

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

JEFFREY HAVARD,

Petitioner,

v.

BURL CAIN, Commissioner,
Mississippi Department of Corrections, and
LYNN FITCH, Attorney General of the
State of Mississippi

Respondents.

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) Civil Action No.: 5:08-cv-275-KS-BWR

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) The Honorable

) Keith Starrett,

) Judge Presiding.

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**SECOND AMENDED PETITION FOR
WRIT OF HABEAS CORPUS**

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SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS

I. INTRODUCTION

Petitioner, Jeffrey Havard, was convicted of capital murder and sentenced to death¹ in violation of numerous constitutional rights and protections. At all stages, Mr. Havard has been the victim of a rush to judgment. There was a rush to judgment by the hospital staff, which jumped to the erroneous conclusion that a sexual battery had been committed, despite the fact that there were other, more plausible explanations. All expert evidence in this case, including from the only experts that the State of Mississippi has called to testify in this case, conclusively refutes this erroneous conclusion. Building on this erroneous conclusion, law enforcement and the District Attorney immediately rushed to judgment, accepting the medical providers' conclusion, and disregarding all evidence that did not support that foregone conclusion. Within minutes of the death of young Chloe Britt and before conducting an investigation, law enforcement and the District Attorney had already determined that this was a capital murder case. Petitioner was charged with capital murder within two days of the death of Chloe Britt.

¹ The death sentence has since been vacated, though Mr. Havard was re-sentenced to die in prison. Previously asserted claims based purely on sentencing issues are being removed from this Second Amended Petition.

Unfortunately, the rush to judgment continued before and during the trial of Petitioner. Petitioner's attorneys failed to conduct an adequate investigation in order to discover and develop evidence to support a meaningful defense; evidence that was readily available and compelling. Perhaps most significantly, they failed to properly request or obtain expert testimony that would have shown that there was no objective, scientifically valid basis for the allegation that a sexual battery had occurred.

After a partial jury was empaneled (including a juror who candidly admitted that she could not be fair to Petitioner because her niece had been raped), the State presented its case, based on unfounded speculation, improper opinion, and unfairly prejudicial evidence. Petitioner's attorneys failed to present an adequate defense in response to the prosecution's shaky evidence. The jury then rushed to judgment, convicting Petitioner of capital murder in a matter of only thirty-five minutes. The court then moved directly into the sentencing phase, at which Petitioner's attorneys called two witnesses and failed to offer any meaningful mitigation arguments. The jury sentenced Petitioner to death, and the trial court rushed him straight to Parchman.

The rush to judgment continued on direct appeal, where the Mississippi Supreme Court refused to consider out-of-record evidence that was properly before it and affirmed the conviction and sentence of the trial court. Petitioner then filed his initial state post-conviction proceedings, in which the Mississippi Supreme Court again failed to consider the very evidence that it had previously stated Petitioner should present in post-conviction proceedings rather than on direct appeal. After Petitioner litigated in this Court for several years and uncovered new evidence showing that Petitioner's conviction based upon a commission of sexual battery is

unfounded and unconstitutional, the Mississippi Supreme Court again summarily denied Petitioner relief without even permitting Petitioner an opportunity to develop and present all evidence in support of his claims. The Court did so even after it became apparent that both the State and Petitioner's trial counsel had violated mandatory post-conviction discovery rules.

Petitioner then returned to this Court but filed his third state post-conviction proceeding related to newly-discovered evidence regarding Shaken Baby Syndrome (SBS) and discovery violations related to failure to disclose statements of the State's sole expert witness. The Mississippi Supreme Court remanded the newly-discovered evidence issues to the Circuit Court for a hearing. The Brady claim was summarily dismissed. In the Circuit Court, ample evidence was presented to the trial court showing that the original trial testimony concerning SBS and related issues was flawed and incorrect. The trial court refused to consider any evidence regarding the sexual battery issue, which was closely intertwined to the issue of SBS based upon the State's original theory of the case. The evidence the trial court refused to consider was that **every single expert** who has ever been associated with the case—including the State's two experts **Dr. Steven Hayne and Dr. Scott Benton**—are of the opinion that there is insufficient medical and scientific support for the early conclusion in the case that the child had been sexually assaulted.

Remarkably, the trial court let Petitioner's capital murder conviction stand but vacated the death sentence. Havard was resentenced to life without possibility of parole or early release. Havard appealed to the Mississippi Supreme Court, which affirmed the Circuit Court. Several Mississippi Supreme Court justices dissented and would have held that the sexual battery evidence was relevant and would have vacated Havard's conviction and allow a re-trial.

Through it all, Petitioner has not had his claims properly considered by a fair, impartial decision maker. This is particularly the case with the elephant in the room that the Mississippi Supreme Court repeatedly refuses to address: that the evidence does not support that a sexual battery occurred. Petitioner now comes back before this Court, requesting a deliberate, proper review of the omitted evidence, facts, and law that support his claims. When these claims are considered in light of the evidence, facts, and established substantive and procedural laws, it is clear that Petitioner did not receive a fair trial and that his conviction and life sentence are unconstitutional. Accordingly, this writ should be granted.

II. STATEMENTS PURSUANT TO MODEL HABEAS FORM

1. The name and location of the court that entered the judgment of conviction and sentence under attack is the Circuit Court of Adams County, Mississippi, the Honorable Forrest A. Johnson, Judge presiding, Case No. 0141.
2. The Sentence of Death Upon Jury Verdict was entered on December 19, 2002.
3. Petitioner was sentenced to death and is presently incarcerated at the East Mississippi Correctional Facility, in Meridian, Mississippi.
4. Petitioner was indicted on June 24, 2002, for capital murder during the course of sexual battery and during the course of felonious child abuse. On the eve of trial, on December 16, 2002, the indictment was amended, charging Petitioner solely with capital murder during the course of sexual battery.
5. Petitioner pled “not guilty” to all charges.
6. Petitioner was tried before the Court and a jury, the Honorable Forrest A. Johnson presiding, and was found guilty of capital murder. A sentencing hearing was held

wherein the jury found the existence of statutory aggravating factors and concluded there were no mitigating factors sufficient to preclude imposition of the death penalty.

7. Petitioner did not testify at any pre-trial hearings. Petitioner also did not testify during the guilt or sentencing phases of the trial.
8. Petitioner appealed his conviction and sentence of death directly to the Mississippi Supreme Court. The docket number of the direct appeal was 2003-DP-00457-SCT.
9. Issues raised on direct appeal of the conviction and sentence were as follows:
 - I. TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO ENSURE THAT JUROR DOROTHY SYLVESTER WAS EXCUSED FOR CAUSE WHERE SHE WAS BIASED AGAINST JEFFREY.
 - II. TRIAL COUNSEL WERE INEFFECTIVE IN FAILING TO ASK ANY QUESTIONS RELATED TO THE POTENTIAL JURORS' QUALIFICATIONS TO SERVE ON A DEATH PENALTY JURY.
 - III. THE SEATING OF A JUROR WHO WOULD AUTOMATICALLY VOTE FOR THE DEATH PENALTY IN ANY AND ALL MURDER CASES AND THIS JUROR'S FAILURE TO ANSWER THE TRIAL COURT'S QUESTIONS ON THIS POINT DEPRIVED JEFFREY HAVARD OF A FAIR TRIAL CONSISTENT WITH THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND THE CORRESPONDING PROVISIONS OF THE STATE CONSTITUTION.
 - IV. JEFFREY HAVARD WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL ADOPTED A DEFENSE STRATEGY AND THEN FAILED TO INVESTIGATE, SECURE EXPERT ASSISTANCE, OFFER ANY EVIDENCE IN SUPPORT OF THE THEORY OR REQUEST A JURY INSTRUCTION IN SUPPORT OF THE THEORY.
 - V. PROSECUTORIAL MISCONDUCT AT CLOSING ARGUMENT OF THE CULPABILITY PHASE VIOLATED JEFFREY HAVARD'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS AND DEPRIVED HIM OF A FUNDAMENTALLY FAIR TRIAL.

- VI. THE TRIAL COURT ERRED IN ALLOWING THE INTRODUCTION OF VICTIM IMPACT TESTIMONY AT SENTENCING.
- VII. COUNSEL WERE INEFFECTIVE FOR NOT DEVELOPING AND PRESENTING COMPELLING EVIDENCE IN MITIGATION OF PUNISHMENT.
- VIII. JEFFREY HAVARD WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN CLOSING ARGUMENT AT THE SENTENCING PHASE OF HIS TRIAL.
- IX. THE TRIAL COURT ERRED IN OVERRULING AN OBJECTION MADE BY DEFENSE COUNSEL TO THE USE OF AN IRRELEVANT LIFE PHOTOGRAPH OF THE VICTIM THEREBY CAUSING PREJUDICIAL SYMPATHY FOR THE VICTIM.
- X. THE TRIAL COURT ERRED IN ANSWERING A JURY QUESTION IN SUCH A WAY AS TO CAUSE SPECULATION OF SOME FUTURE RELEASE IF THE DEFENDANT IS NOT SENTENCED TO DEATH THEREBY INJECTING AN "ARBITRARY FACTOR" INTO THE SENTENCING PHASE OF THIS TRIAL IN VIOLATION OF STATE LAW AND THE STATE AND FEDERAL CONSTITUTIONS.
- XI. THE TRIAL COURT'S LIMITING INSTRUCTION OF THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE WAS ITSELF UNCONSTITUTIONALLY VAGUE AND OVERBROAD.
- XII. THE DEATH SENTENCE IN THIS CASE MUST BE VACATED BECAUSE THE INDICTMENT FAILED TO CHARGE A DEATH PENALTY ELIGIBLE OFFENSE.
- XIII. THE TRIAL COURT ERRED IN ALLOWING THE JURY TO CONSIDER THE AGGRAVATORS OF SEXUAL BATTERY AND ESPECIALLY HEINOUS, ATROCIOUS AND [SIC] CRUEL, WHICH THE JURY USED IN SUPPORT OF A SENTENCE OF DEATH, DENYING HAVARD OF A RELIABLE SENTENCE AS GUARANTEED BY THE UNITED STATES AND MISSISSIPPI CONSTITUTIONS.
- XIV. THE AGGREGATE ERROR IN THIS CASE REQUIRES REVERSAL OF THE CONVICTION AND DEATH SENTENCE.

10. On February 9, 2006, the Mississippi Supreme Court affirmed Petitioner's conviction and sentence of death. *Havard v. State*, 928 So.2d 711 (Miss. 2006) ("*Havard I*").

Petitioner's motion for rehearing was denied on May 25, 2006.
11. Petitioner then sought relief from the United States Supreme Court. His petition for a writ of certiorari was, however, denied. *Havard v. Mississippi*, 127 S. Ct. 931 (2007).
12. Petitioner then filed a request for post-conviction relief in the Mississippi State court system. The docket number of the post-conviction proceeding was 2006-DR-01161-SCT.
13. Issues raised in the State post-conviction proceedings were as follows:
 - I. DURING THE GUILT PHASE OF HIS TRIAL HAVARD'S LAWYERS FAILED TO ADOPTED [SIC] A DEFENSE STRATEGY
 - II. HAVARD'S RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE OF TRIAL WITHIN THE MEANING OF STRICKLAND V. WASHINGTON AND ITS FEDERAL PROGENY, AS GUARANTEED BY THE SIXTH AMENDMENT AS WELL AS THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AS WELL AS THE CORRESPONDING PORTIONS OF THE MISSISSIPPI CONSTITUTION AND MISSISSIPPI CASE LAW WERE DENIED BECAUSE HIS TRIAL COUNSEL WERE INEFFECTIVE BY NOT INVESTIGATING, DEVELOPING AND PRESENTING COMPELLING EVIDENCE IN MITIGATION OF PUNISHMENT
 - III. AS A COMPLETELY SEPARATE AND DISTINCT FAILURE TO RENDER EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE OF TRIAL, HAVARD'S TRIAL COUNSEL WERE INEFFECTIVE IN FAILING TO DEVELOP AND PRESENT COMPELLING EVIDENCE IN MITIGATION OF PUNISHMENT BASED UPON INVESTIGATION INTO JEFFREY'S CHILDHOOD AND FAMILY HISTORY, WHICH HAD THE EFFECT OF DENYING HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT PHASE OF TRIAL WITHIN THE MEANING OF STRICKLAND V. WASHINGTON AND

ITS FEDERAL PROGENY, AS WELL AS THE CORRESPONDING PORTIONS OF THE MISSISSIPPI CONSTITUTION AND MISSISSIPPI CASE LAW

- IV. AS A SEPARATE ISSUE AND COMPLETELY DIFFERENT GROUND FOR RELIEF TRIAL COUNSEL WERE INEFFECTIVE DURING THE PENALTY PHASE OF TRIAL IN FAILING TO DEVELOP AS A MITIGATION THEORY HAVARD'S SUCCESSFUL ADAPTATION TO HAVING BEEN INSTITUTIONALIZED AT CAMP SHELBY
- V. TRIAL COUNSEL WERE INEFFECTIVE IN FAILING TO ASK ANY QUESTIONS RELATED TO THE POTENTIAL JURORS' QUALIFICATIONS TO SERVE UPON A DEATH PENALTY JURY WHICH HAD THE EFFECT OF DENYING HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT AND SENTENCING PHASES OF TRIAL WITHIN THE MEANING OF STRICKLAND V. WASHINGTON AND ITS FEDERAL PROGENY, AS WELL AS THE CORRESPONDING PORTIONS OF THE MISSISSIPPI CONSTITUTION AND MISSISSIPPI CASE LAW
- VI. HAVARD WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN CLOSING ARGUMENT AT THE SENTENCING PHASE OF HIS TRIAL WHICH HAD THE EFFECT OF DENYING HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE OF TRIAL WITHIN THE MEANING OF STRICKLAND V. WASHINGTON AND ITS FEDERAL PROGENY, AS WELL AS THE CORRESPONDING PORTIONS OF THE MISSISSIPPI CONSTITUTION AND MISSISSIPPI CASE LAW
- VII. PROSECUTORIAL MISCONDUCT AT CLOSING ARGUMENT OF THE CULPABILITY PHASE VIOLATED JEFFREY HAVARD'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS AND DEPRIVED HIM OF A FUNDAMENTALLY FAIR TRIAL
- VIII. THE TRIAL COURT ERRED IN ALLOWING THE INTRODUCTION OF VICTIM IMPACT TESTIMONY AT SENTENCING
- IX. JEFFERY HAVARD'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE US CONSTITUTION WERE VIOLATED WHEN THE COURT IMPROPERLY RESPONDED TO A QUESTION POSED BY THE JURY DURING THE SENTENCING PHASE

