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 EPPS, Commissioner,
Mississippi Department of Corrections
And JIM HOOD, Attorney General, State
Of Mississippi *RESPONDENTS*

RESPONSE TO MEMORANDUM IN SUPPORT OF
AMENDED PETITION FOR WRIT OF HABEAD CORPUS

COME NOW, Respondents, in the above-styled and numbered cause and file this Response to Jeffrey Havard's Memorandum in Support of Amended Petition for Writ of Habeas Corpus. Respondents respectfully submit as follows:

INTRODUCTION

This Amended Petition for Writ of Habeas Corpus was filed on September 28, 2012. Respondents assert this Court has jurisdiction over habeas corpus petitions, and that the scope of review is controlled by the provisions of the amendments to 28 U.S.C. Section 2254, *et seq.*, contained in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which was signed into law on April 24, 1996. The AEDPA amends the federal habeas corpus statutes and thus the manner in which federal courts can review claims by persons under state court convictions and sentences. 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

(2000) and further explained in *Cullen v. Pinholster*, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). *See Rivas v. Thaler*, 432 Fed. Appx. 395 (5th Cir. 2011) (unpublished).

Since the present Amended Petition was filed after the effective date of the AEDPA, its provisions apply to this case with full force. *See 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 [AEDPA], we apply the standard of review embodied in the AEDPA"); *Drinkard v. Johnson*, 97 F.3d 751 (5th Cir.1996); *see also Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059 (1997).

PROCEDURAL HISTORY

On June 24, 2002, Havard was indicted for capital murder in the February 21, 2002, death of six-month-old Chloe Britt; Havard was charged with the underlying felony of sexual battery. Pre-trial hearings in this case took place on September 5, 2002, September 25, 2002, and October 30, 2002. On December 16, 2002, jury selection began in the Adams County Circuit Court, the Honorable Forrest A. Johnson, Jr., presiding. After jury selection and trial, on December 18, 2002, Havard was found guilty of capital murder. A sentencing hearing was then conducted, after which, on December 19, 2002, the jury returned the following:

> 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 the 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.

/s/ Cynthia Ethridge
foreman of the jury

Havard filed a post-trial "Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, for a New Trial." On February 3, 2003, the trial court denied the Motion.

On October 4, 2004, Havard appealed his conviction and sentence to the Mississippi Supreme Court, raising the following claims:

I. Whether trial counsel were ineffective for failing to ensure that a juror was excused for cause after exhibiting bias.

II. Whether trial counsel were ineffective by failing to ask "reserve-*Witherspoon*" questions relating to the jurors' potential strong feelings about the death penalty.

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.

IV. Whether Havard was denied effective assistance of counsel due to counsel's failure to adequately support the defense strategy.

A. Failure to obtain DNA evidence
B. Failure to secure a pathologist
C. Failure to include a lesser offense instruction

V. Whether Havard was denied his Constitutional right of a fundamentally fair trial because of prosecutorial misconduct at closing argument.

VI. Whether the trial court erred in allowing the introduction of victim impact testimony at sentencing.

VII. Whether trial counsel were ineffective for not developing and presenting compelling evidence in mitigation of punishment.

VIII. Whether Havard was denied his right to effective assistance of counsel in closing argument at the sentencing phase of trial.

IX. Whether the trial court erred in overruling an objection to a photograph depicting the victim during her lifetime, thus causing prejudicial sympathy.

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.

XI. Whether the trial court's limiting instruction of an aggravating circumstance was itself unconstitutionally vague and overbroad.

XII. Whether the indictment failed to charge the necessary elements to impose the death penalty.

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.

XIV. Whether aggregate error in this case requires reversal of the conviction and death sentence.

XV. Whether any statutory required issues have merit, including whether the sentence was disproportionate to the penalty in similar cases.

On February 9, 2006, the Mississippi Supreme Court affirmed Havard's conviction and death sentence. *Havard v. State*, 928 So. 2d 771 (Miss. 2006). On April 3, 2006, Havard filed a Motion for Rehearing; the court denied Petitioner's Motion on May 25, 2006.

On August 23, 2006, Havard filed a Petition for Writ of Certiorari with the United States Supreme Court, challenging the decision of the Mississippi Supreme Court. In this Petition he presented the following question:

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

On January 8, 2007, the United States Supreme Court denied Havard's Petition for Writ of Certiorari. *Havard v. Mississippi*, 127 S.Ct. 931 (2007).

On May 25, 2007, Havard filed a motion seeking leave to file a petition for post-conviction relief in the trial court with the Mississippi Supreme Court. As outlined in *Havard v. State*, 988 So. 2d 322, Havard presented the following grounds for relief:

I. Ineffective assistance of counsel for failure to adopt defense strategy during guilt phase.

A) Failure to obtain DNA evidence.
B) Failure to secure a pathologist.
C) Failure to include a lesser-offense instruction.

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.

IV. Ineffective assistance of counsel for failing to develop and introduce Havard's successful adaptation at Camp Shelby as mitigating evidence during the penalty phase.

V. Ineffective assistance of counsel for failing to ask potential jurors "reverse-*Witherspoon*" questions during voir dire.

VI. Ineffective assistance of counsel during closing argument at the penalty phase.

VII. Prosecutorial misconduct during closing argument at the guilt phase.

VIII. Victim Impact testimony.

IX. Whether the trial court improperly responded to a question from the jury during the sentencing phase.

X. Limiting instruction of especially heinous, atrocious or cruel aggravating circumstance.

XI. Failure of the indictment to charge a death-penalty-eligible offense.

XII. Jury consideration of aggravating circumstances.

XIII. Competency of trial counsel

XIV. Cumulative error.

On May 22, 2008, the Mississippi Supreme Court denied post-conviction relief. *See Havard v. State*, 988 So. 2d 322 (Miss. 2008). Petitioner filed a Motion for Rehearing on July 3, 2008; the court denied Petitioner's Motion on August 28, 2008.

On April 12, 2011, Petitioner filed a second petition for post-conviction relief, raising the following issue for consideration:

I. The State violated Petitioner's Constitutional rights to a fair trial and due process of law as governed by *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed. 2d 1217 (1959) and related authority.

II. The State withheld exculpatory information in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963) and its progeny.

III. Alternatively to the immediately preceding issue, Petitioner's trial counsel were ineffective for failing to utilize the videotaped statement at issue if it was disclosed or produced prior to trial.

IV. Newly-discovered evidence demonstrates that Petitioner is innocent of the underlying felony of sexual battery– which alone makes Petitioner's case a capital murder case and Petitioner eligible for the death sentence that was imposed.

V. Newly-discovered evidence further demonstrates that Petitioner's trial counsel were ineffective in failing to challenge the underlying felony of sexual battery.

On March 8, 2012, the Mississippi Supreme Court denied Petitioner's second request for post-conviction relief. *Havard v. State*, 86 So. 3d 896 (Miss. 2012).

On April 10, 2009, Petitioner filed a Petition for Writ of Habeas Corpus with this Court. On September 28, 2012, Petitioner filed the instant Amended Petition for Writ of Habeas Corpus.

FACTUAL HISTORY

The facts giving rise to this case are set forth in the opinion on direct appeal from the Mississippi Supreme Court. *See Havard v. State*, 928 So. 2d 771 (Miss. 2006):

Jeffrey Havard was living in Adams County with Rebecca Britt, the mother of six-month old Chloe Britt. FN1. Havard was not Chloe's father. Havard and Britt had been dating for a few months when Britt and Chloe moved in with Havard in his trailer located on property owned by Havard's grandfather. Around 8:00 p.m. on February 21, 2002, Havard gave Britt some money and asked her to go to the grocery store to get supper. Britt returned to find Chloe bathed and asleep. Havard told Britt he had given Chloe her bath and put her to bed. Havard had also stripped the sheets off the bed and told Britt he was washing them. Before that night, Havard had never bathed Chloe or changed her diaper. After Britt checked on Chloe, Havard insisted that Britt go back out to the video store to rent some movies. When Britt returned, Havard was in the bathroom, and Chloe was blue and no longer breathing. Britt performed CPR on Chloe in an attempt to resuscitate her. Britt and Havard drove Chloe to Natchez Community Hospital, where Britt's mother worked. The pathologist who prepared Chloe's autopsy report would later testify that some of her injuries were consistent with penetration of the rectum with an object. Other injuries of the child included abrasions and bruises inside her mouth and internal bleeding inside her skull consistent with shaken baby syndrome. *779. Both the hospital staff and the Sheriff observed anal injuries on Chloe as well, but no one at Chloe's day care had ever noticed bruises or marks on Chloe. No anal injuries or anything unusual about the child's rectum was noticed by the day care staff earlier on the day of February 21st. Chloe was pronounced dead at the hospital later that night.

> FN1. There is some confusion in the record regarding Chloe's age. Chloe was actually six months old on February 21, 2002, the date of the incident leading to the child's death; however, the mother mistakenly testified that Chloe was born on August 29, 2000. It is apparent that Chloe's correct date of birth is August 29, 2001.

In the course of the investigation, Havard was charged with capital murder. In a videotaped statement two days after Chloe's death, Havard denied committing sexual battery on Chloe, but instead claimed he accidentally dropped her against the commode after bathing her, shook her in a panic, and then rubbed her down with lavender lotion before putting her to bed. The State presented DNA evidence which had been collected from the bed sheet. This evidence matched the DNA of both Havard and Chloe. A sexual assault kit testing for any of Havard's DNA in Chloe's rectum or vagina produced negative results. Havard offered no explanation for Chloe's injuries other than the possibility that he wiped her down too vigorously when preparing her for bed.

SCOPE OF REVIEW

Petitioner filed the instant Amended Petition for Writ of Habeas Corpus with this Court on September 28, 2012. Petitioner presents several grounds for relief, including claims of

ineffective assistance of counsel. Most of these claims, despite numerous procedural bars, were fully addressed by the Mississippi Supreme Court on direct appeal or on Petitioner's two post-conviction reviews. Because this Amended Petition was filed after the enactment of the AEDPA, the provisions of 28 U.S.C. Section 2254 apply.

The AEDPA standards of review are set forth in 28 U.S.C. Section 2254(d):

> (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-
>
> > (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.

In cases governed by the AEDPA the analysis differs depending upon whether the issue is one of law, fact, or both. *See Drinkard v. Johnson*, 97 F.3d at 767-68. For questions of fact, habeas relief may be granted only if this Court finds the state court made a determination of fact which was unreasonable in light of the evidence presented to it. *See* 28 U.S.C. § 2254(d)(2); *Drinkard*, *id*. When reviewing such factual determinations, this Court must presume correct the factual findings of the state court, unless Petitioner "rebut[s] the presumption of correctness by clear and convincing evidence." *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, this Court may grant habeas relief only if the state court's determination of law is contrary to "clearly established" United States Supreme Court precedent. *See* 28 U.S.C. § 2254(d)(1); *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 -354.

Thus, 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 (2004); *Middleton v. McNeil*, 541 U.S. 433, 124 S.Ct. 1830 (2004); *Mitchell v. Esparza*, 540 U.S. 12, 124 S.Ct. 7 (2003); *Yarborough v. Gentry*, 540 U.S. 1, 5, 124 S.Ct. 1, 4 (2003); *Lockyer v. Andrade*, 538 U.S. 63, 76, 123 S.Ct. 1166, 1175 (2003); *Williams v. Taylor*, 529 U.S. at 409. In *Holland v. Jackson*, 542 U.S. 934, 124 S.Ct. 2736 (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*.

124 S.Ct. at 2739. *See Woodford v. Visciotti*, 537 U.S. 19, 123 S.Ct. 357 (2002).

Claims involving mixed questions of law and fact are also governed by the dictates of Section 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. at 409-412; *Moore v. Johnson*, 101 F.3d 1069, 1075-76 (5th

Cir. 1996) (*citing Drinkard*, 97 F.3d at 767-68)).[1] This "unreasonable application" standard of review prohibits a federal court from granting 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.

In *Williams v. Taylor*, 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 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 *Patterson v. Dretke*, 370 F.3d 480 (5th Cir. 2004), the Fifth Circuit held:

> "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

[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).

> 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. at 412- 13; *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."). "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).

The long-standing requirement of deference to factual findings made by state courts remains intact in the amendments to Section 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.

The AEDPA changed the standard of proof that a petitioner must adduce to rebut the presumption of correctness of state court findings of fact. The standard is no longer a preponderance of the evidence standard, but the higher standard of clear and convincing evidence. Havard 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 at 484; *Morrow v. Dretke*, 367 F.3d 309, 315 (5th Cir. 2004); Miller v. Johnson, 200 F.3d 274, 281 (5th Cir. 2000)

("Because the state appellate courts are presumed to have determined the facts reasonably, it is the petitioner's burden to prove otherwise, and he must do so with clear and convincing evidence"); *see* 28 U.S.C. § 2254(e)(1).

In order for habeas relief to be granted to Petitioner, this Court must find that the Mississippi Supreme Court's resolution of Havard's claims were contrary to or involved an unreasonable application of, clearly established federal law (as determined by the United States Supreme Court). *Williams v. Taylor*, 529 U.S. at 405; *Jones v. Dretke*, 375 F.3d at 354. This Court must apply those AEDPA standards of review, as outlined above, in determining the veracity of the arguments Havard makes in his Amended Petition.

With that in mind, Respondents assert Havard has not, and cannot, demonstrate how the resolution of the claims raised in state court "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[2]. Furthermore, Petitioner's claims involving questions of mixed law and facts (particularly the claims of ineffective assistance of counsel), do not present decisions that were

[2] 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. *See Teague v. Lane*, 489 U.S. 288, 305-07; *see also Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519 (2004); *Beard v. Banks*, 542 U.S. 406, 124 S.Ct. 2504 (2004). In explaining what rules are to be retroactively applied, the United States Supreme Court, in *Tyler v. Cain*, 533 U.S. 656, 121 S.Ct. 2478 (2001), held:

> 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]

533 U.S. at 663, 121 S.Ct. at 2482 (emphasis added) (internal footnotes omitted). No new rule can be retroactively applied unless the United States Supreme Court has specifically held it to have retroactive application.

based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding. Havard, thus, has failed to state a claim on which relief can be granted.

Even if this Court does find error in some aspect of the case, before it can grant habeas relief, this Court must also conduct a harmless error analysis under the dictates of *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710 (1993). *See Fry v. Pliler*, 551 U.S. 112, 127 S.Ct. 2321 (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, *reh. and stay of execution 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 (1998). Any Constitutional error found must be subjected to an analysis of whether the "error had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. at 637.

Looking to Havard's Amended Petition, Respondents submit at least seven of the claims Havard presents– Claims 1, 2, 3, 10, 16, 18 and 19– were held to be procedurally barred from consideration on direct appeal or state post-conviction review. Thus, 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. *See Ylst v. Nunnemaker*, 501 U.S. 797, 111 S.Ct. 2590 (1991); *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546 (1991); *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497 (1977). 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 (1989).

Additionally, at least seven of the substantive claims Havard presents– Claims 2, 3, 11, 12, 13, 14 and 15– have not been exhausted before the state courts[3]. In some cases Petitioner makes entirely new arguments; in others he modifies old arguments with new facts and allegations. Any claim of the Petitioner which has not been fairly presented to the state court is unexhausted and cannot now be exhausted under the provisions of Miss. Code Ann. Sections 99-39-5(2) and 99-39-27(9). Therefore, this Court must hold any such claim to be procedurally barred from consideration on federal habeas review. *See* 28 U.S.C. § 2254(b)(3).

Speaking to procedural bars and exhaustion, in *Gray v. Netherland*, 518 U.S. 152, 116 S.Ct. 2074 (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,*

[3] Several of the claims set forth in Havard's Amended Petition actually contain two separate assignments of error– with only one of the two being exhausted. For clarity, Respondents hereby delineate the portions of the Amended Petition which are unexhausted:

> In Claim 2, Petitioner did present a claim of prosecutorial error to the state court; he did not allege ineffective assistance of counsel before the state court.
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> In Claim 3, Petitioner did present a claim of trial court error to the state court; he did not allege ineffective assistance of counsel before the state court.
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> In Claim 11, Petitioner's ineffectiveness claim is a modified version of the one presented to the state court.
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> In Claim 12, Petitioner makes a claim which is entirely unexhausted.
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> In Claim 13, Petitioner makes a claim which is entirely unexhausted.
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> In Claim 14, Petitioner's ineffectiveness claim is a modified version of the one presented to the state court.
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> In Claim 15, Petitioner's ineffectiveness claim is a modified version of the one presented to the state court.

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.

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.

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.[8] 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*.[9] 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.[10] 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."[11]
>
> A fair opportunity requires that all the grounds of the claim be first and "fairly presented" to the state courts.[12] *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.*[13] *"[I]t is not enough . . . that a somewhat similar state-law claim was made."*[14] *An argument based on a legal theory distinct from that relied upon in the state court does not meet the exhaustion requirement.*[15] *"Exhaustion 'requires a state prisoner to present the state courts with the same claim he urges upon the federal courts.'"*[16] 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."[17]

> 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.[18] 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."[19]

460 F.3d at 642-43 (emphasis added) (internal citations and footnotes omitted).

Similar claims will not suffice to satisfy the exhaustion requirement; the claims must be the same claim raised on the same legal and factual basis. Speaking to the issue of exhaustion of claims of ineffective assistance of counsel, the Fifth Circuit, in *Johnson v. McCotter*, 803 F.2d 830 (5th Cir. 1986), held:

> "A claim of ineffective assistance of counsel, once raised, litigated and rejected at an earlier habeas proceeding cannot be raised in a later proceeding merely by varying the factors allegedly demonstrating incompetency." . . . . *Passman* does not allow the reassertion of claims for the sole reason that petitioner has now thought of another argument in support of the same claim.

803 F.2d at 833. *See Schouest v. Whitley*, 927 F.2d 205, 208 (5th Cir. 1991); *Molina v. Rison*, 886 F.2d 1124, 1128 (9th Cir. 1989); *Raulerson v Wainwright*, 753 F.2d 869, 873 (11th Cir. 1985); *Sinclair v. State of Louisiana*, 679 F.2d 513, 515 (5th Cir. 1982); *McDonald v. Estelle*, 590 F.2d 153, 155 (5th Cir. 1979); *Cunningham v. Estelle*, 536 F.2d 82, 83 (5th Cir. 1976).

This rule of law is particularly relevant with respect to the instant Amended Petition: Havard has presented claims of ineffective assistance which he never raised in state court; he has also presented claims of ineffective assistance which vary the factors underlying his state court claims. This he cannot do. Both new ineffectiveness claims, as well as variations of claims alleging ineffectiveness of counsel, cannot be considered.

