by adequate and independent state law grounds. The unsupported new argument presented by the petitioner in this claim is wholly without merit and the Mississippi Supreme Court's decision regarding the argument presented on aggravating circumstances was in no way contrary to or an unreasonable application of federal law as announced by the United States Supreme Court. Havard is not

entitled to relief on this claim.

## CLAIM VIII

**PETITIONER'S CLAIM THAT THE MISSISSIPPI SUPREME COURT ERRED IN FINDING SUFFICIENT EVIDENCE TO SUPPORT THE AGGRAVATING CIRCUMSTANCE OF THE CAPITAL OFFENSE BEING COMMITTED DURING THE COMMISSION OF A SEXUAL BATTERY IS BARRED FROM CONSIDERATION BY AN ADEQUATE AND INDEPENDENT STATE COURT GROUND.**

The respondents would point the argument presented immediately *supra* in Claim VII, that the issue argued by the petitioner in this claim is procedurally barred for the same reasons presented there.

On direct appeal and in his post-conviction petition Havard argued to the court below that the trial court had improperly allowed the jury to consider the aggravators of the crime being especially, heinous, atrocious or cruel and that the crime was committed during the commission of a sexual battery. The Mississippi Supreme Court found the argument as to both aggravators to be barred from consideration as having been capable of being raised at trial and a lack of citation to proper authority.

Just as in Claim VII *supra* the petitioner has now abandoned the argument presented to the state court, that one aggravator totally subsumed the other, making them improper to present to the jury and replaces it with the new argument that the Mississippi Supreme Court erred in finding that the aggravators had been proven beyond a reasonable doubt.

Just as argued above the State would assert that the procedural bar of failure to present at trial now bars consideration of the issue. *See Bledsue*; *Wainwright*; *Coleman; Ylst; Engle;*

*Harris; Williams; Busby* and *Stokes*.

Also similar to the previous claim is that this claim has never before been presented fairly presented to the court below for consideration and is unexhausted. *See Ruiz; Gray*; *Teague*; *Bagwell*; *Lockett* and *Castille.*

This claim is also barred from consideration by adequate and independent state law grounds. The unsupported new argument presented by the petitioner in this claim is wholly without merit and the Mississippi Supreme Court's decision regarding the argument presented on aggravating circumstances was in no way contrary to or an unreasonable application of federal law as announced by the United States Supreme Court. Havard is not entitled to relief on this claim.

**CLAIM IX**

**THE MISSISSIPPI SUPREME COURT'S DECISION THAT THE TRIAL COURT DID NOT IMPROPERLY ANSWER A QUESTION POSED BY THE JURY WAS NOT CONTRARY TO OR AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW AS ANNOUNCED BY THE UNITED STATES SUPREME COURT, NOR AN UNREASONABLE APPLICATION OF THE LAW TO THE FACTS OF THIS CASE.**

On direct appeal, Havard complained that the trial court inappropriately answered the jury's questions regarding the definition of life without parole, claiming that the court's answer may have led to a sentence imposed under the influence of passion, prejudice or some other arbitrary factor. The Mississippi Supreme Court considered the issued and rendered the following decision:

**X. WHETHER THE TRIAL COURT ERRED IN ANSWERING A**

**QUESTION SUBMITTED BY THE JURY IN SUCH A WAY AS TO CAUSE SPECULATION OF EARLY RELEASE FROM A LIFE SENTENCE**

¶ 55. The next issue is whether the trial judge, in answering a question submitted to him from the jury while the jury was deliberating during the sentencing phase, created undue speculation of some future release from incarceration if the defendant was not sentenced to death. The question concerned the definition of a life sentence. Havard argues that the trial judge answered the question in a way that left open the possibility in the jurors' minds that if Havard had not been sentenced to death, he could possibly, at some point in the future, be released from incarceration on parole. This, Havard contends, made the option of a life sentence less feasible for the jury. Havard relies on *Williams v. State*, 544 So.2d 782 (Miss.1987), where the concern was introducing an arbitrary and irrelevant factor into the jurors' minds during their decision on sentencing.

¶ 56. In today's case, the following discussion occurred during the sentencing phase of the trial, but outside the presence of the jury:

> 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 MR. SERMOS: May I ask the Court one thing. Possibly consider one additional-

BY THE COURT: All right. What is that?

BY MR. SERMOS: Would be to go up to-like you said, it would be up to the legislature, and I don't know if you want to put it, but "then the legislature would also determine if any new law was to be applied retroactively."

BY MR. HARPER: I don't think that would be a correct statement of the law ... I would suggest adding which they have the prerogative to do.

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. I mean, may be that would be confusing, but I think-what do you think, Robert?

...

BY THE COURT: I could add "or early release."

BY MR. SERMOS: Or early release for any reason.

> BY THE COURT: The only problem is it's always subject to a governor's
>
> BY MR. CLARK: But-
>
> BY THE COURT: I don't want to get into that. Just a second. Based on the suggestion of the defense counsel, the Court would be willing to add "or early release." "Any eligibility for parole or early release."
>
> BY MR. SERMOS: Yes, sir.
>
> BY THE COURT: So this will be 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.

¶ 57. The State cites a case with similar facts, *Wiley v. State*, 691 So.2d 959 (Miss.1997). In *Wiley*, the defendant contended the jury was improperly told about the possibility of parole should he be sentenced to life in prison. This Court agreed with the State's argument in *Wiley* that because the trial judge "steadfastly maintained" that the statute defined life in prison as the punishment, there was no error. *Id.* at 964. The trial judge's ultimate answer to the question puts this issue to rest in this case. The judge answered that a life sentence meant life in prison without any eligibility of parole or early release. Additionally, the statement by the trial judge that "[i]t would be up to the legislature to make any future changes of the law," 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 any surprise to our citizens sitting on a jury. The statement by the trial judge was as general as possible, and there is absolutely no reason to believe the jury made its ultimate decision on the sentence based on this statement to the jury by the trial judge. This issue is without merit.

*Havard* I at 798-99.

Havard brought the issue up again in his post-conviction pleadings before the state

court which found the issue to be procedurally barred, explaining:

> **IX. Whether the trial court improperly responded to a question from the jury during the sentencing phase.**
>
> ¶ 73. During jury deliberation at the sentencing phase of Havard's trial, the jury sent a note to the trial judge asking the court to define life without parole and whether the law could be changed to allow parole for Havard in the future. With the agreement of defense counsel and the prosecution, the Court returned a response which stated: "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." *Havard*, 928 So.2d at 799.
>
> ¶ 74. Just as on direct appeal, Havard now argues that the trial court's response prejudiced the jury by inferring that, if Havard were given a life-without-parole sentence, he could be released in the future. He argues, as before, that the trial court's response to the jury made a life sentence less feasible in the minds of the jurors. Without presenting anything novel to support this claim or a showing of a sudden reversal in the law related to this issue, Havard's claim is procedurally barred. Miss.Code Ann. § 99-39-21(3) (Rev.2007); *see also Lockett v. State*, 614 So.2d at 897.

*Havard* II at 343.

Now, in his habeas argument, Havard appears to abandon the argument that was presented to the court below, that the answer to the jury question may have led to a sentence induced by some arbitrary factor, or that the answer may have been misunderstood by the jury. Havard on the one hand replaces the earlier allegations of arbitrariness and confusion with the declaration that, "The jury was obviously concerned about the "future dangerousness" of Petitioner if he were ever released from prison.", but then on the other hand holds onto the now secondary complaint of arbitrariness that led to speculation.

Neither version of petitioner's claim holds merit as the decision reached by the Mississippi Supreme Court was not contrary to or an unreasonable application of federal law

as announced by the United States Supreme Court. As noted in the decision by the court below in the case of *Wiley v. State*. The two main differences between *Wiley* and the case sub judice were that in *Wiley*, the parole questions came during voir dire, and those jurors who asked the questions did not end up serving on the jury. In Havard's case, the sitting jury as a whole asked these questions to the judge during deliberations. Petitioner's judge was immensely concerned with avoiding speculation and suggestion before the jury. In resolving this concern, he worked with both the State and defense counsel to come up with an answer to the jury's question that was truthful and accurate. Moreover, the judge reiterated to the jury the instructions he had given them earlier.

In both *Wiley* and this Havard's case, the judges did not speculate on parole. Both judges emphasized that neither the trial court nor the jury had any control over parole– indeed, both judges told the jury such was a Legislative concern. When pressured by the jury for an exact answer to a sticky question, both judges gave a truthful response. Moreover, at the close of the presentation of evidence, both judges properly instructed the jury regarding the options of life and death. The judge in petitioner's case reminded the jury of those instructions when answering their questions about parole.

The trial judge in this case formulated a truthful, non-speculative response to a jury question. To reduce any possibility of error, the judge employed the assistance of the State and defense counsel in coming up with an appropriate response. Moreover, the judge reiterated to the jury the instructions given before sentencing began– instructions which correctly informed them on the issue of death or life in prison. The trial judge reiterated to

the jury that life without parole means life in prison without any eligibility for parole. The trial judge then simply noted that the Legislature is responsible for making any changes to that law. The judge was as straightforward as he could be, and obviously petitioner agreed with the judge's decision at the time.