- X. THE TRIAL COURT'S LIMITING INSTRUCTION OF THE ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE VIOLATED MR. HAVARD'S CONSTITUTIONAL RIGHTS BECAUSE IT WAS UNCONSTITUTIONALLY VAGUE AND OVERBROAD
- XI. PETITIONER'S DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT AND NOTICE AND JURY TRIAL GUARANTEES UNDER THE SIXTH AMENDMENT WERE VIOLATED BECAUSE THE INDICTMENT FAILED TO CHARGE A DEATH PENALTY ELIGIBLE OFFENSE
- XII. MR. HAVARD'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE TRIAL COURT ALLOWED THE JURY TO COLLECTIVELY CONSIDER TWO PARTICULAR AGGRAVATORS, WHICH THE JURY USED IN SUPPORT OF A SENTENCE OF DEATH, THUS DENYING MR. HAVARD A RELIABLE SENTENCE AS GUARANTEED BY THE US CONSTITUTION
- XIII. MR. HAVARD'S RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL DURING BOTH THE TRIAL AND PENALTY PHASE OF HIS TRIAL WITHIN THE MEANING OF STRICKLAND V. WASHINGTON AND ITS FEDERAL PROGENY, AS GUARANTEED BY THE SIXTH AMENDMENT AS WELL AS THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AS WELL AS THE CORRESPONDING PORTIONS OF THE MISSISSIPPI CONSTITUTION AND MISSISSIPPI CASE LAW WERE DENIED BECAUSE HIS TRIAL COUNSEL, ROBERT E. CLARK, WAS FULLY INCOMPETENT TO PURSUE LEGAL RELIEF ON MR. HAVARD'S BEHALF
- XIV. MR. HAVARD WAS DENIED HIS RIGHT TO A FAIR TRIAL GUARANTEED BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISION OF THE MISSISSIPPI CONSTITUTION DUE TO CUMULATIVE ERROR. MR. HAVARD'S CONSTITUTIONAL RIGHTS WERE VIOLATED DURING BOTH THE GUILT AND SENTENCING PHASES OF HIS TRIAL AND EACH INDIVIDUAL CLAIM ARTICULATED ABOVE WARRANTS POST-CONVICTION RELIEF, MORE IMPORTANTLY, THE COMBINED PREJUDICIAL EFFECT OF ALL THESE ERRORS, TAKEN TOGETHER, REQUIRES REVERSAL

14. No evidentiary hearing was conducted during Petitioner's initial state post-conviction proceedings.
15. The Mississippi Supreme Court denied Petitioner's post-conviction relief on May 22, 2008. *Havard v. State*, 988 So.2d 322 (Miss. 2008) ("*Havard II*"), re-hearing denied, Aug. 28, 2008.
16. After initial proceedings, merits briefing, and discovery in this federal cause, new grounds for relief were discovered and Petitioner again filed, in 2011, a request for post-conviction relief in the Mississippi State court system. The docket number of the second post-conviction proceeding was 2011-DR-00539-SCT. These federal proceedings were stayed during the second round of state post-conviction proceedings.
17. Issues raised in the second round of State post-conviction proceedings were as follows:

CLAIM 1: THE STATE VIOLATED PETITIONER'S RIGHTS UNDER *NAPUE V. ILLINOIS* AND RELATED AUTHORITY BY SOLICITING AND FAILING TO CORRECT TESTIMONY THAT IT KNEW OR SHOULD HAVE KNOWN WAS FALSE

CLAIM 2: THE *STATE* WITHHELD EXCULPATORY EVIDENCE IN VIOLATION OF *BRADY V. MARYLAND*

CLAIM 3: ALTERNATIVELY TO CLAIM 2, PETITIONER'S TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO UTILIZE THE VIDEOTAPED STATEMENT OF REBECCA BRITT, IF IT WAS DISCLOSED OR PRODUCED BY THE STATE PRIOR TO TRIAL

CLAIM 4: NEWLY-DISCOVERED EVIDENCE DEMONSTRATES THAT PETITIONER IS INNOCENT OF THE UNDERLYING FELONY OF SEXUAL BATTERY AND, THEREFORE, THE CHARGE OF CAPITAL MURDER

CLAIM 5: NEWLY-DISCOVERED EVIDENCE DEMONSTRATES THAT PETITIONER'S TRIAL COUNSEL WERE GROSSLY INEFFECTIVE IN CHALLENGING THE UNDERLYING FELONY OF SEXUAL BATTERY

18. No evidentiary hearing was conducted during Petitioner's second state post-conviction proceedings.
19. The Mississippi Supreme Court denied Petitioner's second request for post-conviction relief on March 8, 2012. *Havard v. State*, 86 So.3d 896 (Miss. 2012) ("*Havard III*"), rehearing denied, May 10, 2012 (on May 10, 2012, the Mississippi Supreme Court denied the Motion for Rehearing but did slightly modify its initial opinion from March 8, 2012).
20. Following *Havard III*, this federal habeas case was unstayed and litigation resumed. Petitioner filed an Amended Petition (Docket # 60), and merits briefing resumed. Petitioner then discovered new evidence related to the SBS and *Brady* issues in the case. Petitioner again filed, in 2013, a request for post-conviction relief in the Mississippi State court system. The docket number of the third post-conviction proceeding was 2013-DR-01995-SCT. These federal proceedings were stayed during the second round of state post-conviction proceedings.
21. Issues raised in the second round of State post-conviction proceedings were as follows:

CLAIM 1: NEWLY-DISCOVERED EVIDENCE DEMONSTRATES THAT PETITIONER IS INNOCENT OF CAPITAL MURDER OR AT LEAST PRESENTS GRAVE DOUBTS CONCERNING GUILT, AS THE STATE'S THEORY THAT CHLOE BRITT DIED FROM SHAKEN BABY SYNDROME HAS BEEN DISAVOWED BY THE STATE'S SOLE EXPERT WITNESS AND IS CONTRADICTED BY THE NEWLY-AVAILABLE OBJECTIVE MEDICAL EVIDENCE.

CLAIM 2: HAVARD'S RIGHTS UNDER *BRADY V. MARYLAND* AND ITS PROGENY WERE VIOLATED BY THE STATE'S FAILURE TO DISCLOSE DR. HAYNE'S PRE-TRIAL REPORT THAT HE COULD NOT STATE THAT A SEXUAL BATTERY HAD BEEN COMMITTED.²

² This claim also included an alternative claim of ineffective assistance of counsel for the failure of trial court to discover the withheld evidence by, for instance, interviewing Dr. Hayne prior to trial.

22. On April 2, 2015, the Mississippi Supreme Court entered an Order permitting Havard “to file his petition for post-conviction relief in the trial court on the issues of newly-discovered evidence presented in his application for leave.” The Supreme Court denied relief on the *Brady* and ineffective assistance of counsel claims raised in the third petition.
23. An evidentiary hearing was conducted during Petitioner’s third state post-conviction proceedings, from August 14-16 of 2017.
24. On September 14, 2018, the Circuit Court entered an Order that upheld Havard’s conviction for Capital Murder but vacated his death sentence based upon newly discovered evidence presented during the evidentiary hearing. Havard was re-sentenced to life imprisonment without possibility of parole or early release.
25. Havard appealed the Circuit Court’s decision to the Mississippi Supreme Court. The docket number of the appeal in the third post-conviction proceeding was 2018-CA-01709-SCT. The Mississippi Supreme Court affirmed the trial court’s denial of post-conviction relief as to the capital murder conviction. *Havard v. State*, 312 So.3d 326 (Miss. 2020) (“*Havard IV*”), re-hearing denied, Mar. 11, 2021. Justices King, Kitchens, and Ishee dissented from the majority opinion. 312 So.3d at 342-49.
26. All of the claims presented in this Petition have been presented to the Mississippi Supreme Court.
27. Petitioner has not previously filed any type of petition, application, or motion in a federal court regarding the conviction challenged herein, with the exception of his Petition for

- Writ of Certiorari to the United States Supreme Court, which was denied, *Havard v. Mississippi*, 127 S. Ct. 931 (2007), and pleadings previously filed in this cause.
28. Petitioner does not have any other petition or appeal now pending in any court, either state or federal, concerning the judgment being challenged herein.
 29. Petitioner, who is indigent, was represented at trial by two court-appointed attorneys: Gus G. Sermos, 858 Meadville Street, Summit, Mississippi, 39666, (601) 276-4333, and Robert E. Clark, 109 Carter Street, Vidalia, Louisiana, 71373, (318) 336-5886.
 30. Petitioner was represented on direct appeal by Andre De Gruy and Stacy P. Ferraro.
 31. Petitioner was represented in his initial State post-conviction proceedings by the Mississippi Office of Post-Conviction Counsel by Robert M. Ryan, Thomas C. Levidiotis, and Louwylynn Vanzetta Williams.
 32. Petitioner was represented in his second State post-conviction proceedings by the Mississippi Office of Post-Conviction Counsel by Glenn Swartzfager and by his counsel in these proceedings, Mark D. Jicka and Graham P. Carner.
 33. Petitioner was represented in his third State post-conviction proceedings by his counsel in these proceedings, Mark D. Jicka and Graham P. Carner. Attorney Caroline K. Ivanov also represented Petitioner in those proceedings.
 34. Petitioner does not have any future sentence to serve after completing the sentence (life without possibility of parole) for the judgment being challenged herein.
 35. The original Petition for Writ of Habeas Corpus was timely-filed, as was the First Amended Petition and this Second Amended Petition for Writ of Habeas Corpus.

III. HABEAS CORPUS STANDARDS

If the Mississippi Supreme Court adjudicated the issues presented below on the merits, this Court should grant the relief requested herein if any of the conditions set forth in 28 U.S.C. § 2254(d)(1) or (2) are present. Thus, this Court should grant this Amended Petition for Writ of Habeas Corpus if any of the Mississippi Supreme Court decisions were contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or if any of those decisions were based on an unreasonable determination of the facts in light of the evidence presented. The claims set forth below, both individually and when considered cumulatively, demonstrate that Petitioner is entitled to the relief requested herein, because one or more of the conditions set forth in 28 U.S.C. § 2254(d)(1) or (2) are present. Accordingly, this Second Amended Petitioner for Writ of Habeas Corpus should be granted.

IV. CLAIMS

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

A. Facts in Support of this Claim:

1. In early 2002, Jeffrey Havard shared a trailer home with his girlfriend, Rebecca Britt, and her 6-month-old daughter, Chloe. Jeffrey had invited Rebecca and her daughter to come live with him after he observed drug dealing and other dangerous conditions at their prior residence. Out of concern for their safety—and especially the safety of young Chloe—Jeffrey opened his home to them.

2. In the following weeks, Jeffrey, in many ways, cared for Chloe as if she were his own child. Jeffrey, who had, in the past, cared for his younger siblings as well as young children of family and friends, assisted with the daily routines of caring for a 6-month-old child.

3. On February 21, 2002, in the evening, Jeffrey and Rebecca Britt decided that Rebecca would go grocery shopping and to rent some movies. While Rebecca was gone, Jeffrey was to give Chloe a bath and put her to bed.

4. After Jeffrey finished bathing Chloe in an infant tub that was placed inside the trailer's main bathtub, he dropped her, because she was slippery. Chloe's head struck the nearby toilet. In a panic, Jeffrey picked Chloe up and shook her in an attempt to revive her, as it appeared that she was in shock. Chloe began to cry, and Jeffrey comforted her. Believing that all was well since Chloe was crying and otherwise seemed okay, Jeffrey put Chloe to bed.

5. A short time later, Rebecca came in from the grocery store. She went into Chloe's bedroom and checked on her. Rebecca emerged from Chloe's bedroom and reported that all was well, further putting Jeffrey at ease that he had not hurt Chloe by accidentally dropping her.

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

7. Upon their arrival at the hospital emergency room at approximately 9:40 p.m., Jeffrey and Rebecca encountered Shelley Smith, a phlebotomist (drawer of blood) who happened to be in the area near the emergency room entrance. Smith testified at trial that she was told at the

outset that Chloe was not breathing. Smith took Chloe from Rebecca and observed at that time that Chloe was blue and was not breathing. Smith “called a code” and rushed Chloe to a “code room,” where efforts to resuscitate her continued.

8. Angel Godbold, a registered nurse, was involved in these efforts to resuscitate Chloe. She testified that when Chloe was first brought into the emergency room, she was cyanotic (i.e., “blue”), had no pulse, had no spontaneous respirations, and “appeared to have been pulseless for an amount of time.” Godbold also testified that Chloe was asystole, meaning that her heart was at a “total standstill.”

9. Others on hand during the efforts to resuscitate Chloe made similar observations. Dr. Laurie Patterson, an emergency room physician, testified that Chloe was not breathing, had no circulation, and had no heart tones when she was first brought into the hospital. Dr. Patterson also observed that Chloe lacked muscle tone. Dr. Patterson administered CPR (“mouth to mouth”) prior to the arrival of the respiratory team.

10. Dr. Ayesha Dar, Chloe’s regular pediatrician, was called to the hospital. When she arrived, the efforts to resuscitate Chloe were still in progress. Dr. Dar noted at that time that Chloe was blue and that her pupils were fixed and dilated, leading Dr. Dar to conclude that Chloe was brain dead.