Respondents deny that any of the claims Havard sets forth in his Amended Petition entitle him to relief. With the exception of the aforementioned unexhausted claims, the claims Petitioner raises before this Court are those previously presented to the state court. The

resolutions 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. Thus, Havard is entitled to no habeas relief.

On a final note, Respondents submit that Petitioner is not entitled to an evidentiary hearing on any of the claims presented in this Amended 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.

28 USC § 2254. Any factual basis of Havard's claims not developed in the state court proceedings do not fall into either of the exceptions noted by Section 2254. In *Cullen v. Pinholster*, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), the United States Supreme Court held that the federal habeas court may not consider any new evidence on habeas review that was not presented to the state court. Entitling Havard to a hearing at which evidence may be offered concerning the factual allegations raised in the Amended Petition would be contrary to the dictates of both the AEDPA and *Cullen v. Pinholster*. Havard is likewise not entitled to an

evidentiary hearing to further flesh out facts not developed at trial, on direct appeal or state post-conviction review. *Id.*

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

On direct appeal, Havard claimed trial counsel were ineffective for not adequately supporting the defense strategy that Havard did not commit sexual battery on the victim. Havard alleged counsel were ineffective for failing to test and present rebuttal DNA testimony; secure expert assistance; and request a lesser offense instruction. The Mississippi Supreme Court, considering the argument raised by Havard, rejected such claim and held as follows:

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

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.

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

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 **789* 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.

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.

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

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).

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.

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."*790 *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.

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).

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 **791* 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 v. State, 928 So. 2d at 787-91.

Havard brought these issues to the attention of the Mississippi Supreme Court a second time, in his petition for post-conviction relief. Again, the court rejected Havard's allegations of error:

> Ineffective assistance of counsel for failure to adopt defense strategy during guilt phase.
>
> 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.

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.

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).

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.

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.

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.

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).

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.

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.

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.

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 reliance on *Richardson* is misplaced.

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."

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.

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.

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.

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.

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**331* 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).

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.

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).

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.

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.

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.

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.

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."

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.*

> 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 discernible 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).
>
> 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.
>
> 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 v. State, 988 So. 2d at 327-332.

Realizing his attempts to discredit Dr. Hayne (or bolster support for Dr. Lauridson) had been unsuccessful thus far, Petitioner tried again. After deposing Dr. Hayne, Petitioner brought these issues to the attention of the Mississippi Supreme Court a third time, in his successive

petition for post-conviction relief. A third time, the Mississippi Supreme Court rejected Petitioner's claims:

> Havard claims that the deposition testimony of Dr. Hayne, taken during discovery on federal habeas review, constitutes newly discovered evidence that supports his claim of ineffective assistance of counsel. Specifically, Havard claims that this newly discovered evidence "supports [his] prior claims of ineffective assistance of counsel with respect to trial counsel's efforts (or lack thereof) in challenging the underlying felony of sexual battery." He contends that those claims were central to the original post-conviction challenge.
>
> This claim is an attempt to rehabilitate failed claims that already have been addressed by this Court. 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. *Havard,* 928 So.2d at 788. Havard's counsel did request an independent review of the autopsy report, but the trial court denied the motion, because no basis for need was shown when Dr. Hayne was available. *Id.* Havard argued that it was his attorneys' failure to present the trial court with a basis for the request that constituted ineffective assistance. *Id.* To support this claim, Havard relied on the affidavit of Dr. Lauridson and a medical journal article in an attempt to show the substantial need that he claimed his attorneys failed to show. *Id.* at 789. The Court refused to consider the documentation on direct appeal, because it was outside of the record. *Id.* Ultimately, the Court found that Havard's counsels' actions were not ineffective and that the trial court did not abuse its discretion by denying Havard's motion for an independent evaluation. *Id.*
>
> Subsequently, in his original post-conviction-relief motion, Havard again raised the issue that his counsel were ineffective in failing to secure an expert witness to aid in research and the development of a defense strategy. The Court reconsidered the issue, in light of Dr. Lauridson's affidavit. Havard also submitted the affidavit of an attorney unrelated to Havard's case, who opined Havard's trial counsel were ineffective.
>
> The Court considered, for the sake of argument, that even if Havard's counsel performed deficiently, meeting the first prong under *Strickland,* Havard could not show prejudice. *Havard,* 988 So.2d at 331. Although the Court's reasoning is more fully explained in that opinion, suffice it to state here that this Court found Dr. Lauridson's affidavit and reports did not contain evidence that would create a reasonable probability that the outcome of Havard's trial would have been different. *Id.* at 333.
>
> In our discussion, we quoted Dr. Lauridson as follows:

[e]xperienced medical examiners commonly encounter dilated anal sphincter's [sic] during post-mortem 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 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.

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.

Id. at 332.

Havard pits the Court's aforementioned statement against Dr. Hayne's deposition testimony. He asserts that Dr. Hayne opined that a dilated anus is a recognized post-mortem finding and that such a finding has an increased incidence in children who have suffered a brain injury and significant loss of brain function. A review of the deposition transcript reveals that Dr. Hayne may have conceded the point to a "possibility" but that was as far as he was willing to go with his opinion.

Q: Do you commonly encounter dilated anal sphincters during a postmortem examination?

A: It can occur, but it's not as common as I think people think.

Q: Is it a recognized finding in the postmortem period.

A: It can be, yes.

Q: And do children who have died of brain injuries have an increased likelihood of having a dilated anus postmortem?

A: It's possible. I think you supplied me with one article from Orange Journal, '97, "American Journal of Forensic Medicine and Pathology." In that particular article, there were 65 cases of which only a handful were involving children of less than one year of age, and of those—

[objection made by the State]

Q: Go ahead, sir.

A: And of all those, only one had suffered a traumatic death. In that particular case, the anus was described as slit-like. So in that case, there was no dilation in a violent death that Dr. Lauridson is referring to in his opinion of 65 cases published in the Orange Journal.

Havard contends that Dr. Hayne's deposition testimony negates this Court's previous rejection of Dr. Lauridson's opinions concerning post-mortem anal dilation. Without conceding Havard's argument, even if true, the Court was addressing his claim that counsel were ineffective. The Court's statement about Chloe still being alive when the dilation of her anus was first observed was not the only basis for denying Havard's ineffective-assistance-of-counsel claim. The Court noted and summarized the testimony of the numerous experienced emergency-room doctors and nurses describing the baby's injuries as indicative of sexual penetration. The Court held that Havard could not show prejudice, even it were to assume, for the sake of argument, that Havard's counsel was deficient in failing to secure an independent pathologist.

Havard now asserts that his attorneys were ineffective because, after failing to secure an independent pathologist, they failed to have any pretrial interaction with Dr. Hayne. He relies on Dr. Hayne's deposition testimony that follows:

Q: Did you ever meet with Gus Sermos or Robert Clark, Mr. Havard's attorneys about this case?

A: I don't remember that, Counselor, but I—

[Objection made by the State]

Q: If requested by them, would you have met with the attorneys for Mr. Havard in this case?

A: I always honored those requests, either prosecution or defense.

Q: And would you have answered their questions in a meeting the same way you have today, if asked?

A: If they were asking the same questions, I would respond the same way.

This new line of questioning is not "newly discovered evidence" within the meaning of Mississippi Code Section 99–39–27(9). The newly discovered evidence must be "practically conclusive that, if it had been introduced at trial, it would have caused a different result in the conviction or sentence." Havard is trying to revitalize his previously raised ineffective-assistance-of-counsel claim by asserting that, if he had known this new information, he would have prevailed on his original post-conviction-relief proceedings.

> Havard now offers the deposition testimony of Dr. Hayne to show: a) that Dr. Hayne has an opinion in line with Dr. Lauridson's and b) that Havard's trial attorneys never interviewed Dr. Hayne prior to trial to learn of his opinion. In the original post-conviction-relief proceedings, Havard presented Dr. Lauridson's report and documentation in an attempt to show that his trial counsel were ineffective in their failure to secure an independent pathologist. This Court considered Dr. Lauridson's report and what it had to offer had it been introduced at trial. Havard's ineffective-assistance-of-counsel claim did not pass the standard set forth in Strickland *Havard,* 988 So.2d at 333. Dr. Hayne's deposition testimony is that he does not remember meeting with Havard's trial counsel. However, even assuming that Dr. Hayne was not interviewed by Havard's trial counsel, the remainder of his deposition testimony that Havard seeks to have this Court consider is duplicative of Dr. Lauridson's report, which was considered and rejected in the original post-conviction proceeding. Furthermore, Havard offers no explanation as to why this information could not have been discovered prior to filing his original motion for post-conviction relief. This issue is procedurally barred. Notwithstanding the procedural bars, the issue is without merit.

Havard v. State, 86 So. 2d at 908-910.

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

The State begins by noting that Havard has abandoned the allegation regarding counsel's ineffectiveness in the failure to obtain DNA testing. Petitioner's habeas argument is devoid of any mention of this particular issue. When a claim is not addressed in the habeas brief it is waived. *Lookingbill v. Cockrell*, 293 F.2d 256, 264 (5th Cir. 2002). Moreover, with respect to the claim that defense counsel were ineffective for failing to secure an expert pathologist or failure to secure a lesser-included instruction, as noted by the Mississippi Supreme Court these issues were procedurally barred. Indeed, the failure to secure a lesser-included offense instruction was barred by the doctrine of red judicata. As these issues were procedurally defaulted, the also are incapable of being exhausted in state court.

Where federal habeas claims are technically exhausted because Petitioner allowed his state law remedies to lapse without presenting his claims to the state court, "there is no substantial difference between nonexhaustion and procedural default." *See Jones v. Jones*, 163 F. 3d 285, 296 (5th Cir. 1998); *see also Sones v. Hargett*, 61 F.3d 410, 416 (5th Cir. 1995); *Finley v. Johnson*, 243 F.3d 215, 220 (5th Cir. 2001) (If a petitioner fails to exhaust state remedies, but the court to which he would be required to return to meet the exhaustion requirement would now find the claim procedurally barred, then there has been a procedural default for purposes of federal habeas corpus relief). Petitioner's state remedies are unavailable; thus, this Court is barred from reviewing Petitioner's claims. *Sones v. Hargett*, *supra*. Accordingly, they cannot be considered by this Court.

Further, Petitioner cannot demonstrate the requisite cause or actual prejudice to overcome the procedural bars. In explaining the cause necessary for excusing a default, the Supreme Court instructed that "there must be something *external* to the petitioner, something that cannot fairly be attributed to him." *Coleman*, 501 U.S. at 753 (emphasis in original). Examples of objective factors which have been found to constitute *cause* to excuse a procedural default include "interference by officials" and "a showing that the factual or legal basis for a claim was not reasonably available to [petitioner]." *McCleskey v. Zant*, 499 U.S. 467 (1991). Respondents recognize that attorney error can constitute cause to overstep the bar when such error rises to the level of the denial of effective assistance of counsel. *See Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645 (1986). In addressing cause for a procedural default that may be based in attorney error, the United States Supreme Court has stated as follows:

> We think, then, that the question of cause for a procedural default does not turn on whether counsel erred or on the kind of error counsel may have made. So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington*, *supra*, we

> discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default.

Murray v. Carrier, 477 U.S. at 488. In the instant case, the state court properly held that counsel's actions did not rise to the level of *Strickland* error; indeed, the state court held there was no ineffectiveness. Because Petitioner fails to establish cause, Respondents submit there is no need to consider whether there was actual prejudice to Petitioner. *Sahir v. Collins*, 956 F.2d 115 (5th Cir. 1992).

Nor does Petitioner's claim merit of a finding of a fundamental miscarriage of justice. The "fundamental miscarriage of justice" exception is even more circumscribed than the cause and prejudice exception and is confined to cases of actual innocence, "where the petitioner shows, as a factual matter, that he did not commit the crime of conviction." *Fairman*, 188 F.3d at 644 (citing *Ward v. Cain*, 53 F.3d 106, 108 (5th Cir. 1995)). To establish the requisite probability that he was actually innocent, the petitioner must support his allegation with new, reliable evidence that was not presented at trial and must show that it was "more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id.* As discussed above, Petitioner fails to produce any new evidence, much less any new reliable evidence, to establish that a miscarriage of justice will result if his claim in Ground One of the instant petition is not considered on the merits. Accordingly, this Court is precluded from considering Havard's claim.

As to the allegation that the Mississippi Supreme Court erred in rejecting Petitioner's *Strickland* argument, the court's analysis is not contrary to clearly established law as announced by the U.S. Supreme Court, not was that analysis unreasonable as applied to the facts of this case. Looking closely at Petitioner's three state court challenges, it appears Petitioner has built his *Strickland* claim backwards. Starting with the prejudice prong, Petitioner argues that because

it is a possibility Britt's rectal injury was caused by something other than a sexual battery, the jury should not have been allowed to find Havard guilty. Petitioner then takes this alleged "possibility prejudice" (essentially a challenge to the sufficiency of the evidence in supporting a finding of the underlying sexual battery), and uses it to presume *Strickland* deficiency: arguing not just that counsel was deficient for not bringing the possibility of Havard's innocence to light, but that counsel was deficient for not securing an acquittal based on that possibility.

Both Petitioner's *Strickland* claim and his subtle sufficiency of the evidence claim are substantively without merit. Petitioner's challenge to the weight of the evidence is not an issue within the purview of a federal habeas court. *See Young v. Kemp*, 760 F.2d 1097, 1105 (11th Cir. 1985)("A federal habeas court has no power to grant habeas corpus relief because it finds that the state conviction is against the 'weight' of the evidence…"). Further, even if the matter were appropriate for habeas review, the state appellate court reviewed the issue in great detail and found the verdict was not contrary to the weight of the evidence.

Respondent alternatively submits that such a determination regarding the weight of the evidence should be entitled to the same deference afforded a state appellate court's finding of the sufficiency of the evidence. *Cf. Parker v. Procunier*, 763 F.2d 665, 666 (5th Cir.), *cert. denied* 474 U.S. 855 (1985); *Gibson v. Collins*, 947 F.2d 780 (5th Cir. 1991); *Callins v. Collins*, 998 F.2d 269, 276 (5th Cir. 1993) ("where state appellate court has conducted a thorough review of the evidence… its determination is entitled to great deference."). Petitioner has presented nothing in his habeas petition to overcome the deference afforded to the findings of fact made by the state appellate court (*see* 28 U.S.C. § 2254(e)(1)). Furthermore, Petitioner has failed to prove that the state court decision was an unreasonable application of law to the facts. *See Williams v.*

Taylor, *supra*. Accordingly, Respondents submit Havard is not entitled to relief based on any claim (direct or implied) of the sufficiency of the evidence.

Insufficiency of the evidence can constitute a claim for habeas relief only if the evidence, when viewed in the light most favorable to the State is such that no reasonable fact finder "could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *see also Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001); *Dupuy v. Cain*, 201 F.3d 582, 589 (5th Cir. 2000). This standard of review "preserves the integrity of the trier of fact as the weigher of the evidence." *Bujol v. Cain*, 713 F.2d 112, 115 (5th Cir. 1983). The *Jackson* standard allows the trier of fact to find the evidence sufficient to support a conviction, even if "the facts also support one or more reasonable hypotheses consistent with the defendant's claim of innocence." *Gilley v. Collins*, 968 F.2d 465, 468 (5th Cir. 1992).

This determination of the sufficiency of the evidence by the state appellate court is entitled to great deference. *Parker v. Procunier*, 763 F.2d 665, 666 (5th Cir.), *cert. denied* 474 U.S. 855 (1985); *Gibson v. Collins*, 947 F.2d 780 (5th Cir. 1991); *see also Callins v. Collins*, 998 F.2d 269 (5th Cir. 1993) ("where state appellate court has conducted a thorough review of the evidence… its determination is entitled to great deference."). Petitioner has presented nothing in his habeas petition to overcome the deference afforded to the state appellate court's decision. Furthermore, Petitioner has failed to prove that the state court's decision was an unreasonable application of law to the facts. *See Williams v. Taylor*, *supra*. To the contrary, Petitioner's claims are contrary to the record.

The *Jackson* standard allows the trier of fact to find the evidence sufficient to support a conviction, even if "the facts also support one or more reasonable hypotheses consistent with the

defendant's claim of innocence." *Gilley v. Collins*, 968 F.2d 465, 468 (5th Cir. 1992). Recently in United States v. *Vargas-Ocampo*,711 F.3d 508, 511 (5th Cir. 2013), the Fifth Circuit reiterated that the "Supreme Court has never departed from the *Jackson* standard, which preserves the fact-finder's role as weigher of the evidence." This standard "'gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *Vargas,* 711 F.3d at 511 (quoting *Jackson, supra*). In *Vargas, supra,* the Fifth Circuit explained that "'the only question under *Jackson* is whether that finding [of guilt] was so insupportable as to fall below the threshold of bare rationality.'" *Id.* at 512 (citing *Coleman v. Johnson*, 132 S. Ct. 2060, 2065 (2012)).

As noted above, Petitioner bases his claim of ineffective assistance of counsel in a separate, indirect claim that the evidence was insufficient to support a finding of the underlying felony. The state court found Petitioner's *Strickland* claim (all three of them, each claiming to add "more and more" evidence to support them), as well as Petitioner's sufficiency claims, to be without merit. This determination of the sufficiency of the evidence by the state appellate court is entitled to great deference. *Parker v. Procunier*, 763 F.2d 665, 666 (5th Cir.), *cert. denied* 474 U.S. 855 (1985); *Gibson v. Collins*, 947 F.2d 780 (5th Cir. 1991); *see also Callins v. Collins*, 998 F.2d 269 (5th Cir. 1993). Havard has presented nothing in his habeas petition to overcome the deference afforded to the state appellate court's decision. Furthermore, Havard has failed to prove that the state court decision was an unreasonable application of law to the facts. *See Williams v. Taylor, supra*.

To merit habeas corpus relief on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-prong test set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984) by demonstrating both constitutionally deficient performance by counsel and

actual prejudice as a result of such ineffective assistance. *See also Motley v. Collins*, 18 F.3d 1223, 1226 (5th Cir. 1994) (summarizing the *Strickland* standard of review). A petitioner's failure to establish both prongs of the *Strickland* test warrants rejection of his claim. *Moawad v. Anderson*, 143 F.3d 942, 946 (5th Cir. 1998); *Bates v. Blackburn*, 805 F.2d 569, 578 (5th Cir. 1986) (overruled on other grounds). The test in *Strickland v. Washington* is applied to appellate counsel as well as trial counsel. *Henderson v. Quarterman*, 460 F.3d 654, 665 (5th Cir. 2006).