The decision rendered by the Mississippi Supreme Court regarding the trial court's proper handling of the jury question was not contrary to nor an unreasonable application of federal law as announced by the United States Supreme Court. Havard's claim is without merit and he is entitled to no relief on this claim.

**CLAIM X**

**THE MISSISSIPPI SUPREME COURT'S DECISION THAT THE PETITIONER WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO ASK "REVERSE-*WITHERSPOON*" QUESTIONS WAS NOT CONTRARY TO OR AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW AS ANNOUNCED BY THE UNITED STATES SUPREME COURT, NOR AN UNREASONABLE APPLICATION OF THE LAW TO THE FACTS OF THIS CASE.**

On direct appeal the petitioner alleged that defense counsel did not adequately voir dire the potential jurors to ascertain if anyone in the venire would automatically impose the death penalty should the defendant be found guilty. Havard went on to allege that due to the insufficient questioning by counsel that a juror, Willie Thomas, was seated on the jury and was predisposed to vote for death. The Mississippi Supreme Court held:

**II. WHETHER TRIAL COUNSEL WERE INEFFECTIVE BY FAILING TO ASK "REVERSE- WITHERSPOON " QUESTIONS RELATING TO THE JURORS' POTENTIAL STRONG FEELINGS ABOUT THE DEATH PENALTY**

¶ 12. Havard's next assignment of error, also one of ineffective assistance of counsel, is that his trial attorneys were ineffective in failing to ask questions relating to the jurors' qualifications to serve on a jury to decide a death sentence. Havard specifically claims defense counsel impermissibly failed to ask "reverse- *Witherspoon* " questions-whether jurors would automatically vote for the death penalty. *Irving v. State*, 498 So.2d 305, 310 (Miss.1986) (citing *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)). Havard, relying on an outside-the-record affidavit from juror number twenty-nine, Willie Thomas, asserts that Thomas believed the death penalty was the only appropriate sentence in a murder trial. Thomas was ultimately selected as juror number eight, in the order of selection, to serve as a member of the trial jury.

¶ 13. The State claims that M.R.A.P. 22(b) bars four issues on appeal, namely issues II, III, IV, and VII, because these issues arise from facts not fully apparent from the record.FN2 The State likewise claims that based on the current version of Rule 22, the proper path Havard should take with regard to these issues is to seek post-conviction relief in the event his case is affirmed on direct appeal. The State claims that in a subsequent post-conviction relief proceeding, extraneous evidence, such as affidavits outside the record, would be permissible. Miss.Code Ann. § 99-39-1, et seq. (Rev.2000).FN3 The current version of Rule 22 clearly states that only issues based on facts fully apparent from the record may be raised on direct appeal.

> FN2. In addition to Issue II currently under discussion, Issue III also relates to the seating of juror Willie Thomas; Issue IV relates to a claim of ineffective assistance of counsel for failure to adequately develop a trial strategy; and, Issue VII relates to a claim of ineffective assistance of counsel in failing to adequately develop mitigating evidence to be presented at the sentencing phase of the trial. These issues will be discussed, infra.
>
> FN3. Specifically, Miss.Code Ann. Section 99-39-17 allows the judge to direct the record expanded to include outside documents and affidavits and to consider those documents as part of the record.

**(b) Post-conviction issues raised on direct appeal**. Issues which may be raised in post-conviction proceedings may also be raised on direct appeal if such issues are based on facts fully apparent from the record.FN4 Where the

appellant is represented by counsel who did not represent the appellant at trial, the failure to raise such issues on direct appeal shall constitute a waiver barring consideration of the issues in post-conviction proceedings.

> FN4. This italicized phrase was added to this Rule by way of an amendment effective February 10, 2005.

M.R.A.P. 22(b) (2005) (emphasis added). Havard responds to these claims by pointing out that this version has only existed since its 2005 amendment. The controlling version, Havard argues, was the rule in effect at the time of the trial when the first sentence of this rule did not contain the phrase "if such issues are based on facts fully apparent from the record." Havard is correct. The version controlling here is the former rule, as it was the rule in effect at the time of the trial.FN5 Rule 22(b), prior to the 2005 amendment, simply stated that, "[i]ssues which may be raised in post-conviction proceedings may also be raised on direct appeal." *Id.* The rule simply provides that issues normally reserved for post-conviction relief may also be raised on direct appeal; thus, this issue is not barred as the State argues. In certain cases, the rule requires those issues to be raised or they will be later waived. The second sentence, which appears in both versions of the rule, is also helpful in determining this issue. "Where the appellant is represented by counsel who did not represent the appellant at trial, the failure to raise such issues on direct appeal shall constitute a waiver barring consideration of the issues in post-conviction proceedings." *Id.* The comment to the current Rule 22 also makes clear that failing to raise certain, though not all, issues on direct appeal in a case such as this will constitute a waiver, specifically when those issues are claims of ineffective assistance of counsel.

> FN5. To be abundantly clear, Rule 22(b), as it existed at the time of Havard's trial, stated:
>
> > Issues which may be raised in post-conviction proceedings may also be raised on direct appeal. Where the appellant is represented by counsel who did not represent the appellant at trial, the failure to raise such issues on direct appeal shall constitute a waiver barring consideration of the issues in post-conviction proceedings.

Rule 22(b) allows the appellant to raise post-conviction issues on direct appeal where the issues are fully apparent from the record of the trial, and failure to

raise such issues constitutes a waiver. Under this provision, *issues such as claims of ineffective assistance of counsel* for failure to object to evidence offered by the state or to argument by the state *must be raised on direct appeal*. Other post-conviction issues which cannot be raised at the time of appeal because they involve actions or inaction outside the record are not waived since they cannot practically be raised without further development or investigation.

M.R.A.P. 22 (comment) (emphasis added). In this case, Havard was represented at trial by counsel other than the current attorneys representing him on appeal. To avoid waiving these issues on post-conviction proceedings, Havard would be required under the current rule to raise them on this direct appeal. Under the former rule, the standard was more flexible and not restricted to certain types of issues. In either case, these issues may properly be raised on direct appeal, but we still must make a determination as to whether certain issues should be addressed on direct appeal, or be left for another day for post-conviction relief proceedings.

¶ 14. Though we may consider these issues on direct appeal, the next question is whether it is appropriate to consider issues that would require us to go outside the record. Reflecting the thrust of the rule generally, this Court recently held that when appellate counsel is different from trial counsel, and when there is a perceived requirement under the rule to raise on direct appeal issues which are commonly reserved for post-conviction proceedings, our consideration of supplemental documents on direct appeal in death penalty cases is proper. *Branch v. State*, 882 So.2d 36, 49 (Miss.2004).

¶ 15. In *Branch*, we continued on a course of wrestling with the procedural quagmire resulting from what we respectfully characterize as a less than clear decision by the United States Supreme Court in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). After declaring the execution of the mentally retarded amounted to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution, the Court stated:

> To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. In this case, for instance, the Commonwealth of Virginia disputes that Atkins suffers from mental retardation. Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national

> consensus. As was our approach in *Ford v. Wainwright*, with regard to insanity, "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." 477 U.S. 399, 405, 416-417, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986).

536 U.S. at 317, 122 S.Ct. 2242. Thus, in *Russell v. State*, 849 So.2d 95, 145-49 (Miss.2003), we began our arduous journey down the road of considering post- *Atkins* claims of mental retardation by death row inmates. Russell was followed by our decision in *Goodin v. State*, 856 So.2d 267, 274-82 (Miss.2003). Our cases dealing with *Atkins* issues via post-conviction relief proceedings are by now legion. *See, e.g., Jordan v. State*, 918 So.2d 636 (Miss.2005); *Wells v. State*, 903 So.2d 739 (Miss.2005); *Conner v. State*, 904 So.2d 105 (Miss.2004); *Hughes v. State*, 892 So.2d 203 (Miss.2004); *Wiley v. State*, 890 So.2d 892 (Miss.2004); *Gray v. State*, 887 So.2d 158 (Miss.2004).

¶ 16. In *Branch*, a direct appeal of a capital murder conviction and imposition of the death penalty, we were confronted with a mental retardation claim supported by documents outside the trial record. Like Havard, Branch had appellate counsel who had not served as his trial counsel. On his direct appeal, Branch submitted an appendices to his original brief, which included, inter alia, various affidavits from a doctor, one of his trial attorneys, family members, and teachers. The State objected to our consideration of these documents which were clearly outside the record. We stated:

> The State challenges Branch's appendices which were not part of trial record. According to the State, these documents are barred from consideration. *Wansley v. State*, 798 So.2d 460, 464 (Miss.2001). However, Branch is not represented by the same counsel. Initially, Branch was represented by Callestyne Crawford and Solomon Osborne. Prior to trial, Osborne was replaced by W.S. Stuckey. The Office of Capital Defense Counsel was appointed for this direct appeal. We note M.R.A.P. Rule 22(b):
>
> Issues which may be raised in post-conviction proceedings may also be raised on direct appeal. Where the appellant is represented by counsel who did not represent the appellant at trial, the failure to raise such issues on direct appeal shall constitute waiver barring consideration of the issues in post-conviction proceedings.