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

12. After Chloe had been intubated, additional efforts to treat her commenced. As part of this effort, nurse Godbold removed Chloe's diaper to take her temperature with a rectal thermometer. This was the first of three times that Chloe's temperature was taken with a rectal thermometer (according to medical records, this was done at 10:06 p.m., 10:13 p.m., and 10:31 p.m.). *See* Medical Records at Docket # 22-2. The first time that Chloe's temperature was taken with a rectal thermometer was approximately 10 minutes after she had been intubated. Nurse Godbold noted at that time that Chloe's anus was dilated to the "size of a quarter." This anal dilation was observed by others in the emergency room, and prompted a call to law enforcement, as it was assumed that sexual abuse had occurred. This incorrect assumption has impacted this case for 20 years now.

13. Though Chloe was resuscitated for almost one hour, she died that night. Emergency room treaters state that she died of a brain herniation or aneurysm, as a result of head trauma.

14. Following the death of Chloe, an autopsy was ordered by the Adams County Coroner. Chloe's body was sent to Dr. Steven Hayne, a forensic pathologist who, at the time, was the chief medical examiner for the Mississippi Department of Public Safety. Dr. Hayne determined that Chloe died as a result of a closed head injury. His Final Report of Autopsy, attached to the original Petition as Exhibit "D," makes no finding that Chloe had been sexually abused in any way.³ The Final Report of Autopsy simply notes that a 1-centimeter contusion was found on Chloe's anus.

³ In an effort to avoid unnecessarily bulking up the record, Petitioner is not re-attaching the exhibits from the original Petition. The referenced Autopsy Report is available at Docket # 7-5.

15. Petitioner was indicted for capital murder during the course of a sexual battery. The trial court appointed two attorneys to represent Petitioner, who was indigent. As demonstrated herein, Petitioner's trial counsel were grossly ineffective in their handling of this case, and especially in their handling of the allegation of sexual battery. Petitioner's counsel utterly failed to investigate or develop readily available evidence to refute the allegation of sexual battery—which alone made this a capital murder case.

16. Petitioner's trial counsel failed to investigate and develop evidence to support Petitioner's innocence with respect to the allegation of sexual battery, and likewise failed to present a defense to that allegation, which is the entire basis for this being a capital case. Namely, Petitioner's trial counsel did not understand, and did not seek to understand, the medical and forensic issues in the case, issues on which the entire case turns.

17. As a result, they did not properly request independent expert assistance, did not learn of alternative, non-criminal explanations for the State's evidence in support of sexual battery, did not obtain information to meaningfully cross-examine Dr. Steven Hayne, and did not obtain information that should have caused them to object to improper opinion testimony regarding alleged sexual abuse. Petitioner's counsel also failed to interview Dr. Hayne, as they had been instructed to do by the trial court when it denied the request for an independent expert. Thus, Petitioner's counsel failed to develop available evidence in support of Petitioner's defense that no sexual battery occurred. Furthermore, they failed to submit to the trial court a lesser-included offense jury instruction that was consistent with Petitioner's defense. Each of these failures is sufficient, standing alone, to grant relief to Petitioner under this claim. Taken together, they demonstrate gross ineffective assistance of counsel entitling Petitioner to relief.

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

19. In opposition to the motion, the State argued that "the State is not medically trained either and when we want to know what the autopsy report says or seek an explanation, we call Dr. Hayne and he discusses it with us. Dr. Hayne is not an agent for us, and Dr. Hayne is certainly available to the defense also to explain or discuss the report."

20. The trial court denied the request, holding that Petitioner had not demonstrated sufficient need for the independent pathologist. The trial court suggested that Petitioner's counsel inquire with Dr. Hayne, the pathologist who conducted the autopsy of Chloe and who was eventually called by the State at trial. The trial court left open the possibility of reconsidering the request upon a more sufficient showing of need.

21. Petitioner's counsel did not consult with Dr. Hayne. Petitioner's counsel also did not renew their request with a more sufficient showing of need for independent expert assistance.

22. Petitioner's counsel were not prepared to deal with medical and forensic issues at trial. Indeed, they clearly did not even understand those issues. Furthermore, they failed to obtain all evidence regarding those issues. For example, the trial court directed Petitioner's

counsel to obtain all medical records related to the case, but they failed to obtain x-rays that are likely significantly exculpatory.⁴ Accordingly, they were wholly unprepared for a trial that would be chiefly focused on allegations of sexual battery.

23. At trial, the only properly qualified and tendered expert witness who testified in any respect about the allegations of sexual battery was Dr. Steven Hayne. His testimony in this regard was, however, limited, and couched in terms of possibility. The reason for the limitations on his testimony were revealed years later: he could not testify to a reasonable degree of medical certainty that a sexual battery occurred. Havard's trial counsel never talked with Dr. Hayne and did not discover his limitations. Dr. Hayne says he told the prosecutor that he could not opine that a sexual battery occurred, but the State did not disclose this. *See infra*.

24. As more fully described *infra*, Dr. Hayne has sworn Declarations and Affidavits and presented sworn testimony that he cannot state to a reasonable degree of medical certainty that any sexual battery occurred. Furthermore, he opines that the 1-centimeter contusion found on Chloe's rectum has many potential causes and is insufficient to prove that any sexual battery occurred. Lastly, Dr. Hayne opined that dilated anal sphincters can be present on those who lack significant brain function. Medical records and testimony from medical providers demonstrate that Chloe was without oxygen for a significant time and that she was "brain dead" when she arrived at the emergency room. Specifically, Dr. Ayesha Dar testified that, when she first saw

⁴ As noted below, Dr. Lauridson cites to "x-ray studies" to support his opinion that large amounts of air were introduced into Chloe's gastrointestinal tract during resuscitation efforts, and opines that this air contributed to the dilated anus. Dr. Lauridson's opinions in this regard are based upon radiology reports, and not the x-rays themselves.

Chloe in the emergency room, Chloe's pupils were fixed and dilated, indicating that she was brain dead.

25. With the State's only expert witness unable to determine to a reasonable degree of medical certainty that any sexual battery occurred, the State was left to rely on the improper opinion testimony of other witnesses who were not qualified to render such opinions. These witnesses included the Sheriff, 2 emergency room nurses, 2 emergency room doctors, and the Coroner.

26. On the whole, the trial testimony of each of these witnesses with respect to the alleged sexual battery followed the same pattern: they testified about what they saw (for instance, the dilated anal sphincter), that what they saw was "not normal," and that this abnormal condition must have been caused by sexual abuse.

27. The qualifications of these witnesses to render opinions about what was "normal" and what "must have been caused by sexual abuse" were never proffered. The State did not tender these witnesses as experts, and the trial court did not qualify them as experts entitled to render opinions. Petitioner's trial counsel never objected to qualifications or the improper opinion of these witnesses, who should only have been permitted to testify about what they saw.

28. Clearly, based upon information from the medical literature, and as explained by Dr. Lauridson and Dr. Hayne (see *infra*) and all other expert witnesses involved in this case (including Dr. Scott Benton, the State's latest expert), these witnesses drew erroneous conclusions based upon what they saw. Based chiefly on this improper opinion evidence, Petitioner was convicted of capital murder during the course of sexual battery and sentenced to death.

29. Following the direct examination of Dr. Steven Hayne, the only expert called by the State that testified in any respect to the allegations of sexual battery, Petitioner's trial counsel cross-examined the witness.

30. While that cross-examination did yield several minor, helpful concessions, it utterly failed to develop information that was the key to Havard's defense and innocence as to the allegation of sexual battery: that there were alternative, non-criminal explanations for the evidence used by the State to support the allegations of sexual battery, such as the dilated condition of Chloe's anus. Evidence provided during Petitioner's direct appeal and state post-conviction proceedings, chiefly the affidavits and report of Dr. James Lauridson, first brought these to light. (*See* Exhibit "B," Affidavits and Report of Dr. James Lauridson).⁵ As demonstrated below, many qualified experts have now ruled out that a sexual battery occurred, and the other (Dr. Hayne, the State's expert witness) states that there is insufficient evidence to support the allegation of sexual battery.

31. Dr. Hayne has reviewed the Final Report of Autopsy for Chloe Britt, his trial testimony, and the applicable Mississippi Crime Lab report. After reviewing these materials, Dr. Hayne submitted a sworn Declaration, which was attached to the original Petition as Exhibit "A" (Docket # 7-2) and incorporated herein by reference as if fully set forth in words. In that Declaration, Dr. Hayne states that he cannot "include or exclude to a reasonable degree of medical certainty that she [Chloe] was sexually assaulted."

⁵ During Petitioner's direct appeal and post-conviction proceedings, Dr. Lauridson presented a series of affidavits, a report, and an Addendum to the report. These were attached cumulatively as Exhibit "B" to the original Petition. *See* Docket # 7-3.

32. Further, Dr. Hayne notes that the one-centimeter contusion that he found on Chloe's anus "could have a variety of causes and is not sufficient in and of itself to determine that a sexual assault occurred."⁶ Dr. Hayne also states that, during the autopsy, he "found no tears of her rectum, anus, anal sphincter, or perineum."

33. Perhaps most significantly, Dr. Hayne notes that "[d]ilated anal sphincters may be seen on persons who have died, **as well as on a person prior to death without significant brain function.** My experience as well as the medical literature recognize that **a dilated anal sphincter is not, on its own evidence of anal sexual abuse,** but must be supported by other evidence." (emphases added).⁷

34. Pursuant to a discovery order entered by this Court, Dr. Steven Hayne was deposed on November 23, 2010.

35. The purpose of the deposition was to further explore Dr. Hayne's opinions as to sexual battery in Petitioner's case, in light of concerns raised in the habeas petition and other pleadings about the sufficiency of the evidence in support of the State's allegation of sexual battery and the ineffectiveness of Petitioner's trial counsel in preparing a defense to that allegation. The deposition was also ordered so that Dr. Hayne could further elaborate on a

⁶ Petitioner would note, for instance, that medical records demonstrate that, on the night of her death, emergency room medical providers took Chloe's temperature 3 times with a rectal thermometer. *See* Docket # 22-2.

⁷ Medical records and testimony from medical providers demonstrate that Chloe was without oxygen for a significant amount of time and that she was "brain dead" when she arrived at the hospital. Specifically, Dr. Dar testified that, when she first saw Chloe in the emergency room, Chloe's pupils were fixed and dilated, indicating that she was brain dead. This observation was made before Chloe was successfully intubated, and before the anal dilation was first observed.

Declaration that he had signed. *See* Docket # 7-2. Petitioner discusses below specific portions of the deposition that demonstrate that Petitioner is entitled to relief:

A. At the outset of his recent deposition, Dr. Hayne acknowledged that he was specifically asked, prior to conducting the autopsy of Chloe Britt, to look for evidence of sexual assault. (Depo. at pp. 10-11). Dr. Hayne testified that there is no mention of sexual battery in the Final Report of Autopsy that he produced, because “I could not come to final conclusion as to that.” (Depo. at 11). Dr. Hayne continued: “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.” (Depo. at 11). Dr. Hayne confirmed that he found no tearing to the rectum, anus, anal sphincter, or perineum during the autopsy, and that he would have noted such tearing if he had found it. (Depo. at 12, 14). Dr. Hayne further opined that it would not be possible for any tears to have healed between the time Chloe Britt was in the emergency room to the time he performed the autopsy, one day later. (Depo. at 14-15).

B. Dr. Hayne did find “a single contusion” on the rectum, but no lacerations or abrasions. (Depo. at 13). This small contusion was found in an area that can be easily injured. (Depo. at 15). When asked if the contusion he found could have been caused by the use of a rectal thermometer, which medical records indicate was used on Chloe Britt three times while she was in the emergency room, Dr. Hayne stated “[t]hat could happen,” though he does not necessarily think such is likely. (Depo. at 15). Dr. Hayne later testified that he “could not exclude” that possibility. (Depo. at 34).

C. Dr. Hayne was then questioned about brain death, or lack of brain activity, with

respect to Chloe Britt. This testimony is significant because Dr. Hayne and Dr. James Lauridson (Petitioner's expert) have both opined that it is possible that a dilated anus (the chief condition that the State used to support the sexual battery allegation) can be seen on a person who is dead or even on a person who is clinically alive but lacks significant brain function. Medical literature discussed above further substantiates that explanation of anal dilation. Along these lines, Dr. Hayne testified that the signs of brain death include "flaccidness," "unconsciousness," "muscle relaxation," "lack of breathing," dilated and fixed pupils, lack of muscle tone, and an asystole heart. (Depo. at 17-18). Medical records, testimony from emergency room treaters, and Dr. Hayne's autopsy findings found every single one of those conditions on Chloe Britt leading up to and following her death.

D. Dr. Hayne was then asked:

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.

(Depo. at 19).

E. Dr. Hayne then confirmed that a dilated anus is a recognized post-mortem finding, and that it is possible that children who have died of brain injuries have an increased likelihood

of having dilated anuses. (Depo. at 19-20). Dr. Hayne further opined that a flaccid or limp muscle condition (both of which were noted on Chloe Britt in the emergency room) can contribute to anal dilation. (Depo. at 24). Lastly, Dr. Hayne again confirmed that a dilated anal sphincter is not, by itself, evidence of anal sexual abuse. (Depo. at 24-25).

F. Dr. Hayne capped off his testimony as follows:

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

* * *

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.

(Depo. at 25-26).

G. Later on, Dr. Hayne states again that he "could only come to the conclusion I so testified in court, that the contusion was consistent with what I've seen in a sexual abuse case." (Depo. at 27). Dr. Hayne further states that he informed the District Attorney, prior to trial, that his opinions on sexual battery were limited to finding a contusion "consistent with sexual abuse, but I'd like to see more evidence before I made the next and more significant evaluation and conclusion." (Depo. at 28) (emphasis added).