Under the deficiency prong of the test, the petitioner must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687. Counsel's performance is considered deficient if "it falls below an objective standard of reasonableness" as measured by professional norms. *Strickland*, 466 U.S. at 688. A determination must be made of whether there is a gap between what counsel actually did and what a reasonable attorney would have done under the circumstances. *Neal v. Puckett*, 239 F.3d 683, 687 (5th Cir. 2001). In other words, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (citation omitted).

Judicial scrutiny of counsel's performance is highly deferential and must be considered in light of the services rendered at the time, rather than by a distorted view of 20/20 hindsight. *Lavernia v. Lynaugh*, 845 F.2d 493, 498 (5th Cir. 1988). "Our scrutiny of counsel's performance is 'highly deferential' and we must make every effort 'to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct of the counsel's perspective at the time.'" *Motley v. Collins*, 18 F.3d 1223, 1226 (5th Cir. 1994). Counsel's services are not evaluated in a vacuum, and all circumstances are considered in determining whether the performance was reasonable under prevailing professional standards.

Lavernia, 845 F.2d at 498. Finally, there is a strong presumption that counsel has exercised reasonable professional judgment. *Strickland*, 466 U.S. at 689; *Martin v. McCotter*, 796 F.2d 813, 187 (5th Cir. 1986).

To prove prejudice, Petitioner must demonstrate that the result of the proceedings would have been different or that counsel's performance rendered the result of the proceeding fundamentally unfair or unreliable. *Vuong v. Scott*, 62 F.3d 673, 685 (5th Cir.), *cert. denied*, 116 S.Ct. 557 (1995); *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993); *Sharp v. Johnson*, 107 F.3d 282, 286 n.9 (5th Cir. 1997). To meet the prejudice prong, Petitioner must affirmatively prove and not merely allege prejudice. *Bonvillain v. Blackburn*, 780 F.2d 1248, 1253 (5th Cir.), *cert. denied*, 476 U.S. 1143 (1986). There is no constitutional entitlement to error free representation. *Washington v. Watkins*, 655 F.2d 1346, 1367 (5th Cir. 1981), *cert. denied*, 466 U.S. 949 (1982).

The United States Supreme Court recently explained that, where the merits of an ineffectiveness claim have been rejected by the state – as in this case – the "pivotal question" in a Section 2254 proceeding "is whether the state court's application of the *Strickland* standard was unreasonable" and that this inquiry "is different from asking whether defense counsel's performance fell below *Strickland*'s standard." *Harrington v. Richter*, 131 S.Ct 770, 178 L.Ed.2d 624 (2011) (citations omitted). Stated differently, a "state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself" since the standards created by *Strickland* and Section 2254(d) are both highly deferential. *Id.; Premo v. Moore*, 131 S.Ct. 733, 178 L.Ed.2d 649 (2011).

Under the AEDPA, the question before this Court in analyzing the claim of ineffective assistance of counsel is not whether the state court's determination was incorrect but whether it was unreasonable - "a substantially higher threshold." *Knowles v. Mirzayance*, 129 S.Ct. 1411,

1420 (2009)(citing *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007)). The Court has referred to this as a "doubly deferential" process. *Knowles v. Mirzayance*, 556 U.S. 111, 112, 129 S.Ct. 1411, 1413, 173 L.Ed.2d 251 (2009) (citation omitted). Federal courts are thus tasked with taking "a 'highly deferential' look at counsel's performance [under *Strickland*]... through the 'deferential lens of § 2254(d). . . ." *Cullen v. Pinholster*, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), citing *Mirzayance*, 556 U.S. at 121, n. 2, 129 S.Ct. at 1419, n. 2. Accordingly, the question to be asked "is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington*,131 S.Ct at 778; *Premo*, 131 S.Ct. at 740. A litigant "must demonstrate that it was necessarily unreasonable for the [state] Supreme Court" to rule as it did. *Cullen v. Pinholster*, 131 S.Ct. at 1403.

The burden is on the habeas petitioner to overcome any reasonable argument supporting the state court decision whether articulated by the state courts or not. *Harrington*, 131 S.Ct at 784-85. This is so because Section 2254 actions are not intended as "a substitute for ordinary error correction through appeal" but as a "guard against extreme malfunctions in the state criminal justice systems…" *Id.* at 786 (citation omitted). Further, "because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Id.* (citation omitted). Respondents submit that the state court's decision finding no merit to Havard's claim of ineffective assistance of counsel was not an unreasonable application of *Strickland, supra*.

Petitioner argues that trial counsel were ineffective for failing to sufficiently argue against the underlying felony of sexual battery. The Mississippi Supreme Court rejected this issue on direct appeal and in Petitioner's two post-conviction proceedings. Each time, the state court noted that 1) Dr. Lauridson's affidavit testimony shows only that there is a "possibility"

that Britt was not sexually battered; 2) Dr. Hayne testified at trial that he could not conclude Britt was sexually battered; and 3) the remaining evidence presented by the State at trial, including testimony from numerous medical personnel, Dr. Hayne's additional testimony, and testimony from Havard himself, were sufficient to support a finding of sexual battery.[1]

When measured against the objective standard of reasonable, professional competence, trial counsel's actions were effective and did not violate the precepts of *Strickland*. Defense counsel had access to Dr. Hayne, the pathologist who conducted the autopsy. Dr. Hayne was an independent expert, testifying on behalf of neither the State nor the defense. After examining all the evidence, and after thorough direct and cross examination, it was Dr. Hayne's opinion that Chloe Britt's rectum had been penetrated by an object. Where Petitioner's argument failed at trial, and fails herein, is in the lack of showing the need for a second pathologist to offer his opinion that, he too, could not conclude Britt was sexually battered. This is especially the case in that Dr. Lauridson never examined the victim.

In determining whether the trial court should have granted Petitioner's request for an expert, the Mississippi Supreme Court analyzed *Ake v. Oklahoma*, 470 U.S. 68 (1985). Pursuant to *Ake*, 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 receive funds to hire his own. The concern in *Ake* was that the defendant be provided "access" to experts. *Ake*, *id*. at 83. Petitioner has not once asserted he was refused such access. He only asserts he was refused access to a particular expert—this is, constitutionally, a non-argument.

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[1] "It bears repeating that the test for federal habeas purposes is *not* whether [the petitioner made the showing required under *Strickland*]. Instead, the test is whether the state court's decision– that [the petitioner] did not make the *Strickland*-showing– was contrary to, or an unreasonable application of, the standards, provided by the clearly established federal law (*Strickland*), for succeeding on his [ineffective assistance of counsel] claim." *Busby v. Dretke*, 359 F.3d 708, 717 (5th Cir. 2004).

The trial 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 parties, and he was not prevented from testifying in favor of Mr. Havard, should the evidence support such testimony (which it did not). At all times Dr. Hayne testified only on behalf of the evidence—not the parties. It cannot be said that there was any error of the trial court, or any deficiency on the part of defense counsel in failing to secure an additional expert.

The Mississippi Supreme Court fully considered the affidavits filed by Dr. Lauridson during Petitioner's post-conviction review. The court found nothing in Dr. Lauridson's findings to attack the credibility of the trial court's ruling. A review of those reports showed the information to be mostly cumulative to information presented by witnesses at trial. Such information included the fact that no semen had been found in Chloe's rectum: that fact was established by the State's DNA expert on direct examination during trial. R. 535. Neither Dr. Lauridson nor Dr. Hayne detected rectal tearing in Chloe Britt.

Moreover, those reports did not suggest a reasonable probability that the presentation of Dr. Lauridson would have resulted in a different outcome at trial. Dr. Lauridson stated, for example, that medical examiners commonly encounter dilated anal sphincters during postmortem exams. However, Dr. Lauridson provided no explanation as to how doctors and nurses in the emergency room testified that Britt's anal area was "gaping" while she was still alive and being treated in the emergency room.

Further, Dr. Lauridson opined that the injury to Britt's anal area—described by medical personnel as being gaping and oozing, and opened to the size of a quarter—was caused by the insertion of an infant thermometer. Apart from the implausibility of the argument that a small thermometer could have caused a gaping wound an inch in diameter, Dr. Lauridson also failed to

address the testimony that medical personnel discovered the injury to Britt's anal area when they first attempted to take Britt's temperature rectally. Dr. Lauridson offered no opinion as to how Britt's injuries could have been caused by a thermometer, when the injury was discovered prior to its attempted use.

Dr. Lauridson attempted to couch his opinions in contradiction to those of Dr. Hayne. However, Dr. Lauridson offered no explanation as to why his opinions also contradicted the sworn testimony of the emergency room doctors and nurses who observed Britt that night. Angel Godbold, a registered nurse of eleven years (with eight years of emergency room experience), described the trauma to Britt's anal area as being so graphic that she later had to seek counseling. R. 367, 379. Patricia Murphy, a registered nurse of nearly thirty years (twenty in the emergency room), opined that the injuries were the result of "the worst sexual trauma she had ever seen." R. 386, 393. Dr. Laurie Patterson, the emergency room physician, also offered her medical opinion that Britt's anal area had been penetrated. R. 402, 407. Dr. Ayesha Dar, Britt's pediatrician, gave a firsthand description of Britt's injuries, including her medical opinion that a foreign object had been forcibly inserted into Britt's rectum. R. 412, 418.

The Mississippi Supreme Court did not violate the laws of the United States Supreme Court in determining Dr. Lauridson's testimony to be vague, without an evidentiary predicate and conclusory (such that trial counsel was *Strickland* deficient). The state court properly held that Dr. Lauridson did not attack the competence of the "clinical observers" in their detection, evaluation and interpretation of the injuries found to have been inflicted upon Chloe Britt (such that trial counsel was *Strickland* deficient). The state court also correctly held that Dr. Hayne's affidavit and deposition testimony was not a contradiction of his trial testimony (such that trial counsel was *Strickland* deficient). Finally, even during Petitioner's successive PCR, the state

court noted that this appellate battle over the question of when it is possible for post-mortem anal dilation to occur (and when it might have occurred in Chloe Britt) disregarded the question of whether the dilation could have been caused by sexual battery—something the state court held was sufficiently proven by the evidence at trial, and was not sufficiently disproven in the ten years following that trial, such that the jury reached its verdict in error.

Taking all post-trial evidence into consideration, the state court was correct in finding trial counsel to have rendered effective assistance. There is no reasonable probability that a jury—after hearing the testimony of Dr. Hayne, the testimony of doctors and nurses who treated Chloe Britt after she was injured, and the testimony of Havard himself that his fingers may have "slipped" inside Chloe Britt's rectum at some point that night—would have placed credence in the testimony of Dr. Lauridson, who was neither present nor ever examined the victim herself. There is no reasonable probability that Dr. Lauridson's unsworn reports, or Dr. Hayne's deposition testimony (which was consistent with his trial testimony), would have resulted in Petitioner being found not guilty of capital murder. Thus, Petitioner fails to demonstrate resulting prejudice to sustain a claim of ineffective assistance of counsel. The Mississippi Supreme Court rendered a decision that was not contrary to nor an unreasonable application of clearly established law as announced by the U.S. Supreme Court; and the court did not unreasonably apply that law to the facts of this case. Havard is entitled to no relief on this claim.

Petitioner also argues the state court was unreasonable in not taking into account the affidavit offered by attorney Ross Parker Simmons. Mr. Simmons, who has no involvement in this case whatsoever, opined that Havard's counsel rendered ineffective assistance. In *Johnson v. Quarterman*, 306 Fed.Appx. 116, 128-29 (5th Cir. 2009), the Fifth Circuit found disfavor with attorney affidavits regarding claims of ineffective assistance of counsel:

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

At to Havard's claim that the state court erred in holding defense counsel was not ineffective regarding the failure to obtain a lesser offense instruction, again, the court's analysis was not contrary to established law as announced by the U.S. Supreme Court nor was it unreasonable as applied to the case of this case. The court properly found that 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 Havard claimed Britt's death was accidental. If Petitioner's version of the facts was to be believed, the incident did not rise to the level of murder or manslaughter. Havard's "accident" defense contained no felonious or premeditated intent to kill Britt; it contained no evidence that Havard killed Britt in a provoked heat of passion. Even now, Petitioner fails to present evidentiary support for a lesser offense instruction.

Counsel cannot be deficient for failing to request an instruction unsupported by the evidence and contrary to the valid theory of the defense. "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)). The court rightfully held counsel's decision not to request such instruction was proper.

Moreover, by limiting the State's options to capital murder or nothing, trial counsel also limited the jury's alternatives with respect to finding Petitioner guilty. Without a lesser offense instruction, had the jury failed to find the underlying felony, Havard would have been acquitted, instead of being sentenced to a lesser crime. 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. If the jury had believed Havard's accidental defense, it would have simply acquitted him; factually, it would have been unable to find him guilty of any lesser included offense. Use of such instruction ran the high risk of petitioner being found guilty for a crime which, legally, he could not have been found guilty.

Lastly, Havard now claims in his habeas memorandum, for the first time, that defense counsel was ineffective for failing to object to the testimony of the medical personnel regarding Britt's injuries. This new argument has never before been fairly presented to the MSSC for consideration and is therefore unexhausted. *See Ruiz v. Quarterman*, 460 F.2d 638 (5th Cir. 2006). Petitioner failed to present this particular claim of ineffectiveness to the Mississippi Supreme Court. Because the claim was not fairly presented to the state court, it is unexhausted and is incapable of being exhausted. Further, Petitioner has made no cognizable showing of

either cause or actual prejudice; nor has he shown how this issue resulted in a fundamental miscarriage of justice, such that he can overcome the controlling procedural bar.

For all of the reasons set forth above, there is no *Strickland* error by trial counsel and therefore no error by the MSSC in finding that Havard was not the victim of ineffective assistance. Havard's allegations are barred in part as well as without substantive merit. Havard is not entitled to relief on this claim.

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

On direct appeal Petitioner took issue with a statement made by the prosecution during closing arguments in 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.

R. 626.

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:

> 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 the merits.
>
> It has long been the rule that defense counsel is entitled to broad latitude in closing arguments 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 prosecutor's 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 v. State, 928 So. 2d at 791.

In his post-conviction proceedings Havard made a nearly identical argument regarding the prosecutor's statement. The Mississippi Supreme Court again held the issue to be procedurally barred:

> 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 this issue under a claim of ineffectiveness of counsel for failing to object. The Court found the issue to be barred but, nonetheless, discussed the issue on the merits […] Havard has not demonstrated a novel claim of 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); Gillard v. State, 446 So. 2d 590 (Miss. 1984).

Havard v. State, 988 So. 2d at 342.

In his habeas petition Havard tweaked his claim, now asserting, 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. This new argument by Petitioner has never before been fairly presented to the state court below from consideration. Therefore, it is unexhausted. Moreover,

any argument Petitioner makes with singular respect to the statement that Havard perhaps "got carried away" is procedurally barred. This issue as a whole is improperly before this Court.

Petitioner's current claim of prosecutorial misconduct revolves around what he describes as repeated statements by the prosecution made for the purpose of creating bias in the jury. Because Petitioner's claim does not revolve around the specific statement complained of in the state court below, his habeas claim was not fairly presented and remains unexhausted. In *Ruiz v. Quarterman*, 460 F.3d 638, 642-43 (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 on 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.

This issue was not presented to the Mississippi Supreme Court, in the context of alleging repeated misconduct by the State during closing arguments of the guilt phase. Thus, this expanded claim of prosecutorial misconduct has not been fairly presented to the state court and remains unexhausted. Further, such unexhausted claim is now incapable of being exhausted in the state courts and must be held procedurally barred unless Petitioner can show cause and prejudice for waiting eleven years to finally raise his claim before a sitting court. *See Gray v. Netherland*, 518 U.S. 152 (1996); *Teague v. Lane*, 489 U.S. 288 (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 Mississippi Code Annotated Sections 99-39-5(2) and 99-39-27(9), Petitioner cannot exhaust this claim, as it would be held barred from consideration in a state collateral proceeding. Therefore, this Court, without a showing of cause and action prejudice, must hold Petitioner's claim to be procedurally barred on federal habeas review. *See Castille v. Peoples*, 489 U.S. 346, 351 (1989). Petitioner has made no cognizable allegation of either cause or actual prejudice in an attempt to overcome the well-establish procedural hurdles he faces; and, respectfully, no such cause or prejudice exists.

Additionally, this issue is barred from consideration by the adequate and independent state law ground that Petitioner lodged no contemporaneous objection at trial to the complained of language. Regarding the lack of a contemporaneous objection to issues rising 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 purpose of federal habeas review. *Bledsue v. Johnson*, 188 F.3d 250, 254 (5th Cir. 1999). The Fifth Circuit has held 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 bears the burden of arguing state fails to strictly or regularly apply procedural bars to similar claims). The Mississippi Supreme Court's alternative discussion of the merits of Petitioner's claim does not vitiate the imposed bar. *See Harris v. Reed*, 489 U.S. 255, 264, n.10 (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.")

Petitioner makes no valid claim of cause and prejudice to overcome the procedural bar on this issue, nor does he demonstrate that counsel's failure to contemporaneously object (when counsel was not *Strickland* deficient) constituted a fundamental miscarriage of justice. Without waiving the governing procedural bar, Petitioner's claim is without substantive merit, as the Mississippi Supreme Court's decision was not contrary to or an unreasonable application of clearly established federal law, such as would require the granting of habeas relief. Therefore, Petitioner's claim is due to be dismissed.

Regarding the specific statement Petitioner argued (in state court) constituted prosecutorial misconduct, on habeas review Havard includes that same statement in his laundry list of alleged misconduct. A review of the trial record reveals, however, that the State's closing argument constituted, simply, a request for the jury to focus on the evidence. The State's comments were not misstatements of the law, they were not speculative, and that did not suggest Havard had committed previous sexual assaults on Chloe Britt or on anyone else. The State's comments were in direct response to closing argument of defense counsel and, taken both by themselves and in the context of the trial, were proper. Finally the jury was instructed on the statutory law it was to apply to determining Havard's fate; it also was amply instructed that the State's comments were not to be considered as evidence.

During closing argument, defense counsel repeatedly argued the prosecution had failed to present sufficient evidence to support its burden of proving Havard guilty beyond a reasonable doubt. In making this argument, defense counsel stressed that the State had no confession, no eyewitnesses and no physical evidence of sexual battery. The State had not hypothesized what object could have caused the sexual injury to Chloe Britt, and it had failed to test Havard himself for 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 Havard panicked and shook Chloe, setting off an accidental chain of events that resulted in her death.

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

> 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 prosecution 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 Chloe died.