If new counsel on direct appeal is required to assert collateral claims, there must be an opportunity to submit extraneous facts and discovery and evidentiary hearing to develop and prove the allegations. *See Brown v. State*, 798 So.2d 481, 491 (Miss.2001) (citing *Smith v. State,* 477 So.2d 191, 195 (Miss.1985) and *Turner v. State*, 590 So.2d 871, 874 (Miss.1991)); *Jackson v. State*, 732 So.2d 187, 190 (Miss.1999).

We have stated that "there is conflicting authority on whether this Court should apply the procedural bar" in a post-conviction relief case raising ineffective assistance of counsel on direct appeal. *Goodin v. State*, 856 So.2d 267, 279 (¶ 30) (Miss.2003). Goodin was then permitted to proceed on the issue of ineffective assistance of counsel and was granted an evidentiary hearing to determine whether he was "mentally retarded within the meaning of *Atkins*." *Although this case is a direct appeal, Branch is represented by counsel who did not represent him in the trial court. Branch must raise Atkins and ineffective assistance of counsel issues in this direct appeal or he will be barred from doing so in subsequent appeals. Therefore, we will permit Branch to proceed with these issues, and we will consider the additional documents supplied in Appendices to Original Brief of Appellant.*

882 So.2d at 49 (emphasis added).

¶ 17. However, we later emphasized the limiting nature of our language in *Branch* regarding consideration of appendices which were not part of the official record on appeal. In *Hodges v. State*, 912 So.2d 730, 750 (Miss.2005), we stated:

> Hodges argues that according to *Branch v. State*, 882 So.2d 36, 49 (Miss.2004), this Court is allowed to consider such extraneous evidence not in the record. However, this Court in *Branch* clearly set forth that such appendices which were not part of the trial record were to be considered only on the *Atkins [ v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) ] and ineffective assistance of counsel issues. Here, during oral argument, defense counsel conceded that he was not pursuing this issue as ineffective assistance of counsel, but rather was doing so under the theory of prosecutorial misconduct. Also, this Court has recently amended Rule 22 of the Mississippi Rules of Appellate Procedure. Even though this amendment does not apply to the case sub judice, this Court holds that the plea hearing, which is not in the record, is barred

> from consideration and Branch does not allow this Court to consider such extraneous evidence. To make it clear what this Court can consider on direct appeal in future cases, Rule 22 has been amended to state that "[i]ssues which may be raised in post-conviction proceedings may also be raised on direct appeal" if such issues are based on facts fully apparent from the record. M.R.A.P. 22 (emphasis added).

912 So.2d at 750.

¶ 18. We are not about to embark upon a journey of a carte blanche consideration of outside-the-record documents, such as a juror's affidavit, to decide issues on direct appeal. Our ruling in *Branch*, as clarified in *Hodges*, was limited to a consideration of Branch's *Atkins* issues as it related to perceived ineffective assistance of trial counsel. It would indeed be dangerous here for us to begin a precedent of considering on direct appeals post-trial affidavits by affiants who have not been subjected to cross-examination. The utilization of affidavits is better served in the post-conviction relief proceedings allowable by statute. Miss.Code Ann. § 99-39-1 et seq. (Rev.2000). Having raised this issue with different counsel on direct appeal, Havard has preserved his right to raise this issue, supported by affidavits, in future post-conviction relief proceedings.

¶ 19. Considering the "reverse- *Witherspoon* " issue, absent the juror affidavit, the exact assignment of error here is that defense counsel was ineffective by failing to ask "reverse- *Witherspoon* " questions, meaning defense counsel should have asked whether the jurors would automatically vote for the death penalty. *Irving*, 498 So.2d at 310. Under this rule, the United States Supreme Court held that a juror must be excused if his or her views on the death penalty would unfairly affect the outcome of the jury verdict. *Witherspoon*, 391 U.S. at 520, 88 S.Ct. 1770. Trial counsel did not ask "reverse- *Witherspoon* " questions, but the trial court did. The trial judge asked if any potential juror would automatically vote for the death penalty. Conversely, the judge also asked if any potential juror would automatically vote against the death penalty. The trial court therefore conducted both a " *Witherspoon* " examination and a "reverse- *Witherspoon* " examination. Worth noting is that the trial judge did strike at least nine venire members for cause at the request of the State based on *Witherspoon* considerations. Neither the State nor defense counsel challenged Thomas for cause or peremptorily. The proper questions were asked by the court and counsel and were answered by the potential jurors. The trial judge questioned the jurors on their abilities or inabilities, both as a group

> and individually, to consider a death sentence. The trial judge also requested that the attorneys not be redundant in their voir dire examination, keeping in mind the voir dire the court had conducted. Honoring this request, defense counsel, during the voir dire, stated to the venire, "I'm not going to ask you anything that the Judge or [counsel for the state] asked you unless we really need to." Again, we cannot find that trial counsel's silence during this phase of voir dire constituted reversible error, when considering the totality of the voir dire examination conducted by the trial judge and the attorneys. Succinctly stated, all necessary questions were propounded to the venire during the whole of voir dire. Defense counsel, having heard the questions and the responses from the venire, and having observed the jurors' demeanor throughout the voir dire, was then free to choose not to repeat the questions. We cannot fairly say defense counsel's performance was deficient and prejudiced the defense. Therefore, this issue fails under the *Strickland* test, and is thus without merit.

*Havard* I at 782-87.

The petitioner then again brought the issue forward in his petition for post-conviction relief arguing that counsel had been ineffective in not asking "reverse-Witherspoon" questions of the potential jurors and again pointed to the seating of juror Willie Thomas being a result of the ineffectiveness. The court below held:

> **V. Ineffective assistance of counsel for failing to ask potential jurors "reverse- *Witherspoon* " questions during voir dire.**
>
> ¶ 60. On direct appeal, Havard argued that his counsel were ineffective by impermissibly failing to ask "reverse-*Witherspoon* " questions, or rather, whether the jurors would automatically vote for the death penalty. *Irving v. State*, 498 So.2d 305, 310 (Miss.1986) (citing *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)). As discussed in Havard's first post-conviction relief issue supra, the instant issue was raised by Havard on direct appeal as his Issue II. The Court refused to consider on direct appeal the affidavit of juror number twenty-nine, Willie Thomas (who was selected as a member of the trial jury as juror number eight in the order of selection). For reasons previously discussed, this Court held that Havard had preserved the issue for post-conviction proceedings.
>
> ¶ 61. In addressing this issue on the merits, absent Thomas's affidavit, the

Court held:

> Considering the "reverse- *Witherspoon* " issue, absent the juror affidavit, the exact assignment of error here is that defense counsel was ineffective by failing to ask "reverse- *Witherspoon* " questions, meaning defense counsel should have asked whether the jurors would automatically vote for the death penalty. *Irving*, 498 So.2d at 310. Under this rule, the United States Supreme Court held that a juror must be excused if his or her views on the death penalty would unfairly affect the outcome of the jury verdict. *Witherspoon*, 391 U.S. at 520[, 88 S.Ct. 1770]. Trial counsel did not ask "reverse- *Witherspoon* " questions, but the trial court did. The trial judge asked if any potential juror would automatically vote for the death penalty. Conversely, the judge also asked if any potential juror would automatically vote against the death penalty. The trial court therefore conducted both a " *Witherspoon* " examination and a "reverse- *Witherspoon* " examination. Worth noting is that the trial judge did strike at least nine venire members for cause at the request of the State based on *Witherspoon* considerations. Neither the State nor defense counsel challenged Thomas for cause or peremptorily. The proper questions were asked by the court and counsel and were answered by the potential jurors. The trial judge questioned the jurors on their abilities or inabilities, both as a group and individually, to consider a death sentence. The trial judge also requested that the attorneys not be redundant in their voir dire examination, keeping in mind the voir dire the court had conducted. Honoring this request, defense counsel, during the voir dire, stated to the venire, "I'm not going to ask you anything that the Judge or [counsel for the state] asked you unless we really need to." Again, we cannot find that trial counsel's silence during this phase of voir dire constituted reversible error, when considering the totality of the voir dire examination conducted by the trial judge and the attorneys. Succinctly stated, all necessary questions were propounded to the venire during the whole of voir dire. Defense counsel, having heard the questions and the responses from the venire, and having observed the jurors' demeanor throughout the voir dire, was then free to choose not to repeat the questions. We cannot fairly say defense counsel's performance was deficient and prejudiced the defense. Therefore, this issue fails under the

> Strickland test, and is thus without merit.

*Havard*, 928 So.2d at 786-87. The issue is now before this Court again, along with Thomas's affidavit.

¶ 62. Mississippi Rules of Evidence, Rule 606, Competency of Juror as Witness, provides:

> (b) Inquiry Into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. *Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.*

(Emphasis added).

¶ 63. The affidavit of Willie Thomas does not meet the exception to Rule 606(b), and it should again be excluded from our consideration. Notwithstanding Rule 606(b), Thomas's affidavit does not offer merit to Havard's claim. Paragraphs three and four of Thomas's affidavit stated:

> I believe that the death penalty is the appropriate punishment for Mr. Havard. I think a person should be prepared to give what they take. If you take a life, a life is required.
>
> I think the same punishment should be given to everyone who kills. I felt this way before I served on the jury and I still feel this way today. I would feel this way even if it were my own son on trial. If people knew they would pay with their lives, there would be less killing.