1. In order to make sure Dr. Hayne's conclusion was clear, he was asked again:

Q: Dr. Hayne, you can't say, or can you say, that Chloe Britt was sexually penetrated to a reasonable degree of medical certainty in this case?

A: I cannot. All I can say is the injury sustained would be consistent with that, but that's not a definitive diagnosis.

(Depo. at 29).

H. The only properly tendered and qualified expert to testify at Petitioner's trial, Dr. Hayne, couched his opinions regarding sexual battery in terms of possibility and in terms of what may be "consistent with" sexual battery. Indeed, in referring to the autopsy finding possibly related to sexual battery (the 1-centimeter contusion), Dr. Hayne uses the words "consistent with" 6 separate times. (Depo. at pp. 11, 25, 27, 28, 29, 38). He did not—and states that he absolutely cannot—opine to a reasonable degree of medical certainty that Chloe Britt was sexually abused by Petitioner or at all. Furthermore, the small contusion has a potential cause other than sexual battery—injury from a rectal thermometer—that Dr. Hayne testified he cannot exclude. As reminder, medical records indicate that Chloe Britt's temperature was taken 3 times with a rectal thermometer on the night that she died.

I. Dr. Hayne further points to a reasonable hypothesis consistent with Petitioner's innocence as to sexual battery, when he states that dilated anal sphincters may be seen on those who, like Chloe Britt, were alive but "without significant brain function" at the time such condition is observed. The cause of Chloe's death was unquestionably a closed head injury. Dr. Dar, Chloe's regular pediatrician who observed her in the emergency room, testified at trial that Chloe was "brain dead" before she was successfully intubated and before the anal dilation was first observed. Dr. Hayne, in his recent testimony, opined to a reasonable degree of medical certainty that Chloe Britt was brain dead, or lacked significant brain function, prior to the anal dilation being observed.

J. Dr. Hayne’s testimony concerning anal dilation cuts to the very core of the Mississippi Supreme Court’s prior review of this issue. In his original state post-conviction proceedings, Petitioner presented affidavits and reports from Dr. Lauridson that discussed, among other things, alternative explanations for the anal dilation that was observed on Chloe Britt (which was the chief evidence used to support the allegation of sexual battery). Dr. Lauridson opined that anal dilation such as that observed on Chloe Britt had potential causes other than sexual penetration. In its treatment of this issue, the Mississippi Supreme Court stated: “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.” *Havard II*, 988 So.2d at 332 (emphasis added). The Court went on to describe Dr. Lauridson’s conclusion as to the dilated anus as “contrary to that of Dr. Hayne.” *Id.*

K. The deposition testimony of Dr. Hayne, related above, demonstrates that there are not any significant differences between the opinions of Dr. Lauridson and Dr. Hayne. Most significantly, Dr. Hayne opines that a dilated anus is a recognized post-mortem finding, and that it is possible that a child who has experienced a brain injury and lack of significant brain function has an increased likelihood of having a dilated anus. (Depo. at 19-20). Dr. Hayne further opines, to a reasonable degree of medical certainty, that Chloe Britt was brain dead before the anal dilation was ever observed in the emergency room. (Depo. at 17-19). This testimony of Dr. Hayne negates the Mississippi Supreme Court’s prior rejection of Dr. Lauridson’s opinions concerning “post-mortem anal dilation”. As Dr. Hayne’s testimony illustrates, there is no difference between post-mortem anal

dilation and dilation observed on a child who is clinically alive but lacks significant brain function, as was unquestionably the case with Chloe Britt.

L. This evidence demonstrates that Petitioner's trial counsel were indeed completely ineffective in their approach to countering the underlying felony of sexual battery. Had they been diligent in seeking independent expert assistance (such as Dr. Lauridson), understanding the medical and forensic issues involved, or by simply talking to Dr. Hayne, they would have discovered persuasive evidence in support of Petitioner's defense that no sexual battery was committed.

M. Dr. Hayne's recent deposition testimony speaks directly to the ineffectiveness of Petitioner's trial counsel. During the deposition, after Dr. Hayne detailed the physical findings and interpreted those findings, he was then asked about his pre-trial interaction with Petitioner's trial counsel.

N. Dr. Hayne testified as 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 - -

MR. MCNAMARA: And I object. This is off the subject, not relevant.

BY MR. JICKA:

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

A: I always honor 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.

O. Dr. Hayne was also asked if he would have answered the questions in the same manner as in his deposition if he had been asked them during Petitioner's trial. Dr. Hayne responded: "Exact way . . . it would make no difference whether defense or prosecution was asking me, the answer would be the same." (Depo. at pp. 28-29).

36. Petitioner's counsel did not consult with Dr. Hayne, despite the fact that (a) the Court advised them to do so if they had questions and (b) the State encouraged them to do so as well. Had they done so, Dr. Hayne would have answered their questions in the same manner as his recent deposition testimony. The fruits of such a meeting would have been, to briefly summarize what is set forth in detail above: (1) that Dr. Hayne could not state, to a reasonable degree of medical certainty, that Chloe Britt had been sexually assaulted, (2) that the only physical finding Dr. Hayne made that was consistent with (though not diagnostic of) sexual penetration—the one centimeter contusion—had an alternative explanation that Dr. Hayne could not exclude (rectal thermometer), (3) that the small contusion was not sufficient, standing alone, to conclude that a sexual battery had occurred, (4) that the anal dilation had non-criminal explanations consistent with the symptomology of Chloe Britt (brain dead/lack of significant brain function and muscle flaccidity/limpness), (5) a dilated anus, standing alone, is not sufficient evidence to conclude that a sexual battery has occurred, and (6) that Dr. Hayne would need additional evidence to opine that a sexual battery had actually occurred. The benefit of trial counsel having such ammunition at their disposal before and during trial is obvious, as is the prejudice that resulted from trial counsel's failure to obtain that information.

37. Petitioner's trial counsel failed to investigate the medical issues in the case and failed to meet with Dr. Hayne (who testified during his deposition that he would have provided trial counsel with the same information set forth in the Declaration and his deposition testimony), and consequently failed to develop information that could have been used to effectively cross-examine Dr. Hayne. The jury, having never heard of the alternative, non-criminal explanations for the medical conditions used to support the State's allegation of sexual battery, convicted Petitioner of murder during the course of sexual battery and sentenced him to death.

38. As mentioned previously, the evidence of the alternative, non-criminal explanations for the dilated condition of Chloe's anus was first revealed on direct appeal by Dr. James Lauridson, an independent pathologist retained by Petitioner's appellate counsel.

39. During Petitioner's direct appeal and state post-conviction proceedings, Dr. Lauridson submitted a series of affidavits and issued a report, all of which were attached to the original Petition as Exhibit "B," and incorporated herein by reference as if fully set forth in words. *See* Docket # 7-3. It bears noting that Dr. Lauridson had to submit a series of affidavits and reports because of delays by the State in producing discovery in the original state post-conviction proceedings.

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

41. In his report, Dr. Lauridson opines as follows:

An x-ray confirmed large amounts of gas in the stomach and entire small and large bowel.

* * *

He [Dr. Hayne] noted a contusion of the anus but did not note any other rectal or perianal injury. He specifically did not find any injury to the sphincter muscle.

* * *

In his testimony Dr. Hayne states that rigor mortis causes contracture of muscles after death. That statement is erroneous, and is contrary to the well-known effects of rigor mortis. Rigor mortis causes rigidity of muscles, but does not cause muscles to contract.

* * *

Thus there is no objective evidence for bleeding from the anus or tear of the anal tissues in the autopsy report or in any photographs taken of the anus.

Experienced medical examiners commonly encounter dilated anal sphincter's during postmortem examinations. Experience as well as the medical literature recognizes that this finding does not imply anal sexual abuse. Studies of this phenomenon, in fact have shown that children who have died of brain injuries have an increased likelihood of having a dilated anus. (reference 2).

In children, the inner mucosa (lining) of the rectum is sometimes visible after death and the pink or red color of the lining of the rectum may be mistaken for trauma. Although some of the medical doctors examining the child testified that there was blood coming from the rectum this was not confirmed either photographically or at the time of autopsy. It is suggested that these physicians mistook the lining of the rectum for trauma.

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

* * *

The conclusions that Chloe Britt suffered sexual abuse are not supported by objective evidence and are wrong.

Postmortem anal dilation in infants is a commonly recognized artifact that does not signify sexual abuse. In this case other facts also contributed to the anal dilation: 1). large amounts of gas introduced in the gastrointestinal tract during resuscitation; and 2). generalized muscle flaccidity. No hemorrhage from the anus was documented, and the autopsy failed to reveal tearing of the anal or rectal tissues. As of this date (May 10, 2007). [sic] Independent examination of the anal tissues has not been possible.

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

43. In the third post-conviction proceedings, further evidence was developed that shows every expert witness qualified to render opinions on sexual battery issues has concluded that there is not a sufficient basis for that conclusion. Dr. Hayne opined in those proceedings that "I cannot go to the point to say that it was sexual battery committed." The State's new expert, Dr. Scott Benton, said "the findings do not support a sexual assault". Havard's experts Dr. Michael Baden, Dr. Janice Ophoven, and Dr. George Nichols (who submitted an affidavit but did not testify) opined at length that the conclusion that Chloe Britt was sexually assaulted is wrong. These opinions will be elaborated upon further in Petitioner's merits briefing.

44. Simply put, opinions from every single expert witness who have reviewed Havard's case and who are qualified to render such opinions support Havard's defense and demonstrate that there was no sexual battery. This includes **both expert witnesses that the State has used over the more than 20 years that this case has persisted.** Petitioner's counsel, however,

completely failed to investigate or discover these alternative explanations, and thus failed to present a meaningful defense.

45. Furthermore, medical literature demonstrates that dilated anuses are not sufficient, standing alone, to indicate that sexual abuse has occurred. Medical literature indicates that **“standards of normal” with respect to anal dilation have not been established, and that such evidence “must be interpreted with caution.”** See McCann, Reay, Siebert, Stephens, and Wirtz, *Postmortem Perianal Findings in Children*, THE AMERICAN JOURNAL OF FORENSIC MEDICINE & PATHOLOGY 17(4): 289-298 (1996) (attached to the original Petition as Exhibit “C”) (emphases added). See Docket # 7-4.

46. Finally, when proposed jury instructions were submitted to the trial court, Petitioner’s counsel did not submit an instruction for a lesser-included offense. During trial, Petitioner, through his statement given to police following his arrest, presented his defense that he accidentally dropped Chloe, leading to the head injuries that claimed her life. Petitioner’s counsel failed to offer an instruction that would have presented the jury with an option consistent with Havard’s defense. The jury, presented solely with the option of convicting Petitioner of capital murder or acquitting him, convicted Petitioner and sentenced him to death.

47. Clearly, Petitioner’s trial counsel failed to investigate and develop evidence in support of Petitioner’s defense and their trial strategy. As a result, they did not understand the medical issues in the case, did not discover and develop readily available evidence in support of Petitioner’s innocence with respect to the allegation of sexual battery, failed to properly request expert assistance, were unprepared to cross-examine Dr. Hayne, and not equipped to object to improper opinion testimony regarding alleged sexual abuse.

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

I believe that Trial Counsel were ineffective within the meaning provided by *Strickland v. Washington*. Once they recognized the need for an expert in pathology—as evidenced by their one-paragraph request—they had a duty to make a proper showing to the trial court, thus either securing the expert or making a record adequate to appeal the denial.

* * *

What counsel did not do was properly ask the court, enumerating the specific reasons they needed an expert, or even to research a particular expert and that person's normal fee. Counsel did not make further request of the court in this regard, did not seek rehearing and neglected to respond to the Court's denial by offering some particular basis for the expert.

* * *

It is my understanding that the medical examiner did not conclude in the Final Report of Autopsy that the victim had been sexually assaulted. Additionally, there was not DNA evidence of sexual assault and the sexual assault kit referenced in the autopsy report revealed an "*an absence on serological evaluation for the presence of semen on the oral swab, vulvar swabs, vaginal swabs, and rectal swabs.*" Consequently, in a case such as this where the State's [sic] was seeking a capital murder conviction based on an alleged sexual assault, and where the evidence was apparently weak and subject to challenge, trial counsel's failure to confer with an expert, take appropriate steps to secure expert assistance and seek relevant discovery all fell below the standard of care expected by attorneys handling capital cases in the State of Mississippi during the relevant time period.

Defense counsel had a duty to be familiar with this Court's [Mississippi Supreme Court] decision in *Harrison v. State*, 635 So.2d 894 (Miss. 1994), to have consulted with an independent pathologist and to have made a proper request for assistance. To have done so would have provided the defense information to rebut the circumstantial conclusion that the injuries to the child's anus resulted from sexual battery or penetration. The affidavit presented by Dr. James Lauridson, meets the test of *Harrison*.

49. Petitioner's trial counsel were clearly deficient in these respects, and these deficiencies prejudiced Petitioner. If Petitioner's trial counsel had not been deficient in this regard, the jury would have been presented explanations of the medical evidence showing that no sexual battery occurred, and there is a reasonable probability that the outcome of Petitioner's trial would have been different. The result of Petitioner's trial is inherently unreliable, and the writ should be granted.

50. In a case where medical and forensic issues were the major issue, Petitioner's counsel clearly did not understand the science at issue. This infected the entirety of their trial preparation and presentation. They clearly indicated this lack of understanding when they filed the motion requesting an independent expert. The trial court, however, held that Petitioner's counsel had failed to make a sufficient showing. In light of this holding, Petitioner's attorneys should have consulted with Dr. Hayne (as instructed by the trial court) and/or made a more sufficient request for assistance. They did neither. Instead, they had a nurse review the pathology report and proceeded to trial wholly unprepared to counter the sexual battery evidence presented by the State.

51. As demonstrated by the post-conviction affidavits and report presented by Dr. James Lauridson, the Declaration executed by Dr. Hayne, and Dr. Hayne's deposition testimony, there are alternative, non-criminal explanations for the evidence that the State presented in support of the allegation of sexual battery. Thus, it is clear that Petitioner's counsel were deficient in failing to understand the medical issues, on which the entire case turns, and adequately request expert assistance. Furthermore, this failure led to a trial that was fundamentally unfair and unreliable.