In line with that argument, the State continued by explaining to the jury 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. It never mentioned previous sexual abuse or battery. It never even mentioned Havard by name in noting that it did not know if anything had ever happened to Chloe before the night she died. The State used a 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 Britt's death. What the State did know, what it told the jury, was that Havard intentionally harmed Britt the night of her murder. And after making this affirmation, the State set forth facts to prove it.

Not only was this comment not in error, assuming this Court finds otherwise, the State also notes—as the Mississippi Supreme Court also did—that this one sentence was so fleeting, so unimportant, as to be prejudicial in light of the remaining evidence of the case. There had been no suggestion at trial that Havard had previously injured or abused Chloe; therefore, any alleged speculation by the State surely fell flat in that there was no evidence to support it. Moreover, the court instructed the jury that 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." Further, the jury was instructed to "disregard" any such statements made by counsel, if said statement "has no basis in the evidence." Finally, the jury was instructed that they were to base their verdict "on the

evidence and not upon speculation, guesswork or conjecture." In light of these facts, it cannot be said that the prosecution's statement resulted in prejudice to Havard.

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, the State properly comported with the law. In proper response to Havard's own closing argument, the State simply cautioned the jury not to believe Havard's theory that anything could have happened. In doing so, the State noted that such theory could not be true for the night of the murder—as, on that night, evidence against Havard was in abundance. This was an acceptable line of argument.

Therefore, even if Petitioner's claim as a whole was not unexhausted; even if Petitioner's challenge to the single statement made during closing argument was not procedurally barred, such claims are unsubstantiated by the record and, alternatively, without legal merit. Havard received a fair trial; as such, aside from the procedural bars, Petitioner's claim is not properly before this Court and is due to be dismissed.

Finally, Havard's alternative argument, that trial counsel were ineffective for failing to object to the complained of statements at closing is likewise barred from consideration in these habeas proceedings. Petitioner failed to fairly present this argument to the state court below; therefore, it too remains unexhausted. Respondents note Havard did mention the word ineffectiveness in his appeal brief. Reducing an argument of *Strickland* magnitude to a reference in a footnote is not a fair presentation of a claim of ineffective assistance of counsel for failing to object to the statement made by the prosecution during closing. It is not a presentation at all of a claim of ineffective assistance for failing to object to the prosecution's closing argument as a whole. Pursuant to *Ruiz*, 460 F.3d 638, 642-43, this issue is barred from consideration.

In order for this court to consider a claim is must have been fairly presented to the state court. It was not. Moreover, Petitioner's unexhausted claim is incapable of being exhausted in state courts and must be held procedurally barred unless Petitioner can show cause and actual prejudice resulting from his failure to raise the issue in state court. *See Gray*, 518 U.S. 152; *Teague*, 489 U.S. 288; *Castille*, 489 U.S. at 351. Under Mississippi Code Annotated Sections 99-39-5(2) and 99-39-27(9), Petitioner cannot now exhaust this claim as it would be held barred from consideration in a state collateral proceeding. As Petitioner has made no cognizable allegation of cause or prejudice in an attempt to overcome the procedural bars, Petitioner's claim of ineffective assistance of counsel must be barred from consideration by this Court.

The allegations set forth in Claim II are unexhausted, procedurally barred from consideration on adequate and independent state law grounds, and have been properly found without Constitutional merit by the Mississippi Supreme Court. Petitioner's request for habeas relief, therefore, should be denied.

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

On direct appeal, Havard argued that during the sentencing phase, Chloe Britt's grandmother inappropriately incited the jury by asking for "a life for a life." The Mississippi Supreme Court rejected such argument, holding as follows:

> 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, ***a***nd 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.
>
> 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.

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.

> 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 v. State, 928 So. 2d at 791-93.

In his post-conviction petition Havard reiterated this argument. The state court again rejected such allegation:

> 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.
>
> 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, not 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 v. State, 988 So. 2d 342-43.

On habeas review, Havard continues to reallege the same argument: to wit, that the testimony of Chloe Britt's grandmother was reversible error. Havard now also claims trial counsel were ineffective. This is unexhausted. Havard has never brought this particular *Strickland* claim to the state court for review. 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. Havard's failure to object a trial barred him from

raising such argument at the state court level; this is an adequate and independent state law ground which bars this Court from reviewing Petitioner's claim in the habeas arena.

Notwithstanding the lack of a contemporaneous object at trial, where the State court "clearly and expressly basis 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 Fifth Circuit has held 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). The state court's alternate discussion of the merits of Petitioner's claim does not vitiate the imposed bar. *See Harris*, 489 U.S. 255; *Fisher*, 169 F.3d 295.

Similar to the issues raised in Claim II, Petitioner alternatively alleges trial counsel were ineffective for not raising an objection to Watson's testimony. Such argument is likewise barred from consideration as Petitioner failed to fairly present it for consideration to the Mississippi Supreme Court; thus, the argument remains unexhausted on the state court level. Havard did reference the possibility of an ineffectiveness claim in a footnote of his direct appeal brief. The Mississippi Supreme Court acknowledged the footnote and found it to be outside of the argument actually presented on direct appeal. Such finding supports Respondents' position that Petitioner failed to fairly present an ineffective assistance of counsel claim for failing to object to Watson's testimony. Therefore, pursuant to *Ruiz*, this issue is barred from consideration by this Court. *Ruiz*, 460 F.3d at 642-43. Moreover, this unexhausted claim is now incapable of being reviewed in the state courts and must be held procedurally barred unless Petitioner can show cause and actual prejudice. *See* Miss. Code Ann. 99-39-5(2) and 99-39-27(9).

Without a showing of cause and actual prejudice, this Court must hold Petitioner's claim of ineffective assistance of counsel procedurally barred from consideration on federal habeas review. *See Castille*, 489 U.S. at 351. Petitioner has made no cognizable allegation of either cause or actual prejudice in an attempt to overcome the procedural bars; therefore, this claim is due to be dismissed.

Alternatively, and without waiving any applicable bars, looking to any possible substantive merit to Petitioner's claim it is apparent the testimony of Lillian Watson was permissible. 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 sentences, and the evidence adduced in this case was illustrative of the harm caused by Payne's double murder.
>
> We are not 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 sentence 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 the 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, 501 U.S. at 808-810.

The Fifth Circuit has adopted the holding and 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, 480-481 (5th Cir. 2002) (noting that improper characterizations of the defendant by the victims and requests for the jury to sentence the victim to death—neither of which occurred in Corrothers's case—are the types of evidence considered inadmissible but, nonetheless, holding the error harmless).

The State acknowledges that victim impact testimony is not limitless in its admissibility. However, the comments of Lllian Watson amount, at most, to harmless error; accordingly, the Mississippi Supreme Court's finding is not in contradistinction to Payne. The facts in this case are similar to *U.S. v. Bernard*, in which the appellate court held that improper characterizations of the defendant and requests for the jury to sentence the defendant 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 killed the children, 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 witness told the defendants that they needed to be afraid because hell was a real place. *Id*.

The Fifth Circuit held that such statements constituted *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, Watson made one comment during 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 they would have based their decision to impose death entirely thereupon. The jury looked to all of the evidence presented. A six-month-old girl had been sexually abused by her mother's boyfriend. The medical staff deemed that abuse to be horrendous. She had been beaten, shaken back and forth, her retinas detached and her brain filled with blood. Havard, on the other hand, had no credible explanation for what happened. Furthermore, he tried to hide what he had done: when medical care was critical, Havard tried to drive away from the hospital; he failed to tell doctors what happened as they

were trying to ascertain the cause of Britt's injuries and formulate proper treatment. The jury sentenced Havard to death based on the facts, not on a single comment by a sentencing witness.

Moreover, just as in *Bernard*, the jury was instructed they were not to be influenced by "bias, sympathy or prejudice." (C.P. 166). They were separately instructed 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 Watson's testimony was unremarkable. Watson testified about her relationship with Britt; about being present for Britt's birth and bonding with her immediately; about her relationship with Britt's mother (Watson's daughter); about the actions she took to support Britt (including paying for daycare and babysitting, and letting Chloe and Rebecca Britt live with her); about how the months after Chloe's death affected her emotionally. R. 657-63. As such, even if this issue were not procedurally barred, in light of the facts of this case, the instructions to the jury, and Watson's cumulative testimony, this one statement was at most harmless; there was no error in the lower court's ruling on this issue.

The allegations set forth in Claim III are unexhausted, procedurally barred from consideration on adequate and independent state law grounds, and have been properly found without Constitutional merit by the Mississippi Supreme Court. Petitioner's request for habeas relief, therefore, should be denied.

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

On direct appeal, Havard argued trial counsel were ineffective for calling only two witnesses during the sentencing phase of his trial (his mother and grandmother). Havard asserted

that more witnesses would willingly have testified to the "chaotic life" Havard had experienced.

In rejecting Havard's claim, the Mississippi Supreme Court held as follows:

> 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.
>
> 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.
>
> 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.

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.*

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.

The State cites cases in response where no ineffective assistance of counsel existed despite not discovering all mitigating evidence. *See *795 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).

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).

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.

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.

> 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, **796* 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.
>
> For all of these reasons, we find this issue to be without merit.

Havard v. State, 928 So. 2d at 793-96.

Havard brought the issue forward once again in his petition for post-conviction relief. The essence of Havard's argument was the same as presented on direct appeal. The Mississippi Supreme Court once again rejected the claim, holding:

> 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.
>
> 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.*
>
> 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.

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.*

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.

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.

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."

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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 (citing Strickland, 466 U.S. at 687, 104 S.Ct. 2052. This issue is without merit.

Havard v. State, 988 So. 2d at 333-38.

Now on habeas review, Havard claims the state 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 if found in *Strickland v. Washington*, 466 U.S. 668 (1984). "The benchmark for judging any claim of ineffectiveness 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 rendered the result unreliable." *Id*. The first inquiry, whether counsel's performance was deficient, focuses on whether or not counsel's advice to Petitioner fell outside of "objective parameters of reasonableness." *Id*. at 678. The prejudice inquiry 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 "to eliminate the distorting effects of hindsight, the 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, the court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance: that is, Petitioner must overcome the presumption that, under the circumstances, counsel's actions might be sound trial strategy.

The facts of this case show that the Mississippi Supreme Court properly applied Strickland when determining that trial counsel's representation was effective. First, the failure to present a case in mitigation is not, per se, ineffective. Furthermore, when Petitioner makes no showing that additional witnesses would have produced a different outcome, Petitioner also fails to make even a prima facie case of ineffectiveness. *U.S. v. Green*, 882 F.2d 999, 1003 (5th Cir. 1989). Comparing the *Strickland* standard to the facts set forth in this case, the evidence demonstrated that counsel was not deficient, nor was Petitioner prejudiced by this nonexistent deficiency. As such, there was no error, and no claim for Petitioner to present on habeas review.

On direct appeal and post-conviction the state court analyzed the issue of counsel's effectiveness during mitigation and found counsel to have performed in a constitutionally acceptable manner. Havard's argument that the state court was constitutionally incorrect in its ruling is unsupportable. During mitigation, Petitioner's counsel called his mother, Cheryl Harrell and his grandmother, Ruby Havard. During direct examination of Harrell, counsel asked Harrell to describe her relationship with the Petitioner. Counsel asked Harrell about Petitioner's step-father, Gordon Harrell. Counsel asked Harrell about Petitioner's relationship with his biological father. Counsel also asked Harrell to tell the jury specifically why Petitioner should not be sentenced to death.

Using these open-ended questions, counsel elicited from Harrell that she and Petitioner had always been close; that Petitioner 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 in their relationship; that Petitioner visited Harrell every chance he got; that Petitioner had been born out of wedlock when Harrell was just a teenager; that Petitioner did not even meet his father until he was sixteen; that Petitioner's father had no place in his life and never supported him. Harrell also told the jury that Petitioner was a "kind, tender-loving person" who loved children. Harrell told the jury a story of how Petitioner came to the defense of his niece, a child afflicted with Down Syndrome, when others made fun of her. Harrell told the jury 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 a right to do so.

Trial counsel also called Petitioner's grandmother, Ruby Havard. As a result of counsel's open-ended questioning, Mrs. Havard spoke of how Petitioner had allowed Rebecca and Chloe Britt to move in with him. She spoke of how hard Petitioner worked at his job at the Carline Boat Line. Mrs. Havard spoke of the years Petitioner had lived with her and her husband (Petitioner's grandfather) when Petitioner 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 ten years ago and did not want to lose another.

This testimony, in itself, was sufficient mitigation to support the state court's finding that Havard's trial counsel was not ineffective pursuant to *Strickland*. Moreover, the affidavits produced by Petitioner on post-conviction were cumulative to the information that had already been presented. Most of them contained more damning evidence that praising. All of them were based on the same two-art theme: that trial counsel never contacted the affiant, and that affiant "would do anything" to help Petitioner.

An examination of these affidavits revealed: Marilyn Cox: Petitioner's aunt, saw bruises on Petitioner on time. Although she concluded Petitioner had been beaten, she never saw how Petitioner acquired the bruises. Marilyn's father (Petitioner's grandfather) had fought with his children and hit his wife on one 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; although 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 diatribe on Petitioner's negative qualities. For instance, after Petitioner came to live with him, William Havard bought Petitioner a truck so that he could get to work. Petitioner took the truck and quit the job. Petitioner caused problems, stayed out late, would not listen, fought with his grandparents, and did not like the idea of his grandfather telling him to do 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, forcing William to

ask neighbors to call the police. Petitioner lived in the trailer his grandfather 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, also attested that Petitioner had problems. Bradshaw stated that Petitioner's family did not attend his graduation at Camp Shelby; as a result 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 drugs and hung out with the wrong people.

Australia Bradshaw, another friend of Petitioner, noted that she and Petitioner had gone to church together as teenagers. 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 attested 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. Such statements are nothing more than conjecture; they do not even rise to the level of hearsay because Petitioner never told them of this abuse. Petitioner never witnessed his grandfather arguing with family members or his wife—indeed, the incident

described occurred before Havard was even born. Moreover, each of these affiants described Petitioner as a stubborn, sullen man, who would "say a lot of hurtful words" to his grandparents—the people who raised him—when they because upset over the fact that Havard used drugs, stayed out late, hung out with the wrong crowd and would not obey or listen to their rightful (and concerned) authority. Indeed, his temper was so volatile that his grandparents had to call the police several times; Petitioner also physically attempted to prevent his grandparents from making those calls.

The positive aspect of these affidavits consists of nothing more than statements that Petitioner was a good guy and good employee, who went to church when he was a teenager, loved children but didn't know his own biological father, and who apparently suffered the life-altering experience of not having family members attend a ceremony at Camp Shelby (forcing Petitioner to have lunch with friends to close they thought of Petitioner as their own son). This cumulative and often self-negative information does not rise to such a level of importance that Petitioner was able to show a reasonable probability that the presentation of such information would have resulted in a different outcome at sentencing. Petitioner sexually battered and beat a child to death; then he lied about it. The state court did not unreasonably apply the Strickland standard in finding Petitioner's ineffectiveness argument to be without merit.

In his post-conviction proceedings Petitioner also presented affidavits from his mother and grandmother, the same witnesses who testified at sentencing. Again, these affidavits were cumulative. Cheryl Harrell reiterated that Petitioner was a good person who loved his siblings and was good with kids. Harrell reiterated that Petitioner went to live with his grandparents when he was thirteen, after seeing violence in his school. Harrell reiterated that she just wanted to tell the jury how much she loved Petitioner and "how special he is to his family."

Harrell did volunteer some new information, which she 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 Harrell's own father wanted her to abort Petitioner. How any of this affected Petitioner himself is anyone's guess, as Harrell did not elaborate. Moreover, Petitioner's grandfather stated that Petitioner was like a son to him, Petitioner's other affiants belabored the fact that they care about Petitioner, and Harrell herself testified as trial as to how close she and Petitioner were. Obviously, after Petitioner was born, he was loved.

Notably missing from Harrell's affidavit and her trial testimony, is information concerning Petitioner's alleged abusive childhood. Indeed, although other affiants talk about alleged abuse by Petitioner's stepfather (even though none has ever actually seen it occur) Harrell herself makes no mention of any abuse. She did not mention it during trial, and she did not mention it in her affidavit. Harrell and Petitioner are the only two individuals vested with a firsthand knowledge of any alleged abuse; yet, neither one had volunteered any information to confirm it, even when afforded the opportunity at trial to do so.

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 on his stepfather. Ruby Havard attested in her affidavit that Petitioner was physically abused by his stepfather, who had a temper. Mrs. Havard never volunteered this information at trial. Even when trial counsel asked about Petitioner leaving his stepfather's home and come to live with her, Mrs. Havard simply stated, "He loved the schools. He always loved us." Moreover, at no time during trial or in her post-trial affidavit did Mrs. Havard state that she witnessed a single act of abuse or that Petitioner ever told her he had been abused.

Interestingly, Mrs. Havard's affidavit consists mostly of statements that would harm Petitioner, not help: that Petitioner did not get on well in high school; that he abused drugs; that when confronted by his grandfather about his drug use would "say ugly things like he wished he had never come to live with us"; that Petitioner 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 woman now present lessens the credibility of both. The women now appear to be in some sort of tug-of-war over which third party to place the blame for Petitioner's selfish criminal act. The result does nothing but weaken Petitioner's case.

There was no deficiency on trial counsel's part in choosing not to present cumulative information from persons who each "would do anything to help" Petitioner; affidavits which consist of unsubstantiated speculation and conjecture; affidavits which, in large part, focus on Petitioner's negative characteristics. That counsel chose not to present witnesses to testify to Petitioner's drug use, run-ins with the police, rebellious nature and other problems shows that counsel properly understood the meaning of the word "mitigation."

Moreover, these affidavits contain information that Petitioner and his mitigation witnesses were in the best position to know. At the point Petitioner, Harrell and Ruby Havard chose to withhold information from Petitioner's jury, the blame lay with Petitioner himself. It cannot be shifted simply because Petitioner and his witnesses chose not to inform the jury of the many alleged problems Petitioner suffered as a child. Petitioner and his witnesses were in the best position to know of any 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 rejecting evidence that was not disclosed or that would not have been helpful (or would have been harmful) in the pursuit of 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. As such, the Mississippi Supreme Court did not unreasonably apply federal law in holding there was no *Strickland* error.

Finally, Respondents address the affidavits presented by trial investigator Don Evans social worker Adrianne Kidd. Evans attested that he had interviewed a "potential" mitigation witness, who had two daughters Petitioner used to babysit. Evans stated that he gave this information to trial counsel; on post-conviction Petitioner faulted trial counsel for not using this witness. Kidd never interviewed Petitioner or any of his family or friends. Using nothing more than school records and notes from interviews Kidd herself did not conduct (and was not present for), Kidd 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*, 225 F.3d at 503-04. Ms. Kidd's affidavit consists of nothing more than undocumented, un-notarized claims drafted solely (and apparently in haste) for the purpose of securing Petitioner a new trial.