(Havard's Exhibit 15, at ¶¶ 3-4). This affidavit simply shows that Thomas

> supports the death penalty. Nothing in this affidavit states that Thomas would automatically vote for imposition of the death penalty in every case without first considering the facts of the particular case, including any mitigating circumstances. As the state points out, the question is not whether Thomas believes in the death penalty, but whether he can follow the law. Nothing in the affidavit stated that Thomas would disregard the trial court's instructions and arbitrarily impose the death penalty in every case regardless of the facts. Thomas' affidavit does not add merit to Havard's claim.
>
> ¶ 64. Havard also offers the affidavit of Natman Schaye, whom Havard asserts is a nationally recognized capital litigator. The summation of Mr. Schaye's affidavit is that he is of the opinion that Havard's defense counsel were deficient in failing to ask questions during voir dire to determine the opinions and attitudes of the venire regarding the death penalty. He further believes that Havard was prejudiced by counsel's deficient performance as evidenced by juror Willie Thomas's affidavit.
>
> ¶ 65. Our previous discussion *supra* regarding this issue reveals that both *Witherspoon* and "reverse- *Witherspoon* " questions were asked by the trial court. The trial court then instructed counsel for the state and the defense not to repeat questions already asked of the venire panel. This Court concluded that the panel was adequately questioned during the whole of the voir dire examination. Mr. Schaye's affidavit is not persuasive to the contrary. Havard's claim of ineffective assistance of counsel still does not pass the standard set forth in *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. This issue is without merit.

*Havard* II at 339-41.

Now, in his habeas memorandum, the petitioner alleges the Mississippi Supreme Court was unreasonable in the decision that counsel were not ineffective, that exclusion of the juror affidavit was unreasonable and the alternative finding regarding the affidavit was unreasonable as well.

To the contrary, the record reflects that counsel were clearly effective and that the court below was not unreasonable by any measure in the handling of this issue. Voir dire on

the issue of death qualification was a two-step process in this case. During the first step, the parties gathered a list of those jurors who stated that they so favored or so opposed the death penalty that they would automatically impose it or refuse to impose it regardless of the evidence presented. The trial court stressed the importance of truthfulness to the jurors on the issue of death qualification, noting, "Ladies and gentlemen, each of you raised your numbers, you're telling this Court under your oath that is honestly the way you feel?" R. 143.

The trial court specifically asked if there was any juror who, "would automatically vote to impose the death penalty if the defendant were found guilty in this case that wouldn't fairly consider it under the evidence?" R. 141. Two jurors– Jurors 103 and 105 (neither being Willie Thomas, who was Juror 29)– stated that they would automatically vote for the death penalty regardless of the circumstances. These jurors ultimately were struck for cause from the jury panel. The trial court then asked if there was any juror who, "had feelings so strong against the death penalty that you cannot under any circumstances consider imposing the death penalty." Twenty-four jurors came forward.

During the second step of death qualification, the court, the State and defense counsel conducted individual, sequestered voir dire on those jurors who indicated that they would have difficulty imposing the death penalty under any circumstances. There was no individualized voir dire on those jurors automatically inclined to vote for the death penalty (only two individuals stated they would impose the death penalty under any circumstance, and those men were struck for cause from the jury panel). There was no individualized voir dire on Willie Thomas because he did not make his allegedly "automatic" preferences known,

even after direct, specific questioning by the court.

During this individualized voir dire, the trial court, the State, and Havard's counsel questioned the jurors about their opposition to the death penalty. In particular, counsel asked these jurors about situations in which they would consider the death penalty; counsel asked a juror whether her personal experiences with abuse affected her feelings on the death penalty; counsel asked a juror about his earlier statements that his "mind was made up about this case" and the effect that had on his position on capital punishment (R. 200); counsel asked jurors whether they would change their opposition to capital punishment if presented with gruesome evidence (R. 206); counsel asked a juror whether talk about the case outside the courtroom affected his opinion on the death penalty, such that his opinion might change when faced with actual testimony and evidence (R. 208); counsel asked a juror whether her outside connection to the defendant affected her feelings on the death penalty (R. 212); counsel clarified with one juror whether his statement that he "follow[ed] the law of the land" contradicted his position that religion prevented him from imposing capital punishment (R. 229).

After individualized voir dire was complete, the trial court considered each side's peremptory and cause challenges. Petitioner successfully moved to strike fourteen jurors for cause, including jurors 103 and 105—the two who had indicated their automatic preferences for the death penalty. petitioner then used seven peremptory challenges to remove additional jurors.

Clearly, counsel engaged in extensive voir dire to make certain Havard's jurors were

death qualified and to secure a fair and impartial jury. His performance was therefore sufficient. While it is true that counsel did not engage in individualized voir dire with those jurors who stated they would automatically impose the death penalty (neither of whom was Willie Thomas), there were only two. The court apparently saw no reason to individually voir dire these men. Instead, it simply instructed the jury as a whole that such automatic preferences were forbidden, and ultimately petitioner successfully moved to strike the two men for cause. Obviously counsel was concerned with striking those jurors who would not afford petitioner a fair trial; if Willie Thomas had come forward with prejudices, it is more than presumable that counsel would have attempted to strike him as well.

What counsel cannot be faulted for is for not asking the redundant question: "is there any juror who would automatically vote to impose the death penalty?" At the point the court asked this question, and two men came forward admitting that automatic preference, and counsel struck those men for cause, counsel's job in making certain those who would automatically vote for death were excluded from the jury was complete. Also what counsel cannot be faulted for is for not asking the offensive question: "is there anyone here who lied to the court when asked about whether they would automatically vote for the death penalty?"

Because counsel was effective during voir dire, and because he cannot be deficient for failing to recognize a lying juror (as Havard claims Willie Thomas was), there can be no *Strickland* error. There is no deficiency, so therefore, no prejudice can result. Indeed, the only prejudice that has even been alleged is that of Thomas serving on the jury; a prejudice that clearly did not result from trial counsel's actions. No *Strickland* prejudice (that resulting

from an attorney's deficiency) was shown. Moreover, there was no prejudice at all, in that the State in no way concedes the validity of the affidavit attributed to Willie Thomas. The fact that the court below refused to consider the affidavit, and in the alternative found it to not support petitioner's argument is discussed in Claim XII, *infra*.

The decision reached by the Mississippi Supreme Court on this claim was not contrary to or an unreasonable application of federal law as announced by the United States Supreme Court nor was it an unreasonable application of the law as applied to the facts of this case. Havard is entitled to no relief on this claim.

**CLAIM XI**

**THE MISSISSIPPI SUPREME COURT'S DECISION REGARDING THE SEATING OF JUROR DOROTHY SYLVESTER WAS NOT CONTRARY TO OR AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW AS ANNOUNCED BY THE UNITED STATES SUPREME COURT, NOR AN UNREASONABLE APPLICATION OF THE LAW TO THE FACTS OF THIS CASE.**

On direct appeal the petitioner argued that his trial counsel were ineffective in not challenging for cause juror Dorothy Sylvester, claiming that she was biased against Havard. The Mississippi Supreme Court considered the issue and held:

> **I. WHETHER TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO ENSURE THAT A JUROR WAS EXCUSED FOR CAUSE AFTER EXHIBITING BIAS**
>
> ¶ 5. Havard argues his representation was ineffective at several points during the trial, violating his right to effective counsel. Havard specifically asserts his trial counsel failed to ensure that juror number twenty-five, Dorothy Sylvester, was excused for cause because she was biased against him. During the court's voir dire, the trial judge asked whether any of the prospective jurors knew

Havard or his family. In response, Sylvester stated, "I don't know him, but I had a niece to be raped-you know-I don't think I could be fair about it, too." The trial judge clarified that he would deal with those concerns later, and at that point in the questioning, he was merely asking if any member of the venire was acquainted with Havard or his family. Sylvester was eventually selected and served on the trial jury as juror number seven in the order of selection.

¶ 6. During the jury selection process, the trial judge granted all but one of the thirteen for-cause challenges exercised by defense counsel. Of the forty-five jurors stricken for cause in this case, defense counsel successfully challenged twelve jurors. Additionally, counsel for the State exercised ten of the allotted twelve peremptory challenges, plus one peremptory challenge on an alternate juror; and, defense counsel exercised seven of the allotted twelve peremptory challenges, but with no peremptory challenges being exercised on an alternate juror. Neither counsel for the State nor for the defense challenged Sylvester for cause or peremptorily. When the trial judge was conducting his voir dire of the jury venire, the emphasis was on fairness. The trial judge informed the jury that the purpose of voir dire examination was to discover anything "that in all honesty would make it very difficult for you to be a totally fair and impartial juror." During his follow-up questions directed at specific jurors, the trial judge also repeatedly asked whether certain circumstances would make it difficult for the juror to be totally fair and impartial. The words "fair," "impartial," "fairly," and "honestly" appear multiple times in the transcript throughout the trial court's voir dire examination. Counsel for the State likewise emphasized fairness in his questioning, and defense counsel informed the members of the jury venire that he would not repeat a question already asked of the jury unless he felt compelled to do so.