If Petitioner would have had his own expert witness, the outcome of this trial would likely have been different.

52. Petitioner's trial counsel failed to object to the improper opinion testimony described above. As a result, the jury was inundated with improper opinions from witnesses who were not qualified to testify that the conditions that they witnessed were caused by sexual abuse. Furthermore, it is clear that these witnesses did not consider and discard alternative, non-criminal explanations for the conditions that they witnessed. They rushed to judgment, determining at the outset that a sexual battery had occurred. In closing argument, the prosecution told the jury that they had no choice but to rely on the improper opinion testimony: "It's ludicrous for you to believe what he told you. I mean the deputies, the coroner, everybody told you what was wrong with that child's rectum, her anus. And they told you what caused it. It's overwhelming." The failure to object to this patently improper opinion testimony is clearly deficient performance by Petitioner's trial counsel, and these deficiencies prejudiced Petitioner. If Petitioner's counsel had objected to the improper opinion evidence, the evidence would have been excluded. Thus, there is a reasonable probability that the outcome of Petitioner's trial would have been different.

53. Finally, the failure of Petitioner's counsel to submit a lesser-included offense instruction presented the jury with a stark choice: convict Petitioner of capital murder or acquit him entirely. In a case involving the death of a six-month-old child, a case charged with emotion and passion, leaving the jury with this choice is not a legitimate defense strategy.

54. Due to the grossly ineffective assistance of counsel shown above, Petitioner did not receive a fair trial. That Petitioner was prejudiced by this deficient performance is evident. For instance, during closing argument, the State repeatedly focused on the fact that Petitioner could

not explain the condition of Chloe that the State was using to support its allegation of sexual battery. The State then said: **“There ain’t no other way to explain it than to admit that he committed sexual battery, ladies and gentleman.”** Had Petitioner’s counsel been effective, he could have explained this evidence, and there is a reasonable probability that the outcome of his trial would have been different.

55. Accordingly, the writ should be granted. At the very least, this Court should conduct an evidentiary hearing on this issue, and grant the writ thereafter.

B. How This Issue Was Presented to the State Courts:

1. This issue was presented during Petitioner’s direct appeal to the Mississippi Supreme Court as Issue IV. The Mississippi Supreme Court denied Petitioner any relief on this ground.

Havard I, 928 So.2d at 788-91.

2. This issue was presented to the Mississippi Supreme Court during Petitioner’s initial state post-conviction proceedings as Issue I. The Mississippi Supreme Court denied Petitioner any relief on this ground. *Havard II*, 988 So.2d at ¶¶ 18-19, 22, 31, 34.

3. This issue was presented to the Mississippi Supreme Court during Petitioner’s second state post-conviction proceedings as Claim 5. The Mississippi Supreme Court denied Petitioner any relief on this ground. *Havard III*, 86 So.3d at ¶¶ 44-53.

4. This issue was presented to the Mississippi Supreme Court during Petitioner’s third state post-conviction proceedings as the alternative relief requested in Claim 2. The Mississippi Supreme Court denied Petitioner any relief on that ground. Order, 2013-DR-01995-SCT (April

2, 2015). The Mississippi Supreme also affirmed the trial court's exclusion of any evidence related to sexual battery in the evidentiary hearing. *Havard IV*, 312 So.3d at 339-42.⁸

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

A. Facts in Support of this Claim:

1. During its closing argument, the State argued as follows:

This baby was shaken to death having been sexually assaulted, and ladies and gentlemen, don't try to understand it. Don't try to figure out how it could have happened. Just know what did happen and render your verdict of guilty of capital murder because that's what this man is over there for doing that to this child.

* * *

The evidence in this case is more overwhelming than any I've ever been involved in.

* * *

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

* * *

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

⁸ Though the trial court excluded the evidence, Havard proffered the testimony to preserve the issue and to include the substance of the evidence in the state court record.

statement from a person trying to deny that they committed a crime in my life. Never.

* * *

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

* * *

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

2. Petitioner's counsel did not object to any of the objectionable argument set forth herein, which appealed to passion, prejudice, and emotion and utilized evidence that was not in the record.

3. Without question, the State crossed the line time and time again in its wholly improper closing argument during the guilt phase of the trial. The State included repeated appeals to emotion and bias, continuously encouraging the jury to not try to determine what happened. The closing argument also relied upon information that was not in the record;

information that appears to have been made up by the prosecutor on the spot. For instance, the prosecutor alluded to prior incidents of sexual abuse of Chloe by Petitioner, when there was absolutely no evidence of that whatsoever.

4. The closing argument also illustrates a pattern prevalent throughout this case: the improper shifting of the burden of proof to Petitioner. The State was required to prove every element of the offense beyond a reasonable doubt, but kept using the fact that Petitioner could not explain the condition of Chloe's anus (which, again, had alternative, non-criminal explanations) to push for a conviction. Independent of Petitioner's attorneys' duty to object to improper argument, the State had a duty to comply with due process in making its jury arguments. The State clearly breached that duty here.

5. The Mississippi Supreme Court's decision that the argument was proper was unreasonable.

6. In the alternative, the failure of Petitioner's counsel to object to this improper and inflammatory argument constitutes prejudicial ineffective assistance of counsel. But for the deficient performance of Petitioner's trial counsel, there is a reasonable probability that the result of the proceedings would have been different.

7. The jury convicted Petitioner of capital murder shortly after the State concluded this improper and inflammatory argument.

B. How This Issue Was Presented to the State Courts:

1. This issue was presented during Petitioner's direct appeal to the Mississippi Supreme Court as Issue V. The Mississippi Supreme Court denied Petitioner any relief on this ground.

Havard I, 928 So.2d at 791.

2. This issue was presented to the Mississippi Supreme Court during Petitioner's state post-conviction proceedings as Issue VII. The Mississippi Supreme Court denied Petitioner any relief on this ground. *Havard II*, 988 So.2d at ¶ 70.

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

This Claim from prior Petitions has been made moot by the vacation of Havard's death sentence in his most recent state court post-conviction proceeding.

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

This Claim from prior Petitions has been made moot by the vacation of Havard's death sentence in his most recent state court post-conviction proceeding.

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

This Claim from prior Petitions has been made moot by the vacation of Havard's death sentence in his most recent state court post-conviction proceeding.

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

This Claim from prior Petitions has been made moot by the vacation of Havard's death sentence in his most recent state court post-conviction proceeding.

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

This Claim from prior Petitions has been made moot by the vacation of Havard's death sentence in his most recent state court post-conviction proceeding.

**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**

This Claim from prior Petitions has been made moot by the vacation of Havard's death sentence in his most recent state court post-conviction proceeding.

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

This Claim from prior Petitions has been made moot by the vacation of Havard's death sentence in his most recent state court post-conviction proceeding.

**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**

A. Facts in Support of this Claim:

1. During voir dire, Petitioner's trial counsel did not ask the potential jurors any questions about their feelings about the death penalty or mitigating evidence.

2. Voir dire covers 130 pages of the trial court transcript. Only 10 pages of that total contains questioning of potential jurors by Petitioner's trial counsel. Petitioner's counsel asked no open-ended questions and accordingly elicited virtually no information from the potential jurors.

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

- a. Whether any of the venire members were personal friends of the trial court judge, the District Attorney, or the Assistant District Attorney.
- b. Whether any of the venire members were sworn officers, federal agents, or reserve officers.
- c. Whether any of the venire members were friends with deputies or police officers.
- d. Whether any of the venire members were medicated and, if so, whether the medication made them drowsy or sleepy.
- e. Whether any of the venire members had been victims of crime.
- f. Whether any of the venire members were related to one another.
- g. Whether, if the State failed to prove its case, the venire members could

find Petitioner “not guilty.”

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

4. There was absolutely no attempt by Petitioner’s trial counsel to “life qualify” the prospective jurors.

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

6. An experienced capital litigator, Natman Schaye, opined as follows during Petitioner’s direct appeal and post-conviction proceedings: “no attorney competent to try a capital murder case reasonably would have been ignorant of the holdings related to capital juror selection” (Direct Appeal Exhibit 1, Affidavit of Natman Schaye). Schaye also states that “life qualifying” jurors has been the standard of care in capital cases in Mississippi since the mid-1980s.

7. The failure of Petitioner’s trial counsel to ask death-qualifying questions during voir dire constituted prejudicial ineffective assistance of counsel. But for the deficient performance of Petitioner’s trial counsel, there is a reasonable probability that the result of the proceedings

would have been different. While Petitioner is no longer under a death sentence, the jury that was selected decided guilt issues before proceeding to the sentencing phase. It is well-known that “death-qualified jurors” are more likely to find a defendant guilty in the guilt phase.

8. Accordingly, the writ should be granted. At the very least, this Court should hold an evidentiary hearing on this issue and grant the writ thereafter.

B. How This Issue Was Presented to the State Courts:

1. This issue was presented during Petitioner’s direct appeal to the Mississippi Supreme Court as Issue II. The Mississippi Supreme Court denied Petitioner any relief on this ground. *Havard I*, 928 So.2d at 786-87.
2. This issue was presented to the Mississippi Supreme Court during Petitioner’s state post-conviction proceedings as Issue V. The Mississippi Supreme Court denied Petitioner any relief on this ground. *Havard II*, 988 So.2d at ¶¶ 63-65.

**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**

A. Facts in Support of this Claim:

1. During voir dire, one of the potential jurors, Dorothy Sylvester, stated as follows: “I don’t know him [Havard], but I had a niece to be raped - - you know - - I don’t think I could I could be fair about it, too.”

2. This potential juror, who was also a registered nurse⁹ of nearly 20 years, was eventually selected to sit on the jury that convicted Havard of capital murder during the course of sexual battery.

3. The Petitioner's attorneys did not seek to excuse Sylvester for cause or to use one of their peremptory challenges on Sylvester.

4. Petitioner's counsel did not utilize all of the peremptory challenges available to Petitioner.

5. Petitioner was convicted of capital murder and sentenced to death by this partial jury.

6. The jury that convicted Petitioner of capital murder and sentenced him to death was by no means the fair and impartial jury that is required by the United States Constitution. The jury included a member who admitted up front that she could not be fair in a case involving allegations of sexual abuse.

7. After her statement admitting her bias, the trial court told this prospective juror that they would "get to" that issue; but neither the trial court nor any of the attorneys asked any further questions of her, and she was eventually chosen to serve on Petitioner's jury.

8. There is no valid strategic reason for not seeking to have that prospective juror excused for cause; if the court would not excuse the juror for cause, a peremptory challenge should have been used.

⁹ The sole proof of the alleged sexual battery came in the form of improper opinion testimony from emergency room nurses and doctors, the Sheriff, and the Coroner. *See supra*, Claim I.

9. On top of that, that same juror was a registered nurse who had worked for 20 years in a local hospital. In a case where testimony of medical personnel, including nurses, would play such a central role, there is no valid strategic reason for not exercising a peremptory challenge to remove this juror.

10. The combination of this fact with the admitted bias of this juror demonstrates that Petitioner's counsel were ineffective for not having this juror removed for cause or with a peremptory challenge.

11. These failures demonstrate that Petitioner was convicted and sentenced by a partial jury and that the trial result is unreliable. But for the deficient performance of Petitioner's trial counsel, there is a reasonable probability that the result of the proceedings would have been different.

12. Thus, the writ should be granted. At the very least, the Court should hold an evidentiary hearing on this issue and grant the writ thereafter.

B. How This Issue Was Presented to the State Courts:

1. This issue was presented during Petitioner's direct appeal to the Mississippi Supreme Court as Issue I. The Mississippi Supreme Court denied Petitioner any relief on this ground. *Havard I*, 928 So.2d at 782.

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

A. Facts in Support of this Claim:

1. Willie Thomas, one of the jurors who ended up being on the panel stated after the trial that he felt that the death penalty was the only appropriate punishment in murder cases. Mt.

Thomas stated that he believes that “[i]f you take a life, a life is required” and that he held that belief before Petitioner’s trial.

2. The jury, which included this member, convicted Petitioner of capital murder and sentenced him to death.

3. The jury that convicted Petitioner of capital murder and sentenced him to death was by no means the fair and impartial jury that is required by the United States Constitution. At least one juror admitted after the trial that he felt that the death penalty was the only appropriate punishment in murder cases.

4. Despite being asked minimal questions on this issue by the trial court, this juror did not reveal his true feelings until after Petitioner had been convicted and sentenced to death.

5. Manifestly, Petitioner was convicted by a jury that contained members who were biased against him. While Petitioner is no longer under a death sentence, the jury that was selected decided guilt issues before proceeding to the sentencing phase. It is well-known that “death-qualified jurors” are more likely to find a defendant guilty in the guilt phase.

Accordingly, his trial was fundamentally unfair and the writ should be granted. At the very least, this Court should conduct an evidentiary hearing on this issue and grant the writ thereafter.

B. How This Issue Was Presented to the State Courts:

This issue was presented during Petitioner’s direct appeal to the Mississippi Supreme Court as Issue III. The Mississippi Supreme Court denied Petitioner any relief on this ground. *Havard I*, 928 So.2d at 787.