Trial counsel's presentation of mitigation evidence was sufficient. The Mississippi Supreme Court, considering the evidence presented at trial, as well as the collateral evidence Petitioner presented post-trial, was not incorrect in that finding. The state court's decision was not an unreasonable application of clearly established law as announced by the U.S. Supreme Court, not did the state court improperly apply the law to the facts of this case. Havard is entitled to no relief on this claim.

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

On direct appeal, Havard claimed that his counsel were ineffective during a short closing argument by not pointing out enough mitigation and conceding to aggravating factors. In rejecting this claim, the Mississippi Supreme Court held as follows:

> 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.
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> "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 v. State, 928 So. 2d at 796.

On post-conviction review the state court determined the issue had been sufficiently addressed on direct appeal; therefore, Havard's claim was held to be procedurally barred for post-conviction purposes:

> 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.
>
> 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."
>
> 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 v. State, 988 So. 2d at 342.

On habeas, Havard presents the same arguments as before in support of his claim that the Mississippi Supreme Court erred in finding that counsel were not ineffective in the presentation of closing argument. Looking at the facts presented to the court below, the Mississippi Supreme Court's decision was not contrary to or an unreasonable application of clearly established law as announced by the U.S. 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 should consider victim impact testimony, and gave only two reasons why the jury should vote for life. Petitioner also claims counsel asserted there were no mitigating factors. According to Havard, combined with the absence of mitigation presented, 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 alleged *Strickland* violations he claims occurred during closing argument. First, Havard claims counsel conceded an aggravating factor that had not been presented to the jury. During closing argument, 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.

It is unclear as to what part of the State's closing (presented by Mr. Rosenblatt) defense counsel was referring; although it is known the only aggravators the State mentioned were sexual battery and that the killing was heinous, atrocious or cruel. Regardless of what defense counsel was referring to, the fact that Chloe Britt died as a young age is not an aggravator. Moreover, that Britt died at a young age was undeniably documented. Thus, the fact that counsel referred to that death as an aggravator is harmless, in that the jury was never instructed on such nonexistent

aggravating circumstance. The jury was instructed with the aggravators of sexual battery and of the murder being heinous, atrocious or cruel. It could only find those aggravators. Therefore, any inadvertent use of the word "aggravator" in counsel's concession that Chloe's death was tragic (and occurred when she was young) would not result in *Strickland* prejudice.

Moreover, Havard's claim that the concession of the aggravator amounted to a concession of his eligibility for the death penalty is incorrect. Mississippi Code Annotated Section 1-3-4 states that, "the term 'capital murder,' when used in any statute shall denote criminal cases, offense and crimes punishable by death, or imprisonment for life in the state penitentiary." *See also* Miss. Code Ann. Section 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 of death. Assuming counsel had conceded an aggravator, such action would not have been a concession of Petitioner's death eligibility. Petitioner was death eligible from the moment he was indicted; counsel could not concede that which was already statutorily pronounced.

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, the Mississippi Supreme Court did not err in finding there was no *Strickland* error with respect to this allegation. Havard's habeas claim is without merit.

Havard also 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, as the state court properly found, counsel's actions were sufficient and Havard's

allegations a misstatement of 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 Havard 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 Havard 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 circumstances 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.

Petitioner's claim that counsel told the jury "he was not even going to try to fit the mitigation into the instructions from the Court" is, thus, taken out of context and a misstatement of the facts. Defense counsel, in making such statement, was reminding the jury of the testimony presented by all witnesses—both state and defense—during sentencing. Defense counsel concluded by empathizing with the jury, telling them he could not begin to know all the things going through their minds when they were considering "the circumstances that are in the instructions" (aggravating and mitigating). Trial counsel then stated that he would not "even try to fit it on that." This was not a concession of mitigating; 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. Defense counsel then took that connection and used it, immediately segueing into a reminder that the jury should 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 were aggravating circumstances and not a single mitigating circumstances. The jury was instructed they did not have to find mitigators in order to return a life sentence. The jury was instructed to consider mitigators as individual jurors, and that even if the other jurors failed to find such mitigator, if one juror believed it existed, it must be weighed in deliberations.

Finally, Petitioner takes issue with counsel's alleged concession to the jury that they should consider victim impact testimony. As the Mississippi Supreme Court properly found,

there was no *Strickland* error in counsel's statements. During closing argument, defense counsel stated as follows:

> [T]here 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 […]

Obviously, the jury is allowed to consider victim impact testimony, as they are also allowed to consider testimony from Havard's family. Trial counsel's comment was nothing more than an introduction to his plea for the jury to consider the mitigation in this case. Referencing Lillian Watson's testimony was nothing more than a compare or contrast line of argument: counsel was merely reminding the jury to consider Petitioner's witnesses, just as the State asked the jury to consider their own. In light of the mitigation evidence, argument and instructions secured by trial counsel, there was no Strickland deficiency. Moreover, Petitioner failed to present evidence to the state court that, as a result of any deficient conduct, Petitioner's sentence was the result of prejudice. As the state court's decision was not an unreasonable application of *Strickland* or any other controlling U.S. Supreme Court precedent, as the state court did not improperly apply the rule of *Strickland* or other controlling precedent to the facts of this case, Havard is entitled to no relief.

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

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 state court rejected Havard's claim:

> 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 v. State, 928 So. 2d at 799-800.

In his post-conviction petition, Havard again claimed the limiting instruction was too vague to pass constitutional muster. The Mississippi Supreme Court found the issue to have been sufficiently resolved on direct appeal and declined to discuss the matter further due to the procedural bar of *res judicata*:

> 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 alsoCrawford 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).
>
> 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 v. State, 988 So. 2d at 343.

Now in his habeas argument, Havard asserts that the Mississippi Supreme Court erred in holding the HAC instruction was constitutionally permissible. The decision of the U.S. Supreme

Court in *Bell v. Cone*, 543 U.S. 447 (2005) affirmatively settles the vagueness question raised by the Petitioner in this case. In *Bell*, the Sixth Circuit granted habeas relief on the basis that the "especially heinous" aggravator was vague and overbroad. Indeed, the instruction at issue was the very instruction found to be "constitutionally insufficient" in *Shell v. Mississippi*, 498 U.S. 1 (1990) (per curiam). Nevertheless, even though the instruction was vague, the U.S. Supreme Court reversed the Sixth Circuit's ruling, based on 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 as it relates to aggravating circumstances is pertinent to the discussion. The Supreme Court held:

> The law governing vagueness challenges to statutory aggravating circumstances was summarized aptly in *Walton, 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***852*** 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 ***454*** 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 death 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*, *supra*, at 653-654, 110 S.Ct. 3047; *Cartwright*, *supra*, 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).[FN6]

FN6. In *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), we held that the Sixth Amendment requires a jury, rather than a judge, to find the aggravating circumstance that renders a defendant death eligible. *Id.*, at 609, 122 S.Ct. 2428. Because *Ring* does not apply retroactively, *Schriro v. Summerlin*, 542 U.S. 348, 358, 124 S.Ct. 2519, 2526, 159 L.Ed.2d 442 (2004), this case does not present the question whether an appellate court may, consistently with Ring cure the finding of a vague aggravating circumstance by applying a narrower construction.

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 (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*, 497 U.S., 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).

Bell v. Cone, 543 U.S. at 452-56. The Mississippi Supreme Court is familiar with the law in this area as three of the cases involving vagueness challenges to the "especially heinous" aggravator originated in that court. *See Clemons v. Mississippi*, 494 U.S. 738 (1990); *Shell v. Mississippi*, 498 U.S. 1 (1990); *Stringer v. Black*, 503 U.S. 222 (1992).

However, the most important precedent to be gleaned from *Bell* is as follows:

> 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. 3046; *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).

Bell, id. at 457-58.

The second paragraph of the instruction approved by the Mississippi Supreme Court in the case sub judice includes the operative language "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." The U.S. Supreme Court has held this language, standing alone, would be sufficient to overcome a claim that the instruction on this aggravator is "contrary to" clearly established Supreme Court precedent. *Id*.

It is also informative to look at the language the U.S. Supreme Court found persuasive in indicating that a proper limiting construction had been applied by the Tennessee Supreme Court:

> 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, supra*, at 432, 100 S.Ct. 1759 (holding that "[t]he 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 toward 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 (Tenn.1982),**457* 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.

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*, 638 S.W.2d, 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, supra*, 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, supra*, at 367. 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).

Bell, id. at 456-59.

For all practical purposes the language the U.S. Supreme Court found persuasive as a properly limiting construction is almost identical to that found in the second sentence of paragraph two of the instruction in the case *sub judice*. Thus, 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. Havard is not entitled to habeas relief on this claim.

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

On direct appeal, Havard argued that the HAC aggravator subsumed the sexual battery aggravator and, therefore, the trial court had erred in allowing the aggravators to be considered by the jury. The Mississippi Supreme Court rejected such argument, holding as follows:

> 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.

> 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.
>
> 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 v. State, 928 So. 2d at 802-03.

Petitioner repeated his claim in his petition for post-conviction relief. The state court found the issued to have been sufficiently address on direct appeal, and barred it from further consideration:

> Havard's entire argument on this issue is restated, verbatim, as follows:
>
> 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.

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.

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.

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.

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 *345 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)."
>
> 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).
>
> 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 v. State, 988 So. 2d at 344-45.

Now in his habeas petition Havard abandons the earlier claims made to the court below and inserts a new argument, without support, that the aggravator was not sufficiently proven at trial. This argument has never been fairly presented to the court below; therefore, it is unexhausted. *See Ruiz*, 460 F.3d at 642-43. Petitioner, in state court, never questioned the sufficiency of evidence to support a finding of this aggravator. In order for this Court to consider a claim it must have been fairly presented to the state court. Petitioner's sufficiency claim is simply unexhausted. Moreover, such unexhausted claim is now incapable of being exhausted in state court and must be held to be procedurally barred by this Court. *See Gray*, 518 U.S. 151; *Teague*, 489 U.S. 288; *Bagwell*, 372 F.3d 748; *Lockett*, 230 F.3d 695. Under the provisions of

Mississippi Code Annotated Sections 99-39-5(2) and 99-39-27(9), Petitioner cannot now exhaust this claim as it would be held barred from consideration in a state collateral proceeding.

Therefore, this Court, without a showing of cause and actual prejudice, must hold this claim procedurally barred on federal habeas review. *See Castille*, 489 U.S. 346. Petitioner has made no cognizable allegation of either cause or actual prejudice in an attempt to overcome the procedural bars; therefore, Petitioner's claim is due to be dismissed.

With respect to the claim that the jury was improperly instructed on both the HAC and sexual battery aggravators, this claim by Petitioner, the only pending claim regarding the aggravator in question, is barred from consideration. For, as the state court properly held, the issue was capable of being presented to the trial court and was not. As the issue was not preserved, there is an independent and adequate state law ground which procedurally bars this issue from further presentation. 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. *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 a showing of both cause and actual prejudice can this bar be overcome; yet, Petitioner has made no showing of either. *See Wainwright v. Sykes*, 433 U.S. 72 (1977); *Coleman v. Thompson*, 501 U.S. 722 (1991); *Ylst v. Nunnemaker*, 501 U.S. 797 (1991); *Engle v. Isaac*, 456 U.S. 107 (1982).

Even though the Mississippi Supreme Court alternatively held the claim to be without merit, such ruling does not vitiate the procedural bar imposed by the court. The U.S. Supreme Court has held that in those instances where the state court has plainly acknowledged to be

imposing a procedural bar, and then gone on to address the merits of a claim, the procedural bar must be recognized by the federal courts as a bar to consideration of the merits of that claim. In *Harris v. Reed*, 489 U.S. 255, 256 (1989), the 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*.[FN10] 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.

The Fifth Circuit applied the *Harris* doctrine in *Williams v. Puckett*, 283 F.3d 272, 280 (5th Cir. 2002):

> 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; *Wainwright v. Sykes*, 433 U.S. 72, 86, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

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 Mississippi Code Annotated Section 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 his bar by a showing of cause and actual prejudice or a fundamental miscarriage of justice. Therefore, 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.

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

Respondents reallege and readopt the arguments presented in Claim VII as if fully set forth herein. Respondents note that the issue argued by Petitioner in this claim is procedurally barred for the same reasons as set forth in Claim VII. On direct appeal and in post-conviction Havard argued to the state court that the trial court had improperly allowed the jury to consider both the HAC and sexual battery aggravators. The Mississippi Supreme Court found the argument to be barred from consideration, as it was capable of being raised as trial and as it lacked citation or reference to any proper authority.

Just as in Claim VII, Petitioner has now abandoned the argument presented to the state court—that one aggravator subsumed the other—and replaced it with a new argument that the Mississippi Supreme Court erred in finding that the aggravators had been proven beyond a

reasonable doubt. Just as Respondents submitted in Claim VII, the procedural bar of failure to present at trial now bars consideration of this issue. Just as Respondents submitted in Claim VII, Petitioner's "revised" version of this argument makes his claim unexhausted.

Moreover, questions regarding the sufficiency of evidence are not proper on federal habeas review. Insufficiency of the evidence can constitute a claim for habeas relief only if the evidence, when viewed in the light most favorable to the State is such that no reasonable fact finder "could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *see also Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001); *Dupuy v. Cain*, 201 F.3d 582, 589 (5th Cir. 2000). This standard of review "preserves the integrity of the trier of fact as the weigher of the evidence." *Bujol v. Cain*, 713 F.2d 112, 115 (5th Cir. 1983). The *Jackson* standard allows the trier of fact to find the evidence sufficient to support a conviction, even if "the facts also support one or more reasonable hypotheses consistent with the defendant's claim of innocence." *Gilley v. Collins*, 968 F.2d 465, 468 (5th Cir. 1992).

This determination of the sufficiency of the evidence by the state appellate court is entitled to great deference. *Parker v. Procunier*, 763 F.2d 665, 666 (5th Cir.), *cert. denied* 474 U.S. 855 (1985); *Gibson v. Collins*, 947 F.2d 780 (5th Cir. 1991); *see also Callins v. Collins*, 998 F.2d 269 (5th Cir. 1993) ("where state appellate court has conducted a thorough review of the evidence . . . . its determination is entitled to great deference."). Petitioner has presented nothing in his habeas petition to overcome the deference afforded to the state appellate court's decision.

Recently in United States v. *Vargas-Ocampo*,711 F.3d 508, 511 (5th Cir. 2013), the Fifth Circuit reiterated that the "Supreme Court has never departed from the *Jackson* standard, which preserves the fact-finder's role as weigher of the evidence." This standard, as stated in Jackson,

supra, "'gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *Vargas,* 711 F.3d at 511 (quoting Jackson, supra). In *Vargas, supra,* the Fifth Circuit explained that "'the only question under *Jackson* is whether that finding [of guilt] was so insupportable as to fall below the threshold of bare rationality.'" *Id.* at 512 (citing *Coleman v. Johnson,* 132 S. Ct. 2060, 2065 (2012)).

Petitioner's state law argument is barred from consideration on adequate and independent state law grounds. Petitioner's new argument is unexhausted and without merit. The Mississippi Supreme Court's decision was in no way contrary to or an unreasonable application of clearly established federal law as pronounced by the Supreme Court of the United States. Havard is not entitled to relief on this claim.

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

On direct appeal, Havard argued that the trial court inappropriate answered the jury's questions regarding the definition of life without parole. Havard claimed the court's answer led to a sentence imposed under the influence of passion, prejudice or some other arbitrary factor. The Mississippi Supreme Court, in rejecting Havard's argument, held as follows:

> 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.

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.

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 v. State, 928 So. 2d at 798-99.

Havard raised this issue a second time in his post-conviction proceedings. The Mississippi Supreme Court found the issue to be procedurally barred, explaining:

> 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.
>
> 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 v. State, 988 So. 2d at 343.

Now, in his habeas argument, Havard appears to abandon the claim that was presented to the court below—that the answer to the jury's question may have led to an arbitrary sentence, or that the jury may have misunderstood the answer. Havard replaces his earlier allegation of arbitrariness and confusion with the declaration that the jury was concerned about Petitioner's future dangerousness should he be released from prison.

Neither version of Petitioner's claim holds merit, and the state court's decision was not in violation or misapplication of federal law. To the extent Petitioner has amended the argument he presented to the state court, such action makes Petitioner's claim both unexhausted and inexhaustible. Additionally, the state court acted properly in determining there was no error. Petitioner's judge was obviously concerned with avoiding speculation and suggestion before the jury; he resolving this concern, the trial judge worked with both the State and defense counsel to answer the jury's question in a way that was truthful and accurate (including reminding the jury

of the instructions it has already received). The judge did not speculate on parole. The judge emphasized that neither the trial court nor the jury had any control over parole—indeed, the judge told the jury such was a legislative concern. When pressured for an exact answer, the judge gave a truthful response; he also instructed the jury regarding the options of life and death, and he reminded the jury of those instructions when answering their question about parole.

The trial judge 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. The jury was properly instructed on the options of death or life in prison. The jury reiterated to the jury that life without parole means life in prison without any eligibility for parole. 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 was not contrary to nor an unreasonable application of federal law as announced by the U.S. Supreme Court.

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

On direct appeal Petitioner alleged defense counsel was ineffective for failing to adequately voir dire potential jurors to ascertain if any of them would automatically impose the death penalty should Havard be found guilty. Havard went on to allege that due to counsel's failure, a juror, Willie Thomas, was seated on the jury despite being predisposed to vote for death. In rejecting Petitioner's claim the Mississippi Supreme Court held as follows:

> 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.

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, 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.

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).

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).

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).

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.

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.

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 v. State, 928 So. 2d at 782-87.

Havard brought this issue forward in his petition for post-conviction relief; he again pointed to the seating of Willie Thomas resulting from the ineffectiveness of trial counsel. The state court again rejected Havard's argument, holding:

> 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.
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> In addressing this issue on the merits, absent Thomas's affidavit, the Court held:
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> 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.

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).

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.
>
> 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.
>
> 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 v. State, 988 So. 2d at 340-41.

Now on habeas Petitioner alleges the state court was unreasonable in 1) deciding that counsel were not ineffective, 2) excluding the juror's affidavit in support of Havard's claim, and 3) alternatively, finding that the affidavit was unreasonable. Respondents submit that the record supports the findings of the Mississippi Supreme Court.