¶ 7. The right to effective assistance of counsel can be found in the Sixth Amendment of the United States Constitution. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Sixth Amendment, however, guarantees only the right to reasonably effective counsel or competent counsel, not perfect counsel or one who makes no mistakes at trial. *Wilcher v. State*, 863 So.2d 719, 734 (Miss.2003); *Mohr v. State*, 584 So.2d 426, 430 (Miss.1991); *Cabello v. State*, 524 So.2d 313, 315 (Miss.1988). *See also Strickland*, 466 U.S. at 691, 104 S.Ct. 2052. Mississippi has recognized that a strong presumption of competence exists in favor of the attorney. *Mohr*, 584 So.2d at 430. The test is one of reasonableness; counsel must have provided "reasonably effective assistance." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. For a defendant to prevail on a claim of ineffectiveness, counsel's representation must have fallen "below an objective standard of

reasonableness." *Id.* at 688, 104 S.Ct. 2052. The United States Supreme Court in *Strickland* laid out the standard and the test that must be met for a successful claim of ineffectiveness of counsel. "The benchmark for judging any claim of ineffectiveness [of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S.Ct. 2052.

¶ 8. A convicted defendant must meet a two-pronged test to prove his trial counsel was constitutionally ineffective. *Id.* at 687, 104 S.Ct. 2052. "First, the defendant must show that counsel's performance was deficient ... second, the defendant must show that the deficient performance prejudiced the defense." *Id.* The *Strickland* Court clarified that "[u]nless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* As to the first prong, the errors of counsel's performance must be so serious that they prevented counsel from functioning as the Sixth Amendment guarantees. *Id.* As to the second prong, the errors of counsel must have been so serious that they deprived the defendant of a fair trial, that being a trial with a reliable result. *Id.* This Court has also noted the importance of both showings having been met. *Stringer v. State*, 454 So.2d 468, 477 (Miss.1984). If either prong is not met, the claim fails. *Neal v. State*, 525 So.2d 1279, 1281 (Miss.1987). *See also Mohr*, 584 So.2d at 430.

¶ 9. Though juror Sylvester initially commented that she did not think she could be fair because of her niece's experience, the voir dire examination did not end there, and the jurors were continually under oath to be truthful in their answers to all voir dire questions propounded by the trial judge and the attorneys. After this comment by juror Sylvester, counsel for both the State and the defendant, as well as the trial judge, continued to ask the potential jurors if any of them felt that they could not be fair in deciding the fate of the defendant in this type of case. Defense counsel did not sit idly by. The record reveals several instances of juror challenges where defense counsel struck for cause certain jurors who felt they could not be fair. Defense counsel did ask the venire members if any of them had been a victim of a crime. Answers were not restricted to situations where venire members themselves were victims; two other jurors, numbers 47 and 60, both answered that a family member had been a victim of a crime. Sylvester did not respond to this question. Defense counsel also made clear that he was going to avoid repeating questions already asked by the trial judge or the prosecutor. The trial court explained to the jurors the presumption of innocence and the necessity of deciding the case based solely on the evidence presented. The trial judge asked if any potential

juror would automatically vote for the death penalty. The judge also asked the converse question-if any potential juror would be unable to vote for the death penalty regardless of the evidence presented at trial. Finally, the trial judge asked the prosecutor, who followed the trial judge in the voir dire examination, not to cover the same subject matter already covered by the trial judge in his voir dire examination. Counsel for the State ensured through questioning that the jurors understood they were to notify the court and the attorneys if any existing problem would affect their ability to consider death as an appropriate sentence. The prosecutor also explored in detail the jury venire's understanding of the burden of proof, reasonable doubt, the presumption of innocence, and the fairness demanded of the jury. The State, through counsel, also inquired if any juror thought he or she could not be fair or reasonable in deciding the issue of the defendant's guilt. From the record, we are simply unable to find defense counsel's decision not to repeat these same questions rises to the level of ineffective assistance of counsel. Additionally, defense counsel had the opportunity not only to hear these voir dire responses from the members of the venire, defense counsel also had the invaluable opportunity to observe the demeanor of these potential jurors, both when they were responding to questions, and when they were simply reacting to the events which unfolded in the courtroom during the voir dire examination.

¶ 10. The answers, or lack of answers, to the voir dire examination, regardless of who was asking the questions, all served the same purpose. Sylvester made no indication during the extensive questioning following her objectionable comments that in any way revealed she would be unable to be fair and impartial in deciding whether Havard was guilty or not guilty, and if found guilty, in deciding the appropriate sentence. Given the multiple opportunities Sylvester had to notify the court or the attorneys of any potential problems she may have had in sitting on the jury, we cannot find trial counsel's performance was so deficient that it prevented counsel from functioning as guaranteed by the Sixth Amendment. Any possible error on the part of counsel must have been so serious that it deprived the defendant of a fair trial with a reliable result. If any counsel error occurred at all during the voir dire examination of juror Sylvester, we cannot find that it rose to such a level so as to require us to judicially declare constitutional ineffectiveness on the part of Havard's trial counsel.

¶ 11. We find counsel's performance was not deficient and that Havard's conviction and subsequent death sentence were not the result of a breakdown in the adversary process which rendered the result of Havard's trial unreliable. Therefore, we find this issue to be without merit.

*Havard* I at 780-82.

The petitioner did not include this allegation involving juror Dorothy Sylvester in his petition for post-conviction relief.

Now, in his memorandum in support of his petition for writ of habeas corpus, the petitioner alleges the Mississippi Supreme Court was unreasonable in presuming that Dorothy Sylvester was truthful throughout the voir dire portion of the trial and erred in not finding counsel ineffective under *Strickland*.

The case sub judice clearly reflects that trial counsel were effective. As such, there is no *Strickland* error and therefore no error on the part of the Mississippi Supreme Court in the rendering of the decision complained of here. In Havard's trial, during the early stages of voir dire juror Dorothy Sylvester indicated that she had a niece who had been the victim of a sexual crime, and that although she did not know petitioner she also did not "think" she could be fair. Subsequent to this statement, voir dire was conducted by the court, the State, and defense counsel, that rehabilitated Sylvester such that she became an acceptable juror. Therefore, there was no error in counsel's decision not to strike Sylvester from the jury.

During voir dire, the jurors were asked if any of them could not be reasonable or fair in deciding whether there were any doubts about Havard's guilt or innocence. Several jurors raised their hands, stating that because of the type of case, they did not feel they could be fair in deciding guilt or innocence. Dorothy Sylvester was not one of those jurors who raised their hands. As such, she unequivocally affirmed that she would be fair in deciding Havard's fate. The jurors also were asked if any of them had a problem with finding Havard not guilty

if the State failed to present enough evidence. Dorothy Sylvester did not raise her hand; she unequivocally affirmed that she could and would find Havard not guilty if the evidence failed to prove beyond a reasonable doubt that he was guilty. With respect to the guilt phase of trial, Dorothy Sylvester, while initially indicating she did not "think" she could be fair, ultimately affirmed—not once, but twice—that she would be fair.

Moreover, the jurors also were thoroughly death qualified. The court asked the jurors if they were so in favor of or opposed to the death penalty that they would automatically impose it or refuse to impose it, regardless of the evidence presented and the law governing them. In not raising her hand, Sylvester indicated that she did not fall into either of those groups. She unequivocally affirmed to defense counsel (as well as to the State and the trial court) that she did not so favor the death penalty that she would automatically impose it. As voir dire continued, the jurors were asked again about automatic preferences in favor of or against the death penalty; again, Sylvester gave no indication she had no such automatic preferences.

Dorothy Sylvester's responses during voir dire effectively rehabilitated her initial statement that she did not "think" she could be fair. Each affirmation she made subsequent to that statement clearly indicated that she would be fair. As such, counsel (as well as the court and the State) were effective in examining Sylvester to uncover any biases or prejudices this family trauma– the sexual crime against her niece– would have on Havard's trial.

It is fact that counsel accepted a juror with a family member who had been the victim of a sexual assault, a juror who initially stated she did not think she could be fair. However,

that juror ultimately revealed herself to be acceptable, during questioning in which she affirmatively stated she could be fair and impartial. Therefore, it was reasonable for counsel to accept Sylvester as a juror. Counsel's decision not to further question Sylvester's partiality– in light of the numerous, redundant questions already showing her to be impartial– was strategic, was of minimal import, and was not deficient.

Petitioner has failed to show any *Strickland* prejudice. Havard's counsel conducted an extensive voir dire. He successfully challenged fourteen jurors for cause. He exercised seven of his peremptory challenges. He moved for the court to allow more individualized voir dire "to make sure that there would be some way for the defense counsel to have a chance to talk to the jurors that we needed to talk to very closely" (R. 222). He moved for a special voir dire and for sequestration of the jury during trial. He moved, pursuant to *Witherspoon*, to enjoin the State from using peremptory challenges to exclude conscientious objectors to the death penalty. Moreover, he secured for petitioner a fair and impartial jury– one that included Dorothy Sylvester.

Thus, it is clear that counsel's actions were thorough and strategic. Havard failed to present any evidence of a deficiency in trial counsel, much less that such deficiency resulted in prejudice to petitioner that would demonstrate a reasonable probability of a different outcome at trial or sentencing. Based on the record and the facts relied upon by the Mississippi Supreme Court in reaching the decision that Havard was not denied the effective assistance of counsel regarding this claim, and that the court was not unreasonable in determining that juror Dorothy Sylvester, and all jurors, were presumed to be truthful in their

responses to the court, the petitioner's claim is without merit and Havard is not entitled to any relief.