CLAIM XIII: THE MISSISSIPPI SUPREME COURT’S “AGGREGATE ERROR” REVIEW WAS INADEQUATE AND DEPRIVED PETITIONER OF DUE PROCESS

A. Facts in Support of this Claim:

1. During Petitioner’s direct appeal, the Mississippi Supreme Court conducted an “aggregate review” of Petitioner’s conviction and sentence. *See Havard I*, 928 So.2d at 803.
2. The Court, in cursory fashion, held that the aggregate errors in the case were not sufficient to require reversal. Petitioner’s conviction and death sentence were affirmed.
3. The Mississippi Supreme Court purported to undertake an “aggregate error” review in this case, but failed to do so in a meaningful way. As demonstrated herein, the errors at trial and deficiencies of Petitioner’s attorneys were legion. Further, the evidence in support of the allegation of sexual battery was insufficient.
4. In essence, Petitioner was convicted for being unable to explain the dilated condition of Chloe’s anus. However, there were alternative, non-criminal explanations for this condition. (*See supra*, Claim I). These alternatives, which are documented in medical literature,¹⁰ were never considered by medical providers, law enforcement, the prosecution, Petitioner’s trial counsel, or the jury.
5. There was insufficient evidence to prove sexual battery, the underlying felony and one of two aggravating factors presented by the State.
6. With only this shoddy evidence before it, the jury doubtless relied upon passion, emotion, and prejudice in rendering its conviction and sentence. In fact, they were encouraged by the State, in its closing argument, to base their decision on emotion. The State, throughout its

¹⁰ *See supra*, Claim I.

highly improper and inflammatory closing argument, repeatedly encouraged the jury to not try to determine what happened, but to render its decision based upon raw emotion.

7. On top of the passion, prejudice, and emotion encouraged by the State, there is obviously a great deal of emotion involved in the death of any six month old child. The Mississippi Supreme Court, however, glossed over all of the flaws in the State's case as well as the emotion that infected the entirety of the trial and affirmed the conviction and sentence in spite of the lack of fundamental fairness to Petitioner.

8. The Mississippi Supreme Court glossed over these issues and simply concluded, with no analysis but the quotation of prior case law, that any errors were harmless.

9. This review fails to comport with due process. Accordingly, the writ should be granted.

B. How This Issue Was Presented to the State Courts:

This issue was presented during Petitioner's direct appeal to the Mississippi Supreme Court as Issue V. The Mississippi Supreme Court denied Petitioner any relief on this ground. *Havard I*, 928 So.2d at 803.

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

A. Facts in Support of this Claim:

1. Petitioner incorporates by reference, as if fully reproduced herein, the Summary of Facts sections for all claims herein involving ineffective assistance of counsel.

2. Those sections demonstrate a pattern of ineffective assistance of counsel that resulted in a trial that was not truly adversarial and thus, fundamentally unfair. Petitioner was

prejudiced by this ineffective assistance of counsel and there is a reasonable probability that, but for this ineffectiveness, the result of the proceeding would have been different.

3. As a result of this non-adversarial trial, Petitioner was convicted of capital murder and sentenced to death. The conviction and sentence resulting from this trial are inherently unreliable, and Petitioner was thus denied his constitutional right to effective counsel and a fundamentally fair trial.

4. Accordingly, the writ should be granted. At the very least, this Court should conduct an evidentiary hearing on this issue and grant the writ thereafter.

B. How This Issue Was Presented to the State Courts:

1. This issue was presented to the Mississippi Supreme Court during Petitioner's state post-conviction proceedings as Issue XIV. The Mississippi Supreme Court denied Petitioner any relief on this ground. *Havard II*, 988 So.2d at ¶ 86.

2. This issue was also presented during Petitioner's second post-conviction proceedings as Claims 3 and 5. The Mississippi Supreme Court denied relief on those grounds. *Havard III*, 86 So.3d at ¶¶ 25-28, 44-53.

3. This issue was presented to the Mississippi Supreme Court during Petitioner's third state post-conviction proceedings as the alternative relief requested in Claim 2. The Mississippi Supreme Court denied Petitioner any relief on that ground. Order, 2013-DR-01995-SCT (April 2, 2015).

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

A. Facts in Support of this Claim:

1. Petitioner incorporates by reference, as if fully reproduced herein, all facts alleged in all other claims raised in this Second Amended Petition.

2. As demonstrated herein, the errors committed at trial and, in particular, the many failures of Petitioner's trial counsel, combined to produce a proceeding that was, from beginning to end, fundamentally unfair.

3. The aggregate effect of all of these infirmities render Petitioner's conviction and sentence unconstitutional.

4. Accordingly, the writ should be granted. At the very least, this Court should conduct an evidentiary hearing on this issue and grant the writ thereafter.

B. How This Issue Was Presented to the State Courts:

1. This issue was presented during Petitioner's direct appeal to the Mississippi Supreme Court as Issue XIV. The Mississippi Supreme Court denied Petitioner any relief on this ground. *Havard I*, 928 So.2d at 803.

2. This issue was presented to the Mississippi Supreme Court during Petitioner's state post-conviction proceedings as Issue . The Mississippi Supreme Court denied Petitioner any relief on this ground. *Havard II*, 988 So.2d at ¶ 89.

3. These issues were presented to the Mississippi Supreme Court during Petitioner's Successive Petition for Post-Conviction Relief. The Mississippi Supreme Court denied Petitioner any relief on these grounds. *Havard III*, 86 So.3d 896 (2012).

4. These issues were presented to the Mississippi Supreme Court during Petitioner's third state post-conviction proceedings. The Mississippi Supreme Court denied Petitioner relief. *Havard v. State*, 312 So.3d 326 (Miss. 2020) ("*Havard IV*"); Order, 2013-DR-01995-SCT (April 2, 2015).

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

A. Facts in Support of this Claim:

1. "[I]t is established that a conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue*, 360 U.S. at 269, 79 S.Ct. at 1177 (internal citations omitted). *See also Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763 (1972); *Miller v. Pate*, 386 U.S. 1, 87 S.Ct. 785 (1967).

2. In the discovery phase of these federal habeas corpus proceedings, Petitioner uncovered a videotaped statement of Rebecca Britt, the mother of Chloe Britt, the alleged victim. The statement, in which Rebecca Britt is interviewed by Adams County Sheriff's Department deputies John Manley and Carey Jackson, was taken on February 22, 2002, the day following the death of Chloe Britt.

3. In the videotaped statement, Rebecca Britt makes statements that are inconsistent with and directly contrary to her testimony at Petitioner's capital murder trial. For instance, Rebecca Britt says in the videotaped statement that Mr. Havard was actively involved in the care of Chloe Britt before the night of her death, that she did not find it strange that Mr. Havard

bathed Chloe on the night of her death, that Mr. Havard had changed Chloe's diapers on prior occasions, and that Mr. Havard loved Chloe. These statements stand in stark contrast to Rebecca Britt's trial testimony.

4. For instance, Rebecca Britt testified as follows at Petitioner's trial:

Q: 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.

5. She 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.**

6. That testimony directly contradicts the following exchange, recorded on the videotaped statement:

Deputy Carey Jackson: Would you say that's kinda strange that he took it upon

himself to bathe the child while you was gone?

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

Deputy John Manley: Did he change her diapers?

Rebecca Britt: Sometimes.

* * *

Deputy Carey Jackson: How did he act towards the child when you was around? Did he ever get angry with the child or anything?

Rebecca Britt: No, he loved her.

7. In addition, the prosecution bolstered Rebecca Britt's testimony at trial, by soliciting testimony from her in which she stated, under oath, that she had never told law enforcement officials anything different from the substance of her trial testimony.

8. That specific testimony is recounted below:

Q: What did you do at the sheriff's department?

A: I answered questions and filled out statements.

Q: How many times did you do that? Do you recall?

A: A few. Two or three times that night, and I couldn't finish. I had to come back the next day.

Q: Did you ever tell them anything other than what you've told these ladies and gentlemen here today?

A: No, sir.

9. The contents of the videotaped statement demonstrate this bolstering to be patently false, as, again, Rebecca Britt makes statements therein that contradict her trial testimony. The contents of the videotaped statement thus demonstrate that Rebecca Britt, a key

prosecution witness, lacked credibility and changed significant parts of her story between the day after Chloe's death (when the statement was taken) and the day that she testified at Petitioner's trial.

10. Several of Rebecca Britt's contradictions have direct bearing on guilt phase issues. At trial, the State made much of the fact that Petitioner was not involved in the daily care of Chloe, that it was strange that he bathed Chloe on the night of her death, and that Petitioner had never even changed Chloe's diaper before. In addition, the Mississippi Supreme Court attached great significance to that last "fact" in its opinion in Petitioner's original post-conviction proceedings. *See Havard II*, 988 So.2d 322, 325-26 (Miss. 2008) ("According to Britt, before that night, Havard had never bathed Chloe or changed her diaper."). All of this information was derived from Rebecca Britt's testimony, and all of it served to paint a nefarious picture of what transpired on the night of Chloe's death. It was all, however, false and contradictory to her videotaped statement, in which she said that Petitioner was involved in Chloe's care, that it was not strange that he bathed her, that Petitioner loved Chloe, and that he had changed Chloe's diapers before.

11. The contents of the videotaped statement thus negated the nefarious picture painted by the State that Petitioner chose that one night to sexually abuse Chloe under the guise of caring for her when he had never done so before. In addition, the videotaped statement actually supports Petitioner's defense theory that he loved Chloe, cared for her, and her death was the result of an accident. The false testimony of Rebecca Britt was clearly prejudicial to Petitioner.

12. If the state presents or fails to correct false or misleading evidence, or allows a false impression of the evidence to go uncorrected, then the state must show, beyond a

reasonable doubt, that there is no reasonable likelihood that the error affected the verdict. *United States v. Agurs*, 427 U.S. 97, 103 (1976). “In adjudicating a claim involving the use of false testimony, the ‘any reasonable likelihood’ standard has been applied to determine materiality. Under that standard, ‘[a] new trial is required if the false testimony could have . . . in any reasonable likelihood affected the judgment of the jury.’” *Barrientes v. Johnson*, 221 F.3d 741, 756 (5th Cir. 2000) (citing *Napue v. Illinois*, 360 U.S. 264, 271 (1959) and *Giglio v. United States*, 405 U.S. 150, 153-54 (1972)); see also *United States v. MMR Corp.*, 954 F.2d 1040, 1047 (5th Cir. 1992) (“[I]f the government used false testimony and knew or should have known of its falsity, a new trial must be held if there was any reasonable likelihood that the false testimony affected the judgment of the jury.”).

13. The contents of the videotaped statement are clearly relevant to Rebecca Britt’s credibility as well as to guilt issues in the trial. The State, having obtained the videotaped statement through Adams County Sheriff’s Department officers and having the statement in its possession, knew or certainly should have known of its contents. By soliciting testimony that contradicted the videotaped statement and by allowing such false testimony to go uncorrected, the State violated Petitioner’s rights under *Napue v. Illinois*, *Smith v. State*, and related authority. Because of the importance of Rebecca Britt’s trial testimony and the disparities between that testimony and the contents of the videotaped statement, there is a reasonable likelihood that the jury’s judgment was affected by the false testimony offered.

14. Accordingly, the writ should be granted. At the very least, this Court should conduct an evidentiary hearing on this issue and grant the writ thereafter.

B. How This Issue Was Presented to the State Courts:

This issue was presented to the Mississippi Supreme Court during Petitioner's second state post-conviction proceedings as Claim 1. The Mississippi Supreme Court denied Petitioner any relief on this ground. *Havard III*, 86 So.3d at ¶¶ 15-24.

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

A. Facts in Support of this Claim:

1. In *Brady v. Maryland*, 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." 373 U.S. 83, 87 (1963). *See also Banks v. Dretke*, 540 U.S. 668 (2004); *Kyles v. Whitley*, 514 U.S. 419 (1995).

2. In the discovery phase of these federal habeas corpus proceedings, Petitioner uncovered evidence that the State withheld the above-described videotaped statement of Rebecca Britt. This statement was never turned over during pre-trial discovery, despite requests from Petitioner's trial counsel for all exculpatory evidence.

3. Petitioner's trial counsel requested exculpatory evidence by sending a letter to the District Attorney's office, requesting all discoverable materials including exculpatory evidence and filing a Motion for Discovery of Information Necessary to Receive a Fair Trial (hereafter "Motion for Discovery"). Without question, the videotaped statement of Rebecca Britt fell within the scope of the Motion, which requested the identities "of all persons who have given oral statements to the prosecution or any law enforcement officer" (Paragraph 3); the identities

“of all persons who have given recorded statements to the prosecution or any law enforcement officer” (Paragraph 4); and information “favorable to the Defendant on the issue of guilt,” including “[s]tatements made by any persons which are exculpatory with respect to the Defendant, including all statements made by prospective prosecution witnesses”

4. Significantly, during pre-trial hearings, the Court took up the above-referenced Motion for Discovery. The following exchange occurred in open court:

BY MR. SERMOS: [W]e filed this motion to make sure that we had everything covered that we may possibly need and knew that the able counsel for the State would read all of this, and if there’s anything in here that remind the State prosecutor of something else that we needed to provide, that’s the reason I filed this motion, and we wanted to make sure we covered all the basis, not just what it says exactly in Rule 9.04.

BY THE COURT: Does the State have anything in regard to this motion?

BY MR. ROSENBLATT: Your Honor, I would agree that we have been in fairly close communication with counsel for this defendant. They’ve done a good job of coming to us and reviewing the evidence that we have that we not able to just hand over to them. **The only thing we’re waiting on now, I think I was - - I’m printing up some color photographs so that they can have actual color copies of the photographs involved in this case. I can’t think of anything else that we’re still holding up on.**

* * *

BY THE COURT: Let the record show that the Court will order that discovery be provided pursuant to Rule 9.04, and this will include the provisions of the rule for reciprocal discovery also. **I would caution the State that this is a capital murder case, and that if there’s any late disclosure of evidence, it will be very carefully reviewed by the Court because the Court will more strictly scrutinize any late disclosure of evidence in this particular case than it normally does because this is a capital murder case.**

5. Nevertheless, Petitioner never knew of the existence of the videotaped statement until the Summer of 2010, when it was produced by the State in Petitioner’s federal habeas corpus proceedings. Petitioner was similarly unaware of the contents of the videotaped

statement until 2010, and did not see a transcript of the statement until 2010. The videotaped statement of Rebecca Britt does not appear in the file inventory of Petitioner's trial counsel. All of the items identified in the file inventory of Petitioner's trial counsel were turned over to Petitioner's direct appeal counsel.