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 opposed the death penalty that they would automatically impose or reject 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 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 they would have difficulty imposing the death penalty under any circumstances. There was no individualized voir dire on those jurors automatically includes to vote for the death penalty, as those two identifying individuals were simply struck 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 individualized voir dire the trial court, the State and defense counsel questioned 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 the 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 "followed 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 Strickland sufficient. While it is true counsel did not engage in individualized voir dire with those jurors who stated that would automatically impose the death penalty, there were only two of them—and neither was Willie Thomas. The court apparently saw no reason to individually question these men. Instead, it simply instructed the jury as a whole that such automatic preferences were forbidden; and, ultimately, Petitioner successfully moved to strike these 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, a second time, if any jurors would automatically vote for the death penalty. At the point the court asked this question, and two men

can forward to admit that automatic preference, and counsel struck those men for cause, counsel's job in making sure those who would automatically vote for death were excluded 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 did not result from defense counsel's actions. No Strickland prejudice (that resulting from an attorney's deficiency) was shown. Moreover, there was no prejudice at all, at the Mississippi Supreme Court properly found.[2]

The decision reached by the Mississippi Supreme Court was not contrary to or an unreasonable application of federal law as announced by the U.S. Supreme Court. Havard is entitled to no relief on this claim.

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

On direct appeal Petitioner argued that defense counsel were ineffective in not challenging for cause Dorothy Sylvester, who Petitioner claims was biased against him. The Mississippi Supreme Court, in rejecting Petitioner's claim, held:

> 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

[2] That the Mississippi Supreme Court refused to consider the affidavit of Willie Thomas, and in the alternative found it unsupporting, is discussed in Claim XII, *infra*.

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.

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.

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. *Wincher 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.

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]less 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.

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.
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> 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.
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> 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 v. State, 928 So. 2d at 780-82.

Petitioner did not raise this issue in his petition for post-conviction relief. In his habeas proceedings, Petitioner alleges the Mississippi Supreme Court was unreasonable in presuming that Dorothy Sylvester was truthful through the voir dire portion of trial and erred in not finding counsel ineffective pursuant to *Strickland*.

To the extent Petitioner now claims he made any *Strickland* allegation, at the state court level, based on failing to strike Dorothy Sylvester because she was a nurse, such claim is untrue.

Respondents deny Petitioner made a claim of ineffectiveness based on Ms. Sylvester's occupation as a nurse. As such claim is unexhausted, it cannot be considered by this Court.

With respect to Petitioner's remaining allegations regarding Dorothy Sylvester (and trial counsel's alleged ineffectiveness) Respondents submit the state court's ruling was not an unreasonable application of Strickland or other controlling U.S. Supreme Court precedent. During voir dire at Havard's trial, 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 did not "think" she could be fair. Subsequently, the court, the State and defense counsel conducted additional voir dire during which Sylvester was rehabilitated. 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 doubts as to 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. Sylvester was not one of the jurors who raised their hands. As such, she affirmed that she would and could be fair in deciding Havard's fate. The jurors also were asked if any of them had a problem finding Havard not guilty if the State failed to present enough evidence. Sylvester did not raise her hand; she 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, Sylvester, while initially indicating she did not "think" she could be fair, ultimately affirmed, twice, that she would be fair.

Moreover, the jurors 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 or reject it regardless of the evidence presented and the governing law. In not raising her hand.

Sylvester affirmed she did not fall into either of those groups. She affirmed to defense counsel that she did not so favor the death penalty that she would automatically impose it. As voir dire continued, jurors were again asked about automatic preferences in favor of or opposition to the death penalty; Sylvester again gave no indication she had such automatic preferences.

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 indicated that she would be fair. As such counsel (as well as the trial court and the State) were effective in examining Sylvester to uncover any biases or prejudices Sylvester's own family trauma would have on Havard's trial.

Yes, 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 affirmed 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 showing impartiality—was strategic, of minimal import, and not deficient.

Moreover, as the Mississippi Supreme Court found, Petitioner also failed to show any *Strickland* prejudice. Havard's counsel conducted extensive voir dire. He successfully challenged fourteen jurors for cause. He exercised seven peremptory challenges. He moved for the court to allow for 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 to the state court any evidence of a deficiency in trial counsel, much less that such deficiency resulted in prejudice to petitioner. 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 Sylvester and all jurors, were presumed to be truthful in their responses to the court, Petitioner's claim is without merit and he is not entitled to any habeas relief.

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

On direct appeal Petitioner claimed that 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 be inappropriately presented; it determined that post-conviction proceedings would be better suited for Petitioner's allegation:

> 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 v. State, 928 So. 2d at 787.

In post-conviction proceedings, Havard declined to argue this claim separately as had been done on direct appeal. Instead, Havard lumped this issue into the argument presented in Claim X, supra (Petitioner's ineffectiveness of counsel/reverse-*Witherspoon* claim). The Mississippi Supreme Court rejected Petitioner's claim:

> 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.
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> 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.

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).

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.
>
> 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.
>
> 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 v. State, 988 So. 2d at 340-41.

On habeas, Petitioner now alleges the state court erred in its holding that Mississippi Rule of Evidence 606 precluded the consideration of the juror's affidavit and that the affidavit, in fact, did not demonstrate juror bias. Petitioner makes a bare allegation that Rule 606 is inapplicable to the affidavit and states only that the lower court ruling was in error. Respondents submit the Mississippi Supreme Court's decision was rooted firmly 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, as there is no federal 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 if 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 Petitioner's 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 (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 (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) (federal habeas court must defer to 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) (federal habeas court may not review state court's interpretation of its own law); *Gibbs v. Johnson*, 154 F.3d 253, 259 (5th Cir. 1998), cert. denied, 526 U.S. 1089 (1999) (same).

As this is purely a matter involving state law, Havard is not entitled to habeas relief. Petitioner's claim challenging the exclusion of evidence is precluded from review by this Court, because the rulings of a state court on evidentiary matters are solely issues of state law. A state prisoner is entitled to relief under Section 2254 only if he is held "in custody in violation of the Constitution or laws or treaties of the United States." *Engle v. Isaac*, 456 U.S. 107, 118 (1981). Federal courts have "long recognized that a 'mere error of state law' is not a denial of due

process. If the contrary were true, then 'every erroneous decision by a state court on state law would come [to this Court] as a federal constitutional question.'" *Id.* at 121 n.21.

Generally, a state court's evidentiary rulings, even if erroneous under state law, do not present constitutional issues that are reviewable in a habeas corpus petition. *See Crane v. Kentucky,* 476 U.S. 683, 689 (1986). "A state court's evidentiary rulings present cognizable habeas claims only if they run afoul of a specific constitutional right or render the petitioner's trial fundamentally unfair." *Johnson v. Puckett,* 176 F.3d 809, 820 (5th Cir. 1999) (citing *Cupit v. Whitley,* 28 F.3d 532, 536 (5th Cir.1994); *Weeks v. Scott,* 55 F.3d 1059, 1063 (5th Cir. 1995). *See also Tigner v. Cockrell,* 264 F.3d 521, 862 (5th Cir. 2001) (The admissibility of evidence under state law is not subject to review by this Court.).

"[I]n reviewing state court evidentiary rulings, the federal habeas court's role 'is limited to determining whether a trial judge's error is so extreme that it constituted a denial of fundamental fairness' under the Due Process Clause." *Castillo v. Johnson,* 141 F.3d 218, 222 (5th Cir. 1998) (citations omitted); *see also Jackson v. Johnson,* 194 F.3d 641, 656 (5th Cir. 1999). The issue of whether the admission of testimony rendered a petitioner's trial fundamentally unfair depends on whether the trial was "largely robbed of dignity due a rational process." *Johnson v. Blackburn,* 778 F.2d 1044, 1050 (5th Cir. 1985) (citations omitted). The "erroneous admission of prejudicial testimony does not justify habeas relief unless the evidence played a 'crucial, critical, and highly significant' role in the jury's determination." *Jackson v. Johnson,* 194 F.3d at 656.

Without waiving the applicable bar, however, Respondents submit the state court's ruling was not contrary to or an unreasonable application of clearly established U.S. Supreme Court precedent. The affidavit of Willie Thomas did not support, legally, Petitioner's contention that

Thomas was automatically inclined to vote for the death penalty. Indeed, Thomas's affidavit contains no such affirmation. Thomas's affidavit, which appears to be prepared by Petitioner's attorneys, states that someone who kills someone else should pay with their own life. However, Thomas does not state that he would impose death without considering mitigation evidence.

Moreover, the issue is not whether Thomas believes in the death penalty, but whether he can set aside those views and consider all the facts (including the mitigation). Thomas never stated during voir dire that he could not be fair; he never stated that he would automatically impose the death penalty; he never stated that he would not consider mitigating evidence. Indeed, Thomas did not say a single word during voir dire—despite being asked those important death qualification questions. The Mississippi Supreme Court was not unreasonable in finding the plain wording of the affidavit insufficient to support Havard's argument of juror bias. Again, this claim is procedurally barred as well as without merit; Havard is not entitled to any relief.

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

See Claim XV.

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

See Claim XV.

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

On direct appeal and post-conviction Havard argued he did not receive a reliable trial as the result of aggregate or cumulative error. In rejecting these repetitious claims, the Mississippi Supreme Court held:

> 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)).
>
> 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)).

Havard v. State, 928 So. 2d at 803.

> 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).
>
> 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.
>
> 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 v. State, 988 So. 2d at 346.

Now on habeas, Petitioner modified his claim somewhat and alleges the Mississippi Supreme Court failed to conduct a meaningful review of unspecified "cumulative errors" Petitioner claimed to have been committed at trial. This claim of inadequacy has never been presented to the state court for consideration; therefore, it is unexhausted. *Ruiz*, 460 F.3d at 642-43. Moreover, such unexhausted claim is now incapable of being exhausted in the state courts and must be held procedurally barred without a showing of cause and actual prejudice. As Petitioner has made no cognizable allegation of cause or prejudice in an attempt to overcome the procedural bar, such claim must be barred from consideration.

Havard also fails to show how a claim of cumulative error constitutes a federal constitutional claim. In *Derden v. McNeel*, 978 F.2d 1453 (5th Cir. 1992), the Fifth Circuit 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).

Derden, 978 F.2d at 1458.

Cumulative error has been recognized as an independent basis for habeas relief, but only where "(1) the individual errors involved matters of constitutional dimensions 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.'" *Westley v. Johnson*, 83 F.3d 714, 726 (5th Cir. 1996) (*citing Derden v. McNeel*, 978 F.2d 1453, 1454 (5th Cir. 1992)) (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). In evaluating the sufficiency of a cumulative error charge, meritless claims or claims that are not prejudicial cannot be cumulated, regardless of the total number raised. *Derden*, 978 F.2d at 1461. *See also United States v. Nine Million Forty One Thousand Five Hundred Ninety Eight Dollars and Sixty Eight Cents*, 163 F.3d 238, 250 (5th Cir. 1998).

The Fifth Circuit has limited the manner in which claims of cumulative error are assessed. In the context of federal habeas review the Fifth Circuit has held the cumulative error doctrine applies only when the errors themselves involve matters of constitutional dimension, are not procedurally barred from habeas and "so infected the entire trial that the resulting conviction violates due process." *Derden, id*. at 1454. 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 quotations 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).

Several of Petitioner's claims are procedurally barred from consideration. Under *Derden* those cannot be added into a cumulative error analysis. Other claims are state law claims which do not involve federal constitutional violations. Still other claims are unexhausted. On direct appeal and in post-conviction the Mississippi Supreme Court addressed Petitioner's claims of cumulative error and found them to be meritless. That holding was not contrary to controlling federal law. Petitioner fails to demonstrate how the Mississippi Supreme Court's determination on the cumulative error claim actually constitutes a federal claim, must less a claim of such magnitude that the state court's decision was unreasonable in applying U.S. Supreme Court precedent. Pursuant to *Derden*, Havard is not entitled to relief on this claim.

There was no merit in any of Petitioner's claims and, therefore, no accumulation of error to warrant relief. The state court found, in upholding the verdict, that there were no errors in this case, much less a cumulative effect of non-existent errors. On habeas, Petitioner fails to show that any alleged errors, capable of review, have aggregated to cast doubt upon whether the verdict satisfied due process. As such, Havard has failed to meet his burden to show that the state court's decision (with regard to his cumulative error claims in Grounds Thirteen, Fourteen or Fifteen) were contrary to or an unreasonable application of clearly established federal law.

As argued to the state court below, Havard failed to demonstrate any errors committed during trial or sentencing. Indeed, Havard failed to show any error at all. 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 established U.S. Supreme Court precedent. Petitioner has done nothing more than proclaim the court below was unreasonable in not finding aggregate error. His claims are due to be dismissed.

CLAIM XVI: PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE STATE'S SOLICITATION AND/OR FAILURE TO CORRECT FALSE TESTIMONY, IN VIOLATION OF *NAPUE V. ILLINOIS* AND ITS PROGENY.

In denying Petitioner's successive post-conviction claim on this issue, the Mississippi Supreme Court held as follows:

> Havard asserts that the State solicited testimony from Rebecca Britt at trial that it knew to be false. His contention is based on Britt's videotaped statement given the day after Chloe's murder at the Adam's County Sheriff's Office. Havard maintains that Britt's videotaped statement and her trial testimony differed and that the State allowed the disparity to go uncorrected.
>
> It is Havard's contention in this successive motion for post-conviction relief that Britt's videotaped statement is "newly discovered evidence." As discussed above, trial counsel was aware of Britt's videotaped statement and viewed it prior to trial. Therefore, the videotaped statement is not newly discovered evidence. This claim would have been procedurally barred from consideration even if it had been raised in Havard's original motion for post-conviction relief because it was capable of being raised at trial and/or on direct appeal. Miss.Code Ann. § 99–39–21(1) (Rev.2007). Likewise, because the videotaped statement is not newly discovered evidence, this issue is procedurally barred from consideration in Havard's successive motion for post-conviction relief. Miss.Code Ann. § 99–39–27(9) (Rev.2007).
>
> Assuming *arguendo* that Britt's videotaped statement was newly discovered evidence not reasonably discoverable at the time of trial, it would have to be "of such nature that it would be practically conclusive that, if it had been introduced at trial, it would have caused a different result in the conviction or sentence." *Id.* Britt's videotaped statement does not meet that threshold.
>
> This Court has held that
>
> > "[a] new trial is required if the false testimony could have ... in any reasonable likelihood affected the judgment of the jury. Manning (quoting *Barrientes v. Johnson*, 221 F.3d 741, 756 (5th Cir.2000) (citing *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763,

> 31 L.Ed.2d 104 (1972); *Napue v. Illinois*, 360 U.S. 264, 271, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959))).

Rubenstein v. State, 941 So.2d 735, 768 (Miss.2006). To prevail on the merits, Havard must first demonstrate that Britt did, in fact, give false testimony. Only then can this Court determine the reasonable likelihood that the false testimony affected the jury's judgment.

Havard claims that, in her videotaped statement to law enforcement officials, Britt expressed that Havard "was actively involved in the care of Chloe Britt before the night of her death; that Mr. Havard had changed Chloe's diapers on prior occasions; and that Mr. Havard loved Chloe." He maintains that Britt's videotaped statement is in "stark contrast" to Britt's trial testimony, in which she testified as follows:

> Q [By the State]: What was the relationship between Jeffrey and your baby?
>
> A: It was—it was, I guess, your typical relationship. He didn't spend too much time with her. I mean, other than her being at the house after day care, he didn't really go out of his way to do things with her or things like that but—
>
> Q: To your knowledge, did he ever bath [sic] the baby?
>
> A: He never did except for the night in question. He said he had given her a bath.
>
> Q: He never bathed her before that, did he?
>
> A: No, sir.
>
> Q: Did he ever change the baby?
>
> A: No, sir.
>
> Q: Did he ever have any extensive interaction, playing with her, that sort of thing, for that length of time?
>
> A: No, sir.

Britt further testified:

> Q: What was your reaction to Jeff giving the baby a bath?

> A: At first, you know, I thought it was nice, you know. Trying—you know—he was trying to help me out, and then it was surprising because he hadn't done anything like that before.

Havard attempts to contrast the above trial testimony by quoting from Britt's videotaped statement,[FN1] in which she stated:

FN1. The State has provided a transcript of Britt's videotaped statement bearing a notarized certificate from a certified transcriptionist, attesting to the accuracy of the transcription. Havard, on the other hand, has provided an uncertified transcription prepared by a paralegal working for Havard's PCR counsel. There are some subtle differences in the two transcriptions. For purposes of comparing Britt's videotaped statement to her trial testimony, the certified transcript provided by the State is used.

> Q: Becky, you know, I asked you last night. Do you know who may have done anything to your daughter?
>
> A: Jeff is the only one I can think of. He was the only one with her.
>
> Q: Is that—is that the only three—you can only think of Jeff, is—is that he was the only one that was with her. Is that what you're talking about?
>
> A: He was—he was the only one there. I can't think of anybody else that would do that to her.
>
> Q: Okay. Do you ever suspect that anything may have happened in the past by someone?
>
> A: No.
>
> Q: Is there anything else that you can tell me, Becky?
>
> A: No. The only thing I can tell you is yesterday and the day before, she was irritable whenever he would want to hold her. And yesterday he was insistent on holding her when she was screaming, and she just screamed even more when he held her.
>
> Q: Is there anything else that you would like to add that would help us in our investigation?
>
> A: I don't know.
>
> Q: I'm sorry?
>
> A: I know he's got a violent temper. That's all I know.

Q: You're talking about Jeff?

A: Yes.

Q: How do you know he's got a violent temper?

A: The way he argues with his grandfather, and I know he's had simple assault on his record.

....

Q: How often did Jeff usually bathe the baby?

A: Never.

Q: He's never bathed her?

A: Never.

Q: Would you say that's kind of strange that he took it upon himself to bathe the child while you were gone?

A: Not really. I mean, he's always doing bottles for me or cleaning up while I'm taking care of her.

Q: Did he change diapers?

A: Sometimes.

Q: Sometimes. But he never bathed her before?

A: No.

Q: Well, how did he act towards the child when he was around? Did he ever get angry with the child or anything?

A: No. He loved her. Just whenever she would be really fussy, he would just act aggravated. I mean, nothing physical or anything. He would just sigh or turn away or walk away.