**CLAIM XII**

**THE PETITIONER'S CLAIM THAT THE MISSISSIPPI SUPREME COURT ERRED IN HOLDING THAT NO JUROR BIASED AGAINST HAVARD WAS SEATED ON THE JURY IS BARRED FROM CONSIDERATION BY AN ADEQUATE AND INDEPENDENT STATE COURT GROUND.**

On direct appeal the petitioner claimed that a juror, Willie Thomas, was predisposed to vote for the death penalty in all cases and was improperly allowed to serve on the jury. The Mississippi Supreme Court found the issue to not appropriately be before the court and that post-conviction proceedings would be more suited for discussion of the issue:

> **III. WHETHER HAVARD WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BECAUSE OF THE SEATING OF A JUROR WHO SUPPORTS THE DEATH PENALTY IN ALL MURDER CASES AND THAT JUROR'S FAILURE TO ANSWER THE TRIAL COURT'S QUESTION ON THIS POINT**
>
> ¶ 20. Havard also claims the seating of juror Thomas, as well as Thomas's failure to answer the trial court's "reverse-*Witherspoon*" questions, effectively deprived Havard of his right to a fair trial under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and their counterparts in the Mississippi constitution. The State counters with its analysis of M.R.A.P. 22, stating that because the record is devoid of any facts to substantiate Havard's claim, this Court cannot consider a post-conviction issue on direct appeal. This issue indeed does not raise claims of ineffective assistance of trial counsel. Although the former Rule 22 required an appellant with different counsel on direct appeal to raise certain issues on pain of waiver in subsequent PCR proceedings, Rule 22 does not require that all issues be heard on direct appeal. Havard has now raised these issues and cannot later be found to have waived them. Havard's avenue for seeking future relief has not been thwarted-he has preserved those issues for post-conviction proceedings. While the current Rule 22 was not in place when Havard's case was tried, the

> current Rule 22, its comments, and *Branch* and *Hodges* give guidance as to what purpose the rule should serve. Concerning this issue, we find that it cannot practically be raised without further development or investigation, which would be proper during future post-conviction relief proceedings. This issue is without merit on direct appeal as post-conviction proceedings are better tailored for the Court to consider it.

*Havard* I at 787.

In his Petition for Post-Conviction Relief, Havard declined to argue this claim separately as had been done on direct appeal. Havard instead only included the issue in the argument forwarded in Claim X, *supra*, dealing with the argument regarding "reverse-*Witherspoon*" issues in the context of ineffective assistance of counsel. After consideration of the matter, in the manner of which it was presented, the court below held:

> **V. Ineffective assistance of counsel for failing to ask potential jurors "reverse- Witherspoon " questions during voir dire.**
>
> ¶ 60. On direct appeal, Havard argued that his counsel were ineffective by impermissibly failing to ask "reverse- *Witherspoon* " questions, or rather, whether the jurors would automatically vote for the death penalty. *Irving v. State*, 498 So.2d 305, 310 (Miss.1986) (citing *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)). As discussed in Havard's first post-conviction relief issue supra, the instant issue was raised by Havard on direct appeal as his Issue II. The Court refused to consider on direct appeal the affidavit of juror number twenty-nine, Willie Thomas (who was selected as a member of the trial jury as juror number eight in the order of selection). For reasons previously discussed, this Court held that Havard had preserved the issue for post-conviction proceedings.
> ¶ 61. In addressing this issue on the merits, absent Thomas's affidavit, the Court held:
>
> > Considering the "reverse- *Witherspoon* " issue, absent the juror affidavit, the exact assignment of error here is that defense counsel was ineffective by failing to ask "reverse- *Witherspoon*" questions, meaning defense counsel should have asked whether the jurors would automatically vote for the death penalty. *Irving*,

> 498 So.2d at 310. Under this rule, the United States Supreme Court held that a juror must be excused if his or her views on the death penalty would unfairly affect the outcome of the jury verdict. *Witherspoon*, 391 U.S. at 520[, 88 S.Ct. 1770]. Trial counsel did not ask "reverse- *Witherspoon* " questions, but the trial court did. The trial judge asked if any potential juror would automatically vote for the death penalty. Conversely, the judge also asked if any potential juror would automatically vote against the death penalty. The trial court therefore conducted both a " *Witherspoon* " examination and a "reverse-*Witherspoon* " examination. Worth noting is that the trial judge did strike at least nine venire members for cause at the request of the State based on *Witherspoon* considerations. Neither the State nor defense counsel challenged Thomas for cause or peremptorily. The proper questions were asked by the court and counsel and were answered by the potential jurors. The trial judge questioned the jurors on their abilities or inabilities, both as a group and individually, to consider a death sentence. The trial judge also requested that the attorneys not be redundant in their voir dire examination, keeping in mind the voir dire the court had conducted. Honoring this request, defense counsel, during the voir dire, stated to the venire, "I'm not going to ask you anything that the Judge or [counsel for the state] asked you unless we really need to." Again, we cannot find that trial counsel's silence during this phase of voir dire constituted reversible error, when considering the totality of the voir dire examination conducted by the trial judge and the attorneys. Succinctly stated, all necessary questions were propounded to the venire during the whole of voir dire. Defense counsel, having heard the questions and the responses from the venire, and having observed the jurors' demeanor throughout the voir dire, was then free to choose not to repeat the questions. We cannot fairly say defense counsel's performance was deficient and prejudiced the defense. Therefore, this issue fails under the *Strickland* test, and is thus without merit.

*Havard*, 928 So.2d at 786-87. The issue is now before this Court again, along with Thomas's affidavit.

¶ 62. Mississippi Rules of Evidence, Rule 606, Competency of Juror as Witness, provides:

**(b) Inquiry Into Validity of Verdict or Indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. *Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.*

(Emphasis added).

¶ 63. The affidavit of Willie Thomas does not meet the exception to Rule 606(b), and it should again be excluded from our consideration. Notwithstanding Rule 606(b), Thomas's affidavit does not offer merit to Havard's claim. Paragraphs three and four of Thomas's affidavit stated:

> I believe that the death penalty is the appropriate punishment for Mr. Havard. I think a person should be prepared to give what they take. If you take a life, a life is required.
>
> I think the same punishment should be given to everyone who kills. I felt this way before I served on the jury and I still feel this way today. I would feel this way even if it were my own son on trial. If people knew they would pay with their lives, there would be less killing.

(Havard's Exhibit 15, at ¶¶ 3-4). This affidavit simply shows that Thomas supports the death penalty. Nothing in this affidavit states that Thomas would automatically vote for imposition of the death penalty in every case without first considering the facts of the particular case, including any mitigating circumstances. As the state points out, the question is not whether Thomas believes in the death penalty, but whether he can follow the law. Nothing in the affidavit stated that Thomas would disregard the trial court's instructions and arbitrarily impose the death penalty in every case regardless of the facts. Thomas' affidavit does not add merit to Havard's claim.

¶ 64. Havard also offers the affidavit of Natman Schaye, whom Havard asserts is a nationally recognized capital litigator. The summation of Mr. Schaye's

> affidavit is that he is of the opinion that Havard's defense counsel were deficient in failing to ask questions during voir dire to determine the opinions and attitudes of the venire regarding the death penalty. He further believes that Havard was prejudiced by counsel's deficient performance as evidenced by juror Willie Thomas's affidavit.
>
> ¶ 65. Our previous discussion *supra* regarding this issue reveals that both *Witherspoon* and "reverse- *Witherspoon* " questions were asked by the trial court. The trial court then instructed counsel for the state and the defense not to repeat questions already asked of the venire panel. This Court concluded that the panel was adequately questioned during the whole of the voir dire examination. Mr. Schaye's affidavit is not persuasive to the contrary. Havard's claim of ineffective assistance of counsel still does not pass the standard set forth in *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. This issue is without merit.

*Havard* II at 339-41.

Now, the petitioner alleges in his memorandum in support of his habeas application that the Mississippi Supreme Court erred in the holding that Mississippi Rule of Evidence 606, precluded the consideration of the juror's affidavit and that the affidavit, in fact, did not demonstrate bias.

The petitioner makes the bare allegation that M.R.E. 606 is not applicable to the document in question and only states that lower court's ruling on the issue was error. The Mississippi Supreme Court's decision to not include the juror affidavit in the deliberations is firmly rooted in that court's interpretation of purely state law. A state court's interpretation of its own state laws or rules does not provide a basis for federal habeas corpus relief since there is no constitutional question involved. *Bronstein v. Wainwright*, 646 F.2d 1048, 1050 (5th Cir.1981). A federal habeas court "takes the word" of the state's highest court as to the interpretation of its law on criminal matters and does not "sit to review" that interpretation,

this court must "defer to [the] implicit conclusion and interpretation of state law" by the state court. *Young v. Dretke*, 356 F.3d 616, 628 (5th Cir.2004).