6. Petitioner's counsel in his direct appeal and original post-conviction proceedings have verified that they never received the videotaped statement of Rebecca Britt at any point during their representation of Mr. Havard, despite the fact that additional discovery requests were made during Mr. Havard's direct appeal and original post-conviction proceedings. Most significantly, the State did not turn over the videotaped statement in Petitioner's original post-conviction proceedings, despite a request for "the complete files of all law enforcement and prosecutorial agencies" pursuant to *Miss. R. App. Proc. 22*.

7. Petitioner's trial counsel, Gus Sermos, at the behest of the State, executed an affidavit in the recent post-conviction proceedings, stating that he had in fact seen the Britt videotaped statement prior to trial. This statement contradicts all other evidence in the case. Further, Sermos says that his statement is based upon his review of records or notes from his file. Sermos previously swore in an affidavit that he had turned over his complete file, and notes or records concerning the video are not in that file. Further, Sermos was required to turn over his entire file pursuant to *MRAP 22*. If such notes/records exist, they were not turned over, in violation of that rule. The State also violated *MRAP 22* because the videotaped statement was never identified or produced in Petitioner's original post-conviction proceedings.

8. Further, Sermos refused to turn over the notes/records after producing the affidavit in the post-conviction proceedings. Petitioner sought leave from the Mississippi Supreme Court

to have Sermos turn over all files concerning Petitioner and to be deposed concerning these matters, but the motion was denied. The history of the case clearly indicates that Sermos has not been cooperative with Petitioner's counsel, calling into question his latest revelation that he had seen the Britt videotaped statement. These factual issues will need to be resolved in this Court, since the Mississippi Supreme Court summarily denied Petitioner's efforts to do so in state courts and simply took Mr. Sermos's word at face value.

9. The credible evidence shows that the State suppressed the videotaped statement at issue until it was forced to turn it over during discovery in Petitioner's federal habeas corpus proceedings. This videotaped statement, taken less than 24 hours after the events giving rise to the charges against Petitioner, was not turned over to Petitioner or any of his attorneys until June 8, 2010, nearly 8 years after he was tried.

10. The suppression of this evidence clearly impacted the outcome of Petitioner's trial. Rebecca Britt was a key prosecution witness, and the contents of the videotaped statement have bearing on guilt phase issues, sentencing phase issues, and the credibility of Rebecca Britt's testimony (since, as described above, there are instances in the statement where Britt directly contradicts or makes statements inconsistent with her trial testimony). If nothing else, the suppression of the statement prevented impeachment of Rebecca Britt to the extent that her trial testimony deviated from what she told the Sheriff's Department officers on the video. Beyond that, the contents of the videotaped statement supported Petitioner's defense that he loved and cared for Chloe Britt and that her death was an accident.

11. Accordingly, the writ should be granted. At the very least, this Court should conduct an evidentiary hearing on this issue and grant the writ thereafter.

B. How This Issue Was Presented to the State Courts:

1. This issue was presented to the Mississippi Supreme Court during Petitioner's second state post-conviction proceedings as Claim 2. The Mississippi Supreme Court denied Petitioner any relief on this ground. *Havard III*, 86 So.3d at ¶¶ 11-14.

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

A. Facts in Support of this Claim:

1. Under the Sixth Amendment, the “‘right to counsel is the right to effective assistance of counsel.’” *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). “A convicted defendant’s claim that counsel’s assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. 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.” *Strickland*, 466 U.S. at 687.

2. If it is somehow determined, in the face of the evidence recounted above, that the State did disclose or produce the videotaped statement of Rebecca Britt, Petitioner has an alternative claim of ineffective assistance of counsel. Simply put, if the videotaped statement of Rebecca Britt was disclosed or produced, then Petitioner’s trial counsel were ineffective for (a)

not informing Petitioner of the existence of the statement, (b) not utilizing the statement to support Petitioner'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 (which, as demonstrated above, it did in several key respects).

3. Mr. Sermos, Petitioner's trial counsel, now states that the statement was produced to him and that he did not find it helpful or exculpatory. Comparing the contents of the statement with Britt's trial testimony, it is obvious that, if this is truly the case, Petitioner's trial counsel were ineffective.

4. These failures constitute violations of Guidelines 11.4.1 (Investigation), 11.4.2 (Client Contact), and 11.4.7 (General Trial Preparation) of the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989).

5. Petitioner was prejudiced by this ineffective assistance of counsel and there is a reasonable probability that, but for this ineffectiveness, the result of the proceeding would have been different.

6. Accordingly, the writ should be granted. At the very least, this Court should conduct an evidentiary hearing on this issue and grant the writ thereafter.

B. How This Issue Was Presented to the State Courts:

1. This issue was presented to the Mississippi Supreme Court during Petitioner's second state post-conviction proceedings as Claim 3. The Mississippi Supreme Court denied Petitioner any relief on this ground. *Havard III*, 86 So.3d at ¶¶ 25-28.

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

A. Facts in Support of this Claim:

1. The United States Supreme Court has emphasized that the “central purpose of any system of criminal justice is to convict the guilty and free the innocent.” *Herrera v. Collins*, 506 U.S. 390, 398 (1993) (emphasis added). In *Herrera*, a majority of the Supreme Court agreed that punishing a defendant for a crime he did not commit would violate due process and the protection against cruel and unusual punishment when a “truly persuasive” showing of actual innocence can be made. *Herrera*, 506 U.S. at 417. *See also In re Davis*, 130 S. Ct. 1 (2009).
2. For background on the sexual battery allegations in Petitioner’s case, Petitioner refers to Claim I above and the briefing on Claim I in his Memorandum Brief in Support of Petition for Writ of Habeas Corpus. That section is incorporated herein by reference as if fully reproduced in words and figures.
3. Pursuant to a discovery order entered by this Court, Dr. Steven Hayne was deposed on November 23, 2010.
4. The purpose of the deposition was to further explore Dr. Hayne’s opinions as to sexual battery in Petitioner’s case, in light of concerns raised in the habeas petition and other pleadings about the sufficiency of the evidence in support of the State’s allegation of sexual battery and the ineffectiveness of Petitioner’s trial counsel in preparing a defense to that allegation. The deposition was also ordered so that Dr. Hayne could further elaborate on a Declaration that he had signed. *See* Docket # 7-2. Petitioner discusses below specific portions

of the declaration and deposition that demonstrate Petitioner's innocence as to the underlying felony of sexual battery.

5. In the Declaration, Dr. Hayne states that he cannot "include or exclude to a reasonable degree of medical certainty that she [Chloe] was sexually assaulted." Further, Dr. Hayne notes that the one centimeter contusion that he found on Chloe's anus "could have a variety of causes and is not sufficient in and of itself to determine that a sexual assault occurred." Dr. Hayne also states that, during the autopsy, he "found no tears of her rectum, anus, anal sphincter, or perineum."

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

7. At the outset of his recent deposition, Dr. Hayne acknowledged that he was specifically asked, prior to conducting the autopsy of Chloe Britt, to look for evidence of sexual assault. (Depo. at pp. 10-11). Dr. Hayne testified that there is no mention of sexual battery in the Final Report of Autopsy that he produced, because "I could not come to final conclusion as to that." (Depo. at 11). Dr. Hayne continued: "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." (Depo. at 11). Dr. Hayne confirmed that he found no tearing to the rectum, anus, anal sphincter, or perineum during the autopsy, and that he would have noted such tearing if he had found it. (Depo. at 12,

14). Dr. Hayne further opined that it would not be possible for any tears to have healed between the time Chloe Britt was in the emergency room to the time he performed the autopsy, one day later. (Depo. at 14-15).

8. Dr. Hayne did find “a single contusion” on the rectum, but no lacerations or abrasions. (Depo. at 13). This small contusion was found in an area that can be easily injured. (Depo. at 15). When asked if the contusion he found could have been caused by the use of a rectal thermometer, which medical records indicate was used on Chloe Britt three times while she was in the emergency room, Dr. Hayne stated “[t]hat could happen,” though he does not necessarily think such is likely. (Depo. at 15). Dr. Hayne later testified that he “could not exclude” that possibility. (Depo. at 34).

9. Dr. Hayne was then questioned about brain death, or lack of brain activity, with respect to Chloe Britt. This testimony is significant because Dr. Hayne and Dr. James Lauridson (Petitioner’s expert) have both opined that it is possible that a dilated anus (the chief condition that the State used to support the sexual battery allegation) can be seen on a person who is dead or even on a person who is clinically alive but lacks significant brain function. Medical literature discussed above further substantiates that explanation of anal dilation. Along these lines, Dr. Hayne testified that the signs of brain death include “flaccidness,” “unconsciousness,” “muscle relaxation,” “lack of breathing,” dilated and fixed pupils, lack of muscle tone, and an asystole heart. (Depo. at 17-18). Medical records, testimony from emergency room treaters, and Dr. Hayne’s autopsy findings found every single one of those conditions on Chloe Britt leading up to and following her death.

10. Dr. Hayne was then asked:

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.

(Depo. at 19).

11. Dr. Hayne then confirmed that a dilated anus is a recognized post-mortem finding, and that it is possible that children who have died of brain injuries have an increased likelihood of having dilated anuses. (Depo. at 19-20). Dr. Hayne further opined that a flaccid or limp muscle condition (both of which were noted on Chloe Britt in the emergency room) can contribute to anal dilation. (Depo. at 24). Lastly, Dr. Hayne again confirmed that a dilated anal sphincter is not, by itself, evidence of anal sexual abuse. (Depo. at 24-25).

12. Dr. Hayne capped off his testimony as follows:

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

* * *

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.

(Depo. at 25-26).

13. Later on, Dr. Hayne states again that he “could only come to the conclusion I so testified in court, that the contusion was consistent with what I’ve seen in a sexual abuse case.” (Depo. at 27). Dr. Hayne further states that he informed the District Attorney, prior to trial, that his opinions on sexual battery were limited to finding a contusion “consistent with sexual abuse, but **I’d like to see more evidence before I made the next and more significant evaluation and conclusion.**” (Depo. at 28) (emphasis added).

14. In order to make sure Dr. Hayne’s conclusion was clear, he was asked again:

Q: Dr. Hayne, you can’t say, or can you say, that Chloe Britt was sexually penetrated to a reasonable degree of medical certainty in this case?

A: I cannot. All I can say is the injury sustained would be consistent with that, but that’s not a definitive diagnosis.

(Depo. at 29).

15. The only properly tendered and qualified expert to testify at Petitioner’s trial, Dr. Hayne, couched his opinions regarding sexual battery in terms of possibility and in terms of what may be “consistent with” sexual battery. Indeed, in referring to the autopsy finding possibly related to sexual battery (the 1 centimeter contusion), Dr. Hayne uses the words “consistent with” 6 separate times. (Depo. at pp. 11, 25, 27, 28, 29, 38). He did not—and states that he absolutely cannot—opine to a reasonable degree of medical certainty that Chloe Britt was sexually abused by Petitioner or at all. Furthermore, the small contusion has a potential cause other than sexual battery—injury from a rectal thermometer—that Dr. Hayne testified he cannot exclude. As reminder, medical records indicate that Chloe Britt’s temperature was taken 3 times

with a rectal thermometer on the night that she died.

16. Dr. Hayne further points to a reasonable hypothesis consistent with Petitioner's innocence as to sexual battery, when he states that dilated anal sphincters may be seen on those who, like Chloe Britt, were alive but "without significant brain function" at the time such condition is observed. The cause of Chloe's death was unquestionably a closed head injury. Dr. Dar, Chloe's regular pediatrician who observed her in the emergency room, testified at trial that Chloe was "brain dead" before she was successfully intubated and before the anal dilation was first observed. Dr. Hayne, in his recent testimony, opined to a reasonable degree of medical certainty that Chloe Britt was brain dead, or lacked significant brain function, prior to the anal dilation being observed.

17. In the years since Dr. Hayne's deposition, even more evidence from more experts (including Dr. Hayne and the State's new expert, Dr. Scott Benton) demonstrates Havard's innocence as to the allegation of sexual battery. *See* Claim I, *supra*. This evidence will be further detailed in Havard's upcoming merits brief.

18. Again, Petitioner was charged with capital murder during the course of sexual battery. Without the underlying felony of sexual battery, Petitioner's conviction and sentence are null and void. Because of evidence detailed above and to be elaborated on further during merits briefing, Petitioner is actually innocent of the underlying felony of sexual battery and, thus, of capital murder.

19. Accordingly, the writ should be granted. At the very least, this Court should conduct an evidentiary hearing on this issue and grant the writ thereafter.

B. How This Issue Was Presented to the State Courts:

1. This issue was presented to the Mississippi Supreme Court during Petitioner's second state post-conviction proceedings as Claim 4. The Mississippi Supreme Court denied Petitioner any relief on this ground. *Havard III*, 86 So.3d at ¶¶ 29-43.

2. Evidence related to the sexual battery issues were presented to the Mississippi Supreme Court during Petitioner's third state post-conviction proceedings. The Mississippi Supreme Court denied Petitioner any relief. Order, 2013-DR-01995-SCT (April 2, 2015). The Mississippi Supreme also affirmed the trial court's exclusion of any evidence related to sexual battery in the evidentiary hearing. *Havard IV*, 312 So.3d at 339-42.

CLAIM XX: NEWLY-DISCOVERED EVIDENCE DEMONSTRATES THAT PETITIONER IS INNOCENT OF CAPITAL MURDER OR AT LEAST PRESENTS GRAVE DOUBTS CONCERNING GUILT, AS THE STATE'S THEORY THAT CHLOE BRITT DIED FROM SHAKEN BABY SYNDROME IS CONTRADICTED BY THE NEWLY-AVAILABLE OBJECTIVE MEDICAL EVIDENCE

A. Facts in Support of This Claim:

1. The United States Supreme Court has emphasized that the "central purpose of any system of criminal justice is to convict the guilty and free the innocent." *Herrera v. Collins*, 506 U.S. 390, 398 (1993) (emphasis added). In *Herrera*, a majority of the Supreme Court agreed that punishing a defendant for a crime he did not commit would violate due process and the protection against cruel and unusual punishment when a "truly persuasive" showing of actual innocence can be made. *Herrera*, 506 U.S. at 417. *See also In re Davis*, 130 S. Ct. 1 (2009).