When comparing Britt's videotaped statement with the portion of her trial testimony Havard claims is conflicting, the only discernible disparities are her responses regarding whether Havard had ever changed Chloe's diaper and whether she was surprised that Havard had bathed Chloe. In her videotaped statement, she told law enforcement officials that Havard sometimes had changed Chloe's diaper. Britt also responded "[n]ot really" to whether she found it

> strange Havard had bathed Chloe. At trial she testified that he had never changed Chloe's diaper and that she was surprised he had bathed Chloe. In all other aspects, the statement and the testimony appear consistent.
>
> Havard asserts that Britt also testified differently regarding his interactions with Chloe. At trial, Britt was asked if Havard had "extensive interaction, playing with [Chloe], that sort of thing, for that length of time" to which Britt respond that he had not. Although not entirely clear from the record, from the context of the questioning, it appears that what the prosecutor meant by "... for that length of time" was a reference to the length of time that Britt was away running errands while Havard was home alone with Chloe the night she died. Nowhere in her videotaped statement was Britt asked about the length of time Havard had spent with the baby.
>
> All indications from her videotaped statement are, however, that Havard did not spend great lengths of time with Chloe. Britt portrayed Havard as someone who was unemployed and slept most of the day while she was out job hunting. Chloe went to daycare during the day, which was paid for by Chloe's grandmother. In her videotaped statement, Britt told law enforcement officials that Havard was "always doing bottles for me or cleaning up while I'm taking care of her." She also told law enforcement that Havard would sigh or turn and walk away when Chloe was "fussy."
>
> Other than Britt's trial testimony regarding whether Havard had ever changed Chloe's diapers and her reaction to Havard bathing Chloe, there is no disparity between Britt's videotaped statement to law enforcement and her testimony at trial. Regardless of her reaction and assuming her trial testimony that Havard did not change diapers was false, given all the evidence in this case, there is no reasonable likelihood that it affected the judgment of the jury.
>
> This issue is procedurally barred by time and the successive-writ bar. Miss.Code Ann. §§ 99–39–5(2)(b), 99–39–27(9)(Rev.2007). Notwithstanding the procedural bars, this issue has no merit.

Havard v. State, 86 So. 3d, 896 900-903 (Miss. 2012).

Respondents first note that the state court denied Petitioner's claim as procedurally barred. Pursuant to the state post-conviction relief act, successive petitions are considered where Petitioner presents claims based on newly discovered evidence. As the state court properly held, however, the videotape upon which Petitioner's claim was based was not newly discovered.

Petitioner's own defense counsel admitted to not only knowing about the videotape, but also watching the tape prior to trial (and choosing not to use it).

The state court's denial of Havard's successive post-conviction petition was based on a procedural bar: the issue was capable of being raised at trial, but was not, and the videotape giving rise to Petitioner's allegation was not newly discovered evidence entitling Petitioner to successive post-conviction relief. *See* Miss. Code Ann. 99-39-21(1), 99-39-27(9). Pursuant to *Ruiz*, the procedural bar to Petitioner's claim in state court prevents Petitioner from presenting this issue to the federal court.

Federal habeas courts are estopped from reviewing state cases applying an independent and adequate state procedural rule unless the petitioner can demonstrate cause and actual prejudice, which respondent submits petitioner cannot show. *See Coleman*, 501 U.S. at 750; *see also Martin v. Maxey*, 98 F.3d at 849 (*citing Sawyer v. Whitley*, 505 U.S. 333 (1992)). When a state court declines to hear a prisoner's federal claims because the prisoner failed to fulfill a state procedural requirement, federal habeas is generally barred if the state procedural rule is independent and adequate to support the judgment." *Sayre v. Anderson*, 238 F.3d 631, 634 (5th Cir. 2001) (citing *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 2553-54, 115 L.Ed.2d 640 (1991); *Amos v. Scott*, 61 F.3d 333, 338-39 (5th Cir. 1995)).

Mississippi Code Ann. Section 99-39-21(1) is an independent state procedural bar. *Stokes v. Anderson*, 123 F.3d 858, 860 (5th Cir. 1997). The adequacy of the procedural bar applied to Petitioner's claims in state court depends on "whether Mississippi has strictly or regularly applied it." *Id*. (citing *Lott v. Hargett*, 80 F.3d 161, 165 (5th Cir. 1996)). However, it is Havard who "bears the burden of showing that the state did not strictly or regularly follow a procedural bar around the time of his appeal" and "must demonstrate that the state has failed to

apply the procedural bar rule to claims identical or similar to those raised by the petitioner himself." *Sones v. Hargett,* 61 F.3d 410, 416 (5th. Cir. 1995); *Amos v. Scott,* 61 F.3d 333 (5th Cir. 1995) Havard has failed to carry his burden of proving an "inconsistent and irregular" application of the bar stated above and has, therefore, defaulted his federal claim in state court pursuant to an independent and adequate state procedural rule. *Stokes, id*. at 861.

Procedural bar notwithstanding, Petitioner fails to show how the state court's finding was an unreasonable or contrary application of *Napue v. Illinois*. It is undisputed that a conviction obtained through the use of perjured testimony violates a defendant's Fourteenth Amendment Due Process Rights. *Mooney v. Holohan,* 294 U.S. 103, 55 S.Ct. 340, 342 (1935), *Napue v. Illinois,* 360 U.S. 264, 269-270, 79 S.Ct. 1173 (1959). However, before a due process violation can exist it must be shown the State knowingly offered such false testimony, and that such testimony was material to the jury's verdict. *Id*. *See also United States v. Miranne,* 688 F.2d 980, 989 (5th Cir.1982), *cert. denied,* 459 U.S. 1109, 103 S.Ct. 736, 74 L.Ed.2d 959 (1983); *United States v. Brown,* 634 F.2d 819, 827 (5th Cir.1981); *U.S. v. Martinez-Mercado,* 888 F.2d 1484, 1492 (5th Cir. 1989) (for examples of the Fifth Circuit's application of this requirement).

> To establish a due process violation based on the State's knowing use of false or misleading evidence, Nobles must show (1) the evidence was false, (2) the evidence was material, and (3) the prosecution knew that the evidence was false. *Giglio v. United States,* 405 U.S. 150, 153-154, 92 S.Ct. 763, 765-766, 31 L.Ed.2d 104 (1972); *Boyle v. Johnson,* 93 F.3d 180, 186 (5th Cir.1996). Evidence is "false" if, *inter alia,* it is "specific misleading evidence important to the prosecution's case in chief." *See Donnelly v. DeChristoforo,* 416 U.S. 637, 647, 94 S.Ct. 1868, 1873, 40 L.Ed.2d 431 (1974). False evidence is "material" only "if there is any reasonable likelihood that [it] could have affected the jury's verdict." *Westley v. Johnson,* 83 F.3d 714, 726 (5th Cir.1996), *cert. denied,* 519 U.S. 1094, 117 S.Ct. 773, 136 L.Ed.2d 718 (1997).

Nobles v. Johnson, 127 F.3d 409, 415 (5th Cir. 1997).

Havard alleges that his constitutional rights were violated when the State offered perjured testimony. In rejecting this claim, the Mississippi Supreme Court's decision was in line with the requirements of *Napue*. As correctly noted, there were two disparities between Rebecca Britt's trial testimony and her pre-trial statement to police. At trial, Britt stated that Havard had never changed Chloe's diaper; pre-trial, Britt told the police Havard "sometimes" changed Chloe's diaper. At trial, Britt testified she "thought it was nice" that Havard had bathed Chloe, and that she was "surprised" because he had not done so before. Pre-trial, Britt told the police that Havard had never bathed Chloe; she also stated she did not think Havard giving her daughter a bath was strange, because in the past Havard had cleaned or prepared Chloe's bottles.

The Mississippi Supreme Court did not go so far as to pronounce that these statements amounted to perjured testimony. The court was correct in classifying these statements as disparities. It was not unreasonable for the court to determine that Rebecca Britt, in reclassifying her reaction to Havard bathing Chloe (from "not strange" to "surprising"), did not commit perjury. Moreover, perjured testimony has to have some intent element to it. Petitioner presented no evidence to suggest that simply because Britt told police, days after her daughter was murdered, that Havard sometimes changed diapers, and then testified, months later, that Havard had not changed diapers, meant that Britt was lying—instead of simply mistaken, instead of simply having forgotten.

Moreover, the Fifth Circuit has repeatedly held that, in order to constitute a due process violation by the admission of allegedly perjured testimony, the Petitioner must first show that the State had knowledge, be it actual or constructive, that the testimony was false. *U.S. v. Martinez-Mercado*, 888 F.2d 1484, 1492 (5th Cir. 1989), *U.S. v. Miranne*, 688 F.2d 980, 989 (5th Cir. 1982), *cert. denied*, 459 U.S. 1109, 103 S.Ct. 736, 74 L.Ed.2d 959 (1983), *United States v.*

Brown, 634 F.2d 819, 827 (5th Cir.1981), *United States v. Kossa*, 562 F.2d 959 (5th Cir. 1975), *cert. denied*, 434 U.S. 1075, 98 S.Ct. 1265, 55 L.Ed.2d 781 (1978).

Petitioner, in failing to present evidence that the declarant herself was lying, also fails to present evidence that the State knew she was lying. This is especially true in light of the fact that, according to Petitioner's own trial counsel, Gus Sermos, the defense team saw this video prior to trial and did not see the glaring disparity of which Petitioner now claims is so evident. Petitioner wishes to "hang his hat" on the alleged existence of a lie—either in Britt's videotaped statement or in her trial testimony. He fails to take the extra step, however, in proving the State knew of the lie. The Mississippi Supreme Court, correctly, reasoned that the differences between the two statements were just that: differences, minor ones which did not rise to the level of lies. Accordingly, there can be no error in the continued holding that the State did not knowingly present false testimony to the jury.

Finally, even if the state court's analysis of the perjury element of *Napue* was incorrect, the court did not unreasonably apply *Napue* in holding the discrepancies immaterial to the final determination of Petitioner's guilt. As the court properly held, "other than Britt's trial testimony regarding whether Havard had ever changed Chloe's diapers and her reaction to Havard bathing Chloe," the statements were the same. The state court did not unreasonably apply U.S. Supreme Court precedent in determining, in light of all the evidence presented, that Rebecca Britt's reaction to Havard bathing Chloe, or Rebecca Britt's memory regarding the number of times Havard had changed a diaper, would not have resulted in a different outcome at trial.

The U.S. Supreme Court echoes this requirement in its holdings. *Napue v. Illinois*, 360 U.S. 264, 269-270, 79 S.Ct. 1173 (1959), *citing Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791; *Pyle v. State of Kansas*, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214; *Curran v. State*

of Delaware, 3 Cir., 259 F.2d 707. See *State of New York ex rel. Whitman v. Wilson*, 318 U.S. 688, 63 S.Ct. 840, 87 L.Ed. 1083, and *White v. Ragen*, 324 U.S. 760, 65 S.Ct. 978, 89 L.Ed. 1348. Because Havard fails to meet the burden of proof to establish his federal habeas claim, and because he cannot circumvent the controlling procedural bar, this issue is without merit.

CLAIM XVII: PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED BECAUSE THE STATE FAILED TO DISCLOSE EXCULPATORY AND IMPEACHMENT EVIDENCE, IN VIOLATION OF *BRADY V. MARYLAND* AND ITS PROGENY.

In denying Petitioner's successive post-conviction claim, the Mississippi Supreme Court held as follows:

> Prior to trial, Rebecca Britt gave a videotaped statement to law enforcement officials. Havard claims that the video was uncovered during the discovery phase of his federal habeas corpus proceedings. Havard alleges that, in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the prosecution withheld the videotape at trial despite his trial counsels' request for all exculpatory evidence.
>
> In *Brady*, the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 83 S.Ct. 1194. In *King v. State*, 656 So.2d 1168, 1174 (Miss.1995), this Court articulated a four-part test to assess whether a *Brady* violation had occurred. Under the test, it is the defendant's burden to prove: "(a) that the State possessed evidence favorable to the defendant (including impeachment evidence); (b) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (c) that the prosecution suppressed the favorable evidence; and (d) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *Manning v. State*, 929 So.2d 885, 891 (Miss.2006).
>
> Despite the State's argument that Havard fails all four prongs of this test, the Court need only look to the third prong to determine that this issue must fail. In its response, the State has provided an affidavit from Gus Sermos, Havard's lead trial counsel, in which he states that, prior to trial, he did watch the videotaped interview of Rebecca Britt that was conducted the day after Chloe's murder at the Adams County Sheriff's Office. Sermos also states that Tom Rosenblatt, the Assistant District Attorney who prosecuted Havard, along with Lt. Manley, were present at the time he watched Britt's videotaped interview.

> Corroborating Sermos's affidavit is the affidavit of Tom Rosenblatt, in which Rosenblatt states that he viewed the videotaped interview of Rebecca Britt conducted by the Adams County Sheriff's office while in the presence of Gus Sermos and Lt. Manley. Given the sworn affidavits from Havard's trial counsel and the prosecutor in his case, we find no merit in Havard's claim of a *Brady* violation, because he has not shown that the evidence was suppressed.

Havard v. State, 86 So. 3d at 900.

The ruling of the Mississippi Supreme Court was not in error. Under the AEDPA, this Court does not decide *de novo* whether a state prisoner has sufficiently proven a *Brady* violation. See *Yarborough v. Alvarado,* 541 U.S. 652, 665, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004) ("We cannot grant relief under AEDPA by conducting our own independent inquiry into whether the state court was correct as a *de novo* matter."); *Neal v. Puckett,* 286 F.3d 230, 236 (5th Cir.2002) (*en banc*) ("We have no authority to grant habeas corpus relief simply because we conclude, in our independent judgment, that a state supreme court's application of [federal law] is erroneous or incorrect."). Rather, this Court decides whether the state court's *Brady* determination resulted in a decision that is contrary to, or involved an unreasonable application of, clearly established federal law. *Busby v. Dretke,* 359 F.3d 708, 717 (5th Cir.2004)." *See Dickson v. Quarterman,* 462 F. 3d 470, 477-478 (5th Cir. 2006).

Pursuant to *Brady*, evidence is not "suppressed" if the defendant either "knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence." *Lawrence, id*. at 257. *See also, e.g., Williams v. Scott,* 35 F.3d 159, 163 (5th Cir.1994), *cert. denied,* 513 U.S. 1137, 115 S.Ct. 959, 130 L.Ed.2d 901 (1995) ("A *Brady* violation does not arise if the defendant, using reasonable diligence, could have obtained the information"); *Blackmon v. Scott,* 22 F.3d 560, 564-65 (5th Cir.), *cert. denied,* 513 U.S. 1060, 115 S.Ct. 671, 130 L.Ed.2d 604 (1994) ("The state is not required to furnish a defendant with

exculpatory evidence that is fully available to the defendant or that could be obtained through reasonable diligence"); *Duff-Smith v. Collins,* 973 F.2d 1175, 1181 (5th Cir.1992), *cert. denied,* 507 U.S. 1056, 113 S.Ct. 1958, 123 L.Ed.2d 661 (1993); *May v. Collins*, 904 F.2d 228, 231 (5th Cir.1990), *cert. denied,* 498 U.S. 1055, 111 S.Ct. 770, 112 L.Ed.2d 789 (1991); *United States v. Marrero,* 904 F.2d 251, 261 (5th Cir.1990), *cert. denied*, 498 U.S. 1000, 111 S.Ct. 561, 112 L.Ed.2d 567 (1990). *West v. Johnson,* 92 F.3d 1385, 1399 (5th Cir.1996); *Brady v. United States,* 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970).

Brady does not obligate the State to furnish a defendant with exculpatory evidence that is fully available to the defendant through the exercise of reasonable diligence. *Rector,* 120 F.3d at 558. When evidence is equally available to both the defense and the prosecution, the defendant must bear the responsibility of failing to conduct a diligent investigation. *Herrera v. Collins*, 954 F.2d 1029, 1032 (5th Cir.1992), aff'd, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). In this sense, Brady applies only to "the discovery, after trial[,] of information which had been known to the prosecution but unknown to the defense." *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). *Kutzner v. Cockrell*, 303 F.3d 333, 336 (5th Cir. 2002).

Moreover, the Supreme Court held in *Brady* that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. Since the decision in *Brady*, the standard has evolved:

> To establish a *Brady* claim, a habeas petitioner must demonstrate that (1) the prosecution suppressed evidence, (2) the evidence was favorable to the petitioner, and (3) the evidence was material. *U.S. v. Ellender*, 947 F.2d 748, 756 (5th Cir. 1991) (citations omitted). In assessing the materiality of suppressed evidence, the Supreme Court explained that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *U.S. v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985). "A 'reasonable probability' is a

> probability sufficient to undermine confidence in the outcome." *Id*., at 682, 105 S.Ct. at 3383. Recently, the Court further observed that a "reasonable probability" of a different result is shown when the non-disclosure "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the jury verdict." *Kyles v. Whitley*, 514 U.S. 419, ----, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490 (1995) (footnote omitted). "[A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Id*. at ----, 115 S.Ct. at 1566. Finally, the materiality inquiry is applied to "the suppressed evidence collectively, not item-by-item." *Id*. at ----, 115 S.Ct. at 1567.

Spence v. Johnson, 80 F.3d 989, 994-995 (5th Cir. 1996).

The Fifth Circuit has taken the standard one step further and held that "'the materiality of *Brady* evidence depends almost entirely on the value of the evidence relative to the other evidence mustered by the State.'" *Id.* at 995 (citations omitted). The Fifth Circuit has also concluded that the *Brady* rule "applies only to impeachment and exculpatory evidence; neutral or inculpatory evidence lies outside its coverage." *U.S. v. Nixon*, 881 F.2d 1305, 1308 (1989). Finally, it should be noted that "the discovery of a *Brady* violation does not automatically entitle a defendant to a new trial." *Id*.

To establish a *Brady* claim, Havard must prove that the prosecution suppressed favorable, material evidence that was not discoverable through due diligence. 373 U.S. at 87, 83 S.Ct. 1194; *Rector v. Johnson*, 120 F.3d 551, 558 (5th Cir.1997). He does not. As the Mississippi Supreme Court acknowledged, both the District Attorney and Petitioner's own trial counsel confirmed that the parties watched this video, together, prior to trial. This disproves, outright, a *Brady* violation.

Curiously, the crux of Petitioner's argument on habeas is that he can show, by clear and convincing evidence, that the Mississippi Supreme Court acted in contradiction of *Brady* by not finding that Petitioner's defense counsel lied when submitting an affidavit to the Mississippi Supreme Court affirming that he had seen the videotape prior to trial. Respondents would note

this is not in itself a *Brady* claim. An allegation that defense counsel perjured himself in an affidavit to the state appeals court, and that his "refusal" to turn over his files is evidence of that perjury, is a claim is independent of whether the State suppressed evidence via *Brady*.