The Mississippi Supreme Court's decision on this issue is binding in this Court's review of this habeas claim as it is strictly a matter of a state court interpretation of state law. *See Bradshaw v. Richey*, 546 U.S. 74, 76, 126 S.Ct. 602, 604, 163 L.Ed.2d 407 (2005)("We have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus."); *Estelle v. McGuire,* 502 U.S. 62, 67-68, 112 S.Ct. 475, 480, 116 L.Ed.2d 385 (1991)(it is not the province of a federal habeas court to reexamine state-court determinations of state-law questions); *Fuhrman v. Dretke*, 442 F.3d 893, 901 (5th Cir.2006)(holding a federal habeas court must defer to a state court's interpretation of state law); *Young v. Dretke*, 356 F.3d 616, 628 (5th Cir.2004)("In our role as a federal habeas court, we cannot review the correctness of the state habeas court's interpretation of state law."); *Johnson v. Cain*, 215 F.3d 489, 494 (5th Cir.2000)(a federal habeas court may not review a state court's interpretation of its own law); *Gibbs v. Johnson*, 154 F.3d 253, 259 (5th Cir.1998)(holding the same), cert. denied, 526 U.S. 1089 (1999).

As this is purely a matter involving state law, Havard is not entitled to habeas relief on this claim.

Without waiving the applicable bar the State would address petitioner's allegation that the court below was unreasonable in holding that the affidavit of Willie Thomas did not support the petitioner's contention that he was inclined to automatically vote for death.

Looking to the affidavit of Willie Thomas, there is nothing that states that he would automatically impose the death penalty. This affidavit was clearly prepared by petitioner's counsel. The affidavit simply states that he believes that someone who kills someone else should pay with their own life. Further, the affidavit does not state that he would impose the sentence of death without consideration of mitigating evidence on behalf of petitioner. The test is not whether he believes in the death penalty, but whether he can set those views aside and consider the mitigating evidence. Mr. Thomas never stated during voir dire that he could not be fair, he did not state that he would automatically impose the death penalty, he did not state that he would not consider mitigating evidence, in fact Thomas did not say anything during voir dire. The Mississippi Supreme Court was not unreasonable in finding the plain wording of the affidavit did not support Havard's argument of bias by the juror. Again, this claim is procedurally barred as well as without merit and Havard is not entitled to relief.

**CLAIM XIII**

**THE PETITIONER'S CLAIM THAT THE MISSISSIPPI SUPREME COURT'S AGGREGATE ERROR ANALYSIS WAS NOT ADEQUATE IS BARRED FROM CONSIDERATION AS THE ISSUE WAS NEVER PRESENTED TO THE COURT BELOW FOR CONSIDERATION AND IS THEREFORE UNEXHAUSTED.**

On direct appeal, Havard used barely half a page of argument to declare that he had presented a powerful argument that he had not received a reliable trial due to unspecified aggregate error. The Mississippi Supreme Court took up the issue and held:

**XIV. WHETHER AGGREGATE ERROR IN THIS CASE REQUIRES REVERSAL OF THE CONVICTION AND DEATH SENTENCE**

> ¶ 66. Havard's next issue before this Court is whether the aggregate error in this case merits reversal. "This Court has held that individual errors, not reversible in themselves, may combine with other errors to make up reversible error." *Byrom v. State*, 863 So.2d 836, 847 (Miss.2003) (quoting *Hansen v. State*, 592 So.2d 114, 142 (Miss.1991)).
>
> ¶ 67. Even when finding errors, this Court has found a harmless aggregate result of those errors is possible. "In *Hansen*, likewise a death penalty case, this Court found that the trial court had committed three errors during the guilt phase, but "we nonetheless hold the errors in this case, given their cumulative effect upon the penalty phase, harmless beyond a reasonable doubt." *Byrom*, 863 So.2d at 847 (relying on *Hansen*, 592 So.2d at 153). "It is true that this Court has reversed death penalty sentences where the cumulative effect of prosecutorial misconduct has denied the appellant a fair and impartial trial. However, the allegations of this petition come nowhere close to the misconduct in *Stringer*, and, in our opinion do not mandate review under § 99-39-21." *Irving v. State*, 498 So.2d 305, 310 (Miss.1986) (relying on *Stringer v. State*, 500 So.2d 928 (1986)).
>
> ¶ 68. We thus find this issue to be without merit.

*Havard* I at 803.

The petitioner again argued the issue in his petition for post-conviction review by proclaiming that each issue argued by Havard in his petition was meritorious in arguing cumulative error. The court below considered the issue and held:

> **XIV. Cumulative error.**
>
> ¶ 87. Havard makes a generic argument that the alleged preceding errors, in the aggregate, fatally compromised his constitutionally protected right to a fair trial. The standard for this Court's review of an appeal from a capital murder conviction and death sentence is clear. Convictions upon indictments for capital murder and sentences of death must be subjected to "heightened scrutiny." *Balfour v. State*, 598 So.2d 731, 739 (Miss.1992) (citing *Smith v. State*, 499 So.2d 750, 756 (Miss.1986); *West v. State*, 485 So.2d 681, 685 (Miss.1985)). Under this standard of review, all doubts are to be resolved in favor of the accused because "what may be harmless error in a case with less at stake becomes reversible error when the penalty is death." *Id.* (quoting

*Irving v. State*, 361 So.2d 1360, 1363 (Miss.1978)). *See also Fisher v. State*, 481 So.2d 203, 211 (Miss.1985).

¶ 88. In *Byrom v. State*, 863 So.2d 836 (Miss.2003), this Court held:

> What we wish to clarify here today is that upon appellate review of cases in which we find harmless error or any error which is not specifically found to be reversible in and of itself, we shall have the discretion to determine, on a case-by-case basis, as to whether such error or errors, although not reversible when standing alone, may when considered cumulatively require reversal because of the resulting cumulative prejudicial effect.

*Id.* at 846-47.

¶ 89. In the case sub judice, the record supports no finding of error, harmless or otherwise, upon the part of the trial court. We thus find there is no prejudicial cumulative effect and no adverse impact upon Havard's constitutional right to fair trial. This issue is without merit.

*Havard* II at 346.

Now in his habeas memorandum, for the first time, the petitioner alleges the Mississippi Supreme Court failed to conduct a meaningful review of the unspecified cumulative errors claimed to have been committed at trial. This claim of inadequacy has never before been presented for consideration. This new argument by the petitioner has never before been fairly presented to the court below for consideration and is therefore unexhausted. The petitioner clearly argues a new issue here in his habeas corpus petition that was not fairly presented below.

As previously discussed several times, *supra*, this issue is barred from consideration for failure to fairly present it to the court below for consideration. *Ruiz*, 460 F.3d at 642-43.

Respondents would assert that this issue was never fairly presented to the Mississippi

Supreme Court in the context of inadequacy of review. In order for this Court to consider a claim it must have been fairly presented to the state court. This claim that the court below did not fulfill the duty to adequately consider the allegation of aggregate error is both without merit as well as unexhausted. While the claim is now unexhausted it is now incapable of being exhausted in the state courts and must be held to be procedurally barred by this Court unless petitioner can show cause and prejudice for not raising it before the state court. *See Gray*, 518 U.S. 152, 116 S.Ct. 2074, 135 L.Ed.2d 457; *Teague*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334; *Bagwell*, 372 F.3d 748, 755; *Lockett*, 230 F.3d 695, 709-10. Under the provisions of Miss. Code § 99-39–5 (2) and § 99-39-27 (9), petitioner cannot now exhaust this claim as it would be held to be barred from consideration in any state collateral proceeding.

Therefore, this Court, without a showing of cause and actual prejudice, must hold this claim which has not previously been fairly presented to the Mississippi Supreme Court to be procedurally barred from consideration on federal habeas review. *See Castille*, 489 U.S. 346, 351, 109 S.Ct. 1056, 1060, 103 L.Ed.2d 380. Petitioner has made no cognizable allegation of either cause or actual prejudice in an attempt to overcome the procedural bars and this claim regarding the Mississippi Supreme Court's treatment of the issue placed before it for consideration must be barred from consideration by this Court.

Alternatively, and without waiving any applicable procedural bar, it is clear this claim is without substantive merit. As argued in the courts below and now on habeas consideration, Havard failed to demonstrate any errors committed during trial or sentencing.

Indeed, Havard failed to show any error at all. Therefore, no prejudice can be shown individually or cumulatively.

In this case, the evidence clearly supports a conviction. Chloe Britt left her home the morning of February 21, 2002, a happy, healthy, six-month-old girl. She returned home the same way. During a period of time later that evening, in which Havard was her only caretaker, Chloe Britt suffered bruises to her entire body, her mouth was scraped and ripped, her rectum was torn open to the size of a quarter, and her brains were shaken so much that she literally exploded from the inside out. Havard then simply put Chloe to bed and prepared to destroy evidence of his crime by washing the bedsheets: his first delay of treatment.

When Rebecca Britt returned home and found Chloe turning blue, Havard "helpfully" suggested they forego an ambulance and head straight to the hospital. Except they did not head straight to the hospital; instead, Havard meandered about the house getting dressed, and then he drove in the wrong direction– away from all hospitals, another delay of treatment. When repeatedly asked by the medical staff and later the police as to what happened to Chloe Britt, Havard said "nothing happened." Yet a further delay of treatment. Only when he realized he was in trouble did Havard say, "Chloe slipped in the bathtub." Yet, when asked to explain the rectal injury, he simply said "I don't know." When asked to explain why he did not come forward with this information, he simply said, "I'm sorry." Moreover, there was ample evidence put on in Havard's favor mitigation.