2. This claim is focused on Havard's new evidence related to SBS, and particularly the changes in science that have taken place from his 2002 trial to the 2017 evidentiary hearing. The case hinges upon comparing what the 2002 jury heard with what a modern jury would hear. For

this reason, the facts of the trial proceedings in 2002 and from the 2017 evidentiary hearing will be detailed in Havard's upcoming merits brief.

3. Succinctly stated, the 2002 trial of Jeffrey Havard and the 2017 evidentiary held before the Circuit Court is a study in contrasts. In 2002, the jury heard from one expert witness on medical issues, Dr. Steven Hayne, the state's expert. In 2017, the Circuit Court heard expert testimony from Dr. Hayne as well as four additional expert witnesses, three of whom were called by Havard. In 2002, Havard had zero expert assistance, having been denied access to independent experts. *See supra*. But the biggest contrast is between the evidence presented in 2017 and how it was vastly different than what the 2002 jury heard.

4. The jury never heard experts say that Chloe's death could have been an accident. The jury never heard experts say that retinal hemorrhages could have a cause other than shaking. The jury never heard experts say that Chloe's intracranial bleeding could have had innocent causes. The jury never heard experts give innocent explanations for the marks on Chloe's body, which were called (but not scientifically verified to be) bruises.

5. The jury never heard that Chloe's medical findings could have occurred at any time other than when she was alone with Jeffrey Havard. The jury never heard any expert say that Chloe's medical findings could have been caused by a fall. In fact, they heard the exact opposite: Chloe's injuries and death were the result of deliberate and intentional shaking only, and could not have been caused by an accident, unless that accident was a violent car crash or a fall from an extreme height.

6. The jury never heard any expert give any innocent explanations for Chloe's medical findings. Indeed, the jury never heard any expert testimony on behalf of the Defendant, because

Defendant's request for expert assistance was denied.

7. The potentially incriminating evidence from the 2002 trial cannot be divorced from the new evidence that Chloe's death could have been accidental. They cannot be interpreted as separate from the new findings. The significance of these allegations is completely different when viewed through the lens of medical evidence that is, at worst, inconclusive yet also largely exculpatory. But, most importantly, it must be remembered that the jury never heard any of this. If they did today, the jury question would be dramatically altered. Petitioner has been prejudiced by his inability to present this evidence to a jury.

8. To best illustrate at this stage the factual basis for this Claim, which will be elaborated upon during the Merits Briefing after the state court record is filed, Havard presents the following chart comparing the evidence the jury heard in 2002 with what a modern jury would hear:

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TOPIC	THE 2002 JURY HEARD	A NEW JURY WOULD HEAR
CAUSE OF DEATH	Violent, deliberate shaking alone. (Dr. Hayne; Tr. at 556-57)	Blunt Force Trauma/ Hypoxic Brain Injury Associated With a Fall/Not Shaking Alone (Dr. Hayne; R. at V. 13, p. 25) (Dr. Baden; R. at V. 13, pp. 77-79) (Dr. Ophoven; R. at V. 14, pp. 204, 210) (Dr. Benton; R. at V. 16, pp. 457-58)
USE OF SBS “TRIAD”	Diagnostic of SBS (Hayne; Tr. at 556-57)	Not Diagnostic of SBS (Baden, R. at V. 13, p. 83) (Ophoven; R. at V. 14, pp. 227-28) (Benton; R. at V. 15, p. 411, V. 16, p. 461)
POSSIBILITY THAT CHLOE’S DEATH CAUSED BY ACCIDENT?	No (Hayne; Tr. at 556-57)	Yes (Baden; R. at V. 13, pp. 86-87) (Ophoven; R. at V. 14, p. 211) (Dr. Van Ee; R. at V. 14, pp. 295-97, V. 15, p. 323)
RETINAL HEMMORHAGE ONLY CAUSED BY SHAKING	Yes (Dr. Patterson; Tr. at 407-408) (Dr. Dar; Tr. at 415-16)	No (Baden; R. at V. 13, p. 85) (Ophoven; R. at V. 14, pp. 202-203) (Benton; R. at V. 16, p. 468)
SHORT FALL COULD HAVE CAUSED CHLOE’S INJURIES/DEATH?	No (Hayne; Tr. at 557)	Yes (Hayne; R. at V. 13, p. 28) (Baden; R. at V. 13, pp. 86-87) (Ophoven; R. at V. 14, pp. 211, 247) (Dr. Van Ee; R. at V. 14, pp. 295-97, V. 15, p. 323) (Benton; R. at V. 16, pp. 461, 463)
SBS CONTROVERSIAL?	No (Hayne; Tr. at 556) General acceptance in 2002 confirmed by: (Baden; R. at V. 13, p. 82) (Ophoven; R. at V. 14, pp. 214-16)	Yes (Hayne; R. at V. 13, p. 54) (Baden; R. at V. 13, pp. 97-102) (Ophoven; R. at V. 14, p. 204) (Benton; R. at V. 16, pp. 462-63)
AMERICAN ACADEMY OF PEDIATRICS ENDORSED SBS & DIAGNOSTIC TRIAD?	Yes (2001 AAP paper; Evidentiary Hearing Transcript Exhibit 14)	No (2009 AAP paper; Evidentiary Hearing Transcript Exhibit 15)
NATIONAL ASSOCIATION OF MEDICAL EXAMINERS ENDORSED SBS?	Yes (2001 NAME position paper; Evidentiary Hearing Transcript Exhibit 12)	No (Ophoven; R. at V. 14, p. 214-16) (2001 NAME position paper not renewed)

9. Because the new evidence demonstrates that Havard's conviction violates due process, he is entitled to the relief requested herein.

B. How This Issue Was Presented to the State Courts:

This issue was presented to the Mississippi Supreme Court during Petitioner's third state post-conviction proceedings as Claim 1. The Mississippi Supreme Court remanded the issues related to newly discovered evidence to the Circuit Court for an evidentiary hearing. Order, 2013-DR-01995-SCT (April 2, 2015). The Circuit Court upheld Havard's capital murder conviction but vacated his death sentence. Havard was resentenced to life without possibility of parole or early release. The Mississippi Supreme affirmed the trial court's decision on appeal and denied Havard relief from his conviction. *Havard v. State*, 312 So.3d 326 (Miss. 2020) ("*Havard IV*"). Justices King, Kitchens, and Ishee dissented from the majority opinion. 312 So.3d at 342-49.

CLAIM XXI: HAVARD'S RIGHTS UNDER BRADY V. MARYLAND AND ITS PROGENY WERE VIOLATED BY THE STATE'S FAILURE TO DISCLOSE DR. HAYNE'S PRE-TRIAL REPORT THAT HE COULD NOT STATE THAT A SEXUAL BATTERY HAD BEEN COMMITTED

A. Facts in Support of This Claim:

1. On January 19, 2014, the *Clarion-Ledger* newspaper published an article about Havard's case. Mitchell, Jerry, *The Death of Chloe Britt: Capital Murder or Accidental Fall?* (Jan. 19, 2014). In the article, new facts about Havard's case, and particularly the role that pathologist Dr. Steven Hayne played in that trial, were revealed. The new facts gleaned from this article demonstrate that the State violated the dictates of *Brady v. Maryland* and its progeny by failing to turn over exculpatory information.

2. Among other topics, the January 2014 article concerns Dr. Hayne's autopsy of Chloe Britt, his failure to find evidence of sexual assault in that autopsy, and the State's pre-trial knowledge of Dr. Hayne's findings—which were exculpatory—that were not communicated to the defense.

The article reads:

Havard is sitting on Mississippi's death row for a crime the state's pathologist believes never took place. Sexual assault was the underlying felony charge against Havard that enabled authorities to pursue the death penalty against him.

"I didn't think there was a sexual assault," Hayne said of his 2002 autopsy of Chloe. "I didn't see any evidence of sexual assault."

During Havard's capital murder trial, doctors, nurses, the sheriff and others told jurors about tears, rips, lacerations and bleeding they saw in the child's anal area.

"Maybe they were looking at folds and thought they were tears," Hayne said. "We were very careful, and we also took sections." He examined those sections under a microscope. His conclusion? They were no tears, rips or similar injuries to the child's rectum, he said. "I would think that would be a definitive evaluation."

When Chloe was brought into the emergency room of Natchez Community Hospital, physicians were focused on saving her life, Hayne said. At trial, doctors and nurses each described the dilation of the child's anus. Hayne said it would be wrong to assume such dilation means sexual assault, saying "that can happen with a child passing a harder stool."

A 1996 study found anal dilation was common among children who died, especially those who suffered brain damage. Hayne said anal dilation could also take place in patients without significant brain function. One doctor testified Chloe was brain dead before they discovered the dilation.

Mitchell, Jerry, *The Death of Chloe Britt: Capital Murder or Accidental Fall?* (Jan. 19, 2014).

3. The article continues in striking fashion: "The pathologist said **he informed prosecutors he couldn't say a sexual assault took place.** The **district attorney acknowledges Hayne was 'probably the weakest (prosecution) witness' on sexual assault** but that doctors,

nurses and law enforcement verified that sexual abuse had taken place.” Mitchell, Jerry, *The Death of Chloe Britt: Capital Murder or Accidental Fall?* (Jan. 19, 2014) (emphases added).

4. Petitioner’s trial counsel requested exculpatory evidence by sending a letter to the District Attorney’s office, requesting all discoverable materials including exculpatory evidence and filing a Motion for Discovery of Information Necessary to Receive a Fair Trial (hereafter “Motion for Discovery”). The Motion for Discovery sought information “favorable to the Defendant on the issue of guilt,” including “[u]nfavorable evidence with respect to prosecution witnesses” (Paragraph 9(a); “any and all other information respecting any prosecution witness which is favorable to the Defendant on the issue of guilt” (Paragraph 9(c); and “[s]tatements made by any persons which are exculpatory with respect to the Defendant, including all statements made by prospective prosecution witnesses” (Paragraph 9(d). More specifically, the Motion for Discovery requested “All records and reports of every kind reflecting the conduct or results of any medical, pathological, toxicological, chemical, biochemical, criminalistic, laboratory, forensic or scientific examinations, investigations and analysis undertaken with the investigation or preparation of this case.” (Paragraph 13).

5. Significantly, during pre-trial hearings, the Court took up the above-referenced Motion for Discovery. The following exchange occurred in open court:

BY MR. SERMOS: [W]e filed this motion to make sure that we had everything covered that we may possibly need and knew that the able counsel for the State would read all of this, and if there’s anything in here that remind the State prosecutor of something else that we needed to provide, that’s the reason I filed this motion, and we wanted to make sure we covered all the basis, not just what it says exactly in Rule 9.04.

BY THE COURT: Does the State have anything in regard to this motion?

BY MR. ROSENBLATT: Your Honor, I would agree that we have been in fairly

close communication with counsel for this defendant. They've done a good job of coming to us and reviewing the evidence that we have that we not able to just hand over to them. **The only thing we're waiting on now, I think I was - - I'm printing up some color photographs so that they can have actual color copies of the photographs involved in this case. I can't think of anything else that we're still holding up on.**

* * *

BY THE COURT: Let the record show that the Court will order that discovery be provided pursuant to Rule 9.04, and this will include the provisions of the rule for reciprocal discovery also. **I would caution the State that this is a capital murder case, and that if there's any late disclosure of evidence, it will be very carefully reviewed by the Court because the Court will more strictly scrutinize any late disclosure of evidence in this particular case than it normally does because this is a capital murder case.**

(T. at pp. 26-27) (emphases added).

6. However, the State never disclosed Dr. Hayne's pre-trial report to the prosecutor that he could not state that a sexual battery had occurred.

7. In *Brady v. Maryland*, 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." 373 U.S. 83, 87 (1963). *See also Banks v. Dretke*, 540 U.S. 668 (2004); *Kyles v. Whitley*, 514 U.S. 419 (1995).

8. In the alternative, Dr. Hayne's statements regarding his pre-trial assessment of the underlying felony of sexual battery demonstrates that Petitioner's trial counsel were ineffective in their efforts to investigate the case, including by failing to speak with Dr. Hayne prior to trial. *See Strickland v. Washington*, 466 U.S. 668 (1984). *See Claim I, supra*.

9. Under either theory noted above, Petitioner is entitled to relief from his unconstitutional conviction.

B. How This Issue Was Presented to the State Courts:

This issue was presented to the Mississippi Supreme Court during Petitioner's third state post-conviction proceedings as Claim 2. The Mississippi Supreme Court denied Petitioner any relief on that ground. Order, 2013-DR-01995-SCT (April 2, 2015).

V. CONCLUSION

For the reasons set forth herein, Petitioner prays that this Court will:

1. Issue a writ of habeas corpus to have Petitioner brought before it to the end that he may be discharged from his unconstitutional confinement and restraint;
2. Issue a writ of habeas corpus to have Petitioner brought before it to the end that he may be relieved of his unconstitutional sentence;
3. Conduct evidentiary hearings on the claims Petitioner asserts herein;
4. Permit Petitioner to engage in discovery pursuant to Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts; and
5. Grant such other relief as may be appropriate and to dispose of the matter as law and justice require.

Respectfully submitted,

JEFFREY HAVARD, PETITIONER

/s/ Mark D. Jicka
Mark D. Jicka

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CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2022, I electronically filed the foregoing with the Clerk of the Court using the ECF System which sent notification of such filing to ALL COUNSEL OF RECORD.

This the 8th day of August, 2022.

/s/ Mark D. Jicka

Mark D. Jicka