Petitioner also argues on habeas is that the AEDPA does not foreclose relief on this claim because the Mississippi Supreme Court denied Petitioner a fair opportunity to pursue the claim after making a prima facie showing of a *Brady* violation. *See Wiley v. Epps*, 625 F.3d 199, 207-213 (5th Cir. 2010). This, too, is not a constitutional claim (or even a *Brady* claim, for that matter). In *Wiley*, the Fifth Circuit refused to grant "AEDPA deference" to a decision of the Mississippi Supreme Court to deny the Petitioner's *Atkins* claim without conducting an evidentiary hearing, despite the fact that Petitioner had set forth a prima facie case requiring such a hearing to develop the claim.

Petitioner fails to explain how establishing a prima facie case under *Atkins*—which is required to secure an evidentiary hearing on the issue of mental retardation—extends the ruling of *Wiley* to the state court's finding that there was no *Brady* violation in this case. Petitioner fails to explain what is required for a "prima facie" case of a *Brady* violation such that 1) U.S. Supreme Court precedent mandates an evidentiary hearing on *Brady* claims in state post-conviction proceedings, and 2) failure to grant an evidentiary hearing, and instead simply rejecting the *Brady* claim outright, violates U.S. Supreme Court precedent. Moreover, the argument is illogical: for indeed, where the Mississippi Supreme Court determined there to be no *Brady* violation whatsoever, it also implicitly ruled there was no prima facie violation either.

Petitioner claims that after he made a prima facie showing of a *Brady* violation, the state procured two affidavits to defeat the claim. Petitioner argues these affidavits "were never tested" despite evidence showing that the State suppressed the videotape. Respondents disagree. In

rejecting Petitioner's *Brady* claim argument, the Mississippi Supreme Court reviewed affidavits from not one but two officers of the court and, properly, determined the issue to fail to rise to such a level as to warrant post-conviction review in the trial court. Petitioner fails to provide any binding federal precedent which would require a state court, in denying a *Brady* claim in a successive post-conviction review, to remand the case to the trial court instead of rejecting a *Brady* claim outright. Therefore, Petitioner fails to prove he is entitled to federal habeas relief.

CLAIM XVIII: ALTERNATIVELY TO CLAIM XVII, PETITIONER'S TRIAL COUNSEL WERE INEFFECTIVE FOR THEIR FAILURE TO UTILIZE THE VIDEOTAPED STATEMENT OF REBECCA BRITT TO SUPPORT PETITIONER'S THEORY OF DEFENSE AND/OR IMPEACH THE TRIAL TESTIMONY OF REBECCA BRITT.

In denying Petitioner's successive post-conviction claim, the Mississippi Supreme Court held as follows:

> As an alternative to Havard's *Brady* violation claim discussed first *supra*, Havard claims that his trial counsel were ineffective by failing to utilize the videotaped statement if the State did disclose or produce it. Specifically, Havard asserts that his "trial counsel were ineffective for (a) not informing Petitioner of the existence of the statement, (b) not utilizing the statement to support [Havard]'s defense to the charge of capital murder and the underlying felony of sexual battery, and (c) not utilizing the statement to cross-examine or impeach Rebecca Britt's trial testimony where it differed from what she told the investigators in the statement...."
>
> "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, 2064, 80 L.Ed.2d 674 (1984). The test is two pronged: The defendant must demonstrate that his counsel's performance was deficient, and that the deficiency prejudiced the defense of the case. Strickland *Washington v. State*, 620 So.2d 966 (Miss.1993). "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. 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 v. Washington*, 466 U.S. at 687, 104 S.Ct. at 2065; *State v. Tokman*, 564 So.2d 1339, 1343 (Miss.1990).

Foster v. State, 687 So.2d 1124, 1129–30 (Miss.1996) (emphasis removed).

This issue is procedurally barred because it fails to meet an exception to the time bar and the successive-writ bar. Miss. Code Ann. §§ 99–39–5(2)(b), 99–39–27(9). Notwithstanding the procedural bars, Havard's claim also fails to pass the standard set forth in *Strickland.*

Havard has failed to present any argument on this matter other than bare assertions. In his motion for post-conviction relief, Havard merely asserts that counsel were deficient and then claims that "[f]or the same reasons set forth in Claim 2, Petitioner was prejudiced by this ineffective assistance of counsel and there is a reasonable probability that, but for this ineffectiveness, the result of the proceedings would have been different." Referring again to the affidavit of Gus Sermos, he states that, to the best of his knowledge, belief, and memory, Britt's videotaped statement contained nothing exculpatory in nature and that Britt's trial testimony was consistent with her videotaped statement.

[W]e must strongly presume that counsel's conduct falls within a wide range of reasonable professional assistance, and the challenged act or omission "might be considered sound trial strategy." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052, 80 L.Ed.2d 674. In other words, defense counsel is presumed competent. *Id.* at 690, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

Bennett v. State, 990 So.2d 155, 158 (Miss.2008). Trial counsel's decision not to use the videotaped statement clearly falls within the realm of trial strategy. However, even if we assume, for the sake of argument, that Sermos was deficient in failing to use the statement, Havard does not explain how the statement could have been used to support his defense. Further, the only discrepancy between Britt's videotaped statement and her trial testimony was whether Havard ever had changed Chloe's diaper before the night Chloe died. As discussed *supra*, there is no reasonable likelihood that Britt's testimony, if false, affected the judgment of the jury. Havard cannot demonstrate how he was prejudiced.

This issue is procedurally barred. Miss. Code Ann. §§ 99–39–5(2)(b), 99–39–27(9) (Rev.2007). Notwithstanding the procedural bars, the issue also is without merit.

Havard v. State, 86 So. 3d at 903-04.

Again, Petitioner fails to overcome the procedural time bar and successive-writ bar that serve as independent and adequate state court bars to this habeas claim. Petitioner does not

provide sufficient evidence of cause or actual prejudice; and he does not show how the failure to produce this videotape to the jury resulted in a fundamental miscarriage of justice.

Notwithstanding Petitioner's procedural bars on federal habeas, Petitioner also fails to show how the state court unreasonably applied *Strickland* in rejecting Petitioner's ineffective assistance of counsel claim. As the court noted in its discussion of *Napue*, the contents of the videotape did not rise to such a level as would have resulted in a different outcome at trial: "the only discrepancy between Britt's videotaped statement and her trial testimony was whether Havard had ever changed Chloe's diaper before the night Chloe died." Petitioner fails to show how this single statement would have changed the course of his trial—and, of course, he cannot. Accordingly, Petitioner cannot show the Mississippi Supreme Court's resolution of a claim was not only "erroneous, but objectively unreasonable" such that habeas relief should be granted. *Yarborough v. Alvarado*, 541 U.S. 652, 124 S.Ct. 2140 (2004); *Middleton v. McNeil*, 541 U.S. 433, 124 S.Ct. 1830 (2004); *Mitchell v. Esparza*, 540 U.S. 12, 124 S.Ct. 7 (2003); *Yarborough v. Gentry*, 540 U.S. 1, 5, 124 S.Ct. 1, 4 (2003); *Lockyer v. Andrade*, 538 U.S. 63, 76, 123 S.Ct. 1166, 1175 (2003); *Williams v. Taylor*, 529 U.S. at 409.

In *Holland v. Jackson*, 542 U.S. 934, 124 S.Ct. 2736 (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 Mississippi Supreme Court knew the governing law on this issue; it properly applied the governing law on this issue. This issue, now presented on habeas, is both procedurally barred and without substantive merit.

CLAIM XIX: NEWLY-DISCOVERED EVIDENCE DEMONSTRATES THAT PETITIONER IS INNOCENT OF THE UNDERLYING FELONY OF SEXUAL BATTERY, WHICH ALONE MADE PETITIONER'S MURDER CHARGE A CAPITAL MURDER CHARGE AND MADE HIM ELIGIBLE FOR THE DEATH PENALTY.

In rejecting Petitioner's successive post-conviction allegation, the Mississippi Supreme Court held as follows:

> Pursuant to a discovery order entered in Havard's federal habeas corpus proceedings, Dr. Steven Hayne was deposed to explore his opinions regarding sexual battery in Havard's case. Havard contends that the deposition was ordered in light of concerns that were raised in the habeas petition regarding the sufficiency of the evidence supporting the State's allegation of sexual battery and the effectiveness of counsel in preparing a defense to the sexual-battery allegation. The latter of these two concerns will be discussed in Havard's next issue. Havard also contends that the deposition was ordered so that Dr. Hayne could elaborate on his signed declaration. It is Havard's claim that the declaration and deposition of Dr. Hayne demonstrate his innocence of the underlying felony, thus meaning that Havard cannot be guilty of capital murder.
>
> ***A. The Declaration of Dr. Hayne***
>
> In a document with the heading "Declaration of Dr. Steven T. Hayne" signed by Dr. Hayne and submitted in the federal court proceedings, Dr. Hayne stated that "[b]ased upon the autopsy evidence available regarding the death of Chloe Britt, I cannot include or exclude to a reasonable degree of medical certainty that she was sexually assaulted." He also stated that the contusion found on Chloe's anus "could have a variety of causes, and is not sufficient in and of itself to determine that a sexual assault occurred." Dr. Hayne also stated that he found no tearing of Chloe's rectum, anus, anal sphincter, or perineum.
>
> Havard puts the most emphasis, however, on Dr. Hayne's statement that "[d]ilated anal sphincters may be seen on persons who have died, as well as on a person prior to death without significant brain function. My experience as well as the medical literature recognizes that a dilated anal sphincter is not, on its own, evidence of anal sexual abuse, but must be supported by other evidence."
>
> ***B. The Deposition of Dr. Hayne***
>
> In his deposition, Dr. Hayne acknowledged that, prior to conducting the autopsy of Chloe, he was specifically asked to determine whether a sexual assault had occurred. There is no mention of sexual battery in the Final Report of Autopsy, because Dr. Hayne "could not come to final conclusion as to that." Dr. Hayne stated: "There was one injury that I indicated would be consistent with the

penetration of the anal area, but that, in and of itself, I didn't feel was enough to come to a conclusion that there was a sexual assault in this particular death." Dr. Hayne confirmed that he found no tearing of the rectum, anus, anal sphincter, or perineum and that he would have noted such tearing if it had been present. He also opined that such tearing could not have healed between the time Chloe was in the emergency room and her autopsy one day later.

Dr. Hayne testified about the single contusion he found on Chloe's rectum, and the absence of abrasions and lacerations. He testified that the contusion was found in an area that is easily injured and that a rectal thermometer like that used in the emergency room to check Chloe's temperature could cause such a contusion, but he did not think it was likely. He also stated that he could not exclude that possibility.

Havard asserts that his expert, Dr. James Lauridson, and Dr. Hayne both have opined that it is possible that a dilated anus can occur in a person who is dead or even a person who is clinically alive but lacks significant brain function. Dr. Hayne testified that signs of brain death include flaccidness, unconsciousness, muscle relaxation, lack of breathing, dilated and fixed pupils, lack of muscle tone, and an asystole heart. Havard points out that medical records, testimony from emergency-room treaters, and Dr. Hayne's autopsy findings found those conditions in Chloe leading up to and following her death.

Some specific deposition testimony of Dr. Hayne on which Havard relies is as follows:

> Q: Based upon the information available to you, Dr. Hayne, was Chloe Britt brain dead or lacked significant brain function at the time her anal dilation was first noted?
>
> A: It was.
>
> Q: And that was after she was successfully intubated; is that correct?
>
> A: That's correct.
>
> Q: And is this an opinion within a reasonable degree of medical certainty?
>
> A: As reflected in the medical record, yes.

Dr. Hayne testified that a dilated anus is a recognized post-mortem finding, and an increased likelihood of such a finding is possible in children who die of brain injuries. He stated that flaccid or limp muscle condition can contribute to anal dilation. Dr. Hayne also testified that a dilated anal sphincter was not, standing alone, evidence of sexual abuse:

> Q: And, Dr. Hayne, can you say from your autopsy evidence, and from the coroner's inquest, the medical records that you reviewed, the photographs, and the laboratory findings, that this child, Miss Britt, was sexually assaulted?
>
> A: I could not come to that final conclusion, Counselor. As I remember in trial testimony, I said that the contusion would be consistent with a sexual abuse, but I couldn't say that there was sexual abuse, and, basically, I deferred to the clinical examination conducted at the hospital.
>
> Q: And so from your standpoint and from your expertise, you cannot say that this child was sexually abused, to a reasonable degree of medical certainty; is that correct?
>
> A: I could not now and I could not then, either; at the trial, or when I wrote the report, or discussed the case with the coroner.

The issue before this Court is whether Havard has newly discovered evidence that would exempt him from the procedural time-bar and the successive-writ bar. The new evidence must be "evidence, not reasonably discoverable at the time of trial, that is of such nature that it would be practically conclusive that, if it had been introduced at trial, it would have caused a different result in the conviction or sentence." Miss.Code Ann. § 99–39–27(9) (Rev.2007). In this task, Havard fails.

First, Dr. Hayne testified at Havard's trial, and he was subjected to cross-examination. In his recent deposition testimony, Dr. Hayne testified that his deposition testimony was consistent with his trial testimony. Although Dr. Hayne's trial testimony was limited regarding sexual battery, nothing in his deposition testimony was inconsistent with his trial testimony. Additionally, at his deposition, Dr. Hayne testified that he had seen no new facts that would cause him to change his testimony at trial.

There is no indication that the deposition testimony provided by Dr. Hayne was undiscoverable at the time of trial. The fact that Havard's counsel now asks questions in more detail than did Havard's trial counsel on cross-examination does not qualify the answers as newly discovered evidence within the meaning of Mississippi Code Section 99–39–27(9).

Havard tries to compare his case to that of *Williams v. State,* 35 So.3d 480 (Miss.2010), in which the defendant was convicted on two counts of sexual battery, one against each of his two daughters. Williams challenged the sufficiency of the evidence supporting the sexual-battery charge in Count II against his younger, ten-month-old daughter. This Court reversed Count II because the only evidence against the defendant on that count was the testimony of the doctor who examined the children. With regard to Count I, the older child, the doctor testified that the "injuries were 'definitely consistent' with someone

who had been sexually abused 'to a reasonable degree of medical certainty.' " *Id.* at 486. As to the younger daughter, the doctor's testimony was that the child's injuries were "very consistent with anal penetration." *Id.* The Court stated: "[t]his physician couched his opinion in terms of suspicion of probability, which, standing alone, absent additional corroborating evidence, is insufficient in a criminal case." *Id.* at 486–87.

Havard relies on the following deposition testimony of Dr. Hayne:

> Q: And Dr. Hayne, can you say from your autopsy evidence, and from the coroner's inquest, the medical records that you reviewed, the photographs, and the laboratory findings, that this child, Miss Chloe Britt, was sexually assaulted?
>
> A: I could not come to that final conclusion, Counselor. As I remember in trial testimony, I said that the contusion would be consistent with a sexual abuse, but I couldn't say that there was sexual abuse, and, basically, I deferred to the clinical examination conducted at the hospital.

With regard to Havard's assertion that the rectal thermometer used to take Chloe's temperature in the emergency room could have been the object that caused the contusion, Dr. Hayne testified:

> A: I did not think that was an insertion injury from a rectal thermometer by medical personnel. I could not exclude it, but I think it was unlikely, Counselor.

Havard's case is distinguishable from *Williams*, most significantly because Dr. Hayne's testimony was not the only evidence supporting the sexual-battery allegation. Unlike *Williams*, numerous emergency-room personnel witnessed Chloe's physical condition and gave testimony at Havard's trial. *See Havard*, 988 So.2d 322, 332. Additionally, Williams denied sexually abusing his daughters. Although Havard denies that he sexually assaulted Chloe, he gave the following statement to the police:

> Q: And you said you had wiped her down in her private area. Okay. Can you tell us how you wiped her down and what you done [sic].
>
> A: I just took a normal wipe, just wiped her down between her legs like normal. Inside of her—inside of her buttocks, inside of buttocks [sic] to clean her out.
>
> Q: And you said earlier that your finger may have slipped or you may have wiped her a little bit too hard?
>
> A: It's possible. I was still upset and nervous and shaky.

> Q: Okay. What do you mean by wiping her too hard?
>
> A: Maybe I was too rough with her. Maybe I shook her too hard. I don't know.
>
> Q: You say you wiped her too hard. What do you mean by that?
>
> A: Maybe I went too far in on her when I was wiping her out, inside of her butt.
>
> There is no merit to Havard's claim that newly discovered evidence exists that supports his innocence. This issue is procedurally barred by time and as a successive writ. Miss.Code Ann §§ 99–39–5(2)(b), 99–39–27(9) (Rev.2007).

Havard v. State, 86 So. 3d at 904-07.

Petitioner submits he is actually and factually innocent of the charges against him. Respondents submit this claim is not cognizable on federal habeas review as an independent claim. "Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Herrera v. Collins*, 506 U.S. 390, 400, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993); *see also Graves v. Cockrell*, 351 F.3d 143, 151 (5th Cir. 2003); *Dowthitt v. Johnson*, 230 F.3d 733, 741 (5th Cir. 2000). Rather, a petitioner's claim of actual innocence is merely a "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Dowthitt*, 230 F.3d at 741 (citation omitted). Respondents submit Havard's assertion of actual innocence fails to present an "independent, substantive constitutional claim;" therefore, Havard is not entitled to habeas relief.

The Fifth Circuit has refused to permit claims of actual innocence on habeas review. *E.g.*, *Graves v. Cockrell*, 351 F.3d 143, 151 (5th Cir. 2003) ("[The *Herrera* court] left open whether a truly persuasive actual innocence claim may establish a constitutional violation sufficient to state a claim for habeas relief. The Fifth Circuit has rejected this possibility and held that claims of

actual innocence are not cognizable on federal habeas review." (internal citations omitted)); *Dowthitt v. Johnson*, 230 F.3d 733, 741 (5th Cir. 2000); *Foster v. Quarterman*, 466 F.3d 359, 367-68 (5th Cir. 2006); *Cantu v. Thaler*, 632 F.3d 157, 167 (5th Cir. 2011), *vacated on other grounds*, 132 S. Ct. 1791 (U.S. 2012).

CONCLUSION

Wherefore, premises considered, Respondents respectfully move this Court deny Petitioner an evidentiary hearing, dismiss the amended 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 this 12th day of September, 2013.

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CERTIFICATE OF SERVICE

This is to certify that I, Melanie Thomas, Special Assistant Attorney General for the State of Mississippi have on this date electronically filed the foregoing **Response to Memorandum in Support of Amended 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: United States District Court Judge Keith Starrett; and Mark D. Jicka and Graham P. Carner, attorneys for Petitioner, Jeffrey Keith Havard.

This, the 12th day of September, 2013.

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