The Mississippi Supreme Court had before it ample evidence to conclude no error occurred at trial and Havard does not present any credible argument now that shows the

lower court erred in reaching that conclusion. The issue is procedurally barred as well as lacking substantive merit. Havard is not entitled to relief on this claim.

## CLAIMS XIV & XV

### PETITIONER'S CLAIMS OF CUMULATIVE ERROR ARE WITHOUT MERIT.

The petitioner does not now specifically contend that the Mississippi Supreme Court's decision regarding the allegations of cumulative error was contrary to or an unreasonable application of clearly establish law according to the United States Supreme Court. Petitioner has done nothing more than proclaim the court below was unreasonable in not finding aggregate error in either of these final claims.

The controlling precedent in this circuit regarding cumulative error claims as announced by the Fifth Circuit is found in *Derden v. McNeel*, 978 F.2d 1453 (5th Cir. 1992) (*en banc*), where the court of appeals held:

> First, any cumulative error theory must refer only to errors committed in the state trial court. A habeas petitioner may not just complain of unfavorable rulings or events in the effort to cumulate errors. *See United States v. Rivera*, 900 F.2d 1462, 1470-71 (10th Cir.1990) (en banc ); *Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir.1987) ("Twenty times zero equals zero."). If an action of the trial court cured a putative error, the petitioner is complaining only of an adverse event rather than actual error. *Compare Donnelly*, 416 U.S. at 645, 94 S.Ct. at 1872.
>
> Second, the error complained of must not have been procedurally barred from habeas corpus review. *See, e.g.*, *Coleman v. Thompson*, *supra*. Beyond the notion of procedural bar, it is important that a defendant objected to errors to demonstrate that they were believed at the time of trial to have had an adverse effect on the defense. A trial transcript is lifeless, bereft of the nuances of behavior, facial expression and inflection of voice that so powerfully influence the participants and jury. A transcript may be

> misleading: it may suggest for instance, that the trial judge made a comment arguably demeaning to the defendant, although the judge actually intended to display wry humor or to mutter to himself rather than reprove the defendant. Only a contemporaneous objection, difficult as it may be to criticize comments by the judge or opposing counsel's argument, distinguishes harmless remarks from those truly felt to be prejudicial to the defense.
>
> Third, errors of state law, including evidentiary errors, are not cognizable in habeas corpus as such. *Estelle v. McGuire*, 502 U.S. 62, ----, 112 S.Ct. 475, 480, 116 L.Ed.2d 385 (1991); *Marshall v. Lonberger*, 459 U.S. 422, 438 n. 6, 103 S.Ct. 843, 853 n. 6, 74 L.Ed.2d 646 (1983). Errors of state law rise to constitutional dimension only if they "so infused the trial with unfairness as to deny due process of law." *Lisenba v. California*, 314 U.S. 219, 228, 62 S.Ct. 280, 286, 86 L.Ed. 166 (1941); *see also Walker v. Engle, supra*.
>
> Fourth, the federal court must review the record as a whole to determine whether the errors more likely than not caused a suspect verdict. *Kirkpatrick v. Blackburn*, 777 F.2d 272, 281 (5th Cir.1985), *cert. denied*, 476 U.S. 1178, 106 S.Ct. 2907, 90 L.Ed.2d 993 (1986).
>
> 978 F.2d at 1458.

The Fifth Circuit concluded by holding:

> After en banc rehearing, we now hold that federal habeas corpus relief may only be granted for cumulative errors in the conduct of a state trial where (1) the individual errors involved matters of constitutional dimension rather than mere violations of state law; (2) the errors were not procedurally defaulted for habeas purposes; and (3) the errors "so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S.Ct. 396, 400-01, 38 L.Ed.2d 368 (1973).
>
> 978 F.2d at 1454.

The Fifth Circuit has limited the manner in which claims of cumulative error are assessed. Thus, in the context of federal habeas review the Fifth Circuit has held that the cumulative error doctrine only applies when the errors themselves involve matters of

constitutional dimension, are not procedurally barred from habeas consideration and "so infected the entire trial that the resulting conviction violates due process." *Derden v. McNeel*, *supra* at1454. When a federal habeas court evaluates whether the cumulative error doctrine applies to a set of facts, it "review[s] the record as a whole to determine whether the errors more likely than not caused a suspect verdict." *Spence v. Johnson*, 80 F.3d 989, 1001 (5th Cir.1996) (internal quotation marks omitted). Further, "[m]eritless claims or claims that are not prejudicial cannot be cumulated, regardless of the total number raised." *Westley v. Johnson*, 83 F.3d 714, 726 (5th Cir.1996) (quoting *Derden*, 978 F.2d at 1461).

As has been pointed out above several of petitioner's claims are procedurally barred from consideration by this Court. Under *Derden*, those claims cannot be added into the cumulative error analysis. Further, there are claims that are basically state law claims and do not involve a federal constitutional violation. These claims cannot be considered in any cumulative error analysis.

The Mississippi Supreme Court addressed the cumulative error claims raised by petitioner at both direct appeal and post-conviction review:

> **XIV. WHETHER AGGREGATE ERROR IN THIS CASE REQUIRES REVERSAL OF THE CONVICTION AND DEATH SENTENCE**
>
> ¶ 66. Havard's next issue before this Court is whether the aggregate error in this case merits reversal. "This Court has held that individual errors, not reversible in themselves, may combine with other errors to make up reversible error." *Byrom v. State*, 863 So.2d 836, 847 (Miss.2003) (quoting *Hansen v. State*, 592 So.2d 114, 142 (Miss.1991)).
>
> ¶ 67. Even when finding errors, this Court has found a harmless aggregate result of those errors is possible. "In *Hansen*, likewise a death penalty case,

this Court found that the trial court had committed three errors during the guilt phase, but "we nonetheless hold the errors in this case, given their cumulative effect upon the penalty phase, harmless beyond a reasonable doubt." *Byrom*, 863 So.2d at 847 (relying on *Hansen*, 592 So.2d at 153). "It is true that this Court has reversed death penalty sentences where the cumulative effect of prosecutorial misconduct has denied the appellant a fair and impartial trial. However, the allegations of this petition come nowhere close to the misconduct in *Stringer*, and, in our opinion do not mandate review under § 99-39-21." *Irving v. State*, 498 So.2d 305, 310 (Miss.1986) (relying on *Stringer v. State*, 500 So.2d 928 (1986)).

¶ 68. We thus find this issue to be without merit.

*Havard* I at 803.

**XIV. Cumulative error.**

¶ 87. Havard makes a generic argument that the alleged preceding errors, in the aggregate, fatally compromised his constitutionally protected right to a fair trial. The standard for this Court's review of an appeal from a capital murder conviction and death sentence is clear. Convictions upon indictments for capital murder and sentences of death must be subjected to "heightened scrutiny." *Balfour v. State*, 598 So.2d 731, 739 (Miss.1992) (citing *Smith v. State*, 499 So.2d 750, 756 (Miss.1986); *West v. State*, 485 So.2d 681, 685 (Miss.1985)). Under this standard of review, all doubts are to be resolved in favor of the accused because "what may be harmless error in a case with less at stake becomes reversible error when the penalty is death." *Id.* (quoting *Irving v. State*, 361 So.2d 1360, 1363 (Miss.1978)). *See also Fisher v. State*, 481 So.2d 203, 211 (Miss.1985).

¶ 88. In *Byrom v. State*, 863 So.2d 836 (Miss.2003), this Court held:

> What we wish to clarify here today is that upon appellate review of cases in which we find harmless error or any error which is not specifically found to be reversible in and of itself, we shall have the discretion to determine, on a case-by-case basis, as to whether such error or errors, although not reversible when standing alone, may when considered cumulatively require reversal because of the resulting cumulative prejudicial effect.

*Id.* at 846-47.

> ¶ 89. In the case sub judice, the record supports no finding of error, harmless or otherwise, upon the part of the trial court. We thus find there is no prejudicial cumulative effect and no adverse impact upon Havard's constitutional right to fair trial. This issue is without merit.

*Havard* II at 346.

The decision of the Mississippi Supreme Court in deciding this state law ground is neither contrary to or an unreasonable application of clearly established federal law as announced by the United States Supreme Court.

Petitioner has not demonstrated that the Mississippi Supreme Court's determination of the cumulative error claim, if it is in fact a federal claim to begin with, is contrary to or an unreasonable application of clearly established federal law as announced by the United States Supreme Court. Further, he has not demonstrated that there is cumulative error under *Derden v. McNeel, supra*. Havard is entitled to no relief on this claim.

## CONCLUSION

Respondents respectfully move this Court deny an evidentiary hearing, dismiss the petition for writ of habeas corpus filed herein with prejudice, and deny petitioner a certificate of appealability to appeal this matter to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that I, Pat McNamara, Special Assistant Attorney General for the State of Mississippi, have electronically forwarded the foregoing RESPONDENTS' MEMORANDUM OF AUTHORITIES IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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This, the 13th day of November, 2009.

s/ **PAT MCNAMARA**